

Stan Pinegar, President and CEO

Ed Simcox, President Emeritus

Boonville Natural Gas Corp.

Citizens Energy Group

Community Natural Gas Co., Inc.

Duke Energy

Fountaintown Gas Co., Inc.

Indiana Michigan Power

Indiana Natural Gas Corp.

Indianapolis Power & Light Company

Midwest Natural Gas Corp.

Northern Indiana Public Service Co.

Ohio Valley Gas Corp.

South Eastern Indiana Natural Gas Co., Inc.

Sycamore Gas Co.

Vectren Energy Delivery of Indiana, Inc.

November 4, 2011

Ms. Beth Krogel-Roads
Legal Counsel
Indiana Utility Regulatory Commission
101 W. Washington St., Suite 1500 East
Indianapolis, Indiana 46204

Re: IURC RM # 11-05--Indiana Voluntary Clean Energy Portfolio Standard Program

Dear Ms. Roads,

The Indiana Energy Association (“IEA”), on behalf of its members, appreciates this opportunity to respond to comments submitted in writing and made orally at the October 14, 2011 Technical Conference concerning the proposed rules to implement the Voluntary Clean Energy Portfolio Standard Program (the “VCEP”). The IEA urges the Indiana Utility Regulatory Commission (“Commission”) to be mindful of the plain language of the enabling statute, Ind. Code § 8-1-37-1 *et. seq.* (“Chapter 37”) in implementing the VCEP. Indiana law is clear that legislative intent derives from the plain language of the statute. The IEA also responds to a few other comments proposing changes to the structure of the proposed strawman (the “Strawman”) issued by the Commission.

I. The Resulting Rules Must Be Consistent With The Plain Language Of Chapter 37 By Recognizing Chapter 37’s Limited Exceptions To Relying On Existing Clean Energy Resources To Satisfy CPS Goals.

Rules adopted by administrative agencies must be consistent with the Indiana Code. *Potts v. Review Bd. of Indiana Employment Sec. Div.*, 438 N.E.2d 1012, 1016 (Ind.Ct.App. 1982) (“Boards cannot . . . create a rule out of harmony with the statute [or] . . . in conflict with the state’s organic law, or antagonistic to the general law of the state.”) Excluding existing clean energy resources from the clean energy resources that may be relied upon to satisfy the CPS Goals, as some parties advocate, is inconsistent with plain language of the statute. Chapter 37 expressly exempts only two categories of existing clean energy resources from satisfaction of CPS Goals: (i) certain existing demand side management efficiency or energy efficiency initiatives undertaken after

January 1, 2010, and (ii) electricity generated from natural gas at a facility constructed in Indiana after July 1, 2011, . *See* Ind. Code §§ 8-1-37-4(a)(16), (21). If the Legislature had intended to exclude all existing clean energy resources from satisfying the CPS Goals, inclusion of these two exceptions would have been unnecessary. These two exceptions are included, however, and demonstrate the Legislature intended for other existing clean energy resources to satisfy the CPS Goals.

The Commission has previously recognized the rules of statutory interpretation applicable to an unambiguous statute:

When interpreting a statute, the first step is to determine whether the Legislature has spoken clearly and unambiguously on the point in question. *City of N. Vernon v. Jennings Nw. Reg'l Util.*, 829 N.E.2d 1, 4 (Ind. 2005). A statute that is clear and unambiguous must be read to mean what it plainly expresses and its plain and obvious meaning may not be enlarged or restricted. *Ind. Dept. of State Revenue v. Horizon Bancorp.*, 644 N.E.2d 870, 872 (Ind. 1994). Clear and unambiguous statutes leave no room for judicial construction. *City of Carmel v. Steele*, 865 N.E.2d 612, 618 *citing*, *Poehlman v. Feferman*, 717 N.E.2d 578, 581 (Ind. 1999).

Indiana-American Water Co., Cause No. 43133, p. 6 (IURC 12/5/2007). Chapter 37 unambiguously addresses whether existing clean energy resources may be used to satisfy the standards by exempting only two categories. No such limitation is imposed in Chapter 37 for other existing clean energy resources. Had the Legislature intended to exclude all existing clean energy resources from the CPS Goals, the limitations it placed on certain demand side management and natural gas generation facilities would have been expanded to all resources.

The comments asserting that no existing resources should count render the limited exceptions superfluous. There would be no need for the limitations that are included if no existing clean energy resources were intended to satisfy the CPS Goals. Any construction rendering portions of the statute a nullity must be avoided. *Beckerman v. Gordon*, 618 N.E.2d 56, 57 (Ind.Ct.App. 1993) (“we will not construe a statute so as to render any part of it a nullity.”) Since the other parties’ construction renders portions of Chapter 37 a nullity, their proposal to eliminate all existing resources must be rejected under well-established principles of statutory construction.

Other parties’ comments focus on Sections 10(a) and 11(c)(2) to contend that only resources obtained through additional, future actions can comply. These sections, however, do not preclude counting existing clean energy resources towards the CPS Goals. Section 10(a) instructs the Commission to adopt implementation rules for Chapter 37 and characterizes the VCEP as a commitment by an electricity supplier to “undertake to supply specified

percentages of the total electricity supplied to their Indiana retail electric customers from clean energy.” The Indiana Office of Utility Consumer Counselor (“OUCC”) and others contend that “undertake” implies future action to secure clean energy resources in satisfaction of the CPS Goals. Nothing in this language, however, requires the use of new clean energy resources. The future action contemplated in Section 10 concerns an electricity supplier’s commitment to secure a set percentage of its load from clean energy resources. Section 10(a) does not require securing new clean energy resources.

Similarly, the OUCC contends Section 11(c) supports its construction that only new resources are to be used based on the requirement that an electricity supplier submitting an application has an “expectation of obtaining” clean energy resources. The “expectation of obtaining” does not foreclose using existing resources to satisfy the goals. Rather, the language speaks to the “expectation of obtaining” the goals over the entire period of the program.

Comments also reference statements attributed to Senator Beverly Gard in the Fort Wayne *Journal Gazette*. However, the Commission has previously recognized that the opinions of one legislator, even a bill’s sponsor, are not imputed to the entire Legislature unless those views find statutory expression. *Indiana American*, Cause No. 43133, p. 8, *citing A Woman’s Choice-East Side Women’s Clinic v. Newman*, 671 N.E.2d 104 (110) (Ind. 1996).

The OUCC also supports its interpretation with a chart purporting to show that several electricity suppliers already would satisfy the first CPS Goal period if existing resources were counted. Setting aside its accuracy, the chart has no bearing on the construction of the plain language of Chapter 37.¹ The Commission cannot over-ride the Legislature’s plain language based on a presumption the Legislature was unaware of pertinent facts.

In its model calculation, the OUCC included output from coal facilities fitted with advanced technologies that reduce regulated air emissions in accordance with Ind. Code § 8-1-8.8-2(1). The IEA members do not agree that these technologies are clean energy resources includable as clean energy projects under I.C. 8-1-8.8-2(1) and thus the OUCC’s chart overstates the degree to which the goals of the statute have been met to date.

The Indiana Industrial Group (“Industrial Group”) expresses concern that electricity suppliers could “obtain a windfall” under the Strawman by tracking operating costs with existing facilities that meet the definition of a clean energy resource. The Industrial Group contends this result would be contrary to legislative intent and urges the Commission to limit “clean energy resources” to new investments. As noted above, Chapter 37 makes clear that only two

¹ Some of the electricity suppliers have reviewed the chart and are unable to determine the basis for the assumptions or match the data provided.

categories of clean energy resources do not satisfy the CPS Goals. Limiting clean energy resources to new investment would be inconsistent with this plain language. Moreover, allowing an electricity supplier to recover legitimately incurred costs is not a “windfall.” If the Industrial Group’s concern is that the Strawman could be used by an electricity supplier to seek recovery of costs that are already being recovered in rates, the IEA does not believe such double recovery is permitted under the Strawman or under Chapter 37. Such double dipping would preclude approval of the program since the resulting costs would “result in an increase to the retail rates and charges of the electricity supplier above what could reasonably be expected if the application were not approved.” Ind. Code § 8-1-37-11(c)(3).

II. Receipt of State Or Federal Incentives Should Not Preclude Award Of Other Incentives.

The Hoosier Environmental Council (“HEC”) and the OUCC argue that if a participating electricity supplier has received federal or state incentives for a clean energy project separate from the VCEP, then the supplier should be ineligible for any Chapter 37 incentives for that project even though it otherwise qualifies. The IEA disagrees with both the logic and the legal justification for this position.

The legislative policy with respect to the Commission’s evaluation of potential incentives available to a participating supplier is set forth in several statutory provisions. The definition of “clean portfolio standard goal” provided at Ind. Code § 8-1-37-5 sets the stage for incentives, stating the term “refers to a goal ... that a participating electricity supplier must achieve ... to qualify for one (1) or more of the financial incentives described in section 13 of this chapter.” Likewise, Ind. Code § 8-1-37-10(a) sets out broad parameters for this rulemaking and addresses incentives directly, providing none of the limitations advocated by HEC and the OUCC. I.C. 8-1-37-13(a) provides the only limitations on incentives contained in all of Chapter 37.

In fact, a reading of the plain language of this section provides several distinct directives: incentives may not be cumulative with respect to each CPS goal period; incentives may not be authorized for a resource previously granted an incentive under I.C. 8-1-8.8-11(a)(2); the incentive may be different for each of the goal periods as determined by the Commission; and the Commission may consider the extent a participating supplier has utilized resources listed in I.C. 8-1-37-4(a)(1) –(16). Nothing in Chapter 37 forecloses program incentives because other state or federal incentives have been awarded.

The HEC and the OUCC also seem to assume that the electricity supplier will retain both the federal or state incentive and the incentive established in Chapter 37. Particularly in cases where the incentive reduces the cost of the investment, the benefits inure to ratepayers and not to the electricity supplier. This has happened in other instances. *See, e.g., Public Service of Indiana,*

Cause No. 39312, p.30 (5/26/93) (approving the estimated costs for clean coal technology as part of the CPCN but reducing the possible recoverable portion to the “net of any DOE contributions”). A blanket prohibition of the type advocated by HEC and the OUCC will discourage electricity suppliers from pursuing such projects and defeats the incentives established by statute.

In addition, the argument put forth by HEC and the OUCC is not logical when the stringent cost containment provisions of Chapter 37 are taken into consideration. In particular, Ind. Code § 8-1-37-10(b)(2) provides that when the Commission evaluates an application it must determine that approval of a supplier’s program application will not result in an increase in that supplier’s rates and charges beyond what could be reasonably expected if the application was not approved. All stakeholders are aware that current federal incentives available for many of the generation resources listed in Section 4 of Chapter 37 are predominate factors as to the cost competitiveness of those resources. As the statutes laid out above indicate, the VCEP was clearly established to incent certain generation options for suppliers in a manner that protects ratepayers. The proposition that the supplier applying for the program must effectively choose between other state and federal incentives (to keep costs competitive) and the potential incentive available to suppliers under Chapter 37 is neither logical nor consistent with the goals of the program as established by the legislature.

III. The Criteria For Consideration Of A Plan Should Be Reduced In The Rule, Not Expanded As Suggested By Some Comments.

The IEA expressed substantial concern with respect to the numerous non-statutory criteria provided in the Strawman for both program and incentive applications. IEA members reaffirm those objections and respectfully request the Commission review the IEA comments provided in numbered paragraphs 4 and 7 submitted on October 7, 2011. As stated in those comments, the IEA objects to the notion that even more non-statutory criteria be added to the evaluation process undertaken by the Commission. The requirements for both applications are clearly established by the Legislature and those should be reflected in the rule. The Commission should reject the urgings of those who would re write the statute as if they were the legislature and establish rules that carry out the policy adopted by the law.

IV. The Industrial Group’s Limitation On The Ability To Modify A Plan Would Make Participation Under The VCEP Unattractive.

Requiring the electricity supplier to pursue the CPS Goals “in the same or substantially similar manner” as set forth in the approved plan would be a mistake. Electricity suppliers will need flexibility to meet the CPS Goals in the most cost-effective manner. A supplier that files prior to CPS Goal Period I will be projecting energy sources through 2025. Costs and technologies are likely to change and impact the potential cost. An electricity supplier will

evaluate its plan throughout the compliance period and evaluate whether sources in the plan continue to provide the best value. Constraining an electricity supplier from adjusting a plan to reflect changing circumstances could result in greater costs.

V. Review for Completeness Need Not Be Extended To Sixty Days.

Some parties proposed extending the deadline for evaluating the completeness of an application from twenty to sixty days. This would unnecessarily delay consideration of a plan. The purpose for reviewing an application for completeness is not to determine whether parties agree with the proposed plan or that the evidence is sufficient. The purpose is to ensure that the application includes the items required under the rules so that time is not wasted reviewing an incomplete application. This administrative function should be completed quickly to allow the proceeding to move forward once the required information for consideration has been submitted. The minimum standard filing requirement (“MSFRs”) includes a similar provision with a twenty-day review period for rate proceedings. *See* 170 IAC 1-5-4(a). No more time is required to review a VCEP plan than is required to ensure a utility has submitted the documentation required under the MSFRs.

VI. Proposals To Establish A REC Certification Process Would Be Better Dealt With Outside This Emergency Rulemaking.

Covanta Clean Energy has proposed the Commission expand this rulemaking to adopt rules that establish a renewable energy credit (“REC”) certification process. The IEA recommends the Commission defer consideration of such a certification process until final rules for Chapter 37 are implemented, after this emergency rulemaking. A REC certification process adds to the complexity of these rules, and is intricate enough to warrant an entire separate rulemaking. Addressing this proposal when the VCEP rules are finalized will provide greater opportunity to develop thorough certification rules.

VII. Conclusion.

The IEA appreciates this opportunity to address issues raised by comments submitted to the Commission.

Very truly yours,

A handwritten signature in black ink that reads "Stan Pinegar". The signature is written in a cursive, flowing style.

Stan Pinegar