

## THE PUBLIC UTILITIES COMMISSION OF OHIO

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 4901:1-29-  
06(E)(1) OF THE OHIO ADMINISTRATIVE  
CODE.

CASE NO. 17-2358-GA-WVR

### ENTRY

Entered in the Journal on November 14, 2018

#### I. SUMMARY

{¶ 1} The Commission grants, to the extent set forth in this Entry, the joint request for a waiver of Ohio Adm.Code 4901:1-29-06(E)(1) from the rule's requirement for third-party verification for telephonic enrollments that are recorded by retail natural gas suppliers and governmental aggregators, as it applies to customer-initiated inbound calls.

#### II. DISCUSSION

{¶ 2} Direct Energy Services, LLC, Direct Energy Business, LLC, Dominion Energy Solutions, Inc., Interstate Gas Supply, Inc., and SouthStar Energy Services, LLC (collectively, the Applicants or the Marketers) are retail natural gas suppliers as defined in R.C. 4929.01, are certified to provide competitive retail natural gas service (CRNGS) under R.C. 4929.20, and are subject to the jurisdiction of this Commission pursuant to R.C. 4929.24.

**A. Summary of the Application and Comments**

{¶ 3} On November 15, 2017, the Applicants submitted a joint application to the Commission requesting a waiver of the third-party verification (TPV) provision of Ohio Adm.Code 4901:1-29-06(E)(1), as it applies to customer-initiated inbound calls. Specifically, the Applicants have requested a waiver of the provision of the rule that requires TPV on inbound telephonic sales if the entire call is recorded by the retail natural gas supplier or governmental aggregator and the recording is archived and retained in accordance with the Commission's rules.

{¶ 4} In their application, the Marketers note that Ohio Adm.Code 4901:1-29-06(E)(1) was revised in *In re Comm. Review of its Rules for Competitive Retail Natural Gas Serv.*, Case No. 12-925-GA-ORD, to require the sales portion of the call be recorded by the retail natural gas supplier or governmental aggregator and to require third-party verification by a second, separate recording made by an independent third-party verifier confirming that the various representations and customer acknowledgments required by the subparagraphs of the rule were made during the call. The Applicants note that, after the time for rehearing had passed, they realized the revision to Ohio Adm.Code 4901:1-29-06(E)(1) could be interpreted to require TPV for telephonic enrollment even if the CRNGS supplier had recorded the entire call. The Applicants state that, to avoid the risk that they could be found to have not complied with the rule, they have engaged independent third-party verifiers to corroborate that the necessary representations and customer acknowledgments have been made, even though they believe the recording by the retail natural gas supplier provides indisputable evidence that the representations and acknowledgments were made before the enrollment was completed.

{¶ 5} The Applicants state that, based on a review of the prior rulemaking, it can be reasonably concluded that the Commission did not intend to require TPV for telephonic enrollments in instances where the retail supplier or governmental aggregator recorded the entire call. However, they argue that, even if it was the intent of the

Commission, they should be granted a waiver solely for telephonic enrollment with respect to customer-initiated inbound calls. The Applicants note that these calls are typically generated in response to written offers that the prospective customer has received as a result of a CRNGS provider's mail campaign or as a result of the prospective customer's review of the Apples to Apples chart on the Commission's website. Further, according to the Applicants, the fact that the prospective customer initiates the call is significant because it demonstrates that the customer has acted affirmatively to explore the offer, which is a different dynamic than receiving a cold call from a telemarketer attempting to convince a customer to enroll with a supplier.

{¶ 6} Additionally, the Applicants argue that the additional TPV process is not only costly but is an inconvenience to customers who have made the decision to call in and accept an offer, by placing them on hold to await a third-party verifier to provide the same acknowledgements that have just been given to a call center representative. Finally, the Applicants reiterate that the requested waiver would only apply to customer-initiated inbound calls where the entire conversation between the call center representative and prospective customer will still be recorded, providing evidence as to whether the requirements of the rule's subparagraphs have been met.

{¶ 7} On January 19, 2018, the Ohio Consumers' Counsel (OCC) filed a motion to deny the application. OCC argues that the application for waiver is actually an application for rehearing on the previous rule review and should be denied because the Commission cannot, by law, entertain a late-filed application for rehearing. Further, OCC contends that the Marketers' arguments are also a collateral attack on the rule, which is prohibited under the doctrine of collateral estoppel. OCC argues that whether any participant in the rulemaking proposed the rule change is irrelevant. According to OCC, what is relevant is that no participant in the rulemaking – including the Marketers – objected to the rule change through the rehearing process. OCC asserts that the issue was thus litigated in the rulemaking, and should not be re-litigated here.

{¶ 8} Additionally, OCC contends that the Applicants have not shown good cause for a rule waiver, as they have not shown that complying with the consumer protections in the rule is unduly burdensome. OCC states that the Marketers contend that compliance with the rule “diminishes the customer experience and may sour the prospective customer on shopping” but do not support this contention with any data showing the number or percentage of customers who have complained about the process, or who hung up because of delays caused by the process. Similarly, OCC states that the Marketers do not provide any supporting data to support their claim that compliance with the rules has caused them to incur added expenses. According to OCC, the Marketers’ assertion that hiring third-party verifiers has raised their prices and puts them at a competitive disadvantage with marketers of electric service is false; a marketer that sells both natural gas and electric service has the same independent third-party verification requirement that applies to marketers that only sell natural gas service.

{¶ 9} Further, OCC states that the consumer protections in the current rule are necessary to help prevent unlawful changes in consumers’ natural gas suppliers. OCC argues that independent third-party verification of the consumer acknowledgments adds an additional level of consumer protection to the natural gas enrollment process through a time- and date-stamped recording, ensuring that the consumer’s natural gas supplier is not changed unlawfully. OCC asserts that consumers may call the marketer not only to enroll in service, but to inquire about an offer. According to OCC, the independent third-party verification helps protect these consumers. OCC claims that the purpose of the independent third-party verifier is to confirm not only that the consumer has received the information required by the rule, but to confirm that the consumer understands and accepts all the terms and conditions of the offer.

{¶ 10} Lastly, OCC argues that the Commission should not address the Marketers’ issues in the present case as well as in the pending rulemaking in Case No. 17-1847-GA-

ORD. OCC states that the Commission should deny the application in this case, allowing the issues to be raised through the rulemaking process.

{¶ 11} On February 5, 2018, the Applicants filed a memorandum contra OCC's motion to deny the application. The Applicants deny OCC's allegation that the waiver request is actually an untimely filed application for rehearing of the previous rulemaking. The Applicants state the first part of the application for waiver does not go to the merits of the rule, and Applicants are not asking the Commission to reverse the Order adopting the rule or to amend the rule itself. Applicants argue they are not, as OCC would have it, precluded from asking the Commission if the adopted version of the rule is consistent with the Commission's intent. According to the Applicants, if a rule contains an error, any party can, at any time, file a waiver request seeking relief from the provision in question until the Commission can correct the mistake in the next rulemaking proceeding. Additionally, the Applicants contend that the waiver request is not barred by the doctrine of collateral estoppel because this case is not an attempt to re-litigate an issue that was determined, either explicitly or implicitly, by the Commission in Case No. 12-925-GA-ORD.

{¶ 12} Further, the Applicants argue that, contrary to OCC's assertion, good cause exists for granting the waiver request even if the Commission finds that the adopted version of the rule is consistent with its intent. The Applicants state the TPV requirement for telephonic enrollment inconveniences prospective customers and adds costs to the process without providing any additional consumer protection benefit. Lastly, the Applicants argue the Commission should reject OCC's assertion that consideration of this rule should be deferred to the pending CRNGS rulemaking proceeding, Case No. 17-1847-GA-ORD. The Applicants state that, contrary to OCC's claim, considering the waiver request at this time rather than deferring the issue to the pending CRNGS rulemaking will not result in a duplication of effort and will provide the Commission with the opportunity to determine if eliminating the TPV requirement for inbound calls

leads to an increase in disputes regarding the representations made in the enrollment process.

{¶ 13} On February 12, 2018, OCC filed a reply to Applicants' memorandum contra. OCC argues the Marketers go beyond merely examining the Commission's intent in adopting the rule and question whether the Commission should have adopted the rule at all. OCC contends that this is a prohibited collateral attack on the rule and amounts to an application for rehearing of the rule's adoption and that the Marketers should have made these arguments when the rule was adopted in December 2013. Additionally, OCC argues the Marketers have not shown good cause and do not meet the burden of proof in this case; therefore, the Commission should deny the application.

{¶ 14} On August 21, 2018, Staff filed its comments. Staff states that, after reviewing the application, it does not object to the requested waiver of the requirement for TPV verification of inbound telephonic enrollments, so long as all other requirements of Ohio Adm.Code 4901:1-29-06(E)(1) remain in place. Staff notes that the Applicants must still record the entire call, including the sales portion, the enrollment portion, and the verification portion, and must ensure that the other specific items listed in the rule are verified by the customer. Additionally, Staff explains that Ohio Adm.Code 4901:1-29-06(E)(1) is currently under review by the Commission as part of its five-year rule review in Case No. 17-1847-GA-ORD. Staff states that the proper venue for evaluating enrollment rules is in the five-year rule review process; however, Staff recognizes that the requested waiver could provide a valuable service by allowing a field test of the streamlining of the inbound enrollment process. Staff recommends that the waiver be limited to the pendency of the rule review and the waiver would then expire when the rule review is completed, at which time, the waiver would be either incomplete, part of the revised rule, or rejected by the Commission. Staff states that the revised or reauthorized rule should supersede the waiver. Staff notes that the Applicants should be made aware that the granting of this waiver does not mean that the TPV requirements

will be adopted in the revised rule and the Applicants bear any risk associated with changing back their business practices, if the Commission, as part of the rule review process, does not accept elimination of the TPV for inbound calls.

{¶ 15} On November 9, 2018, OCC filed a reply to Staff's comments. OCC argues that Staff's comments do not address the Marketers' burden of showing good cause for the waiver. OCC states that, despite recognizing that the proper venue for this issue is in the rule review, Staff wrongly recommended a short-term field test of the rule waiver. Further, OCC contends that Staff's proposal for a short-term waiver could harm consumers. OCC states that neither Staff nor the Marketers have offered any reliable means of evaluating the field test of the proposed waiver and whether it is adequately protecting consumers or reducing consumer frustration. For those reasons, OCC requests the Commission deny the joint application for waiver.

#### ***B. Commission Conclusion***

{¶ 16} The Commission notes that Ohio Adm.Code Chapter 4901:1-29, which applies to CRNGS providers, is intended to provide minimum standards for service quality, safety, and reliability; provide customers with sufficient information to make informed decisions about CRNGS; protect customers against deceptive, unfair, and unconscionable acts and practices in the marketing, solicitation, and sale of CRNGS and in the administration of any contracts for such services; and promote nondiscriminatory access to CRNGS, ensure timely enrollment with retail natural gas suppliers and governmental aggregators, maintain natural gas service, and timely and correctly switch retail natural gas suppliers and governmental aggregators. Ohio Adm.Code 4901:1-29-02(A)(3). In their joint application, the Applicants' request a waiver from Ohio Adm.Code 4901:1-29-06(E)(1), which provides:

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, [specified requirements].

The rule's subparagraphs specify a number of verbal questions, requests, or statements and customer acknowledgements that must be verified by the independent third-party verifier. Ohio Adm.Code 4901:1-29-06(E)(1)(a)-(k).

{¶ 17} The Commission has reviewed the Applicants' request for a waiver, Staff's comments, and OCC's reply to Staff's comments, as well as OCC's motion and the Applicants' response. Initially, we note that Ohio Adm.Code 4901:1-29-02(C) provides that the Commission may, upon an application or a motion filed by a party, waive any requirement of Ohio Adm.Code Chapter 4901:1-29, other than a requirement mandated by statute, for good cause shown. The Commission finds that the Applicants have shown good cause for the requested waiver. Accordingly, the Applicants' request for a waiver of the provision of Ohio Adm.Code 4901:1-29-06(E)(1) requiring third-party verification of the enrollment on inbound calls, where the retail natural gas supplier or governmental aggregator records the entire call, should be granted. Additionally, the Commission finds that the rule waiver should be extended to apply to all CRNGS suppliers. As noted by the Applicants, the transfer of a call by a telemarketer to a call center representative after a prospective customer has expressed interest in an offer does not constitute an inbound call under this waiver. The Commission also emphasizes that the other requirements of Ohio Adm.Code 4901:1-29-06(E)(1) must still be met; therefore, the Applicants must record the entire call, including the sales portion, the enrollment portion, and the verification portion. Additionally, the Applicants must continue ensuring that the other specific items listed in the rule are verified with the customer in clear, plain language.

{¶ 18} Although the Applicants appear to request the rule waiver for an indefinite period of time, the Commission finds that the waiver should be granted only until the



Commission issues an order addressing the TPV requirement for telephonic enrollment in the pending five-year rule review in Case No. 17-1847-GA-ORD. The Commission agrees with Staff that it is appropriate to test a more streamlined inbound enrollment process, as a means to inform our review of this issue in the pending rulemaking.<sup>1</sup> Therefore, the Commission finds that the requested waiver of Ohio Adm.Code 4901:1-29-06(E)(1) should be granted, subject to Staff's recommendations.

{¶ 19} The Commission finds, at this time, that OCC's motion for a denial of the waiver application should be denied. OCC will have an opportunity to file comments in the pending CRNGS rule review proceeding.

{¶ 20} Finally, the Commission notes that the waiver granted is limited to the purpose of this case only and does not impact the Commission's ability to reconsider this issue in any future proceeding.

### *C. Procedural Issues*

{¶ 21} On December 1, 2017, OCC filed a motion to intervene in this proceeding. OCC argues it has authority under R.C. Chapter 4911 to represent the interests of Ohio's residential utility customers and that the interests of such customers may be adversely affected by this proceeding. OCC further submits that its participation will not unduly prolong or delay the proceeding and that its advocacy will significantly contribute to the full development and equitable resolution of the issues.

{¶ 22} On December 15, 2017, the Applicants responded to OCC's motion to intervene. The Applicants note that they do not object to OCC's intervention in this case.

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<sup>1</sup> With respect to the Applicants' argument that Ohio Adm.Code 4901:1-29-06(E)(1), as adopted in the prior rulemaking, may be inconsistent with the Commission's intent, we note that the argument is better addressed in Case No. 17-1847-GA-ORD.

However, to the extent that OCC's statements are intended to represent grounds for denying the waiver request, the Applicants submit that those grounds are without merit.

{¶ 23} On December 21, 2017, OCC responded to the Applicants' response to OCC's motion to intervene. OCC argues that, although the Applicants do not oppose OCC's motion to intervene, they do dispute statements OCC made for the basis for its intervention, thus addressing substantive issues raised in OCC's motion to intervene. Further, OCC asserts that the Commission should consider the Applicants' response to be a memorandum contra only for purposes of the pleading cycle in Ohio Adm.Code 4901-1-12. Additionally, OCC argues intervention should be granted because consumers need the protection of the third-party verification process.

{¶ 24} Upon consideration of OCC's motion to intervene in this proceeding, the Commission finds that the motion is reasonable and should be granted. The Commission notes that the Applicants do not oppose OCC's intervention. The Commission finds that the motion to intervene filed by OCC complies with the requirements set forth in R.C. 4903.221 and Ohio Adm.Code 4901-1-11, and should, therefore, be granted.

{¶ 25} On January 17, 2018, Applicants filed a joint motion for protective order. Applicants requested an order, pursuant to Ohio Adm.Code 4901-1-24(A)(1), directing that discovery not take place until a procedural course is set. Applicants argue that, if the Commission ultimately finds that there is no need for a hearing, discovery will have resulted in an unnecessary burden and expense. According to the Marketers, OCC's discovery requests are premature and the Applicants have made efforts to resolve this discovery issue with OCC.

{¶ 26} On February 1, 2018, OCC filed a memorandum contra the Applicants' motion for protective order. OCC argues the Commission should deny the motion and order the Marketers to respond to OCC's discovery requests. OCC contends that discovery may begin when a proceeding has commenced and that there is no requirement

that a hearing or procedural schedule be set before parties exercise their discovery rights. Additionally, OCC states that the Marketers have not exhausted all reasonable means for resolving their dispute regarding OCC's discovery requests as required by the Commission's rules.

{¶ 27} On February 8, 2018, Applicants filed a reply to OCC's memorandum contra. The Applicants argue that, if the Commission elects to decide this case based on the information now before it and does not set the matter for hearing, responding to discovery requests would, by definition, impose an unnecessary burden and expense upon Applicants because the purpose of discovery is to permit parties to develop evidence for hearing. Additionally, the Applicants contend, contrary to OCC's assertion, they have complied with the requirement to attempt to resolve the discovery issue and were unable to reach a resolution with OCC.

{¶ 28} The Commission finds that, as the application for waiver has been granted and OCC has not sought to compel discovery, it is not necessary for the Applicants to respond to OCC's discovery requests. The issues raised in the application for waiver will be further addressed in the Commission's CRNGS rule review process and OCC will have the opportunity to fully participate in that proceeding.

### III. ORDER

{¶ 29} It is, therefore,

{¶ 30} ORDERED, That OCC's motion to intervene be granted. It is, further,

{¶ 31} ORDERED, That the Applicants' motion for protective order is moot. It is, further,

{¶ 32} ORDERED, That the Marketers' application for waiver be granted to the extent set forth in this Entry. It is, further,

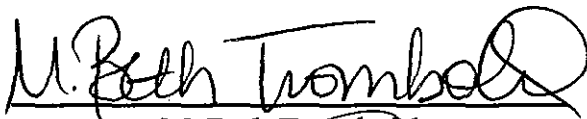
{¶ 33} ORDERED, That OCC's motion for a denial of the application for waiver be denied. It is, further,

{¶ 34} ORDERED, That a copy of this Entry be served upon all parties of record.

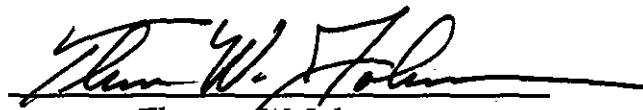
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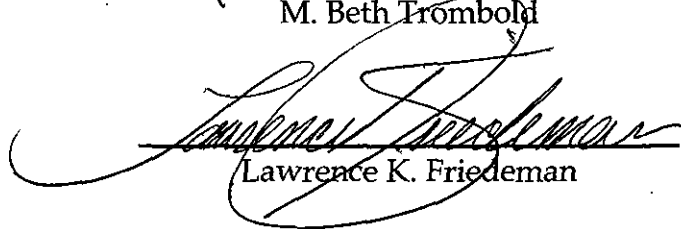
Asim Z. Haque, Chairman



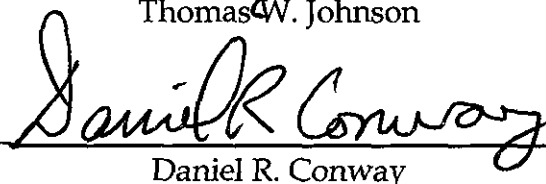
M. Beth Trombold



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Lawrence K. Friedeman



Daniel R. Conway

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Barcy F. McNeal  
Secretary