

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission-Ordered)
Investigation of Marketing Practices in the) Case No. 14-568-EL-COI
Competitive Retail Electric Service Market)

**MEMORANDUM CONTRA OF IGS ENERGY APPLICATION FOR REHEARING THE
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

Joseph Olikier (0086088)
Email: joliker@igsenergy.com
Counsel of Record
Matthew White (0082859)
Counsel of Record
Email: mswhite@igsenergy.com
IGS Energy
6100 Emerald Parkway
Dublin, Ohio 43016
Telephone: (614) 659-5000
Facsimile: (614) 659-5073

Attorneys for IGS Energy

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I. INTRODUCTION

On November 18, 2015, the Public Utilities Commission of Ohio (“Commission”) issued a Finding and Order (“Commission”) stating that effective January 1, 2016, no competitive retail electric service (“CRES” or “supplier”) contract labeled as a fixed-price contract may include a clause that would allow the CRES provider to pass-through additional charges to customers—regardless of customer sophistication or class. Interstate Gas Supply, Inc. (“IGS or IGS Energy”) and several other suppliers filed applications for rehearing identifying that the Order is unlawful, unreasonable, and incapable of being practically implemented by January 1, 2016 without harming the competitive market. While these suppliers indicated a willingness to review and discuss the Commission’s existing rules related to contract disclosures, they noted that any changes should occur in a separate rulemaking proceeding with a reasonable implementation period for any final rules the Commission ultimately adopts.

On December 18, 2015, the Office of the Ohio Consumers’ Counsel (“OCC”) also filed an application for rehearing. Without addressing any of the practical and legal

barriers related to implementing the Commission's Order, the OCC alleged that the Order is unlawful because it did not apply to existing contracts. Moreover, the OCC alleged that the Order is unlawful because customers should have the right to terminate a fixed-price contract without penalty to the extent that market prices decrease during the term of the contract. Finally, OCC alleged that the Order is unlawful because by not prohibiting suppliers from renewing fixed-price contracts into variable contracts, the Order allows suppliers to avoid compliance with the Order. For the reasons already set forth in IGS's application for rehearing, and, as discussed further below, OCC's application for rehearing lacks merit and should be rejected.

Moreover, to the extent that the Commission considers the issues identified in OCC's application for rehearing, the Commission should limit its consideration to the context of Commission rules that apply to residential customers. Given the level of sophistication of commercial and industrial customers, the order would unnecessarily frustrate both consumers and suppliers by impeding suppliers' ability to provide innovative products and services to this class by requiring an overly simplistic labeling structure that cannot be practically implemented.

II. ARGUMENT

A. It would be unlawful, arbitrary and unfair to retroactively apply the Order to existing contracts

OCC claims that the Order is unlawful and unreasonable because it does not apply to existing contracts.¹ As identified in IGS's application for rehearing, applying the Order to existing contracts would violate the Ohio Constitution's prohibition against

¹ OCC Application for Rehearing at 2-3.

retroactive application of law and regulations.² Further, given the significant delay between the briefing in this case and the final Order issued on November 18, 2015, it would be unjust, arbitrary, and capricious to apply the Order to existing contracts.³

The Ohio Constitution provides that “[t]he general assembly shall have no power to pass retroactive laws.” *State v. Cook*, 83 Ohio St.3d 404, 410 (1998); Ohio Constitution, Section 28, Article II. The Ohio Constitution prohibits retroactive application of statutes to impair vested rights in existing contracts or create new burdens. *State v. Cook* at 410-412. This limitation applies to administrative rules. *Fraternal Order of Police v. Hunter*, 49 Ohio App. 2d 185, 195 (1975). Ohio courts have held that “[r]etroactive application of administrative rules is particularly disfavored when substantive rights are involved.” *Martin v. Ohio Dept. of Human Serv.*, 130 Ohio App. 3d 512, 524 (1998) (Ct. Appeals, Second Dist., Champaign Co.).

OCC proposes that the Commission retroactively apply the Order to existing contracts. Because OCC’s proposal would impair suppliers’ substantive rights to pass-through costs specifically enumerated in their contracts with customers, it would violate precedent and the Ohio Constitution’s prohibition against retroactive application of law and regulation.

Moreover, OCC’s proposal to retroactively apply the Order to existing contracts is particularly egregious, given that the Commission opened this proceeding and then did nothing for eighteen months. During that time, suppliers were free to enter into fixed-price contracts with pass-through clauses. Had the Commission not delayed its Order,

² IGS Application for Rehearing at 17-18.

³ *Id.*

the number of contracts potentially impacted by the Order would be significantly less. Thus, the retroactive application of the Order to existing contracts would also be arbitrary and capricious.

B. A finding of deceptive, misleading, or unconscionable conduct cannot occur without a hearing, written findings of fact, and conclusions of law

In its second assignment of error, OCC claims that it is unlawful and unreasonable to require a customer to file a complaint to enforce the Order.⁴ OCC's alleged deficiency in the Order lacks merit.

Initially, OCC's proposal would violate due process and R.C. 4903.09. Whether a supplier has violated rules and engaged in deceptive, misleading, or unconscionable conduct cannot be determined without a fact specific examination. If a customer need not file a complaint, through what venue would the Commission make that determination?

Under Ohio law, "[i]n all contested cases heard by the public utilities commission, a complete record of all of the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact." R.C. 4903.09. Thus, the Commission cannot find that a specific supplier has committed deceptive, misleading, or unconscionable conduct without a legal proceeding and an order adjudicating that proceeding following the protections of due process. *See Tongren v. Pub. Util. Comm'n*, 85 Ohio St. 3d 87 (1999) ("In this case, it is without question that the Public Utilities

⁴ OCC Application for Rehearing at 3-5.

Commission failed to meet the requirements of R.C. 4903.09 by not providing an adequate record.”); *Vectren Energy Delivery of Ohio v. Pub. Util. Comm’n*, 113 Ohio St. 3d 180 at ¶ 53 (2007) (due process allows for a hearing, testimony, cross-examination, and the filing of briefs).

Accordingly, OCC’s proposal to predetermine, without a complaint and hearing, that suppliers with pass-through clauses in fixed price contracts have committed deceptive, misleading, and unconscionable conduct is contrary to Ohio law and basic tenants of fair play.

C. The Commission should reject OCC’s request that suppliers insert an option for customers to terminate a contract due to market-based price changes

In its Order, the Commission recognizes that suppliers may enter fixed-price contracts and incur unexpected costs due to regulatory orders or changes in law. In light of this risk, the Order determined that suppliers may, in these limited circumstances, obtain affirmative customer consent to renegotiate the terms of a contract.⁵ OCC alleges that the Order is unlawful and unreasonable because it did not provide customers a right to unilaterally terminate their agreement without penalty when market-prices decrease.⁶ OCC’s proposal is unlawful and it is unreasonable.

Initially, it is important to note that the focus of this proceeding relates to supplier marketing conduct and disclosures. The Commission should reject OCC’s request out of hand as procedurally inappropriate in this proceeding.

⁵ Order at 12-13.

⁶ OCC Application for Rehearing at 5-6.

OCC's proposal is also substantively without merit. The provision discussed in the Order related to regulatory out provisions, which may be invoked only to the extent that a change in the law or regulation renders a contract unlawful or uneconomic; however, the applicability of the Order did not relate to general changes in market conditions such that suppliers could exit their contracts simply because market conditions became unfavorable. Thus, OCC's assignment of error misapplies the reasoning in the Order.

Moreover, OCC's proposal is detached from market fundamentals. When a supplier enters into a fixed-price long-term retail contract with a customer, the supplier is likely to procure a corresponding long-term wholesale contract to hedge against the risk that the real time price for electricity may change over time. That is the value of a long-term contract—whatever happens with respect to future market prices, the customer is insulated from the impact of those changes. If the market price for electricity does in fact decrease as OCC envisions, then it would be unjust and unreasonable to provide the customer with the ability to back out of the contract and leave the supplier holding an uneconomic wholesale position that it entered into on behalf of the customer. Such a unilateral unbargained for right to early termination would require suppliers to incorporate a great degree of risk into their offers. Accordingly, the Commission should deny OCC's rehearing request.

D. The Order did not disturb the Commission's rules regarding contract renewals

OCC alleged that the Order is unlawful because it did not prohibit suppliers from renewing fixed rate contracts into variable contracts.⁷ In failing to do so, OCC reasons that the Order allows suppliers to avoid compliance with the Order. OCC's argument is incorrect.

The Order specifically indicated that it relied upon Ohio Administrative Code ("OAC") 4901:1-21-05, which pertains to the marketing and solicitation through, among other things, fixed-price offers. The Order, moreover, held that supplier fixed price offers may specify that they are limited to the term of the contract. The Order stated that the Commission's rules should be "modified as follows 'Fixed price: An all-inclusive per kWh price that will remain the same at least three billing cycles *or the term of the contract*, whichever is longer.'"⁸

OCC, however, is not concerned with the terms of the fixed-price contract period. Rather, OCC seeks to impose additional conditions that apply to the renewal of the contract with a customer. By its nature, the terms of any renewal are outside of the initial terms negotiated between the supplier and customers. And the Commission has a separate and distinct set of rules that apply to the renewal period. See OAC 4901:1-21-11 and OAC 4901:1-21-12.

Except for contracts that renew on a month-to-month basis (which a customer can cancel at any time), suppliers must adhere to specific notice requirements before

⁷ OCC Application for Rehearing at 7-8.

⁸ Order at 13-14 (emphasis added).

they may renew a contract with a customer.⁹ These rules provide advance notice to the customer of forthcoming changes and give the customer the opportunity to select a different product if they so desire. 4901:1-21-11(F) specifically states that “[s]uch notice shall accurately *describe or highlight any changes and state that the customer contract will renew at the specified rate unless the customer affirmatively cancels the contract.*” (emphasis added). Thus, the rule contemplates that a contract renewal may include different terms and a different rate not included in the original contract term. The Commission has already determined that the process of providing advanced notice prior to the expiration of a contract term is appropriate, and any supplier that complies with this process is not violation of the Commission’s rules.¹⁰ To the extent that OCC desires to propose changes to these rules, IGS suggests that OCC reserve them for the Commission’s quinquennial review.

III. CONCLUSION

For the reasons stated herein, IGS requests that the Commission deny OCC’s application for rehearing and grant IGS’s application for rehearing and correct the errors identified therein. Moreover, IGS urges the Commission to grant the Motion for Stay filed by the Retail Energy Supply Association to ensure that changes to supplier disclosure requirements are made in a manner that can be appropriately incorporated into contracts—January 1, 2016 simply does not provide sufficient time, given the uncertainty surrounding the additional compliance requirements adopted in the Order.

⁹ OAC 4901:1-21-11(F).

¹⁰ *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*, Entry on Rehearing at 5 (Feb. 26, 2014).

Any changes that are ultimately made to OAC 4901:1-21-05 should be made within a separate rulemaking proceeding and implemented after final approval by Joint Committee on Agency Rule Review.

Respectfully submitted,

/s/ Joseph Olikier

Joseph Olikier (0086088)

Email: joliker@igsenergy.com

Counsel of Record

Matthew White (0082859)

Counsel of Record

Email: mswhite@igsenergy.com

IGS Energy

6100 Emerald Parkway

Dublin, Ohio 43016

Telephone: (614) 659-5000

Facsimile: (614) 659-5073

Attorneys for IGS Energy

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing *Memorandum Contract of IGS Energy Application for Rehearing of the Office of the Ohio Consumers' Counsel* was served this 28th day of December 2015 via electronic mail upon the following:

/s/ Joseph Olikier

Joseph Olikier

dboehm@BKL1awfirm.com mkurtz@BKLLawfirm.com jkylernohn@BKLLawfirm.com Michael.schuler@occ.ohio.gov kjoseph@napower.com shopson@napower.com cgelo@napower.com arobinson@napower.com cmooney@ohiopartners.org Debra.Bingham@occ.ohio.gov bill.wright@puc.state.oh.us kjoseph@napower.com cgelo@napower.com shopson@napower.com arobinson@napower.com cmooney@ohiopartners.org mhpeticoff@vorys.com glpetrucci@vorys.com gkrassen@bricker.com dstinson@bricker.com mberedo@ci.perrysburg.oh.us smhoward@vorys.com trhayslaw@gmail.com LESLIE.KOVACIK@toledo.oh.gov	jmcdermott@firstenergycorp.com scasto@firstenergycorp.com dboehm@BKLLawfirm.com mkurtz@BKLLawfirm.com jkylernohn@BKLLawfirm.com mayorsoffice@cityofparma-oh.gov tdobeck@parmalaw.org jmills@city.cleveland.oh.us cgoodman@energymarketers.com srantala@energymarketers.com Bojko@carpenterlipps.com ghiloni@carpenterlipps.com mohler@carpenterlipps.com Schmidt@sppgrp.com eagleenergy@fuse.net judi.sobecki@aes.com mkimbrough@keglerbrown.com callwein@keglerbrown.com lrussell@aarp.org anita.lewis@championenergyservices.com mandy.chiles@puc.state.oh.us mswhite@igsenergy.com haydenm@firstenergycorp.com;
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