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

REPLY COMMENTS
by the
SIERRA CLUB

I. INTRODUCTION

The Sierra Club now respectfully submits these reply comments on the potential effect recent changes in Ohio law may have on alternative energy requirements. Initial comments were filed on July 31, 2014 by various parties to this proceeding. Specifically, the comments were directed to two questions, posed by the Commission, regarding the in-state requirements of Ohio Revised Code 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?

Several comments filed in this proceeding claimed that the Commission does not have the statutory authorization to amend O.A.C. 4901:1-40-03 to prorate the in-state

requirement for 2014 based upon the effective date of the Sub. S.B. 310 and therefore, the requirement should be eliminated.[1] However, as noted in Sierra Club's initial comments, no statutory directive exists for the Commission to eliminate or prohibit the prorating of the in-state resource requirements in 2014. Therefore, Sierra Club recommends that the Commission take no 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. In other words, the in-state requirement should not be eliminated by the Commission in 2014. In the alternative, the Commission should execute the least intrusive conduct – prorating the requirement from the beginning of the year through the effective date of the legislation.

II. REPLY COMMENTS

FirstEnergy relies on their interpretation of the intent of the General Assembly to support their claim that in-state requirement should be eliminated completely.[2] Absent from the amendment is an authorization by the General Assembly to eliminate the in-state requirement in its entirety for 2014. FirstEnergy's reliance on a specific and narrow reading of legislative intent is similar to the misguided reasoning of some of the other parties. The stated intent of the legislature, as was widely reported and evidenced in the amended version of section §4928.64(B)(2), was to freeze the standards for two years starting in 2015 in order to study the effects of SB221.[3] Nothing in the bill provides any evidence of a legislative intent to completely eliminate the in-state requirement for all of

[1] FirstEnergy Solutions Comments page 2; FirstEnergy Comments page 3 & 4.
[2] FirstEnergy Initial Comments at 4.
[3] See S.B. 310 as enrolled - Section 4.

2014. Therefore, the Commission should not impose this drastic change and eliminate a requirement *currently existing in Ohio law.*

Direct Energy Services contends that the in-state requirement be completely eliminated because section (C)(1) of R.C. 4928.64 includes the phrase "most recent applicable benchmark under (B)(2)" in determining compliance and section (B)(2) contains a chart which includes a column entitled "By end of year".[4] Under Direct Energy's argument since the General Assembly placed an effective date on the amended version of R.C. 4928.64 (B)(3) that occurs before the end of the year the legislature must have intended to eliminate the requirement. This is novel but faulty logic.

The full language of amended R.C. 4928.64(C)(1) states,

> **The commission** annually **shall review** an electric distribution utility's or electric services company's **compliance with the most recent applicable benchmark** under division (B)(2) of this section **and**, in the course of that review, **shall identify any under compliance or noncompliance of the utility** or company that it determines is weather-related, related to equipment or resource shortages for qualifying renewable energy resources as applicable, or is otherwise outside the utility's or company's control. (Emphasis Added).[5]

This Section merely outlines how the Commission should review a company's compliance with the law but it does not augment a Company's responsibility to comply with the law. Additionally, amended section (B)(3) still includes the option for companies to use in-state resources. Therefore, there will be no hardship on the companies if the Commission chooses not to completely eliminate the in-state requirement for 2014 because the law allows for both the counting of in-state and other resources. The notion

[4] Direct Energy Services Comments at 3.
[5] R.C. 4928.64(C)(1).

that the amended law results in a complete elimination of the in-state requirement for 2014 is unsupported by the plain language of the statute.

There is nothing in the amended version of the bill that expressly authorizes the elimination of the in-state requirement for 2014. Additionally, the intent of the law was to freeze the standards at 2014 levels for two years, 2015 and 2016, for a study of the law. Therefore, the intent does not support completely abandoning the in-state requirement for 2014. Further, a total abandonment may artificially affect the data the study might use and frustrate the stated purpose of the freeze. Sierra Club recommends enforcement of the in-state requirement for 2014. In the alternative, the Commission should treat the amended version exactly as it is written and include the in-state requirement for the pre-effective dates and allow it to be bypassed for the post-effective dates.

The Industrial Energy Users ("IEU") comments are without merit and should be ignored by the Commission. The ideas expressed in IEU's comments were already considered and rejected by the Commission in the initial rules case.[6] It is unclear as to why IEU wants the Commission to reconsider a position that the PUCO has already determined to be incorrect.

IEU erroneously states that the Commission has incorrectly imposed, through its rules, an annual in-state requirement inconsistent with the law and therefore, the Commission should not impose a partial-year requirement.[7] However, this idea was brought up five years ago and rejected. In an Entry on Rehearing in the original Green Rules case, AEP objected to the annual requirement of O.A.C. 4901:1-40-(A)(2)(a) by claiming – similar to IEU's current assertion – that the in-state provision should be

[6] PUCO Case No. 08-888-EL-ORD.
[7] IEU Initial Comments at 3.

applied comprehensively rather than annually.[8] The Commission unequivocally rejected this idea:

> The Commission declines to adopt the proposed changes [cumulative rather than annual] to this rule. **The annual in-state provision, for both solar and non-solar resources, is consistent with the statutory benchmark design and objectives.**[9] **(**Emphasis added).

In addition, Ohio utilities routinely report annual progress and are subject to penalty if these requirements are not met. Therefore, the IEU assertion that the Commission has used an "incorrect starting point" is nothing more than an attempt to bring up an idea that has already been rejected in a previous rule proceeding and which has been employed in actual reporting practices.

IEU also states that the intent of the General Assembly is to "avoid extra costs" being imposed on Ohio customers.[10] Yet IEU presented no evidence to support the assertion that the in-state requirement, at present, imposes any significant additional cost to customers. The General Assembly also stated that it is the "intent of the General Assembly to incorporate **as many forms** of inexpensive, reliable energy sources in the state of Ohio as possible."[11] (Emphasis added). This certainly includes in-state resources. Since no economic burden has been demonstrated, IEU's comment should be ignored. There is no supported reason or reasoning for the Commission to eliminate the requirement for 2014. IEU's recommendation, and the similar comments of others participating in this proceeding that advocate eliminating the 2014 in-state requirement should therefore be rejected.

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[8] IEU Initial Comments at 3.
[9] *In the Matter of the Adoption of Rules for Alternative and Renewable Energy Technology […]*, Case No. 08-888, Entry on Rehearing at 26 (June 17, 2009).
[10] IEU Initial Comments at 4.
[11] SB 310 Section 3.

III. CONCLUSION

For the reasons stated above, Sierra Club recommends that the Commission preserve the in-state requirement through 2014. In the alternative, the Commission should only pro-rate the requirement from the beginning of the year through the effective date of the new law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *Reply Comments*, submitted on behalf of the Sierra Club, was served by electronic mail, upon the following Parties of Record, this 12th day of August, 2014.

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Summary: Reply Comments electronically filed by Mr. Christopher J. Allwein on behalf of SIERRA CLUB