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**

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

INTRODUCTION

On June 13, 2014, the Governor of the State of Ohio signed into law Substitute Senate Bill 310 ("S.B. 310"), amending various provisions of 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 provision of S.B. 310 that amends R.C. 4928.64(B)(3) 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?

On July 31, 2014, various parties filed initial comments related to these questions. Pursuant to the Entry, Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively, "Companies") hereby submit their reply to the following parties' comments: Retail Energy Supply Association ("RESA"); Sierra Club; FirstEnergy Solutions Corp. ("FES"); The Dayton Power and Light Company ("DP&L"); Ohio Environmental Council ("OEC"); Direct Energy Services LLC and Direct Energy Business LLC ("Direct Energy"); Union Neighbors United, Julia F. Johnson and Robert and Diane McConnell ("Union Neighbors United); Industrial Energy Users- Ohio ("IEU") and SRECTrade, Inc. ("SRECTrade"). Also, while the Companies address all of the major issues raised in the various reply comments, their decision not to respond to any specific argument made by a party should not be construed as the Companies' agreement with, or opposition to, such argument.

COMMENTS

A. The Companies agree with the majority of the commenting parties that S.B. 310 eliminated the in-state requirement contained in the S.B. 221 version of R.C. 4928.64(B)(3) commencing with the effective date of S.B. 310.

The majority of the commenting parties correctly and collectively agree that 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 renewable energy resource benchmarks for 2014 and thereafter. First, similar to the Companies, RESA comments that S.B. 310 is not ambiguous and clearly requires elimination of the in-state requirement and, in the event that the Commission believes that S.B. 310 is ambiguous, the only just and reasonable interpretation is that EDUs and electric service companies "are not mandated to obtain renewable energy resources from in-state facilities in order to meet the 2014 renewable energy requirements…"[1] The Companies agree with those comments

[1] RESA Comments at 7.

in that with the passage of S.B. 310 there is no longer an in-state requirement. The Companies also agree that RESA correctly references Commission Rule 4901:1-40-03, which requires the Commission to calculate the baselines based on *calendar years*.[2] In addition, the Commission's own rules further recognize that under S.B. 221 (and unchanged by S.B. 310), benchmark compliance under R.C. 4928.64 is an annual, calendar-year requirement. Under Rule 4901:1-40-05(A), Ohio Administrative Code:

> Unless otherwise ordered by the commission, each electric utility and electric services company shall file by April fifteenth of each year, on such forms as may be published by the commission, an annual alternative energy portfolio status report analyzing all activities undertaken in the previous calendar year to demonstrate how the applicable alternative energy portfolio benchmarks and planning requirements have or will be met. Staff shall conduct annual compliance reviews with regard to the benchmarks under the alternative energy portfolio standard. (emphasis added).

Further, the Commission's previous orders also recognize that the benchmarks contained in R.C. 4928.64 are annual requirements. For example, in *In the Matter of the Review of the Alternative Energy Rider Contained in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 11-5201-EL-RDR, the Commission stated:

> Section 4928.64, Revised Code, also requires the Commission to undertake an annual review of each electric distribution utility's or electric service company's compliance with the annual benchmark, including whether the failure to comply with an applicable benchmark is weather-related, is related to equipment or resource shortages, or is otherwise outside the utility's or company's control. Section 4928.64(C)(1), Revised Code. If the Commission determines, after notice and opportunity for hearing, that the utility or company failed to comply with an annual benchmark, the Commission shall impose a renewable energy compliance payment (compliance payment) on the utility or company. Compliance payments may not be passed through to consumers.[3] (emphasis added).

[2] *Id.* at 2, f.n. 1.
[3] *See* Case No. 11-5201, Opinion and Order at p. 4 (August 7, 2013).

Moreover, in the Commission's order approving the Companies' 2013 annual report required by Rule 4901:1-40-05(A), the Commission ordered the Companies to demonstrate compliance with their 2014 benchmarks by retiring renewable energy credits ("RECs") between March 1 and April 15 of the following year, although R.C. 4928.64 required that the Companies comply with annual benchmarks.[4] Under 4901:1-40-04(D)(3), a REC may be used for compliance any time in the five calendar years following the date of its initial purchase or acquisition. In other words, in order to demonstrate compliance with 2014 benchmarks, an EDU must simply retire sufficient RECs by April 15, 2015 that would be qualified under Rule 4901:1-40-04(D)(3) for 2014 compliance purposes as of December 31, 2014. Nothing in S.B. 310 requires the Commission to change this practice, which recognizes that the renewable energy requirements under S.B. 310 are annual requirements.

Second, the Companies agree with FES that the Ohio Legislative Service Commission's Bill Analysis on S.B. 310 further demonstrates the legislature's intent in eliminating, without qualification, the in-state requirement as provided in the "current law".[5] Further, the Bill Analysis also demonstrates the legislature's correct interpretation that the current law (and unchanged by S.B. 310) provides a yearly requirement: "Current law provides yearly benchmarks for meeting the renewable portion of the alternative energy requirement, but does not provide benchmarks for advanced energy resources."[6]

[4] *See* Case No. 13-913-EL-ACP, Finding and Order at ¶8 (January 29, 2014). *See also* Case No. 11-2489-EL-ACP, Finding and Order at ¶12 (August 15, 2012); Case No. 12-1246-EL-ACP, Finding and Order at ¶9 (October 10, 2012);
[5] FES Comments at 3.
[6] Bill Analysis, Ohio Legislative Service Commission, As Passed by Senate at p. 7.

Third, the Companies concur with the Union Neighbors United Comments that call into question the legality of an in-state requirement under the Commerce Clause of the United States Constitution.

Last, the Companies agree with RESA, Direct Energy and DP&L that any proration requirement would be nearly impossible to calculate and requiring any further compliance with an in-state requirement would be against the public interest.

B. Sierra Club, OEC and SRECTrade's assertion that the effective date of the elimination of the in-state requirement of January 1, 2015 is incorrect.

As an initial matter, it is important to articulate the roles that both the Commission and General Assembly play in relation to the renewable energy requirements in S.B. 310. The General Assembly's role sets out the law and policy for the state related to renewable energy resource requirements. It is the Commission's role to implement and enforce those laws by measuring and ensuring an EDU's compliance with those statutory benchmarks. Under both S.B. 221 and S.B. 310, the General Assembly has mandated that an EDU provide, each year, a certain portion of its electricity from renewable energy resources. Those benchmarks remain unchanged - what has changed under S.B. 310 is what resources an EDU is permitted to use to meet those requirements. Effective September 12, 2014, the General Assembly has mandated that an EDU has the option of meeting those requirements by either in-state resources or resources deliverable to the state of Ohio. Therefore, on December 31, 2014, the statutory deadline by which an EDU has to provide a portion of its electricity from renewable energy resources (2.5% in 2014), an EDU may comply by procuring either in-state or out-of-state renewable resources. When the Commission measures an EDU's compliance with S.B. 310 requirements on April 15, 2015, it does not have authority, through rulemaking or otherwise, to require an EDU to meet any portion of its 2014 renewable

energy benchmark through in-state resources. Sierra Club, OEC and SRECTrade's comments to the contrary are without merit.

Sierra Club and OEC assert that the Commission should take no action to eliminate or prorate the in-state requirement for the year 2014 because no statutory directive exists for the Commission to eliminate or prorate the in-state requirement in 2014.[7] While S.B. 310 does not require the Commission to prorate the in-state requirement, such a provision is completely unnecessary since the in-state requirement has been eliminated. The Commission does not have the authority to "continue to require in-state procurement"[8] because the in-state requirement no longer exists. The authority to prorate could only exist if it were expressly included in S.B. 310 -- which it was not.

As discussed in the Companies' comments, the statute does explicitly require the Commission to take action as it relates to the energy efficiency requirements contained in former R.C. 4928.66. Had the General Assembly authorized the Commission to prorate the in-state requirement or require its elimination as of January 1, 2015, it would have done so when enacting the legislation as it did for the energy efficiency requirements. Rather, the statute explicitly and unambiguously eliminates the in-state requirement as of its effective date of September 12, 2014. As discussed in the several comments, as well as the Companies' comments, the Companies' compliance with the renewable energy mandates in R.C. 4928.64 is measured on a yearly basis. Contrary to OEC's contention that elimination of the in-state requirement for compliance year 2014 would be retroactive, S.B. 310 prospectively eliminated any requirement that an EDU utilize in-state resources to meet its 2014 year-end requirement and the Commission has no authority to find an EDU out of compliance if the EDU chooses not to utilize an in-state resource to meet those

[7] Sierra Club Comments at 2.
[8] *Id.* at 3.

requirements. At the end of 2014, the date upon which compliance is measured and when S.B. 310 is in effect, an EDU or electric services company, under the explicit language contained in R.C. 4928.64, have the option of meeting those requirements with in-state resources, but it is not required. Sierra Club's concern that Commission action eliminating this requirement will discourage current or near term investment in Ohio facilities is alleviated because an EDU who has already procured in-state renewable resources to comply with 2014 can still utilize those resources. For all of those 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 does not have the authority to prorate the in-state requirement based upon the effective date 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 12th day of August 2014, *via* electronic transmission, except those specifically designated as being served via U.S. mail.

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