

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission's Review :
of its Rules for Competitive Retail :
Electric Service Contained in : Case No. 12-1924-EL-ORD
Chapters 4901:1-21 and 4901:1-24 of :
the Ohio Administrative Code. :

REPLY COMMENTS
OF
DOMINION RETAIL, INC.

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By its entry of November, 7 2012, the Commission, pursuant to Section 119.032, Revised Code, and the Common Sense Initiative ("CSI") established by Executive Order 2011-01K, initiated a review of its rules governing competitive retail electric service ("CRES") as set out in Chapters 4901:1-21 and 4901:1-24, Ohio Administrative Code ("OAC"), and published, for comment by stakeholders, various amendments to those rules proposed by the Commission staff ("Staff"). Dominion Retail, Inc. ("Dominion Retail"), a Commission-certified CRNGS supplier, filed initial comments on January 7, 2013. In accordance with the Commission's November 7, 2012 entry, Dominion Retail hereby submits its reply comments.

Dominion Retail has reviewed all the comments filed by the stakeholders and believes that many of the suggestions contained therein have merit. In these reply comments, Dominion Retail will identify those stakeholder proposals that it endorses, as well as addressing those proposals with which it takes issue.

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CHAPTER 4901:1-21 COMPETITIVE RETAIL ELECTRIC SERVICE PROVIDERS

Rule 4901:1-21-02 Purpose and scope.

Rule 4901:1-21-02(C)

Direct Energy Services, LLC and Direct Energy Business, LLC (“Direct”) recommend that language be added to this paragraph that would permit the Commission to waive a requirement of this chapter on its own motion.¹ Dominion Retail notes that there is a similar suggestion before the Commission in Case No. 12-925-GA-ORD with respect to the corresponding CRGNS rule. One way or the other, this provision should be the same in both sets of rules, but, if this authority is to be added, it must be subject to the “good cause” requirement that applies to applications and motions for waivers filed by parties.

Rule 4901:1-21-06 Customer Enrollment.

Rule 4901:1-21-06(D)(1)(e)

Rule 4901:1-21-06(D)(2)(a)(viii)

Rule 4901:1-21-06(D)(2)(a)(ix)(b)

Rule 4901:1-21-06(G)(3)

As described in the Commission entry issuing the rules for comment, Staff has recommended that “short time requirements in Chapter 4901:1-21 be modified from calendar days to business days.”² A review of the comments will show that the stakeholders that addressed this proposal are all generally supportive of this Staff recommendation, and some, like the Retail Energy Supplier Association (“RESA”) and Eagle Energy, LLC (“Eagle”) took pains to identify instances Staff missed in implementing the switch from calendar days to business days.³

¹ See Direct Comments, 2.

² November 7, 2012 Entry, 2,

³ See RESA Comments, 24; Eagle Comments, 5,6,8,and 9.

As indicated in its initial comments, Dominion Retail has no objection to this proposal in those instances where the time frame in question is only a few days and relates to actions that must be taken by the host electric utility or the CRES provider. The proposed change makes perfect sense in these circumstances. Where the rules require that action must be taken by one of these business entities within, say, a two or three-day window and there is an intervening weekend or holiday, compliance could well require that the actions be taken outside of the entity's normal business hours. However, although the entry did not define what constitutes a "short time requirement," this rationale loses force when the time frame is seven days or longer because, under a calendar standard, the utility or CRES provider will always have at least four business days (if there is a holiday), and usually five business days to take the required action. Moreover, where the time frame relates to an action that the customer must take – such as the seven-day period for rescinding an enrollment specified in the paragraphs of Rule 4901:1-21-06 cited above – a switch from the bright-line calendar day standard introduces the possibility for confusion on the part of the customer. If, as is currently the case, the customer is told that he/she has seven days to act to rescind the contract, the customer knows the deadline precisely without having to perform a calculation to distinguish between business days, weekends, and holidays.

There are three other very important factors that should lead the Commission to retain the calendar standard for the contract rescission period. First, as Dominion Retail observed in its initial comments, the electric utilities are geared up to the use of the seven calendar day rescission period. In joining Dominion Retail in opposing the switch to business days for calculating the seven-day rescission period, Ohio Power Company ("AEP Ohio") confirms that this would require changes to the utility's IT/computer systems and would create additional labor

costs.⁴ Second, as AEP Ohio points out, this change would conflict with the electric rules, which provide for a seven calendar-day rescission period.⁵ Finally, and most importantly, no one, including Staff, the parties commenting during the August 6, 2012 workshop, and the stakeholders filing comments, has suggested that the current seven calendar day rescission period has caused any problems. Indeed, as AEP Ohio correctly observes, the change to business days would actually harm customers because the resulting extension of the rescission period would, in some instances, delay switching the customer to the CRES provider's service by an additional month.⁶

The only conceivable argument against retaining the calendar day standard for calculating the enrollment rescission period is the notion that time periods under the rules should all be calculated on the same basis. However, the Commission should bear in mind that the Staff never suggested that all time frames should be calculated on a calendar-day basis. Rather, Staff specifically limited its recommendation to rules with "short time requirements." Plainly, rules with extended time requirements, like sixty days or ninety days, contemplate the use of calendar days. If a business-day standard were used for these rules, one would have to go through the exercise of sitting down with a calendar and counting up all the weekend days and holidays over several months to assure compliance. So, although Emerson's familiar observation that "foolish consistency is the hobgoblin of small minds" would seem to apply to any argument that time periods under the rules should all be calculated on the same basis, if the Commission believes that consistency is a relevant consideration, the Commission could simply determine that the business-day standard should apply to time requirements of less than seven days and that the calendar-day standard should apply to time requirements of seven days or more. Be that as it

⁴ See AEP Ohio Comments, 2-3.

⁵ *Id.*

⁶ See AEP Ohio Comments, 3.

may, in view of the impacts of a switch to a business-days standard discussed above, the Commission should retain the current calendar day standard for Rules 4901:1-21-06(D)(1)(e), 4901:1-21-06(D)(2)(a)(viii), 4901:1-21-06(D)(2)(a)(ix)(b), and 4901:1-21-06(G)(3).

Rule 4901:1-21-06(D)(1)(j)

In its initial comments, Dominion Retail pointed out that the title of subparagraph (D)(1)(j) of this rule – “Uniform” – has nothing to do with the subject matter of this provision, which sets out a requirement that door-to-door solicitors display a valid photo identification of the approved retail natural gas supplier or governmental aggregator he or she represents. Thus, Dominion Retail suggested that the heading of this subparagraph be changed to “Photo Identification.” However, in performing a subsequent review of this rule, Dominion Retail has discovered that, unlike the corresponding current CRNGS rule, the only subparagraphs at this level that have headings are (D)(1)(i) and (D)(1)(j). Thus, from a format standpoint, the more appropriate fix would be simply to remove the headings from these two subparagraphs.

Rule 4901:1-21-09 Environmental Disclosure.

Rule 4901:1-21-09(D)(3)(b)

Rule 4901:1-21-09 establishes a detailed processes to assure that customers of CRES providers receive information regarding the approximate retail electric generation resource mix and environmental characteristics associated with electrical power offered in Ohio's competitive marketplace. As indicated in its initial comments, Dominion Retail does not dispute that interested customers should have access to this information and has no objection to providing this information in connection with contract offers as required by Rule 4901:1-21-09(D)(3)(a). However, Dominion Retail went on to argue that the Rule 4901:1-21-09(D)(3)(b) requirement

that CRES providers report this information quarterly to customers is unduly burdensome and, contrary to the objectives of the CSI, imposes substantial costs on CRES providers with no corresponding customer benefit. FirstEnergy Solutions, Corp. (“FES”) makes this same point in its comments, and like Dominion Retail, suggests that, rather than requiring costly quarterly mailings, CRES providers should be permitted to provide customers access to this information by posting it on their websites.⁷ RESA agrees, and notes in its comments that Illinois, which previously required that the environmental information be mailed, has amended the statute to permit the information to be supplied to customers via web posting and electronic mailing.⁸

As an attachment to its comments, RESA has provided a revised version of Rule 4901:1-21-09 that provides for posting of environmental information on the CRES suppliers’ websites in lieu of quarterly mailings and also simplifies the manner in which the information is to be presented.⁹ Dominion Retail urges the Commission to adopt this version of the rule.

4901:1-21-10 Customer information.

Although the prohibitions set forth in this rule against disclosure of customer account numbers and social security numbers without the customer’s consent apply to CRES providers, both IGS and RESA have expanded their comments to address the significant problem posed by the fact that customer account numbers are not included along with the other information contained in the eligible-customer lists that electric utilities must make available to Commission-certified CRES providers.¹⁰ Dominion Retail recognizes that, unlike the CRNGS rules, which also address the gas utility’s nondisclosure obligations, this rule applies strictly to the nondisclosure obligations of CRES providers. However, in view of the importance of this issue,

⁷ See FES Comments, 8-9.

⁸ See RESA Comments, 14-16.

⁹ See RESA Comments, Attachment A.

¹⁰ See IGS Comments 4; RESA Comments, 16-17.

Dominion Retail would offer the following observations to supplement the comments of Direct and RESA on this subject.

The inability to obtain customer account numbers remains one of the largest barriers competitive suppliers face in attempting to sign up customers. Customers typically do not know their account numbers, so, unless a customer happens to have a bill on hand at the time he or she is ready to accept a supplier offer, the enrollment process comes to a screeching halt and can only resume after the customer has secured the number from the electric utility. Not only does this inconvenience the customer – often to the point that the customer loses interest – but the need to reconnect with the customer to complete the transaction adds to the supplier's costs, which, in turn, leads to higher prices than would otherwise be the case. In addition to facilitating enrollments and reducing delay, providing customer account numbers will also cure the very real problem of customer error in providing the account number, which also leads to delay and to disgruntled customers when the customers ultimately discover that they are not getting the pricing for which they thought they had signed up.

Obviously, including account numbers as part of the information provided in connection with eligible-customer lists would require amendments to both Rule 4901:1-10-24(E)(1), OAC, and Rule 4901:1-10-29(E), OAC. Although the current nondisclosure requirement in the former is apparently a product of privacy concerns, disclosure of account numbers is on a different footing than the disclosure of social security numbers, where the concern is exposure to the risk of identity theft. The more relevant question with respect to the disclosure of account numbers is whether the disclosure would lead to an increase in slamming. There is no evidence to suggest that this would be the case. As IGS reports, Pennsylvania has recognized that making account numbers available to competitive suppliers facilitates enrollment by reducing costs and errors

and generally provides for better customer service. There has been no increase in slamming in that state as a result of this measure. Moreover, Virginia has also provided for the disclosure of account number to competitive suppliers for many years. Any lingering concerns the Commission may have that making account numbers available could increase slamming should be ameliorated by the multi-step enrollment verification process in Ohio, which will catch slammers red-handed and subject them to sanctions, including the possible rescission of their certification.

As an alternative to making account numbers available, RESA suggests that the Commission authorize the use of some other method of identifying customers in the enrollment process, such as birthdates or driver's license numbers. Another approach would be the option Dominion Retail advanced in Case No. 06-423-GA-ORD, which was to have the utility assign a unique enrollment identifier to each customer account, with such identifiers to be made available to CRNGS suppliers upon request. The Commission rejected this proposal, but the problem is still with us, and something should be done to address it. Although admittedly also beyond the scope of this rulemaking proceeding, one measure that would facilitate enrollment and reduce errors in the face of the rule prohibiting the disclosure of account numbers would be a requirement that customer bills prominently display the account number so that customer can readily identify it and distinguish it from other numbers, such as meter numbers, that also appear on the bill. However, this would only be a partial fix. Dominion Retail urges the Commission to revisit this issue, if not in this proceeding, in the electric rulemaking proceeding.

CHAPTER 4901:1-24 CERTIFICATION OF CRES PROVIDERS

Rule 4901:1-24-04 Filing of an application.

Staff has proposed that existing Rule 4901:1-24-04, which sets out the application process for securing or renewing certification, be redesignated as Rule 4901:1-24-05 and that a new Rule 4901:1-24-04 be inserted, which would provide as follows:

Beginning on the effective date of this chapter, each application for certification or certification renewal shall be assigned a new case number in sequential order as the case is received, beginning with XX-7000 by the commission's docketing division.

As discussed in detail in its initial comments, Dominion Retail opposes this new rule.¹¹ Under the existing practice, certificate renewal applications are typically filed in the docket in which the initial certification was approved, which facilitates researching the certification history of a particular supplier, broker, or governmental aggregator. If the proposed rule is adopted, this easily-followed trail will disappear. Duke Energy Retail Sales, LLC ("DERS") also picked up on this problem in its comments, suggesting that, if renewal applications are to be assigned new case numbers, the Commission should modify the renewal application forms to provide for the entry of previous certification docket numbers so there will be a tool available to track a supplier's certification history short of a performing a DIS name search.¹² As Dominion Retail mentioned in its comments, attempting to retrieve a supplier's certification history by a DIS name search is not only tedious, but does not always yield complete results. Moreover, as DERS' comment suggests, if the subject supplier has undergone a name change subsequent to the issuance of the original certificate, the task of tracking the certification history through a DIS search becomes even more arduous.

¹¹ See Dominion Retail Comments, 5-70.

¹² See DERS Comments, 17.

Although DERS' proposal is certainly better than nothing, requiring the applicant's certification history to be included in renewal applications will not provide the same level of detail that is readily available in a one-stop visit to the suppliers' CRS docket under the current practice of filing renewal applications under the case number assigned to the original certification application. As Dominion Retail noted in its comments, the current system also makes it easy to keep tabs on the status of protective orders, a capability that will become increasingly important if the Staff's proposal to extend protection to certain application exhibits for a period of six years is adopted.

The November 7, 2012 entry provides no explanation for the proposed rule, but if there is an internal administrative reason for assigning a new case number to each renewal application, the Commission should weigh the administrative benefit against the inconvenience this rule would cause before approving this new practice. If the Commission does adopt the rule proposed by Staff, the Commission, in addition to implementing DERS' recommendation, should consider the possibility of creating a separate CRS docket for each supplier, broker, and governmental aggregator along the lines of the TRF dockets that are maintained for rate-regulated utilities so all the information relating to a supplier's certification history will still be available in one place.

For those reasons stated above, Dominion Retail urges the Commission to reject proposed Rule 4901:1-24-04. However, if the proposed rule is to be adopted, it should be revised as follows:

Beginning on the effective date of this ~~chapter rule~~, each application for certification or certification renewal shall be assigned a new case number **by the commission's docketing division** in sequential order as the case is received, beginning with XX-7000. ~~by the commission's docketing division.~~

Rule 4901:1-24-05 Application content.

As noted above, Staff has renumbered the existing rule governing certification applications and renewals as Rule 4901:1-24-05 to accommodate the insertion of the proposed case number assignment rule discussed above. Before addressing the stakeholder comments regarding this rule, Dominion Retail would again point out that there is an inherent flaw in the structure of this rule.

Proposed Rule 4901:1-24-05(A) continues to require that applications be made on forms authorized by the Commission and generally describes the information that the forms are intended to elicit, while proposed Rule 4901:1-24-05(B) continues to require that the applicant complete the appropriate application form in its entirety and supply all required attachments, affidavits, and evidence of capability specified in the form. However, subparagraphs (B)(1), (B)(2), and (B)(3), which apply, respectively, to generation suppliers/power marketers, aggregators/brokers, and governmental aggregators, after repeating the requirement that the applicant “shall file general, technical, managerial, and financial information as set forth in the application” (emphasis added), then provide that “(t)his information” – *i.e.*, the information specified in the application form – “includes, but is not limited to” the information identified in the various subparagraphs of the rule. In fact, the application forms require substantially more information than the items specifically identified in these subparagraphs, which present what is, at best, an incomplete, shorthand list describing some of the information required by the instructions in the application forms. Further, the application forms are not organized in the same manner as the subparagraphs of the rule and, in numerous instances, use language that is far different from the language in the rule describing the information to be provided.

For example, subparagraphs (B)(1)(c) and (B)(2)(c) refer to the application including “balance sheets, credit ratings and other relevant financial information,” but Section C of the application forms, headed “Applicant Financial Capability and Experience,” requires nine separate exhibits (Exhibits C-1 through C-9), which are to include, respectively, annual reports, SEC filings, financial statements, financial arrangements, forecasted financial statements, credit rating, credit reports, bankruptcy information, and merger information. Further, while these subparagraphs of the rule mention only “balance sheets,” the instructions for Exhibit C-3, the “Financial Statements” portion of the applications, require the applicant to submit, as financial statements, balance sheets, income statements, and cash flow statements for the most recent two-years. Further, under the revised version of the rule proposed by Staff, new subparagraphs B(1)(c)(i-iii) and (B)(2)(c)(i-iii) specifically require applications to include “Financial Exhibit 1,” “Financial Exhibit 2,” and “Financial Exhibit 3,” which are terms that do not appear anywhere in the application forms.

Under these circumstances, subparagraphs (B)(1), (B)(2), and (B)(3) of Rule 4901:1-24-05 not only serve no purpose, but also create the potential for confusion because the terms are not the same as those used in the application forms. Rules are intended to prescribe or proscribe certain conduct by those subject to them. However, in this instance, these subparagraphs do not provide notice to applicants of what is actually required. Indeed, in view of the way the rule is structured, the only purpose of these subparagraphs appears to be tell the Commission itself what it can require applicants to provide. Plainly, the rule is meaningless from the standpoint of the applicant for a certificate because, pursuant to Rule 4901:1-24-05(B), the applicant must provide all the information identified in the application form in any event. The instructions in application forms are – as they should be – detailed and straightforward and stand by themselves. Surely, no

one would suggest that an applicant should have to go to a rule to interpret the instructions on an application form.

Rule 4901:1-24-05(A) already provides notice to applicants of the type and general purpose of the information that the application forms are intended to elicit and, thus, there is no need for subparagraphs (B)(1), (B)(2), and (B)(3). Accordingly, Dominion Retail recommends that subparagraphs (B)(1), (B)(2), and (B)(3) of Rule 4901:1-24-05 be eliminated in their entirety and that, to the extent the Commission wishes to require applicants to submit information beyond that identified in the current versions of the application forms, it do so by revising the instructions contained in the forms effective as of the date of the order in this case.

Rule 4901:1-24-05(B)(1)(e) and (B)(2)(d)

These new Staff-proposed subparagraphs purport to require that applicants for certification include proof in their application “of an Ohio office and an employee in this state in accordance with division (G) of section 4929.22 of the Revised Code.” Based on the fact the cited statute applies to providers of retail gas service, Dominion Retail assumes that these subparagraphs were inadvertently carried over from the corresponding proposed CRNGS rule now under consideration in Case No. 12-925-GA-ORD as a part of Staff’s attempt to harmonize the two sets of rules. However, if these provisions were deliberately included, Dominion Retail agrees with RESA that, there being no similar statute in Chapter 4928, Revised Code, the Commission has no authority to impose such a requirement in its CRES rules.¹³ Accordingly, although Dominion Retail believes all the subparagraphs of Rule 4901:1-24-05(B) should be eliminated for those reasons previously discussed, these two subparagraphs must be removed in any event.

¹³ See RESA Comments, 19.

Rule 4901:1-24-05(B)(1)(f)

Staff has also picked up subparagraph (B)(1)(F) of the corresponding CRNGS rule – Rule 4901:1-1-27-05, OAC – for inclusion in the rule governing the content of CRES certification applications, including additional language proposed by the Staff in Case No. 12-925-GA-ORD that would require that the applicant disclose “if there is pending legal action against the applicant or past rulings finding against the applicant.” Thus, proposed Rule 4901:1-24-05(B)(1)(f) provides as follows:

- (f) Statements as to whether the applicant has ever been terminated from any choice program; if applicant's certification has ever been revoked or suspended; if applicant has ever been in default for failure to deliver; or if there is pending legal action against the applicant or past rulings finding against the applicant.

Dominion Retail agrees that this information should be provided in certification and renewal applications, but, for those reasons set forth above, believes that this requirement, along with the other requirements set forth in subparagraphs (B)(1), (B)(2), and (B)(3), should be set forth as an instruction in the application form rather included in the rule itself. Indeed, the instructions for application Exhibit B-4 already require even more information than that described in proposed subparagraph (B)(1)(f) of the rule:

Exhibit B-4 “Disclosure of Liabilities and Investigations,” provide a description of all existing, pending, or past rulings, judgments, contingent liabilities, revocations of authority, regulatory investigations, or any other matter that could adversely affect applicant’s financial or operational ability to provide the services it is seeking to be certified to provide.

Dominion Retail would again emphasize that, pursuant to Rule 4901:1-24-05(B), applicants are required to provide the information identified in the application form, irrespective of the language used in the subparagraphs (B)(1), (B)(2), and (B)(3) to couch, in shorthand form, some of the information to be submitted in the application. Thus, although Dominion Retail

agrees with RESA's criticism that the additional language proposed by Staff is overly broad,¹⁴ refining the language of the rule itself will not change the information that the applicant must provide because, under the structure of the rule, the requirements of the application form control. The same can be said for OCC's assertion that the proposed language is not broad enough.¹⁵ Under the structure of the rule, the language of subparagraph (B)(1)(f) is irrelevant. The instructions for completing application Exhibit B-4 do not limit the information required to Ohio information, which appears to be one of OCC's primary concerns. And, although Dominion Retail disagrees with OCC that mere allegations raised in other jurisdictions should be reported in applications, adding a new subparagraph to the rule will have no effect on the current requirements because the requirements are dictated by the application form, not the rule.

The fix for all this is to eliminate all the subparagraphs of Rule 4901:1-24-05(B) and to revise the instructions for completing Exhibit B-4 of the application to read as follows:

Exhibit B-4 "Disclosure of Liabilities and Investigations," provide a description of all existing, pending, or past rulings, judgments, contingent liabilities, revocations or suspensions of authority (**including any terminations from choice programs**), regulatory investigations, or any other matter that could adversely affect or call into question applicant's **managerial**, financial, or **technical operational** ability to provide the services it is seeking to be certified to provide **in accordance with the requirements of Chapter 4928 of the Revised Code and Chapter 4901:1-21 of the Administrative Code.**

If the Commission rejects Dominion Retail's proposal to eliminate the subparagraphs of Rule 4901:1-1-24-05(B) in their entirety, the Commission should, at minimum, remove proposed subparagraphs (B)1(f)(i-iii) because, as previously noted, the numbered "Financial Exhibits" referred to therein are undefined and do not appear in the application forms. Dominion Retail also notes that, if the subparagraphs of proposed Rule 4901:1-1-24-05(B) are retained, there will

¹⁴ See RESA Comments, 20. As RESA point out, the new Staff language would cover all sorts of things that have nothing to do with the provision of CRES.

¹⁵ See OCC Comments, 20.

be an overlap between existing subparagraph (B)(1)(b), which refers to “prior regulatory or judicial actions,” and the additional subparagraph (B)(1)(f) language proposed by Staff, which refers to “pending legal action against the applicant or past rulings finding against the applicant.” To eliminate this duplication, the subparagraph (B)(1)(b) reference to regulatory or judicial actions should be removed. If the Commission does not eliminate the subparagraphs, it should consider replacing the reference subparagraph (B)(1)(b) to regulatory and judicial actions with a requirement that the applicant identify all jurisdictions in which it is authorized to provide competitive retail services, which is precisely what the application form itself actually requires in the instructions in the “Managerial Capability and Experience” section.

Rule 4901:1-24-06 Affidavits

Staff has not proposed any significant changes to the rule specifying the contents of affidavits to be submitted with certification applications. However, as RESA points out in its comments, there is an extraneous “Application or approval or denial” at the beginning of paragraph (A) that should be removed.¹⁶ In addition, although Dominion Retail does not understand why the reference to “Title XLIX” has been inserted after “Chapter 2928” paragraph (D), if this reference is to be included it should be changed to “Title 49,” as RESA suggests.¹⁷

Rule 4901:1-24-08 Protective orders.

Rule 4901:1-24-08(A)

As indicated in its initial comments, Dominion Retail supports Staff’s proposal to allow financial exhibits to certification and renewal applications to be filed under seal without the need for an accompanying motion for a protective order. Dominion Retail also endorses Staff’s

¹⁶ See RESA Comments,

¹⁷ *Id.*

proposal to extend the protection for six years from the date the certificate or renewal certificate is issued, which eliminates the need to file multiple motions for protection of the same confidential financial information as the previous protective orders expire under the otherwise applicable timetable. However, there are two problems with the Staff's version of the proposed rule.

First, although, in this instance, Staff has correctly designated the exhibits as Exhibit C-3, Exhibit C-4, and Exhibit C-5 to conform to the application instructions, it is not clear to Dominion Retail why Exhibit C-4 should be afforded automatic protection. For obvious reasons, applicants typically seek and are granted protection for Exhibit C-3, which contains copies of the applicant's financial statements for the two most recent years and Exhibit C-5, which contains projected financial statements for the next two years. However, under the instructions, Exhibit C-4, titled "Financial Arrangements," is to contain copies of the applicant's financial arrangements to conduct CRES as a business activity, such as guarantees, bank commitments, contractual arrangements, credit agreements, and the like. It is doubtful that all this information would qualify for confidential treatment under the Rule 4901-1-24(D), OAC, criteria for protective orders. Accordingly, Dominion Retail believes that there should be no automatic protection for Exhibit C-4. Of course, if an applicant believes it can make the case for confidential treatment of all or some of these financial arrangements, the applicant would still be free to apply for a protective order pursuant to proposed Rule 4901:1-27-08(B).

Second, although Dominion Retail assumes that this proposed rule is intended to apply to financial exhibits filed in connection with both initial certification applications and renewal certification applications, because this rule appears before the rule relating to renewal applications and refers only to the issuance of a "certificate," there could be some confusion in

this regard. Thus, Dominion Retail suggests that the rule be revised to clarify that it applies to both initial and renewal certification applications.

Rule 4901:1-24-08(C)

In its comments, RESA suggests that paragraph (C) of the proposed rule should be tweaked so that, in instances where the applicant files a motion seeking to continue the protection after the expiration of automatic six-year protection period, the new protection will extend for 24 months, rather than 18 months as currently provided in Rule 4901-1-24(D), OAC.¹⁸ According to RESA, this will synchronize the protection with the two-year certification renewal cycle, which will make it easier for certificate holders to keep tabs on the confidential status of protected exhibits. Dominion Retail agrees that there is no harm in this, particularly since it is Dominion Retail's understanding that attorney examiners have recently begun to exercise their authority to provide that protective orders in certification cases will expire in 24 months rather than in 18 months as the rule would otherwise require.

4901:1-24-09 Certification renewal.

Dominion Retail supports the additions to the rule governing certification renewals proposed by Staff and applauds Staff's proposal to change the window for filing certification renewal applications in Rule 4901:1-27-09(A) from 30 to 120 days prior to the expiration of the current certificate to 30 to 60 days, a measure Dominion Retail has previously advocated.

4901:1-24-10 Application approval or denial.

Apart from renumbering the rule (currently Rule 4901:1-27-06), it does not appear that Staff has not proposed any changes. This rule is much more straightforward than the

¹⁸ See RESA Comments, 21.

corresponding proposed CRNGS rule, Rule 4901:1-27-10, now before the Commission in Case No. 12-925-GA-ORD, and, thus, has drawn limited comment.

4901:1-24-10(A)

Dominion Retail notes that Staff inserted language in the opening paragraph of the corresponding CRNGS rule to clarify that the rule applies to both initial and renewal certification applications. Dominion Retail suggests that similar language be added here so that the paragraph (A) would read as follows:

- (A) If the commission does not act upon an application **for certification or certification renewal** within thirty days of the filing date, the application shall be deemed automatically approved pursuant to section 4928.08 of the Revised Code on the thirty-first day after the official filing date.

4901:1-24-10(A)(2)

RESA points out that, in view of the order of the subparagraphs, the rule appears to suggest that the discretionary hearing referred to in subparagraph (A)(2)(c) would occur after the 90-day suspension period referred to in subparagraph (A)(2)(b), which would be contrary to the statute.¹⁹ Dominion Retail agrees, and believes there the this provision would benefit from some additional clarification of the process. Accordingly, Dominion Retail proposes the following changes:

- (2) If the commission, or ~~the an~~ attorney examiner ~~appointed by the commission,~~ has acted to suspend an application, ~~the commission will:~~
 - (a) **The commission or the attorney examiner shall docket ~~Docket the its~~ decision setting forth, and notify the applicant of the reason(s) reasons** for such suspension. **The decision and** may direct the applicant to furnish any additional information as the commission or the attorney examiner ~~deem deems~~ necessary to evaluate the application.
 - (b) **The docketing division shall serve a copy of the decision upon the applicant.**

¹⁹ *Id.*

(c) **The commission or the attorney examiner ~~At its discretion~~, may set the matter for hearing, either as a part of the decision suspending the application or by subsequent entry, if a hearing is deemed necessary.**

(d)(b) **The Commission shall act Aet to approve or deny the application within ninety days from the date ~~that~~ the application was suspended.**

Rule 4901:1-24-11 Material changes to business operations.

Rule 4901:1-24-11(B)

As noted in its initial comments, Dominion Retail believes that the changes defined as “material changes” in the CRES and CRNGS rules should be identical. Thus, to provide consistency between the two sets of rules, Dominion Retail proposed that a new subparagraph (12) be added to Rule 4901:1-24-11(B) identifying “Any change in the applicant's name or any use of a fictitious name” as a material change.

RESA takes issue with Staff’s new proposed subparagraph (B)(3), which identifies, as a material change, the “(a)ssignment of a portion of the customer base and contracts of a retail natural gas supplier or governmental aggregator to another public utility in this state.” Obviously, the reference to “a retail natural gas supplier” was inadvertent, but, more to the point, as RESA points out, not all contract assignments would constitute a “material change” as the term is employed in the rule.²⁰ Dominion Retail agrees with RESA that this that this provision should be eliminated.

In the first place, competitive suppliers and governmental aggregators are not public utilities, and there is no scenario in which a marketer would assign a contract to an EDU. However, if the actual intent was to address the assignment of contracts to another marketer, OGMG/RESA’s points are well taken. Small commercial and residential contract assignments

²⁰ See RESA Comments, 22.

are already reported to the Commission pursuant to Rule 4901:1-21-11(D)(1), OAC, and requiring a second filing containing the same information would be inconsistent with the CSI. Further, as Rule 4901:1-24-11(A)(2), makes clear, material changes are reported so that the Commission can determine if the change will adversely affect the fitness and/or ability of the supplier or governmental aggregator to provide the services for which it is certified. The assignment of a few contracts to another supplier would not rise to this level. Finally, although the assignment of a considerable portion of a marketer of governmental aggregator's the customer base to another supplier would certainly represent a material change, the material changes identified in the subparagraphs of Rule 4901:1-27-11(B) are not an exclusive list of the changes that must be reported. Dominion Retail believes that it is highly unlikely that a certificate holder would fail to report a development of this type as a material change and subject itself to the array of sanctions the Commission could impose.

Rule 4901:1-24-13 Certification suspension, rescission, or conditional rescission.

Rule 4901:1-24-13(B) and (C)

RESA argues in its comments that the provisions of these paragraphs that prohibit a supplier whose certificate has been suspended or conditionally rescinded from engaging in advertising run afoul of constitutional limitations on a regulatory agency's authority to regulate commercial speech.²¹ Thus, RESA suggests that the advertising prohibition should extend only to advertising that is unfair, misleading, deceptive, or unconscionable and not to all advertising. Dominion Retail does not agree that this prohibition raises a commercial free speech issue.

Under the rules, a supplier whose certificate has been suspended or conditionally rescinded is not permitted to offer to serve or contract to serve potential customers. To solicit

²¹ *Id.*

potential customers through advertising when the supplier cannot serve them would, of itself, be misleading, and the Commission has a valid interest in preventing the customer confusion that would result from a supplier advertising a service it cannot provide. Further, suppliers are already prohibited from engaging in unfair, misleading, deceptive, or unconscionable marketing practices, so a provision limiting the advertising prohibition in the manner proposed by RESA would be a meaningless sanction.

Rule 4901:1-24-13(E)(12)

For those reasons previously discussed in connection with Rule 4901:1-24-05(B)(1)(e) and (B)(2)(d), Dominion agrees with RESA that the failure to maintain an Ohio office and an employee in this state do not represent lawful grounds for suspending or rescinding a certificate.²² Thus, subparagraph (E)(12) should be eliminated.

ADDITIONAL RECOMMENDATION

As Dominion Retail discussed in its initial comments, there are several rules before the Commission for review in this proceeding that prescribe the exact language that must be included in notices to customers. However, to comply Legislative Service Commission OAC style requirements, the prescribed language uses lower case for words that would normally be capitalized – *e.g.*, the public utilities commission of Ohio rather than the Public Utilities Commission of Ohio – and presents business hours in words rather than numerals – *e.g.*, eight a.m. to five p.m., rather than 8:00 a.m. to 5:00 p.m. These OAC conventions are fine for the rules, but, to put it simply, using the OAC style in the actual notices themselves produces odd-looking results.

²² See RESA Comments, 23.

COH raised this issue in connection with the bill format rules approved in Case No. 11-4910-AU-ORD, by filing a motion seeking a waiver so as to permit it to use the more customary method of displaying these names and hours on its bills. The Commission granted the motion and went on to find that any utility wishing to make the same changes could do so without the need to file a separate motion so long as the departure from the form specified in the rule “is strictly limited to changes in capitalization and numeric references, which do not change the intent, application, or structure of the required language.” Dominion Retail urges the Commission to grant a similar blanket waiver in its order in this case so that, subject to the same restrictions, companies may utilize the more typical format in notices required by these rules without the need to file individual motions for waivers.

Respectfully submitted,




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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been served upon the following parties by regular U.S. mail, postage prepaid and/or by electronic mail this 6th day of February 2013.


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