BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission's Review of Ohio Adm.Code Chapters 4901:1-21, 4901:1-23, 4901:1-24, 4901:1-27, 4901:1-28, 4901:1-29, 4901:1-30, 4901:1-31, 4901:1-32, 4901:1-33, and 4901:1-34 regarding Rules Governing Competitive Retail Electric Service and Competitive Retail Natural Gas Service.	**))))))))**	**Case Nos. 17-1843-EL-ORD 17-1844-EL-ORD 17-1862-EL-ORD 17-1845-GA-ORD 17-1846-GA-ORD 17-1847-GA-ORD 17-1848-GA-ORD 17-1849-GA-ORD 17-1850-GA-ORD 17-1851-GA-ORD 17-1852-GA-ORD**

REPLY COMMENTS
OF
THE RETAIL ENERGY SUPPLY ASSOCIATION

October 22, 2021

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I. INTRODUCTION

The Retail Energy Supply Association ("RESA")[1] files, in accordance with the schedule set by the Public Utilities Commission of Ohio ("Commission"), the following comments in response to a number of proposals from the Office of the Ohio Consumers' Counsel ("OCC") and a proposal from Citizens' Utility Board of Ohio ("CUB-Ohio").[2] OCC seeks to implement numerous new competitive retail electric service ("CRES") and competitive retail natural gas service ("CRNGS") rules that the Commission has rejected in the past, are unnecessary today, and would make the shopping experience less desirable to customers. Importantly, OCC failed to demonstrate how its proposals, which require or prohibit numerous actions, can be adopted within the "two-for-one regulatory restriction" framework set forth in R.C. 121.95(F).[3] OCC did not address this key consideration in its initial comments, even though the Commission acknowledged it in its September 8, 2021 Entry as a reason why only a limited number of revisions were being proposed.[4] This omission, alone, justifies rejection of OCC's proposals. RESA demonstrates below that, in addition, OCC's individual proposals are unjust and unreasonable. CUB-Ohio proposes an unnecessary mandate as well, seeking a mandate for extra disclosure of the

[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 of the Association. Founded in 1990, RESA is a broad and diverse group of 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] Failure to respond to a recommendation in the initial comments by any person does not indicate agreement by either RESA or its members, and RESA and its members reserve the right to seek rehearing of any adverse finding based on a comment that is not addressed.

[3] R.C. 121.95(F) states: "Beginning on the effective date of this section and ending on June 30, 2023, a state agency may not adopt a new regulatory restriction unless it simultaneously removes two or more other existing regulatory restrictions. The state agency may not satisfy this section by merging two or more existing regulatory restrictions into a single surviving regulatory restriction." Rules that include the words "shall," "must," "require," "shall not," "may not," and "prohibit" are considered to contain regulatory restrictions. R.C. 121.95(B).

[4] Entry at ¶ 7 (Sep. 8, 2021).

environmental characteristics. The Commission should reject the OCC and CUB-Ohio proposals as explained below, and adopt RESA's suggested revisions as set forth in RESA's initial comments (which will fit within the regulatory restrictions framework).

II. COMMENTS

A. CRES/CRNGS Certification Rules

1. Automatic confidential treatment for credit reports and credit ratings is reasonable when requested by an applicant (CRES Rule 4901:1-24-08 and CRNGS Rule 4901:1-27-08).

OCC opposes a rule allowing both credit reports and credit rating information to be treated as confidential or as trade secrets if filed under seal. OCC Comments at 33. OCC reasons that these rule revisions should be rejected because credit ratings are "typically" not considered to be confidential or trade secrets, and because a credit rating is a good indicator of financial health. *Id*. at 33-34. OCC's objection to these rule revisions is inadequate, unsupported, and must fail. OCC's objection only addresses the rule revisions as they relate to the credit rating, not the credit report. OCC is obligated to present more than "do not revise" and, having presented no explanation or support with regard credit reports, the Commission should conclude that OCC's objection as to credit reports is insufficient and reject it.

As to OCC's objection to confidential treatment for credit ratings, OCC failed to cite any Ohio statute, Ohio case law or Commission precedent to support its first claim that they are "typically" not confidential. In addition, OCC did not object to the Commission's June 2020 decision to allow credit reports to be eligible for automatic confidential treatment.[5] RESA is also not aware of any objection from OCC to any credit rating filings since. OCC's second basis for

[5] OCC did not raise any objection or seek rehearing of the Commission's June 3, 2020 Entry in *In the Matter of the Commission's Consideration of a New Electronic Certification Processing System for Providers of Competitive Retail Electric Service and Competitive Retail Natural Gas Service and the Waiver of Applicable Procedural Rules Contained in Ohio Adm.Code Chapters 4901:1-24 and 4901:1-27*, Case No. 20-1077-GE-WVR.

objecting to the proposed rule revisions – the credit rating information is a good indicator of financial health – is irrelevant to whether the information should be able to be afforded confidential treatment. The Commission regularly receives information in confidential filings that is helpful for the Commission to carry out its responsibilities. These proposed rule revisions will not affect the analysis of financial capability that the Commission must make. The argument should be rejected.

Moreover, OCC overlooks that the proposed rule revisions do not mandate the filing of credit reports under seal, guarantee confidential treatment, or provide indefinite confidential treatment. Experience shows that, since the waiver has been in effect, some applicants have opted to file their credit ratings publicly. Thus, there is no reason to believe that the credit reports will only be presented to the Commission under seal if the rule revisions are adopted. The proposed rule revisions also will not prevent an interested party from challenging confidential treatment when first submitted, or if the applicant requests to extend confidential treatment. *See* Rule 4901:1-24-08(D) and Rule 4901:1-27-08(D). Therefore, the Commission should conclude that OCC's arguments against the proposed revisions of Rule 4901:1-24-08 and Rule 4901:1-27-08 are inadequate and unsupported; rather, the Commission should adopt the proposed rule revisions upon finding that they will continue to provide the appropriate balancing of interests.

2. The Commission should not adopt OCC's recommendations to expand reviews of applications for certification (CRES Rule 4901:1-24-10(A) and CRNGS Rule 4901:1-27-10(A)).

OCC recommends that the Commission should "not rush to approve [an] application because of the statutory 90-day timeframe" for applications for certification that are suspended within 30 days of filing, but instead should deny certification. OCC Comments at 31. In what appears to be a contradiction, OCC further states that the Commission should allow discovery in an application proceeding that is suspended because it is incomplete. *Id*. The Commission should reject both recommendations if for no other reason than inconsistency.

As a practical matter, the two recommendations cannot be aligned. Under OCC's first recommendation that the Commission deny an application if it finds it incomplete, there would never be a suspension, just repeated refilings until the Commission allowed the automatic 30-day approval process to run its course. Under its second recommendation, OCC would now begin discovery on a closed application. Thus, the recommendations are mutually incompatible.

Further, the recommendation to immediately deny applications the Commission would otherwise suspend is nonsensical because it forces a refiling for no real purpose that is consistent with the legislative direction governing the Commission's review authority. If the Commission suspends an application, Ohio law provides a 90-day window for the applicant to address the reasons leading to the suspension. If the applicant fails to do so, the Commission can then deny the application. R.C. 4928.08(B) and R.C. 4929.20(A). OCC's nonsensical "auto-denial" would create nothing more than a meaningless additional filing requirement that is inconsistent with the legislatively mandated process.

In apparent recognition that its "auto-denial" recommendation does not conform to Ohio law, what OCC apparently is seeking is the mandatory commencement of discovery and a comment period if the Commission suspends an application. OCC Comments at 32. However, the Commission already has the discretion to set the matter for hearing, which presumes that it may also set the matter for comment and discovery. Some additional process, in fact, may be required as a result of a recent Ohio Supreme Court decision finding that the Commission must provide a detailed set of reasons for its approval of a certificate that is contested. *In the Matter of the Application of Suvon, LLC*, 2021-Ohio-3630 (Oct. 14, 2021).

In any case, this set of OCC recommendations concerning the certification process is pointless. If the applicant has not met the filing requirements, the Commission must suspend the application until the applicant can satisfy the Commission that the applicant meets the statutory requirements for a certificate. If the application is contested, the Commission may set it for hearing, discovery, or comments. If the applicant cannot meet the filing requirements within the suspension period, the Commission must deny the application. Thus, OCC's proposed rule changes are unnecessary.

B. CRES/CRNGS Marketing and Enrollment Rules

1. Existing disclosure requirements meet the needs of customers for accurate information when contracting for energy services (CRES Rule 4901:1-21-05(C) and CRNGS Rule 4901:1-29-05(D)).

Like OCC, RESA members agree that they have a responsibility to honestly and fully inform their customers of the terms and conditions of their contracts, a responsibility that begins with the first contact with a potential customer.[6] RESA members also share an interest in the

[6] RESA members agree on the following customer principles:

Our Core Principles are

Effective Consumer Protections that give customers sufficient trust in the retail market so that they shop freely and with confidence for the products and services that best meet their needs. As such, RESA members hereby commit to undertaking and promoting the following practices:

- Not engaging in unfair, deceptive, or misleading conduct as defined by applicable state and federal statutes and regulations.
- Not making false or misleading representations of competitive products and services, including misrepresenting rates, prices, or customer savings.
- Using plain language, including words and images that facilitate customer understanding of competitive products and services.
- Providing customers with written information, upon request, or with a link to a website at which information can be obtained, in response to all customer inquiries.
- Using reasonable efforts to provide accurate and timely information about products, services, and customers' cancellation rights.
- Ensuring that any product or service offering made by a competitive retail electric provider contains information designed to be understood by the customer, including but not limited to providing any written information to customers in the language used during a sales call or on-site visit or negotiation of the contract.

administration of rules concerning business practices that undermine consumer confidence in the market. Unlike OCC, RESA members trust that sharing accurate information and encouraging the fair administration of existing laws is sufficient to protect consumers from unfair and unconscionable business practices. In that spirit, RESA recommends that the Commission reject several OCC recommendations that would restrict or prohibit marketing activities.

a. Robo-calling and spoofing

Although stated generally, OCC recommends that the Commission provide for specific rules treating automated calling and spoofing, the mislabeling of a caller identification, as an unfair or deceptive marketing practice. OCC Comments at 4-5. Further, OCC recommends that the certificate of a supplier caught spoofing be suspended or rescinded. While both practices can be used to unlawfully market products, both are heavily regulated under federal and state law. The recommended changes are not needed.

Initially, there is already a substantial regulatory structure to deal with both robo-calling and spoofing. Robo-calling is addressed by federal laws such as the Telephone Consumer Protection Act, section 227 of Title 47 of the United States Code, and federal rules such as section 310.4 of Title 16 of the Code of Federal Regulations, and section 64.1200 of Title 47 of the Code of Federal Regulations. Under those laws, the Federal Communications Commission ("FCC") and

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- Ensuring prompt and fair investigations of all customer inquiries and complaints concerning a competitive supplier's service and/or marketing practices.
- Cooperating fully with the appropriate state regulatory authorities, state consumer agencies, and local law enforcement in investigations concerning unfair, deceptive and/or misleading marketing practices prohibited by state law or regulation.
- Applying all of the above principles and practices in:
  1. Training of marketing representatives.
  2. In-person and telephone contact with customers.
  3. Dispute resolution of customer complaints and disputes.

https://www.resausa.org/about-us/resa-principles (viewed Oct. 15, 2021).

the Federal Trade Commission ("FTC") have extensive enforcement authority to police unwanted marketing. Spoofing is addressed by the Telephone Robocall Abuse Criminal Enforcement and Deterrence (TRACED) Act, which requires telephone companies to implement a new call token system to prevent scammers from making calls that have inaccurate caller identification information and expands the penalties that the FCC can impose. Pub. Law No. 116-105 (Dec. 30, 2019). Further, the Attorney General of Ohio has authority to initiate enforcement actions to support federal efforts. R.C. 109.87. Ohio law also criminalizes telecommunications fraud. R.C. 2913.05.

Existing Commission rules also address the problems. Both the electric and gas marketing rules on telephone solicitation limit the use of telephone solicitations in a manner consistent with federal requirements regarding telemarketing by incorporating the do-not-call requirements. Rule 4901:1-24-05(C)(4) and (5) and Rule 4901:1-29-05(D)(4). Additionally, rules generally provide that CRES suppliers and CRNG suppliers may not engage in deceptive practices, which certainly includes spoofing.

As noted, OCC also recommends that the Commission must suspend or rescind a certificate of a spoofer. That action may be appropriate in a particular case, but a blanket requirement, in lieu of other remedies that the Commission has used to address unlawful behavior, is not appropriate when additional monitoring or financial penalties may be sufficient to address the issue.

b. Proposed bans on door-to-door sales, incentives to switch, and introductory rates

OCC recommends rules to ban door-to-door sales, incentives to switch, and introductory rates. OCC Comments at 6-10. None of these recommendations should be adopted.

OCC's recommendation to ban door-to-door sales is not new. It has made this recommendation repeatedly, particularly during the recent health emergency, but the Commission has balanced the various customer and industry concerns and determined that such bans are not needed. *See, e.g., In the Matter of the Proper Procedures and Process for the Commission's Operations and Proceedings During the Declared State of Emergency,* Case No. 20-591-AU-UNC, Entry on Rehearing at ¶¶ 24-27 (Aug. 12, 2020). As the Commission has explained, the Commission was following state health guidelines when it permitted the resumption of door-to-door solicitations, provided temporary guardrails governing solicitations as needed, and increased its supervision. In this case, OCC offers nothing new to warrant a change in the Commission's prior decisions. OCC Comments at 8-9. Moreover, the Commission has already placed significant restrictions on door-to-door sales to assure that consumers are not adversely affected. Rule 4901:1-21-06(D) and Rule 4901:1-29-06(D). Accordingly, there is no reasonable justification for a ban on such sales.

OCC's recommendation to ban incentives for new enrollments is a solution looking for a problem. OCC offers no evidence that incentives for new enrollments are a problem in Ohio, instead citing a news article about problems in Chicago. OCC Comments at 6, note 11. Even if there were some evidence of a problem, it appears that it is directed at low-income customers, many of whom participate in the PIPP program and are not permitted to be served by competitive suppliers. Rule 4901:1-21-06(B) and Rule 4901:1-29-06(C).

In any case, a ban on incentives would throttle a marketing practice that many consumers enjoy in other contexts such as the purchase of cell phone service, grocery services, and credit card enrollments.[7] Like the sellers of those commodities, electric and natural gas suppliers should be

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[7] *See, e.g.* T-Mobile's recent I-Phone incentive at https://www.t-mobile.com/?cmpid=MGPO_PB_P_EVGRNBHV_43700064687827251_529901649969&gclid=CjwKCAjw8KmLBhB8EiwAQbqNoP449cLNx6Z6rChvSQstw66EkK9jjIDkR5OMurvlYDxMhRolIeH7ERoC6_EQAvD_BwE&gclsrc=aw.ds (viewed Oct. 16, 2021); Kroger's grocery services sign-up incentive at https://www.kroger.com/pr/pickup-delivery-savings-4?ds_rl=1281638&ds_rl=1281562&cid=ps_adw_ogs_15x3savoffer_t:%2Bkroger&gclid=CjwKCAjw8KmLBhB8EiwAQbqNoIMxRcWuE33wXhnutK23rLeFi2ZvzonaxArY9xefHBvL4T4SLspD6BoCjoYQAvD_BwE&gclsrc=aw.d

free to match their products to the desires of their customers. In fact, the state energy policy supports exactly that approach. R.C. 4928.02(B) and R.C. 4929.02(B).

Finally, the Commission should not adopt OCC's recommendation to ban introductory rates. OCC's recommendation attempts to improperly generalize to the industry the problems associated with a couple of suppliers, Verde Energy and PALMco, that engaged in business practices far removed from those of RESA members. OCC Comments at 7. Each offered introductory rates that converted to prices that were well above their competitors. These practices led to Commission investigations and ultimately significant penalties. *See, e.g.*, *In the Matter of the Commission's Investigation of PALMco Power OH*, Case No. 19-957-GE-COI, Opinion and Order (Jan. 29, 2020). These investigations demonstrate that the Commission has adequate means under the current rules to address a rogue supplier. OCC, however, would take those enforcement actions and extend them into a new rule prohibiting all introductory rates that convert to variable rate contracts and make it applicable to all energy suppliers. OCC has not made the case that the broad application of a ban is justified. It is not.

Additionally, this use of a sledgehammer instead of a scalpel presents the same kind of problems that a ban on new customer incentives presents: it ignores that there is a legitimate place for introductory offers and that customers see value in them. Once again, to enact a total ban would be contrary to state policy. R.C. 4928.02(B) and R.C. 4929.02(B).

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s (viewed Oct. 16, 2021), and credit card incentives at https://www.cardratings.com/bestcards/rewards-cards.php?src=295628&quadlink=http://o1.qnsr.com/cgi/r?;n=203;c=1579929;s=3086;x=7936;f=201605101559050;u=j;z=TIMESTAMP;&ad=345038754391&fb=credit%20card%20rewards&mt={matchtype&dev=c&network=g&gclid=CjwKCAjw8KmLBhB8EiwAQbqNoI8-Dq6L7Rhm8vx02XM2c3R1G0PcyqUm1wLtGcEyAM7tcoitxZk9ahoCjOIQAvD_BwE (viewed Oct. 16, 2021).

c. Additional mandated contract labeling

Inviting the Commission to reopen a fight in which there is no evidence anyone was hurt, OCC seeks to amend the rules to require contract labeling and to prohibit reopener clauses in fixed-rate contracts. OCC Comments at 14-15. The Commission should reject OCC's invitation.

In response to an attempt by FirstEnergy Solutions to pass through additional wholesale costs triggered by the 2014 polar vortex, the Commission opened an investigation that led to labeling guidelines and a prohibition on reopener provisions in contracts with fixed rates for energy and capacity in November 2015. The Commission then stayed the application of the guidelines, revised them, and then stayed the revised guidelines. *In the Matter of the Commission-Ordered Investigation of Marketing Practices in the Competitive Retail Electric Service Market*, Case No. 14-568-EL-COI, Fourth Entry on Rehearing (Sep. 27, 2017) ("Marketing Practices COI"). FirstEnergy Solutions never enforced the pass-through on residential customers, and all commercial customer complaints were settled. *Id.*, Application for Rehearing of the Retail Energy Supply Association at 2 (Apr. 28, 2017). Since the guidelines were stayed, there apparently has been no new issue to reverse the stay, and the Commission staff did not take the Commission's invitation to address this issue when it recommended the rules being reviewed in this proceeding. Thus, no residential customers were adversely affected and no other incidents have occurred to suggest that the guidelines are necessary.

Despite the lack of any demonstrated reason for adopting new rules, OCC states that labeling contracts as fixed, introductory, or variable will go a long way to help consumers understand the rates they will pay for service. OCC Comments at 14. Commission rules, however, already provide for detailed terms and conditions for competitive electric service sales. Rule 4901:1-21-05(A). OCC does not explain how a one-word label would provide any improvement.

It is more likely, however, that slapping a one-word label on a contract would be no improvement. Differences in contract language are not trivial. *Marketing Practices COI*, Application for Rehearing of the Retail Energy Supply Association at 4. Without careful parsing of the many different kinds of contract provisions, the proposed labels likely would lead to further unanticipated problems.

The Commission should also reject the recommendation to treat as an unfair business practice a contract that contains a fixed rate and pass-through provision. OCC Comments at 14. First, OCC does not address the "automatic drop" guideline and its consequences that were the import of the Commission's "fixed means fixed" guideline. The effects of the drop guideline were bad outcomes for both customers and suppliers, and the Commission correctly stayed their effect. *Marketing Practices COI*, Application for Rehearing of the Retail Energy Supply Association at 8-10.

Moreover, there is nothing deceptive or unfair when the contract correctly states the rate for the term of the agreement and provides that it may change if certain conditions occur, if the terms and conditions are clearly stated and explained. Individual cases may raise questions about a particular contract, as occurred during the 2014 polar vortex, but there is no justification for a blanket rule when Commission rules already provide that "marketing materials … include or accompany a service contract sufficient information for customers to make intelligent cost comparisons against offers they receive from other CRES providers" and other detailed contract disclosure requirements. Rule 4901:1-21-05(A) (punctuation omitted for clarity) and Rule 4901:1-21-12.

Moreover, OCC has not offered anything to demonstrate that the decision to stay the guidelines issued in the Marketing Practices COI was anything other than positive. It does not provide any evidence of customer confusion or injury that would be addressed by its labeling recommendation or contract restrictions, and the Commission staff did not include any changes to the rules similar to what OCC is recommending despite the passage of over four years since this rulemaking was designated as the vehicle for addressing the issues raised in the Commission investigation. Given what has *not* transpired in those four years, it is time to put these issues permanently to rest.

d. Expanded environmental disclosures

OCC and CUB-Ohio urge the Commission to alter the environmental disclosure requirements. OCC recommends that suppliers disclose the number and date on which they retire renewable energy credits ("RECs"); CUB-Ohio suggests that suppliers share environmental disclosure materials as part of the enrollment process. OCC Comments at 13-14; CUB-Ohio Comments at 2. Neither recommendation should be adopted.

The current rules provide that a supplier must make available its sources of energy in great detail. Rule 4901:1-21-09. Further, the rules provide that a supplier cannot claim in the enrollment process that any generation sources provide an environmental advantage that does not exist. Rule 4901:1-21-05(C)(9).

The change proposed by the OCC would add a discussion of RECs. RECs are a complex product that can serve to demonstrate compliance with the now-temporary renewable energy requirement. R.C. 4928.64. They are priced in separate markets and governed by various state rules that differ substantially. *See* https://www.renewableenergyworld.com/blog/primer-on-recs-how-they-work-and-how-theyre-changing-the-world/ (viewed Oct. 16, 2021). Without a sound understanding of what is required, the net result of requiring disclosure of REC retirements would be a homonymic wreck of confusion.

CUB-Ohio's proposal similarly is an example of unneeded regulation. As noted, current rules already provide the customer interested in the environmental characteristics of the power being purchased a means of determining the generation mix. Mandating further disclosure in the marketing materials is not necessary or demonstrated to improve the purchasing decision. To the extent that a supplier believes that kind of disclosure provides a competitive advantage, it should be permitted to pursue it; no supplier, however, should be required to do so.

2. The Commission should reject the recommendation of OCC to revise the rules applicable to variable rate contracts (CRES Rules 4901:1-21-05(A), 4901:1-21-12(B)(7) and CRNGS Rules 4901:1-29-05(A) and 4901:1-29-11(J)).

In another example of overstatement that infects many recommendations offered by OCC, the Counsel states that "[m]arketers have caused significant harm to consumers by gouging them with unconscionable rates charged through variable rate contracts" and that customers are confused by the variable rate contracts they receive from competitive suppliers. OCC Comments at 21. However, OCC fails to support either claim. Despite its failure to provide any evidence for its claims, OCC makes three recommendations. First, it implies that the Commission should ban variable rate contracts. Second, it recommends that the Commission require offers and contracts to pass a subjective "clarity" test and tie them to an index. Third, it recommends that the Commission cap variable rates to 2.25 times the utility's standard offer. *Id.* at 21-22.

Initially, OCC offers no basis for terminating variable rate offers other than its unsupported claims. In fact, both residential and commercial customers often see value in variable rate contracts because they can provide cost savings over fixed price contracts. Customers can then elect whether they want the cost savings or pay a potentially higher price for a fixed rate offer. It is a customer choice. *See* https://www.smartenergy.com/should-you-choose-a-fixed-or-a-variable-rate-plan/ (viewed Oct. 15, 2021). It would be wrong to take an option off the table through an unsupported claim of confusion as a matter of state policy. R.C. 4928.02(B) and (C) and R.C. 4929.02(A)(2) and (3).

Second, OCC's "clarity" test is not needed, and limiting variable contracts to those that are tied to an index is not reasonable because disclosure requirements are sufficient. As OCC concedes, current rules require a clear and understandable explanation of the factors that will cause a price to vary including any applicable formula. *See* Rule 4901:1-21-05(A)(3), Rule 4901:1-21-12(B)(7), Rule 4901:1-29-05(A), and Rule 4901:1-29-11(J). If the terms and conditions for a contract are plainly explained, the choice is for the customer to make; the Commission should not impose rules that further restrict the customer's options.

Further, OCC's additional restrictions on a supplier's contracting to only those contracts that could be tied to an index ignores market realities. There is nothing wrong with a contract agreement based on non-indexed factors as long as the contract clearly informs the customer that other factors may affect the price paid.

Third, OCC's attempt to fix the amount by which a variable rate offer exceeds the standard offer rate emphasizes the contradictions inherent in its proposals on variable rate contracts. While OCC assumes that a customer will understand clearly stated offers, it nonetheless recommends a price cap arbitrarily set at 2.25 times the standard offer rate. R.C. 4928.05(A)(1), however, provides that CRES supplied by a competitive supplier is not subject to the Commission's ratemaking authority in Chapter 4909. In addition, R.C. 4928.10(A) states that the Commission's rules may address *disclosure* of pricing terms for customers. There is no practical reason for the arbitrary cap in the vast number of cases either. Further, it is clear that OCC is once again trying to force market offers to be compared against the much more regulated wholesale standard offer, a comparison the Commission has often correctly rejected. *See also* RESA's discussion below regarding OCC's shadow billing proposal.

3. Mandating disclosure of marketing plans, a registration process and other activities related to use of third parties and independent sales agents is not lawful or reasonable (CRES Rule 4901:1-21-06 and CRNGS Rule 4901:1-29-06).

OCC proposes that the Commission add numerous provisions related to suppliers' use of third parties and independent sales agents, to mandate:

- Disclosure to the Commission and OCC of a supplier's plans to use third-party sales agents, including the agents' names.
- Third-party and independent sales agents to register with Commission, identifying management personnel names, sales agent names, office address and telephone number.
- Suppliers to train the third-party agents directly, with documentation given to Commission.
- Suppliers to audit, bi-annually, the training materials and agents' solicitation practices.
- Suppliers to suspend the use of agents that fail to comply with Ohio laws, and audit all enrollments by that third party at the supplier's cost.

OCC Comments at 15-17. There are fundamental flaws with these OCC proposals. First, OCC stated that its purpose for these proposed changes is to make suppliers ultimately responsible for any bad acts by third parties and independent sales agents; however, these changes will not accomplish that purpose. *Id.* at 15. For example, mandating disclosure of a plan to use such third party sales agents or requiring them to register with the Commission does not make a supplier responsible for the sales agent's actions. Second, the Commission does not have statutory authority over third parties and independent sales agents to mandate a registration process. It is noteworthy that OCC does not address the Commission's authority to require registration by third parties and independent sales agents. The reason is that R.C. Chapters 4928 and 4929 do not extend Commission authority to the third-party sales agents. Third, suppliers should not be required to disclose their marketing plans and strategies to the Commission and OCC. This recommendation also would require a constant disclosure of trade secret information and would be burdensome as different agents are used. Fourth, OCC's proposed changes would unnecessarily interfere with existing contractual terms and conditions that suppliers have with third parties and independent sales agents. Because there are multiple problems with OCC's proposals, the Commission should reject these changes.

4. Rules that mandate shadow billing, an online customer form, and a state "Do Not Call" registry should be rejected (CRES Rule 4901:1-21-10 and CRNGS Rule 4901:1-29-09).

OCC argues that, "to protect consumers from unconscionable charges," the Commission should adopt rules that would apply to the *electric and natural gas distribution companies* to mandate that they provide (a) shadow billing information to the Commission and to OCC and (b) an on-line form for customers to opt out from the utility sharing the customer's contact information. OCC Comments at 25-26. Alternatively, OCC states suppliers should develop a State of Ohio "do not call" registry. *Id*. OCC's requests should be rejected because they are inappropriate for the supplier rules under review in these proceedings, were previously rejected by the Commission, and are unnecessary.

OCC fails to explain why it is reasonable to include in any of the rules under consideration, which apply to suppliers, new rules that apply to the utilities. It is further noteworthy that OCC's requests for shadow billing and an on-line form are directly inconsistent with the Commission's prior decisions to move rules that apply to the *natural gas distribution companies* out of the CRNGS rules and into Ohio Administrative Code Chapter 4901:1-13.[8] OCC seemed to recognize

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[8] The Commission noted the Staff's efforts and supported those efforts by approving rule revisions to consolidate all rules addressing the minimum gas service standards for natural gas distribution companies in one chapter. *In the Matter of the Commission's Review of Chapter 4901:1-13 of the Ohio Administrative Code, Regarding Minimum Gas Service Standards*, Case No. 13-2225-GA-ORD, Finding and Order at ¶¶ 13, 15, 106 (July 30, 20214); *In the Matter of the Commission's Review of the Minimum Gas Service Standards in Chapter 4901:1-13 of the Ohio Administrative Code*, Case No. 19-1429-GA-ORD, Finding and Order at ¶¶ 7 and 108 (February 24, 2021).

Staff's proposals here are to continue eliminating existing rules that mandate action by the *natural gas distribution companies*[9] when OCC stated that it does not oppose those proposals. OCC Comments at 34-35. OCC's shadow billing and online form proposals, however, would be inconsistent with the purpose of the Staff's proposed changes in these rules. And, if not already clear, the fact that OCC did not present proposed language or identify where these utility rules should be included in the supplier rules, is further evidence that OCC's shadow billing and online form do not fit within the supplier rules. On these bases alone, both the shadow billing and online form proposals should be rejected.

Rules on shadow billing also should be rejected based on prior Commission precedent, which includes decisions issued earlier this year. In response to industry objections pointing out the unreasonableness of shadow billing, the Commission has repeatedly rejected OCC's shadow billing request because substantial, viable customer information is already available. *In three separate decisions issued in 2021 alone, the Commission rejected rule proposals from OCC to require the utilities to conduct shadow-billing analyses.* The Commission stated in January 2021 in the context of the electric distribution utility rules:

> The Commission rejects OCC's argument regarding shadow billing. *Viable public resources already exist, namely the Commission's "apples to apples" website at energychoice.ohio.gov, which enable customers to compare differences between CRES providers' programs and rates and an EDU's SSO.* If customers have concerns regarding a discrepancy between rates listed on energychoice.ohio.gov and the price-to-compare listed on their utility bill, they have the opportunity to contact the Commission regarding the difference, as well as contact the specific CRES provider or EDU. We value transparency between customers and the rates/programs administered by CRES providers and an EDU's SSO rate, and, at the same time, we recognize the additional cost and burdens implementing OCC's proposed shadow billing report would have on EDUs. At this time, we find the current informational resources available to customers sufficient and

[9] *See e.g.* Entry at Attachment G pages 22-23 (proposed changes to Rule 4901:27-13(F)) and Attachment K pages 18-19, 22-25 and 39-41 (proposed changes to Rule 4901:1-29-06(H), Rules 4901:1-29-08(C) and (D)(6), Rule 4901:1-29-09(C) and Rule 4901:1-29-13) (Sep. 8, 2021).

> OCC's proposed shadow billing requirement unnecessary; therefore, OCC's first assignment of error should be denied.

In the Matter of the Commission's Review of its Rules for Electrical Safety and Service Standards Contained in Chapter 4901:1-10 of the Ohio Administrative Code, Case No. 17-1842-EL-ORD, Entry on Rehearing at ¶ 35 (Jan. 27, 2021) (emphasis added) (also rejecting OCC's request to make shadow billing publicly available).

In February 2021, the Commission came to the same conclusion in the context of the natural gas distribution utility rules, stating:

> Consistent with our decisions in prior cases, the Commission declines to adopt OCC's shadow-billing proposal. *2009 MGSS Case*, Finding and Order (July 29, 2010) at 48- 49; *In re Duke Energy Ohio, Inc.*, Case No. 19-1593-GE-UNC, Finding and Order (Dec. 18, 2019) at ¶¶ 28, 35; *In re the Commission's Review of its Rules for Electrical Safety and Service Standards Contained in Chapter 4901:1-10 of the Ohio Administrative Code*, Case No. 17-1842- EL-ORD, Finding and Order (Feb. 26, 2020) at ¶ 162, Entry on Rehearing (Jan. 27, 2021) at ¶ 35. As OCC has acknowledged, its proposal would require significant billing system changes. Further, there are a number of existing resources, such as the Commission's Energy Choice Ohio website, that provide a substantial amount of information for customers to compare pricing and available offers.

In the Matter of the Commission's Review of the Minimum Gas Service Standards in Chapter 4901:1-13 of the Ohio Administrative Code, Case No. 19-1429-GA-ORD, Finding and Order at ¶ 89 (Feb. 24, 2021).

In April 2021, the Commission rejected shadow billing again, stating the following in a rehearing decision:

> * * * [T]he Commission fully explained the basis for its decision in the February 24, 2021 Finding and Order. We noted that the Commission has previously rejected, on several occasions, similar shadow-billing recommendations; that customers have other existing resources for comparing pricing and available offers; and that OCC's proposal would require significant billing system or other programming changes, as the natural gas companies noted in their reply comments.

Id., Entry on Rehearing at ¶ 20 (Apr. 21, 2021).

Those three decisions are the most recent rulings; the Commission also rejected the shadow-billing proposal in other cases. *See e.g.*, *In re Application of Ohio Power Company to Initiate Phase 2 of its gridSMART Project and to Establish the gridSMART Phase 2 Rider*, Case No. 13-1939-EL-RDR, Opinion and Order at ¶ 79 (Feb. 1, 2017) (rejecting Ohio Partners for Affordable Energy's request for shadow billing) and *In re the Purchased Gas Adjustment Clause Contained within the Rate Schedules of Duke Energy Ohio, Inc.*, Case No. 18-218-GA-GCR, et al., Opinion and Order at ¶ 54 (Dec. 18, 2019) (rejecting OCC's shadow billing recommendation which the Commission had also previously rejected in Duke's 2015 audit case regarding its GCR rider).

Shadow billing should be rejected as well because it results in an inappropriate apples-to-oranges comparison. Shadow billing fails to include only the same type of product because it lumps all known prices together and calculates an average. It would not include special contract pricing or pricing billed only by the supplier (i.e., under a dual billing arrangement or a supplier-consolidated billing arrangement). It does not adjust for higher-priced environmental offers either. Shadow billing also wrongly presumes that the lumped-together average is comparable to the standard offer rate that results from a wholesale-style auction.

Because OCC raises nothing new in these proceedings to justify any shadow billing requirements, the Commission should follow its prior decisions and again reject any rules that mandate the utilities to conduct shadow-billing analyses and share the results with OCC and the Commission.

OCC's request for an online opt-out form should also be rejected because it is duplicative of the Commission's long-standing requirement for customers to be notified at least four times each year with written notice, in billing statements or other communications, of their right to object to being included on the eligible-customer lists. Already, customers can opt out of the eligible-customer list by calling the utility, writing to the utility or by completing the appropriate form on the utility website. *See* Rule 4901:10-25(F)(4) and Rule 4901:1-13-12(F)(3). Customers can also opt to not have their customer-specific information provided to suppliers. *See* Rule 4901:1-10-24(F)(3) and Rule 4901:1-13-12(F)(4). Those opt outs remain in effect until the customer directs otherwise. Given these existing rules, OCC's proposed mandate for an online form should be rejected.

OCC's alternative for a requirement that suppliers develop a state of Ohio "do not call" registry is not within the Commission's authority and is unnecessary. Like many of the other proposals, OCC presents no authority by which the Commission can order suppliers to develop a state registry. Without the requisite statutory authority, the Commission cannot require it. A state registry also is unnecessary because the Commission's rules already require suppliers to obtain and not solicit by telephone customers who have placed themselves on the Do Not Call registry of the FTC. *See* Rule 4901:1-21-05(C) and Rule 4901:1-29-05(D). In addition, suppliers must obtain the list specific to Ohio customers by their area code. The FTC registry is well known and established, having begun in 2003, and customers can easily add themselves. OCC's request would be duplicative of the FTC list.

OCC's proposal would also prohibit suppliers from visiting customers on its proposed state "do not call" registry, which is unnecessary and impractical. If customers do not want to be solicited at their residence or business, they can easily address it with a "no soliciting" sign. Signage is a more effective approach because there is no practical way to maintain an accurate list as customers move in and out. It is not reasonable to assume that customers will notify the registry when they relocate, resulting in an inaccurate registry.

Lastly, if the Commission were to initiate a state registry (which it should not), RESA also objects to OCC's suggestion that suppliers must be required to "develop" a state do not call system. Presumably, this OCC suggestion would include suppliers paying for such a registry. Suppliers should be able to participate if they choose – not be required by Commission rule. Suppliers should not be required to fund a registry that is outside the Commission's authority and unnecessary. OCC has not demonstrated why the current rules are insufficient and why a duplicative and unworkable state registry is necessary. The Commission, therefore, should reject the registry proposal.

5. Automatic renewal of customer supply contracts should not be prohibited (CRES Rule 4901:1-21-11 and CRNGS Rule 4901:1-29-10).

OCC next proposes that the Commission prohibit automatic renewal of customer contracts, except when they renew on a month-to-month basis, and thus require affirmative customer consent for a contract to renew (with advance notice explaining that opportunity). OCC Comments at 17-20. Automatic renewal of customer supply contracts does not conflict Ohio law or policy. Rather, automatic renewals are a frequent contractual term proposed and included in numerous business contracts. Moreover, RESA understands that most jurisdictions with retail choice allow automatic renewal of customer supply contracts. Customers can address that term if they have concerns with it by either negotiating a different term or terminating the contract before or after the renewal. The Commission has repeatedly ruled that automatic renewal of customer contracts is acceptable, finding that the Commission rules provide sufficient consumer protection – including advance notice of the upcoming contract renewal. *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 at ¶ 69 (Dec. 18, 2013) and Entry on Rehearing at ¶ 11 (Feb. 26, 2014); *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 at ¶ 75 (Dec. 18, 2013) and Entry on Rehearing at ¶ 12 (Apr. 23, 2014). The Commission should reject this OCC proposal, consistent with its prior decisions.

6. The Commission does not have authority to limit the amount of early termination fees (CRES Rule 4901:1-21-11(F)(4) and CRNGS Rule 4901:1-29-10(G)(4)).

OCC next claims that early termination fees for residential customers should be zero, but proposes that the Commission mandate a limit of $25.00 for early termination fees.[10] OCC fails to cite any statutory basis for its proposal or explain why $25.00 should be the amount of any cap. Importantly, OCC overlooks the Commission does not have the authority to regulate the amount of supplier charges – including early termination fees. R.C. 4928.05(A)(1) states that CRES supplied by a supplier is not subject to the Commission's ratemaking authority in Chapter 4909. In addition, R.C. 4928.10(B) and R.C. 4929.22(B) limit what the Commission's rules may address, namely, *disclosure* of terms for customers to "terminate service, including any required notice and any penalties." *See also* R.C. 4928.10(D)(6) and R.C. 4929.22(D)(4). The Commission, as a state agency, can only exercise that authority which has been specifically delegated to it by the General Assembly.[11] Without the requisite statutory authority to regulate suppliers' early termination fees, the Commission cannot impose a limit or cap the amount of early termination fees.

[10] OCC Comments at 18, 20.

[11] *Tongren v. Pub. Util. Comm.* (1999), 85 Ohio St.3d 87, citing *Columbus S. Power Co. v. Pub. Util. Comm.* (1993), 67 Ohio St.3d 535, 620 N.E.2d 835; *Pike Natural Gas Co. v. Pub. Util. Comm.* (1981), 68 Ohio St.2d 181, 22 O.O.3d 410, 429 N.E.2d 444; *Consumers' Counsel v. Pub. Util. Comm.* (1981), 67 Ohio St.2d 152, 21 O.O.3d 96, 423 N.E.2d 820; and *Dayton Communications Corp. v. Pub. Util. Comm.* (1980), 64 Ohio St.2d 302, 18 O.O.3d 478, 414 N.E.2d 1051.

In addition, early termination fees are an important contract term. When a supplier enters into a contract with a customer, the supplier is committing to provide electricity or natural gas for the contract term at the specified price. The supplier also enters into a wholesale contract(s) committing to purchase that electricity or natural gas. Customers who terminate their contract before the contract term expires impose a risk on the supplier because the supplier is still obligated to its wholesale provider to purchase the supply. The early termination fee mitigates the risk of an early termination. Importantly, OCC did not include any explanation or justification for its proposed $25.00 amount and therefore, the Commission has no basis for accepting it. For all of the above reasons, this OCC proposal should be rejected by the Commission too.

III. CONCLUSION

For the reasons set forth above, RESA recommends that the Commission reject the proposals from OCC and CUB-Ohio. As RESA explained in its initial comments, a number of clarifications and revisions to the rules are appropriate and timely to improve the CRES and CRNGS rules, while also fitting within Ohio's requirements for regulatory restrictions. RESA urges the Commission to adopt RESA's proposals as contained in its initial comments.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned certifies that a courtesy copy of the foregoing document is also being served (via electronic mail) on the 22nd day of October 2021 on all persons/entities listed below:

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