BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

Initial Comments of
The Retail Energy Supply Association and
Interstate Gas Supply, Inc.

I. Introduction

On July 2, 2012, the Public Utilities Commission of Ohio ("Commission") scheduled a workshop to be held at the office of the Commission on August 6, 2012, to elicit feedback on rule revisions to the Competitive Retail Electric Service ("CRES") provider rules found in Chapters 4901:1-21 and 4901:1-24, Ohio Administrative Code ("OAC")[1]. The workshop was conducted by the Commission Staff who also presented their thoughts on rule revisions. On November 7, 2012, the Commission issued Staff's proposed amendments to Chapters 21 and 24 of the OAC and requested written comments on the proposal. The Retail Energy Supply Association and Interstate Gas Supply, Inc. (collectively "RESA")[2] timely submits these initial comments for the Commission's consideration. The comments expressed in this filing represent the position of RESA as an organization; they may not represent the individual views of any particular member of RESA.

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[1]Since all the rules being referred here are Chapter 4901:1, OAC, RESA will refer to a particular rule by its specific chapter and rule number. Thus, the first rule in Chapters 4901:1-21 will be referenced as "Rule 21-01" and the other rules will be referenced similarly.

[2]RESA's members include: Champion Energy Services, LLC; ConEdison *Solutions*; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; GDF SUEZ Energy Resources NA, Inc.; Hess Corporation; Integrys Energy Services, Inc.; Just Energy; Liberty Power; MC Squared Energy Services, LLC; Mint Energy, LLC; NextEra Energy Services; Noble Americas Energy Solutions LLC; NRG, Inc.; PPL EnergyPlus, LLC; Stream Energy; TransCanada Power Marketing Ltd. and TriEagle Energy, L.P. As noted, the comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of RESA.

The members of RESA are experienced suppliers of CRES and many of the RESA members are Commission-certificated CRES providers currently serving customers throughout Ohio. RESA endorses some of the Staff proposed rule changes, opposes some of the suggested changes, and seeks additional modifications to the existing rules in Chapters 21 and 24 of the OAC. Specifically, in addition to the changes proposed by the Staff, RESA advocates the following: (a) a new definition of "small commercial customer" should be adopted which excludes industrial and large commercial customers, now being regulated as small commercial customers; (b) amend the language in Rule 21-05 to define what truly constitutes unfair, misleading, deceptive, or unconscionable acts or practices in marketing and promotional materials; (c) amend Rule 21-09 governing the environmental disclosure requirements to permit electronic, website disclosure; and (d) standardize all time limits by measuring them in "business" instead of "calendar" days, but do not shorten the response time. RESA appreciates this opportunity to present its views on the rules that govern CRES operations in Ohio and if requested by the Commission or the Staff would provide additional information on the proposed rule changes.

II. Proposed Amendments in Chapter 21

A. Rule 21-01, Definitions

The Staff's proposal included no change or revision to the current definitions. RESA recommends that the definition of "small commercial customer" be modified. Currently, a small commercial customer is defined in Rule 21-01(II) as "a commercial customer that is not a mercantile commercial customer." The term "mercantile customers" is defined in Section 4928.01(A)(19), Ohio Revised Code, as a "commercial or industrial customer if the electricity consumed is for nonresidential use and the customers consumes more than seven hundred thousand kilowatt hours per year or is part of a national account involving multiple facilities in one or more

states." Thus, by virtue of these two definitions, a *small* commercial electric customer is any non-residential end use customer who consumes less than 700,000 kilowatt-hours per year. 700,000 kWh per year is a large quantity of power, generally associated with industrial users and very large commercial customers, such as shopping malls and office towers. In the energy market today, a "small commercial customer" is generally thought of as a restaurant, dry cleaners, or small store whose use of electricity would generally be for lighting, space heating/cooling and personal computers. This differs from light manufacturers or megastores with thousands of square feet of commercial space that run elevators, escalators and acres of lighted parking lots with high demands for power.

Generally small commercial customers (e.g. independent restaurants, coffee shops, accountant and law offices), unlike the larger end users, do not have an energy manager or engineers on staff. Since true small commercial customers may lack the sophistication that the in-house expertise provides large users, true small commercial customers may need more information and longer notice periods than larger commercial users. To that end, Chapters 21 and 24 stipulate that CRES providers are required to provide more information to residential and small commercial customers, and are subject to more Commission review as to transactions with residential and small commercial customers, than with large commercial customers.

RESA agrees that the rules for residential and truly small commercial customers should be more comprehensive and protective than for the larger end users. In terms of customer protections, the current definition of a small commercial customer is a poor benchmark because it uses a threshold promulgated primarily for tax purposes rather than one that defines the customer class that needs the most comprehensive protections. The reality is that 700,000 kWh is simply a very large

amount of power to use over a year.[3] A 700,000 kWh customer with a 100% load factor would have a demand of 80 kW.[4] A lighting, space heating/cooling customer generally has a load factor in the 30% to 40% range. At a 35% load factor, a customer using 700,000 kWh would have a peak demand in the 229 kW range, which is a substantial load. From a business-size and operational perspective, a small commercial user is generally one with a 10-30 kW load. This is evident in the Ohio Power Company tariff where small customers (GS-1 and GSA-2) are defined as those with peak demand less than 10 kW.[5]

Lumping all non-mercantile, commercial electric customers into one category inappropriately extends the small commercial customer definition to some very large users. Since the primary purpose of the small commercial customer definition is to establish a threshold for the implementation of the consumer protection rules, as opposed to taxation purposes, the small commercial customer definition should be set to include, as close as possible, only the truly "small" non-residential customers. Including medium and large sized commercial customers into the "small" commercial customer definition dilutes the focus of the Commission's limited resources to those customers who need the attention the most, and imposes needless additional costs on larger customers who now have to pay the costs of complying with small commercial customer regulations. Setting the small commercial customer threshold at the 10-30 kW demand level is appropriate to protect those truly small commercial customers while also recognizing the contracting expertise and sophistication of the not-so-small commercial customer.

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[3]Other states' definitions reinforce this point. For instance, Illinois defines the small commercial customer at low load levels. The definition in that state is: "[s]mall commercial retail customer means those nonresidential retail customers of an electric utility consuming 15,000 kilowatt-hours or less of electricity annually in its service area." 220 Illinois Compiled Statutes 5/16-102.

[4]700,000 divided by 8,760 (all the hours in the year).

[5]Duke Energy Ohio, Dayton Power and Light and the three FirstEnergy distribution utilities allocate tariff rates by voltage, so a direct comparison is not available.

Like Ohio, Pennsylvania is an open access state with a variety of commercial end users. In Pennsylvania, a small, commercial electric customer is defined as "[a] person, sole proprietorship, partnership, corporation, association or other business that receives electric service under a small commercial, small industrial or small business rate classification, and whose maximum registered peak load was less than 25 kW within the last 12 months." Sections 54.152 and 54.2, Pennsylvania Code.

RESA recommends that the definition of a small, commercial electric customer be based on kilowatts (demand) for the year as opposed to kWh (consumption). Further, the level of demand set for defining a small commercial end user should be set at 25 kW to exclude medium and large end users. Accordingly, RESA recommends that the Commission adopt the following as the definition of "small commercial customer":

> (II) "Small commercial customer" means a commercial customer that ~~is not a mercantile commercial customer~~ has a demand of 25 kilowatts or less.

B. Proposed Rule 21-03, General Provisions

The reference in paragraph (E) to rule "24-10" correctly refers to the current rule regarding material changes. As a house keeping matter, if the Commission accepts the Staff-proposed changes to Chapter 24, then Rule 21-03(E) should refer to Rule 24-11.

C. Proposed Rule 21-05, Marketing and Solicitation

Subsection B

Currently, pursuant to Rule 21-05(B), CRES providers must provide promotional and advertising materials for residential and small commercial customers to the Commission within five "calendar" days of a Commission request. The Staff has proposed to change that timeframe to three "business" days. RESA supports using business days instead of calendar days as it presents a

uniform amount of time to locate requested material and deliver it to the Staff. The problem with the Staff proposal as presented is that three business days is often shorter than five calendar days. Thus, the conversion from calendar days to business days could result in reducing the amount of time a CRES provider has to respond. Staff presented no reason as to why it needs delivery in a shorter time than under the current rule. It may be very difficult to find the prior advertising or promotional materials in question, verify that it was sent to customers or used in a specific media area, and then transmit actual copies to the Staff. It is not unusual for marketers to have different promotions occurring in different market areas or segmented to certain classes or types of customers. It may legitimately take more than three business days to fulfill the request. Given that a CRES provider's best efforts may still result in the failure to get the advertising copies to the Commission within three business days, which would constitute a rule violation for which the CRES could be penalized, a five business day limit is more reasonable.

In its comments in Case No. 12-925-GA-ORD, RESA is proposing the same five business day turn-around for requested materials from competitive retail natural gas service ("CRNGS") providers. RESA supports consistency between the rules for CRES and CRNGS suppliers and that reasonably requires that the time frame be five business days.

Subsection C

RESA supports the concept expressed in the current provision (C) that CRES providers should not engage in unfair, misleading, deceptive, or unconscionable acts or practices; however RESA is concerned that two of the "per se" violations need clarification in order to avoid unintended consequences. First, Rule 21-05(C)(3) declares all advertising or promotional materials that make an offer or present environmental information to be unfair, misleading, deceptive or unconscionable if the advertising or promotional materials lacks a telephone number. While a

telephone number may be easily included in some printed material, much advertising and promotional activities are done in a media where that is not practical. The Commission should recognize that advertising can have different goals and purposes that often do not need the inclusion of a CRES provider's telephone number.[6] This is particularly true of billboards, television and radio advertising, and internet banners. As for the environmental disclosure, as further noted below, RESA believes that it should be addressed by use of a website so that the environmental information is available "on call" by the public, instead of providing a phone number for the public "to call." Thus, RESA proposes that the current Rule 21-05(C)(3) be modified to clarify that promotional or branding advertising need not contain contact information and that, in this day and age, contact information may be something other than a telephone number.

> (3) Except in advertising or promotional materials offered only for general branding purposes, ~~F~~failing to provide in or with its advertisements and promotional materials that make an offer for sale, the means by which a potential customer can contact the CRES provider, such as a toll-free telephone number ~~(and~~ or address ~~for printed materials)~~ or web address, ~~which~~ so that the potential customer may ~~call or write to~~ request detailed information regarding the price, terms, conditions, limitations, restrictions, and, if applicable, environmental characteristics of the service offered. This is not a strict-liability provision; any noncompliance with this provision will be evaluated in the context of the totality of the advertising.

Second, in Rule 21-05(C)(7), the Staff requests that it pre-approve the design of a photo ID which must be worn by all CRES employees engaged in "direct solicitation." Failure to wear and display a CRES provider photo identification when engaged in direct solicitation is considered, under the rule, to be *per se* an unfair, misleading, deceptive, or unconscionable act. This provision was clearly aimed at door-to-door solicitation, where the employee is in direct, visible contact with the customer; however as written it is not limited to just door-to-door sales. Arguably, a CRES

[6]The Commission is housed in the former Borden building. Borden, for years, ran non-deceptive branding advertisements using Elsie the Cow as a spokesperson and did not provide a phone number for Elsie.

employee engaged in making telephone solicitations or running a desk at a trade show is making a "direct" solicitation. RESA believes a distinction must be made between door-to-door sales and a sale conducted by a CRES provider who is at a company kiosk or desk at trade show. In the latter case, the CRES provider need not wear a visible photo identification card. The experience and interactions that occur between a prospective customer and a door-to-door salesperson may justify the need for outwardly visible identification, but the same need does not exist when the customer proactively walks over to the trade show desk or kiosk. In that instance, the contact is initiated by the customer. Further, in a kiosk or trade show desk, employees for a particular CRES are clearly identified, eliminating any deception as to their purpose or activity. From a policy standpoint, a substantial reason for requiring identification is to ensure that the person does not misrepresent themselves or for whom they are employed. There is no such risk of misidentification when a customer approaches a kiosk or a trade show desk.

Even in the instance of door-to-door solicitation, RESA is concerned with finding the lack of the approved badge a deceptive act *per se*. Deception requires mal intent. Similarly, an unconscionable act is one that shocks the public conscious. Marketing employees are people too; they run late for work or may forget to take their ID card to work on a particular day. The rule makes all such omissions intentional and designed to cause harm. Such a conclusion may be justified if there was a pattern of either a particular salesman not having a photo ID card, or numerous salespersons not wearing photo ID cards. In sum, the lack of a photo identification, in and of itself, should not constitute a *per se* solicitation that is unfair, misleading, deceptive, or unconscionable in every circumstance. Moreover, RESA cautions that "per se" violations be reserved for the most egregious violations, and that automatically imposing such a penalty on a CRES provider for the inadvertent action of perhaps a single person or a single instance could

negatively impact its licenses in multiple states due to reporting and disclosure requirements of violations. In the very competitive retail electric market, any violation can severely damage a CRES supplier, and inadvertence should not warrant a severe penalty.

For all of these reasons, this subsection, as proposed by the Staff, should be modified as follows to only apply to door-to-door sales and to permit the door-to-door salesman to present a defense:

> Engaging in ~~direct~~ door to door solicitation to residential customers where the CRES provider's sales agent fails to wear and display a valid CRES provider photo identification. The format for this identification shall be preapproved by the staff. Upon submission of evidence, the Commission may decide that the failure to wear and display a valid CRES provider photo identification did not constitute an unfair, misleading, deceptive, or unconscionable act.

The Staff has proposed adding an additional *per se* unfair, misleading, deceptive, or unconscionable act. Rule 21-05(C)(11) declares it to be an unfair, misleading, deceptive, or unconscionable act to engage in direct solicitation without complying with the laws and ordinances of the customer's jurisdiction. First, the word "direct" should be replaced with door-to-door solicitation to remove any ambiguity that a telephone solicitation is a direct solicitation with the buyer. Second, the rule puts the Commission in the place of deciding when an act violates a local ordinance. The Commission does not have expertise in municipal law; let alone what the case law may be in the particular area. Over the years, there has been a great deal of litigation when communities have banned certain types of door-to-door sales, often referred to as "Green River Ordinances."[7] The validity of such Green River Ordinances often rests on the signage or

[7]"Green River Ordinances" prohibit door-to-door sales without express permission from the household beforehand, and are so named for the city of Green River, Wyoming, which was the first city to enact such an ordinance. The ordinance was found to be constitutional. *Town of Green River v. Fuller Brush Co.*, 65 F.2d 112 (10 Cir. 1933).

enforcement policy of the community.[8] Further, whether an ordinance has been violated may well be contested by the marketer on factual grounds. Finally, the local ordinance that the marketer is accused of violating may have no impact on whether the solicitation was in fact unfair, misleading, deceptive, or unconscionable. For example, a marketer may have parked their car too close to the curb in violation of a community ordinance, but such is not related to the solicitation. Since, each community in which a marketer violates an ordinance can prosecute the sales agent, there seems to be no need for the Commission to attempt enforce an ordinance the community has elected not to prosecute.

In sum, since the Commission is not in a position to judge whether an ordinance has been violated, and a community is free to prosecute a CRES provider if it violates an ordinance, no purpose is served by this proposed rule and it should not be accepted by the Commission.

Subsection D

Finally, with respect to Rule 21-05, Staff has proposed, a new provision (D), that requires that criminal background checks be conducted for all employees and agents who are engaged in door-to-door marketing and enrollment. RESA does not oppose this new provision. However, the language in this provision should be modified in two respects: (1) CRES providers should be allowed to have third parties conduct the background checks and (2) the background checks should apply to door-to-door solicitations, not marketing activities. Accordingly, RESA proposes the following language for Rule 21-05(D):

> (D) CRES providers shall perform or require to be performed criminal background checks on all employees and agents engaged in door-to-door ~~marketing~~ solicitation and enrollment.

[8] *Id.*

D. Proposed Rule 21-06, Customer Enrollment

Provision (D)(1)(h)(iv) requires the retention of an audio recording of the customer's enrollment for one year after the contract with the customer is terminated. This could be an exceedingly long period of time. RESA believes that the retention requirement should be for a specifically defined period of time after enrollment and recommends that the retention period be for one year after the date the customer is enrolled. Thus, we would modify proposed provision (D)(1)(h)(iv) to change the phrase "after the contract with the customer is terminated" to the phrase "after the enrollment date of the customer."

Proposed provision (D)(1)(i) will require that terms and conditions be provided to the residential customer at the time of sale and be printed in dark ink on white or pastel paper and be ten-point type or greater. However, if the door-to-door sale is made using an electronic medium, it may 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. If an email address is not immediately available, the sales representative should be allowed to 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. RESA recommends that proposed provision (D)(1)(i) be revised to read as follows: "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."

In Rule 21-06(D)(2)(b)(i), a CRES provider must currently send the customer a written contract within one calendar day following telephonic enrollment. The Staff proposes to change the time frame from "calendar" day to "business" day. RESA believes that this is appropriate and

agrees with this suggestion to measure the time frame in business rather than calendar days. However, RESA suggests that the obligation to send a written contract be triggered not upon enrollment between the seller and buyer, but, rather, by confirmation of the enrollment by the utility. A utility's rejection of an enrollment is not a terribly unusual event. Sending a contract and then a subsequent notice of enrollment failure to the same customer within days unnecessarily confuses customers. Given the speed of electronic data transfers, triggering the obligation to send the contract after enrollment confirmation will not result in an undue delay in correspondence, particularly since a customer's rescission rights are measured against the utility's confirmation letter, which will not occur in any event if the enrollment is denied.

Proposed provision (E) appears to require a CRES provider to obtain proof of the customer's consent pursuant to Provision (D) of this Rule, even where the customer and the CRES provider agree to a material change to an existing contract. The Commission should not adopt this proposed provision as it is philosophically flawed and will likely lead to negative consequences for customers that outweigh any benefits. First, this proposed provision places more risk on CRES providers, logically leading such CRES providers to price their products accordingly and most likely in an upward manner to account for this additional risk. The proposed subsection needlessly runs counter to the goal of providing customers with the most competitive prices available from CRES providers. Second, RESA is not aware of any particular public outcry or examples of CRES providers using amendment provisions of a customer contract in an inappropriate manner. 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 retail electric or natural gas 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. Finally, the proposed rule runs counter to the letter and spirit of the Common Sense Initiative. Executive Order 2011-OlK, entitled "Establishing the Common Sense Initiative," sets forth several factors to be considered in the promulgation of rules and the review of existing rules. Among those factors, the Commission must review its rules to: (a) determine the impact that a rule has on small businesses; (b) attempt to balance properly the critical objectives of regulation and the cost of compliance by the regulated parties; and (c) amend or rescind rules that are unnecessary, ineffective, contradictory, redundant, inefficient, or needlessly burdensome, or that have had negative unintended consequences, or unnecessarily impede business growth. Proposed provision (E) will have a negative impact on small businesses, does not balance interests appropriately and is not necessary.

While RESA believes the proposed new provision (E) should altogether be abandoned, an alternative that is not as dramatic as affirmative consent does exist. We suggest the following substitute be considered. Instead of adopting the proposed provision (E) regarding "material change" obligations, 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.

Proposed provision (F) would require the CRES provider to notify the customer within three business days from the electric distribution company's notification of rejection that the customer will not be enrolled or enrollment will be delayed, along with the reasons. RESA believes that three business days may not be sufficient time and respectfully requests that the notification period in provision (F) be extended to five business days.

E. Proposed Rule 21-09, Environmental Disclosure

RESA suggested during the August 2012 workshop that less-detailed information should be required and that an internet posting of this environmental information is reasonable. (Transcript at 19). Staff did not adopt those recommendations; moreover, the Staff proposes that the pie chart depict the generation resources to an even smaller percentage level. RESA members understand that the mix of generation resources and environmental characteristics of the power supplies need to be disclosed to customers. *See*, Section 4928.10(F), Ohio Revised Code. However, the statute does not require the extensive information set forth in Rule 21-09 and the statute does not require that disclosure be accomplished in any particular manner. Thus, RESA contends that the intent of the statute can be fulfilled in a variety of ways and that this administrative rule should include greater flexibility and impose fewer costs of compliance.

The factors set forth in the Common Sense Initiative, which were noted earlier, encourage and justify a simplification of the information to be disclosed to customers per Section 4928.10(F), Revised Code, especially when the time, costs and benefit of the information are considered. A brief summary of the current rule is helpful. This rule applies to all CRES providers and requires that they provide the same information in the same format – the generation resource mix,

environmental characteristics with the generation of power, and inclusion of renewable energy credits sold and purchased. The rule further requires product-specific air emissions, radioactive wastes, and regional average data. The information must be disseminated each year and every quarter. Moreover, it is noted that the Staff has proposed an addition in provision (C)(2)(c) that will require all CRES providers to "assume that purchased energy has the same generation resource mix as the regional generation resource mix * * * as provided by the CRES provider's regional transmission organization or independent system operator." Since all CRES providers are subject to Rule 21-09 and, if the quoted language is adopted, the CRES providers all shall make the same assumptions about generation resource mixes and, then, the required pie chart, per provision (D)(2)(a), will be the same. The benefit to be gained by all of these requirements is outweighed by the time and efforts needed to develop the information. As a result, it is not practical to require all CRES providers, many of whom are small businesses, to individually generate not only the same pie chart but also all of the other information required by the rule. Moreover, it should be noted that this rule disproportionately affects small businesses.

In addition, the factors set forth in the Common Sense Initiative justify permitting disclosure through internet postings on CRES provider websites. The Commission should allow disclosure options that are flexible and innovative, especially since not all customers are interested in this information or read bill inserts or mailings. The Commission is aware that these periodic mailings or bill inserts are expensive to produce and circulate. In addition, the electric distribution companies have been less than receptive to disseminating the information via bill inserts. Moreover, there is no evidence that the mailings or bill inserts provide the information to the customers more effectively than the internet. In fact, the internet is in many ways superior. When the customer gets the bill insert or letter with the environmental disclosure, if they are not curious at

the time about the generation mix behind their electric service, then they will discard the insert or letter. Subsequently, especially when they are considering whether to buy a more "green" form of power, they may want to know at that time what their current supplier mix is. If the information of generation mix is on the website, it is available when the customer wants it – not just when they receive the mailing.

Finally, RESA points out that Illinois law specifically had required mailings of environmental information and, recently, the Illinois legislature changed the law to allow web postings and electronic mailing. *See*, 220 Illinois Compiled Statutes Section 5/16-127, which became effective January 1, 2013. In Attachment A to these comments, RESA proposes the revisions in Rule 21-09.

G. Rule 21-10, Customer Information

The Staff proposed no revisions for Rule 21-10. RESA believes that the Commission should recognize expressly that electric distribution companies and CRES providers can rely on various types of information to validate customer-switch requests during the enrollment process. Currently, most CRES programs envision that only the customer account number and/or the customer's social security number will be obtained by the CRES provider for initiating an enrollment.[9] For good reason, retail customers are not always comfortable disclosing their social security number for fear of identity theft. Further, potential customers do not always have their account number, especially when they are at a trade fair or otherwise are not at their residence at the time of solicitation. For these reasons, RESA proposes that CRES providers be able to provide other customer-specific information to initiate a switch request, such as a birth date or driver's license number. Moreover, RESA proposes that the Commission expressly find that, upon request, the electric distribution companies shall provide customer account numbers to CRES providers for the purpose of customer

[9]Duke Energy Ohio stated during the workshop that it allows greater flexibility. It allows suppliers to submit the meter number, or both the customer service address and customer name of record. (Transcript at 51)

enrollment. The Commission should expressly allow more enrollment flexibility to further open the market.

H. Proposed Rule 21-11, Contract Administration

Subsection C

In provision (C), the current rule requires CRES providers to maintain individual customer contracts for two years after each contract terminates. Rule 21-11(C), should be modified as follows to clarify that CRES providers may satisfy this retention policy with scanned, or other electronically stored copies of the service contracts:

> (C) CRES providers shall maintain copies of individual customer contracts for no less than two years after each such contract terminates. Copies may be saved in electronic formats if such preserves the image of the original signatures on signed documents.

Subsection D

In Rule 21-11(D)(4), the Staff proposed to decrease the timeframe for the CRES providers to give copies of each standard contract form when the Staff submits a request. Staff proposes that, instead of five calendar days, CRES providers shall provide the contract form to the Staff within three business days. Consistent with RESA's position as to Rule 21-05(B), RESA supports the consistency of using "business" days instead of "calendar" days throughout the CRES and CRNGS rules, but the change should not result in a shorter amount of time for the providers to respond.

Subsection F

Staff makes two proposals to Subsection F. First, it clarifies that the subsection only applies to residential and small commercial customers. RESA agrees with this clarification, noting that the definition of small commercial customers ought to be amended as noted above to remove the industrial and larger commercial end users. Second, the Staff replaces the term "electronic mail" with "e-mail." RESA agrees with this updating of terms. As part of the updating, though, the

Commission should amend Rule 21-11(F)(3)(c)(iii), which requires that, when a CRES provider provides the customer notice via e-mail, there must be an e-mail receipt returned that "confirms that the addressee has opened the document." In modern e-mail, whether there is a response is controlled by the customer. A CRES provider cannot force the recipient to return the "receipt" and thus cannot ensure compliance with this requirement. The Commission should only require that the notice includes the return receipt, but not require that the receipt be returned -- that is an election that should be made just by the customer. RESA proposed the following language for this provision:

> (iii) Include a receipt that can be returned to the sender by which ~~confirms that~~ the addressee can acknowledge that he or she has opened the document.

I. Rule 21-12, Contract Disclosure

Per provision (B)(11), CRES providers must include specific language allowing customers to contact the Ohio Consumers' Counsel ("OCC"). At the present time, calls to the toll-free telephone number that is listed in the rule receive a message directing the caller to OCC's website. Given this situation, CRES providers should not be mandated to list a telephone number that does not assist the customer, or list the related business hours of use of that telephone number. Provision (B)(11) should simply state "The Ohio consumers' counsel (OCC) represents residential utility customers in matters before the PUCO. The OCC can be contacted at http://www.pickocc.org."

J. Rule 21-14, Customer Billing and Payments

Identical language referring to OCC is part of provision (C)(13) of Rule 21-14. As previously advocated, this provision as related to bills should be likewise be modified by deleting the telephone number and business hours.

K. Proposed Rule 21-18, Consolidated Billing Requirements

Again, in provision (C)(15), the mandatory instructions for referring customers to the OCC should be modified in the same manner, by deleting the telephone number and business hours.

III. Proposed Amendments in Chapter 4901:1-24

A. Proposed Rule 24-05(B), Application Content

RESA has two concerns with the Staff's proposed additions for this rule. First, in provisions (B)(1)(e) and (B)(2)(d), the Staff seeks to require that CRES applicants include in their application materials proof of an Ohio office and an employee in Ohio. This language is identical to what is contained in CRNGS Rule 27-05(B)(1)(e) and (B)(2)(d). Thus, the Staff may have carried the language over to the CRES rules in its attempt to make the CRES and CRNGS rules more consistent. This additional language, however, is not appropriate for the CRES rules because the underlying statute does not mandate that CRES providers submit proof of an Ohio office and an employee in Ohio. This is an important factor because, the relevant statute for the retail natural gas market -- Section 4929.22(G), Revised Code, -- expressly requires the CRNGS to maintain an office and an employee in Ohio. There is no equivalent statutory obligation for CRES providers and they should not be mandated, via administrative rule, to have an office and an employee in Ohio. The Commission cannot impose such a requirement without authorization from the General Assembly. In addition, to the best of RESA's knowledge, states have not widely required an in-state employee in order to qualify for certification. Finally with regard to this proposed provision, the Common Sense Initiative factors justify rejection of the provision. The proposal imposes particular risks on small businesses, including those with only one employee, and those risks are not outweighed by any stated interest or objective. Thus, those two proposed additions should not be accepted by the Commission.

Second, RESA believes that the proposed language relating to legal actions and past findings in provision (B)(1)(f) needs adjustment and greater specification. For instance, it should be clear from the language that any hotline-style calls are not "pending legal actions" or "past rulings" because the Commission will already have the information and because often those calls are simply situations in which customer education is needed. Also, the language should be limited to legal actions or past rulings related to the applicant's technical, managerial and financial abilities. As currently proposed, the language would require disclosure of matters that are irrelevant to the Commission's evaluation for certification or certification renewal. For instance, the current language would require the applicant to disclose a worker's compensation action or an on-the-job automobile accident. Such information is outside the scope of the Commission's certification evaluation. Therefore, RESA proposes the following for provision (B)(1)(f):

> (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 ~~is~~ are pending or past legal actions or findings against applicant ~~or past rulings finding against the applicant~~ that are related to applicant's technical, managerial or financial abilities to provide CRES. The applicant need not include in its statements information related to any calls, inquiries, or resolutions from calls to the Commission's hotline.

B. Proposed Rule 24-06, Affidavits

RESA has two small suggestions: (1) for the opening paragraph, the words "Application approval or denial" should be removed; they appear to have been inadvertently included; and (2) in provision (D), the reference to "Title XLIX" should be changed to "Title 49" to be more user-friendly. *See*, Gov. Bar. R. XII.

C. Proposed Rule 24-07, Motions

RESA supports this new proposal from the Staff. RESA suggests, for provision (B), that the words "activity of a" be deleted because *pro hac vice* allows appearances in proceedings, not appearances for only certain activities within a proceeding.

D. Proposed Rule 24-08, Protective Orders

RESA enthusiastically supports this new proposal by the Staff. It is a wise and practical proposal for handling the many protective order requests made by CRES providers. RESA suggests one modification -- for provision (C) -- to allow any extension of a protective order beyond the six-year period to coincide with the CRES provider's certification cycle, instead of limiting the protective order to the 18-month time period set forth in Rule 4901-1-24, OAC. RESA believes that this suggestion will also eliminate some of the existing troubles that have been experienced to date with protective orders. After all, certificate holders tend to focus on those regulatory items on a biennial basis, not on an 18-month basis. RESA believes there will be no harm by this slight adjustment.

E. Proposed Rule 24-10, Approval and Denial of Application

RESA believes that, inadvertently, the Commission has implied in provision (A)(2)(c) that the Commission can hold a hearing after the 90-day suspension period set forth in provision (A)(2)(b). However, Section 4928.08(A), Revised Code, requires the Commission to do the opposite. Section 4928.08(A) states in pertinent part, "[i]n the case of such a suspension, the commission shall act to approve or deny certification or certification renewal to the application not later than ninety days after the date of the suspension." To resolve this possible conflict, the order of provisions (A)(2)(b) and (A)(2)(c) could be switched.

F. Proposed Rule 24-11, Material Changes to Business Operations

This rule contains a list of events that will be considered to be material changes to the information contained in the certification or certification renewal application and that require special notification to the Commission. In the Staff's proposed provision (B)(3), any assignment of customers and contracts has been deemed to constitute a material change. It is unclear why the Staff considers *any* assignment to be a material change. For example, assignment between affiliates or assignments made as part of an internal reorganization would trigger a special notification. However, Rule 21-11(D)(1) already requires providers to give notice to the Director of the Service Monitoring and Enforcement Department, or its designee, when a residential or small commercial contract is assigned. There is no reason that every assignment must be deemed a material change and require a separate, additional notification. For these reasons, it is appropriate to reject the Staff's proposed provision (B)(3) as unnecessary.

G. Proposed Rule 24-13, Suspension and Rescission

Provision (B)(2) and (C) in Rule 24-13 impose a blanket prohibition on advertising by CRES providers whose certificates are either suspended or conditionally rescinded. RESA does not object to a prohibition on advertising that is unfair, misleading, deceptive or unconscionable. However, the Commission does not have statutory authority to make a blanket prohibition on all advertising. Further, there are constitutional limitations on the prohibition of advertising by a regulatory commission. *See*, *Central Hudson Gas & Elec. V. Public Serv. Comm'n*, 447 U.S. 557 (1980). These two provisions should be modified to prohibit advertising that is unfair, misleading, deceptive or unconscionable, but not all advertising. The Commission has not demonstrated the necessity for a blanket prohibition on commercial free speech.

The Staff has proposed in provision (E)(12) that the Commission be able to suspend, rescind or conditionally rescind a CRES provider's certificate if the provider failed to maintain an Ohio office and an employee in Ohio. As reflected above in the discussion about provisions (B)(1)(e) and (B)(2)(d) in Rule 24-05, the Ohio Legislature has not required CRES providers to have an Ohio office and employee. Moreover, the Commission does not have statutory authority to mandate that CRES providers have an Ohio office and employee. Without that underlying statutory authority, the Commission cannot, by administrative rule, establish the prerequisite authority for it to suspend or rescind a certificate when a CRES providers does not have an Ohio office or employee. Moreover, in addition, to the best of RESA's knowledge, states have not widely required an in-state employee in order to maintain certification. Finally with regard to this proposed provision, the Common Sense Initiative factors justify rejection of the provision. The proposal imposes particular risks on small businesses, including those with only one employee, and those risks are not outweighed by any stated interest or objective. Therefore, Staff-proposed provision (E)(12) must be deleted.

Also for this rule, RESA believes a typographical error is included in proposed provision (F)(1) – the sentence should begin with "The EDU" because it is the EDU who will serve notice of the default and propose a remedy to the CRES provider. Moreover, this suggested modification will make provision (F)(1) parallel to an existing provision in the CRNGS rules – Rule 27-13(F)(1).

H. Proposed Rule 24-14, Financial Security

RESA has noticed that two stylistic edits are appropriate to this rule.

- In provision (B), the term "financial instrument" is used, but the rest of the rule refers to financial security. To be consistent, it is recommended that "financial security" be used throughout to avoid ambiguity.

- In provision (C), the reference to Rule 24-12 would be Rule 24-13, if the Commission adopts the Staff's proposed renumbering of the rules.

IV. Other Point Related to Chapters 21

The Staff proposed that many of the timeframes in the CRES rules be changed from "calendar" days to "business" days. RESA fully supports that proposed change. However, a review of the proposed CRES rules shows that the change was not fully universal. RESA recommends that "calendar days" be modified to the *equivalent* number of business days in all instances. To achieve that goal the following rules should substitute "business" days for "calendar days" or "days." The following is a list of the rules that would have to be modified to make the use of business day universal:

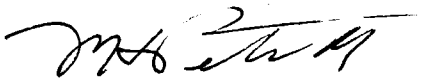
- Rule 21-04(C)
- Rule 21-06(D)(1)(g), (2)(b)(iii), (3)(b)(ii), (3)(d), and (3)(f)
- Rule 21-07(B)(4) and (5)
- Rule 21-08(C)(3), (5)(b), (7) and (12)(b)
- Rule 21-11(D)(1)(a), (F)(2), (F)(3), (F)(4), and (G)
- Rule 21-12(B)(5)
- Rule 21-14(C)(9)
- Rule 21-17(A)(11), (D)(2), (D)(3), and (F)
- Rule 21-18(F)

V. Conclusion

RESA respectfully requests that its comments and suggested edits for the CRES rules in Chapters 21 and 24 be adopted by the Commission. Among the various comments set forth above, RESA strongly urges the Commission to accept its positions for the following changes. (a) a new definition of "small commercial customer" should be adopted to recognize that there are varying types of commercial customers, apart from mercantile customers; (b) more targeted language is needed in Rule 21-05 to define what constitutes unfair, misleading, deceptive, or unconscionable acts or practices in marketing and promotional materials; (c) the environmental disclosure

requirements in Rule 21-09 should be simplified and additional options for their disclosure should be available; (d) CRES providers should have five business days to respond to staff requests for audio recordings and contract forms in Rules 21-05(B) and 21-11(D)(4); and (e) CRES providers should not be required to maintain an Ohio office and employee as proposed in Rules 24-05(B)(1)(e), 24-05(B)(2)(d), and 24-13(E)(12).

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document was served via electronic mail on all parties who have or will be submitting initial comments in Case No. 12-1924-EL-ORD this 7th day of January 2013, or shortly thereafter when the identity of such commenter is known.

M. Howard Petricoff

APPENDIX A

4901:1-21-09 Environmental disclosure.

(A) This rule establishes a process by which customers are assured of ~~receiving~~ having access to information, in a timely and consistent manner, concerning the approximate retail electric generation resource mix and environmental characteristics associated with electrical power offered in Ohio's competitive marketplace.

(B) This rule applies to all competitive retail electric service (CRES) providers of retail electric generation service. CRES providers offering or providing more than one contract for power supplies shall disclose the appropriate generation resource mix and environmental characteristics for each such contract.

(C) Determination of environmental disclosure data.

(1) Contents of environmental disclosure data shall include:

(a) Approximate generation resource mix, which consists of the following:

CRES providers shall specifically identify each of the following generation sources used in their generation of power: biomass power, coal-fired power, hydro power, natural gas-fired power, nuclear power, oil-fired power, other sources, solar power, and wind power. ~~, and unknown purchased resources.~~

CRES providers shall exercise all reasonable efforts to identify the power source or resources used to generate the power in question, and shall maintain documentation sufficient to demonstrate the steps taken to make such identification.

(b) Environmental characteristics, which consists of the following:

CRES providers shall report the environmental characteristics typically associated with the generation of power being offered under each supply contract.

CRES providers shall also report the air emissions of nitrogen oxides, sulfur dioxide, and carbon dioxide associated with the generation of power being offered under the supply contract.

In addition, CRES providers shall report the generation of high- and low-level radioactive waste associated with the power being offered under the supply contract.

(2) Methodology for determining environmental disclosure data shall include:

(a) At the time of certification, CRES providers shall submit for commission review their proposed methodology for determining their environmental disclosure data.

(b) The actual environmental disclosure data, to be provided quarterly, shall be verifiable. CRES providers shall maintain documentation sufficient to demonstrate the accuracy of the actual environmental disclosure data.

(c) When calculating the generation resource mix, the CRES provider shall assume that purchased energy has the same generation resource mix as the regional generation resource mix for the twelve-month period of June 1 to May 31, as provided by the CRES provider's regional transmission organization or independent system operator.

(3) Each CRES provider shall submit to staff for its review and approval a proposal for incorporating the use of any renewable energy credits (RECs) ~~within~~ into its annual and quarterly environmental disclosures. ~~At a minimum, such submittal would be required for the following~~ The CRES provider shall provide statements, when applicable:

(a) ~~A~~ That the CRES provider ~~sells~~ sold RECs from one of its electric generating facilities.

(b) ~~A~~ That the CRES provider ~~purchases~~ purchased RECs as a means of complying, in part or whole, with a renewable energy resource benchmark under the state's alternative energy portfolio standard requirements.

(c) Whether the CRES provider complied with the renewable energy resource benchmark under the state's alternative energy portfolio standard requirements.

(4) Timing for disclosing environmental data:

(a) Certified CRES providers shall annually project their environmental disclosure data for the current calendar year.

(b) Certified CRES providers shall make quarterly comparisons of actual to projected environmental disclosure data.

(c) Each certified CRES provider shall publish the required environmental disclosure data each year according to the following schedule:

January – disclose projected data for current calendar year.

March – disclose actual data for the prior calendar year, compared to projected data for prior calendar year.

June – disclose actual data for the period January through March of current year, compared to projected data for current calendar year.

September – disclose actual data for the period January through June of current year, compared to projected data for current calendar year.

December – disclose actual data for the period January through September of current year, compared to projected data for current calendar year.

(D) Environmental disclosure to customers shall include:

(1) Content:

Each customer shall ~~received~~ have access to environmental disclosure data, as detailed in paragraph (C) of this rule.

(2) Format:

The environmental disclosure data shall be provided in a standardized format to facilitate comparisons by customers. This data shall be disclosed in a legible form at the CRES' election either by posting on the CRES' website or mailing a statement printed in not less than ten-point type. The presentation of this data shall comply with each of the following requirements:

(a) A pie chart shall be provided which illustrates on a percentage basis the various generation resources, as detailed in paragraph (C)(1)(a) of this rule, used in the generation of the power offered under the contract. The percentages shall be rounded to the nearest ~~whole number~~ one-half percent. The pie chart shall not include colors, but shall include the use of shading and labels to more clearly communicate the information as set forth in appendices A and B to this rule. To the extent the pie chart included in appendices A and B to this rule cannot be replicated, CRES providers shall exercise reasonable efforts to simulate the required shading to the extent possible.

(b) A table shall be provided which illustrates the typical environmental characteristics associated with the generation resource categories detailed in paragraph (C)(1)(a) of this rule.

The general categories and assumptions to be depicted in the table are as follows:

Biomass power – results in air emissions and solid waste.

Coal-fired power – results in air emissions and solid waste.

Hydro power – results in wildlife impacts.

Natural gas-fired power – results in air emissions and solid waste.

Nuclear power – results in radioactive waste.

Oil-fired power – results in air emissions and solid waste.

Other sources – results in unknown impacts.

Solar power – results in no significant impacts.

~~Unknown purchased resources – results in unknown impacts.~~

Wind power – results in wildlife impacts.

(c) The product-specific air emissions shall be presented in a bar chart, along with a regional average emission reference. The product-specific emission rates shall appear as a percentage of the average regional emission rate for each of the three types of air emissions. Percentages shall be calculated from comparison of product-specific and average regional emission rates on a basis of pounds emitted per megawatt hour.

(d) The figures reflecting the generation of radioactive wastes shall be presented in a table. High-level radioactive waste shall be reported in pounds per one thousand kilowatt hour (kWh), while low-level radioactive waste is to be reported in cubic feet per one thousand kWh. Any radioactive waste greater than zero but less than ".0001" shall be depicted as < 0.0001.

For use in the implementation of this rule, the following definitions shall apply:

High-level radioactive waste – means nuclear fuel that has been removed from a nuclear reactor.

Low-level radioactive waste – means radioactive waste not classified as high-level radioactive waste, transuranic waste, spent nuclear fuel, or by-product material as defined in section 11(E)(2) of the "Atomic Energy Act of 1954," 68 Stat. 921, 42 U.S.C. 2014(e)(2), as amended by the Price-Anderson Amendments Act of 2005, 119 Stat. 779.

(e) The annual projection of approximate generation resource mix and environmental characteristics shall appear as depicted in appendix A to this rule. The regional average data, if available, will be updated by the commission by December first of each year or as conditions warrant. The quarterly comparisons of actual environmental disclosure data to projected environmental disclosure data, comprised of data specific to the power offered under the contract, shall appear as depicted in appendix B to this rule.

(f) Each CRES provider shall maintain records detailing the magnitude of each environmental characteristic associated with the power offered under the contract. Such details shall be provided to customers and commission staff upon request and may be included on a CRES provider's website.

(g) A CRES provider may include other information that it feels is relevant to the required environmental disclosure data, provided this additional information is distinctly separated from the required information. CRES providers shall maintain sufficient documentation to permit verification of the accuracy of any additional information that is disclosed.

(3) Timing:

(a) Annual projection.

The CRES provider at its election shall either post its environmental disclosure data on its website or mail a printed copy to ~~include with~~ each customer under contract, its most recent projection of environmental disclosure data, consistent with the schedule presented in paragraph (C)(3) of this rule and the format depicted by appendix A to this rule.

~~If a customer is under contract at the time the projected environmental disclosure data is revised, the revised environmental disclosure data shall be provided to the customer via bill insert or separate mailing. The annual environmental disclosure can be accomplished electronically if a customer agrees to such an approach.~~

(b) Quarterly comparisons of actual to projected data.

The comparison of actual to projected environmental disclosure data shall be provided to customers on a quarterly basis, consistent with both the schedule presented in paragraph (C)(3) of this rule and the format depicted by appendix B to this rule.

These items will be disclosed to customers via the CRES provider's website, bill inserts or by separate mailing. ~~The quarterly environmental disclosure can be accomplished electronically if a customer agrees to such an approach.~~

(E) Environmental disclosure to the commission shall include:

Each CRES provider shall electronically submit its annual projection and quarterly comparisons of environmental disclosure data to the deputy director of the utilities department or their designee consistent with the schedule presented in paragraph (C)(3)(c) of this rule. The information provided to staff shall be identical in content and format to that provided to customers.

(F) The generation resource mix disclosed pursuant to this rule should not be used as an indicator of the CRES provider's compliance with Section 4928.64 of the Revised Code.

Summary: Comments Initial Comments electronically filed by M HOWARD PETRICOFF on behalf of Retail Energy Supply Association and Interstate Gas Supply, Inc.