BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

INITIAL COMMENTS OF THE RETAIL ENERGY SUPPLY ASSOCIATION

I. INTRODUCTION

On June 11, 2012, the Governor of Ohio signed into law Amended Substitute Senate Bill ("S.B. 315"), which became effective on September 10, 2012. S.B. 315, *inter alia*, amended provisions of the Ohio Revised Code, including a provision addressing green pricing programs. S.B. 315 adopted Section 4928.70, Revised Code, which provides as follows:

> (A) The 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.
>
> (B) The commission shall adopt rules necessary to carry out purposes of this section.

In addition, on January 10, 2011, the Governor of Ohio issued Executive Order 2011-01K, entitled "Establishing the Common Sense Initiative." This Executive Order sets forth several factors to be considered in the promulgation of agency rules and the review of existing agency rules. Among the factors to be considered, the Public Utilities Commission of Ohio ("Commission") must (a) determine the impact that its rules have on small businesses, (b) attempt to balance properly the critical objectives of its regulations and the cost of compliance by the regulated parties; (c) amend or rescind rules that are unnecessary, ineffective, contradictory,

redundant, inefficient, or needlessly burdensome and (d) amend or rescind rules that have had negative unintended consequences, or unnecessarily impede business growth.

In addition, existing law requires further analyses in the promulgation of agency rules and the review of existing agency rules. Specifically, in accordance with Section 121.82(A), Revised Code, in the course of developing draft rules, the Commission must evaluate the rules against a business impact analysis. If there will be an adverse impact on businesses, as defined in Section 107.52, Revised Code, the agency shall incorporate features into the draft rules to eliminate or adequately reduce any adverse impact.

On August 16, 2012, the Commission held a workshop in this proceeding in order to engage interested stakeholders in a discussion about the appropriate revisions needed to incorporate the applicable provisions contained in S.B. 315 into the Ohio Administrative Code. On October 17, 2012, the Commission issued its Staff's proposal – a new set of rules in Chapter 4901:1-42 of the Ohio Administrative Code, and a business impact analysis. The Commission requested that initial comments from interested persons on the draft rules and/or on the business impact analysis be filed by November 19, 2012.

In response to the Commission's Entry in this proceeding, the Retail Energy Supply Association ("RESA"),[1] as a stakeholder, has reviewed the Entry, the business impact analysis,

[1] RESA's members include: Champion Energy Services, LLC; ConEdison *Solutions*; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; Energetix, Inc.; Energy Plus Holdings LLC; Exelon Energy Company; GDF SUEZ Energy Resources NA, Inc.; Green Mountain Energy Company; Hess Corporation; Integrys Energy Services, Inc.; Just Energy; Liberty Power; MC Squared Energy Services, LLC; Mint Energy, LLC; NextEra Energy Services; Noble Americas Energy Solutions LLC; PPL EnergyPlus, LLC; Reliant; Stream Energy; TransCanada Power Marketing Ltd.; and TriEagle Energy, L.P. The comments expressed in this filing represent the position of RESA as an organization; they may not represent the individual views of any particular member of RESA.

and the proposed new rules. The following is RESA's response to the Staff's proposal.

II. COMMENTS

A. Overview

Competitive retail electric service ("CRES") providers do not have the state-granted powers of a utility company, such as a franchised service area and eminent domain. Nor are CRES providers subject to the state's imposition of price, service, and product obligations that are designed to prevent abuses of such state-granted powers. Instead, CRES providers in Ohio, like all independent businesses, provide the products and services that people want at prices they are willing to pay.

The single green pricing provision contained in S.B. 315, which is now Section 4928.70, Revised Code, merely permits the Commission to "periodically" review CRES providers' green programs for the limited purpose of making "...recommendations to improve or expand program subject of the review." The General Assembly did not instruct the Commission to police the non-utility green power programs, edit their marketing material, or change their business plans. It only authorized periodic review of certain types of programs presumably to allow the Commission to be current on developments in the market and then have an advisory rule. Simply put, the Commission may make suggestions only; the CRES provider is under no obligation to follow the suggestions.

B. Specific Proposed Rules

1. Proposed Rule 4901:1-42-03(B)

Proposed Rule 4901:1-42-03(B) states as follows:

> (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.

The proposed requirement that any program or marketing materials that address green pricing programs be provided to Commission Staff for review at least 10 business days prior to the initial distribution to existing or potential customers is not within the scope of Section 4928.70, Revised Code. First, this is not a "periodic review" requirement; this proposed rule continuously applies every day to every CRES provider and every green project. Second, since the only purpose of the statute is for the Commission to provide recommendations regarding the programs reviewed, there is no basis or justification for the ten-business day prior review. More important, the ten-business day requirement violates the Common Sense Initiative ("CSI") requirements. In the name of advising a CRES provider on how to improve or expand its green programs, Commission would basically be adding two weeks (ten business days) to every marketing program rolled out. That is a costly and needless regulation. It is likely not to improve or expand green pricing programs. Instead, it will detract from CRES providers bringing green pricing programs to Ohio. Finally, there is the fear that, if the rule is approved today, some future Commission will take the ten business days to edit the CRES provider's marketing materials or use the Commission's policing authority under Chapter 4901:1-21 (where the Commission can take action against allegedly fraudulent or misleading statements), as a means of prior restraint on the CRES provider's commercial speech.

It should be noted that currently the Commission Staff does not receive marketing material of any type in advance. To receive marketing materials, the Staff must request the

materials and then the CRES provider must provide it in five calendar days – after the request, which would be well after circulation. See Rule 4901:1-21-05(B). Further, Rule 4901:1-21-05(B) is limited to the production of promotional and advertising materials targeted to residential and small commercial customers of a CRES provider. There are no limits in the proposed rule and it applies Fortune 500 companies as well as residential customers.

RESA believes that Subsection B of proposed Rule 4901:1-42-03 should not be promulgated at all.

2. Proposed Rule 4901:1-42-03(C)

Proposed Rule 4901:1-42-03(C) provides that any Ohio electric distribution utility or CRES provider 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 prepare a form and all CRES providers shall fill out the form semi-annually in January and July.

Since the only purpose of the authorizing statute is to advise CRES providers on how to improve or expand their green pricing programs, there is not a clear need for all CRES providers to report their monthly participation in green pricing programs or the monthly volume of megawatt-hours for green pricing programs. This is particularly true as CRES providers *already* report their renewable energy credits annually including the sales data for all power and the amounts of renewable energy credits. Since there no need for monthly participation and volume data in addition to the already-provided annual renewable energy report, this proposed rule fails the CSI mandate. Filling out monthly data for Ohio only is time-consuming and unnecessary and as such harms small businesses.

3. Proposed Rules 4901:1-42-03(E) & (F)

RESA does not object to Staff Proposed Rule 4901:1-42-03(E), which calls for any CRES provider who offers a green pricing program to maintain sufficient documentation to verify that adequate resources were secured and retired to support the product offerings. In particular, RESA agrees that the documentation should be provided to the Commission Staff only upon request. Moreover, the Commission's other existing rules addressing the length of time that records need to be kept and the form of records should also be included in this rule. RESA believes that, if a customer complains or the Commission Staff has reasonable cause to believe that a CRES provider is fraudulently selling renewable energy but not providing renewable energy, inquiry and, when appropriate, enforcement should take place. The authority that the Commission already has under Chapter 4901:1-21 would be an adequate basis upon which to proceed. In other words, RESA believes that rules promulgated pursuant to a statute that allows the Commission to periodically provide advice, not enforcement, are not the appropriate or logical location. Instead, the CRES provider oversight rules are the proper location. However, if this proposed rule specifically helps assure an adequate review, RESA will not oppose it.

The same does not apply to proposed Rule 4901:1-42-03(F), which requires a CRES provider to keep green pricing program 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 Commission's renewable energy credits. No reason has been presented why a uniform, single system of verifying that the power being sold as green power is in fact from renewable sources. Separate documentation systems will raise costs without a well defined

benefit. Thus, this provision fails the CSI requirements.

4. Proposed Rule 4901:1-42--03(G)

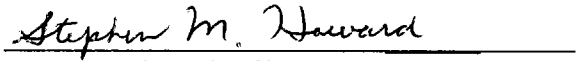
Subpart (G) is vague and redundant and thus should be rejected. Subpart G prohibits an electric distribution utility or CRES provider who offers a green pricing program from double-counting the resources used to support participation in a green pricing program. Unlike the utilities which have conservation requirements, CRES providers in Ohio only have one environmental obligation -- to meet the renewal portfolio standards in Section 4928.64, Revised Code. Since there is no other obligation, there can be no other double counting for purposes of state regulation. There are many green programs and green certification programs, the most prominent of which is the national Green-e program. Existing and future federal government and private green programs come with different definitions of what constitutes green power and a single program may well qualify as credit in a federal or private program as well as the single state system. Enforcement of what qualifies for a non-Ohio statutory programs rests with those voluntary groups or the federal government which sponsor such programs, not with the Commission. Similarly, the enforcement for double counting an Ohio program rests with the Ohio program.

Simply put, there cannot be CRES provider double counting when there is only a single CRES provider environmental requirement. Further, a statute that grants the Commission only authority to provide CRES providers with advice on improving and advancing green programs does not authorize a matrix of rules designed to enforce efficient or conservation statutes that do not apply to CRES providers. Finally, no one can read this undefined restriction on double counting and know with certainty what is being prohibited.

III. CONCLUSION

For the reasons presented above, provisions (B), (C), (F), and (G) of Proposed Rule 4901:1-42-03 should be not be promulgated by the Commission as rules.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document is being served or will be served on all parties who submit initial comments in this case.

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Summary: Comments Initial Comments electronically filed by Mr. Stephen M Howard on behalf of Retail Energy Supply Association