

# THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE APPLICATION OF  
ASTRAL ENERGY, LLC FOR A WAIVER OF  
OHIO ADM.CODE 4901:1-21-05(A)(4).

CASE NO. 18-743-EL-WVR

## ENTRY

Entered in the Journal on October 7, 2020

### I. SUMMARY

{¶ 1} The Commission denies, without prejudice, Astral Energy, LLC's request for a waiver of Ohio Adm.Code 4901:1-21-05(A)(4).

### II. DISCUSSION

{¶ 2} Astral Energy, LLC (Applicant) is an electric services company, as defined in R.C. 4928.01, is certified to provide competitive retail electric service (CRES) under R.C. 4928.08, and is subject to the jurisdiction of this Commission pursuant to R.C. 4928.16.

#### A. *Summary of the Application and Procedural History*

{¶ 3} On April 23, 2018, Applicant filed an application with the Commission requesting waiver of Ohio Adm.Code 4901:1:21-05(A)(4) to allow Applicant to employ marketing materials for flat-monthly rate offers that do not disclose a specific listing of the rates to be charged per month for the duration of the contract. Applicant proposes to provide customers an individual flat-rate price based on a "proprietary algorithm" that it has created. The proprietary algorithm purportedly incorporates a range of rate factors such as "the customer's historic usage, peak vs. off peak usage, and other factors." Application at ¶ 6. Because the proprietary algorithm provides a customized, individual rate offer, Applicant submits that it cannot include the rate offer in its marketing materials as directed by Ohio Adm.Code 4901:1:21-05(A)(4). Nevertheless, Applicant maintains that the proposed modification of marketing protections is: (1) instrumental to its business model; and, (2) not harmful to customers because they are able to determine and comparatively evaluate offers of monthly charges prior to contracting with Applicant.

{¶ 4} On June 4, 2018, Applicant filed a Notice of Substitution of Exhibit 1 to its application. Applicant proposes to substitute the originally proposed enrollment contract with a revised contract that charges a default fixed, rather than variable, flat-rate monthly price for customers who do not renew or cancel their contracts after the initial six-month contract term. Consistent with the original contract submission, Applicant continues to maintain that customers are free to cancel enrollment without penalty at any time after the initial six-month contract term.

{¶ 5} On May 10, 2018, the Ohio Consumers' Counsel (OCC) filed a motion to intervene in this proceeding. There were no memoranda contra OCC's motion to intervene.

{¶ 6} On July 25, 2019, Staff and OCC filed separate comments regarding the application.

{¶ 7} On August 7, 2019, Applicant filed its response to the comments filed by Staff and OCC.

{¶ 8} On August 8, 2019, OCC filed reply comments.

***B. Summary of the Comments***

{¶ 9} On July 25, 2019, Staff filed its comments. Staff opposes the waiver request because the proposed marketing materials would not provide rate information basic to conducting a cost comparison. Staff notes that, in addition to the requested waiver of Ohio Adm.Code 4901:1-21-05(A)(4), Applicant's proposal would also require either: (1) a waiver of Ohio Adm.Code 4901:1-21-03(D), which requires that CRES providers furnish "at least one current [residential] offer for posting on the [EnergyChoice Ohio] Apples-to-Apples chart within four calendar days of making such offers to Ohio customers;" or, (2) that Applicant post another current offer in each of the territories where it markets flat-monthly rate offers. Staff is also concerned about Applicant's method for obtaining permission to access customer generation usage histories, which expands the distribution of customer data

beyond the monthly information that CRES providers already receive prior to enrolling customers in new service contracts.

{¶ 10} On July 25, 2019, OCC filed comments opposing the waiver application. OCC notes that Applicant's failure to disclose a rate in its marketing materials increases the potential for customers to commit to rates that may be much higher than the utility standard service offer (SSO) rate or the rate that is charged by other suppliers. OCC alternatively argues that if the Commission grants the waiver, it should do so only on the conditions that Applicant disclose: (1) how its charges compare to SSO rates at different usage levels; (2) sufficient prospective and ongoing bill comparison data, including the utility's SSO charges, to enable customers to make and maintain meaningful choices; and, (3) semi-annual summaries showing customers how their choice of Applicant's services compared with what the charges would have been under the utility's SSO. OCC also opposes the proposed automatic contract renewal mechanism because the renewal default rate pricing was not defined.<sup>1</sup>

{¶ 11} On August 7, 2019, Applicant filed its response to the comments of Staff and OCC. Applicant notes that it is not seeking to market based on any savings or discount, instead focusing on "zero risk, budgetary certainty, and peace of mind." Applicant further asserts that its proposal encourages energy conservation, as conserving customers would expect to be offered reduced renewal rates at the close of their initial six-month contract period.

{¶ 12} On August 8, 2019, OCC filed reply comments. OCC offered its agreement with the three adverse Staff comments previously filed in this case: (1) Applicant is not disclosing a per kilowatt price in its marketing materials; (2) Applicant will not be able to comply with its obligation to post a residential offer on the EnergyChoice website (Ohio

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<sup>1</sup> Applicant's Notice of Substitution of Exhibit 1 to its Application for Waiver filed June 4, 2018, addresses this issue by revising the standard term enrollment contract to provide for a flat-rate, rather than variable rate, monthly price for customers who do not renew or cancel their initial contracts.

Apples-to-Apples chart); and, (3) Applicant's access to customer usage data for purposes of creating individual rate offers is excessive.

**C. *Commission Analysis***

{¶ 13} At the outset, the Commission finds that OCC's motion to intervene meets the standards for intervention set forth in R.C. 4903.221 and Ohio Adm.Code 4901-1-11, and in accordance with the procedural schedule established by the attorney examiner. Entry (June 26, 2019). Accordingly, OCC is granted intervenor status in this case.

{¶ 14} As to the merits of the application, we initially note that Applicant's waiver request is narrowly tailored to address marketing disclosures that do not exist under its business model. Applicant proposes to prepare individual six-month flat-monthly rate marketing offers based on a range of rate factors such as "the customer's historic usage, peak vs. off peak usage, and other factors." Application at ¶ 6. Applicant submits that it cannot include a rate offer in its marketing materials as directed by Ohio Adm.Code 4901:1-21-05(A)(4) because its offers will be based on a proprietary algorithm, which provides a customized rate offer that is purportedly specific to each customer's historic usage. With this information in mind, the Commission must assess the value of the proposed consumer product in comparison to the impact on the consumer protection safeguards that are the subject of the waiver request.

{¶ 15} Ohio Adm.Code Chapter 4901:1-21 is intended to provide standards and safeguards to protect consumers from deceptive, unfair and unconscionable marketing practices and to ensure that they can make informed decisions about offers from CRES providers. Within this chapter are defined marketing requirements that are intended to allow customers ease-of-pricing comparisons in their CRES analysis before they commit to service contracts. Ohio Adm.Code 4901:1-21-05. In addition to requiring Apples-to-Apples pricing information on marketing and solicitation materials, the rules provide that marketers must include comparative pricing information on marketing materials that accompany contract proposals, and on the EnergyChoice website so that customers can

educate themselves easily and early in their decision-making as to potential choice considerations. Ohio Adm.Code 4901:1-21-03(D).

{¶ 16} Applicant's proposed business model is unique among CRES providers. Prior to this waiver request, the Commission has yet to consider a flat-rate marketing model that attempts to correlate monthly residential pricing to a customer's actual, rather than assumed, individual usage. Here, Applicant intends to individually tailor each of its flat-rate customer pricing offers based on a computer algorithm, which will generate an offer price based on a review of a customer's historic electricity consumption as measured in load and usage. As the load and usage of each customer may be widely variant, Applicant submits that it is impossible for it to produce and include in its marketing materials "a specific listing of the rate to be charged per month for the duration of the contract," as is required by Ohio Adm.Code 4901:1-21-05(A)(4).

{¶ 17} In considering Applicant's waiver application, we note that we remain supportive of the rights of consumers to purchase their electricity in a variety of ways, that there may be value in the consumer's mind to offering a flat-rate pricing plan, and that there is no prohibition against this type of pricing plan, provided that it is offered into the market in a manner consistent with existing rules. Such a plan might be preferable to some consumers, whether that outcome is measured in terms of overall cost savings, budget predictability, hedging against market conditions, incentivizing reduced consumption, or some other consumer preference.

{¶ 18} Juxtaposed against the benefit of consumer choice is the consumer protection associated with the early marketing restrictions that the waiver encompasses. In considering this aspect of the waiver request, we must consider the feasibility of Applicant's proposed business model as it relates to the provision of requisite data as described by Applicant. There is no reason to waive consumer marketing protections unless Applicant demonstrates a reasonable basis for why its product requires the waiver.

**D. Commission Conclusion**

{¶ 19} At this time, we conclude that Applicant has not shown good cause for the requested waiver. The specific price comparison information that is required to be incorporated in marketing materials and updated on the EnergyChoice Ohio website is a critical consumer protection aspect of Ohio's CRES choice program. In order to receive the requested waiver, Applicant must demonstrate that the marketing and nonconforming pricing of its services as described in its business model outweighs the negative impacts on consumer protections provided for in Ohio Adm.Code Chapter 4901:1-21. We find that Applicant's proposed business model currently fails to justify the requested waiver, as more fully described below.

{¶ 20} Applicant's proposal to offer individualized pricing based on actual historic customer load and usage presupposes reliance on hourly interval data reported by an electric distribution utility to PJM for settlement purposes. As of the date of this decision, this information is not yet available to Applicant or any other CRES provider. Accordingly, Applicant is currently unable to offer any meaningful customer-specific, algorithmic pricing options that would justify the requested marketing waivers. Absent the ability to make marketing offers based on customers' actual historic electricity load and usage, there is no basis for diminishing the consumer protections from deceptive, unfair and unconscionable marketing practices that safeguard consumers' abilities to make informed decisions about CRES.

{¶ 21} While unique in its described approach toward conservation incentives and customer budgeting, Applicant's proposal does not provide for the required price comparison information that benefits customers when initially considering CRES choices. Further, the significance of the lack of price comparison is heightened by Applicant's purported need to access specific customer account and usage information in excess of the information that marketers already receive in order to prepare individual rate proposals prior to offering price information to proposed customers. Ohio Adm.Code 4901:1-10-24(E).

{¶ 22} In disapproving Applicant's current waiver request, we reserve the right to revisit this issue in the future. Through the integration of advance metering equipment, it is reasonable to conclude that the information needed to make meaningful customer-specific, algorithmic offers may soon be available for Applicant's intended use. Advanced metering equipment that measures individual customer load and usage in a manner that Applicant purports to consider for rate offering purposes is being widely deployed across the state. It is reasonable to conclude that the granular customer-specific information that Applicant requires to tailor its rate offers may be available at a future date. Assuming that occurs, the Commission may re-evaluate the consumer protection analysis provided in this decision. Moreover, we may also re-evaluate the criteria required for posting a residential offer on the EnergyChoice website (Ohio Apples-to-Apples chart) in regard to a re-filed waiver application should Applicant choose to propose an otherwise acceptable pricing alternative that is offered on a non-volumetric basis relating to criteria other than the individualized usage data that Applicant purports to presently require. Accordingly, Applicant is authorized to file another request for waiver of the marketing considerations described herein in the future should the customer-specific data necessary to implement its marketing business plan become available. Until such time as that customer usage data is available to Applicant, we decline to grant the requested waiver as proposed.

### III. ORDER

{¶ 23} It is, therefore,

{¶ 24} ORDERED, That Applicant's application for waiver be denied to the extent set forth in this Entry. It is, further,

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

COMMISSIONERS:

*Approving:*

Sam Randazzo, Chairman

M. Beth Trombold

Lawrence K. Friedeman

Dennis P. Deters

*Dissenting:*

Daniel R. Conway

MLW/hac



# THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE APPLICATION OF  
ASTRAL ENERGY, LLC FOR A WAIVER OF  
OHIO ADM.CODE 4901:1-21-05(A)(4)

CASE NO. 18-743-EL-WVR

## DISSENTING OPINION OF COMMISSIONER DANIEL R. CONWAY

Entered in the Journal on October 7, 2020

I respectfully dissent from today's Entry denying without prejudice the Applicant's request for a waiver of Ohio Admin. Code 4901:1-21-05(A)(4) (which requires CRES providers to include a rate offer in their initial marketing materials that they provide to prospective customers). In addition, regarding Ohio Admin. Code 4901:1-21-03(D)'s requirement that CRES providers make certain postings on the Commission's Apples-to-Apples website, as the Staff contends the Applicant must do, I would also waive and/or modify that requirement to the extent it is not practical for the Applicant to meet requirements that assume that all CRES providers are offering per-kWh offers. And, to the extent appropriate to achieve the rule's objective, I would require alternative disclosures on our website that do accommodate the type of flat per-month rate that the Applicant does offer.

The Applicant seeks a waiver of our rule regarding marketing materials because it cannot develop its flat per-month rate for a particular customer until it has obtained his/her historical usage information. As I understand it, the Applicant's first marketing effort is to reach out to the customer, pique the customer's interest in a flat per-month rate by extolling its benefits (e.g., predictability, zero risk, simplifying the customer's ability to budget household expenses, hedging against market conditions, incentivizing reduced consumption, or some other consumer preference), and get the customer's agreement to allow the Applicant access to his/her historical billing data, so that the Applicant can run its proprietary algorithm and develop a flat per-month rate offer for that particular customer. But, unfortunately for the Applicant, its round peg of a competitive retail electric generation service does not fit neatly into our square hole of a marketing rule. Hence the request for a waiver.

Our policy, which the Legislature has directed us to implement is, in part, to "ensure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs." ORC 4928.02(B). Consistent with that policy, I think that the Applicant's proposed competitive service is one that we should encourage and that our rules should accommodate, not frustrate.

Nor do I think that we should reject the Applicant's waiver request based on a belief that its proprietary algorithm is not an adequate tool for the Applicant to rely upon to develop its customer-specific flat per-month rate. The adequacy of its algorithm to produce price offers that are good enough to implement its business model is a judgment that, in my view is squarely within the Applicant's bailiwick, not ours. In that regard, I don't believe it is accurate to interpret the Applicant's request, which the Entry does, as depending upon having access to historical PJM load and/or usage data that is specific to prospective Ohio customers in order to develop its flat per-month rate offers. As I read the filings that Applicant has made, the customer's historical retail billing information included in his/her past bills, whatever that includes, will be sufficient for it to run its algorithm. In any event, if the Applicant's algorithm produces rates that are unattractive to prospective customers (because, for example they are too high, coupled with other more qualitative benefits that are not enough to offset the cost), the competitive market and shopping customers will turn their thumbs down on the product. If the rates are too low to meet the Applicant's profit requirements, it will have to make adjustments to its algorithm, make changes to its wholesale power procurement approach, etc., or exit the market.

With respect to concerns about the Applicant's postings on the Apples-to-Apples website, it seems to me that the problem lies with the bias that underlies the website, which is that CRES offers will be based on per-kWh rates. The solution, if one is needed, is to come up with an alternative, through a waiver and, if necessary, a modification, that accommodates this innovative flat per-month rate that the Applicant seeks to offer.

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/ Daniel R. Conway

By: Daniel R. Conway  
Commissioner

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Summary: Entry denies, without prejudice, Astral Energy, LLC's request for a waiver of Ohio Adm.Code 4901:1-21-05(A)(4) electronically filed by Heather A Chilcote on behalf of Public Utilities Commission of Ohio