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. 13-0652-EL-ORD

COMMENTS
By the
SIERRA CLUB

I. Introduction

The Sierra Club now respectfully submits these comments, solicited by the Public Utilities Commission of Ohio ("PUCO" or "Commission")[1] on the potential effect recent changes in Ohio law may have on alternative energy requirements. Specifically, the Commission posed two questions regarding the in-state requirements of 4928.64(B)(3):

> **(A) Does the General Assembly's amendment to R.C. 4928.64(B)(3) by Sub. S.B. 310 require the Commission to amend Ohio Adm. Code 4901:1-40-03 to eliminate the in-state requirement in its entirety, including the portion of 2014 prior to the effective date of Sub. S.B. 310?**
>
> **(B) Does the General Assembly's amendment to R.C. 4928.64(B)(3) by Sub. S.B. 310 require the Commission to amend Ohio Adm. Code 4901:1-40-03 to prorate the in-state requirement for 2014 based upon the effective date of Sub. S.B. 310 and to eliminate the requirement thereafter?**

Upon review of the existing law and the changes enacted, the Sierra Club asserts that the law does not require the Commission to eliminate or prorate the in-state obligations in Ohio

[1]Presented in the Attorney-Examiner's Entry of July 11, 2014.

Revised Code 4928.64(B)(3) for the year 2014. As presented below, the new law specifies where and when the Commission is to take action. No statutory directive exists for the Commission to eliminate or prorate the in-state resource requirements in 2014. Therefore, the Commission should not take any such action that would disrupt or discourage investment, manufacturing and employment related to the in-state requirements prior to 2015, when the recently enacted legislation requires specific Commission activity related to the alternative energy rules.

II. Comment

A. The Commission Should take no Action Regarding the In-State Requirement Prior to 2015 Because there is no Statutory Directive to do so.

R.C. 4928.64, as modified by recent legislation, does not require the Commission to eliminate or prorate the 2014 obligations of electric distribution utilities or electric service companies to procure in-state resources to satisfy a portion of their 2014 benchmarks. The effective date of the legislation is September 12, 2014, less than four months prior to the end of the year. Thus, the current law is in effect for more than two-thirds of the year. The Commission's questions focus on what action is required due to the effective date occurring in the last third of the calendar year. Sierra Club asserts that, unlike other modified sections of the law, there is no directive in 4928.64(B)(3) that requires Commission action. In contrast, in the recently enacted legislation, the Commission is directed to take action in the form of promulgating rules in several different places in the law.

The legislature made significant changes to existing law. These changes included requiring the Commission to promulgate specific rules governing particular portions of the law. In the new section labeled §4928.11, the Commission is directed by the enacted legislation to

"adopt rules to carry out this section." Thus, where the legislature desires specific Commission action, they expressly present and require it.

Similarly, in §4928.65, the Commission is required to "adopt rules" governing cost disclosure by January 1, 2015. This directive and the new directive in §4928.11 are specific and directed to the Commission. An obligation of required action is absent from §4928.64. If the General Assembly desired modification to the 2014 procurement, a specific directive to the Commission would have been inserted here, just as it was presented in other sections. It was not. Therefore, it is not a requirement for the Commission to take any action with regard to in-state procurement.

Because such a statutory directive is absent, the Commission should continue to require in-state procurement, as it has done annually for the previous five years, of each electric distribution utility and each electric services company for 2014. Any change or modification to be made in the future should accompany the rule promulgation set to take effect on January 1, 2015. This will provide a more certain schedule for electric distribution utilities, electric service companies and alternative industry businesses assisting with utility and service company procurement. It is likely that most if not all electric distribution utilities and electric service companies have already procured in-state renewables for 2014 through requests for proposals, long-term contracts, banking of RECs and other established forms of procurement. Therefore, the Commission should not attempt to create a directive where none exists.

B. The Commission should take no action that Discourages Current or Near-Term Investment in Ohio facilities and that Create or Maintain Ohio jobs.

As stated and reiterated several times by the Ohio Supreme Court: "It is well settled in Ohio that the Public Utilities Commission is a creature of the General Assembly and may

exercise no jurisdiction beyond that conferred by statute."[2] The General Assembly provided specific instruction to the Commission in the recently enacted legislation where it wanted the Commission to take action.[3] No such directive was stated in R.C. 4928.64. Therefore, the changes in the statute should be treated prospectively.

Absent a specific directive from the legislature, the Commission should not attempt to apply the law retroactively or create disruption of current procurement, construction and manufacturing efforts related to in-state procurement. The Commission should take no action that discourages continued investment in renewable (alternative) resources within the state of Ohio.

The in-state language was not removed from the law. The law states that "The qualifying renewable energy resources implemented by the utility or company shall be met either: (a) Through facilities located **in this state**; or (b) With resources that can be shown to be deliverable into this state." (Emphasis Added). The bill's authors made several, significant changes to the existing legislation. The authors could have struck the language "through facilities located in this state" if they wanted to eliminate in-state resources as an option of the requirement. The language could have been modified to reduce the emphasis on the in-state option. However, this did not occur. Therefore, the Commission should not impose upon itself an obligation where none expressly exists.

In the event that the Commission may choose to consider any specific action, any proposed action should be accompanied by appropriate due process proceedings that encourage and consider stakeholder and interested parties' participation and positions prior to adoption.

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[2] *Toledo* v. *Pub. Util. Comm.* (1939), 135 Ohio St. 57; *Akron & Barberton Belt Rd. Co.* v. *Pub. Util. Comm.* (1956), 165 Ohio St. 316; *Baltimore & Ohio Rd. Co.* v. *Pub. Util. Comm.* (1968), 16 Ohio St. 2d 60; *Ohio Bus Line* v. *Pub. Util. Comm.* (1972), 29 Ohio St. 2d 222.

[3] See for example, §§4928.662, in addition to the statutory sections presented earlier in the brief.

III. Conclusion

The Sierra Club appreciates the opportunity to submit these Comments in response to the Commissions' questions. The Sierra Club urges the Commission to consider and adopt the above recommendations with regard to in-state energy procurement for the calendar year 2014.

Respectfully submitted,

/s/ Christopher J. Allwein
Christopher Allwein
Williams, Allwein & Moser LLC
1500 Grandview Ave Suite 330
Columbus OH 43212
Phone: (614)429-3092
Fax: (614)670-8896
callwein@wamenergylaw.com

Attorney for Sierra Club

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *Comments*, submitted on behalf of the Sierra Club, was served by electronic mail, upon the following Parties of Record, this 31st day of July, 2014.

/s/ Christopher J. Allwein
Christopher J. Allwein

SERVICE LIST

William.wright@puc.state.oh.us
amy.spiller@duke-energy.com
Elizabeth.watts@duke-energy.com
ricks@ohanet.org
obrien@bricker.com
haydenm@firstenergycorp.com
callwein@wamenergylaw.com
jfinnigan@edf.org
meissnerjoseph@yahoo.com
kjkolich@firstenergycorp.com
cdunn@firstenergycorp.com
stnourse@aep.com
mjsatterwhite@aep.com
mkl@bbrslaw.com
Susan@heatispower.org
cuttica@uic.edu
psharkey@environmentallawcounsel.com
scasto@firstenergycorp.com
judi.sobecki@aes.com
todonnell@dickinsonwright.com
cmontgomery@dickinsonwright.com
mswhite@igsenergy.com
trent@theoec.org
swilliams@nrdc.org
drinebolt@ohiopartners.org
Bojko@carpenterlipps.com
hussy@carpenterlipps.com
mohler@carpenterlipps.com
sam@mwncmh.com
joliker@mwncmh.com
fdarr@mwncmh.com
mpritchard@mwncmh.com
Jennifer@dgardiner.com
terry.etter@occ.ohio.gov

Attorney Examiners:

Richard.bulgrin@puc.state.oh.us
Bryce.mckenney@puc.state.oh.us

Summary: Comments regarding the in-state requirement presented in 4928.64(B)(3) electronically filed by Mr. Christopher J. Allwein on behalf of SIERRA CLUB