

**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 Chapters)	Case No. 12-1924-EL-ORD
4901:1-21 and 4901:1-24 of the Ohio)	
Administrative Code.)	

**MEMORANDUM CONTRA APPLICATIONS FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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I. INTRODUCTION

To protect the interest of Ohioans in reasonable electricity prices¹ and consumer protection,² the Office of the Ohio Consumers' Counsel ("OCC") files this Memorandum Contra the Applications for Rehearing of the Retail Energy Supply Association ("RESA"), Interstate Gas Supply, Inc. ("IGS"), and Direct Energy Services, LLC with Direct Energy Business, LLC ("Direct Energy"). On January 17, 2013, OCC and the Ohio Poverty Law Center,³ and several Competitive Retail Electric Service providers ("CRES" or "Marketers") filed Applications for Rehearing of the Public Utilities Commission of Ohio's ("PUCO" or "Commission") December 18, 2013, Finding and Order ("December 18 Order").

At issue in this proceeding is the PUCO's review of the rules that govern CRES providers when they market and sell electricity to Ohio consumers. The CRES rules set forth the necessary consumer protections to help ensure that CRES providers do not

¹ R.C. 4928.02(A).

² R.C. 4928.10.

³ Ohio Partners for Affordable Energy also filed an application for rehearing.

engage in unfair, misleading, deceptive, or unconscionable acts or practices related to: 1) the CRES providers' interactions with customers, 2) the marketing solicitation, or sale of a CRES, and 3) the administration of contracts for CRES.⁴ Generally, the applications for rehearing of RESA, IGS and Direct Energy seek to remove certain important consumer protections from the CRES rules. For the reasons discussed below, the PUCO should reject RESA, IGS and Direct Energy's arguments.

II. RECOMMENDATIONS

A. 4901:1-21-05 – Marketing and Solicitation

i. 4901:1-21-05(C)(7)

The PUCO correctly ruled in its December 18 Order that Marketers engaged in door to door solicitation are required to wear and display a valid photo identification.⁵ The format for the identification is to be approved by the PUCO Staff.⁶

But RESA argues in its application for rehearing that there may be reasons that a CRES marketer would not wear a photo identification badge. RESA also contends that Marketers should be permitted to submit evidence to the PUCO that demonstrates the “failure to wear and display a valid CRES provider photo identification did not constitute an unfair, misleading, deceptive, or unconscionable act.” RESA provided no additional support for this argument from the information it filed in its initial comments.⁷

⁴ See Ohio Admin. Code 4901:1-21-03(A)(1)-(3).

⁵ Finding and Order at 16-17 (December 18, 2013).

⁶ Id.

⁷ RESA Initial Comments at 8 (January 7, 2013).

As OCC noted in its initial comments, OCC routinely reviews residential consumer complaints registered with the PUCO call center.⁸ There are some consumer grievances where CRES agents represented themselves as being associated with an electric utility. Thus, any time a CRES provider is soliciting customers it is crucial that the customer understands the CRES provider is not associated with the electric utility. A photo identification badge helps remove any ambiguity concerning the proper identification of the sales agent. After all, employees of an electric utility are required to display a company photo identification when they visit a customer's premise.⁹

There is no reason that CRES agents should not be required to adhere to the same identification standard. The photo identification serves an additional purpose in promoting public safety by readily identifying a CRES employee who is on the customer's property, or who is working in a public venue.

Further, RESA's proposal would be a burden on administrative (PUCO and others) resources. RESA's request is foreshadowing that every PUCO action on failure to wear badges will precipitate a challenge by the CRES industry. The PUCO's resources are better spent than hearing continuing rationales on why a violation of this consumer protection standard should be excused. In this regard, granting RESA's proposal would diminish the incentive for CRES providers to comply with the rule because they could view the rule as something they could contest with every claimed violation. The rule—and its incentive for compliance—is needed for consumer protection.

⁸ OCC Initial Comments at 6 (January 7, 2013).

⁹ Ohio Admin. Code 4901:1-10-13.

For each of the stated reasons, the PUCO should deny rehearing and require CRES providers to wear their photo identification at any time they are involved in direct solicitations with customers.

ii. 4901:1-21-05(C)(11)

The PUCO properly adopted provision (C)(11) of 4901:1-21-05 as proposed by the PUCO Staff. It states that “engaging in direct solicitation to customers without complying with all applicable ordinances and laws of the customer’s jurisdiction” will be, *per se*, an unfair, misleading, deceptive, or unconscionable act in every circumstance.”¹⁰ RESA opposes this provision.¹¹ RESA contends this rule improperly puts the Commission in the position of determining when an act violates a local ordinance.¹² Similarly, RESA states that if an ordinance has been violated, the local jurisdiction has the authority to impose commensurate penalties -- not the PUCO.¹³ RESA’s argument should be denied.

First, RESA already raised this concern in its initial comments and has provided no new support or information in its application for rehearing.¹⁴ The PUCO denied RESA’s argument in the December 18 Order, finding that PUCO Staff’s proposed language is appropriate.¹⁵

Second, and contrary to RESA’s assertion that that the PUCO is not in a position to judge the violation of an ordinance, the Commission has a public duty pursuant to the

¹⁰ Finding and Order at 18-19 (December 18, 2013).

¹¹ RESA Application for Rehearing at 13.

¹² *Id.*

¹³ *Id.*

¹⁴ RESA Initial Comments at 9-10 (January 7, 2013).

¹⁵ Finding and Order at 19 (December 18, 2013).

certification of CRES providers¹⁶ to protect customers from unfair, deceptive, or unconscionable acts or practices. And RESA incorrectly submits that the PUCO will be deciding when an act violates a local ordinance.¹⁷ Ohio Admin. Code 4901:1-21-05(C)(11) does not state that the PUCO will be deciding when an act violates a local ordinance. Instead, the PUCO's rule clearly explains that if a Marketer engages in direct solicitation to customers without complying with all applicable ordinances and laws of the customer's jurisdiction" it will be, *per se*, an unfair, misleading, deceptive, or unconscionable act in every circumstance. This is within the PUCO's authority. R.C. 4928.10 provides the PUCO with the power to adopt rules that prohibit unfair, deceptive, and unconscionable acts and practices in the marketing, solicitation, and sale of such a competitive retail electric service and in the administration of any contract for service. Thus, the changes the PUCO adopted with respect to Ohio Admin. Code 4901:1-21-05(C)(11) are consistent with the PUCO's authority per R.C. 4928.10. Accordingly, RESA's argument should be denied.

B. 4901:1-21-06 – Customer Enrollment

i. 4901:1-21-06(D)(1)(i)

In its December 18, Order, the Commission prescribed that terms and conditions be provided on white or pastel paper using dark ink and an established font size so as to help ensure that customers can read these CRES contracts.¹⁸ RESA disagrees with this long-standing PUCO requirement.¹⁹ RESA argues that this requirement excludes sales that are taking place via a direct solicitation and where electronic means may be used to

¹⁶ R.C. 4928.08(C).

¹⁷ RESA Application for Rehearing at 13.

¹⁸ Finding and Order at 27-28 (December 18, 2013).

¹⁹ RESA Application for Rehearing at 3.

present and obtain record of the customer's consent.²⁰ Instead of providing customers a written copy of the terms and conditions at the time of sale, RESA suggest that the terms and conditions could be e-mailed to the customer.²¹ RESA's application for rehearing should be denied for the following reasons.

Terms and conditions that are presented to customers in CRES contracts are complicated and are not necessarily easily readable on a small electronic display. Furthermore, there is no assurance that the version of the terms and conditions that the customer read and signed on the small display are the same terms and conditions that are eventually e-mailed to the customer. Finally, the RESA proposal fails to consider that the written terms and conditions document would likely be needed as part of the third party verification ("TPV") process that occurs at the conclusion of the sale.

ii. 4901:1-21-06(D)(1)(h)

The Commission ruled in Ohio Admin. Code 4901:1-21-06(D)(1)(h) that an independent third-party verifier must confirm with the customer that the sales agent has left the property of the customer prior to continuing with the TPV process.²² RESA, Direct Energy, and IGS challenged the PUCO's finding that a sales agent must leave the customer's property prior to the third-party verification process.²³ Contrary to these claims, the PUCO's ruling is correct for protecting Ohioans during the marketers' sales transactions.

²⁰ Id.

²¹ Id.

²² Finding and Order at 26-27 (December 18, 2013).

²³ IGS at 1, RESA at 17, Direct Energy at 4.

RESA maintains that a sales agent should not be required to leave a customer's property before the third-party verification call takes place,²⁴ and also contends that a sales agent should not be precluded from returning to a customer's property after the verification process unless the customer directs otherwise.²⁵ In addition, RESA argues that a customer should be allowed to decide whether the sales agent remains at the customer's property during the verification process.²⁶

IGS states that it is unlawful and unreasonable to require sales agents to leave a customer's property during the third-party verification process.²⁷ Although IGS is supportive of sales agents being required to leave the customer's property during the third-party verification process,²⁸ IGS argues that the agent should be allowed to stay on the customer's property if the customer gives affirmative consent, memorialized in third-party verification.²⁹

Similarly, Direct Energy argues that the PUCO's rule on third-party verification procedures is unreasonable because it does not provide flexibility to the agent.³⁰ Direct Energy contends that a customer may wish to ask the agent questions that the third-party verification agent is not permitted to answer.³¹ Thus, Direct Energy reasons that the Commission should amend the rule to permit a solicitor to return to a customer's property

²⁴ RESA Application for Rehearing at 17.

²⁵ *Id.*

²⁶ *Id.* at 18.

²⁷ IGS Application for Rehearing at 1-2.

²⁸ *Id.* at 3.

²⁹ *Id.*

³⁰ Direct Energy Application for Rehearing at 4.

³¹ *Id.*

if the customer indicates to the third-party verifier that they would like answers to their questions from the CRES provider.³²

The PUCO rejected the recommendation to allow an agent to return to a customer's property "on the basis that this would undermine the rule requiring independent [third-party verification]."³³ The PUCO's rule on independent third-party verification currently serves to protect consumers. The Commission's concern appears to be that sales agents who remain on the customer's property while the TPV takes place could coach or coerce the customer into agreeing to something they might not if left alone.³⁴ The requirements in this rule will aid in deterring customer intimidation or coercion by Marketers. If customers have questions after the third-party verification process is complete, the customer can certainly contact the Marketer with those inquiries at a time of the customer's choosing. The entire premise of the third-party verification process is to make certain that the customer indeed understands what he/she is agreeing to (without being pressured or coerced by a sales agent).

The PUCO's rule protects customers. The rule serves to verify that a customer switching to a CRES provider actually agreed to the change. And the rule provides some assurance that the customer understands the terms and conditions of the contract. Finally, the independent third-party verification process serves the objective of preventing the unfair, deceptive, and unconscionable acts and practices that are banned by Ohio law.

³² Id.

³³ Finding and Order at 27 (December 18, 2013).

³⁴ See, for example, *In the Matter of the Commission Staff's Investigation into the Alleged Violations of the Minimum Telephone Service Standards by Buzz Telecom, Corporation*, Case No. 06-1443-TP-UNC, Opinion and Order at 16 (October 3, 2007) where the Commission found Buzz Telecom personnel remained on the telephone line during the TPV process and "coached" the subscriber, in violation 47 C.F.R. 64.1120(C)(3), resulting in a violation of former Ohio Admin. Code 4901:1-5-08.

For these reasons, RESA, IGS and Direct Energy’s applications for rehearing on this issue should be denied.

C. 4901:21-11 – Contract Administration

i. 4901:21-11(H)³⁵

The PUCO ruled that CRES providers and customers must consent to any material change in an existing contract and that CRES providers are required to provide proof of the consent using one of the methods outlined in Ohio Admin. Code 4901:1-21-06. To this end, the PUCO found that the “substantial benefits of consumer protection against material changes without consent outweigh the costs for CRES providers or governmental aggregators to acquire customer consent prior to making such changes.”³⁶ That ruling is needed for the protection of consumers.

RESA sought clarification as to whether the Commission’s intention was to require additional consent when an already agreed upon price adjustment is triggered.³⁷ RESA contends that material changes in contracts are common for many kinds of products like credit cards, mortgages, etc. While this may be true for these kinds of products, material changes in CRES contracts are relatively new in Ohio. Every effort must be afforded to ensure that customers understand their CRES contracts and that they

³⁵ Discussion of this rule was previously discussed in Rule 21-06(E).

³⁶ Finding and Order at 32 (December 18, 2013).

³⁷ RESA Application for Rehearing at 20-21.

affirmatively consent to material changes in the contracts.³⁸ This is especially true for changes in the pricing.

D. Certification Rules

i. Ohio Admin. Code 4901:1-24

The PUCO made rulings on the minimum requirements for CRES certification in its December 18 Order. Specifically, the PUCO determined that Ohio Admin. Code 4901:1-24-05(B)(1)(e) requires CRES applicants to provide statements about prior terminations from any choice program, revocations or suspensions or certificates, defaults for failure to deliver, and statements regarding whether “there are pending or past regulatory or judicial actions or findings against applicant or past rulings against the applicant.”³⁹ The PUCO’s rulings are correct. But RESA applied for rehearing on this rule change because it contends the language is “overly broad.”⁴⁰ In this regard, RESA contends that disclosing all past and pending judicial and regulatory actions is unnecessary and contrary to the Common Sense Initiative.⁴¹ RESA therefore proposes to amend the rule to state that only those past rulings against the applicant that relate to the applicant’s “technical, managerial or financial abilities to provide CRES “should be disclosed.”⁴² RESA also recommends that an applicant need not include in its statements

³⁸ In this regard, the Commission has acknowledged the importance of customers being notified about material changes to their contracts. For example, in its initiation of the CRES Rules, the PUCO held that “material changes to customer contracts must be highlighted for the customer’s review.” *In the Matter of the Commission’s Promulgation of Rules for Minimum Competitive Retail Electric Service Standards Pursuant to Chapter 4928, Revised Code*, Case No. 99-1611-EL-ORD, Finding and Order at 26 (April 6, 2000).

³⁹ Finding and Order at 55.

⁴⁰ Id. at 22.

⁴¹ Id.

⁴² Id. at 23.

information related to any calls, inquiries, or resolutions from calls to the PUCO's hotline.⁴³

RESA's recommendations should be rejected. First, the PUCO's rulings are needed for the administrative efficiency of having on hand the information that it can, in its judgment and not in the judgment of marketers, determine to be relevant for protecting the public interest in the certification process. In addition, applicants for CRES certification should not have the latitude to determine if the reason why they were terminated from participation in a choice program was related to technical, financial, or managerial abilities. The Commission has the expertise to evaluate applications and to determine whether or not an applicant is fit to be a certified CRES provider in Ohio. Certainly more information is preferable when it comes to evaluating a CRES providers' fitness to provide service to customers. The PUCO's rule, as written, will serve to allow the PUCO to determine if a Marketer is fit for certification, or if there are red-flags that would warrant rejecting a Marketer's application for certification.

III. CONCLUSION

The CRES rules are intended to provide customers with protection from unfair, misleading, deceptive, or unconscionable acts or practices related to CRES marketing, enrollment processes and the administration of competitive contracts. But IGS, RESA, and Direct Energy's applications for rehearing seek to remove important consumer protections from the CRES rules. For the reasons articulated herein, the PUCO should deny RESA, Direct Energy and IGS' applications for rehearing.

⁴³ Id.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memo Contra was served on the persons stated below via electronic transmission, this 27th day of January 2014.

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