

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**COMMENTS
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION

Among other things, Amended Substitute Senate Bill 315 (“Am. Sub. S.B. 315”) authorizes the Public Utilities Commission of Ohio (“Commission” or “PUCO”) to periodically review the green pricing programs offered as part of competitive retail electric service (“CRES”) in Ohio.¹ The law also authorizes the Commission to recommend ways to improve or expand the green pricing programs offered in Ohio.

In an Entry dated October 17, 2012, the Commission proposed implementing Am. Sub. S.B. 315 by adding Chapter 4901:1-42 to the Ohio Administrative Code (“Chapter 42”). In this proceeding, the Commission seeks comment on the PUCO Staff’s proposed rules for Chapter 42.² The Commission has instructed that “comments be directed

¹ R.C. 4928.70. Am. Sub. S.B. 315 was signed by the governor on June 11, 2012 and became effective on September 10, 2012. Am. Sub. S.B. 315 did not define the term “green pricing program.” The PUCO Staff has proposed that the term mean “a program in which an Ohio electric distribution utility or CRES offers an electric product in which the product is marketed based on its fuel source and/or emissions profile. Such programs may include the use of renewable energy credits.” The attachment to these Comments contains suggested revisions to this definition.

² The proposed rules were issued as Attachment B to the October 17 Entry.

towards whether the proposed rules sufficiently address the requirements of Am. Sub. S.B. 315 and how the rules could better address those requirements.”³

The Office of the Ohio Consumers’ Counsel (“OCC”), on behalf of all of the approximately 4.2 million residential customers of Ohio electric distribution utilities (“EDUs”), urges the Commission to make several changes to the PUCO Staff’s proposal. The changes OCC suggests will add needed consumer protections and clarity to the rules and will help streamline them. OCC’s Comments address the more substantive of the changes OCC recommends. A mark-up of the proposed rules showing all of OCC’s suggested changes is attached to these Comments.

II. COMMENTS

A. The Distinction Between Electric Distribution Utilities and Competitive Retail Service Providers in the Rules Is Unnecessary and Confusing.

Throughout Proposed Rules 2 and 3, EDUs and CRES providers are mentioned separately. Yet the rules apply equally to both EDUs and CRES providers that have green pricing programs. The distinction between EDUs and CRES providers is thus unnecessary.

Further, by specifying that the rules apply expressly to EDUs and CRES providers, the proposed rules suggest that there might be providers of green pricing programs to whom the requirements do not apply. Thus, the proposed rules are confusing. The Commission should change the unnecessary and confusing language.

³ Entry at 2.

In this regard, the PUCO Staff apparently intended to make clear that the rules apply to EDUs and CRES providers alike.⁴ This may be accomplished by using the single term “provider” and defining it in Rule 1 as “an electric distribution utility as defined in division (A)(6) of section 4928.01 of the Revised Code, or a competing service provider of an electric service that has been deemed to be competitive under chapter 4928 of the Revised Code, who offers a green pricing program to retail electric customers in Ohio.” This change would eliminate the need for the separate definitions of “CRES” and “EDU” contained in Proposed Rules 1(C) and (E), respectively.

In fact, the definition of “CRES” in Proposed Rule 1(C) is inaccurate. The proposed rule defines CRES as “a competitive retail electric service provider, as defined in division (A)(4) of section 4928.01 of the Revised Code.” But R.C. 4928.01(A)(4) defines only the **service**: “a component of retail electric service that is competitive as provided under division (B) of this section.” The statute does not define a competitive retail electric service **provider**. Further, use of the term “CRES” to refer to a provider is inconsistent with other uses of “CRES” throughout the Commission’s rules.⁵

To help clarify and streamline the proposed rules, the Commission should replace the separate terms “EDU” and “CRES” with the singular term “provider,” as OCC recommends. As shown in the attachment to these Comments, adopting this recommendation would help clarify and streamline the rules. The Commission should make the change recommended by OCC.

⁴ If the green pricing are meant to apply to programs other than those offered by EDUs and CRES providers, that should be specified in the rules.

⁵ See generally Ohio Adm. Code Chapters 4901:1-21 and 4901:1-24.

B. Proposed Rule 2(A) Should Be Reworded to Make It More Accurate and More Direct.

Proposed Rule 2 states the purpose and scope of Chapter 42. Proposed Rule 2(A) provides:

This chapter addresses the review of green pricing programs offered in this state as part of competitive retail electric service, as authorized by section 4928.70 of the Revised Code. Parties affected by these rules include all Ohio EDUs and CRES providers serving or soliciting retail electric customers in Ohio.

OCC suggests two changes to this proposed rule. First, the phrase “as authorized by” in the first sentence of Proposed Rule 2(A) should be changed to “pursuant to.” As written, the phrase “as authorized by” would modify “competitive retail electric service,” and would thus suggest that competitive retail service is authorized by R.C. 4928.70. That, however, is not the case. Because the sole function of R.C. 4928.70 is to empower the Commission to review and make recommendations to improve or expand green pricing programs, the phrase “pursuant to” is more appropriate. Thus, the first sentence should read: “This chapter addresses the review of green pricing programs offered in this state as part of competitive retail electric service, pursuant to section 4928.70 of the Revised Code.”

Second, the second sentence of Proposed Rule 2(A) awkwardly uses a roundabout approach to get its message across. The sentence should make a more direct and complete statement: “These rules apply to all providers of a retail electric service that has been deemed to be competitive under chapter 4928 of the Revised Code who offer a green pricing program to retail electric customers in Ohio.” This change would eliminate the need for the definition of “soliciting” in Proposed Rule 1(J), since the term is used only in Proposed Rule 2(A). And it is in line with OCC’s recommendation in Section

II.A. of these Comments. The Commission should make the changes OCC recommends in the attachment to these Comments.

C. Consumer Protections Should Be Added to Proposed Rule 3(A) in Order to Specify That Promotional Materials for Green Pricing Programs Comply with the Commission’s Rules for Marketing and Solicitation by CRES Providers.

Proposed Rule 3(A) would require providers offering green pricing programs to ensure that any program materials distributed to customers “accurately portray the product.” The proposed rule, however, does not specify the standard for determining the accuracy of the promotional materials.⁶

In order to protect consumers, and to provide certainty for consumers and providers alike, Rule 3(A) should specify the standard by which green pricing promotional materials will be judged. The rule should require that such promotional materials comply with the marketing and solicitation provision of the CRES rules found in Ohio Adm. Code 4901:1-21-05 (“CRES Rule 5”). CRES Rule 5, among other things, requires marketing materials to be clear and understandable. That rule also protects consumers against unfair, misleading, deceptive and unconscionable practices in the marketing, solicitation and sale of CRES. CRES Rule 5 provides considerable consumer protections, and would be a good standard to use for judging the adequacy of all providers’ materials promoting green pricing programs to retail customers.

The Commission should also specify that those who violate the green pricing rules are subject to the same penalties as those who violate the CRES rules: a forfeiture of up to \$10,000 per occurrence; suspension, rescission, conditional rescission, revocation

⁶ Webster’s defines “accurate” as “conforming exactly to truth or to a standard.” See <http://www.merriam-webster.com/dictionary/accurate>.

or non-renewal of the provider's certificate; rescission of a customer contract; and/or restitution or damages to the customer.⁷ The attachment to these Comments suggests language, in a proposed rule 3(I), for this purpose.

In addition, Proposed Rule 3(A) should make clear that the requirement applies to program materials distributed not only to existing customers, but also to potential customers. This change would provide additional clarity and consumer protections.

Further, like several other of the proposed rules,⁸ the requirement in Proposed Rule 3(A) would apply to "any" provider. This is very vague; Webster's defines "any" as "one or some indiscriminately of whatever kind."⁹ For clarity and to protect consumers, Proposed Rule 3(A) should be more specific in its application. Instead of "any" provider, the requirement should apply to "every" provider, i.e., "being each individual or part of a group without exception."¹⁰

Thus, as shown in the attachment to these Comments, Proposed Rule 3(A) should read as follows: "Every provider offering a green pricing program shall ensure that all program materials distributed to existing and potential customers comply with Rule 4901:1-21-05 of the Administrative Code." The Commission should adopt OCC's recommended improvement to Proposed Rule 3(A).

⁷ Ohio Adm. Code 4901:1-21-15(A).

⁸ See Proposed Rules 3(C), 3(E) and 3(F). In addition, Proposed Rule 3(B) refers to "[a]ny program or marketing materials...."

⁹ See <http://www.merriam-webster.com/dictionary/any>.

¹⁰ See <http://www.merriam-webster.com/dictionary/every?show=0&t=1352231305>.

D. Proposed Rule 3(C) Should Be Changed to Add Specificity Regarding the Application of the Filing Requirements and to Add Flexibility for Green Pricing Program Providers to Meet the Requirement.

Proposed Rule 3(C) establishes a semi-annual filing requirement for providers to file details of their green pricing programs with the Commission. The first part of the rule sets forth the minimum content of the filing requirement. This part of the rule should be changed in two ways: (1) to reflect that a provider may have more than one green pricing program, and (2) to specify that the requirement applies to the details of the provider's green pricing program(s). The attachment to these Comments suggests language to effectuate these changes.

The second part of the rule would require that the semi-annual filings occur on July 31 and January 31, with the filings containing details of the provider's green pricing program for the previous six months. If a provider, however, wishes to file details of its green pricing program(s) before July 31 and January 31, the rule would not allow it. Providers should be allowed to make the required filing any time during the months of July and January. The rule change shown in the attachment to these Comments would accomplish this by allowing providers to file "by" July 31 and January 31.

In addition, the rule should specify that the filings are to contain information for the immediately preceding six months. The Rule 3(C) language in the attachment to these Comments would make the rule more specific and clearer. The Commission should adopt the language suggested by OCC.

E. The Reference to the Alternative Energy Portfolio Standard Should Be Removed from Proposed Rule 1(A) and Inserted into Proposed Rule 3(F).

Proposed Rule 1(A) defines "AEPS" as "the alternative energy portfolio standard as set forth in section 4928.64 of the Revised Code." The acronym AEPS, however, is

used only once in the proposed rules, in the first sentence of Proposed Rule 3(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.”

Use of the acronym AEPS in proposed Chapter 42 is unnecessary. The definition of the term should be deleted from Proposed Rule 1(A), and the reference to the alternative energy portfolio standard should be inserted into Proposed Rule 3(F). Other changes should also be made to Proposed Rule 3(F) to promote clarity and simplicity. As shown in the attachment to these Comments, the first sentence of Proposed Rule 3(F) should read as follows:

Every provider offering a green pricing program shall maintain sufficient documentation to verify that the resources used to support participation in each green pricing program offered by the provider are separate from the resources used for compliance with the state’s alternative energy portfolio standard as set forth in section 4928.64 of the Revised Code.

In order to help streamline and clarify Chapter 42, the Commission should adopt this change.

F. The Commission Should Adopt a Rule Addressing Its Authority to Review and Make Recommendations to Improve and Expand Green Pricing Programs Granted in the Statute.

R.C. 4928.70(A) expressly empowers the Commission to review green pricing programs offered in Ohio, and to make recommendations to improve and expand those programs. While the proposed rules address marketing materials, filing requirements and some administrative matters, they lack a discussion of the Commission’s actual review of green pricing programs, as referenced in the law. The proposed rules also do not address

recommendations for improving and expanding green pricing programs in Ohio, as referenced in the law. The Commission should rectify these omissions.

To better effectuate R.C. 4928.70(A), the Commission should adopt a rule addressing its authority granted under the statute. The attachment to these Comments suggests language, contained in a proposed rule 3(H), for this purpose.

III. CONCLUSION

The green pricing rules proposed by the PUCO Staff are a good first step toward implementing Am. Sub. S.B. 315. The Commission, however, should strive to adopt rules that are adequately specific, that are consistent with other Commission rules and that provide adequate consumer protections. The changes recommended by OCC, as shown in the attachment to these Comments, will help the Commission attain that goal. The Commission should adopt OCC's recommendations.

Respectfully submitted,

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4901:1-42-01 Definitions

- (A) ~~"AEPS" means the alternative energy portfolio standard as set forth in section 4928.64 of the Revised Code.~~
- ~~(B)~~ "Commission" means the public utilities commission of Ohio.
- ~~(C)~~ ~~"CRES" means a competitive retail electric service provider, as defined in division (A)(4) of section 4928.01 of the Revised Code.~~
- ~~(DB)~~ "Double-Counting" has the meaning set forth in rule 4901:1-40-01 of the Administrative Code.
- ~~(E)~~ ~~"EDU" means an electric distribution utility and shall have the meaning as set forth in division (A)(6) of section 4928.01 of the Revised Code.~~
- ~~(FC)~~ "Green pricing program" means a program in which ~~an Ohio electric distribution utility or CRES offers an retail electric service product in which the product~~ is marketed to customers based on its fuel source and/or emissions profile. Such programs may include the use of renewable energy credits.
- (D) "Provider" means an electric distribution utility as defined in division (A)(6) of section 4928.01 of the Revised Code, or a competing service provider of an electric service that has been deemed to be competitive under chapter 4928 of the Revised Code, who offers a green pricing program to retail electric customers in Ohio.
- ~~(GE)~~ "Renewable energy credit" and "REC" means the environmental attributes associated with one megawatt-hour of electricity generated by a renewable energy resource.
- ~~(HF)~~ "Renewable energy resource" shall have the meaning as set forth in ~~division (A)(37) of section 4928.01, of the Revised Code.~~
- ~~(IG)~~ "Retired" means permanently removing the resource from circulation so as to eliminate the potential for double-counting of the resource.
- ~~(J)~~ ~~"Soliciting" means providing information to a potential future customer.~~

4901:1-42-02 Purpose and Scope

- (A) This chapter addresses the review of green pricing programs offered in this state as part of competitive retail electric service, ~~as authorized by pursuant to~~ section 4928.70 of the Revised Code. ~~Parties affected by these rules include all Ohio EDUs and CRES providers serving or soliciting~~ These rules apply to all providers of a retail electric service that has been deemed to be competitive under chapter 4928 of the Revised Code who offer a green pricing program to retail electric customers in Ohio.
- (B) Upon an application or a motion filed by a party, the commission may waive any requirement of this chapter, other than a requirement mandated by statute, for good cause shown.

4901:1-42-03 Requirements

- (A) ~~Any Ohio EDU or CRES~~ Every provider offering a green pricing program shall ensure that ~~any all~~ program materials distributed to existing and potential customers ~~accurately portray the product~~ comply with Rule 4901:1-21-05 of the Administrative Code.
- (B) ~~Any All~~ program or marketing materials being used by ~~an Ohio EDU or CRES a provider~~ 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.
- (C) ~~Any Ohio EDU or CRES~~ Every provider offering a green pricing program shall semi-annually file details of its program(s) including, but not limited to, the monthly number of participants in each program and the monthly volume of participation in each program measured in renewable megawatt-hours. The commission may prescribe a form for such semi-annual filings. The ~~filing deadlines for this requirement details for each program~~ shall be filed with the commission as follows:
- (1) ~~On By~~ July 31st of each year, the monthly participation details for months January through June of that year shall be provided to the commission;
 - (2) ~~On By~~ January 31st of each year, the monthly participation details for months July through December of the previous year shall be provided to the commission.

- (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-provider~~ files, and the Commission approves, a motion for protective order, pursuant to Rule 4901-1-24 of the Ohio Administrative Code.
- (E) ~~Any Ohio EDU or CRES Every provider~~ offering a green pricing program shall maintain sufficient documentation to verify that adequate resources were secured and retired to support ~~the each~~ product offerings. Such documentation shall be provided to commission staff promptly upon request.
- (F) ~~Any Ohio EDU or CRES Every provider~~ offering a green pricing program shall maintain sufficient documentation to verify that the resources used to support participation in ~~the each~~ green pricing program ~~offered by the provider~~ are separate from the resources used for compliance with the state's ~~AEPS alternative energy portfolio standard as set forth in section 4928.64 of the Revised Code~~. Such documentation shall be provided to commission staff promptly upon request.
- (G) ~~An Ohio EDU or CRES Providers~~ offering a green pricing program shall not engage in double-counting of resources used to support participation in ~~a the~~ green pricing program.
- (H) The Commission may periodically review any green pricing program offered as part of competitive retail electric service in this state, and may make any recommendations it deems necessary to improve or expand the program.
- (I) Any provider that fails to comply with section 4928.70 of the Revised Code, any rule in this chapter, or any commission order adopted thereunder may, after opportunity for hearing, be subject to any and all of the following available under the law, including but not limited to:
- (1) Forfeiture to the state of not more than ten thousand dollars for each such failure. Each day's continuance of the violation is a separate offense.
 - (2) Suspension, rescission, conditional rescission, or revocation of the CRES provider's certificate or denial of a request for renewal of a certificate.
 - (3) Rescission of a customer contract.
 - (4) Restitution or damages to the customer/consumer.

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing Comments upon the following via electric transmission, this 19th day of November, 2012.

/s/ Terry L. Etter

Terry L. Etter

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11/19/2012 4:27:32 PM

in

Case No(s). 12-2157-EL-ORD

Summary: Comments Comments by the Office of the Ohio Consumers' Counsel electronically filed by Patti Mallarnee on behalf of Etter, Terry L Mr.