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

MEMORANDUM CONTRA APPLICATIONS FOR REHEARING OF THE RETAIL ENERGY SUPPLY ASSOCIATION AND DIRECT ENERGY BUSINESS, LLC/DIRECT ENERGY SERVICES, LLC

INTRODUCTION

The Retail Energy Supply Association (RESA), Direct Energy Business, LLC, and Direct Energy Services, LLC (collectively, "Direct") jointly respond to the Applications for Rehearing filed on March 27, 2020 by Ohio Office of Consumers' Counsel, FirstEnergy (collectively, Ohio Edison Company, Toledo Edison Company and The Cleveland Electric Illuminating Company), Duke Energy Ohio, Inc., Ohio Power Company, and Dayton Power & Light Company. The Applications should be denied for the reasons that follow.[1]

ARGUMENT

"In determining whether any order of the commission is unlawful and unreasonable, inquiry should therefore be made, not only into the evidence, to determine whether the order is properly supported by the evidence, but also into the proceedings during the course of the hearing, to determine whether the statutes relative to procedure have been followed and whether

[1] Unless otherwise indicated, this memorandum contra refers to the electric distribution utilities-rehearing applicants as "the EDUs."

the law applicable to the proceeding has been properly applied." *Village of St. Clairsville v. Pub. Util. Comm'n*, 102 Ohio St. 574, 579, 132 N.E. 151, 152 (1921).

R.C. 4928.11 requires the Commission to adopt rules "that specify minimum service quality, safety, and reliability requirements for noncompetitive retail electric services supplied by an electric utility in this state [.]" As with all statutes directing the Commission to promulgate rules, "we defer to the commission's expertise in deciding the most effective means of implementing the legislature's intent." *Ohio Consumers' Counsel v. Pub. Util. Comm.,* 2008-Ohio-860, ¶ 28, 117 Ohio St. 3d 289, 296, 883 N.E.2d 1025, 1032. The February 26, 2020 Finding and Order represents a reasonable and lawful exercise of discretion. With regard to the issues addressed below, none of the parties seeking rehearing have demonstrated otherwise.

A. The Commission should deny rehearing regarding O.A.C. 4901:1-10-33(A).

Rule 4901:1-10-33 addresses consolidated billing; *i.e.,* including charges for both competitive and noncompetitive goods and services on the EDU bill. Staff's original rule changes proposed to disallow consolidated billing of "non-commodity goods and services." The Commission rejected this proposal. "However, the Commission does acknowledge IGS's concern about unreasonable preferences and competitive advantages, considering the current rules have not directly addressed the situation where an EDU consistently enters into a contract only with the EDU's affiliate regarding placement of only that affiliate's non-jurisdictional service charges on the EDU's bill at the exclusion of all potential providers."[2] To address this concern, the Commission added the following language to subsection (A): "An electric utility

[2] Finding and Order ¶ 213.

cannot discriminate or unduly restrict a customer's CRES provider from including non-jurisdictional charges on a consolidated electric bill."[3]

OCC and each of the EDUs object to this rule change. Their positions are addressed below.

1. OCC

OCC argues that EDU bills may only include charges for "jurisdictional" goods and services. "Nowhere in 4928.10, R.C. 4905, or R.C. 4909 is the PUCO vested with authority to establish rules that authorize non-jurisdictional charges to be included on a regulated monopoly customer's electric bill."[4]

OCC is mistaken. The statutory definition of "retail electric service" specifically includes "generation service, aggregation service, power marketing service, power brokerage service, transmission service, distribution service, ancillary service, metering service, *and billing and collection service*."[5] Billing and collection is a non-competitive retail electric service.[6] The Commission plainly has authority to regulate what charges may appear on an EDU's bills. The revised rule regulates *bills*, not the underlying *service* for which a charge appears on the bill.[7]

The revised rule does not "authorize" anything not previously authorized.[8] As the Commission is aware, EDUs have collected charges for warranty products and other "non-

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[3] *Id*.
[4] OCC App. Rehearing at 10.
[5] R.C. 4928.01(A)(27) (emphasis added).
[6] R.C. 4928.01(B) ("For the purposes of this chapter, a retail electric service component shall be deemed a competitive retail electric service if the service component is competitive pursuant to a declaration by a provision of the Revised Code or pursuant to an order of the public utilities commission authorized under division (A) of section 4928.04 of the Revised Code. Otherwise, the service component shall be deemed a noncompetitive retail electric service."); R.C. 4928.03 (excluding billing and collection service from service components declared "competitive"); R.C. 4928.04 (establishing process for billing and collection service to become a competitive service).
[7] Finding and Order at ¶ 213 ("While the placement of these charges on a utility bill are subject to the Commission jurisdiction, the services themselves fall outside of such jurisdiction.").
[8] *See* OCC App. Rehearing at 10.

jurisdictional" products and services for many years. The new rule simply says that EDUs must also grant bill access to CRES providers who offer "non-jurisdictional" products. This rule change is sensible, fair, and lawful. As the Commission noted, "[t]he EDU must allow the customer's CRES provider, on an open and nondiscriminatory basis, access to the consolidated bill to list the newly termed, "non-jurisdictional services" charges."[9] While the revised rule "does not force the EDU to place the customer's CRES provider's nonjurisdictional service on the consolidated bill, the Commission believes its amendment strikes a middle ground whereby fairness to the CRES provider is accounted for as is the EDU's freedom to contract is respected."[10]

The EDUs should not be permitted to decide for themselves who gets access to the electric bill to collect charges for non-jurisdictional services. The Order recognizes this as should be upheld.

2. AEP / DP&L

AEP and DP&L do not object to the new rule *per se*; they object to the adoption of the rule without a guarantee of cost recovery for billing system changes necessary to comply with the rule. AEP "requests that the Commission grant the Company authority to either directly charge CRES providers these costs or create an accounting deferral to defer IT costs associated with coding our billing system for subsequent recovery in rates."[11] DP&L does not request deferral authority, but clarification that "utilities should not be forced to bill for non-

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[9] Order ¶ 242.
[10] *Id.*
[11] AEP App. Rehearing at 5.

jurisdictional charges; especially, without sufficient cost-recovery and appropriate parameters/limitations."[12]

Contrary to DP&L's suggestion, the rule does not "force" EDUs to do anything they do not already do. EDUs currently include supplier charges on consolidated bills. The rule requires EDUs to include *all* supplier charges, including charges for non-jurisdictional goods and services, on the bill. CRES providers maintain the option of billing non-jurisdictional charges separately. But if the consumer prefers consolidating billing, there is no reason to deprive them of this choice.

AEP does not, and cannot, cite supporting authority for its claim that "[a]dopting the new rule without providing for recovery of incremental costs is unlawful and unreasonable."[13] By their very nature, rules and regulatory requirements impose costs. No statute requires the Commission to address cost recovery at the time it imposes a new regulatory requirement. Indeed, the Commission is prohibited from doing so. Cost recovery issues are matters to be addressed in a rate proceeding under R.C. Chapter 4909 or R.C. 4928.141. If AEP believes the new rule will impose incremental costs that cannot be recovered through any of its plethora of existing riders, it may file an appropriate application for cost recovery. Neither AEP nor DP&L are entitled to blank checks.

Cost recovery issues are irrelevant to whether an underlying regulatory requirement is reasonable or lawful. The Commission need not give a second thought to cost recovery until a proper application is before it.

3. FirstEnergy

[12] DP&L App. Rehearing at 2.
[13] AEP App. Rehearing at 5-6.

FirstEnergy claims that language mandating parity for affiliated and non-affiliated suppliers is "unnecessary under current Commission Rules and creates uncertainty for EDUs." These baseless concerns do not make the revised rule unreasonable or unlawful.

By conceding that "[t]he law already prohibits a public utility from subjecting a CRES to any undue or unreasonable prejudice or disadvantage,"[14] FirstEnergy has basically conceded to the Commission's authority to adopt the rule. The rule does nothing more than prohibit undue or unreasonable prejudice or disadvantage in a specific context. Even if the rule were redundant (and it is not), redundancy does not render a rule unreasonable or unlawful.

FirstEnergy also complains that the rule "offers no clarity" around how EDUs should implement it, and that it is "concerned about the substantial EDU resources that will be required to implement this amended Rule."[15] Specific questions about implementation are left unsaid, and not the slightest clue is given about the "substantial resources" FirstEnergy is referring to. In any case, costs and implementation issues must be dealt with in separate cases tailored for that purpose.

4. Duke

Duke says the revised rule "is overbroad and may not give the Commission sufficient discretion to take into account the individual circumstances in each case."[16] The Commission *always* has the discretion to consider the individual circumstances of each case, so the fact the rule does not say so expressly does not render it "overbroad." Duke's request to add the word "unreasonably" before "discriminate" is a solution in search of a problem.

B. The Commission should deny rehearing regarding O.A.C. 4901:1-10-24.

[14] FirstEnergy App. Rehearing at 12.
[15] *Id*.
[16] Duke App. Rehearing at 8.

Staff proposed a new Section 4901:1-10-24(H) to permit customers to request that their EDU place a "block" on their account to prevent the customer's generation service provider from being switched without the customer's authorization. The Commission rejected this proposal. OCC's request to resurrect the proposal should be denied.

The Commission found that allowing consumers to request a block on their account was unnecessary because "current consumer protections are adequate."[17] OCC disputes this conclusion by pointing to the recent Verde Energy enforcement action as proof that "slamming unfortunately does occur."[18] OCC cites the *Verde* Staff Report generally, but does not cite a page identifying any slamming complaints—because there are none. Staff did not accuse Verde of slamming. OCC goes on to also mention PALMco, but that enforcement proceeding did not involve slamming complaints either.[19] Having failed to identify a *single instance* of slamming, OCC cannot be heard to complain that existing rules which prohibit this practice are inadequate.

As explained during the comment period, existing rules already block any change of generation supplier without customer consent.[20] Customers receive this protection without having to ask for it. Introducing a redundant layer of "protection" against slamming would make new 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.

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[17] Order ¶ 68.
[18] OCC App. Rehearing at 7.
[19] *See* Staff Report, Case No. 19-957-GE-COI (May 10, 2019).
[20] OAC 4901:1-21-06(C) ("CRES providers are prohibited from enrolling potential customers without their consent and proof of that consent as delineated in paragraph (D) of this rule.")

OCC continues to overlook the legal impediments to a proposed blocking feature. "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). The legislature adopted the practical equivalent of Staff's proposal by allowing customers to opt-out of government aggregation.[21] The opt-out mechanism for aggregation accomplishes the same goal as the affirmative consent requirement for shopping customers: it prevents a change of suppliers without consent. The Commission cannot adopt rules that conflict with statutory procedures. *Time Warner AxS v. Pub. Util. Comm.,* 1996-Ohio-224, 75 Ohio St. 3d 229, 240–41, 661 N.E.2d 1097, 1106 ("The commission cannot *sua sponte* enlarge its statutory authority by rule.").

The legislature has declared generation service a competitive service that "consumers may obtain . . . from any supplier or suppliers."[22] R.C. 4928.10(G) requires EDUs to provide customer information to suppliers for marketing purposes. 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. The Commission reasonably concluded that the blocking feature is unnecessary.

C. The Commission should deny rehearing regarding OCC's opt-in proposal

OCC challenges the Commission's decision to reject a proposal that would prohibit electric utilities from releasing customer contact information to energy marketers unless consumers opt-in to the release of their personal information.[23] This proposal flatly contradicts

[21] R.C. 4928.21.
[22] R.C. 4928.03.

[23] OCC App. Rehearing at 11.

R.C. 4928.10(G). EDUs are *required* to release customer information "unless, as to customer-specific information, the customer objects."[24] The Commission cannot convert a statutorily-mandated opt-out provision into a provision requiring customers to opt-in—coronavirus or no coronavirus.[25]

OCC then invites the Commission to do indirectly by rule that which it cannot do per statute. The proposal to modify Rule 4901:1-10-24(F)(4) to "provide consumers with the ability to use their utility's website for the purpose of electronically removing his or her name from the person contact disclosure list" essentially asks the EDUs to turn their customer information systems into something resembling Wikipedia, where anyone with a computer can edit or delete information at will.[26] There already exist multiple ways a customer may opt-out of marketing lists, including phone, email, regular mail, and through the Commission's website. Creating another means for customers to opt-out of marketing lists, without proof the existing means are ineffective or insufficient, does not seem to be a wise expenditure of resources.

D. The Commission should deny rehearing of OCC's shadow billing proposal.

The Commission has rejected OCC's "shadow billing" proposal every time OCC has proposed it—and OCC has proposed it in numerous proceedings.[27] The Commission did nothing unreasonable or unlawful by rejecting this proposal yet again.

In Case No. 09-0326-GA-ORD, the Commission rejected OCC's proposal to require

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[24] R.C. 4928.10(G).
[25] *See* OCC at 11 ("At a minimum, this change should be made during the coronavirus emergency.").
[26] OCC App. Rehearing at 11-12.

[27] *Application of Duke Energy Ohio*, Case No. 19-1593-GE-UNC (Dec. 18, 2019 Finding and Order); *Application of Columbia Gas of Ohio,* Case No. 19-1429-GA-ORD (Jan. 9, 2013 Finding and Order); *Review of Chapter 4901:1-13 of the Ohio Admin. Code,* Case No. 09-0326-GA-ORD (July 29, 2010 Finding and Order).

natural gas companies to include "choice comparison information" on customers' bills.[28] The Commission found that "there are options already available for customers to refer to in order to detect that there are competitive choice opportunities" and "it would not be appropriate to require the companies to provide this information on the bill, especially in light of the costs that they would potentially incur and that would potentially be passed on to their customers."[29]

The same reasons for rejecting shadow billing continue to hold. First, it invites a misleading comparison. Some customers are motivated by loyalty programs or other value-added benefits, such as energy efficiency offerings. The value of those programs and benefits is not reflected in the comparison of a supplier rate to the SSO. The value of rebates and other rewards may also not be reflected in the CRES supplier rate.

Second, it is wrong to assume that consumers choose a supplier based solely on price. Price stability is more important to some customers. Even if a customer pays more than the SSO rate, they still receive the benefit of a fixed price product which protects them from volatility.

Third, shadow billing remains unnecessary. Other publicly available information allows customers to understand the differences with marketers' programs and rates (e.g., Apples to Apples) and the SSO. These sources provide a full comparison of the products. OCC's proposal would not provide the customer with all the information necessary to make an informed decision. Customers would instead be forced to decide based on incomplete or misleading data. If that were not enough, customers would also be forced to pay for the system upgrades necessary to implement a flawed system.

The latest iteration of shadow billing continues to overlook the flaws that have led the

[28] Finding and Order (July 29, 2010) at 48.
[29] *Id*. at 48-49.

Commission to consistently reject it. The Commission should reject OCC's request for rehearing on this issue.

CONCLUSION

The Commission should deny the applications for rehearing with respect to the issued raised above.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing document was electronically filed this 6th day of April, 2020. Parties subscribed to DIS will receive automatic notification of this filing. A courtesy copy was also served via email to the following:

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