

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE PROPER
PROCEDURES AND PROCESS FOR THE
COMMISSION'S OPERATIONS AND
PROCEEDINGS DURING THE DECLARED
STATE OF EMERGENCY AND RELATED
MATTERS.

CASE NO. 20-591-AU-UNC

IN THE MATTER OF THE JOINT
APPLICATION OF THE RETAIL ENERGY
SUPPLY ASSOCIATION AND CERTAIN
COMPETITIVE RETAIL SUPPLIERS FOR
WAIVER OF THE CURRENT SUSPENSION
OF IN-PERSON MARKETING TO
CUSTOMERS IN OHIO.

CASE NO. 20-1040-GE-UNC

ENTRY ON REHEARING

Entered in the Journal on August 12, 2020

I. SUMMARY

{¶ 1} The Commission denies the application for rehearing filed by the Office of the Ohio Consumers' Counsel of the Commission's June 17, 2020 Entry, allowing competitive retail electric service providers and competitive retail natural gas service suppliers to resume door-to-door marketing services, pursuant to all applicable requirements and best practices issued by the Ohio Department of Health and any relevant local health authorities to ensure the health and safety of Ohioans.

II. DISCUSSION

A. *Procedural History*

{¶ 2} R.C. 4928.08 states that no electric services company shall provide a competitive retail electric service (CRES) to a consumer in this state without first being certified by the Commission. R.C. 4928.16(A) states that the Commission has jurisdiction under R.C. 4905.26, upon initiative of the Commission, regarding the provision by an electric services company or governmental aggregator subject to certification under R.C. 4928.08 of any service for which it is subject to certification. Similarly, R.C. 4929.20 states that no retail

natural gas supplier shall provide a competitive retail natural gas service (CRNGS) to a consumer without first being certified by the Commission. R.C. 4929.24 states that the Commission has jurisdiction under R.C. 4905.26, upon initiative of the Commission, regarding the provision by a retail natural gas supplier subject to certification under R.C. 4929.20 of any service for which it is subject to certification.

{¶ 3} R.C. 4928.02 states that it is the policy of this state to ensure retail electric service consumers protection against unreasonable sales practices and to protect at-risk populations. R.C. 4928.02(I) and (L). Ohio Adm.Code 4901:1-21-02(B) states that after notice and, if necessary, an opportunity for hearing, the Commission, upon its own motion, may require CRES providers to take any appropriate action necessary to comply with the state's policy as stated in R.C. 4928.02. Similarly, Ohio Adm.Code 4901:1-29-02 states that after notice and, if necessary, an opportunity for hearing, the Commission, upon its own motion, may require CRNGS suppliers to take any appropriate action necessary to comply with the state's policy as stated in R.C. 4929.02.

{¶ 4} On March 9, 2020, the Governor signed Executive Order 2020-01D (Executive Order), declaring a state of emergency in Ohio to protect the well-being of Ohioans from the dangerous effects of COVID-19. As described in the Executive Order, state agencies are required to implement procedures consistent with recommendations from the Ohio Department of Health (ODH) to prevent or alleviate the public health threat associated with COVID-19. Additionally, all citizens are urged to heed the advice of the ODH regarding this public health emergency in order to protect their health and safety. The Executive Order was effective immediately and will remain in effect until the COVID-19 emergency no longer exists. ODH is making COVID-19 information, including information on preventative measures, available via the internet at coronavirus.ohio.gov/.

{¶ 5} Pursuant to R.C. 3701.13, the Director of the ODH has the authority to issue orders and has supervisory authority over "all matters relating to the preservation of the life and health of the people" and the "ultimate authority in matters of quarantine and

isolation.” On March 12, 2020, the Director issued an Order indicating that “all persons are urged to maintain social distancing (approximately six feet away from other people) whenever possible.”

{¶ 6} On March 12, 2020, the Commission opened Case No. 20-591-AU-UNC and directed all utility companies in this state to review their disconnection procedures in light of the state of emergency. *In re the Proper Procedures and Process for the Commission's Operations and Proceedings During the Declared State of Emergency and Related Matters*, Case No. 20-591-AU-UNC (*Emergency Case*), Entry (Mar. 12, 2020) at ¶ 7. On March 13, 2020, the Commission directed all public utilities in this state to review their reconnection procedures and extended the winter reconnection order through May 1, 2020.

{¶ 7} Further, on March 17, 2020, through the *Emergency Case*, the Commission directed CRES providers and CRNGS suppliers to immediately suspend, for all customer classes, all door-to-door and in-store marketing to customers as well as any other sales or solicitation practice that involves in-person contact in this state for the duration of the emergency, unless otherwise ordered by the Commission. *Emergency Case*, Entry (March 17, 2020) at ¶ 7.

{¶ 8} On April 30, 2020, the Director of the ODH issued an Order to reopen certain businesses, subject to social distancing and other workplace safety requirements and sector specific provisions, including provisions for the consumer, retail, and services sector.

{¶ 9} On May 14, 2020, Retail Energy Supply Association, AEP Energy, Inc., Direct Energy Business, LLC, Direct Energy Services, LLC, Energy Harbor LLC, Energy Professionals of Ohio, Interstate Gas Supply, Inc., and Vistra Energy Corp. (collectively, Joint Applicants) filed a joint application in Case No. 20-1040-GE-UNC. Due to updated guidance from the ODH, Joint Applicants requested the Commission to allow the recommencement of all in-person and door-to-door solicitations as soon as reasonably possible.

{¶ 10} On May 20, 2020, the Director of the ODH issued an Order to responsibly rescind requirements of the Stay Safe Ohio Order and lift the mandatory requirements and restrictions that were needed during the initial phase of the COVID-19 pandemic. On May 29, 2020, the Director issued a revised Stay Safe Ohio Order that further lifted restrictions previously issued. Since May 29, 2020, the Director issued additional Orders which opened up various parts of the economy, including youth day camps, full dine-in service in restaurants and bars, and banquet facilities, subject to social distancing requirements.

{¶ 11} By Entry dated June 3, 2020, the Commission modified its March 17, 2020 directive by allowing CRES providers and CRNGS suppliers to resume marketing activities at stores and other retail establishments and to start scheduling in-person appointments for non-residential customers, subject to arrangements between the CRES providers and CRNGS suppliers and the store; compliance with relevant requirements and best practices issued by the ODH, as well as any guidance or order from any relevant local health authority; and in accordance with all Commission rules and statutory mandates.

{¶ 12} Further, by Entry dated June 17, 2020, in light of the May 20, 2020 and subsequent Orders issued by the Director of the ODH to lift mandatory requirements and restrictions to safely open up the Ohio economy, the Commission further modified its March 17, 2020 directive to CRES providers and CRNGS suppliers. Specifically, the Commission allowed the resumption of door-to-door solicitation of CRES and CRNGS, subject to all relevant requirements and best practices issued by the ODH and any relevant local health authority and specific guidance outlined by the Commission. Further, the Commission allowed CRES providers and CRNGS suppliers to resume scheduling in-person appointments for residential customers, subject to the parameters outlined in the Entry.

{¶ 13} R.C. 4903.10 states that any party who has entered an appearance in a Commission proceeding may apply for a rehearing with respect to any matters determined therein by filing an application within 30 days after the entry of the order upon the Commission's journal.

{¶ 14} On July 17, 2020, the Coalition of Homelessness and Housing in Ohio (COHHIO), Northeast Ohio Public Energy Council (NOPEC), the Office of the Ohio Consumers' Counsel (OCC), Ohio Poverty Law Center (OPLC), Pro Seniors, Inc. (PSI), and Southeastern Ohio Legal Services (SEOLS) (collectively, Consumer Advocates) filed an application for rehearing of the June 17, 2020 Entry, asserting two assignments of error.

{¶ 15} On July 27, 2020, Retail Energy Supply Association, Direct Energy, LLC, Direct Energy Business, LLC, and Vistra Energy Corp. (collectively, Marketers) filed a memorandum contra Consumer Advocates' application for rehearing. On the same day, Interstate Gas Supply, Inc. (IGS) filed a memorandum contra Consumer Advocates' application for rehearing.

B. Consideration of the Application for Rehearing

1. STANDING ARGUMENTS RAISED BY THE MARKETERS AND IGS

{¶ 16} Before addressing the Consumer Advocates' two assignments of error, we initially discuss standing arguments made by the Marketers and IGS. The Marketers argue that only one of the Consumer Advocates, OCC, is a party in the underlying proceedings and, thus, only that agency has standing to participate. R.C. 4903.10, the Marketers note, allows a party who has entered an appearance in person or by counsel in the proceeding to file an application for rehearing. Because the other Consumer Advocates did not enter an appearance or seek leave to file an application for rehearing in these matters, the Marketers argue that these entities have forfeited their ability to participate. IGS agrees with the Marketers' point and urges the Commission to give no weight to their inclusion into OCC's application for rehearing.

{¶ 17} Upon review, we agree with the Marketers and IGS. R.C. 4903.10 states that, after any order has been made by the Commission, any "party" who has entered an appearance in person or by counsel in the proceeding may apply for a rehearing with respect to any matters determined in the proceeding. The Consumer Advocates, with the exception of OCC, are not parties to this proceeding. Ohio Adm.Code 4901-1-10 enumerates who are

parties to a Commission proceeding, and R.C. 4903.221 and Ohio Adm.Code 4901-1-11 establish criteria for intervention. COHHIO, NOPEC, OPLC, PSI, and SEOLS did not seek and have not been granted intervention in either of the above-captioned cases. R.C. 4903.10 also provides that an affected person, firm, or corporation may file for rehearing in an uncontested proceeding or by leave of the Commission. However, neither of these proceedings is an uncontested proceeding, and COHHIO, NOPEC, OPLC, PSI, and SEOLS did not seek leave from the Commission to file an application for rehearing. Accordingly, we consider the application for rehearing filed by the Consumer Advocates as having been only filed by OCC, the sole party with standing to proceed, and refer to the arguments made as such.

2. FIRST ASSIGNMENT OF ERROR: RESUMPTION OF DOOR-TO-DOOR SALES

{¶ 18} OCC argues that the Commission erred by allowing energy marketers to resume door-to-door sales while the pandemic is still ongoing. OCC notes that the pandemic has worsened since the Commission issued its June 17, 2020 Entry, which directed the resumption of door-to-door marketing of CRES and CRNGS. According to OCC, allowing door-to-door marketing will needlessly increase risk of personal contact because such transactions involve the exchange of written materials such as marketing information, sales contracts, pens, other instruments to sign contracts, third-party verification forms, the consumer's utility bill, and customer interaction with a marketer's tablet, laptop, and cellular phone.

{¶ 19} Because the pandemic is worsening, OCC urges the Commission to modify its stance on door-to-door marketing. OCC explains that past precedent supports the Commission modifying earlier orders, as long as it justifies the change. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 2007-Ohio-4276, 872 N.E.2d 269, at ¶ 16. Further, OCC contends the Commission has special authority under R.C. 4909.16, the emergency statute, for preventing injury to the public. Additionally, OCC claims the Commission may properly consider additional evidence of the pandemic worsening, data for which was not available when the Commission issued the June 17, 2020 Entry, under

R.C. 4903.10. Finally, OCC proclaims, citing several cases, there is precedent for the Commission to reverse itself on rehearing because of changed circumstances or additional evidence that calls into question the Commission's initial decision. *See, e.g., Columbus & Southern Ohio Elec. Co. v. Pub. Util. Comm.*, 10 Ohio St.3d 12, 460 N.E.2d 1108 (1984); *In re Ohio Edison Co., The Cleveland Electric Illum. Co., and The Toledo Edison Co. for Authority to Provide for a Standard Service Offer*, Case No. 14-1297-EL-SSO, Entry on Rehearing (May 11, 2016); *In re the Application for Establishment of a Reasonable Arrangement Between Ohio Edison Co. and V&M Star*, Case No. 09-80-EL-AEC, Entry on Rehearing (Apr. 29, 2009) at ¶ 7.

{¶ 20} To bolster its point, the OCC points to a recent enforcement case initiated by the Commission to investigate two marketers, SFE Energy Ohio, Inc. (SFE Energy) and Statewise Energy Ohio, LLC (Statewise), who are alleged to have engaged in a pattern of unfair, deceptive, unconscionable, and dangerous acts or practices surrounding their marketing actions merely a week after the Commission's June 17, 2020 Entry. *In re SFE Energy Ohio, Inc. & Statewise Energy Ohio, LLC's Compliance with the Ohio Revised Code & Ohio Administrative Code & Potential Remedial Action*, Case No. 20-1216-GE-COI (*SFE Energy Case*), Entry (July 1, 2020). OCC believes it is unreasonable for the Commission to allow energy marketers to self-regulate their conduct because regulation and enforcement falls within the Commission's duties. Though OCC agrees the *SFE Energy Case* is a good example of regulatory oversight by the Commission and Staff, OCC also does not believe Staff will be able to procure a video of the door-to-door marketing in every proceeding involving alleged bad conduct. Because marketing can be conducted through mail, media, telephone calls and over the internet without posing health risks, OCC believes the Commission should reinstitute the ban on door-to-door marketing due to the public interest.

{¶ 21} The Marketers identify several issues with OCC's argument that the Commission should reverse its decision regarding door-to-door marketing because of the rising number of COVID-19 cases. First, the Marketers argue that cases were rising and no cure existed even when the Commission suspended door-to-door marketing and when it lifted the suspension. According to the Marketers, the rise in COVID-19 cases does not

comprise “changed circumstances” because this situation was foreseeable. Second, the Marketers note the Governor had indicated, as recently as on July 22, 2020, that mask precautions taken to combat COVID-19, such as mandating masks, are working.

{¶ 22} As its third point, the Marketers contend OCC’s proposal to indefinitely, if not permanently, suspend door-to-door marketing does not align with state policy. The Marketers explain that Ohio has charted a middle path, where the economy will be allowed to function as long as businesses observe common-sense precautions. The Marketers believe this approach is evident in the Governor’s Responsible RestartOhio campaign, under which industry-specific precautions have been issued for businesses throughout the state. The Marketers note the Commission has directed retail suppliers to observe these precautions. Furthermore, the Marketers believe the Commission lacks the resources and expertise to develop parallel public health policies for entities under its jurisdiction. The Marketers also characterize the *SFE Energy Case* as an isolated incident demonstrating the Commission’s and its Staff’s ability to promptly investigate any alleged instances of non-compliance with the June 17, 2020 Entry. The Marketers argue that the Commission has never before sanctioned an entire industry for the actions of one company, and it should not start now. Finally, the Marketers argue that OCC is not able to link a rise in COVID-19 cases to door-to-door marketing because this sales channel was suspended for half of March, all of April and May, and the better part of June. Despite this prohibition, COVID-19 cases still rose and, accordingly, the Marketers proclaim there is no reason to believe that door-to-door marketing has any meaningful impact on the spread of COVID-19.

{¶ 23} IGS believes the Commission properly relied upon the state’s health experts in its determination to lift the ban on door-to-door solicitations. Further, IGS notes the Commission, in recognition of concerns raised by OCC, included additional directives to ensure that suppliers and their agents proceed with caution and strict adherence to the relevant health and safety requirements. By relying upon state-issued guidelines, IGS argues the Commission has mitigated all of OCC’s concerns regarding a spike in cases because the Governor and state experts are continuously adjusting policies based on the

current pandemic outlook. IGS also believes the Commission has considered and rejected OCC's suggestion to unreasonably discriminate against the energy industry relative to all other businesses in this state, including those that also conduct door-to-door activities. In fact, IGS suggests such a request is contrary to the Governor's July 15, 2020 address, which was cited by OCC in its application for rehearing, which encourages Ohioans to wear masks and sustain the positive economic momentum. Finally, though IGS believes the Commission has issued adequate safeguards to protect Ohioans with regard to door-to-door solicitation, IGS recommends limiting door-to-door marketing to only those suppliers which directly employ their sales force. Per IGS, this level of control should assuage many of the stated concerns regarding in-person marketing.

{¶ 24} Upon review of OCC's first assignment of error, we decline to overturn our June 17, 2020 Entry. Initially, we note that our decision in that Entry was clearly informed by the public health guidance formulated by the Director of the ODH through Orders issued by ODH during May 2020. These Orders rescinded various requirements of the Stay Safe Ohio Order to safely open up the economy, subject to social distancing requirements. *Emergency Case*, Entry (June 17, 2020) at ¶¶ 13, 15. Because the Commission is not a public health agency, we must abide by the health guidance issued by the ODH and direction from the Governor.

{¶ 25} Further, as both the Marketers and IGS have noted, we have put into place several guardrails, which CRES providers and CRNGS suppliers must follow to resume door-to-door solicitation. Given the nature of door-to-door solicitations and due to the heightened risk to the elderly, vulnerable populations, or others in their homes, the Commission urged CRES providers and CRNGS suppliers to proceed with caution and strictly adhere to the relevant requirements and best practices issued by the ODH and any relevant local health authorities to ensure the health and safety of Ohioans. We directed entities to contact the Director of the Commission's Service Monitoring and Enforcement Department (SMED), or his designee, 48 hours before commencing door-to-door solicitations. We also directed CRES and/or CRNGS suppliers to inform the Director of

SMED in the event they received, from a state or local enforcement authority, a warning or more formal citation for failure to comply with such requirements and best practices, including any applicable local “Do Not Knock” registry or solicitation permitting provisions. Further, we clarified that we would treat a violation of our rules or any relevant health code violations committed by an agent of a CRES provider or CRNGS supplier the same as if the violation were committed by an employee of the provider or supplier. Finally, we alerted entities that, if we receive complaints that a CRES provider or CRNGS supplier, or its agent, failed to leave a customer’s premises immediately upon request, we would investigate and strictly enforce Ohio Adm.Code 4901:1-21-06(D)(1)(j) and 4901:1-29-05(E)(3) using our full statutory authority. *Emergency Case*, Entry (June 17, 2020) at ¶¶ 15-16.

{¶ 26} Moreover, the *SFE Energy Case* demonstrates that we will swiftly act when suppliers violate the precautions we put into place through the June 17, 2020 Entry to ensure Ohioans’ safety. In the *SFE Energy Case*, while Staff was already investigating SFE Energy and Statewise for alleged misleading and deceptive practices, Staff received a doorbell camera video on June 24, 2020. In the video, an SFE Energy agent is not wearing a mask, in possible violation of the Commission’s June 17, 2020 Entry. Further, the SFE Energy agent does not leave the customer’s doorstep when asked by the customer and continues to make false and misleading statements. Further, on June 26, 2020, a utility sent Staff another doorbell camera video. In that video, the agent is also not wearing a mask, in possible violation of the Commission’s June 17, 2020 Entry. *SFE Energy Case*, Staff Letter (June 30, 2020). Four days later, by letter dated June 30, 2020, Staff alerted the Commission regarding the potential violations of the Entry and other matters. The day after receiving Staff’s letter, the Commission opened its investigation into SFE Energy and Statewise. And by July 15, 2020, the Commission directed SFE Energy and Statewise to cease all marketing and enrollment of residential customers and cease all door-to-door marketing to small commercial and mercantile customers during Staff’s investigation. Consequently, we disagree with OCC’s argument that the June 17, 2020 Entry allows energy marketers to self-regulate their conduct because the *SFE Energy Case* demonstrates the Commission is

stringently carrying out its statutory duties of regulation and enforcement of utility companies.

{¶ 27} We are cognizant of the Marketers' contention that there have been no widespread violations of the Commission's June 17, 2020 Entry by suppliers. Further, OCC has not demonstrated a causal link between the rise of COVID-19 cases in Ohio and door-to-door marketers, which could cause the Commission to single out this industry alone. At this time, based on the alleged bad conduct of one entity¹ alone, we decline to cease door-to-door solicitation of all CRES and CRNGS. Therefore, OCC's first assignment of error is denied.

3. SECOND ASSIGNMENT OF ERROR: VIOLATION OF R.C. 4903.09

{¶ 28} Next, OCC argues that the Commission's June 17, 2020 Entry permitting the resumption of door-to-door marketing does not comply with R.C. 4903.09 because the Commission did not provide evidentiary support, findings of fact, or reasons prompting its decision. OCC further explains that, while the Commission initially held off the resumption of door-to-door sales, merely two weeks later, it abruptly allowed door-to-door marketing to resume without any explanation. Merely referencing ODH orders, according to OCC, is not enough to permit the resumption of door-to-door marketing.

{¶ 29} However, the Marketers and IGS posit that the Commission's rationale is apparent from the four corners of the June 17, 2020 Entry. According to the Marketers, the Commission has consistently followed the guidance of the Governor and the ODH. For example, the Marketers note the decision to suspend all in-person marketing was prompted by the Governor's March 9, 2020 Executive Order. Similarly, the decision to allow some in-person marketing (but not door-to-door) was based on ODH's Order issued on May 20, 2020. Finally, the decision to permit door-to-door marketing was not made until the ODH determined that it was safe for businesses to resume operations in the state under certain

¹ SFE Energy and Statewise are affiliates. SFE Energy, Inc. is the parent company of both entities, owning 100 percent of SFE Energy and 51 percent of Statewise.

precautions. Accordingly, the Marketers and IGS believe the Commission complied with R.C. 4903.09 by explaining what it was doing and why.

{¶ 30} As explained above, our June 17, 2020 Entry adequately explains why the Commission allowed door-to-door marketing to start back up, based on guidance from the Director of the ODH. Entry (June 17, 2020) at ¶¶ 13-16. OCC's second assignment of error is, therefore, denied.

III. ORDER

{¶ 31} It is, therefore,

{¶ 32} ORDERED, That the application for rehearing filed by the OCC be denied. It is, further,

{¶ 33} ORDERED, That a copy of this Entry on Rehearing be served upon all interested persons and parties of record.

COMMISSIONERS:

Approving:

Sam Randazzo, Chairman

M. Beth Trombold

Lawrence K. Friedeman

Daniel R. Conway

Dennis P. Deters

AS/kck

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Case No(s). 20-0591-AU-UNC, 20-1040-GE-UNC

Summary: Entry denying the application for rehearing filed by the Office of the Ohio Consumers' Counsel of the Commission's June 17, 2020 Entry, allowing competitive retail electric service providers and competitive retail natural gas service suppliers to resume door-to-door marketing services, pursuant to all applicable requirements and best practices issued by the Ohio Department of Health and any relevant local health authorities to ensure the health and safety of Ohioans electronically filed by Heather A Chilcote on behalf of Public Utilities Commission of Ohio