

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Joint Application of)	
Direct Energy Services, LLC,)	Case No. 17-2358-GA-WVR
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)	
4901:1-29-06(E) of the Ohio)	
Administrative Code.)	

**REPLY TO MARKETERS' DECEMBER 15, 2017 FILING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION

Ohio Adm. Code 4901:1-29-06(E) helps protect consumers from unlawful changes of their natural gas supplier by requiring verification of a consumer's telephonic enrollment for a marketer's natural gas service. The verification of a customer's enrollment with a marketer must occur through a time and date stamped recording by an independent third party.¹ The applicants in this case ("Marketers") seek to avoid complying with this rule in circumstances in which the Marketer receives an inbound call from a consumer in response to a sales offer.²

The Office of the Ohio Consumers' Counsel ("OCC") has moved to intervene in this case on behalf of Ohio's 3.1 million residential natural gas consumers.³ Consumers need to be represented in this case where the existing consumer protections of the Public

¹ Ohio Adm. Code 4901:1-29-06(E)(1).

² Joint Application for Waiver (November 15, 2017).

³ OCC Motion to Intervene (December 1, 2017).

Utilities Commission of Ohio's ("PUCO") rules may be diminished.⁴ On December 15, 2017, the Marketers filed a "Response" to OCC's Motion to Intervene. The Marketers do not oppose OCC's intervention,⁵ but instead address statements OCC made in presenting the basis for its intervention.⁶

OCC files this Reply to the Marketers' filing.⁷ The Marketers raise issues regarding the pending rulemaking in Case No. 12-925-GA-ORD and the PUCO's intent in adopting Ohio Adm. Code 4901:1-29-06(E) in the last rulemaking.⁸ These issues are reiterations of the Marketers' arguments in their application, and are well beyond the statements in OCC's Motion to Intervene. OCC will not address these issues at this time, but reserves the right to file additional pleadings in this case concerning these issues.

The Marketers claim that third-party verification is not needed where a consumer calls a marketer in response to a sales offer. The Marketers are wrong. They avoid the fact that telephone solicitation of consumers to change their natural gas supplier may occur even if consumers initiate the call to a marketer. Consumers who call a marketer need the same protections from unlawful changes to their natural gas supplier as consumers who receive sales calls from marketers.

Ohio Adm. Code 4901:1-29-06(E) is an integral part of the PUCO's effort to protect consumers from being taken advantage of when discussing offers with natural gas marketers. The Marketers downplay the importance of the rule in protecting consumers. The rule's consumer protections should not be marginalized.

⁴ See OCC Motion to Intervene at 2, 3.

⁵ Response at 1, 5.

⁶ *Id.* at 5.

⁷ Ohio Adm. Code 4901-1-12(B)(2).

⁸ Response at 3-5.

II. REPLY

A. The PUCO's procedural rules do not accommodate "responses" to a motion, so the PUCO should treat the Marketers' filing as a memorandum contra that is subject to the limited pleading cycle in Ohio Adm. Code 4901-1-12.

Before delving into the substance of the applicant's filing, there is a procedural issue to be addressed. The Marketers filed a "Response" to OCC's Motion to Intervene on December 15, 2017. The PUCO's procedural rules do not provide for the filing of a "response" to a motion.

The rules provide only for the filing of a memorandum contra,⁹ followed by other parties' reply to the memorandum contra.¹⁰ This is important because of the limited pleading cycle established by Ohio Adm. Code 4901-1-12. When a motion is filed, the rule allows parties to file a memorandum contra to the motion within 15 days and a reply to the memorandum contra within seven days after that. Nothing more.

Although the Marketers do not contest OCC's Motion to Intervene, the PUCO should consider the Marketers' "Response" to be a memorandum contra *only* for purposes of the pleading cycle in Ohio Adm. Code 4901-1-12. The PUCO has ruled that the substance of a pleading, not the title given it by its author, determines how the pleading should be treated under the PUCO's procedural rules.¹¹ In that case, a document labelled "Reply Comments" was used to respond to substantive issues raised in a memorandum contra. The PUCO determined that the "Reply Comments" should be

⁹ Ohio Adm. Code 4901-1-12(B)(1).

¹⁰ Ohio Adm. Code 4901-1-12(B)(2).

¹¹ See *In the Matter of the Application of Ohio Power Company for a Limited Waiver of Ohio Adm. Code 4901:1-18-06(A)(2)*, Case No. 17-1380-EL-WVR, Entry (July 12, 2017), ¶16.

treated as a “reply” under Ohio Adm. Code 4901-1-12(B)(2).¹² Similar treatment should be applied to the Marketers’ “Response” in this case.

While the Marketers do not oppose OCC’s intervention in this case,¹³ they do dispute statements OCC made as the basis for its intervention.¹⁴ Hence, the Marketers address substantive issues raised in OCC’s Motion to Intervene. Further, their “Response” was filed within the 15-day timeframe for filing a memorandum contra to a motion under Ohio Adm. Code 4901-1-12(B)(1). The “Response” is, in fact, a memorandum contra.

Thus, the Marketers’ “Response” should be treated as a memorandum contra, but only for purposes of the limited pleading cycle in Ohio Adm. Code 4901-1-12(B). Because the rule does not provide for additional pleadings beyond a reply to a memorandum contra, the Marketers should not be allowed to file further pleadings responding to this Reply.

B. Consumers need to be protected from unlawful changes of their natural gas supplier during telephonic contacts with marketers, whether consumers call the marketer or the marketer calls them.

The Marketers claim that the primary purpose of Ohio Adm. Code 4901:1-29-06(E) is not to prevent unlawful changes of a consumer’s natural gas supplier, but instead to show that the consumer made the acknowledgements required by the rule.¹⁵ The Marketers’ attempt to downplay the significance of the rule should raise concerns at the PUCO about whether consumers would be adequately protected if the Marketers are

¹² *Id.*

¹³ Response at 1, 5.

¹⁴ *Id.* at 2-5.

¹⁵ *Id.* at 2.

allowed to avoid complying with the rule. The rule assists consumers in deciding whether to accept a marketer's offer, without the marketer being able to influence the decision. Ohio Adm. Code 4901:1-29-06(E) is essential to protecting consumers from unlawful changes of their natural gas supplier during telephone calls with marketers. Consumers who call marketers need the same protects as consumers who receive calls from marketers.

Ohio Adm. Code 4901:1-29-06 is titled "Customer Enrollment and Consent." The "consent" portion of the title is noteworthy because it signifies that the rule addresses the process for documenting that consumers *agree* to a change of their natural gas supplier. This is emphasized in the first two substantive matters discussed with a consumer during a third-party verification call.¹⁶

First, the independent verifier must first tell the consumer that the marketer is not the consumer's current natural gas company and that the consumer may choose to remain with the current natural gas company's applicable tariff or default service.¹⁷ This helps to make clear to the consumer – from an independent source – that accepting the marketer's offer would result in a change of the consumer's natural gas supplier. It also helps make clear to the consumer – from an independent source – that the consumer does not have to accept the marketer's offer. If the waiver is granted, this consumer protection is lost.

Second, the independent verifier must ask whether the consumer has given consent to enroll with the marketer's service.¹⁸ This is the heart of the consumer

¹⁶ That is, after the consumer acknowledges the identity of the independent verifier, the exact purpose of the call, and the fact that the call is being recorded. Ohio Adm. Code 4901:1-29-06(E)(1)(a) and (b).

¹⁷ Ohio Adm. Code 4901:1-29-06(E)(1)(c).

¹⁸ Ohio Adm. Code 4901:1-29-06(E)(1)(d).

protections in the rule. It provides a definitive showing, from an independent source, of whether the consumer agrees to change natural gas suppliers. Importantly, if the consumer does not consent to the change of supplier when speaking with the independent verifier, that's the end of the conversation. There are no more attempts to convince the consumer to change suppliers. That might not be the case with calls made to a natural gas marketer. This consumer protection is an important difference between what is in place now and what the Marketers want in this case. If the waiver is granted, this consumer protection is lost.

Independent third-party verification of the consumer acknowledgements through a time and date stamped recording¹⁹ helps ensure that the consumer's natural gas supplier is not changed unlawfully (without the consumer's consent). Although natural gas marketers also must make a time and date stamped recording of the entire sales call,²⁰ that alone might not be enough to protect consumers. Independent third-party verification of the consumer acknowledgements adds an important level of consumer protection to the natural gas enrollment process in Ohio.

III. CONCLUSION

Consumers need the protection afforded by the independent third-party verification of their telephonic contacts with natural gas marketers that currently exists in Ohio Adm. Code 4901:1-29-06(E). This is true whether consumers call a marketer or are called by a marketer. Although they do not oppose OCC's motion to intervene, the Marketers downplay the importance of the consumer protections in the rule on calls

¹⁹ Ohio Adm. Code 4901:1-29-06(E)(1).

²⁰ *Id.*

consumers make to natural gas marketers. The Marketers' approach should heighten the PUCO's concerns about the application, and should give the PUCO more reason to grant OCC's Motion to Intervene and deny the Joint Application.

Respectfully submitted,

BRUCE WESTON (0016973)
OHIO CONSUMERS' COUNSEL

/s/ Terry L. Etter

Terry L. Etter (0067445), Counsel of Record
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel

65 East State Street, 7th Floor

Columbus, Ohio 43215

Telephone: 614-466-7964 (Etter Direct)

terry.etter@occ.ohio.gov

(will accept service by e-mai

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Reply was served on the persons stated below
via electronic transmission this 21st day of December 2017.

/s/ Terry L. Etter

Terry L. Etter

Assistant Consumers' Counsel

SERVICE LIST

William.wright@ohioattorneygeneral.gov

sdismukes@eckertseamans.com

BarthRoyer@aol.com

mnugent@igsenergy.com

aemerson@porterwright.com

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

12/21/2017 4:43:12 PM

in

Case No(s). 17-2358-GA-WVR

Summary: Reply Reply to Marketers' December 15, 2017 Filing by The Office of the Ohio Consumers' Counsel electronically filed by Ms. Jamie Williams on behalf of Etter, Terry Mr.