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BEFORE
 THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the Joint Application of	:	
Direct Energy Services, LLC,	:	
Direct Energy Business, LLC,	:	
Dominion Energy Solutions, Inc.,	:	
Interstate Gas Supply, Inc., and	:	
SouthStar Energy Services, LLC	:	
for a Waiver of a Provision of	:	
Rule 4901-29-06(E)(1) of the Ohio	:	
Administrative Code.	:	

PUCO

Case No. 17-2358-GA-WVR

JOINT APPLICATION FOR WAIVER
 OF
 DIRECT ENERGY SERVICES, LLC,
 DIRECT ENERGY BUSINESS, LLC,
 DOMINION ENERGY SOLUTIONS, INC.,
 INTERSTATE GAS SUPPLY, INC.,
 AND
 SOUTHSTAR ENERGY SERVICES, LLC

Direct Energy Services, LLC, Direct Energy Business, LLC, Dominion Energy Solutions, Inc.,¹ Interstate Gas Supply, Inc., and SouthStar Energy Services, LLC (collectively, “Applicants”) hereby apply to the Commission pursuant to Rule 4901:1-29-02(C), Ohio Administrative Code (“OAC”), for a waiver of the provision of Rule 4901:1-29-06(E)(1), OAC, that appears to require third-party verification (“TPV”) for telephonic enrollments by retail natural gas suppliers and governmental aggregators even if the entire call is recorded by the supplier or aggregator and the recording is archived and retained as required by Rule 4901:1-29-06(E)(2)(b), OAC. More specifically, Applicants seek a waiver of this requirement only with

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¹ Dominion Energy Solutions, Inc. was formerly known as Dominion Retail, Inc. (“Dominion Retail”).

respect to customer-initiated inbound calls. In support of their application, Applicants state as follows.

1. Applicants are Commission-certified suppliers of competitive retail natural gas service (“CRNGS”) in this state. Each of the Applicants was a participant in Case No. 12-925-GA-ORD,² the rulemaking proceeding in which current CRNGS rules were established, either in its own right or as a member of a group representing supplier interests that filed comments in the case.

2. Prior to its amendment in Case No. 12-925-GA-ORD, Paragraph (E)(1) of Rule 4901:1-29-06, OAC, the rule governing telephonic enrollment, provided as follows:

To enroll a customer telephonically, a retail natural gas supplier, governmental aggregator, or an independent third party verifier shall make a date- and time-stamped audio recording before the completion of the enrollment that verifies, at a minimum, the following:

The subparagraphs of Paragraph (E)(1) then went on to specify various representations that were to be made to and acknowledged by the prospective customer as a part of the enrollment process.

3. Although the Staff-proposed rules that were attached to the Commission’s November 7, 2012 entry initiating the CRNGS rulemaking proceeding added a new subparagraph and modified one of the existing subparagraphs, no changes were proposed to Paragraph (E)(1) itself.³ Thus, as under the existing rule, the proposed rule provided that the date- and time-stamped audio recording of the required verification could be made by the retail

² See *In the Matter of the Commission's Review of its Rules for Competitive Retail Natural Gas Service Contained in Chapters 4901:1-27 through 4901:1-34 of the Ohio Administrative Code*, Case No. 12-1925-GA-ORD (Finding and Order dated December 18, 2013, as modified by Entry on Rehearing dated February 26, 2014).

³ The proposed rules issued for comment reflected the Staff’s elimination of Paragraph C of Rule 4901-29-06, which caused the telephonic enrollment rule to be redennominated as Paragraph D. However, as indicated above, the language of Paragraph (D)(1) of the Staff-proposed rule was identical to the language of existing Paragraph (E)(1).

supplier, governmental aggregator, or an independent third-party verifier. However, the Commission invited participants in the rulemaking proceeding to address several questions contained in an attachment to the entry, among which were whether Rule 4901:1-29-06(E)(1) should be amended to require that, in addition to the enrollment portion of the call, the sales pitch segment of the call should also be recorded, and whether the rules should be clarified to require greater customer protection.⁴

4. In their filed comments, several participants, including Dominion Retail and the Office of the Ohio Consumers' Counsel ("OCC"), advocated that the sales portion of the call should also be recorded,⁵ while the Ohio Gas Marketers Group ("OGMG") and the Retail Energy Supply Association ("RESA") jointly opposed such a change.⁶ In its comments, Dominion Retail noted that it had always been its practice to record the entire call (*i.e.*, both the sales and verification portions) and pointed out that, in the event of a customer complaint, the recording of the sales portion of the call provides irrefutable evidence with respect to whether sales personnel had engaged in high-pressure, unscrupulous, or misleading sales tactics.

5. In its December 18, 2013 finding and order in the rulemaking proceeding (the "Order"), the Commission determined that the sales portion of the call should also be recorded and noted that certain CRNGS providers already record the entire call, which, according to the

⁴ See Case No. 12-925-GA-ORD (Entry dated November 7, 2012, Attachment A, Question 4).

⁵ See Dominion Retail Comments, 5; Dominion Retail Reply Comments, 8-9; OCC Comments, 6-7; OCC Reply Comments, 8-9.

⁶ See OGMG/RESA Comments, 7-8; OGMG/RESA Reply Comments, 10-11.

Commission, demonstrated that, recording the entire call was feasible.⁷ The Commission reaffirmed this finding in its February 26, 2014 entry on rehearing (the “Entry on Rehearing”).⁸

6. Notwithstanding that no participant in the proceeding had advocated any other change to the Paragraph (E)(1) of Rule 4901:1-29-06, and notwithstanding that the Commission made no mention of any other change to the telephonic enrollment rule in either its Order or Entry on Rehearing, the adopted version of the Rule 4901:1-29-06(E)(1)⁹ appended to the Entry on Rehearing provided as follows:

To enroll a customer telephonically, a retail natural gas supplier or governmental aggregator, shall make a date- and time-stamped audio recording of the sales portion of the call, if the customer is enrolled, and before the completion of the enrollment process, a date- and time- stamped audio recording by an independent third-party verifier that verifies, at a minimum, the following:

Thus, in addition to incorporating the requirement that sales portion of the call be recorded by the retail natural gas supplier or governmental aggregator – the only telephonic enrollment issue in dispute in the rulemaking proceeding – the new version of Paragraph (E)(1) appears to require third-party verification by a second, separate recording made by an independent third-party verifier confirming that the various representations and customer acknowledgements spelled out in the subparagraphs of Paragraph (E)(1) were, in fact, made during the call.

7. It was not until after the deadline for filing for rehearing had passed that several of the Applicants first noticed that the new version of the rule could be interpreted to mean that

⁷ See Order, 45-46.

⁸ See Entry on Rehearing, 22.

⁹ The discussion in the Order and the Entry on Rehearing referred to the paragraph in question as Paragraph (D)(1). However, a new Paragraph (C) was inserted in the final version of Rule 4901-29-06, resulting in the telephonic enrollment rule reverting to the Paragraph (E) designation as under the previous version of the rule.

TPV was required for telephonic enrollment even if the CRNGS supplier had recorded the entire call. Their initial reaction was that this could not have been the Commission's intent because it would make no sense to require TPV for telephonic enrollment where the entire call had already been recorded by the retail natural gas supplier or governmental aggregator, a measure that provides indisputable evidence as to whether the supplier representations and customer acknowledgements required by the subparagraphs of Paragraph (E)(1) were made before the enrollment was completed. However, to avoid the risk that they could be found to be in violation of the rule, the Applicants that already recorded the entire call engaged independent third-party verifiers to corroborate, by a second, separate recording, that the representations and customer acknowledgements required by the subparagraphs of Paragraph (E)(1) had been made.

8. Rule 4901:1-29-02(C), OAC, provides that the Commission "may, upon an application or a motion filed by a party, waive any requirement of this chapter, other than a requirement mandated by statute, for good cause shown." Applicants respectfully submit that there is good cause for granting a waiver of the provision of Rule 4901:1-29-06(E)(1), OAC, that appears to require TPV for telephonic enrollment even if the CRNGS supplier records the entire call and archives and retains the recording in accordance with the requirements of Rule 4901:1-29-06(E)(2)(b), OAC.

9. First, there are strong indications that, despite the language that made its way into the new version of Paragraph (E)(1) of Rule 4901:1-29-06, OAC, the Commission's actual intent was not to require TPV for telephonic enrollment where the entire call is recorded by the retail natural gas supplier or governmental aggregator. If that is the case, the Commission, although precluded from amending the rule outside a rulemaking proceeding, can and should find that

good cause exists for waiving the rule as requested by Applicants. Second, even if the Commission did, in fact, intend to require TPV for telephonic enrollment in instances where the entire call is recorded by the supplier or aggregator, there are other reasons for finding that good cause exists for granting the requested waiver, not the least of which is the adverse impact the rule has on both CRNGS providers and potential customers while providing no additional consumer benefit. Applicants turn first to the factors that they believe signal that the provision in question is not consistent with the Commission's intent.

10. As noted above, no participant in the rulemaking proceeding ever suggested that that a separate, recorded TPV process was necessary where the supplier or aggregator recorded the entire call. Although the supplier groups opposing the requirement that the sales portion of the call be recorded argued that the TPV process provided sufficient consumer protection,¹⁰ this argument focused solely on the situation where the supplier or aggregator did not record the sales portion of the call and opted to use a subsequent recording made by a third-party verifier to corroborate that the pre-enrollment representations and customer acknowledgements required by the subparagraphs of Paragraph (E)(1) had, in fact, been made. This argument did not address, in any way, the situation where the supplier or aggregator exercised the option to record the entire call, including the verification, as permitted under the former version of the rule.

11. In rejecting the supplier groups' argument and determining that the sales portion of the call should be recorded, the Commission pointed to customer complaints received by its call center that turned on discrepancies between the accounts offered by the customer and the

¹⁰ See OGMG/RESA Comments, 7-8; OGMG/RESA Reply Comments, 10-11.

sales representative as to the representations that were made during the call.¹¹ The Commission then went on to note that certain CRNGS providers already record the entire call, which the Commission relied on as an indication that recording the entire call was feasible.¹² This certainly suggests that the Commission viewed recording the entire call as the solution to the problem of disputes over what representations were actually made during the call. Moreover, the Commission made no mention in its Order or Entry on Rehearing of any change to the existing rule other than imposing the requirement that the sales portion of the call be recorded. If the Commission actually intended to require TPV in instances where the entire call is recorded by the supplier, one would assume that the Commission would have explained this new requirement in its Order.¹³ That the Order is silent on this subject suggests that the Commission recognized that, unlike door-to-door solicitation, where the need for TPV is obvious, in the case of telephonic enrollment, there is no reason to require TPV where the supplier records the entire call. Recording and archiving the entire call provides irrefutable evidence as to what was said if there is a subsequent dispute regarding the representations made to a customer. Plainly, no purpose would be served by requiring a second, separate recording by a third-party verifier to corroborate that the pre-enrollment representations and customer acknowledgements required by the subparagraphs of Paragraph (E)(1) were made. Indeed, such a duplicative requirement would be contrary to the Governor's Common Sense Initiative.¹⁴ However, this is not the only reason

¹¹ See Order, 46.

¹² *Id.*

¹³ In so stating, Applicants recognize that the Order stated that "(s)ome minor, noncontroversial changes have been incorporated into the new proposed rules without Commission comment." (Order, 3). However, a change of this magnitude would certainly not fall into this category.

¹⁴ See Executive Order 2011-01K issued January 10, 2011.

to believe that the Commission did not actually intend to establish a TPV requirement in connection with telephonic enrollments where the supplier records the entire call.

12. In this connection, Applicants would point out that the rules governing competitive retail electric service (“CRES”) were also before the Commission for review during the same time frame in which changes to CRNGS rules were being considered.¹⁵ The corresponding CRES telephonic enrollment rule, Rule 4901:1-21-06(D)(2)(a), OAC, which was adopted by the Commission in its February 26, 2014 entry on rehearing in Case No. 12-1924-EL-ORD, provides as follows:

To enroll a residential or small commercial customer telephonically, a CRES provider shall make a date and time stamped audio recording verifying before the completion of the telephone call, at a minimum, all of the following:

Thus, the CRES rule, which was adopted the very same day the CRNGS rules were finalized, continues to permit CRES providers to make the audio recording verifying that the representations and customer acknowledgments specified in the subparagraphs of that rule were made before the completion of the call. Why would the Commission provide CRES suppliers with the option of recording the verification themselves, but require a TPV process for CRNGS suppliers that record the entire call? That there is no logical answer to this question buttresses Applicants’ perception that new Rule 4901:1-29-06(E)(1) does not reflect the Commission’s actual intent, particularly in view of the fact that the Business Impact Analysis prepared for Case No. 12-925-GA-ORD repeatedly mentions that one of the Commission’s objectives was to harmonize the CRNGS and CRES rules that were not industry specific.

¹⁵ See *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 (Finding and Order Dated December 23, 2013).

13. In this same vein, it is worthy of mention that the Business Impact Analysis prepared in connection with the amendments to Chapter 4901:1-29, OAC, although making no specific reference to Rule 4901:1-29-06(E)(1), contains the following observation in the “Adverse Business Impact” section.

However, in light of the fact that the majority of modifications clarify the rules contained within this chapter and that the major substantive amendments reflect procedures already widely in use[d] by the businesses, it is improbable that any service providers will need to significantly upgrade any programs or revise internal protocols. In addition, while unlikely, there may be nominal costs associated with disclosure requirements during the enrollment process.

It is reasonable to assume that the Commission’s observation that “the major substantive amendments reflect procedures already widely in use[d] by the businesses” encompassed the practice of those providers that already recorded the entire call. Applicants believe that it is unlikely that the Commission would have offered this observation if the intent of the new rule were to require CRNGS suppliers that record the entire call to engage a third-party verifier to conduct the verification process and to require that the verification be captured a second time in a separate recording. Contrary to the Commission’s expressed expectation, not only would such a requirement entail a significant revision to the internal protocols of suppliers that already recorded the entire call, but it would also adversely impact those suppliers financially because engaging a third-party verifier would add significant costs to the enrollment process, an outcome that is also at odds with the Commission observation set forth above.

14. If, as Applicants posit, the Commission did not actually intend to require a TPV process for CRNGS suppliers that record the entire call, the question becomes how this requirement made its way into the adopted version of Rule 4901:1-29-06(E)(1), OAC. Because

the language of the new version of Paragraph (E)(1) is rather awkward,¹⁶ Applicants suspect that this anomaly may have inadvertently crept into the rule when the draftsman redlined the prior version of Paragraph (E)(1) in an attempt to accommodate the new requirement that the sales portion of the call also be recorded. The former version provided that the retail supplier, the aggregator, or a third-party verifier could make the audio recording verifying that the requirements of the subparagraphs of Paragraph (E)(1) had been met. However, a third-party verifier would not be in a position to record the sales pitch segment of a call. Thus, it may be that the draftsman, in attempting to incorporate this new requirement, rearranged the language of the existing rule in a manner that had the unintended consequence of eliminating the option for the retail supplier or governmental aggregator to make the recording verifying that the requirements of the subparagraphs of Paragraph (E)(1) had been met and that the Commission overlooked this anomaly in adopting the amended version of the rule. Alternatively, because a customer-initiated call would typically not involve a sales pitch, it may be that the Commission never intended the TPV requirement to apply to enrollments generated by inbound calls. Rather, the Commission may have envisioned that the TPV process would be employed only in connection with outbound telephone solicitations initiated by a telemarketer, which obviously would have a sales pitch segment.

15. Only the Commissioners that signed the Order in Case No. 12-925-GA-ORD know if it was their actual intent to require TPV for telephonic enrollments in instances where the retail supplier or governmental aggregator record the entire call. However, based on the

¹⁶ If one eliminates the words relating to the sales portion of the call, the sentence, read literally, now states that “. . . a retail natural gas supplier or governmental aggregator shall make . . . a date- and time-stamped audio recording by an independent third-party verifier . . .” Further, the conditional clause “if the customer is enrolled,” appears to be misplaced, which results in an incomplete sentence.

factors set forth above, one can reasonably conclude that this was not the Commission's intent. If the current Commission agrees with this assessment, the Commission should find that just cause exists for granting Applicants' request for a waiver of this provision of the rule. Or, if the Commission intended that the TPV requirement would apply only to enrollments generated by outbound telephonic solicitations, the Commission should issue an entry confirming this interpretation of the rule. However, if the Commission's actual intent was to impose this new requirement in connection with all telephonic enrollments, there are additional reasons that constitute just cause for granting the waiver requested by Applicants.

16. As noted at the outset, Applicants seeks a waiver of the TPV requirement for telephonic enrollment only with respect to customer-initiated inbound calls. These calls are almost always generated in response to written offer that the prospective customer has received as a result of a CRNGS provider mail campaign or as a result of the prospective customer's review of the apples-to-apples chart on the Commission website. That the prospective customer initiates the call is significant because it demonstrates that the prospective customer has acted affirmatively to explore the offer, thereby creating a far different dynamic than exists when a prospective customer receives a cold call out of the blue from a telemarketer that attempts to convince the customer to enroll with a particular supplier.

17. When prospective customers call in response to a mailed offer, they do so because they find the offer attractive. Because a copy of the proposed contract is typically included with the offer, prospective customers have all the information before them they need to make an informed decision at the time they make the call. Ironically, if the customer elects to accept the contract by completing and returning the enrollment card or by enrolling via the internet, that

ends the process. However, if the customer finds telephonic enrollment more convenient, or if the customer calls because he/she has a specific question about the offer or the associated terms and conditions, under the new version of Rule 4901:1-29-06(E)(1), OAC, the prospective customer has to jump through the TPV hoop before the enrollment can be completed. The discussion with the CRNGS provider's call center representative, including the required representations and customer acknowledgements, generally takes approximately seven minutes, but the TPV requirement doubles the time the prospective customer must remain on the phone in order for the enrollment to be completed.

18. Inconveniencing customers who have made the decision to accept an offer by placing them on hold to await a third-party verifier and by requiring them to provide the very same acknowledgements they have just given to the call center representative diminishes the customer experience and may sour the prospective customer on shopping. Indeed, the Applicants that have implemented TPV for telephonic enrollments to comply with the new version of Rule 4901:1-29-06(E)(1), OAC, have received numerous complaints from customers venting their frustration with the process. Moreover, a number of prospective customers that are placed on hold while being transferred to a third-party verifier or become disenchanted with the memory test they are subjected to as a part of the TPV process simply hang up, thereby preventing the completion of the enrollment. Further, if a prospective customers cannot remember if a particular required representation was made by the call center representative, the third-party verifier will terminate the call, thereby forcing the customer to start over even though it was the customer's stated intention to accept the offer. This outcome can only add to the customer's frustration and increase the likelihood that the customer will not be enrolled.

19. As previously noted, engaging a third-party verifier adds significant costs to the enrollment process. Although these additional costs obviously have an adverse financial impact on CRNGS providers, the cost of TPV also has a detrimental effect on potential customers because these costs must ultimately be reflected in providers' offer prices, resulting in pricing for retail natural gas service that is higher than it would otherwise be. Moreover, the difference between the CRES rule governing telephonic enrollment, which has no TPV requirement, and CRNGS telephonic enrollment rule is problematic for CRNGS providers that also provide retail electric service. These providers must either equip their call center representatives to manage two separate sets of pre-enrollment protocols, or apply the more expensive CRNGS requirement to both the CRNGS and CRES enrollments to limit the possibility for error. Either of these approaches adds to their cost of doing business, which, in turn, makes for higher offer prices for both services than would otherwise be the case and places CRES providers that also provide retail natural gas service at a competitive disadvantage vis-à-vis CRES providers that are not subject to a TPV requirement for telephonic enrollment.

20. It would be one thing if the burden imposed on the CRNGS providers and prospective customers by the TPV requirement for telephonic enrollment was accompanied by a corresponding benefit in terms of increased consumer protection, but that is not the case. Applicants appreciate the importance the Commission attaches to assuring that customers are fully informed before contracting for service with a CRNGS provider. However, customers that initiate the enrollment process by calling a CRNGS provider in response to a mailed offer already have before them the information required by the subparagraphs of Rule 4901:1-29-06(E)(1), OAC. Further, call center personnel use a script that contains a checklist to assure that all the required representations are made and acknowledged before the customer is enrolled, and

the customer's responses are captured on the recording of the call. Under these circumstances, requiring customers to go through this same drill a second time with a third-party verifier does nothing but inconvenience the customer and add costs that are totally unnecessary. Indeed, it is difficult to comprehend why the rule requires this duplicative process in the case of telephonic enrollments resulting from customer-initiated calls when the customer could have enrolled in response to the same offer by mail or via the internet, methods which require no corroborative customer acknowledgements before a third party.

21. Because no participant in Case No. 12-925-GA-ORD advocated this new requirement, and because the Commission Order and Entry on Rehearing did not mention this change, Applicants can only speculate as to the underlying rationale. However, if the thinking was that, without independent third-party verification, "coaching" could be a problem (*i.e.*, the call center representative can elicit the desired response if the customer gets it wrong the first time), a moment's reflection will show that this is not a legitimate concern where the entire call is recorded. Say, for example, that, as a part of the verification process, the representative asks the prospective customer to confirm that the he/she has received a verbal statement that the supplier "is not the customer's natural gas company and that the customer may choose to remain with the natural gas company's applicable tariff or default service" as required by rule 4901:1-29-06(E)(1)(c), OAC. If the customer missed this representation when it was made, or forgot that it was made, the call center representative can cure this defect on the spot by making the representation again and asking the customer to confirm that he/she understands it. There is nothing untoward about providing this information a second time, and it is certainly far better for the representative to provide the information a second time than to have a rule that brings the enrollment process to a halt if the prospective customer forgets that the representation was made

when the third-party verifier asks the same question, an outcome that provides no information whatever to the customer. Again, because the entire conversation between the call center representative and the prospective customer will be recorded, there will be irrefutable evidence as to whether the requirements of subparagraph (c) have been met.

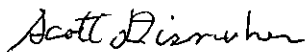
22. Finally, Applicants would emphasize that the requested waiver would apply only to customer-initiated inbound calls and not to enrollments resulting from outbound telemarketing calls. The Commission should adopt a strict definition of an “inbound call” for purposes of the waiver and should make it clear that the transfer of a call by a telemarketer to a call center representative after the prospective customer has expressed interest in an offer does not constitute an inbound call covered by the waiver.

23. Applicants recognize that the Commission will be initiating another mandatory review of the CRNGS rules in the not too far distant future. In the new rulemaking proceeding, Applicants will, of course, advocate that the requirement for TPV in connection with telephonic enrollments be eliminated for customer-initiated, inbound calls based on the same factors discussed above. However, granting the requested waiver of this provision of Rule 4901:1-29-06(E)(1), OAC, at this time will provide the Commission with the opportunity to determine if eliminating the requirement the TPV requirement for telephonic enrollment where the entire call is recorded by the supplier or governmental aggregator leads to an increased number of customer complaints. Although Applicants believe that this outcome is highly unlikely, the experience gained while the waiver is in place will allow the Commission to make an informed decision on this issue in the rulemaking case.

24. For those reasons set forth above, Applicants respectfully submit that good cause exists for granting its request for a waiver of the provision of Rule 4901:1-29-06(E)(1), OAC, that appears to require TPV for telephonic enrollment even where the retail natural gas supplier or governmental aggregator has recorded the entire call. Alternatively, if it was not the Commission's intent that the TPV requirement be applied in the case of customer-initiated inbound calls, the Commission should clarify this point.

WHEREFORE, Applicants respectfully request that their application for a waiver of the provision of Rule 4901:1-29-06(E)(1) that appears to require TPV for telephonic enrollment even in instances where the retail natural gas supplier or governmental aggregator records the entire call be granted.

Respectfully submitted,



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