



Green Strategies Bulletin



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Implementing Ohio Senate Bill 221: Public Utilities Commission of Ohio Releases Alternative Energy Portfolio Standard Rules

Rules Subject to Re-Hearing, Approval by “JCARR”

On May 1, 2008, Governor Strickland signed into law Senate Bill 221 (SB 221), which included Ohio’s landmark alternative energy portfolio standards. This law creates a statewide marketplace for advanced and renewable energy by mandating that Ohio’s investor-owned utilities utilize more diverse generation sources such as wind, solar, biomass, energy efficiency and clean coal technologies.

The Public Utilities Commission of Ohio (the Commission) released proposed rules on August 20, 2008 to implement the alternative energy portfolio standard set forth in SB 221. Comments and reply comments were filed by nearly 40 interested parties, including the renewable energy industry as led by a coalition of wind and solar power energy trade associations and advocacy organizations, including the American Wind Energy Association (AWEA), Wind on the Wires (WOW), Ohio Advanced Energy (OAE), and Environment Ohio.

On April 15, 2009, the Commission finalized the long-awaited rules. The clock has already started ticking on the 30-day window during which interested parties may file an application for rehearing. The deadline for filing an application for rehearing is May 15, 2009. Once the rehearing process is completed, the rules will be sent to the Joint Committee on Agency Rule Review (JCARR) for final review and publica-

tion. A full copy of the SB 221 Implementation Rules is available at:

<http://www.puco.ohio.gov/PUCO/Rules/Rule.cfm?id=8724>

The rules could take effect as early as 60 to 90 days after they are sent to JCARR.

Key Provisions

I. Rule 4901:1-40-01 – Definitions

“**Biomass energy**”: Ohio Revised Code Section (O.R.C.) 4928.01(A)(35) defines “renewable energy resource” to include “biomass energy” as well as “non-treated by-products of the pulping process or wood manufacturing process, including bark, woodchips, sawdust and lignin in spent pulping liquors.”

Rule 4901:1-40-01(E) defines the term similarly, but adds “forestry waste and residues,” “vegetation waste” and “right of way trimmings” among other waste and by-products. The Commission’s order conditions the use of forestry resources on the use of “sustainable” forestry practices.

“**Clean coal technology**”: O.R.C. 4928.01(A)(34)(c) defines “clean coal technology” as including any technology with the following:

Design capability to control or prevent the emission of carbon dioxide, which design capability the commission shall adopt by rule and shall be based on economically feasible best available technology or, in the absence of a de-

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terminated best available technology, shall be of the highest level of economically feasible design capability for which there exists generally accepted scientific opinion.”

The Commission rule similarly defines clean coal as any technology “that removes or has the design capability to remove criteria pollutants and carbon dioxide from an electric generating facility that uses coal as a fuel or feedstock.” Neither the statute nor the rule defines a specific “design capability.”

“Co-firing”: “Co-firing” is defined in Rule 4901:1-40-01(G) as “simultaneously using multiple fuels in the generation of electricity.” During the debate over the implementation of SB 221, there had been some question regarding how much “credit” to award a plant that utilizes both renewable and conventional fuel sources.

Consistent with recommendations from the renewable energy industry, the rule specifies that the proportion of fuel input attributable to an advanced or renewable energy resource will dictate what proportion of electricity output qualifies as advanced or renewable energy.

“Deliverable into this state”: SB 221 requires that at least one-half of the renewable energy generated under the portfolio standard must be derived from facilities located in the state of Ohio. The other half must be “deliverable” to Ohio. The rule defines “deliverable” to mean that the “electricity originates from a facility within a state contiguous to Ohio” or “originates from other locations, pending a demonstration by an electric utility or electric services company that the electricity could physically be delivered to the state.”

This does not necessarily include all electricity generation originating within the MISO and/or PJM transmission systems, and the Commission rejected arguments that renewable energy credits (RECs) from anywhere in the country could qualify. [RECs are tradable instruments that represent the fully aggregated attributes associated with one megawatt-hour of electricity. See O.R.C. 4928.01(A)(35).] RECs will be subject to the same limitation.

The Commission also explained in its order that the demonstration of deliverability will require some form of “power flow and/or deliverability study,” though not necessarily “signed contracts” for the power.

“Distributed Generation” and “RECs”: SB 221 recognizes distributed generation as both qualifying advanced and renewable energy resources. This means that certain non-utility owned distribution generation systems can be used to satisfy SB 221’s portfolio standards.

Rule 4901:1-40-01(L) defines “distributed generation” to include “electricity production that is on-site and is capable of supplying energy to the utility distribution system.” As the Commission’s order explains, on-site production qualifies regardless of whether it is owned by a customer or third-party. This ensures that systems installed pursuant to power purchase agreements (PPAs) will qualify as distributed generation – and therefore as a renewable or advanced energy resource, as appropriate.

The Commission also explained that any RECs resulting from distributed generation belong to the owner of the equipment producing the electricity unless a contract states otherwise. Thus, RECs are not automatically claimed by utilities.

“Double-counting”: The rule’s definition of “double-counting” prohibits utilities from using renewable energy, renewable energy credits or energy efficiency savings to

- (1) satisfy multiple regulatory requirements,
- (2) support multiple voluntary product offerings,
- (3) substantiate multiple marketing claims, or
- (4) some combination of these.

The rule notes that double counting also includes the use of “acquired, committed, utility-owned renewable energy resources if renewable energy credits for the generation of such resources can be separately transferred.”

i. Double-counting, energy efficiency savings:

In addition to creating an alternative energy portfolio requirement, SB 221 contains a similar energy efficiency mandate. Though “energy efficiency” qualifies as an “advanced” energy resource under SB 221, the rule prevents a utility from counting the same energy efficiency measure toward both the energy efficiency benchmarks in O.R.C. 4928.66 and advanced energy benchmarks in O.R.C. 4928.64(B).

To clarify further, Rule 4901:1-40-04(B)(7) limits qualifying advanced energy resources to energy efficiency, “above and beyond” that used to comply with the energy efficiency benchmarks.

ii. Double-counting, voluntary offerings: The reference to voluntary product offerings in the definition prohibits utilities from using RECs obtained through voluntary green pricing programs to simultaneously satisfy the renewable energy benchmarks. Thus, if a customer agrees to voluntarily pay more for “green power,” the utility may not count this “donation” toward its statutory obligations. This ensures that customers participating in such programs contribute toward additional renewable energy investment.

“Fully aggregated” and “renewable energy credit”: The rule defines “fully aggregated” and “renewable energy credit” to indicate that, while RECs can be unbundled, environmental attributes cannot be unbundled from the REC and sold separately to satisfy other compliance requirements (i.e. sulfur dioxide RECS and nitrous oxide RECs).

II. Rule 4901:1-40-02 – Purpose and Scope

Authority to waive alternative energy requirements – Rule 4901:1-40-02(B): The rule states that the Commission may “waive any requirement of this chapter [of the rules]” for “good cause shown,” but not waive statutory requirements.

III. Rule 4901:1-40-03 – Requirements

Portfolio standard baseline – Rule 4901:1-40-03(B): Under SB 221, the Commission is required to derive a baseline from the average of the total kilowatt hours sold during the past three years to assess a utility’s compliance with alternative energy benchmarks. This baseline will be used to calculate how much renewable power is required under the statutory benchmarks.

The rule calculates the baseline based on a “rolling average.” For example, in 2010, the baseline would be the average of kilowatt hours sold in 2007-2009; while in 2015, the baseline would be the average from 2012-2014. Utilities may file an application requesting a reduced baseline at any time. New competitive providers entering the retail electric market are required to use projected first year sales as the baseline calculation during its first year of service in Ohio.

10-year planning requirement – Rule 4901:1-40-03(C): The rule requires utilities to adopt at least a 10-year planning horizon for compliance with the alternative energy portfolio standard. The Commission emphasized that the 10-year planning horizon is for planning purposes only and will not be binding on utilities.

IV. Rule 4901:1-40-04 – Qualified Resources

Placed-in-service date – Rule 4901:1-40-04(A) and (B): The rule specifically defines qualifying alternative energy resources as facilities placed in service after January 1, 1998. Facilities older than this do not qualify.

Qualified resources, renewable energy – Rule 4901:1-40-04(A): This rule sets forth the list of technologies that qualify as “renewable energy” and are eligible to satisfy the renewable tier of the alternative energy portfolio standard. Among these resources are solar, wind, hydroelectric, geothermal, solid

waste, biomass, fuel cells, certain storage facilities and distributed generation systems. The rule also adds further definition to several other technologies classified in the statute as “renewable.”

- i. **Solid waste energy:** For consistency purposes, the identification of solid waste energy as a renewable energy resource was modified to align with the reference to “solid waste” in R.C. 4928.01(A)(35), which excludes such energy resulting from processes primarily reliant upon combustion.
- ii. **Fuel cells:** The Commission eliminated any feedstock limitations on the use of fuel cells. SB 221 allows a fuel cell to qualify as both a renewable and/or advanced energy resource. The rule categorizes fuel cells as advanced and renewable energy, but does not specifically say whether electricity from a fuel cell is placed in one category or another, or could be counted twice.
- iii. **Storage facilities:** Ohio R.C. Section 4928.01(A)(35) identifies as a renewable energy resource any “storage facility that will promote the better utilization of a renewable energy resource that primarily generates off-peak.” Under the rule, a storage facility qualifies as a renewable energy resource only if the electricity used to pump the resource into the storage reservoir itself qualifies as a renewable energy resource. Additionally, the amount of energy that qualifies as a renewable energy resource does not include the amount of energy required to initially pump the resource into the storage reservoir.

Qualified advanced energy resources – Rule 4901:1-40-04(B): Rule 4901:1-40-04(B) identifies the list of technologies that qualify as “advanced energy” resources and are eligible to satisfy the advanced energy tier of the portfolio standard. Among these resources are:

- (1) a modification to a “facility... that increases its generation output without increasing [its] maximum annual carbon dioxide emissions preceding the modification;”
- (2) distributed generation systems;
- (3) clean coal technology;
- (4) significant nuclear enhancements;
- (5) fuel cells;
- (6) advanced solid waste of construction and demolition debris conversion technologies; and
- (7) demand-side management or energy efficiency advancements.

The Commission clarified that only the incremental gains in output associated with the enhancements identified in subparagraphs (B)(1), (B)(4) and (B)(7), as identified above, are credited toward the advanced energy benchmarks.

Mercantile customer-sited resources – Rule 4901:1-40-04(C): The rule allows mercantile customer-sited resources to qualify as alternative energy resources, assuming that doing so will not violate the prohibition against double-counting. Mercantile customer-site resources include, among other things, electric generation equipment owned or controlled by a mercantile customer (i.e., a commercial customer using more than 700,000 kWh of electricity/year) that uses an alternative energy resource. A more detailed list is provided in the rule.

Use of RECs by utilities – Rule 4901:1-40-04(C): The rule permits utilities to satisfy all or part of its renewable energy benchmarks through RECs. However, the rule limits the use of RECs to those associated with electricity generated in Ohio (or electricity deliverable into the state) after the July 1, 2008 effective date of SB 221. Consistent with the statute, the rule establishes the lifespan of a REC as five years from the date of initial purchase or acquisition.

Application for Certification of Qualified Advanced or Renewable Energy Resources – Rule 4901:1-40-04(E): Paragraph (E) sets forth a mandatory procedure by which alternative energy providers must apply to the Commission for the certification of a particular project as an advanced or renewable energy resource before their particular advanced or renewable energy products are deemed to count toward a utility's benchmark. The process does not establish mandatory notice or hearing requirements, but it does allow an interested party to intervene and request a hearing. If a hearing is not requested, and the Commission fails to act within 60 days, the application is deemed approved.

Classification of New Technologies – Rule 4901:1-40-04(F): Consistent with the statute, the rule also provides the Commission with the discretionary power to, *sua sponte*, classify new technologies as advanced or renewable energy resources. Mirroring the transparency provision in Paragraph (E), the provision also allows an interested party to request a hearing.

V. Rule 4901: 1-40-05 – Annual Status Report and Compliance Reviews

Annual alternative energy status reports must be filed by April 15 of each year. Until 2024, the annual review will only include compliance with the renewable energy portfolio standards because the

first advanced energy benchmark is not triggered until 2024. Within 30 days of the filing of the annual report, any person can file comments with the Commission. Following the close of the comment period, the Commission Staff is to issue its findings and recommendations. The Commission also retains the power to hold a hearing on such reports.

VI. Rule 4901:1-40-06 – Force Majeure

The *force majeure* rule tracks the language of SB 221, which allows a utility to request a *force majeure* determination to examine whether “renewable energy resources are reasonably available in the marketplace in sufficient quantities for the utility or company to comply with the subject minimum benchmark during the review period.” The rule gives the Commission discretion to waive all, or part, of a utility's compliance with the renewable energy benchmarks if a force majeure condition is determined to exist. But, the rule explicitly places the burden on the utility to demonstrate that it unsuccessfully pursued “all reasonable compliance options,” including the solicitation of RECs, before granting a motion for *force majeure*.

VII. Rule 4901:1-40-07 – Cost Cap

In response to concerns about the potential high cost of renewable energy, SB 221 includes a “cost cap” that excuses a utility from compliance with an alternative energy benchmark “to the extent that (the utility's) reasonably expected cost of compliance exceeds its reasonably expected cost of otherwise producing or acquiring the requisite electricity by three percent or more.”

The renewable energy industry filed a number of comments regarding the calculation and application of this cost cap, given its importance to the operation of the portfolio standard. The rule seems to have incorporated many of the industry's recommendations.

Two Independent 3% Cost Caps: The rule recognizes two separate, independent, 3% cost caps within the alternative energy portfolio standard: one for renewable energy and one for advanced energy. This bifurcation serves to prevent, for example, an expensive nuclear or clean coal plant from triggering the cost cap for the renewable energy tier of the portfolio standard.

3% Cost Cap Calculation: The rule establishes that the 3% cost caps are calculated by “comparing the total expected cost of generation to customers of an electric utility or electric services company, while satisfying an alternative energy portfolio standard requirement, to the total expected cost of generation

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to customers of the electric utility or electric services company without satisfying that alternative energy portfolio standard requirement.”

In adopting this standard, the Commission rejected suggestions by utilities that the calculation be based on a comparison of the differing costs of “specific” types of generation, dismissing that proposal as “inherently arbitrary.” Instead, the rule compares a utility’s overall generation rates inclusive of and exclusive of the renewable and advanced portfolio standards. In addition, the rule makes this calculation mandatory and exclusive, so it may not be calculated differently unless the Commission first modifies the rule itself.

Cost Cap, Unavoidable Surcharges: As noted above, the Commission’s cost cap calculation requires a comparison of renewable energy generation to conventional energy generation. In order to ensure a fair “apples-to-apples” comparison, the rule clarifies that all environmental costs associated with conventional energy are to be included when determining the price of that power.

Cost Cap, Partial Compliance: The rules require a utility to comply with whatever portion of a benchmark can be satisfied prior to the 3% cost cap being triggered. For example, if a utility’s costs of complying with the renewable energy benchmark exceeded the cost of otherwise producing the electricity by 3.0% (thereby triggering the 3% cap), a utility would be required to implement renewable energy resources up to the cost cap, but not above it.

“Catch Up” Provision: The rule grants the Commission the flexibility to “increase a future year’s compliance” to account for a prior year’s under-compliance in the event the cost cap is triggered. The Commission specifically reserved the right to make decisions regarding a “catch-up” requirement on a case-by-case basis.

VIII. Rule 4901:1-40-08 – Compliance Payments

Rule 4901:1-40-08 establishes penalty payments for noncompliance with the renewable energy portfolio standards. The compliance payments are based upon the megawatt-hours of under-compliance and are to be deposited into the State of Ohio’s advanced energy fund.

Compliance payments for failing to comply with the renewable benchmarks are set at \$45/MWh in 2009. In all other years, the “per MWh payment for renewable energy resources will be adjusted annually to reflect the annual change to the consumer price index.” The rule also requires the Commission staff to conduct an annual review to assess whether increases to the compliance payment provision are warranted.

For undercompliance with the solar benchmarks, the following compliance payments must be paid as set out in the statute:

Year	Payment per MWh (Solar)
2009	\$450
2010 and 2011	\$400
2012 and 2013	\$350
2014 and 2015	\$300
2016 and 2017	\$250
2018 and 2019	\$200
2020 and 2021	\$150
2022 and 2023	\$100
2024 and beyond	\$50

IX. Rule 4901:1-40-09 – Annual Report

An annual report must be submitted to the General Assembly by the Commission regarding overall compliance with the alternative energy portfolio standards. The rule was expanded to allow for a period of public comment in the 30 days prior to the report being sent to the General Assembly.

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