

FILE

BEFORE  
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	:	Case No. 17-2358-GA-WVR
SouthStar Energy Services, LLC	:	
for a Waiver of a Provision of	:	
Rule 4901-29-06(E)(1) of the Ohio	:	
Administrative Code.	:	

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JOINT MEMORANDUM CONTRA OCC APPLICATION FOR REHEARING

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By the above-styled application filed herein on November 15, 2017, Direct Energy Services, LLC, Direct Energy Business, LLC, Dominion Energy Solutions, Inc., Interstate Gas Supply, Inc., and SouthStar Energy Services, LLC (collectively, "Applicants") sought a waiver of the provision of Rule 4901:1-29-06(E)(1), Ohio Administrative Code ("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. The waiver request was limited to enrollments resulting from customer-initiated inbound calls.

The Office of the Ohio Consumers' Counsel ("OCC"), through its motion to intervene and subsequent motion to deny the application, opposed the waiver request,<sup>1</sup> while the

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<sup>1</sup> See OCC Motion to Intervene dated December 1, 2017 and OCC Motion to Deny Application dated January 19, 2018.

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Commission staff (“Staff”), in filed comments, indicated that it had no objection to the requested waiver so long as all other requirements of Rule 4901:1-29-06(E)(1), OAC, remain in place.<sup>2</sup>

By entry dated November 14, 2018 (“Entry”), the Commission granted the waiver request, finding that Applicants had shown good cause for the waiver as required by Rule 4901:1-29-02(C), OAC.<sup>3</sup> On December 14, 2018, OCC filed an application for rehearing from the Entry, wherein OCC alleges that the Entry is unjust and unreasonable in four particulars. For those reasons set forth below, Applicants submit that none of the grounds for rehearing advanced by OCC has merit and urge the Commission to deny the rehearing application. However, before addressing OCC’s assignments of error, Applicants would offer the following general observation regarding OCC’s position in this matter.

As in its earlier filings in this docket, OCC peppers its application for rehearing with charges that waiver of the TPV telephonic enrollment requirement will put customers at risk for misleading, deceptive, unfair, and unconscionable acts and practices in the marketing, solicitation, and sale of competitive retail natural gas service.<sup>4</sup> Nothing could be farther from the truth. The requirement that the entire call be recorded will remain in place, and the recording will be retained and archived in accordance with the Commission’s rules. That recording will provide irrefutable evidence of exactly what was said during the call. The only thing that will change is that the customer verification – the acknowledgement by the customer that he/she has been provided the information required by the subparagraphs of Rule 4901:1-29-06(E)(1), OAC – will no longer be recorded twice, once by the supplier and a second time by the third-party

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<sup>2</sup> See Staff Comments dated August 21, 2018, at 1.

<sup>3</sup> See Entry, ¶¶ 4-6.

<sup>4</sup> See, e.g., OCC Memorandum in Support, 5.

verifier. Because a third-party verifier recording does not include the sales portion of the call, it sheds no light on the question of whether the supplier has engaged in misleading, deceptive, unfair, and unconscionable acts and practices. Nor does it provide evidence as to whether the required supplier representations and customer acknowledgements were actually made during the call. That evidence is contained in the supplier recording of the entire call, which will continue to be available to the Commission in the event of a subsequent dispute.

To hear OCC tell it, one might get the impression that the TPV requirement for telephonic enrollment is the most important customer protection device since the invention of the seat belt. However, if OCC truly believes that the TPV requirement is indispensable, where was OCC in Case No. 12-925-GA-ORD,<sup>5</sup> the rulemaking proceeding in which the telephonic enrollment TPV requirement somehow crept into Rule 4901:1-29-06(E)(1) despite the fact that no participant in that case, including OCC, had advocated it? And where was OCC in Case No. 12-1924-EL-ORD,<sup>6</sup> the competitive retail electric service (“CRES”) rulemaking proceeding? As in Case No. 12-925-GA-ORD, no participant in the CRES rulemaking, including OCC, advocated a telephonic enrollment TPV requirement. As Applicants have previously explained, the fact that the CRES telephonic enrollment adopted the same day as Rule 4901:1-29-06(E)(1) contains no TPV requirement is one of a number of factors that strongly suggest that the adopted version of Rule 4901:1-29-06(E)(1) was not consistent with the Commission’s intent. Applicants will not repeat that discussion here, but, sufficeth to say, the fact that OCC did not advocate a TPV

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<sup>5</sup> 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. 12-925-GA-ORD (Finding and Order dated December 18, 2013, as modified by Entry on Rehearing dated February 26, 2014).

<sup>6</sup> 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 18, 2013).

requirement for telephonic enrollments in either of these rulemaking proceedings indicates that its newfound unbridled support for such a requirement is a tad disingenuous.

The reason no participant in either of these rulemaking proceedings recommended TPV for telephonic enrollments was that the participants recognized that if the required representations and customer acknowledgements required by the applicable telephonic enrollment rule have already been recorded by the supplier, there is no need to record them a second time. All this requirement does is add costs for the suppliers and annoy customers, who are inconvenienced by being subjected to a memory test by the third-party verifier despite the fact that they have already indicated that they wish to accept the supplier's offer and have already acknowledged that the supplier has provided the information required by the subparagraphs of Rule 4901:1-29-06(E)(1), OAC, all of which is captured by the supplier recording of the entire call. Thus, even if, despite the fact that the Commission never mentioned the TPV telephonic enrollment requirement in its finding and order or entry on rehearing in Case No. 12-925-GA-ORD, it did intend to include this requirement in the rule, the determination in the Entry that applicants have shown good cause for the requested waiver is unassailable.

1. The Entry complies with the R.C. 4903.09 requirement that the Commission set forth the reasons prompting its decisions.

As its first assignment of error, OCC asserts that the Commission violated R.C. 4903.09 because the Entry failed to explain the basis for the Commission's determination that Applicants had demonstrated good cause for the rule waiver requested in the joint application.<sup>7</sup> This argument is mystifying, to say the least.

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<sup>7</sup> OCC Application for Rehearing, 2; OCC Memorandum in Support, 4-6.

As a review of the Entry will quickly show, the Commission summarized the various factors set forth by Applicants in their joint application as grounds for a finding that good cause exists for granting the waiver, the showing required by Rule 4901:1-29-02(C), OAC.<sup>8</sup> The Commission then recounted the arguments advanced in Applicants' memorandum contra OCC's motion to deny the application that refuted OCC's claim that good cause for granting the waiver had not been established.<sup>9</sup> Thus, although OCC faults the Commission for not explaining the finding that "the Applicants have shown good cause for the requested waiver,"<sup>10</sup> it is apparent that this finding was the result of the Commission's acceptance of Applicants' position as set forth in its filings and the rejection of the position of OCC. Having stated Applicants' position, there was no need for any further explanation. Although this should end the matter, there are two propositions offered by OCC in an attempt to support this assignment of error that Applicants cannot permit to pass without comment.

First, OCC states that "the requirements for 100% third-party verification of telephone solicitations were adopted because of significant abuses that occurred during telephonic sales by marketers of residential natural gas service."<sup>11</sup> What is the basis of this assertion? There is certainly nothing in the record in Case No. 12-925-GA-ORD that supports this claim. In fact, what the Commission said in its finding and order in that case was that its call center received customer complaints that turned on discrepancies between the accounts offered by the customer and the sales representative as to the representations that were made during the call.<sup>12</sup> The

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<sup>8</sup> See Entry, ¶¶ 4-6.

<sup>9</sup> See Entry, ¶¶ 11-12.

<sup>10</sup> Entry, ¶ 17.

<sup>11</sup> OCC Memorandum in Support, 5.

<sup>12</sup> See Case No. 12-925-GA-ORD Finding and Order, 46.

Commission addressed that problem by finding that the entire call, including the sales portion, should be recorded, but made no mention of any need for a TPV requirement.<sup>13</sup> In any event, any “significant abuses that occurred during telephonic sales” would be captured on the recording of the sales portion of the call, not by a subsequent third-party verifier recording of the verification process.

Second, OCC claims that the “consumer protections offered by the rule simply cannot be duplicated by a marketer recording the entire sales call,” noting that, although the supplier recording of the entire call could ultimately reveal improper acts or practices by the supplier down the road, the TPV requirement could prevent the consumer from being unlawfully switched in the first place.<sup>14</sup> However, the important point that OCC misses is that the waiver of the TPV requirement applies only in the case of inbound calls initiated by a customer that has acted affirmatively to accept a specific supplier offer that the customer already has in hand, and not to unsolicited cold sales calls initiated by a telemarketer. In this circumstance, the memory test administered by the third-party verifier may frustrate the customer’s stated intent to enroll with a supplier if the customer happens to miss a single question posed by the third-party verifier. Such an outcome is patently unreasonable, especially when one considers that the customer could have accepted the offer by mail or online – which requires no third-party corroboration – but chose to enroll by telephone because he or she found it more convenient. Further, these customers are also protected from being switched without their consent by the

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<sup>13</sup> *Id.*

<sup>14</sup> OCC Memorandum in Support, 6.

rescission period provided in Rule 4901:1-29-06(H)(3), OAC, and can shut down the enrollment if they did not actually consent to service by the supplier in question.

Rehearing on this ground should be denied.

2. The Commission's determination that the waiver should be extended to all suppliers of competitive retail natural gas service ("CRNGS") was necessary to avoid providing the Applicants with a competitive advantage.

As its second ground for rehearing, OCC charges that the Commission's finding that the waiver should be extended to all CRNGS suppliers<sup>15</sup> was unlawful, unjust, and unreasonable because, according to OCC, extending the waiver in this fashion puts more customers "at risk of misleading, deceptive, unfair, and unconscionable acts and practices in the marketing, solicitation, and sale of competitive retail natural gas service."<sup>16</sup> For those reasons previously stated, the waiver does not put any customers at risk for any such acts or practices. Rather, the waiver merely removes the requirement that the various supplier representations and customer acknowledgements spelled out in the subparagraphs of Rule 4901:1-29-06(E)(1), OAC, be recorded twice, once by the supplier and a second time by a third-party verifier. However, the point, for purposes at hand, is that the Commission could not lawfully limit the waiver to the Applicants because such a measure would be discriminatory on its face. Plainly, to relieve the Applicants of the costs associated with telephonic TPV while forcing other CRNGS suppliers to continue to incur such costs would place the latter at a competitive disadvantage. Accordingly, rehearing on this ground must be denied.

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<sup>15</sup> See Entry, ¶ 17.

<sup>16</sup> OCC Application for Rehearing, 2; OCC Memorandum in Support, 6-7.

3. OCC's claim that the Commission erred by failing to establish metrics for determining if the waiver generates an increase in customer complaints is without merit.

For its third ground for rehearing, OCC asserts that the Commission erred by granting the waiver of the rule “for the purpose of testing the proposed enrollment process but without establishing any metrics for gauging whether the process protects consumers against misleading, deceptive, unfair, and unconscionable acts and practices in marketing, solicitation, and sale of competitive retail natural gas service.”<sup>17</sup> Two points bear mention.

First, contrary to OCC's premise, the Commission did not grant the waiver of telephonic TPV requirement “for the purpose of testing the proposed enrollment process.” Here is what happened. As a review of the joint application will show, after making the case that just cause existed for granting the requested waiver, Applicants mentioned that a valuable byproduct of granting the waiver at this time rather than waiting for the mandatory five-year review of Chapter 4901:1-29, OAC, to take up the issue was that it would provide the Commission with the opportunity to determine if eliminating the TPV requirement for telephonic enrollment leads to an increase in customer complaints. That there would be actual experience under the waiver would inform the Commission's decision in the rulemaking case as to whether the rule should be amended by striking the TPV requirement.<sup>18</sup> Applicants made this point again in its memorandum contra OCC's motion to deny the application in response to OCC's misguided contention that any change to the telephonic enrollment process should only be considered in the next rulemaking proceeding.<sup>19</sup> Staff echoed Applicant's point in its Comments, noting that

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<sup>17</sup> OCC Application for Rehearing, 2; OCC Memorandum in Support, 7-10.

<sup>18</sup> Joint Application, 15.

<sup>19</sup> Joint Memorandum Contra, 24-25.



granting the waiver at this time would permit a field test of the streamlined enrollment process.<sup>20</sup> Although the Commission agreed with the Staff's observation in the Entry,<sup>21</sup> the basis for granting the waiver was the Commission's finding that applicant had demonstrated good cause for doing so.<sup>22</sup> The fact that the Commission will be able to determine if the waiver results in an increase in customer complaints before considering whether to eliminate the TPV telephonic enrollment process in the pending rulemaking proceeding is simply an additional benefit of granting the waiver request at this time.

Second, and more importantly, it is readily apparent that OCC's professed concern over the Commission's failure to establish metrics for determining whether the waiver has resulted in a sharp uptick in customer complaints is merely a pretense for opening the door to an investigation into other matters that have nothing to do with the number of customer complaints generated by the waiver of the TPV telephonic enrollment requirement, such as whether customers are saving or losing money with their supplier, and whether customers that have enrolled telephonically via inbound calls understand the terms and conditions of their supply contract.<sup>23</sup> Although OCC may be interested in this information, there is no nexus between information of this type and the method by which customer enrollment is effectuated. Supplier offers and the price to compare are publicly available on the Commission's apples-to-apples chart, and all customers receive a copy of their supply contract regardless of whether they enroll by mail, online, or by telephone.

Rehearing on this ground should be denied.

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<sup>20</sup> Staff Comments, 1-2.

<sup>21</sup> See Entry, ¶ 18.

<sup>22</sup> See Entry, ¶ 19.

<sup>23</sup> See OCC Memorandum in Support, 9-10.

4. OCC's claim that the Commission should have stayed the effective date of the waiver pending the outcome of the rehearing process is untenable.

As its final ground for rehearing, OCC contends that it was unjust and unreasonable for the Commission to fail to stay implementation of the waiver pending completion of the rehearing process.<sup>24</sup> In other words, notwithstanding that OCC did not request such a stay at any point before the Entry was issued, OCC now faults the Commission for not staying the effective date of the waiver on its own motion until such time as it ruled upon any subsequent applications for rehearing. Of course, OCC cites no precedent for the Commission staying the effective date of an order *sua sponte* pending a ruling on any rehearing applications that might be filed because no such precedent exists. Rather, OCC merely points to an instance in which the Commission granted rehearing for purposes of considering issues raised on rehearing to avoid the denial of the application for rehearing by operation of law,<sup>25</sup> then allowed the matter to languish for an extended period.<sup>26</sup> What this has to do with the issue at hand escapes us.

R.C. 4903.15 provides that, “(u)nless a different time is specified therein or by law, every order made by the public utilities commission shall become effective immediately upon entry thereof upon the journal of the public utilities commission.” Thus, the waiver granted in this case was effective November 14, 2018, and Applicants have changed their call center protocols for verification of telephonic enrollments resulting from customer-initiated inbound calls in reliance on this effective date. Although R.C. 4903.10(B) provides for an automatic stay of the effective date in instances in which the application for rehearing is filed before the effective date of the order, the statute further provides that “(i)n all other cases the making of such an

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<sup>24</sup> OCC Application for Rehearing, 2; OCC Memorandum in Support, 10-11.

<sup>25</sup> See R.C. 4903.10(B).

<sup>26</sup> OCC Memorandum in Support, 10.

application shall not excuse any person from complying with the order, or operate to stay or postpone the enforcement thereof, without a special order of the commission.” Having failed to seek a special order staying the waiver prior to the effective date, OCC now tries an end run around the plain language of these statutes by claiming that the Commission acted unreasonably and unlawfully by not imposing an unprecedented stay of the effective date of a waiver on its own motion. The Commission should give this argument the short shrift it deserves and should deny rehearing on this ground.

WHEREFORE, Applicants respectfully request that OCC’s application for rehearing be denied in its entirety.

Respectfully submitted,

/s/ Scott Dismukes

(By BER per 12/20/18 Email Authorization)

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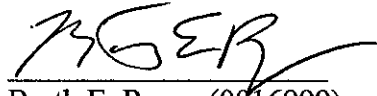
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Certificate of Service

I hereby certify that a copy of the foregoing was served by electronic mail on the following parties this 21st day of December 2018.

  
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