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

Application for Rehearing By The Retail Energy Supply Association

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Filed January 17, 2014

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I. Introduction

A. Procedural History

On August 20, 2012, the Public Utilities Commission of Ohio ("Commission") held a workshop to elicit ideas for revising the Competitive Retail Electric Service ("CRES") provider rules covering certification and enrollment codified in Chapters 4901:1-21 and 4901:1-24, Ohio Administrative Code ("OAC").[1] On November 7, 2012, the Commission issued Staff-proposed amendments to both Chapters, and requested written comments on the proposal. The Retail Energy Supply Association ("RESA")[2] submitted extensive comments,[3] addressing practical shortcomings with some of the Staff's proposed amendments as well as existing problems with the current rules that were not addressed in the Staff's proposal. RESA also filed reply comments,[4] addressing several proposals made by other commentators which either had no legal basis or failed the Common Sense Initiative's criteria established for agency rules.[5] On December 18, 2013, the Commission issued a decision, in which it adopted a number of revisions to Chapters 21 and 24.

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[1]All the rules being referred in this document are in Chapter 4901:1, OAC. Therefore, 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: AEP Energy, Inc.; Champion Energy Services, LLC; ConEdison *Solutions*; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; GDF SUEZ Energy Resources NA, Inc.; Homefield Energy; IDT Energy, Inc.; 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. 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.

[3] Submitted January 7, 2013.

[4] Submitted February 6, 2013.

[5] Executive Order 2011-0lK, 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.

B. Description of RESA and Summary of Argument

The members of RESA are experienced suppliers of CRES and many of the RESA members are Commission-certified CRES providers currently serving customers throughout Ohio, as well as in other open-access states. RESA has reviewed the Commission's decision and respectfully requests that the Commission reconsider certain limited aspects of the adopted rules. The comments expressed in this Application for Rehearing represent the position of RESA as an organization; the comments may not represent the individual views of any particular member of RESA.

Specifically, RESA advocates on rehearing the following rules:

- **Rule 21-01(JJ)** - The Commission's regulatory scheme is based upon the premise that residential and small commercial customers are unsophisticated and the Commission needs to oversee their contracting for services. RESA does not dispute the basic premise that service to residential and small commercial customers should be subject to more extensive regulation than service to large commercial or industrial customers, but RESA believes the current definition of "small commercial customer" is inaccurate. The current definition of "small commercial customer" includes every industrial and commercial customer who is not a "mercantile" customer. The definition of mercantile customer was first created to allow very large power users to qualify for lower rates and self-assessment of the kilowatt-hour ("kWh") tax.

  Additionally, the current rule's definition of small commercial customer is out of line with that used by other states with which Ohio commerce competes. The Commission's over-regulation of what are actually large commercial and industrial customers imposes a cost, not a benefit on those customers. The Commission should modify the definition of "small commercial customer" so that it includes only the unsophisticated low-volume commercial customers who will benefit from such regulation.

- **Rule 21-05(C)(7)** - The rule effectively requires all sales agents to wear / display their photo badges when making a direct sale to residential customers because failure to do so is deemed a *per se* violation. The problem with the rule is the choice of the word "direct solicitation." The clear intent of the rule is to address door-to-door sales. Rather than using the term "direct solicitation," the mandatory wearing of a photo badge should be in circumstances where the photo badge can be seen and the sales agents are not readily linked to their employer, namely, during door-to-door solicitations.

- **Rule 21-05(C)(11)** – This rule declares that "engaging in direct solicitation to customers without complying with all applicable ordinances and laws of customer's jurisdiction" will be, *per se,* an unfair, misleading, deceptive, or unconscionable act in every circumstance. 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 reasonable purpose is served by this *per se* rule and it should be deleted by the Commission.

- **Rule 21-05(E)** – This rule sets the allowable hours for door-to-door sales. RESA understands the concern about limiting door-to-door solicitations so as not to inconvenience the public, but the 7 p.m. cut-off hour is too early. The cut-off should be 8 p.m., or at a minimum, a rule amendment should take daylight saving time into account as previously proposed by Ohio Partners for Affordable Energy and supported by the Ohio Consumers' Counsel. In fact, RESA members who conduct door-to-door solicitations are most often asked to return after dinner during the times of 7p.m. – 8 p.m. The Commission should revise the rule to allow for solicitation until 8 p.m.

- **Rule 21-06(D)(1)(i)** – This rule requires residential retail customers to be presented with the proposed contract terms and conditions in dark ink on white or pastel paper. That appears to exclude use of electronic medium with email delivery. Similarly, there have been questions about the validity of electronic signatures. Ohio law is clear that electronic media can be used for contracts. Further, in many ways, electronic media is superior to white or pastel paper because email delivery, unlike hand delivery of paper documents, can be easily validated and the retail customers can subsequently print off multiple copies.

- **Rule 21-06(D)(1)(h)** – This newly adopted provision addresses the TPV process for door-to-door solicitations. It states: "[t]he independent third-party verifier must confirm with the customer that the sales agent has left the property of the customer. The sales agent is not to return before, during or after the TPV process." RESA believes there are several distinct problems. First, this provision should be applicable to door-to-door solicitations of residential customers only. Many "small commercial customers" are large (as noted earlier) and those sales calls could be followed by dinner or entertainment, while the sales agent is building a relationship with the client. Second, the word "before" should be removed. The sales agent, by virtue of the door-to-door sales process, would have been at the customer property before the TPV process. It is an error to preclude the sales agent's presence before the TPV.

  Third, the sales agent should not be precluded from returning to a customer's property after the TPV process unless the customer directs otherwise. TPV agents are precluded from selling to or answering questions for a customer. The sole action of a TPV agent is to ask the verifying questions and receive "yes" or "no" answers. To ensure the verification is independent, the verification fails when the customer has questions, and the sale is not completed. If the TPV process fails (in which case the sale will not go through) and a customer has further questions and wants to discuss

them with the sales agent, the adopted rule would preclude the sales agent from ever answering those questions at the customer's property. Also, there is no means for the sales agent to address the sale if some other non-substantive issue causes the TPV to fail. It simply is unfair to preclude the sales agent from all post-TPV contact with the customer when the customer is requesting additional conversations. Additionally, allowing a sales agent to return after the TPV process will not jeopardize the TPV process because it already concluded. Fourth, the customer should be able to decide whether the sales agent remains at the customer's property during the TPV. Whether a sales agent stays during the TPV should be a matter decided by the customer, not the Commission. Customers can choose who can be at their property. If this change is accepted, RESA suggests that the rule expressly require that the TPV agent to confirm whether the representative of the CRES or governmental aggregator remained during the TPV and the customer consented to the representative remaining at the customer's property.

- **Rule 21-06(D)(2)(b)(i)** – This rule requires CRES providers to send the contract to a telephonically enrolled customer before the electric distribution company ("EDU") confirms the enrollment. That means a disqualified customer will have a contract that is null and void, if the enrollment is rejected by the EDU. To avoid the confusion, RESA suggests that the retail contract be sent out within one business day of the EDU confirming the enrollment, instead of within one business day of the telephonic enrollment.

- **Rule 21-11(F)(3)(c)(iii)** – This is a new rule requiring confirmation of the *opening* of the contract renewal (or email containing the contract renewal) when a renewal notice is sent by email to the customer. The problem here is there is no practical way for the CRES provider to know that a customer has opened its mail or has read the email if the customer does not accept the email request by sender to send a notice email reply.

- **Rule 21-12(B)(7)(e)** – While RESA is grateful to the Commission for recognizing that offers are evolving, the new rule here limits products to only monthly products. There are many products with the arrival of advanced metering, which may lead to hourly or daily priced options. RESA would recommend the rule be revised to remove the term "monthly" and instead use the unit price of the flat rate if it is something other than per kWh.

- **Rule 24-05(B)(1)(e)** – This rule addresses what information about the CRES provider is required to be in its certificate application. The Commission, in response to RESA's earlier comments, disagreed that statements about past and pending regulatory or judicial actions should be limited to those actually related to the applicant's technical, managerial and financial abilities to provide CRES type services. As written, the Commission is requiring CRES providers to provide information that will be irrelevant to the evaluation process. It is unclear, for example, what (if anything) slip-and-fall-type employee disputes will add to the evaluation of a company's ability to provide CRES. The rule can be appropriately tailored to meet the needs of the Commission (require disclosures) and not be

unnecessarily broad and burdensome.

- **Rule 24-08** – This rule provides for the extension of protective orders related to financial data in the certificate application. RESA believes this suggested rule is extremely helpful and will reduce administrative compliance costs. RESA also believes, though, that the rule should be geared to better measure the time for extensions – either the original six-year extension period or any additional extension requests to match up with the renewal cycle. Thus, since the renewal cycle is every 2 years, requests for extension should not be limited to 18 months but extended up to 24 months to coincide with the new application.

In addition to the above rule amendments, RESA also requests that the Commission grant rehearing in order to clarify two items in its final rule order that could lead to misinterpretations:

- **Rule 21-11(H)** requires that a CRES provider secure and document material changes to an existing agreement. RESA does not object to this new rule, but because of previous discussions with some social action groups the Commission should clarify that a "material change" takes place when the agreement is mutually modified, not every time the modification is exercised. Thus, for example if a contract is mutually modified so that the price is adjusted up or down dollar for dollar for every change in the annual PJM capacity cost the annual change in the rate would not require additional documented approval.

- **Rule 21-12(B)(7),** which calls for "all fees" to be listed, could mean that the CRES contract must account for the total amount being charged to the customer for electricity. RESA seeks clarification that it is not a requirement that all cost components or sub-components be listed in the CRES contract. Thus, for example, if a retail contract has both a monthly fixed customer fee and a cents per kWh fee, the contract must present the amount of the customer fee per month and the amount of the kWh fee. Rule 21-12(B)(7) should not require that the customer fee be broken down to show how much was for postage, account handling, and interaction with EDU unless any of those charges were variable. RESA recommends the rule instead state any fees not already included in the per-unit price.

II. Amendments in Chapter 21

A. Rule 21-01, Definitions

In RESA's Initial Comments, it recommended that the definition of "small commercial customer" be modified. Under the current rules, a small commercial customer is defined in Rule 21-01(JJ) 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 customer 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." The mercantile level of 700,000 kWh parallels the tax code, which permits customers using over 700,000 kWh to declare and pay their own kWh tax rather than have it billed by the utility company.[6] Mercantile customers use an amount of power so large that the state of Ohio actually lowered the per-kWh rate for them in light of the volume of power used.[7] Additionally, the 700,000 kWh customers are allowed to "opt out" of paying for the EDUs' energy efficiency riders because they are so large that they can prove to the Commission that they have implemented energy efficiency measures of their own.[8] Thus, other statutory provisions recognize that such customers are not "small."

The test of being a "mercantile" customer is not a good criterion for determining when a commercial customer is sophisticated enough to be spared the Commission's enrollment, renewal and other contract regulations designed to protect residential customers. Using a definition of "small commercial" that truly captures the commercial customer whose use of power is so limited that it is not likely to be overseeing the expense closely has two benefits: (1) it allows the Commission to focus its resources on the population that needs protection and (2) it lowers the cost to those who do not need intensive regulation.

RESA, in its Initial Comments, suggested defining "small commercial customer" as "a commercial customer that has a demand of 25 kilowatts or less" which is the standard in

[6] Section 5727.81, Ohio Revised Code as currently effective, allows customers with 500,000 kWh to pay their own kWh tax.
[7] *Id.*
[8] Section 4928.66(A)(2)(c), Revised Code.

Pennsylvania[9] and is similar to Illinois.[10] The Commission stated that "the concerns of RESA/IGS are more appropriately addressed by the electric distribution utilities (EDUs) in their individual tariffs." (Finding and Order at 6)

RESA respectfully disagrees with the Commission for several reasons. First, the decision of what constitutes a small commercial customer should be made by the Commission not controlled or even delegated to the six Ohio EDUs. The General Assembly, in Section 4928.02, Revised Code, required the Commission to implement energy policy for the state.

Second, letting the EDUs control the debate creates the possibility for inconsistency throughout Ohio by EDU service area. There is no good reason why two like facilities should be subjected to different Commission enrollment, contract documentation or renewal procedures depending on which EDU serves them.

The fear that EDUs have different views on what constitutes a small commercial customer is not a theoretical concern. Below is a list of how the EDUs' tariffs reference or define "small commercial customer" in their tariffs today:

EDU	Use of "Small Commercial Customer"	Tariff Sheet
Dayton Power and Light Company	Its generation and distribution tariffs refer to residential, secondary and primary categories.	Sheets G10, G12, G13, D17, D19 and D20.
	"Small commercial customer" is not defined and the tariff includes no usage thresholds. It allocates it rates by voltage. However, its secondary service imposes no demand charge for the first 5 KW of use.	Sheets D19 (page 1), G19 (page 1), G29 (page 1).
Duke Energy of Ohio Inc.	For switching purposes, its tariffs refer to residential, commercial and industrial categories. "Small commercial and industrial customers" are defined as "customers who use electricity for nonresidential purposes, consume less than 700,000 kWh of electricity per year and are not part of a national account involving multiple facilities in one or more states."	Sheets 21.4 (pages 1 and 2), 22.8 (page 3)
	For other purposes, Duke does not expressly define "small commercial customer." It refers to distribution voltage categories	Sheets 40.15 (page 1)and

[9] Sections 54.152 and 54.2 Pennsylvania Code.
[10] 220 Illinois Compiled Statutes 5/16-102.

	and allocates its rates by voltage. However, its Rates DS and DM are divided for customers with an average monthly demand is greater or less than 15 kilowatts.	43.15 (page 1)
	It also refers to "large commercial and industrial customers" as 1,000 KW or more.	Sheet 75.1 (page 4)
FirstEnergy (all 3 EDUs)	Its Schedule of Rates tariff refers to residential, secondary and primary categories.	SoR Sheets 1, 10, 20, 21.
	"Small commercial customer" is not defined and the Schedule of Rates tariff includes no usage thresholds. It allocates its rates by voltage. Its secondary service imposes one demand charge for the first 5 KWs of use and another for all KWs over 5 KWs. It also used 5 KWs as a measurement for the billing demand.	SoR Sheet 20 (page 1)
	Its Schedule of Rates tariff and its Supplier tariff refers to "small commercial customers" but do not define the terms.	SoR Sheet 4 (page 15) and Suppl. Sheet 1 (page 18).
Ohio Power Company (both zones)	"Small commercial customer" is not defined. The tariffs refer to residential and small commercial both as a"GS-1" customers.	Sheets 103-30D, 220-2D, 320-2D, 220-2, 320-2
	GS-1 service is available to "secondary customers with maximum demands less than 10 KW."	Sheets 220-1D and 220-1.
	Its tariffs refer to residential, commercial and industrial categories.	Sheets 103-19D and 103-19.
	It also refers to "large commercial," but offers no threshold/line of demarcation.	Sheet 103-30D.

Today, the definition of "small commercial" is uniform but inaccurate. Following the Commission's suggestion to raise the definition for discussion on a EDU-by-EDU tariff basis would result in a piecemeal approach and place different consumer protections on similar customers simply because the local utility uses a different definition for small commercial customer. The goal of RESA is to appropriately apply consumer protections to the small commercial customers who need them. It would also make the task of the Commission's call center more difficult.

Third, the industry does not consider customers with usage approaching 700,000 kWh per year to be small. RESA noted previously, usage of 700,000 kWh per year is a large quantity of

electricity that, generally, is associated with industrial users and very large commercial customers, such as shopping malls and office towers who have thousands of square feet of commercial space with elevators, escalators, and acres of lighted parking lots requiring high demands for power. In contrast, a "small commercial customer" is generally thought of today as independent restaurants, coffee shops, accountant and law offices, dry cleaners, or small stores with electricity generally used for lighting, space heating/cooling and personal computers. This is evident in Ohio Power Company's tariff (see chart above) where small customers are referenced as those with peak demand less than 10 kW and to some extent in Duke Energy Ohio's tariff (see chart above) where two non-residential rates are defined with a threshold of an average monthly demand greater or less than 15 kilowatts.

Small and large commercial customers are different and have different needs. In particular, small commercial customers, generally, do not have an energy manager or engineers on staff, unlike the larger commercial customers. Also, true small commercial customers may lack the sophistication that the in-house expertise provides to the large users. As a result, true small commercial customers may need more information and longer notice periods than larger commercial users.

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 commercial customers. However, in terms of customer protections, the current definition of a small

commercial customer uses an unrealistic threshold (700,000 kWh per year) that was promulgated primarily for tax purposes and that is not otherwise accepted by the industry.

Fourth, 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 protections, as opposed to tax-related purposes, the small commercial customer definition should include, as close as possible, only the truly "small" non-residential customers. Including medium- and large-sized commercial customers in 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 pay the costs of complying with small commercial customer regulations.

Fifth, as noted before, other open-access states distinguish truly small commercial customers as well. 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. Illinois defines the small commercial customer at low load levels too. 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.

For all of the above reasons, setting the small commercial customer threshold in 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

customers. More specifically, RESA recommends that the definition of a small, commercial electric customer be based on kilowatts (demand) for the year as opposed to kWh (consumption), and be set at 25 kW. Accordingly, RESA recommends that the Commission adopt the following as the definition of small commercial customer in Rule 21-01: "a commercial customer that ~~is not a mercantile commercial customer~~ **has a demand of 25 kilowatts or less**."

B. Rule 21-05, Marketing and Solicitation

1. Rule 21-05(C)(7)

In Rule 21-05(C)(7), 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 residential customer; however as adopted it is not limited to just door-to-door sales. 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. A CRES employee running a desk at a trade show is making a "direct" solicitation, but need not wear a visible photo identification card under those circumstances because (1) the contact is initiated by the customer and (2) employees for a particular CRES are already 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 him/herself or the employer. The lack of photo identification does not create a risk of misidentification when a customer approaches a kiosk or a trade show desk. As a result, photo identification should not be mandated.

Even in the instance of door-to-door solicitations, 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 photo identification to work on a particular day. The rule declares *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 identification, or numerous salespersons not wearing photo identifications. 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 an inadvertent act 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, Rule 21-05(C)(7) 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.**

Alternatively, the provision could be deleted from the list of *per se* violations.

2. Rule 21-05(C)(11)

The Commission adopted provision (C)(11) of Rule 21-05 as proposed by the Staff, and is now declaring that "engaging in direct solicitation to customers without complying with all applicable ordinances and laws of the customer's jurisdiction" will be, *per se*, an unfair, misleading, deceptive, or unconscionable act in every circumstance. RESA opposed this provision previously for several reasons. In deciding not to accept RESA's comments, the Commission simply stated that the "Staff's proposed language is appropriate." (Finding and Order at 19)

RESA continues to have serious concerns with Rule 21-05(C)(11). First, "direct solicitation" should be replaced with "door-to-door solicitation" to be clear that the provision addresses only door-to-door activities. This change will make the provision more consistent with provision (E), wherein the Commission references local ordinances and regulations related to door-to-door solicitation. Also, this change is needed because other means of solicitation (e.g., telephone solicitation) fall within the definition of direct solicitation but are not intended to be covered by the provision. Second, this provision incorrectly puts the *Commission* in the place of deciding when an act violates a local ordinance. The Commission does not have expertise in or the authority to enforce municipal law; let alone evaluate what the case law may be in the particular area.[11] Third, if an ordinance has been violated, the local jurisdiction has the authority to impose commensurate penalties. The Commission is not the entity that imposes penalties for violations of municipal laws. Fourth, Rule 21-05(C)(11) declares any such violations to be

[11]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." 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 in that case was found to be constitutional. *Town of Green River v. Fuller Brush Co.*, 65 F.2d 112 (10 Cir. 1933). The validity of such Green River Ordinances often rests on the signage or enforcement policy of the community. *Id.* RESA's point is reinforced by this latter statement – the enforcement of the local ordinances is done at the local level; it is not a matter within the scope of the Commission's authority.

unequivocally an unfair, misleading, deceptive, or unconscionable act in every circumstance. However, 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 sale agent may have parked 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 CRES supplier might violate an ordinance can prosecute the sales agent, there seems to be no need for the Commission to attempt to enforce a community ordinance or to declare every local violation to be an unfair, misleading, deceptive, or unconscionable act subject to Commission action.

In sum, 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 reasonable purpose is served by this *per se* rule and it should be deleted by the Commission.

3. Rule 21-05(E)

As adopted, Rule 21-05(E) declares that, when there are no local laws and ordinances, door-to-door marketing and solicitation can only take place between nine a.m. and seven p.m. Ohio Partners for Affordable Energy ("OPAE") had recommended that the hours for door-to-door sales be extended between April and September to 9 a.m. and 8 p.m. (OPAE Initial Comments at 42) OCC recommended door-to-door marketing be allowed until dusk. (OCC Reply at 9-10) The Commission stated in the Finding and Order (page 15) that the 9 a.m. to 7 p.m. hours was a reasonable balance between the suggestions received. Given that two consumer representatives have advocated for a later time period for conducting door-to-door marketing between April and September, RESA urges the Commission to reconsider and allow the hours for door-to-door sales to take place between 9 a.m. and 8 p.m., instead of the more limited time frame it adopted. Many agents are asked to return after dinner, typically between

the hours of 7 p.m. and 8 p.m. To allow for customers to return from work and eat dinner, it seems reasonable to allow the additional hour. Moreover, the Commission does allow other marketing and solicitation activities to take place until 9 p.m. *See*, Rule 21-05(C)(6). At a minimum, the rule should take daylight saving time into consideration (allowing door-to-door solicitation during daylight saving time between 9 a.m. and 8 p.m.).

C. Rule 21-06, Customer Enrollment

1. Rule 21-06(D)(1)(i)

Provision (D)(1)(i), as adopted, will require that terms and conditions be provided to the residential customers at the time of the sale, be printed in dark ink on white or pastel paper, and be ten-point type or greater. This language envisions that only paper copies of the terms and conditions will be provided. Moreover, the Commission stated that it did not agree that conditions may be provided electronically to a customer in order to satisfy this rule. (Finding and Order at 28) However, if the sale takes place via door-to-door solicitation and the salesperson is using an electronic medium, it makes sense to also allow provision of the terms and conditions to the residential customer via email. Electronic mail is nearly instantaneous, and provides the CRES supplier with an actual record (electronic) that the terms and conditions were provided. Federal law allows contracts or other records to be provided to the consumer via electronic means if the consumer is informed of several facts and then the consumer consents to electronic records. *See*, 15 USC §7001(c)(1). Additionally, Ohio's Home Solicitation Sales Act (specifically, Section 1345.23, Ohio Revised Code) states:

> The seller shall present the writing to the buyer and obtain the buyer's signature to it. The writing shall state the date on which the buyer actually signs. The seller shall leave with the buyer a copy of the writing which has been signed by the seller.[12]

[12]"Home solicitation sale" does not mean commercial sales. It means "a sale of consumer goods or services in which the seller or a person acting for the seller engages in a personal solicitation of the sale at a residence of the

Nothing in that statute requires that a signed-by-the-customer hard copy must be provided to residential customers. Also, the statute would not preclude a CRES provider from presenting the document via computer or tablet (or other similar means), having the customer electronically sign the terms and conditions, and then sending the signed copy via email.

Finally, the Commission's requirement that the contract be on white or pastel paper with dark ink is at odds with the General Assembly's millennium decision that provides for the acceptance of electronic contracts and electronic signatures. Section 1306.06, Revised Code, states:

> (A) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.
>
> (B) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.
>
> (C) If a law requires a record to be in writing, an electronic record satisfies the law.
>
> (D) If a law requires a signature, an electronic signature satisfies the law.

It should also be noted that, in addition to the being at odds with Ohio's statutory acceptance of electronic agreements, the rule also violates the Common Sense Initiatives criteria with which all agency rules must comply. Electronic agreements allow for easy retrieval by the customer, the ability to easily print copies and the ability to easily cut and paste provisions from the contract in emails to correspond with the CRES provider. Finally, there is little support in the record of this proceeding for paper only, let alone the choice of ink and paper color. This is the very micro-managing that the Common Sense Initiative seeks to eliminate.

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buyer, including solicitations in response to or following an invitation by the buyer, and the buyer's agreement or offer to purchase is there given to the seller or a person acting for the seller, or in which the buyer's agreement or offer to purchase is made at a place other than the seller's place of business." (Emphasis added.)

2. Rule 21-06(D)(1)(h)

This newly adopted provision addresses the TPV process for door-to-door solicitations. It states: "[t]he independent third-party verifier must confirm with the customer that the sales agent has left the property of the customer. The sales agent is not to return before, during or after the TPV process." RESA believes there are several problems. First, this provision should be applicable to door-to-door solicitations of residential customers only. Many "small commercial customers" are large (as noted earlier) and those sales calls could be followed by dinner or entertainment, while the sales agent is building a relationship with the client. Second, the word "before" should be removed. The sales agent, by virtue of the door-to-door sales process, would have been at the customer property before the TPV process. It is an error to preclude the sales agent's presence before the TPV.

Third, the sales agent should not be precluded from returning to a customer's property after the TPV process unless the customer directs otherwise. TPV agents are precluded from selling to or answering questions for a customer. The sole action of a TPV agent is to ask the verifying questions and receive "yes" or "no" answers. To ensure the verification is independent the verification fails when the customer has questions, and the sale is not completed. If the TPV process fails (in which case the sale will not go through) and a customer has further questions and wants to discuss them with the sales agent, the adopted rule would preclude the sales agent from ever answering those questions at the customer's property. Also, there is no means for the sales agent to address the sale if some other non-substantive issue causes the TPV to fail. It simply is unfair to preclude the sales agent from all post-TPV contact with the customer when the customer is requesting additional conversations. Additionally, allowing a sales agent to return after the TPV process will not jeopardize the TPV process because it already concluded.

Fourth, the customer should be able to decide whether the sales agent remains at the customer's property during the TPV. Whether a sales agent stays during the TPV should be a matter decided by the customer, not the Commission. Customers can choose who can be at their property. RESA notes that Pennsylvania recently changed its rules to allow this as well. If this change is accepted, RESA suggests that the rule expressly require that the TPV agent to confirm whether the representative of the CRES or governmental aggregator remained during the TPV and the customer consented to the representative remaining at the customer's property.

3. Rule 21-06(D)(2)(b)(i)

In Rule 21-06(D)(2)(b)(i), as recently adopted, a CRES provider must currently send the customer a written contract within one business day following telephonic enrollment. However, the obligation to send a written contract should be triggered not upon enrollment between the seller and buyer, but, rather, upon confirmation of the enrollment by the EDU. It must be recognized that an EDU's rejection of an enrollment is not an unusual event. Thus, sending a contract to the customer and then subsequently sending notice of enrollment failure within days unnecessarily confuses customers. Given the speed of electronic data transfers used by the CRES providers and EDUs for enrollments, sending the contract *after* enrollment confirmation by the EDU 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. More importantly, sending the contract *after* enrollment confirmation by the EDU will still provide full and timely disclosure of the sale, which is the intent of the rule as noted in the Finding and Order (page 30). The Commission should recognize that avoiding confusion in the enrollment process is worthwhile and can be

accomplished with RESA's proposed change without jeopardizing the Commission's interest in full and timely disclosure of the sale.

D. Rule 21-11, Contract Administration

1. Rule 21-11(F)(3)(c)(iii)

The Commission should revise Rule 21-11(F)(3)(c)(iii), which requires that, when a CRES provider sends a customer a contract renewal notice via e-mail, there must be an e-mail receipt returned that "confirms that the addressee has opened the document." A CRES provider cannot force the customer to open the email or any attached document, and thus the CRES provider cannot ensure compliance with this requirement. In fact, most operating systems can ask the recipients of a request to verify (1) if an email has been opened or (2) if they want to block the notice, or will not send the notice unless the recipient affirmatively agrees. RESA would accept a Commission requirement that an email notice includes a return receipt as that is possible, but the requirement that the email/document be opened or verified that the customer opened the email cannot be controlled.[13]

The RESA approach would put email on an equal footing with renewal notices sent by mail or incorporated into the customer's bill. In those two circumstances, there is no requirement that a receipt be returned to the CRES provider "confirming that the addressee has opened the document."

In further support for this change, RESA points out, as noted earlier in this Application for Rehearing, that federal law allows contracts or other records to be provided to the consumer via electronic means if the consumer is informed of several facts and then the consumer consents

[13] Should the Commission decide that a CRES provider must send a request for acknowledgement that the email has been opened, the rule should be modified as follows: "(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."

to electronic records. *See*, 15 USC §7001(c)(1). Nothing in that federal statute requires that a specific receipt be returned by the sender or that the document be opened. At most, it requires that the ability to verify or acknowledge is provided. *See*, 15 USC §7001(c)(2)(B).

2. Rule 21-11(H)[14]

As adopted, Rule 21-11(H) requires a CRES provider to obtain proof of the customer's consent pursuant to Provision (D) of Rule 21-06, when the customer and the CRES provider agree to a material change in an existing contract. In adopting the language, the Commission stated "the substantial benefits of consumer protection against material changes without consent outweigh the costs for CRES providers or governmental aggregators to acquire customer consent prior to making such changes." However, the impact of provision (H) is not fully clear. RESA seeks clarification as to whether a change in pricing due to a specific adjustment that is already agreed upon in the existing contract constitutes a material change for which additional customer consent is required.

If the Commission's intention is to require additional customer consent when an already agreed-upon price adjustment is triggered in an existing contract, RESA requests modification for several reasons. First, 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 additional affirmative consent for such changes to retail electric contracts when the parties already acknowledged the possibility of the price change at the time the contract was executed. Second, RESA is not aware of any particular public outcry or examples of CRES providers using adjustment provisions of a customer contract in an inappropriate manner. Customers are assumed to have read and understood the terms of their contracts when they enter

[14] Discussion of this topic previously involved Rule 21-06(E), where the language was located in the Staff's proposal. The Commission accepted the Staff's proposal, but moved it to Rule 21-11(H).

into those contracts, including potential price adjustments. Third, if a customer does not like an adjustment 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. If Provision (H) requires additional customer consent to price adjustments expressly set forth in the existing contract, it will have a negative impact on small businesses, does not balance interests appropriately, and is not necessary.

E. Rule 21-12, Contract Disclosure

Per adopted Rule 21-12(B)(7), CRES providers must include in their contracts with residential and small commercial customers an itemized list and explanation of all prices and "all" fees associated with the service. Although the specific change made in the rule was only the addition of the word "all" before "fees," RESA seeks clarification because the rule had already required disclosure of the fees associated with the service. Moreover, in discussing this rule, the Commission stated in the Finding and Order (at page 44) that it was clarifying that "all fees must be disclosed." RESA is not clear whether the Commission intends for the contract to disclose all CRES fees, all EDU fees, fees not otherwise included in the CRES price (per kWh), or something else. Therefore, RESA requests rehearing for clarification purposes.

F. Rule 21-12(B)(7)(e)

While RESA is grateful to the Commission for recognizing that offers are evolving, the new rule here limits products to only monthly products. There are many products with the arrival of advanced metering, which may lead to hourly or daily priced options. RESA would recommend the rule be revised to remove the term "monthly" and instead use the unit price of the flat rate if it is something other than per kWh.

III. Amendments in Chapter 4901:1-24

A. Rule 24-05, Application Content

Rule 24-05 requires CRES applicants to provide information in their certificate applications including general, technical, managerial, and financial information. Provision (B)(1)(e)[15] requires statements about prior terminations from any choice program, revocations or suspensions of certificates, defaults for failure to deliver, and statements regarding whether "there are pending or past regulatory or judicial actions or findings against applicant or past rulings against the applicant." RESA believes that the adopted language relating to legal actions and past findings needs adjustment because it is overly broad. For instance, as adopted, it would require statements about any hotline calls even though the Commission will already have that information and even though those calls are often simply situations in which customer education is needed. Also, the adopted language will most assuredly 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, an on-the-job automobile accident, slip and fall accidents, etc. Such a broad requirement will not assist the Commission's certification evaluation. Moreover, the language includes no time frame, thus requiring information that will also be irrelevant simply because of its age.

RESA supports the full disclosure of information that is relevant to the certificate evaluation process. *All* past and pending judicial and regulatory actions are unnecessary and contrary to the Common Sense Initiative. The language should be tailored to legal actions or past rulings actually related to the applicant's technical, managerial and financial abilities. Therefore, RESA proposes the following modifications for provision (B)(1)(e):

[15] Discussion of this topic previously involved Rule 24-05(B)(1)(f), where the language was located in the Staff's proposal. The Commission accepted the Staff's proposal, but after other changes the language was placed in Rule 24-05(B)(1)(e).

(e) 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 regulatory or judicial 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. Rule 24-08, Protective Orders

RESA points out that, by virtue of provision (A), the Commission will grant automatic six-year protective orders for financial statements, financial arrangements and forecasted financial statements filed under seal. As written, however, the protective treatment will commence on the date of the issuance of the certificate. That will not capture the time period in which the certificate application is pending. Therefore, RESA recommends that provision (A) be changed slightly to state: "* * * If these exhibits are filed under seal, they will be afforded protective treatment ~~**for a period of six years**~~ from the **time of filing under seal until six years after the** date of the certificate for which the information is being provided."

Also, RESA requests rehearing of provision (D) so that any extension of a protective order for financial statements, financial arrangements and forecasted financial statements beyond the six-year period will coincide with the CRES provider's two-year certification cycle, instead of requiring that the extended protective order be subject to an 18-month time period. Depending on the specific timing, RESA's request is essentially an extension of a subsequent protective order for six months longer than 18 months because of the two-year certification cycle. RESA believes that this change is not significant, but it has the possibility of eliminating some of the existing troubles that have been experienced to date with renewing protective orders with unique, rolling deadlines. The reason is fairly simple – certificate holders tend to focus on such regulatory items on a biennial basis, not on an 18-month basis. If more simple time frames

are applied, CRES providers can better track the expiration dates and seek extensions in timely fashion. RESA believes there will be no harm by this slight adjustment and there is a greater potential for better tracking of protective orders by all.

IV. Conclusion

RESA respectfully requests the Commission grant its application for rehearing of certain CRES rules in Chapters 21 and 24, and make the requested modifications and clarifications. Among the various comments set forth above, RESA strongly urges the Commission to accept its positions for the following changes. (a) modify the definition of "small commercial customer" to recognize the are varying types of commercial customers, apart from mercantile customers; (b) apply the obligation to wear/display a photo identification only to door-to-door sales and declare that failure to wear/display such identification will not, *per se*, be an unfair, misleading, deceptive or unconscionable act under Rule 21-05(C)(7); (c) amend Rule 21-05(E) to allow door-to-door sales until 8 p.m. year round or at a minimum during daylight saving time,; (d) confirm in Rule 21-06(D)(1)(i) that terms and conditions can be presented to residential customers via electronic medium, the residential customer can electronically sign the agreement, and the agreement can be provided to residential customers who consent via email; (e) revise Rule 21-05(D)(1)(h) to apply to door-to-door solicitations of residential customers, to not preclude a sales agent from being at the customer's residence *before* or after the TPV takes place and to allow a sales agent to remain during the TPV at the customer's property; and (f) clarify that Rule 21-11(H) does not require additional customer consent when a price adjustment previously agreed upon in an existing contract actually takes place (if Rule 21-11(H) does require additional customer consent under those circumstances, the rule should be modified) and clarify whether the rule applies to all CRES contracts or has more limited application.

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CERTIFICATE OF SERVICE

I certify that a copy of this Application for Rehearing was served via electronic mail this 17th day of January 2014 on the parties listed below.

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