BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission's Review of its Rules for the Alternative Energy Portfolio Standard Contained in Chapter 4901:1-40 of the Ohio Administrative Code	**Case No. 13-652-EL-ORD**

COMMENTS OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND THE TOLEDO EDISON COMPANY

INTRODUCTION

As part of its five-year review of the Commission's rules, the Commission's Staff made various recommendations for modifications to the rules governing energy efficiency and peak demand reduction requirements as set forth in Ohio Adm. Code 4901:1-39 and Alternative Energy Portfolio Standards as set forth in Ohio Adm. Code 4901:1-40, including certain amendments to incorporate combined heat and power ("CHP") projects and Waste Energy Recovery ("WER") projects consistent with Am. Sub. S.B. 315. By Entry dated January 29, 2014, the Commission established a comment period in which interested parties could submit comments on the proposed changes to the aforementioned rules. On March 3, 2014, various parties including Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively, "Companies") submitted comments. On March 24, 2014, various parties, including the Companies, filed reply comments.

Since then, on June 13, 2014, the Governor of the State of Ohio signed into law Substitute Senate Bill 310 ("S.B. 310"), amending various provisions made by the General Assembly to the renewable energy, energy efficiency, and peak demand reduction requirements for the State of Ohio. The effective date of S.B. 310 is September 12, 2014.

One amendment that the General Assembly made to R.C. 4928.64(B)(3) by S.B. 310 eliminates the existing requirement that at least one-half of the annual renewable energy resources benchmark be sourced from facilities located in the state of Ohio (the "in-state requirement"). On July 11, 2014, the Commission issued an Entry seeking comments and reply comments from interested persons on two specific questions:

1. Does the General Assembly's amendment to R.C. 4928.64(B)(3) by S.B. 310 require the Commission to amend Rule 4901:1-40-03, O.A.C. to eliminate the in-state requirement in its entirety, including the portion of 2014 prior to the effective date of S.B. 310?

2. Does the General Assembly's amendment to R.C. 4928.64(B)(3) by S.B. 310 require the Commission to amend Rule 4901:1-40-03, O.A.C. to prorate the in-state requirement for 2014 based upon the effective date of S.B. 310 and to eliminate the requirement thereafter?

The Companies will address both questions together below. As discussed in the Companies' Comments below, the answer to question number (1) is: yes, and the answer to question number (2) is: no.

COMMENTS

S.B. 310 eliminated the in-state requirement contained in the S.B. 221 version of R.C. 4928.64(B)(3) related to an EDU's compliance with its 2014 renewable energy resource benchmarks. The Commission is not authorized to promulgate a rule requiring to the contrary.

The Commission is a creature of statute and may exercise only that jurisdiction conferred upon it by the General Assembly.[1] As an administrative agency, the Commission possesses only such rule-making powers as are delegated by statute. A Commission rule that conflicts with existing statutes is invalid, and hence must fail.[2]

[1] *Columbus Southern Power Co. v. Pub. Util. Comm., 67* Ohio St, 3d 535, 537, 620 N.E.2d 835 (1993); *Tongren v. Pub. Util. Comm.,* 85 Ohio St. 3d 87, 88, 706 N.E.2d 1255 (1999).

[2] *Hoover Universal v. Limbach,* 61 Ohio St.3d 563, 569, 575 N.E.2d 811 (991); *Athens I-home Telephone Co, v. Peck,* 158 Ohio St. 557, 574, 110 N.E.2d 571 (1953).

In this instance, the statue is clear. There is no ambiguity. The conduct required by R.C. 4928.64(B)(2) under either S.B. 221 or S.B. 310, is that an EDU must obtain a portion of the electricity supply required for its standard service offer from qualifying renewable energy. For purposes of measuring compliance under R.C. 4928.64, an EDU must meet the renewable energy benchmarks set forth in law on the date that compliance must be demonstrated. Under S.B. 310, the General Assembly amended R.C. 4928.64(B)(3) to indicate that an EDU can, effective September 12, 2014, comply with the benchmarks contained in R.C. 4928.64(B)(2) by obtaining a portion of its electricity supply from qualifying renewable energy resources that are either: 1) from facilities located in this state; or (2) from resources that can be shown to be deliverable to this state. In other words, the General Assembly eliminated the requirement that at least half of the renewable energy come from in-state facilities.

Nowhere in R.C. 4928.64, as it will be in effect on September 12, 2014 and thereafter, is there are requirement that an EDU meet monthly or prorated benchmarks.[3] Indeed, the General Assembly wrote a statute that affords an EDU every reasonable opportunity to comply with the statutory requirements by allowing at least a full year to comply. There is nothing in S.B. 310 that retroactively changes the compliance deadline to an earlier date or requires, or permits, an annual average, proration or phase in of the previously existing provisions of S.B. 221 related to in-state renewable energy requirements. The conduct prescribed by R.C. 4928.64 is an EDU's compliance with the renewable energy benchmarks as they exist as of September 12, 2014. S.B. 310 modified this benchmark by eliminating the in-state requirement. EDUs must now comply with this new benchmark. Thus, there is no authority for the Commission to engage in an

[3] *State ex rel. Burrows v. Indus. Comm.*, 78 Ohio St. 3d 78, 81, 676 N.E.2d 519 (1997) ("Unambiguous statutes are to be applied according to the plain meaning of the words used ... and courts are not free to delete or **insert** other words.")

analysis to determine whether the first 9½ months of 2014 should be governed by a preexisting benchmark that no longer is in effect.

Further evidencing the General Assembly's intent, Section 2 of S.B. 310 expressly states that existing R.C. 4928.64 is hereby repealed. Thus, as of September 12, 2014, the S.B. 221 version of R.C. 4928.64 no longer exists, leaving only the S.B. 310 version of R.C. 4928.64. Effective September 12, 2014, R.C. 4928.64 does not contain an in-state requirement for an EDU's compliance with renewable energy resource benchmarks, and nothing contained in S.B. 310 changes the deadline for compliance or permits any proration. Had the General Assembly meant for portions of R.C. 4928.64 from S.B. 221 to continue to exist, to be prorated or to be phased out, it would have expressly provided as much in S.B. 310. Indeed, it expressly provided for the phase-in of energy efficiency requirements contained in R.C. 4928.66.[4] The General Assembly did not authorize pro ration of the in-state requirement for renewable energy resources.

CONCLUSION

For all of these reasons, the Commission should amend Rule 4901:1-40-03, O.A.C. to eliminate the in-state requirement in its entirety as is required under S.B. 310. The Commission should not amend Rule 4901:1-40-03, O.A.C. to prorate the in-state requirement based upon the effective date of S.B. 310. The Commission should eliminate from its rules any requirement for in-state renewable energy resources. Any action otherwise would be contrary to the clear language of S.B. 310 as discussed above.

[4] *See* Section 6 of S.B. 310.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a copy of the foregoing was sent by, or on behalf of, the undersigned counsel to the following parties of record this 31st day of July 2014, *via* electronic transmission, except those specifically designated as being served via U.S. mail.

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