

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Joint Application of)	
Direct Energy Services, LLC,)	
Direct Energy Business, LLC, Dominion)	Case No. 17-2358-GA-WVR
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 THE PUCO STAFF’S COMMENTS ON MARKETER REQUESTS
TO WAIVE CONSUMER PROTECTION REGULATIONS
BY
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

I. INTRODUCTION

Rules of the Public Utilities Commission of Ohio (“PUCO”) help protect consumers from unlawful changes of their natural gas supplier. One such rule, Ohio Adm. Code 4901:1-29-06(E)(1), requires that a consumer’s telephonic enrollment for a marketer’s natural gas service be verified through a time and date-stamped recording by an independent third party. This rule was adopted by the PUCO in 2013¹ and, after review by the Joint Committee on Agency Rule Review (“JCARR”), became effective on December 1, 2014. The applicants in this case (“Marketers”) seek to avoid complying with this rule on calls received from consumers in response to a sales offer.²

Already, it is difficult for Ohioans to avoid losing money when choosing a Marketer’s natural gas service compared to the utility’s standard choice offer for natural

¹ Case No. 12-925-GA-ORD, Finding and Order (December 18, 2013).

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

gas.³ The Marketers' proposals to weaken consumer protections are a bad idea that could make the PUCO's gas "choice" program even worse for Ohio consumers.

On January 19, 2018, the Office of the Ohio Consumers' Counsel ("OCC") filed a Motion to Deny the application in this case. OCC noted that the application for waiver is in reality a late-filed application for rehearing of the Order adopting the rule.⁴ OCC also pointed out that the Marketers intend to re-argue their case for changing the rule in the pending review of the competitive natural gas rules (Case No. 17-1847-GA-ORD). And thus, the PUCO can avoid needless duplication of effort by denying the application. In addition, OCC noted that the Marketers have not shown good cause for the waiver, as required by Ohio Adm. Code 4901:1-29-02(C). On February 5, 2018, the Marketers filed a memorandum contra to OCC's Motion to Deny. OCC filed its reply to the Marketers' memorandum contra on February 12, 2018.⁵

In addition, the Marketers filed a motion for protection on January 17, 2018. The Marketers filed the motion to avoid responding to OCC's discovery, which had been properly served to the Marketers on December 29, 2017.⁶ OCC filed its memorandum contra the motion for protection on February 1, 2018. The Marketers filed a reply to OCC's memorandum contra on February 8, 2018.

Nine months later the PUCO has not ruled on the motion for protection. And thus, the Marketers have not responded to OCC's discovery. This is yet another example of the

³ Shadow billing data show that as of August 2018 Columbia Gas Choice customers have paid \$1.6 billion more than they would have under Columbia's standard offer.

⁴ Case No. 12-925-GA-ORD, Finding and Order (December 18, 2013).

⁵ Ohio Adm. Code 4901-1-12(B)(2).

⁶ See Ohio Adm. Code 4901-1-16; Ohio Adm. Code 4901-1-17.

disregard of consumers' discovery rights under what was supposed to be the legislature's reform of discovery practices at the PUCO nearly four decades ago in R.C. 4903.082.

On August 21, 2018, the PUCO Staff filed comments regarding the application. OCC responds to the PUCO Staff's comments, although the PUCO has not created a comment or other process in this case.

II. RESPONSE

A. The Marketers have not met the burden of proof for granting a waiver of the third-party verification rules that protect consumers. The Marketers' application should be denied.

The PUCO's rules require that proponents of a waiver of its gas marketing rules have the burden of showing good cause for the waiver.⁷ The PUCO Staff does not address this burden of proof required by the PUCO. Instead, the PUCO Staff merely state that they have "no objection at this time" to the Marketers' proposed alternative to the consumer protections in Ohio Adm. Code 4901:1-29-06(E)(1) on a trial basis until the current rulemaking is completed.⁸ OCC has noted elsewhere in this proceeding that the Marketers have not shown good cause and thus do not meet this burden.⁹

The Marketers claim that they are harmed by complying with the third-party verification rule but have not shown any harm from complying with the rule.¹⁰ The Marketers also have not supported their claim that complying with the third-party verification rule puts them at a competitive disadvantage.¹¹ Further, their primary

⁷ Ohio Adm. Code 4901:1-29-02(C).

⁸ PUCO Staff Comments at 1.

⁹ See OCC's Reply to Memorandum Contra Motion to Deny (February 12, 2018) at 5-10.

¹⁰ OCC's Reply to Memorandum Contra Motion to Deny at 8-9.

¹¹ *Id.* at 9-10.

argument – that the PUCO somehow adopted the third-party verification rule by mistake¹² – lacks merit.¹³ Therefore, the PUCO should deny the application.¹⁴

B. The short-term waiver proposed by the PUCO Staff would serve no purpose because there is no reliable means to gauge the effect the waiver would have on consumers.

In its comments, the PUCO Staff confirmed that the current rule provides an important consumer protection: “Staff strongly believes that verifying the enrollment with the consumer in clear, plain language, using a template uniformly followed by all companies, provides a valuable safeguard which protects consumers. The intent of the rule is to make sure that, to the greatest extent possible, the consumer understands the key provisions of their service contract.” But, contradictorily, the PUCO Staff also stated that it has no objection at this time to waiving the third-party requirement of in-bound telephonic enrollments, so long as all other requirements of Ohio Adm. Code 4901:1-29-06(E)(1) remain in place, strictly as a test until the current rulemaking is completed.¹⁵ The PUCO Staff recognized that the proper venue for evaluating the enrollment rules is the five-year rule review being conducted in Case No. 17-1847-GA-ORD.¹⁶

Despite recognizing that the proper venue for this issue is in review of the PUCO’s rules,¹⁷ the PUCO Staff contends that it is appropriate to operate outside that rule review process. In the PUCO Staff’s view that is appropriate because “the requested waiver could service [sic] a valuable service by allowing a field test of the streamlining

¹² See Application, ¶¶9-15.

¹³ OCC’s Reply to Memorandum Contra Motion to Deny at 5-7.

¹⁴ Granting the waiver so the PUCO can gauge the effect of the waiver on consumers, as the Marketers suggest (*see id.* at 15), would needlessly put consumers at risk. The PUCO should reject the suggestion.

¹⁵ Staff Comments at 2.

¹⁶ *Id.*

¹⁷ *Id.*

of the Inbound enrollment process.”¹⁸ The PUCO Staff is wrong in recommending a field test that could harm consumers.

Neither the PUCO Staff nor the Marketers have offered any reliable means of gauging whether the proposed waiver adequately protects consumers or reduces consumer frustration, as the Marketers claim. The PUCO Staff offers no metrics for evaluating the field testing of the process. And the Marketers suggest that its waiver would be “successful” only if the PUCO does *not* experience a “sharp uptick in customer complaints as a result of the waiver of the TPV requirement for customer-initiated calls....”¹⁹ This is not a reliable gauge for determining whether the waiver is adequately protecting consumers who call the Marketers in response to an offer. Ohioans should not be guinea pigs for a marketer “field test” on waiving the protections that were presented to JCARR in the rule review.

First, consumers might not be aware of the third-party verification process and how it should function under the waiver. Thus, they might not know their rights or that they could contact the PUCO with a complaint.

Second, no baseline has been identified that would be used for comparing the number of pre-waiver third-party verification complaints against the Marketers versus the number of third-party verification complaints against them under the waiver. This is necessary for making a valid comparison.

Third, neither the PUCO Staff nor the Marketers have identified what would constitute a “sharp uptick” in complaints. Would it involve a percentage of complaints or

¹⁸ *Id.* at 2-3.

¹⁹ Marketers’ Response to OCC’s Motion to Intervene (December 15, 2017) at 4.

an actual number? And how would the figure be derived? From the consumer perspective, any “uptick” in complaints would be unacceptable.

The short-term waiver proposed by the PUCO Staff would not reliably determine the “benefits” touted by the Marketers in their application.²⁰ At the same time the field test allows customers to be harmed. The PUCO should not approve a nebulously designed waiver program that has the potential for harming consumers.

The PUCO already has seen the *reality* of harm to consumers at the hands of some marketers in the Dominion area. There, some Ohioans are experiencing another test of sorts for marketer treatment of consumers who default (are randomly assigned) to marketer monthly variable rates in the Dominion area. In the Dominion area, some consumers have been charged marketer rates exceeding 300% above the market price (the competitively bid standard choice offer).

III. CONCLUSION

Ohioans need the protection afforded by the independent third-party verification of their telephonic contacts with natural gas marketers found in Ohio Adm. Code 4901:1-29-06(E). This is true whether consumers call a marketer or are called by a marketer. This consumer protection should not be undermined without a showing of good cause, as required by Ohio Adm. Code 4901:1-29-02(C). The Marketers have not made the requisite showing. In addition, the short-term waiver proposed by the PUCO Staff would serve no real purpose but would expose consumers to harm. To protect consumers, the PUCO should deny the application.

²⁰ Staff Comments at 3.

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 43215-4213
Telephone: 614-466-7964 (Etter Direct)
terry.etter@occ.ohio.gov
(will accept service by e-mail)

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Response was served on the persons stated below via electronic transmission this 9th day of November 2018.

/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

Attorney Examiner:

Stacie.cathcart@puc.state.oh.us

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

11/9/2018 4:44:06 PM

in

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

Summary: Reply Reply to the PUCO Staff's Comments on Marketer Requests to Waive Consumer Protection Regulations by The Office of the Ohio Consumers' Counsel electronically filed by Ms. Jamie Williams on behalf of Etter, Terry Mr.