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

ENTRY

The Commission finds:

(1) All state agencies are required to conduct a review, every five years, of their rules and to determine whether to continue their rules without change, amend their rules, or rescind their rules. On April 23, 2013, the Commission initiated a review of the Alternative Energy Portfolio Standard rules contained in Ohio Adm.Code Chapter 4901:1-40.

(2) Subsequently, in May 2014, the General Assembly passed 2014 Sub.S.B. No. 310 (S.B. 310), which became effective on September 12, 2014. S.B. 310 amended R.C. 3706.25, 4928.01, 4928.20, 4928.53, 4928.64, 4928.65, and 4928.66. Additionally, for the purpose of adopting the new R.C. 4928.645, the General Assembly amended R.C. 4928.65, 4928.6610, 4928.6611, 4928.6613, 4928.6614, 4928.6615, and 4928.6616. The amendments modify Ohio's renewable energy, energy efficiency, and peak demand reduction requirements.

(3) One amendment made to R.C. 4928.64(B)(3) eliminated the requirement for electric distribution utilities and electric services companies to purchase at least one-half of their renewable energy resources through facilities located in the state of Ohio (the in-state requirement).

(4) By Entry issued on July 11, 2014, comments and reply comments were requested on the modification of R.C. 4928.64(B)(3) by S.B. 310 in order to assist in the review of Ohio Adm.Code 4901:1-40-03. Specifically, the Commission requested comments on whether the amendment to R.C. 4928.64(B)(3) by S.B. 310 requires the Commission to amend Ohio Adm.Code 4901:1-40-03 to eliminate or prorate the in-state requirement.

(5) Comments were filed by SRECTrade, Inc., Industrial Energy Users - Ohio (IEU-Ohio), Union Neighbors United (UNU), Direct Energy Services, LLC, and Direct Energy Business, LLC (collectively, Direct Energy), The Toledo Edison Company, Ohio Edison Company, and The Cleveland Electric Illuminating Company (collectively, FirstEnergy), the Ohio Environmental Council (OEC), The Dayton Power and Light Company (DP&L), FirstEnergy Solutions Corp. (FES), Sierra Club, and the Retail Energy Supply Association (RESA). Reply comments were filed by IEU-Ohio, Direct Energy, FirstEnergy, OEC, Sierra Club, RESA, and the Ohio Consumers' Counsel (OCC).

(6) SRECTrade, OEC, and Sierra Club argue that S.B. 310 does not require the Commission to amend Ohio Adm.Code 4901:1-40-03 at all. SRECTrade, OEC, and Sierra Club assert that the Commission should recognize S.B. 310 as a temporary freeze of the in-state requirement which begins January 1, 2015, and terminates two years later before the in-state requirement resumes in 2017. OEC argues that the Commission is not required to, and lacks the authority to, amend Ohio Adm.Code 4901:1-40-03 as it relates to the in-state requirement for 2014. OEC also asserts that Article II, Section 28 of the Ohio Constitution prohibits the General Assembly from passing retroactive laws, which means that it could not, and did not, alter the benchmarks for 2014. Sierra Club argues that R.C. 4928.64 contains no obligation or required action and that, if the General Assembly intended the Commission to modify 2014 procurement, it would have adopted a specific directive as it did in other sections of S.B. 310.

IEU-Ohio, UNU, Direct Energy, FirstEnergy, DP&L, FES, and RESA argue that the in-state requirement should be eliminated in its entirety, including for 2014. They assert that the statute contains no annual or partial year in-state requirement. Additionally, IEU-Ohio contends that any over-compliance can be counted towards the total compliance required by 2027. Direct Energy and FirstEnergy argue that, prior to S.B. 310, R.C. 4928.64(B)(3) did not contain a partial-year compliance obligation, so the Commission should not now impose a partial-year compliance requirement. Further, RESA points to language contained in both versions of R.C. 4928.64(B) referring to the fact that renewable energy resources are

required to be acquired by the end of the year and emphasizes that no language requires any portion to be obtained prior to that time.

On reply, Sierra Club and OEC reiterate their arguments that there is no directive in R.C. 4928.64(B)(3) that requires Commission action as far as modifying the rule. However, Sierra Club requests that, if the Commission disagrees with this theory, in the alternative, the Commission should enact rules maintaining the in-state requirement for the portion of the year prior to the effective date of S.B. 310 and allow it to be eliminated only after the effective date.

Direct Energy, IEU-Ohio, RESA, and FirstEnergy reiterate their arguments on reply that the language of the statute is plain and requires elimination of the in-state requirement in its entirety. Direct Energy, IEU-Ohio, RESA, and FirstEnergy assert that the Commission possesses no authority to reinstate the in-state requirement unless the General Assembly subsequently adopts it.

(7) Initially, the Commission finds no merit to the argument by SRECTrade, OEC, and Sierra Club that the Commission is not required to, and lacks the authority to, amend the rules. While the Commission was conducting its five-year review of Ohio Adm.Code Chapter 4901:1-40, the General Assembly adopted S.B. 310. Accordingly, we have authority to amend the rules to be consistent with the Revised Code.

(8) Next, the Commission turns to the issue put out for comment: whether the General Assembly intended to eliminate the in-state requirement for the entirety of 2014, or whether the in-state requirement should be pro-rated in accordance with the effective date of the statute.

The Supreme Court of Ohio has held that, "[f]ollowing a primary rule of statutory construction, we must apply a statute as it is written when its meaning is unambiguous and definite," and that "[a]n unambiguous statute must be applied in a manner consistent with the plain meaning of the statutory language, and a court cannot simply ignore or add words." *Portage Cty. Bd. of Commrs. v. Akron*, 109 Ohio St.3d 106, 2006-Ohio-954, 846 N.E.2d 478, ¶ 52, citing *Savarese v. Buckeye Local*

School Dist. Bd. of Edn., 74 Ohio St.3d 543, 545, 660 N.E.2d 463 (1996); *Burrows v. Indus. Comm.*, 78 Ohio St.3d 78, 81, 676 N.E.2d 519 (1997).

Here, the Commission finds that the plain language of R.C. 4928.64(B)(3), as amended by S.B. 310, requires the Commission to amend Ohio Adm.Code 4901:1-40-03 to eliminate the in-state requirement for 2014 and beyond. The Commission finds that both the pre-S.B. 310 version of R.C. 4928.64(B)(2), as well as the version amended by S.B. 310 provide that the required renewable energy resources must be "* * * in accordance with the following benchmarks: *By end of year* * * * 2014 * * *" (emphasis added). This language makes the pertinent date to be considered the end of the year, and, following the primary rule of statutory construction, this language cannot be ignored. Additionally, no requirement exists in either version of R.C. 4928.64(B)(2) for any portion of the established benchmarks to be achieved prior to the end of the year. Here, we find that, as S.B. 310 eliminates the in-state requirement and is effective several months prior to the end of 2014, the in-state requirement will no longer exist at the end of 2014. Additionally, the Commission's rules do not require companies to submit their annual reports on compliance with the benchmarks until April 15th of the following year; thus, the in-state requirement also will not exist at the time companies are required to file their annual reports. Ohio Adm.Code 4901:1-40-05. Consequently, as the end of 2014 is the pertinent date in the statute, the in-state requirement is eliminated for 2014, with no pro-ration necessary.

Additionally, although several commenters have argued that the General Assembly did not intend to eliminate the in-state requirement at all, this argument also defies the plain language of the statute. R.C. 4928.64(B)(3), as amended by S.B. 310, provides that "[t]he 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." Thus, the plain language of the statute provides no required amount of in-state qualifying renewable energy resources for any year.

(9) Accordingly, in line with the Commission's analysis and conclusion in Finding (8), the Commission directs Staff to propose an amendment to Ohio Adm.Code 4901:1-40-03 to eliminate the in-state requirement in its entirety.

It is, therefore,

ORDERED, That Staff propose amended rules containing an amendment to Ohio Adm.Code 4901:1-40-03 to eliminate the in-state requirement in its entirety in accordance with Finding (9). It is, further,

ORDERED, That a copy of this Entry be served upon all electric distribution utilities and electric service companies in the state of Ohio, the Ohio Consumers' Counsel, the Electric-Energy industry list-serve, the Renewable and Advanced Energy Portfolio Standards list-serve, and all other interested persons.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Thomas W. Johnson, Chairman

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Entered in the Journal

OCT 15 2014

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Secretary