

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission's Review)	
of its Rules for Competitive Retail Electric)	Case No. 12-1924-EL-ORD
Service Contained in Chapters 4901:1-21)	
And 4901:1-24 of the Ohio Administrative)	
Code.)	

**INITIAL COMMENTS OF DIRECT ENERGY SERVICES, LLC
AND DIRECT ENERGY BUSINESS, LLC**

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I. INTRODUCTION

Pursuant to the Commission's November 7, 2012 Entry in this matter, Direct Energy Services, LLC and Direct Energy Business, LCC (jointly, "Direct Energy") respectfully submit these Initial Comments to the proposed amended rules.

II. INITIAL COMMENT ON SPECIFIC RULES

A. Rule 4901:1-21-01 "Definitions."

In order to more clearly distinguish between general forms of direct solicitation and door-to-door solicitation Direct Energy suggests that the terms "direct enrollment" and "door-to-door solicitation" be separately defined. Direct Energy proposes that direct enrollment be defined to mean "face-to-face enrollment of a customer initiated by a retail natural gas supplier or governmental aggregator at a place other than the supplier's principal place of business when such solicitation is made by previous arrangement or when the consumer solicited is previously known to the seller." In contrast, "door-to-door solicitation" should be defined to mean "face-to-face solicitation of a customer initiated by a retail natural gas supplier or governmental aggregator at the home or place of business of the customer through canvassing without an appointment and/or previous personal relationship." These proposed changes would clearly distinguish alternative types of direct marketing and true door-to-door solicitation.

B. Rule 4901:1-21-02 “Purpose and scope.”

Subsection A(2)(d) provides a statement of the intent of these proposed rules. The meaning of the phrase “timely and correctly switch CRES providers” is not entirely clear but presumably the intention is to ensure that customers who are seeking to switch to a CRES provider can do so quickly and accurately. Therefore, Direct Energy suggests that this statement could be further clarified as follows: “Promote nondiscriminatory access to competitive retail electric services, ensure customers’ timely and accurate enrollment with CRES providers, and maintain reliable electric service.”

Subsection C should be amended to provide that the commission may waive any requirement of this chapter, other than a requirement mandated by statute, for good cause shown and “upon its own motion,” in addition to the other methods specified. Without this clarification, the Commission would be precluded from taking some actions it may want to take simply because it has not preserved the ability to waive its own rules.

C. Rule 4901:1-21-03 “General provisions.”

Subsection B prevents CRES providers from causing or arranging for the disconnection of distribution service. This rule should be amended to acknowledge situations where a supplier enters into a supplier consolidated billing agreement with an electric distribution utility (“EDU”) or when an EDU adopts a purchase of receivables program. Direct Energy suggests this rule should reflect the exception as follows: “unless the CRES provider participates in an electric utility’s purchase of receivables program or the customer is billed under a supplier consolidated billing arrangement between the CRES provider and the electric utility.”

Subsection D discusses the Commission’s authority to review CRES providers residential standard contract offers. The rule should be amended to specify that it applies to open residential

customer offers and extend the timeframe to five business days for consistency with other CRES and CRNG rules. Not all offers to residential customers are openly available to all customers, for example, affinity offers are restricted to members of certain clubs, friends and family, etc. This rule should only require that offers generally available to any residential customer be submitted for review. Other offers will be provided by request of staff and those requests are covered in Rule 4901:1-21-05. Direct Energy suggests the rule be modified as follows:

For the purpose of market monitoring and providing the public comparative information from CRES providers' residential standard contract offers generally available to any residential customer, CRES providers shall furnish to the director of the service monitoring and enforcement department or the director's designee the following information, transmitted by e-mail or facsimile within five business days of making such offers to Ohio residential customers.

This proposed change in no way limits the Commission's ability to request to review a CRES provider's product offers or marketing materials, but reduces the administrative burden to a CRES provider to routinely submit every offer that exists in the market.

Subsection (D)(1) should add the phrase "if the product is a per unit price" to the end of the sentence to reflect the possibility that CRES providers could offer a product not tied to a unit price.

D. Rule 4901:1-21-05 "Marketing and solicitation."

Subsection B requires a CRES provider to submit promotional and advertising material targeted for residential and small commercial customers to the commission within three business days of such a request. Three days is a very short period of time to provide a copy of such materials, particularly if the Commission is seeking to review a particular document. Therefore, this rule should be modified to provide five business days to respond to a request for materials.

Subsection C(5) prohibits telephone solicitation of individuals on the federal trade commission's "do not call" registry who are not otherwise exempted; Direct Energy suggests

that this rule be slightly modified to include also compliance with state “do not call” registry regulations.

Subsection C(7) prohibits direct solicitation to residential customers where the CRES provider’s sales agent fails to wear and display a valid CRES provider photo identification and requires the format of this identification to be preapproved by the staff. First, the term “direct solicitation” should be replaced with the term “door-to-door solicitation” as defined by Direct Energy. Second, requiring preapproval of the format of identification is burdensome and unnecessary. If the Commission wants a sample copy of a CRES provider’s identification badges, CRES providers can certainly maintain a copy on file. However, there is no reason for the Commission to provide preapproval of a sales agent’s badge and this proposed rule should be deleted. Alternatively, if there is a particular format the Commission would like to establish as a template for CRES providers photo identification badge the Commission should specify this format in these rules to ensure consistent compliance amount CRES providers.

Subsection C(8)(g) defines failure to conspicuously disclose an affiliate relationship with an existing Ohio electric utility as an unfair, misleading, deceptive, or unconscionable act. This proposed language would not catch a footnote that appeared on the reverse side of a letter. Not only should the disclosure be conspicuous but it should be required to be made at the first practical opportunity. For the sake of consistency and clarity, Direct Energy suggests that this rule be more specific and match the rule proposed by OGMG in Docket 12-925-GA-ORD:

- (f) “Fail to disclose (e.g. on the same line as the logo appears or in the introductory paragraph) in any mailing, the intent of which is to solicit a customer, in an appropriate and conspicuous type-size an affiliate relationship or branding agreement on advertising or marketing offers that use an Ohio utility’s name and logo.”

Subsection D imposes a requirement for CRES providers to perform criminal background checks on all employees and agents but should be modified to use the term “solicitation” (following door-to-door) instead of “marketing” to be consistent with the definitions proposed by Direct Energy.

E. Rule 4901:1-21-06 “Customer enrollment.”

A subsection should be added to this rule which states “Each electric utility shall provide in its tariff the ability for a CRES provider to enroll a customer by providing a secure pin known to the account holder, such as a social security number, driver’s license registration number, or other unique identifier.” This proposed rule would promote nondiscriminatory access to competitive retail electric services by enabling a customer to enroll with a CRES provider without requiring the customer to have her utility bill in hand or have memorized his electric utility account number.

A customer should have the ability to enroll with a CRES provider with what is in their wallet, rather than having to locate a utility bill in order to ascertain their account number. To be clear, Direct Energy supports requiring the need for an account number when enrollment is through a door-to-door solicitation. However, allowing a customer to enroll with a CRES provider through information known to that customer at any location will open new channels to reach potential customers. Today, conversations with residential customers about CRES provider services are often limited to the customer’s home where they have copies of their bills. This proposed change will allow customers to shop for electric service anytime and anywhere, rather than only when they have a utility bill in hand. This would also enable CRES providers to reach customers at times when the customer is most open to understanding and discussing energy options.

Subsection D governs residential and small commercial enrollment. To reflect the required use of third-party verifications, a provision should be added to D(1) to specify that where enrollment occurs by door-to-door solicitation, an audio recorded third-party verification and the customer's signature on a contract shall constitute consent.

Subsection D(1)(b) requires a CRES provider to provide each customer with enrollment documents that contain specific terms, including understandable pricing, terms and conditions of service, the dollar amount of all recurring and nonrecurring charges, the applicable generation resource mix and environmental characteristics, and duration of the contract. While Direct Energy sees the value this information provides to the customer, rather than requiring a print version to be provided, it would be beneficial to also give the customer an option to review this information via a website or email. Therefore, Direct Energy suggests that the rule be modified to provide that CRES providers have the option to provide this information by advising customers of where to locate such information via a website, providing such information via email, or providing a telephone number to a customer service line for a customer to request a paper version of the contract.

Subsection D(1)(d) should add "In the case of mail or facsimile enrollment, the CRES provider may satisfy this rule by including language in the contract that encourages the customer to make a copy of the signed agreement." This change would accomplish goal of providing the customer with the information but would give the customer the opportunity to print and retain the information at their own convenience.

Subsection D(1)(e) should include "door-to-door solicitation" as well as "direct solicitation." While Direct Energy appreciates the goal of rule revisions to provide consistency, for example, by the consistent use of "business" rather than "calendar" days, in this instance the

use of calendar days is more appropriate because it is easier to calculate both for CRES providers and customers. Therefore, this rule should be modified to allow customers seven calendar days (a full week) to rescind a contract.

Subsection D(1)(h)(ii) requires that the independent third party verifier must confirm with the customer that the sales agent has left the property of the customer and that the sales agent is not to return before, during or after the independent third-party verification process. Although Direct Energy supports the requirement that a representative not return before or during the verification, the term “after” is problematic and should be modified to provide an exception that permits an agent to return to the premises.

During a third-party verification, in order to ensure true separation between a sale and the verification, the verifier cannot answer questions the customer may ask or provide any further explanation of the terms because this would be considered part of the sale. Therefore, removal of the word after from this proposed rule is necessary because there are many situations that occur during a third-party verification that would warrant an agent returning to the premises, for example: technical issues such as the call being dropped or having a bad connection; human error in transposing the telephone number that prevents the call from being completed; the customer could have additional questions for the agent after the agent has left and could request that the agent return to answer such questions.

In fact, Direct Energy already requires our agents not be present during a residential verification and often have had customers flagging down our sales agents to answer additional questions. Under the proposed rule the agent would have to tell the customer they cannot return and essentially leave the customer with no choice but to call a customer service number or review a website rather than asking the sales person directly.

In order to advance the goal of promoting nondiscriminatory access to competitive retail electric services and accurate enrollment of customers, the Commission should recognize that certain situations will require an agent to return to the premises in order to facilitate the completion of the transaction and the term “after” should be deleted from the proposed rule.

Subsection D(1)(j) again requires preapproval of the photo identification. This proposed rule should be deleted or if there is a particular format the Commission would like to establish as a template for CRES providers photo identification badge the Commission should specify that format in these rules.

Subsection D(1)(i) requires that terms and conditions must be provided to the residential customer at the time of sale and must be printed in dark ink on white or pastel paper and be ten-point type or greater. Direct Energy recommends the change proposed by OGMG in the CRNG rules, which is: “The terms and conditions must be provided to the residential customer at the time of sale, via electronic mail, via use of an electronic screen, or via paper. If the terms and conditions are provided via paper, they must be printed in dark ink on white or pastel paper and be ten-point type or greater.” This proposed change reflects the fact that if the sale is made using an electronic medium, it would make more sense to have the terms and conditions provided to the customer via email. Electronic mail is nearly instantaneous and provides for less waste. However, if an email address is not immediately available, Direct Energy recommends that the sales representative display the terms and conditions on an electronic screen if available. If an electronic screen is not available, the final alternative should be to provide the terms and conditions on paper with the appropriate font size.

Subsection D(1)(k) requires a door-to-door solicitor to leave the premises of a customer when requested to do so by the customer or owner or occupants of the premises. In order to

avoid any confusion about the interpretation of this rule, Direct Energy suggests that the word “expressly” be inserted before the word “requested.”

Finally, a provision should be added to the third-party verification rules under Subsection D(1) to include a rule that prohibits a third party verifier from being compensated on the basis of a customer enrollment. This provision would ensure that the verifier was acting as a truly independent party and would protect the interests of residential customers.

Subsection E requires that where the customer and the CRES provider agree to a material change to an existing contract, the CRES provider shall obtain proof of consent and provide details of the revised contract terms and conditions. Direct Energy identifies the same flaws with this proposed rule as OGMG raised in response to the proposed CRNG rule.

First, the proposed rule is likely to result in large numbers of customers returning to the utility rather than allowing a customer to retain their contract unless they act to cancel. The Commission should not adopt this proposed subsection because it is philosophically flawed and will likely lead to negative consequences for customers that outweigh any benefits. This proposed subsection places more risk on CRES providers, logically leading products to be priced accordingly and most likely in an upward manner to account for this additional risk. The proposed subsection needlessly runs counter to the goal of promoting nondiscriminatory access to competitive retail electric service because it complicates the process of contract revision.

Second, material change provisions in contracts are common across many retail markets for all kinds of products (credit cards, mortgages, etc.) and there is no obvious reason to require affirmative consent to such a change for CRES customers. Customers are assumed to have read and understood the terms of their contracts when they enter into those contracts, including the potential for material changes with appropriate notice. If a customer does not like a material

change term in a contract, the customer is free to shop for another CRES provider that does not have such a provision.

Direct Energy suggests that Subsection E should be deleted. Alternatively, the Commission should adopt a rule that requires residential and small commercial contracts to contain language specifying that no amendment to a contract will be valid without notice to the customer with at least fifteen (15) days advance notice and a period of at least five (5) business days from the postmark date of the notice for the customer to rescind the contract without penalty. This way, a residential customer would be guaranteed notice of the change, as well as the ability to terminate the contract without penalty. If a CRES provider wanted to charge a different price or change other material terms than what was included in the original contract, then the customer would receive the notice and would have the option to cancel the contract without incurring an early termination fee or other type of charge.

Finally, if Subsection E is not deleted, the rule should at least be modified to clarify that this concept does not apply to a contract renewal but rather to a material change to an existing contract whose initial term has not yet expired. We propose the insertion of the following sentence at the end of Subsection E: “This Subsection does not apply to contract renewals which are addressed by Rule 4901:1-21-11 of the O.A.C.”

For clarification, in Subsection G should be revised to provide, “prior to *the customer* commencing competitive retail electric service...” (change italicized).

F. Rule 4901:1-21-08 “Customer access, slamming complaints, and complaint handling procedures.”

Subsection B requires each CRES provider to provide a status report and notify the customer and staff within three business days following receipt of the complaint and conclusion

of the investigation following a complaint. Direct Energy proposes to permit the CRES provider five business days to gather relevant data and respond to the complaint. Therefore we suggest that “five business days” be substituted for “three business days” throughout this subsection. This additional time will permit a CRES to process a more thorough investigation into customer complaints and provide additional information to both the Commission and customers. Alternatively, the Commission could allow five business days for response but provide that a CRES should use its best efforts to reply as soon as possible.

Subsection C(4) establishes a rebuttable presumption of “slamming” if the supplier cannot provide “valid documentation” confirming that the customer authorized the switch. Direct Energy suggests that this rule should be modified to insert the phrase “whether in paper, recording, or electronic format or mode” after “valid documentation” to make sure that any type of documentation, whatever the format, will suffice. The rule should be further modified to provide that such documentation includes, “but is not limited to” one of the following (prior to the listing of sample types of valid documentation in a-c) or to delete items a-c.

G. Rule 4901:1-21-09 “Environmental disclosure.”

Subsection C(3) requires each CRES provider to submit to staff for review and approval a proposal for incorporating the use of any renewable energy credits (RECs) into its annual and quarterly environmental disclosures. The language used in C(3)(c) is confusing because it is unclear how the proceeding term “when applicable” would apply to “whether the CRES provider complied with the renewable energy resource benchmark under the state’s alternative energy portfolio standard requirements. The Commission should clarify if it is seeking an affirmative statement that the CRES did comply with the renewable energy resource benchmark and also if there is a specific timeframe that should be included, such as the most recent year.

Subsection D(3)(a) requires an annual projection be included with all customer contracts. This rule should be revised to allow the contract to reference a website where the information may be found or to allow the customer to request a copy via email or mail. Inclusion of environmental disclosures adds to costs and additional paperwork which could distract a customer from their actual terms and conditions. Consistent with the way information flows today CRES suppliers should be required to conspicuously disclose where the information may be found but not be required to include a print copy with the contract.

Subsection D(3)(b) suggests that the quarterly environmental disclosure to customers can be accomplished electronically “if a customer agrees to such an approach.” Because Direct Energy advocates that environmental disclosures should be electronically filed, it should also be permissible to direct customers to a website where environmental disclosure data can be reviewed rather than wait for a customer to request electronic disclosure the rule should be reversed to allow for electronic disclosure unless the customer requests otherwise. Therefore, Direct Energy suggests the rule be simplified to provide that both annual and quarterly environmental disclosure can be accomplished electronically.

H. Rule 4901:1-21-12 “Contract disclosure.”

Subsection B(7)(a) should be revised to require a per kilowatt hour charge when the product offered is priced per kilowatt hour and not for products which are not on a per unit price basis.

Subsection B(7)(c)(ii) requires that, for variable-rate offers, in the event that a CRES provider chooses to provide a description of the offer that is a clear and understandable explanation of the factors that will cause the price to vary including any related indices and how often the price can change, the CRES provider may not charge an early termination fee. This

rules fails to take into account the risk factors of certain types of variable-rate-hybrid offers, such as a capped variable rate. A capped variable rate poses a unique risk to CRES providers and one method to hedge such risk is to combine the offer with an early termination fee. Therefore, the sentence in this rule prohibiting a CRES provider from charging an early termination fee should be deleted.

Subsection B(16) requires environmental disclosure data accompany the contract. This rule should be clarified to allow a reference to a website where the information may be found and the ability of the customer to specifically request a copy of the disclosure rather than include within the contract.

Subsection B(21) requires a statement that a customer may be disconnected for failure to pay electric utility charges. This rule should include CRES provider charges in accordance with changes to rule 4901:1-21-03 proposed above.

Subsection B(22) permits a CRES provider to lower the price per kWh charged to a customer under an existing contract without consent but should be clarified to provide that a CRES provider may make such a change to the contract provided there are no other “material” changes to the terms and conditions to the contract. Without this change, a CRES provider could not lower the price charged to a customer without the customer’s consent, even if the change was something simple like the CRES provider’s mailing address, customer service telephone number, or other minor detail.

I. Rule 4901:1-21-14 “Customer billing and payments.”

Subsection C(5) requires a per kilowatt hour charge. This rule should be revised to require a per kilowatt hour charge when the product offered is priced per kilowatt hour and not for products which are not on a per unit price basis.

J. Rule 4901:1-21-17 “Opt-out disclosure requirements.”

For the sake of consistency with the CRNG rules, Subsection B should be modified to provide that a governmental aggregator provide notice to all customers served of their right to opt-out of the aggregation every two years.

K. Rule 4901:1-24-05 “Application content.”

Subsection B(1)(f) provides that a certification applicant must disclose if there is pending legal action against the applicant or past rulings finding against the applicant. This language needs to be clarified to exclude those situations involving hotline-style calls or informal complaints, worker’s compensation claims, tax disputes, slip and fall cases, and other matters not related to the applicant’s technical, managerial, and financial abilities. Therefore, Direct Energy recommend that Subsection (B)(1)(f) be modified to state:

(f) Statements as to whether the applicant has ever been terminated from any Choice program; if applicant’s certification has ever been revoked or suspended; if applicant has ever been in default for failure to deliver; or if there are pending or past legal actions or findings against applicant that are related to applicant’s technical, managerial or financial abilities to provide CRES service. The applicant need not include in its statements information related to any calls, inquiries, or resolutions from informal complaints or inquiries to a Commission, consumer advocate, or other third party entity that takes or processes informal complaints or inquiries.

L. Rule 4901:1-24-14 “Certification suspension, rescission, or conditional rescission.”

Subsection E lists reasons that the commission may suspend, rescind, or conditionally rescind a CRES provider’s certificate. Subsection E(5) includes a finding by the commission that a CRES provider deliberately omitted information or knowingly provided false information on a certification or certification renewal application, including supporting attachments. This section should be modified to provide that an omission of “material” information would provide reason for suspension of a CRES provider’s certificate.

III. CONCLUSION

Direct Energy requests that the Commission accepted its recommended changes to the proposed rules in the Commission's November 7, 2012 Entry and reserves the right to file reply comments in this docket.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Initial Comments of Direct Energy Services, LLC and Direct Energy Business, LLC will be served by electronic mail delivery upon the parties who file Initial or Reply Comments in this proceeding.

/s/ Jennifer L. Lause

Jennifer L. Lause

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Summary: Comments Initial Comments of Direct Energy Business, LLC and Direct Energy Services, LLC electronically filed by Ms. Jennifer L. Lause on behalf of Direct Energy Business, LLC and Direct Energy Services, LLC