BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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| In the Matter of the Commission's Review of Chapters 4901:1-9, 4901:1-10, 4901:1-21, 4901:1-22, 4901:1-23, 4901:1-24, and 4901:1-25 Of The Ohio Administrative Code. | ) ) ) ) | Case No. 06-653-EL-ORD |

**REPLY COMMENTS OF CONSTELLATION NEWENERGY, INC, DIRECT ENERGY SERVICES, LLC, INTEGRYS ENERGY SERVICES, LLC AND STRATEGIC ENERGY, LLC**

Now come Constellation NewEnergy, Inc. ("CNE"), Direct Energy Services, LLC ("Direct Energy"), Integrys Energy Services, LLC ("Integrys"),and Strategic Energy LLC ("SEL")[1] and pursuant to the April 4, 2007 and April 23, 2007 Entries in the matter at bar, submit these Reply Comments for the Commission's consideration. CNE, Direct Energy, Integrys, and SEL (collectively, the "Marketers") are all Commission certificated competitive retail electric suppliers ("CRES"). These parties filed individual Initial Comments expressing their view of the current status of the CRES Rules[2] and the amendments to the CRES Rules proposed by the Commission Staff, as well as certain Rules addressing standards for Electric Distribution Utilities ("EDU")[3] which impact the CRES. However, in keeping with the Commission's general directive that parties with like interests consolidate their filings, the Marketers join in the following Reply Comments.

These Reply Comments primarily respond to the Initial Comments filed on behalf of the Office of Ohio Consumers' Counsel, the Appalachian People's Action Coalition, Edgemont Neighborhood Coalition, Community Action Partnership Empowerment Center of Greater

[1] Direct Energy Services, LLC and Strategic Energy LLC are members of the Retail Energy Supply Association and participated with that organization in filing initial comments in this proceeding.

[2] Ohio Administrative Code 4901:1-21 et. seq.

[3] Ohio Administrative Code Sections 4901:1-10 Et. Seq.

Cleveland, and Communities United for Action, and Consumers for Fair Utility Rates (collectively "Social Action Groups"). The Social Action Groups not only responded to the Commission's Staff proposals to the CRES Rules, but introduced new, proposed amendments for CRES. Many of the proposals suggested by the Social Action Groups track similar proposals made earlier this year for Competitive Retail Natural Gas Suppliers, which the Commission rejected for good reason. The Marketers believe that a similar course should be followed by the Commission as to competitive retail electric suppliers, and the Social Action Groups' recommendations discussed below should be rejected.

In addition to the Social Action Groups, Initial Comments were filed by Ohio's EDUs, industrial and commercial energy consumers. While the Marketers do not support all the positions taken in those Initial Comments, the state of the record is such that the Marketers do not believe additional Reply Comments are necessary on the points raised in those filings. However, the Marketers' election not to present additional comments now on the myriad of issues and concerns raised in those filings should not be interpreted as an endorsement of or support for the positions raised by those parties. The Marketers expressly reserve the right to comment further on such topics in the event that subsequent proceedings arise regarding such issues.

## I. COMMENTS

### A. 4901:1-9-05(A) CRES Providers and the Uniform System of Accounts

The Marketers agree with IEU-Ohio that the Commission should not require CRES providers to keep their books of account consistent with the FERC's Uniform Systems of Accounts ("USOA"). As pointed out by CNE in its initial comments, this proposed amendment was apparently premised on the mistaken belief that CRES providers typically keep their books

of account consistent with the USOA. The USOA was designed for and used almost exclusively by utilities subject to traditional cost of service rate making. The major distinguishing feature of Senate Bill 3 which restructured energy sales in Ohio is that energy, as distinct from wire service, is a competitive service and as such will be priced at market rates[4]. The Commission's current rule recognizes this fact and as such does not impose a particular accounting system, let alone one designed for rate regulated companies for non rate regulated energy competitors. The Commission's Entry should clearly state that CRES providers will not be forced to undergo the cost and complexity of adopting the Federal Energy Regulatory Commission's Uniform System of Accounts for A & B Class Electric Utilities.

**B. 4901:1-10-13 (H) Allocation of Partial Payments**

The current Rule governing partial payment priority has a four step allocation scheme: 1) payment of billed and past due CRES charges; 2) payment of billed and past due EDU charges; 3) payment of billed due current EDU charges; and finally 4) payment of billed and due CRES charges. This method of allocating a partial payment between CRES and the EDU attempts to equitably divide revenue received when a customer has failed to fulfill its obligation to make full, timely payments. The current system was the product of a Commission proceeding in which the needs of CRES suppliers, utilities and the customer were weighted. After successful deployment with electric utilities in the northern portion of the state, this four step allocation plan was adopted as the partial payment priority rule for state wide use. During the several years the partial payment priority has been in place it has not been the subject of formal complaints. The OCC seeks to amend the current rule and shift priority so that the EDU is paid first unless the CRES receivables are being purchased by the EDU and then the partial

[4] See Section 4928.14, Revised Code

payment order is determined in a manner "most advantageous" in preventing a shut off. The OCC proposed rule has three flaws. First, it is cumbersome and requires an evaluation of whether the receivables are being purchased or not. Second, what is "most advantageous" for shut off is not necessarily most advantageous for the customer. A customer who is not in danger of shut off may be subjected to a penalty and \ or lose a favorable energy price when the EDU is paid to the exclusion of the CRES. Finally, the current rule sought to balance the needs of the CRES, EDU and customer, whereas the OCC proposal is designed only to assist a small section of customers who are in danger of shut off. The suggested change will not improve the current rule[5].

**C. 4901:1-21-03 General Provisions**

At page 95 of their Initial Comments, the Social Action Groups suggest that Subsection D be modified to require CRES providers serving residential and small commercial customers to furnish rate and cost information to the Office of the Consumers' Counsel ("OCC"). The OCC maintains that it needs this information for maintaining its "Comparing Your Energy Choices" fact sheet, yet provides no reason why it cannot obtain this information from the Staff. Therefore, the Commission should reject the Social Action Groups' recommendation.

**D. 4901:1-21-05 Marketing and Solicitation**

In paragraph B, the Social Action Groups (Initial Comments, p. 96) request that the OCC be provided with a copy of all promotional and advertising materials that is targeted toward residential customers. In a vibrant energy market, the number, type and variety of marketing material available aimed at Ohio's five million households would be substantial. It would be

[5] The problems of partial payment priority has largely been eliminated in natural gas marketing where the major local distribution company buy the commodity receivables and shut off and bad debt are addressed using trackers.

burdensome to collect and timely deliver all such material to the OCC, and equally burdensome for the OCC to review all such material. Thus, there does not seem to be a good reason for creating such a burden. Further, the General Assembly has not provided the OCC or for that matter the Commission, with the authority to review or edit marketing material of CRESs. Even if such authority had been delegated, it would be subject to the First Amendment protection of commercial speech, which has a high threshold before a state governmental agency can exercise prior restraint.

If the Social Action Groups are concerned that false or fraudulent advertising is taking place, complaints can be filed with the Commission. Thus, merely to enforce existing Commission standards for marketing do not require prior delivery of marketing material, and can be addressed on a complaint basis. The OCC made the same request as to natural gas marketers in its May 12, 2006 Initial Comments in Case No. 06-423-GA-ORD at p. 12. The Commission rejected that proposed amendment to the Rules governing gas marketers in Case No. 06-423-GA-ORD, and should do the same in the matter at bar.

In paragraph C of Rule 4901:1-21-05, the Social Action Groups (Initial Comments, p. 96) seek a direct prohibition against CRESs contacting customers that have requested to be removed from the eligible-customer list that is maintained by EDUs. The Social Action Groups also want to make it clear that customers that object to being incorporated on the eligible-customer list should not be contacted by CRES. The Social Action Group's suggestions are unnecessary. Subsection C prohibits unfair, misleading, deceptive, or unconscionable acts or practices, generally with a list of some examples. The list contained in Subsection C is not an exhaustive list, but an illustrative one. The suggestion that a specific prohibition on specific conduct should be expressed is unnecessary. Further, particularly in the case of administrative mistakes, there

may be good reason for CRES providers to contact a customer that has been "dropped" by the EDU. The current rule establishes criteria and judges whether an alleged violation has taken place if a CRES contacts a customer. This seems a more prudent approach than to forbid any contact by fiat as proposed by the Social Action Groups. It is important to note that as of this writing, the Marketers are unaware of any inappropriate contacts by a CRES with a customer who has contacted the EDU to be dropped from CRES service. Therefore, it appears that the Social Action groups are attempting to address a "problem" that simply does not exist.

**E. Rule 4901:1-21-06**

The Marketers do not oppose the Social Action Group's recommendation that the restriction in Paragraph B on former PIPP customers that are on the PIPP arrearage crediting programs be eliminated so that these customers can be served by CRES providers.

The Social Action Groups want the requirement for CRES providers to retain audio recordings of residential and small commercial customer enrollments extended for a period of two years, instead of one year after a CRES contract has terminated. Further, the Social Action Groups want the Rule to require that the CRES provide a copy of the audio recording to the Commission staff, or the customer, within five calendar days of a request.

With respect to the argument that the retention period be extended to two years, the Commission must weigh the cost of additional warehousing and cataloguing contract documentation material against the benefit such extra warehousing provides. The benefit of keeping an audio recording of a customer enrollment is that if there is a subsequent challenge as to whether the enrollment was conducted properly there is documentation. Note the actual terms must be produced in writing following the enrollment and there is a separate rule governing the retention of the contract terms and conditions as opposed to the recorded enrollment. The

current rule calls for CRES to keep the audio record of the enrollment sign up for a year after the service contract expires. It is unlikely that the enrollment procedure would be challenged a few months following the commencement of CRES service. It is highly unlikely that a challenge to the enrollment would be raised at the end of the CRES contract itself. It is extremely unlikely that a challenge to the sign up would be raised a year after the contract expires. So the Social Action Groups' request to extend the warehousing and cataloguing of these audio recording an additional year appears to produce no benefit, yet it will increase the cost of doing business.

The OCC made the same argument at page 14 of its May 12, 2006 Initial Comments in Case No. 06-423-GA-ORD. The Commission, in Case No. 06-423, rejected this argument and should do so in this proceeding as well. With respect to the argument that a copy of the audio recording be given to the OCC or others, no reason for this addition has been provided. A copy must be provided during discovery if there is a formal complaint and the Commission Staff by rule must be provided a copy on request outside of a formal proceeding.

**F. Rule 4901:1-21-07 Creditworthiness and Deposits**

As providers of a monopoly service, the Commission has imposed upon EDUs a set of creditworthiness standards which dictate when a retail customer with a poor record of paying their bills must post a deposit (See Rule 4901:1-21-07). Since a customer can only get electric wire service from the EDUs at prices set by the Commission, which include bad debt and carrying costs for lag between invoice and payment, written rules governing creditworthiness and specified levels for customer deposits are appropriate for EDUs. The Social Action Groups (Initial Comments, pp. 99-100) seek by Rule to have the Commission impose on CRESs essentially the same provisions that apply to EDUs, which is both unnecessary and inappropriate.

There is a fundamental difference between EDUs and CRES that do not require similar administrative rules regarding creditworthiness and customer deposits. The EDU provides a regulated service, and the Commission sets the terms and conditions of service, including the credit terms, based on that unique status. In stark contrast, no customer is compelled to buy a single kWh from a CRES provider. Rather, CRESs operate exclusively through contracts between willing buyers and willing sellers. Chapter 4928, Revised Code appropriately treats CRES retail customer contracts as market transactions, and thus only subjects the CRES to limited Commission regulation, which excludes the setting of rates and service terms. Thus, the Commission lacks the statutory authority to set CRES credit terms for serving retail customers. This is not to say that CRES have no limits on credit practices, for CRES face the same usury laws as other market regulated merchants. Aside from those generally commercially applicable terms, CRESs have the ability to establish their own terms of service. Further, the competitive pressures placed upon the terms of service of a CRES but other CRESs, also act to establish reasonable commercial terms and conditions of service, if a customer does not like a particular CRES' credit terms, that customer is free to take service from another CRES or the EDU.

It should also be noted that, although the Social Action Groups' recommendation discusses residential customers, their recommended language would apply to all customers. The Social Action Group has demonstrated no need for the change to CRES service, generally, and fails to note the important distinction between residential customers and larger more sophisticated commercial and industrial customers. The ability of a CRES to price commercial and industrial customers, in particular, based on an assessment of the credit risk associated with a particular customer is an essential element of the competitive marketplace.

A uniform creditworthiness and deposit rule as proposed by the Social Action Groups would effectively put an end to prepayment discounts, negate a CRES' ability to lower prices for customers with superior credit, and potentially limit the competitive choices available to poorer credit customers. Thus, a uniform standard of deposits and creditworthiness as suggested by the Social Action Groups are not only *ulta vires*, for the Commission lacks the authority to impose specific credit policies over CRES, but such a rule could stifle the development of varied retail customers products and services and retail competition as a whole, in conflict with the expressed goal of Senate Bill 3 Restructuring[6].

**G. 4901:1-21-10 Customer Information**

The Social Action Groups (Initial Comments, pp. 100-102) want to further tighten the conditions under which an account number or a social security number is disclosed by a CRES. Specifically, in Subsection B, the Social Action Groups want to prohibit a CRES from disclosing a customer's account number to an EDU or a CRES consumer credit evaluation agency. With respect to the social security number disclosure in Subsection C, Social Action Groups want the CRES to be able only to disclose the social security number with a CRES credit evaluation agency upon request by the customer to demonstrate financial responsibility, to a CRES collections and/or credit reporting agency, or for participation in programs funded by the Universal Service Funds, such as the PIPP program. The Social Action Group's arguments should be rejected. While the Marketers are mindful of the need to protect account numbers and social security numbers because customers are concerned with identify theft, CRES providers often need to disclose an account number or a social security number in conjunction with the EDU to verify charges and true up accounts. CRES must make similar disclosures to credit

[6] Section 4928.02, Revised Code

agencies in order to establish retail customer creditworthiness. The current rule provides adequate safeguards for such limited uses, while the amended language from the Social Action Groups arguably would restrict such legitimate business uses without additional customer authorization. No predicate has been established which shows the current rule to be inadequate to protect customer identity. The Marketers believe the current rule appropriately balances customer protection and legitimate business interests, and agrees with the Staff that the current rule need not be amended.

### H. 4901:1-21-11 Contract Administration

The Social Action Groups (Initial Comments, pp. 102-103) want Subsection C modified to require that each CRES maintain copies of individual contracts for three (3) years (instead of two years) after a contract terminates, and to provide a minimum of fourteen (14) days written notice of assignments of contracts to another CRES to not only the Director of the Service Monitoring and Enforcement Department of the PUCO and any affected EDU, but also to the OCC.

Once again, the Social Action Groups in their Initial Comments present no demonstrated need for extending the warehousing and cataloguing of expired contracts for an additional year. The implicit rationale appears to be that if two years is good, then three years would be better. The problem with that approach is that extending the length of time expired contracts are kept increases the cost of doing business, a cost that will be revisited on retail customers as part of the price they pay for services from CRESs. Absent evidence that a significant proportion of contract disputes have occurred which required archived contracts of greater than two years from the time the contract terminated, there is no reason to increase the amount of time expired contracts must be housed. With respect to the assignment issue, CRES providers will, in the

normal course of an assignment transaction, provide notice to both the customer and the EDU and to the Staff. The Marketers see no reason to change this practice.

## I. 4901:1-21-12 Contract Disclosure

The Social Action Groups (Initial Comments, p. 103) want to allow customers to have the right to request from the CRES up to 24 months of the customer's payment history without charge. Currently, the rule allows a customer to request up to 24 months of a customer's payment history twice within any twelve-month period. This current approach seems a reasonable balance between giving the customer adequate access to information and sending price signals which discourage abuse. Once again, no facts have been provided showing the number of customers that have made a third request and had to pay a fee, let alone that there was an overwhelming need for more than two requests. Without a factual basis demonstrating a need, the Social Action Groups' suggestion should be rejected. The Social Action Groups also want the contract to contain provisions to disclose that a customer has a right to terminate the contract without penalty if the customer enrolls in a PIPP program, and a provision with respect to residential and small commercial customers that CRES providers are prohibited from requesting a customer's social security number and/or account number without the customer's written consent, except in specific circumstances.

There are already eighteen different provisions that are required to be contained in a contract as per Rule 4901:1-21-12. Adding the Social Action Groups' suggested additional provisions only complicates matters and would not promote diversity among suppliers. The Social Action Groups' suggestion should be rejected.

## J. 4901:1-21-14 Customer Billing and Payments

The Social Action Groups (Initial Comments, p. 105) want Subsection C of Rule 4901:1-21-14 modified to define a billing month as including an interval for service in a proceeding 28-32 days. The Social Action Groups' filing does not indicate why this particular interval is desirable, let alone should be established to the exclusion of any other time period. In fact, it should be noted that this rule would prevent a customer from contracting to receive billing more frequently than monthly, or to take a discount from receiving few invoices. Once again, these are service terms that are best left to the competitive market and the desires of the contracting parties. There is no evidence that uniform billing intervals rise to the level that requires governmental intervention. Social Action Groups' proposed language would foreclose options to select invoicing at intervals other than those dictated by the Social Action Groups and is at odds with Chapter 4928 of the Revised Code. Therefore, this recommendation is unnecessary and should be rejected.

The Social Action Groups (Initial Comments, p. 105) also want CRES providers to make arrangements for accepting cash payments at the company or authorized agents of the company, or other appropriate locations at no cost to the customer. This suggestion conflicts with the Social Action Groups proposal made in its May 12, 2006 initial comments in Case No. 06-423 at p. 19-20. Indeed, the recently promulgated Minimum Telephone Service Standards allow at least a $2.00 flat flee charged by agents.

The major problem with the Social Action Groups' suggestion is not its inconsistency with other monopoly service providers' obligations, it is with the principle that energy purchased from a CRES provider is a market transaction in which the customer chooses just the services the customer desires at a price the customer is willing to pay. Having the Commission mandate a

network of agents in various locations accepting cash payments at no cost takes away the right of customers who do not want that service from having the agent network cost imposed upon them. Furthermore, there has been no demonstration that this is a service that customers want or desire. We presume that the focus of the Social Action Groups' recommendation is limited to residential consumers as we are unaware of non-residential customers wishing to pay for services in such a fashion. Imposing the cost of a network of agents accepting cash payments on all customers may be the preference of the Social Action Groups, but it is at odds with the principle of established by the General Assembly in Chapter 4928, Revised Code which calls for service terms and prices for energy to be established by the market.

### K. Rule 4901:1-21-18 Consolidated Billing Requirements

The Social Action Groups (Initial Comments, pp. 107-108) want to modify Subsection K of Rule 4901:1-21-18 to require CRES providers to make the same arrangements for accepting cash payments at business offices and other appropriate locations within the service territory at no cost to the customer which is now a feature of EDU service. Here again, this suggestion is at odds with the General Assembly's philosophy of competition and having choices. The General Assembly did not want the government to dictate the terms and conditions of service and pricing choices. If a customer believes that having authorized agents capable of receiving payments is important and wants to pay for that service then they should seek out a CRES willing to allow such payment arrangements. Similarly, if a customer prefers lower prices and no cash or local office payment options, then they should seek out a CRES that offers such a payment option. The whole idea of restructuring is to let the market, not the Office of Consumers' Counsel, dictate what added services there will be and who will pay for such services. The Social Action

Groups' recommendation is once again wholly inapplicable to CRES that serve only commercial and industrial customers. The Social Action Groups' suggestion should be rejected.

## II. Conclusion

The Marketers believe that the proposed rule that CRES providers be made subject to the requirements of the Uniform System of Accounts should be rejected. Further, the Commission should reject the suggested additional rule amendments suggested by the Social Action Groups referenced above.

Respectfully submitted,

/s/

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## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply Comments were served by U.S. First Class Mail or e-mail upon the following persons this 24th day of July, 2007:

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