BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

MEMORANDUM CONTRA OF THE RETAIL ENERGY SUPPLY ASSOCIATION TO THE OFFICE OF THE OHIO CONSUMERS' COUNSEL'S MARCH 22, 2024 APPLICATION FOR REHEARING

I. INTRODUCTION

The February 21, 2024 Order in the above-captioned cases is not erroneous because it did not include the revisions that the Office of the Ohio Consumers' Counsel ("OCC") sought, despite the three arguments in OCC's application for rehearing. Rather, the Public Utilities Commission of Ohio ("Commission") correctly decided to not adopt OCC's proposed rule changes. Specifically, the Order is not unlawful or unreasonable because there are existing protections in the supplier rules today and in the supplier rules as adopted in these proceedings. While OCC agrees and often cites to the benefits of competitive markets to deliver competitive products and services to customers,[1] OCC also often, as it does here, proposes overly broad rules and regulations in the name of customer protections. OCC's proposals, however, will blunt the benefits of a competitive

[1] *In re the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 23-301-EL-SSO, Initial Brief for Consumer Protection by Office of the Ohio Consumers' Counsel at p. 50, arguing that certain programs should be provided through the competitive market (January 19, 2024).

marketplace and deprive customers of these benefits. While RESA believes OCC's proposed customer protection changes should have been outright rejected, any further consideration of the proposals warrants further consideration in a separate proceeding, as the Commission found in its Order.

In addition, there was no error in continuing the existing waivers that allow customers greater flexibility in the enrollment and verification processes because customers still have the options to use the "traditional" approaches. The Commission's decision allows customers the opportunity to select to use digital processes if the customer would like. Simply because OCC does not want customers to have these options does not render the Commission's not eliminating them now unlawful or unreasonable. Finally, OCC wrongly claims that it was error to revise Ohio Adm.Code ("Rule") 4901:1-24-08(A) for competitive retail electric service ("CRES") and Rule 4901:1-27-08(A) for competitive retail natural gas service ("CRNGS"). The revisions correspond with a long-standing Commission decision that OCC did not challenge at the time. That earlier decision was justified, and the Commission confirmed that the same rationale exists today for incorporating the revisions in the respective CRES and CRNGS rules. The Retail Energy Supply Association ("RESA")[2] urges the Commission to deny OCC's application for rehearing in its entirety.

[2] 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.

II. ARGUMENT

A. OCC's first assignment of error should be rejected because the Commission did not err when it declined to adopt proposals alleged to be consumer protections and when OCC fails to meet the statutory burden set forth in Rule 4901-1-35(A).

In its first assignment of error, OCC asserts that the Commission acted unlawfully and unreasonably by deferring consideration of the consumer-protection proposals suggested by OCC and other stakeholders to a yet-to-be initiated case.[3] OCC alleges that deferring consideration is unlawful and unreasonable because (1) the Commission has had sufficient time to rule, and (2) delay will harm consumers. Neither claim has merit because OCC's underlying rule proposals are themselves unlawful and unreasonable, and many have been rejected by the Commission before. The claim of sufficient time to rule is also meritless given the scope of this review, and the allegation of harm is not substantiated. Finally, OCC's first assignment of error does not meet the statutory burden set forth in Rule 4901-1-35(A), as OCC's application for rehearing only substantively addresses two rule changes in assignments of error 2 & 3 yet appears to seek many more unidentified and unexplained rule changes through the "temporal" error OCC raises in the first assignment of error. As such, while the Commission should deny assignment of error 1, if the Commission considers the issue at all it must be limited to a procedural issue related to the rule changes OCC seeks in assignments of error 2 & 3.

In its initial comments, OCC proposed numerous unreasonable changes, including banning door-to-door sales, incentives to switch, introductory rates, and variable rates.[4] Other unreasonable and unlawful proposals argued for by OCC include mandating the disclosure of

[3] OCC Application for Rehearing at 3-4.

[4] OCC Initial Comments at 6-10, 22-25.

marketing plans and a registration process for third party and independent sales agents.[5] As RESA explained in its reply comments, OCC is proposing to take away options from customers, thus effectively limiting customer choice, without providing a factual basis to support its arguments.[6] First, implementing total bans on programs that incentivize suppliers to offer competitive prices and that would put limitations on customer choice is contrary to state policy.[7] Second, the Commission already has significant protections in place to protect consumers like rules regulating the practice of door-to-door sales.[8] Finally, OCC's proposals for marketing plans and sales agents would require that the Commission to enact rules to apply to those outside of the Commission's jurisdiction (sales agents), and would require the disclosure of competitively sensitive information and trade secrets (disclosing marketing plans).[9] It can hardly be grounds for rehearing that the Commission deferred a ruling on OCC's "customer-protection" proposals when either the Commission has already found them to be without merit or they are inappropriate.[10] The reasonable outcome would have been for the Commission to soundly reject (again) OCC's claims.

[5] OCC Initial Comments at 15-17.

[6] RESA Reply Comments at 13-15.

[7] RESA Reply Comments at 7-10; R.C. 4928.02(B) and R.C. 4929.02(B).

[8] RESA Reply Comments at 7-8; Rule 4901:1-21-06(D) and Rule 4901:1-29-06(D).

[9] RESA Reply Comments at 15-16.

[10] *See generally*, RESA Reply Comments at 7-17, citing to many prior Commission decisions and reasons by OCC's proposals are inappropriate. *See also.*, *In re the Matter of the Proper Procedures and Process for the Commission's Operation and Proceedings During the Declared State of Emergency and Related Matters*, Case No. 20-591-AU-UNC, Entry on Rehearing (September 23, 2021) (declining to adopt OCC's per se proposed indefinite ban on door-to-door sales and finding it proper to allow the resumption of door-to-door sales); and *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. 22-809-GA-ORD, Finding and Order at ¶ 19 (December 24, 2021), rejecting OCC's request to establish rules on shadow billing.

As the Commission recently held, OCC does not possess infinite bites at the apple to continue relitigating the same issues.[11]

OCC's "ample time" argument should be rejected because it is a red herring. While RESA generally supports timely reviews to the supplier rules at issue here in order to best enhance Ohio's pro-customer choice statutory framework, there is no indication from the Commission that time restraints were its basis for not considering OCC's proposals. Instead, the Commission stated that the complex issues submitted by stakeholders should be taken up in a subsequent case to allow for a more thorough review.[12] Further, OCC has raised these types of issues before, and they have been rejected by the Commission.[13]

OCC further alleges that customers will be harmed by delayed consideration of its proposals. This argument should be rejected because OCC fails to articulate facts that would support that conclusion.[14] The suppliers named in OCC's application for rehearing have already been subject to Commission action for noncompliance with the existing rules. This demonstrates that, in practice, the existing rules are working to protect Ohio consumers. The fact that the Commission has already initiated investigations into the suppliers OCC references undercuts OCC's argument that customers will be harmed by the Commission not adopting OCC's proposed

[11] *In re Application of The Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan*, Case No. 08-1094-EL-SSO, Tenth Entry on Rehearing, denying OCC's application for rehearing (November 30, 2022); R.C. 4903.10.

[12] Finding and Order at ¶ 18.

[13] *In re the Matter of the Proper Procedures and Process for the Commission's Operation and Proceedings During the Declared State of Emergency and Related Matters*, Case No. 20-591-AU-UNC, Entry on Rehearing (September 23, 2021) (declining to adopt OCC's per se proposed indefinite ban on door-to-door sales and finding it proper to allow the resumption of door-to-door sales); *In re the Commission-Ordered Investigation of Marketing Practices in the Competitive Retail Electric Service Market*, Case No. 14-568-EL-COI (March 29, 2017).

[14] *See generally*, OCC Application for Rehearing at 3-4.

rule changes now. Therefore, OCC fails to demonstrate how the existing rules and the Commission's actions under the rules are inadequate.

In addition, OCC does not explain its first assignment of error with the required statutory specificity. According to Rule 4901-1-35, a party seeking rehearing:

> [M]ust set forth, in numbered or lettered paragraphs, the specific ground or grounds upon which the applicant considers the commission order to be unreasonable or unlawful.[15]

OCC alleges that it raised certain "consumer protection issues" in its comments and reply comments that addressed several subjects.[16] OCC then asserts that the Commission has had ample time to consider those issues.[17] However, OCC's application for rehearing only addresses two issues with specificity – in assignments of error 2 and 3, which are alternative paths to the standard enrollment and standard third-party verification ("TPV") processes, and confidentiality of certain information required by CRES and CRNGS certification applications. OCC's failure to specifically raise in its first assignment of error any other aspect of the supplier rules that should have been modified prevents the Commission from considering these unidentified and unexplained changes.

OCC's consumer-protection proposals were correctly not adopted in the supplier rules. They have either been rejected previously or are inappropriate. OCC's failure to properly present this assignment of error with the specificity required by the Commission is an additional reason for rejecting the first assignment of error.

[15] Rule 4901-1-35(A).

[16] OCC Application for Rehearing at 3.

[17] OCC Application for Rehearing at 4.

B. OCC's second assignment of error mischaracterizes the limited waivers granted by the Commission and does not establish any error.

In this assignment of error, OCC asserts that only use of the standard enrollment and TPV processes will prevent customers from being signed up for CRES or CRNGS without the customer's consent.[18] OCC's second assignment of error mischaracterizes the Commission's Order, is an improper collateral attack on decisions in other proceedings, and OCC again seeks the use of a broad rule change to address a narrow issue. The assignment of error should be rejected.

In its second assignment of error, OCC claims that the Commission erred by indefinitely extending suppliers' waivers from certain Commission rules regarding enrollment and TPVs.[19] OCC's application for rehearing omits the underlying facts from the individual waiver cases where the Commission found that a basis for the waivers had been substantively demonstrated. The Commission granted waivers after finding the proposed alternatives still protected customers also streamlined the process. An example is IGS training their own employees to become specialized home energy consultants to do door-to-door sales.[20]

OCC's argument is also logically inconsistent. OCC argues that continuation of the waivers of the involved rules is improper because some suppliers ignored the rules. OCC does not explain how the parties that identified alternative means to ensure customer consent to the contracts is insufficient or how requiring the suppliers with alternative consent paths to follow the standard TPV process yields additional benefits to customers.

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[18] OCC Application for Rehearing at 6.

[19] OCC Application for Rehearing at 4-5.

[20] *In the Matter of the Application of Interstate Gas Supply, Inc., for a Waiver of Ohio Adm. Code 4901:1-10-29(D)(6)(b) and 4901:1-21-06(D)(1)(h),* Case No. 14-1740-EL-WVR.

OCC also fails to explain why this is not a collateral attack on the underlying waiver cases. The Commission generally does not permit collateral attacks,[21] collateral attacks are often barred by R.C. 4903.10, and even when a collateral attack is allowed under R.C. 4905.26, the Commission has rejected arguments that were recently and thoroughly considered as improper collateral attacks.[22] OCC has failed to meet this standard. The argument is an untimely application for rehearing of the decisions in the underlying waiver cases, the issues were recently and thoroughly considered, and OCC fails to explain how a supplier without a waiver and which violated the standard TPV requirement necessitates other entities that demonstrated an alternative path to meeting the spirit of the rule need to comply with the standard TPV requirement. Again, OCC is not entitled to endless bites at the apple. Its arguments were already considered and rejected and should again be rejected here.

Finally, OCC mischaracterizes the Commission's decision. The Commission indicated it would revisit, wholistically, the rules in the next review of the supplier rules, and decide then if it makes sense to have the existing waivers extended. Of course, the waivers might be eliminated because the alternative consent verification process in the individual waiver cases might be made itself part of the supplier rules. In any event, OCC had an opportunity in the individual waiver cases to advance its arguments, and did in fact do so, and the Commission rejected OCC's arguments. OCC raises nothing new here that demonstrates that alternative

[21] *See In the Matter of the Procurement of Standard Service Offer Generation Service for Customers of The Dayton Power and Light Company*, Case No. 17-957-EL-UNC, Entry on Rehearing at ¶ 19 (Nov. 16, 2022) (denying OCC's application for rehearing as an improper collateral attack).

[22] *In re Suburban Natural Gas v. Columbia Gas of Ohio*, Case No. 21-1768-GA-CSS, Opinion and Order at ¶ 58 (Apr. 10, 2019) (citing *Board of Education v. The Cleveland Elec. Illum. Co.*, Case No. 91-2308-EL-CSS, Entry (July 2, 1992)).

consent verification processes to the standard TPV cannot or should not continue to be utilized as authorized by the Commission.[23]

C. The Commission did not err in incorporating its June 2020 decision in its certification rules to allow credit reports and credit ratings to be submitted without a motion for protective order if a competitive supplier opts to file that information under seal.

OCC claims in its third and final assignment of error that there is "no basis" for the Commission-adopted rules that allow suppliers to file credit reports and credit ratings under seal and have that information treated confidentially. OCC argues that the suppliers should have the burden – through a motion – to demonstrate that its credit rating and credit report should be protected from the public, instead of receiving automatic confidential treatment.[24] OCC further claims that credit ratings typically are not confidential, and some business credit reports can be obtained through sources such as Dun & Bradstreet, Equifax, and Experian.[25]

In these proceedings, the Commission adopted the following identical changes for CRES Rule 4901:1-24-08(A) and CRNGS Rule 4901:1-27-08(A):

> An applicant may file financial statements, financial arrangements, ~~and~~ forecasted financial statements**, credit reports, and credit ratings** under seal. If these exhibits are filed under seal, they will be afforded protective treatment for a period of six years from the date of the certificate for which the information is being provided.

A motion for protective order is not required for the credit reports and credit rates filed under seal because CRES Rule 4901:1-24-08(B) and CRNGS Rule 4901:1-27-08(B) both state a certification "applicant may file a motion for protective order covering information not covered under paragraph (A)" of those rules.

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[23] OCC Application for Rehearing at 6.

[24] OCC Application for Rehearing at 7.

[25] OCC Application for Rehearing at 7.

There is a lawful and reasonable basis for the adopted revisions in CRES Rule 4901:1-24-08(A) and CRNGS Rule 4901:1-27-08(A), and therefore OCC's assignment of error is wrong. The Commission concluded years ago that suppliers would no longer be required to file motions for protective orders if a supplier chooses to file a credit report or credit rating under seal. The Commission, on its own initiative in June 2020, waived CRES Rule 4901:1-24-08(A) and CRNGS Rule 4901:1-27-08(A) to expand the types of items that can be afforded protective treatment without the filing of a motion for protective order – by adding credit reports and credit ratings – if a supplier applicant chooses to file them under seal.[26] The Commission reached that conclusion in order to effectuate the PUCO Community's then-new functionality and to streamline the certification process for the competitive suppliers.[27] That rationale still exists today, and the Commission confirmed it in its February 21, 2024 decision in these proceedings. Specifically, the Commission stated:

> [I]n response to the comments relating to Staff's proposed revisions to Ohio Adm.Code 4901:1-24-08(A) and 4901:1-27- 08(A), we agree that credit reports and credit ratings should be allowed to be filed under seal, consistent with the waiver granted in Case No. 20-1077-GE-WVR. The Commission notes the waiver in that case was awarded to accommodate the expanded functionality of the Commission's web-based system that enables a streamlined process for both CRES and CRNGS providers to complete new certification applications, complete renewal applications, submit material changes, or abandon their certificates.[28]

In addition, OCC's third assignment of error should be rejected because it wrongly suggests that, with the adopted rule revisions, credit rating and credit reports must be filed under seal as confidential and/or will be forever treated as confidential by the Commission. OCC's third

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[26] *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, Entry at ¶ 6(b) (June 3, 2020).

[27] *Id*. at ¶ 6.

[28] Finding and Order at ¶ 17.

assignment of error states that the Commission "ruled that the credit reports filed by marketers when applying for certificates to serve Ohioans should automatically be treated as confidential." As the language of adopted CRES Rule 4901:1-24-08(A) and adopted CRNGS Rule 4901:1-27-08(A) states, the rule revisions do not mandate the filing of credit reports or credit ratings under seal, and do not provide indefinite confidential treatment. RESA previously pointed out that, since the waivers have been in place, some suppliers have opted to file their credit ratings and credit reports publicly, while others have not.[29] The adopted rule revisions also do not prevent an interested party from challenging confidential treatment when first submitted, or if the supplier requests to extend confidential treatment. The Commission pointed that out as well in its Finding and Order at ¶ 17, stating: "[f]urthermore, we agree with RESA that nothing in the rule prohibits parties from contesting the confidential nature of such information in such a proceeding." OCC's mischaracterizations are another reason for rejecting the third assignment of error.

Next, OCC's third assignment of error should be rejected because it is nothing more than another attack on the Commission's June 2020 ruling in Case No. 20-1077-GE-UNC because the Commission is revising CRES Rule 4901:1-24-08(A) and CRNGS Rule 4901:1-27-08(A) to reflect that 2020 decision in its rules. OCC had the opportunity in 2020 but opted not to challenge the decision in Case No. 20-1077-GE-UNC at that time. OCC's attempt to challenge the 2020 ruling in OCC's initial comments in these proceedings was rightly rejected. OCC should not be allowed a third opportunity (via rehearing) to challenge and revise the Commission's June 2020 ruling to not require suppliers to file motions for protective order if a supplier chooses to file a credit report or credit rating under seal.

[29] *See* RESA's Reply Comments at 3.

OCC's claim that these documents are "typically" not confidential or otherwise available through sources should not be accepted because there are existing restrictions on the public disclosure of such information. For example, Dun & Bradstreet prevent parties from publishing its information.[30]

Finally, OCC's assignment of error should be rejected because it is a restatement of its earlier comments in these proceedings, which were fully considered and rejected by the Commission. Paragraph 17 of the Commission's February 21, 2024 decision makes clear that OCC's comments regarding CRES Rule 4901:1-24-08(A) and CRNGS Rule 4901:1-27-08(A) were fully considered and rejected by the Commission. OCC's third assignment of error raises nothing new that warrants a reversal of the Commission's decision on this point.

III. CONCLUSION

RESA recommends that the Commission deny OCC's March 22, 2024 application for rehearing in its entirety. The "consumer protections" OCC wants are not warranted, continuing the existing waivers that allow customers greater flexibility in the enrollment and verification processes is reasonable especially since customers still have the options to use the "traditional" enrollment and verification processes, and incorporating revisions in CRES Rule 4901:1-24-08(A)

[30] *See* https://www.dnb.com/ca-en/utility-pages/terms-of-use.html.

and CRNGS Rule 4901:1-27-08(A) to reflect the Commission's in June 2020 decision in Case No. 20-1077-GE-UNC is reasonable.

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 1st day of April 2024 on all persons/entities listed below:

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Summary: Memorandum Contra electronically filed by Mrs. Gretchen L. Petrucci on behalf of Retail Energy Supply Association.