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 THE RETAIL ENERGY SUPPLY ASSOCIATION

Substitute Senate Bill 310 ("Sub. S.B. 310") will become effective on September 11, 2014. Among several other changes to Ohio's renewable energy program, Sub. S.B. 310 eliminated the existing mandate in Section 4928.64(B)(3), Revised Code, that electric utilities and electric services companies obtain at least one-half of the required number of renewable energy credits (both regular and solar) from qualified renewable energy facilities located within the State of Ohio ("In-State Requirement"). The Public Utilities Commission of Ohio ("Commission") has asked for comments from interested persons to assist in its review of Rule 4901:1-40-03, Ohio Administrative Code ("OAC") addressing implementation of Sub. S.B. 310. Specifically, the Commission posed the following two questions:

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 on the effective date of Sub. S.B. 310 and to eliminate the requirement thereafter?

The Retail Energy Supply Association ("RESA")[1] timely filed initial comments, stating that it was the intent and purpose of Sub. S.B. 310 to eliminate the In-State Requirement for all of

[1] RESA") is a broad and diverse group of 21 retail energy suppliers who share the common vision that competitive energy retail markets deliver a more efficient, customer-oriented outcome than the regulated utility structure. Several RESA members are certificated as Competitive Retail Electric Service ("CRES") providers and are active in the Ohio retail market. RESA's members include: AEP Energy, Inc.; Champion Energy Services, LLC; Consolidated Edison Solutions, Inc.; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; GDF SUEZ Energy Resources NA, Inc.;

calendar year 2014. RESA was not alone in that position, elimination of the In State Requirement effective for the whole of the reporting year for 2014 was the position was taken by six of the nine other sets of comments filed. Those taking the position that the In-State Requirement is not applicable for 2014 included parties with a wide range of interest, including industrial power consumers, utilities, competitive retail electric service providers and a citizens group.[2] As detailed in the following section, none of the arguments raised by the three sets of comments which did not support implementation in 2014[3] presented a valid legal theory which would mandate either that the Commission wait until January 2015 before removing the siting limit on renewable energy capable of being delivered into Ohio or try to allocate compliance based on the effective date of Sub. S.B. 310 through an apportionment method.

I. The Pertinent Changes in Sub. S.B. 310

A. The Plain Statutory Language

Below in red line is the soon-to-be effective edition of Section 4928.64(B), Revised Code:

Section 4928.64(B), Revised Code, as Changed by Sub. S.B. 310

(2) ~~**At least half**~~ **The portion** [of the alternative energy resources implemented] **under division (B)(1) of this section** shall be generated from renewable energy resources, including one-half per cent from solar energy resources, in accordance with the following benchmarks:

By end of year	[Renewables]	[Solars]
		* * *
2014	2.5%	0.12%

* * *

(3) ~~**At least one-half of the**~~ **The qualifying** renewable energy resources implemented by the utility or company shall be met ~~**through**~~ **either: (a) Through**

Homefield Energy; IDT Energy, Inc.; Integrys Energy Services, Inc.; Interstate Gas Supply, Inc. dba IGS Energy; Just Energy; Liberty Power; MC Squared Energy Services, LLC; Mint Energy, LLC; NextEra Energy Services; Noble Americas Energy Solutions LLC; NRG Energy, Inc.; PPL EnergyPlus, LLC; Stream Energy; TransCanada Power Marketing Ltd. and TriEagle Energy, L.P. The comments expressed in this filing represent only those of RESA as an organization and not necessarily the views of each particular RESA member.

[2] The six sets of like comments were filed by: (1) Industrial Energy Users-Ohio, (2) FirstEnergy's 3 electric distribution utilities, (3) The Dayton Power & Light Company, (4) FirstEnergy Solutions Corp., (5) Direct Energy Services LLC/Direct Energy Business Services LLC, and (6) Union Neighbors United.

[3] The three sets of opposing comments were filed by Sierra Club, Ohio Environmental Counsel, and SRECTrade, Inc.

facilities located in this state; ~~**the remainder shall be met with**~~ **or (b) With** resources that can be shown to be deliverable into this state.

In the current version of Section 4928.64(B), Revised Code, there is an expressed requirement that half the alternative energy resources implemented must be sited in Ohio by the end of the year. In the amended version, the requirement for alternative generation resources is either "(a) through facilities located in this state, or (b) with resources that can be shown to be deliverable into this state" by the end of the year. Thus, the express language of Sub S.B. 310 replaces the In-State Requirement with the option of the alternative renewable energy resource merely being deliverable to Ohio by the end of this year. The Commission as a state agency must carry out this direct mandate from the General Assembly. The phrase "by the end of the year" clearly refers to calendar 2014 and does not separate the whole of 2014 according to the effective date of this amendatory change.

B. What is not Included in the Statutory Language

Notably, neither the current statute nor the amended statute requires that the renewable energy credits used for compliance be generated contemporaneously with when the power is actually used. Such statutory language would be required to support an argument for any type of apportionment for the treatment of the 2014, as is suggested in the Commission's second question above. Finally, there is no language in the Sub. S.B. 310 requiring a utility or an electric services company to obtain a portion of the alternative renewable energy resource prior to the effective date of the statute.

II. Opposing Arguments Fail

Sierra Club alleges that, if the General Assembly wanted to modify the 2014 procurement, "a specific directive to the Commission would have been inserted."[4] A cursory review of the statute though reveals that the statute does in fact provide such a directive. As quoted and highlighted

[4] Sierra Club Initial Comments at 2.

above, the statutory amendment states that "By the end of the year 2014", alternative generation resources is implemented either "(a) through facilities located in this state, or (b) with resources that can be shown to be deliverable into this state."

Both Sierra Club and the Ohio Environmental Council argue that Sub. SB 310 must be applied prospectively, commencing in 2015.[5] SRECTrade Inc. more boldly states that the effective date of the elimination "should be" January 1, 2015, because any earlier date would impose an unreasonable burden on the utilities and electric services companies.[6] This argument fails both legally and factually. It fails because the new statutory provision does not have a 2015 implementation date, nor were there uncodified sections in Sub. S.B. 310 that specificed a commencement date of 2015. Lacking specific instructions in either the bill or its notes that the removal of the In-State Requirement takes effect on date certain, Sub. S.B. 310's effective date for the In State Requirement is 90 days from passage.[7] Sub. SB 310 becomes effective on September 11, 2014 and to delay its effective date until after that point in time is to nullify the clear and unambiguous intent of the General Assembly.

As for the allegation of harm, it should be noted that removing the In-State Requirement does not disqualify the use of any of the Commission's certificated renewable energy generation facilities from receiving renewable energy credits in the exact amount as before Sub. S.B. 310 becomes effective. In other words, a megawatt-hour of power from an in-state renewable energy

[5] Sierra Club Initial Comments at 3; Ohio Environmental Counsel Initial Comments at 3.
[6] SRECTrade, Inc. Initial Comments at 2.
[7] Subject to constitutional limitations, the legislature can determine when an act or statutory provision will go into effect. State ex. rel. Ach v. Evans, 90 Ohio St. 243, 107 N.E. 537 (1914). Sub. SB 310 contains no express dates. Article II of the Ohio Constitution, §1c, states that laws will take effect 90 days after signing by the Governor of Ohio, unless the law falls within a specific exception. Sub. SB 310 is not one of those constitutional exceptions (statutes levying taxes, appropriating current expenses or an emergency law).

source will continue to receive a renewable energy credit at the same exchange rate as before the new statute became effective.[8]

When one considers both the plain language of Sub. S.B. 310, which requires that "by the end of 2014" an alternative renewable energy resources requirement can be satisfied in one of two ways – renewable energy credits sited in Ohio or sited outside of Ohio by being deliverable to Ohio – and the fact that compliance with the statutory standard both before and after Sub. S.B. 310 is not demonstrated until April 2015,[9] (when utilities and competitive retail electric service suppliers report in April of 2015 for calendar year 2014), the only proper interpretation of Sub. S.B. 310's requirements for renewable energy credits is that it shall apply in 2014. Thus, the Commission should clarify by Opinion and Order in this proceeding that utilities and electric services companies may satisfy the their renewable energy credit requirements for solar and non-solar credits generated from facilities sited in Ohio, or sited outside Ohio and deliverable to Ohio, for calendar year 2014.

Respectfully Submitted,

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[8] Section 4928.65, Revised Code, sets the exchange rate at 1 megawatt-hour = 1 Renewable Energy Credit. That exchange rate was unchanged by the Sub. S.B. 310.
[9] *See*, Rule 4901:1-40-05(A), Ohio Administrative Code.

CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case (those parties are marked with an asterisk below). In addition, the undersigned certifies that a courtesy copy of the foregoing document is also being served (via electronic mail or if specially designated by U.S. mail) on 12th day of August 2014 upon all persons/entities listed below.

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