BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE COMMISSION'S REVIEW OF CHAPTER 4901:1-10 OF THE OHIO ADMINISTRATIVE CODE	))))	CASE NO. 17-1842-EL-ORD

JOINT INITIAL COMMENTS OF THE RETAIL ENERGY SUPPLY ASSOCIATION AND DIRECT ENERGY BUSINESS, LLC/DIRECT ENERGY SERVICES, LLC

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INTRODUCTION

The Retail Energy Supply Association (RESA), Direct Energy Business, LLC, and Direct Energy Services, LLC (collectively, "Direct") jointly submit these Initial Comments in accordance with the Entry of July 17, 2019.[1]

Ohio Administrative Code Chapter 4901:1-10 requires "investor-owned electric utilities" and "transmission owners" to observe certain minimum service, safety, and reliability standards.[2] These rules give substance to the statutory requirement of electric utilities to render "adequate service."[3] Any revisions to the rules should continue to "promote safe and reliable service to consumers and the public," and provide "minimum standards for uniform and reasonable practices."[4] For the most part, Staff's proposed revisions accomplish this objective.

Staff's revisions leave most of the existing electric service and safety standards intact. RESA's and Direct's comments will focus on three substantive additions: (i) a new prohibition against including charges for nonelectric goods and services on utility bills; (ii) new standards for prepaid services; and (iii) a new mechanism permitting customers to "block" their account to prevent a change of suppliers. Before addressing Staff's proposals, however, RESA and Direct will first address a proposal of their own.

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[1] The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member. Founded in 1990, RESA is a broad and diverse group of twenty retail energy suppliers dedicated to promoting efficient, sustainable and customer-oriented competitive retail energy markets. RESA members operate throughout the United States delivering value-added electricity and natural gas service at retail to residential, commercial and industrial energy customers. More information on RESA can be found at www.resausa.org.

[2] OAC 4901:1-10-02(A)(1).

[3] *See* R.C. 4905.22.

[4] OAC 4901:1-10-02(A)(2).

COMMENTS

1. The Commission should require the customer bill of rights to advise customers of their right to shop for competitive services.

Chapter 4901:1-10-12 requires electric utilities to provide new customers (and current customers upon request) "a written summary of their right and obligations" in "clear and understandable language." This summary is usually referred to as the "customer bill of rights." A new customer reading a customer bill of rights developed under current rules would learn that there is something called a "CRES provider" and a "standard service offer," but customers should not be expected to know what these terms mean. The customer bill of rights assumes too much knowledge on the part of the reader.

The bill of rights should inform customers of their options for generation service. Customers should be informed that their electric utility is required to provide a standard service offer (SSO). Customers should also be informed that they are not required to take service under the SSO; generation is a competitive service that customers have the right to shop for, if they so choose. Adding the following two paragraphs before current Rule 4901:1-10-12(G) would accomplish these disclosures:

> NEW (G): A statement that the electric utility is required to provide consumers, on a comparable and nondiscriminatory basis within its certified territory, a standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service. [5]
>
> NEW (H): A statement that electric generation service is a competitive retail electric service and that the customer has the right to shop for electric generation

[5] *See* R.C. 4928.141(A) ("[A]n electric distribution utility shall provide consumers, on a comparable and nondiscriminatory basis within its certified territory, a standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service.").

service from a competitive retail electric supplier (CRES). The statement shall include a reference to the Customer Choice FAQ on the Commission's website.

Adding the two paragraphs above would also make existing disclosures more understandable. After being advised of the right to receive generation service under an SSO or from a CRES, customers would read:

~~(G)~~(I): A statement that customers have the right to obtain, from their electric utility, a list of available CRES providers, that are actively seeking residential customers in its service territory and their phone numbers.

~~(H)~~(J): A statement that customers returning to the electric utility's standard offer service due to default, abandonment, slamming, or certification rescission of a CRES provider will not be liable for any costs associated with the switch.

The remaining paragraphs in Rule 4901:1-10-12 should be re-designated as (K), (L), and so on, with no substantive changes.

RESA and Direct's proposal is consistent with state energy policy and the Commission's ongoing responsibility to "educate consumers in this state regarding electric industry restructuring [.]"[6] Electric industry restructuring allows customers to choose their generation provider. Customers should be informed that they have this choice.

2. The Commission should reject the proposal to allow CRES supplier blocks on utility accounts.

RESA, Direct, the Commission, and Ohio's electric utilities are all on the same page: no one wants to see "slamming," or unauthorized switching of generation suppliers. To RESA and Direct's knowledge, verified slamming complaints are so rare as to be virtually non-existent. Yet Staff is proposing new Section 4901:1-10-24(H), which provides:

Each electric utility shall allow any customer to request a competitive retail electric service provider block be placed on their account. The block shall prevent the customer generation service provider from being switched without the customer's authorization to the electric utility in the form of a customer provided code or other customer identifiable manner. The release shall be provided to the

[6] R.C. 4928.19.

electric utility from the customer or other authorized persons on the account. The code shall be considered confidential customer information.

Staff's proposal seems to be a solution in search of a problem. The Commission should reject it for the reasons that follow.

a. The proposed rule is unnecessary.

As a practical matter, current law already "blocks" any change of generation supplier without customer. Staff's proposal would also block a change of suppliers without customer consent. The proposal offers no new protection against slamming.

In restructuring the electric generation market, the legislature knew about the potential for slamming. It addressed this by directing the Commission to adopt rules prohibiting "switching, or authorizing the switching of, a customer's supplier of competitive retail electric service without the prior consent of the customer in accordance with appropriate confirmation practices, which may include independent, third-party verification procedures."[7] The subsequently-promulgated rules incorporate numerous safeguards that not only protect customers against slamming, but make customers whole if slamming is found to have occurred.[8] To RESA and Direct's knowledge, these rules have worked—and worked well.

The current rules do not require customers to do anything to receive protection against slamming. "CRES providers are prohibited from enrolling potential customers without their consent and proof of that consent as delineated in paragraph (D) of this rule."[9] Electric utilities, as well, are prohibited from disclosing account information (which is necessary to complete an

[7] R.C. 4928.10(D)(4).
[8] *See* OAC 4901:1-21(D)(1)(f)("The CRES provider shall not initiate the switch of a customer's electric service with the electric utility prior to the completion of the enrollment transaction with the customer.")
[9] *See* OAC 4901:1-21-06(C).

enrollment) unless the customer has consented to the release of this information.[10] The rules also lay out detailed procedures for investigating and remedying slamming complaints.[11] This procedure effectively places the burden on CRES providers to prove that a customer enrolled; customers do not need to prove they did not enroll.[12] Electric utilities are required to inform customers of the procedure to follow if the customer believes he or she has been slammed.[13]

The proposed rule offers no new protections for customers. But it *would* create confusion and undue burden, as discussed next.

b. The proposed rule would be confusing and burdensome to customers.

The proposed rule would send a mixed message to customers. Current rules require electric utilities to inform customers that their account information may not be disclosed, nor their supplier changed, without the customer's affirmative consent.[14] The new rule would "allow any customer to request a competitive retail electric service provider block be placed on their account." These rules would telegraph mixed messages. Telling customers that their supplier cannot be switched without their consent, and at the same time telling them they may block their account to prevent unauthorized switching, is a recipe for confusion. Suggesting that a block may be necessary to prevent unauthorized switching unnecessarily calls into question the Commission's confidence in its ability to enforce existing rules. Customers could be led to believe that if they do *not* set up a block, their supplier could be changed without their consent.

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[10] *See* OAC 4901:1-10-24(E)(1)("An electric utility shall not disclose a customer's account number without the customer's consent and proof of that consent as delineated in paragraph (E)(4) of this rule [.]").
[11] OAC 4901:1-10-21(H) (titled "Slamming Complaints").
[12] *See* OAC 4901:1-21-08(C)(4)("[I]f the CRES provider cannot produce valid documents confirming that the customer authorized the switch, there shall be a rebuttable presumption that the customer was switched without authorization.").
[13] *See* OAC 4901:1-10-12(J) ("Information explaining the procedures customers must follow if they believe their generation and/or transmission service has been switched without their consent.").
[14] OAC 4901:1-10-12(I).

Additionally, customers may erroneously assume that requesting a block on their account also removes them from the list of customers eligible to shop (not true) and will prevent them from receiving marketing materials from CRES providers (also not true).

Confusion created by the new rule would be compounded by undue burden. Enrollments could not proceed on blocked accounts unless the customer provides a "code or other customer identifiable manner." Anyone who has ever bought anything online or subscribed to a website knows how frustrating it is to keep track of passwords and log-in credentials—in addition to whatever other credentials customers already have with their utility. Additional credentials seem especially unnecessary given all of the other information a customer must provide to confirm an enrollment—including a 15 to 20-digit account number. Additional procedures would need to be established to verify the identity of customers who forget their credentials—which is to say, most customers.

The proposed rule is not consumer-friendly. It would make enrollments more difficult simply for the sake of being difficult. A new category of litigation would be created to address disputes about whether a particular account was blocked, whether the account should have been blocked, or whether some "other authorized person" had authority to consent to an enrollment despite a block. And then there is the issue of what happens if an account is blocked without the consent of the "customer." Does every adult member of a household, regardless of whether they are listed on the bill, have authority to request a block? Does the utility have sole discretion to decide who may or may not request a block, or whether a block may only be applied to prevent switching *from* the utility? Is the utility liable for "slamming" if it initiates a block without proper consent? If a customer moves within the utility service area, does the block follow the customer or does it remain associated with the property? Can a customer place a block to prevent

being switched from their current supplier to default service or another supplier? These are all valid questions that deserve answers before proceeding along the path proposed by Staff.

c. The proposed rule is discriminatory and anti-competitive.

Another problem with the proposed rule is that it is entirely one-sided. By design, the rule is intended to prevent switching from the standard service offer to an offer available from a competitive supplier. The rule makes no allowance for a shopping customer to block their account from being switched from their chosen supplier to the utility or another supplier. The rule is discriminatory on its face. It benefits utilities by preventing *their* customers from being switched without consent, but does not extend the same benefit to CRES suppliers.

d. The proposed rule is unlawful.

Whatever good intentions may have motivated this proposal are not a substitute for the Commission's legal authority to adopt it. "The PUCO, as a creature of statute, has no authority to act beyond its statutory powers." *Disc. Cellular, Inc. v. Pub. Util. Comm.,* 2007-Ohio-53, ¶ 51, 112 Ohio St. 3d 360, 373, 859 N.E.2d 957, 969. "The commission cannot *sua sponte* enlarge its statutory authority by rule." *Time Warner AxS v. Pub. Util. Comm.,* 1996-Ohio-224, 75 Ohio St. 3d 229, 240–41, 661 N.E.2d 1097, 1106.

The legislature has declared generation service a competitive service that "consumers may obtain . . . from any supplier or suppliers."[15] With very few exceptions, all customers are eligible to shop for generation service. Customers are also eligible to participate in aggregation. The legislature intended for shopping and aggregation to be available to everyone but forced on no one. It accomplished this goal in different ways by treating shopping and aggregation differently.

[15] R.C. 4928.03.

Suppliers can market to everyone eligible to shop but may only enroll customers who have affirmatively consented to changing suppliers. The affirmative consent requirement ensures that customers remain with their utility until they choose otherwise.

Affirmative consent is not required to enroll customers through an aggregation program. To avoid what amounts to "involuntary" enrollment, customers may opt-out of aggregation by placing themselves on a "do not aggregate list."[16] The opt-out mechanism for aggregation accomplishes the same goal as the affirmative consent requirement for shopping customers: it prevents a change of suppliers.

"As a general rule of statutory construction, the specific mention of one thing implies the exclusion of another." *Montgomery Cty. Bd. of Comm'rs v. Pub. Utilities Comm'n*, 28 Ohio St. 3d 171, 175, 503 N.E.2d 167, 170 (1986). Staff's proposed rule essentially creates an opt-out mechanism for shopping customers that the legislature intended only for customers subject to aggregation. If the legislature wanted to allow a "do not shop" list to coincide with a "do not aggregate" list, it would have crafted legislation accordingly. It did not.

To reiterate a point made earlier, RESA and Direct condemn slamming. A customer's supplier should not be changed without consent. RESA and Direct support existing rules that prohibit slamming. If data shows that these rules are inadequate—and RESA and Direct are not aware of any such data—then RESA and Direct would like to be part of the solution. RESA and Direct cannot get behind any "solution" until Staff provides a better explanation of the problem.

3. The proposed rule regarding non-commodity billing should be clarified.

RESA and Direct have no philosophical objection to new rules providing guidance on the billing of "non-commodity" goods and services. The rules should not prohibit electric utilities

[16] R.C. 4928.21.

from allowing charges for nonelectric products or services from being included on utility bills when these goods or services are provided by a CRES or other separate entity

Staff's specific proposals are problematic, starting with the following definition:

> (W) "Non-commodity good" or "Non-commodity service" is neither a tariffed service provided by an electric distribution utility nor a competitive retail electric service as set forth in division (A)(4) of section 4928.01 of the Revised Code.

In other words, charges for a "tariffed service" and "competitive retail electric service" would be permitted on utility bills. Charges for "neither" of these services would not be permitted.

While not as clear a definition as it could be, Staff seems to define non-commodity goods and services to mean the same thing as "nonelectric product or service" under R.C. 4928.17(A)(1). The structure and context of R.C. 4928.17 make clear that "nonelectric product or service" is shorthand for "a product or service other than retail electric service."[17] Staff's definition should therefore be changed as follows:

> (W) "Nonelectric ~~commodity~~ good" or "Nonelectric ~~commodity~~ service" means a good or service other than "retail electric service," ~~is neither a tariffed service provided by an electric distribution utility nor a competitive retail electric service~~ as set forth in division (A)~~(4)~~(27) of section 4928.01 of the Revised Code.

But even under this revised definition, it is not entirely clear what Staff is trying to accomplish. Under proposed Rule 4901:1-10-22(K):

> No bill format shall contain charges for non-commodity goods or services from a third party supplier *or* the EDU. (Emphasis added.)

[17] *See* R.C. 4928.17(A) and (A)(1). Under R.C. 4928.01(A)(27), "retail electric service" means "any service involved in supplying or arranging for the supply of electricity to ultimate consumers in this state, from the point of generation to the point of consumption. For the purposes of this chapter, retail electric service includes one or more of the following "service components": generation service, aggregation service, power marketing service, power brokerage service, transmission service, distribution service, ancillary service, metering service, and billing and collection service."

And under proposed Rule 4901:1-10-33(L):

> No consolidated bill format shall contain charges for non-commodity goods or services from a thirty party *of* the EDU. (Emphasis added.)

It is not clear whether Staff intended to use "or" in one chapter and "of" in the other or whether this is a typo. "Or" would seem to make sense in both chapters, but perhaps Staff intended consistency with "of." RESA and Direct are not in a position to support or oppose a proposal they do not understand.

Any final rules concerning non-commodity billing should be consistent with statutes that govern the same topic. An electric utility/EDU cannot lawfully offer "non-commodity goods or services." These services may only be offered through "a fully separated affiliate" of the electric utility.[18] There is really no reason to prohibit by rule that which is already prohibited by statute; *i.e,* the offering of non-commodity goods or services by an EDU. If the Commission is inclined to do so anyway, RESA and Direct have no objection.

The rules should not prohibit electric utilities from allowing charges for nonelectric products or services from being included on utility bills when these goods or services are provided by a CRES or other separate entity. R.C. 4928.17 specifically allows an electric utility/EDU to include charges on the utility bill for nonelectric products and services offered by an affiliate of the utility (assuming all of the code of conduct requirements have been checked). If utilities are allowed to include their affiliates' charges on a bill, non-affiliated entities must have access to the bill as well.

[18] R.C. 4928.17(A)(1).

In light of the definitional issues discussed above, the proposed rules should be clarified to conform to R.C. 4928.17.

4. The proposed rules regarding pre-paid service are unnecessary.

The new rules in 4901:1-10-22(C) and 4901:1-10-33(F) pertain to "prepaid services." These rules are also unnecessary.

Proposed Rule 4901:1-10-22(C) sets for certain standards for prepaid services offered by an electric utility. Although the standards themselves are not objectionable, they are misplaced. Any electric utility wishing to offer prepaid services must file an appropriate tariff and receive approval to offer the service. Any conditions or standards associated with the service must be included in the tariff. A rule authorizing prepaid service does not trump the statutory requirement for tariff approval of *all* services.[19]

Proposed Rule 4901:1-10-33(F) would apply the same standards proposed in Section 22(C) to prepaid services offered by CRES suppliers. But the "new" standards do not require much more than what is already required under existing rules. For example, Section (33)(F)(1) requires that certain contract terms be disclosed and agreed to, but numerous statutes and rules already require disclosure and consent for *all* terms of *all* contracts. Likewise, Section 33(F)(2) requires account statements for prepaid services to "be consistent with requirements indicated in (C), (D), and (E) of this rule," but CRES suppliers are already required to comply with those provisions.

[19] *See* R.C. 4928.15(A) ("[N]o electric utility shall supply noncompetitive retail electric distribution service in this state on or after the starting date of competitive retail electric service except pursuant to a schedule for that service that is consistent with the state policy specified in section 4928.02 of the Revised Code and filed with the public utilities commission under section 4909.18 of the Revised Code.").

CONCLUSION

The existing electric service and safety standards have worked relatively well. Any amendments should be narrowly-tailored to address real, demonstrable issues supported by adequate data and analysis. The Commission should adopt RESA and Direct's recommendations.

Date: August 16, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing document was electronically filed this 16th day of August, 2019. Parties subscribed to DIS will receive automatic notification of this filing.

/s/ Mark A. Whitt

Summary: Comments Joint Comments of Retail Energy Supply Association and Direct Energy Business, LLC/Direct Energy Services, LLC electronically filed by Shelli T Clark on behalf of Direct Energy Business, LLC and Direct Energy Services, LLC and Retail Energy Supply Association