BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission-Ordered Investigation of Marketing Practices in the Competitive Retail Electric Market.	)))	14-568-EL-COI

APPLICATION FOR REHEARING OF THE RETAIL ENERGY SUPPLY ASSOCIATION

In accordance with R.C. 4903.10 and Ohio Admin. Code 4901-1-35, the Retail Energy Supply Association (RESA) files this Application for Rehearing of the March 29, 2017 Second Entry on Rehearing (Second Entry). The Commission should grant rehearing because:

A. Requiring CRES providers to label residential contracts as fixed, variable, or introductory is unreasonable and unlawful; and

B. Requiring CRES providers to transfer to default service customers who do not affirmatively consent to contract terms triggered by a "regulatory opt-out" provision is unreasonable and unlawful.

Accordingly, the Commission should (i) grant this application for rehearing, and (ii) issue an order holding this proceeding in abeyance, pending conclusion of the Chapter 4901:1-21 rulemaking ordered in the Second Entry, and also mandated by R.C. 111.15. A Memorandum in Support follows.

MEMORANDUM IN SUPPORT

I. INTRODUCTION

Just as military generals are prone to fighting the last war, administrative agencies sometimes tend to focus more on something that happened in the past than anything going on in the present. Such is the case with this investigation. Following the "polar vortex" that struck the Midwest in January 2014, a CRES provider announced its intent to "pass-through" certain RTO charges to customers, residential and non-residential alike. The ensuing publicity quickly prompted an investigation. The investigation led to "fixed-means-fixed" guidelines, issued in November 2015. Those guidelines were promptly put on hold to address issues raised by rehearing, and revised guidelines were issued in March 2017. During this four-year period, the supplier that bore the brunt of the polar vortex controversy decided not to pass-through the RTO charges to residential customers. A handful of mercantile customers filed formal complaints, but all of those have settled.[1] Thus, despite all the effort to develop guidelines, no residential customers have been affected by the incident that prompted them, and no other incidents have occurred to suggest that these guidelines are still necessary—assuming they were necessary to begin with.

The revised "fixed-means-fixed" guidelines not only fail to solve a problem that no longer exists; they create new problems. This application for rehearing addresses two specific problems with the revised guidelines, as well as an overarching problem with the process leading up to them.

First, the guidelines now require all CRES providers to label their contracts as "fixed," "variable," or "introductory," and to bring their contracts into compliance within six months.

[1] *See* Case Nos. 15-455-EL-CSS (joint motion to dismiss granted Sept. 29, 2016), 14-1944-EL-CSS (joint motion to dismiss granted Nov. 3, 2016); 14-1610-EL-CSS (joint motion to dismiss granted Dec. 15, 2016); 14-1182-EL-CSS (joint motion to dismiss granted April 5, 2017).

Second Entry ¶ 29. The Commission also ordered a rulemaking. *Id*. The Commission has recognized that the rulemaking may result in requirements for new or modified contract labels. *Id*. Thus, any contracts modified before new rules are even proposed may need to be modified again after new rules are finalized. It would be manifestly unfair to require RESA members to incur costs to modify their contracts to meet this new labelling requirement, and then a few months later, spend even more money to undo or re-do these modifications to satisfy new requirements. Revising contracts to include or change labels, then revising them again to revise the labels, would serve no purpose but to confuse customers and waste suppliers' resources.

The second problem with the revised guidelines is the automatic drop triggered by exercising a regulatory opt-out clause. Under the new guidelines, "the invocation of the regulatory opt out clause will *terminate the contract* and the CRES provider may not retain the customer *even under the previous contract's prices, terms and conditions*. Instead, the CRES provider must return the customer to the standard service offer after a reasonable period for renegotiation of the contract." Second Entry ¶ 19 (emphasis added). Customer inaction is the equivalent of rejection of new terms. Nov. 18, 2015 Order (Order) at 12. But another consequence of inaction is the absence of affirmative consent to transfer the customer to default service. The guidelines therefore purport to require what the Revised Code expressly prohibits: "switching, or authorizing the switching of, a customer's supplier of competitive retail electric service without the prior consent of the customer . . . ." R.C. 4928.10(D)(4). The existing rules plainly do not authorize customer slamming in the scenario described in the revised guidelines. It is equally plain that the Commission cannot "interpret" its rules to permit something that the statute authorizing the rule expressly prohibits. *See* Second Entry ¶ 32 ("[T]he Commission

issued guidelines represent 'our interpretation going forward of the Commission's current rules contained in Ohio Adm.Code 4901:1-21-05.'").

Both of these problems are the inevitable consequence of a flawed process. The investigation was driven by anecdote and assumption, not facts. The record does not reveal any examination of any CRES provider's contracts, let alone the specific language of any supplier's pass-through provision, or any other provision. The comments reflect divergent views on the very concept of a "pass-through" clause, which the Commission recognized in distinguishing these clauses from "regulatory opt-out" clauses. Order at 12. But regulatory opt-out clauses evade precise categorization as well, and distinguishing opt-out clauses from pass-through clauses is no small feat.[2] The Commission has made sweeping assumptions and generalizations about what pass-through and regulatory opt-out clauses are, what any specific clauses say, whether all suppliers' clauses are the same, whether all suppliers even use these clauses, or any other *fact* necessary to support a reasoned conclusion regarding the effect of these clauses. And while the Commission insists that the guidelines are not new rules but an "interpretation going forward of existing rules," saying this does not make it so. The guidelines plainly require suppliers to do things going forward they did not have to do before, and that makes them "rules" as defined in R.C. 111.15.

One thing RESA and the Commission should be able to agree on is this: the path forward should look out the windshield, not the rear-view mirror. Continued wrangling over the fixed-

[2] According to the Order, "[r]egulatory opt-out clauses allow a supplier to revise a contract by proposing new contract terms to the customer." Order at 12. The clauses are triggered by "circumstances . . . over which a CRES provider has no control and no ability to hedge, such as a regulatory change in law." *Id*. The initiating Entry defines a pass-through clause as a provision to "allow a CRES supplier to pass through to the customer the additional costs of certain pass-through events." Entry ¶ 2. The Order provides no additional or clarifying definition. It is no surprise, then, that parties have widely divergent views on the difference (if any) between pass-through and regulatory opt-out clauses. *See* Second Entry ¶¶ 15-19.

means-fixed guidelines is not in anyone's interests. The record of this proceeding can be incorporated in the upcoming rulemaking, where further debate and refinement can and should take place. In the meantime, the Second Entry should be held in abeyance.

II. ARGUMENT

The Commission cites R.C. 4928.02 and 4928.06 as grounds for this investigation. Entry ¶1. R.C. 4928.02 is a statement of Ohio energy policy. The statute provides no independent grounds for investigations. R.C. 4928.06 directs the Commission to adopt rules to carry out the policies specified in R.C. 4928.02, which it did by adopting, among other provisions, the consumer protections rules contained in Chapter 4901:1-21, O.A.C.

A "rule" under R.C. 111.15 includes "any . . . standard having a general and uniform operation adopted by an agency under the authority of the laws governing the agency[.]" R.C. 111.15(A)(1). This definition is broader than formal rulemaking, and can include decisions of an agency "which extinguishes or impairs a vested legal relationship, creates a new obligation, imposes a new duty or attaches a new disability to previous transactions . . . .*Ohio Assn. of Cty. Bds. of Mental Retardation & Developmental Disabilities v. Pub. Emp. Ret. Sys.,* 61 Ohio Misc. 2d 836, 839, 585 N.E.2d 597, 599 (Com. Pl. 1990) (memorandum of understanding between government agencies constituted a "rule" subject to R.C. 111.15). Changes to agency rules are subject to the filing and notice requirements of R.C. 111.15. *See* R.C. 111.15(A)(2) (defining "agency" to include "any governmental entity of the state").

The Commission acknowledges that "the proceeding for the proposed rules must and will comply with all statutory requirements . . . ." Second Entry ¶ 32. The Commission is mistaken to conclude that "no rules were established by the Order." *Id*. ¶ 31. The Order specifically directs CRES suppliers to do two things that no reasonable interpretation of Rule 4901:1-21-05 requires:

(i) label their contracts, and (ii) automatically drop customers when invoking a regulatory opt-out clause. This directive "creates a new obligation, imposes a new duty," and has "general and uniform operation," thus fitting squarely within the definition of a "rule." *Ohio Ass'n of Bds*., 585 N.E.2d at 599; R.C. 111.15(A)(1). An interpretation of existing rules must be reasonable, and the Commission's interpretation simply is not. *See Columbus S. Power Co*., 147 Ohio St.3d 439, 2016-Ohio-1608 ¶ 25(reversing Commission's unsupported finding that RER revenues were not the equivalent of transition charges); *Duke Energy Corp. Inc.*, 148 Ohio St.3d 510, 2016-Ohio 7535 ¶¶ 21-22 (reversing Commission's unsupported finding that corporate separation plan complied with statutory requirements).

RESA raises this point only to preserve it for appeal. The Commission obviously has a different take on its authority to issue the guidelines and "interpret" its rules. The remainder of this application addresses two additional problems with the Second Entry that arise independent of any procedural irregularities.

A. Requiring CRES providers to label residential contracts as fixed, variable, or introductory is unreasonable and unlawful.

One of the questions posed in the initial Entry was: "What alternative label should be used on a contract with a pass-through clause that has an otherwise fixed rate?" Entry ¶ 2(h). Commenters offered many different proposals, including "variable price," "pricing agreement and potential cost pass-through," "price with pass-through," and "conditional fixed-rate." Order at 24-25. The Commission decided that alternative labels "should not be required" because they "would be unhelpful and may further confuse customers." *Id*. at 25. The only definitive guidance in the Order is that otherwise fixed-price contracts should be labeled as variable or introductory rate. *Id*. at 25 ¶ 19.

The Second Entry does not merely "clarify" the previous guidance on this issue. Second Entry ¶ 29. The Second Entry goes much further by dictating not only that all contracts be labelled, but that one of three labels be used: "[F]or residential customers, all contracts must be labeled as either 'fixed,' 'introductory,' or 'variable' rates." *Id*. This labelling requirement is unreasonable and unlawful for at least three reasons.

First, the current rules do not require labels. No provision of Chapter 4901:1-21 requires a CRES provider to use any specific words to describe a product in either marketing materials or contracts, let alone mandate what words may appear in the heading of a contract. This is not a matter of "interpretation." *See id* ¶ 32. It is a matter of the words used in the rules. The rules say what they say, and they do *not* say that CRES contracts must be labelled a certain way—or at all.

Second, the Commission has acknowledged that some CRES products "could possibly be inadequately represented" by these labels, but that "the appropriate place to resolve issues of possible alternative labels for products is in the rulemaking that the Commission directed Staff to commence . . . ." *Id*. ¶ 29. RESA agrees. Because the current rules do not require labels, requiring labels requires a change to the rules. CRES suppliers should not be forced to seek a "waiver of the guidelines" (*id*.) to use labels other than the three prescribed. The rules the guidelines "clarify" permit any label, or no label, provided the standards in Rule 4901:1-21-05 are otherwise met. Suppliers should be held to the standards of existing rules, not rules the Commission intends to enact in the future.

Third, the labelling requirement is simply counterproductive at this stage of the investigation. The Commission acknowledges that this subject deserves more attention in a rulemaking, and a rulemaking is around the corner. Second Entry ¶ 29. CRES providers are required to provide marketing and advertising material to Staff upon request, so labelling issues

can be ironed-out as needed in that context until new rules are issued. *See* O.A.C. 4901-1-21-05(B). It just does not make sense, and is not fair to customers, to revise contract labels now and revise them again when the rules change. The labelling requirement would impose substantial compliance costs, with no corresponding benefit.

The upcoming rulemaking will provide ample opportunity to more fully vet the labelling issue. The labelling requirement should be held in abeyance until then.

B. Requiring CRES providers to transfer to default service customers who do not affirmatively consent to contract terms triggered by a "regulatory out" provision is unreasonable and unlawful.

The initial entry posed a series of questions related to "pass-through" clauses. Entry ¶ 2(a) through (h). The order announcing the guidelines distinguishes these clauses from "regulatory op-out" clauses, which "allow a supplier to revise a contract by proposing new contract terms to the customer." Order at 12. Under the original guidelines, "[a] customer rejecting the terms *would then be permitted* to pursue another CRES provider or the default service without being subjected to any penalty." *Id* at 12-13 (emphasis added).

The revised guidelines fundamentally change what happens when a supplier invokes a regulatory opt-out clause. "[W]hen a CRES provider invokes the regulatory opt out clause, it is the CRES provider's responsibility to return the customer to the standard service offer unless the customer affirmatively consents to new prices, terms, or conditions." Second Entry ¶ 19. For customers who do not affirmatively consent (which includes customers who ignore a supplier's communications or simply do nothing), "the invocation of the regulatory opt out clause will terminate the contract and the CRES provider may not retain the customer even under the previous contract's prices, terms and conditions. Instead, the CRES provider must return the customer to the standard service offer after a reasonable period for renegotiation of the contract." *Id*.

This automatic termination requirement is unreasonable and unlawful. The policy of R.C. 4928.02(B) is to "[e]nsure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options *they elect to meet their respective needs."* (Emphasis added.) In other words, state policy recognizes the principle of freedom of contract. Freedom of contract means that parties decide for themselves how they will allocate rights and responsibilities. The right of parties to freely contract must obviously be balanced with other policies, including policies to ensure against "unreasonable sales practices, market deficiencies, and market power." R.C. 4928.02(I). Dictating the termination of a contract whenever some unspecified "regulatory out" occurs does not "balance" these rights. It destroys one in the name of the other. And just as no statute dictates the termination of contracts based on any sort of triggering event, the existing rules also lack any such requirement.

The Commission's new guideline is also at odds with the statutory and rule prohibitions against slamming. Under Rule 4901:1-21-06(C), "CRES providers are prohibited from enrolling potential customers without their consent and proof of that consent as delineated in paragraph (D) of this rule." In addition, "[t]he CRES provider shall not initiate the switch of a customer's electric service with the electric utility prior to the completion of the enrollment transaction with the customer." 4901:1-21-06(D)(1)(f). If a customer has not responded to a supplier's request for consent to new terms under a regulatory opt-out clause, the customer also has not expressed affirmative consent to switch suppliers. Yet the new guidelines compel the supplier to "return the customer to the standard service offer"—which is exactly the same as "initiat[ing] the switch of a

customer's electric service." Suppliers can comply with this new guideline or they can comply with the enrollment rules under Rule 4901:1-21-06, but they cannot comply with both.[3]

An automatic drop rule would be particularly absurd in situations where the supplier is willing to serve under the same terms and conditions. For example, suppose a supplier's regulatory opt-out clause said something like this: "If a regulatory opt-out event occurs, we may propose new terms. If you do not affirmatively consent to the new terms, this contract will continue under the existing terms." Under the Commission's guidelines, the last sentence would be ignored, the contract would be terminated, and the customer would be put back on default service—without the customer's consent, and most likely without their knowledge until they received the next bill. A customer wishing to receive the *same* service from the *same* supplier under the *same* terms and conditions would have to go through the enrollment process all over again.

Moreover, an event triggering a regulatory opt-out clause would likely affect all suppliers, including utilities providing default service. Any new costs would be the practical equivalent of a "non-bypassable" charge. Forcing a supplier to drop the customer would not enable the customer to avoid the cost, because the default provider would likely pass on the new cost as well. Incumbent default service providers would no doubt welcome recapturing customers, but their gain would be CRES suppliers' loss—not because of competition, but because of the regulatory windfall an automatic drop provision would create.

The automatic drop provision is a bad idea. If the Commission does not hold this proceeding in abeyance, it should at least eliminate this new requirement.

---

[3] The only statutory provision for default to standard service is when a supplier fails to render service. R.C. 4928.14. Invoking a regulatory opt-out clause meets none of the statutory criteria in which a supplier can be deemed to have "failed to provide such service." *See* R.C. 4928.14(A)-(D).

III. CONCLUSION

RESA and its members are committed to the principles of transparency, disclosure, and fair dealing. These principles also underlie the consumer protection provisions of Chapter 4901:1-21. Despite the good intentions that may have inspired them, the revised guidelines make it harder, not easier, to promote these principles. The Second Entry should be held in abeyance until the Chapter 4901:1-21 rulemaking process is finished. At a minimum, the Commission should grant rehearing and modify the order to find that (a) CRES providers are not required to label contracts and (b) CRES providers are not required to drop customers and return them to default service upon invoking a "regulatory out" clause.

Dated: April 28, 2017

Respectfully submitted,

/s/ Mark A. Whitt

Mark A. Whitt (0067996)
Rebekah J. Glover (0088798)
WHITT STURTEVANT LLP
The KeyBank Building, Suite 1590
88 East Broad Street
Columbus, Ohio 43215
Telephone: (614) 224-3946
Facsimile: (614) 224-3960
whitt@whitt-sturtevant.com
glover@whitt-sturtevant.com
(Counsel willing to accept service by email)

ATTORNEYS FOR THE RETAIL
ENERGY SUPPLY ASSOCIATION

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Application for Rehearing was served by electronic mail this 28th of April, 2017, to the following:

law@cityofparma-oh.gov
tdobeck@parmalaw.org
mberedo@ci.perrysburg.oh.us
trhayslaw@gmail.com
lrussell@aarp.com
bojko@carpenterlipps.com
perko@carpenterlipps.com
rboston@noblesolutions.com
dstinson@bricker.com
gkrassen@bricker.com
joliker@igsenergy.com
schmidt@sppgrp.com
judi.sobecki@aes.com
cgoodman@energymarketers.com
srantala@energymarketers.com
dboelim@bkllawfirm.com
mkurtz@bkllawfirm.com
jkylercohn@bkllawfirm.com
cmooney@ohiopartners.org
jodi.bair@occ.ohio.gov
maureen.willis@occ.ohio.gov
hmadorsky@city.cleveland.oh.us
shopson@napower.com
callwein@keglerbrown.com
cgoodman@energymarketers.com
haydenm@firstenergycorp.com
scasto@firstenergycorp.com
cynthia.brady@exeloncorp.com

/s/ Rebekah J. Glover
One of the Attorneys for the Retail Energy Supply Association

Summary: Application for Rehearing electronically filed by Ms. Rebekah J. Glover on behalf of Retail Energy Supply Association