

FILE

BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission-Ordered )  
Investigation of Marketing Practices in the ) Case No. 14-568-EL-COI  
Competitive Retail Electric Service Market. )

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MOTION FOR A STAY  
AND  
MOTION FOR AN EXPEDITED RULING  
BY  
THE RETAIL ENERGY SUPPLY ASSOCIATION

On April 9, 2014, the Public Utilities Commission of Ohio ("Commission") opened this docket to investigate whether it was unfair, misleading, deceptive or unconscionable to market contracts as "fixed-rate contracts" or "percentage-off the price-to-compare contracts" when such contracts also included "pass-through" provisions.<sup>1</sup> The Commission sought comments in response to a series of questions. The Retail Energy Supply Association ("RESA")<sup>2</sup> timely filed initial comments more than year and half ago, on May 9, 2014, as did 17 other commentators. Also, RESA and several others filed reply comments on May 27, 2014.

On November 18, 2015, the Commission issued a Finding and Order, concluding among other things that "in all [competitive retail electric service ("CRES")] contracts, whether residential, commercial, or industrial, fixed should mean fixed. \* \* \* Consequently, the Commission finds that, on a going-forward basis, CRES providers may not include a pass-through clause in a contract labeled as 'fixed-rate.'"<sup>3</sup> The Commission's November Finding and Order, however, makes it clear

<sup>1</sup> Entry at 2.

<sup>2</sup> 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 more than twenty 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](http://www.resausa.org).

<sup>3</sup> Finding and Order at 11.

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that further changes will be forthcoming and that the specifics have not been finalized. The Commission stated the following:

The “fixed-means-fixed” guidelines discussed above represent our interpretation ongoing forward of the Commission’s current rules contained in Ohio Adm. Code 4901:1-21-05, which govern CRES marketing and solicitation. Consequently, the Commission finds that CRES providers shall have until January 1, 2016, to bring all marketing for contracts being marketed into compliance with the “fixed-means-fixed” guidelines set forth in this Finding.

Additionally, the Commission finds that changes to the Commission’s current rules **should be initiated** in order to provide clearer, more specific guidance for customers and CRES providers in the future. \* \* \* The Commission finds that **definitions should be incorporated into the Commission’s rules** governing CRES in Ohio Adm. Code Chapter 4901:1-21 and, thereafter, should be modified on the Energy Choice Ohio website. \* \* \*

The Commission directs Staff to draft proposed rules consistent with these findings and finds that a rules proceeding should be commenced. (Emphasis added.)<sup>4</sup>

Moreover, because of very legitimate concerns over various aspects of the November Finding and Order decision, RESA intends to file an application for rehearing pursuant to Section 4903.10, Revised Code.<sup>5</sup> The application for rehearing deadline is December 18, 2015. A ruling on RESA’s application for rehearing will not necessarily occur before the January 1, 2016 deadline established by the Commission for all CRES providers to modify existing marketing materials to bring them into conformance with the November ruling. Because RESA intends to raise significant and compelling arguments on rehearing that may result in further changes to the Commission’s conclusions on this issue and RESA intends to actively participate in the Commission’s future rulemaking wherein even further alterations may take place, it is not reasonable to *require* all CRES providers in Ohio to modify their existing marketing materials by January 1, 2016.<sup>6</sup>

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<sup>4</sup> Finding and Order at 13-14.

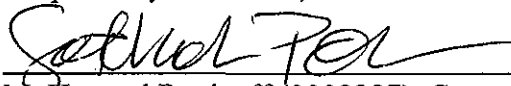
<sup>5</sup> Other applications for rehearing may also be filed.

<sup>6</sup> The Commission regularly reviews its Administrative Code rules and does not require the affected entities to implement changes prior to the finalization of their rules. Yet, that is effectively what that Commission has stated in its November 18 Finding and Order in this proceeding.

Without a ruling on this motion for a stay and a ruling issued on an expedited basis, CRES providers will be forced to evaluate all marketing materials used in Ohio and make adjustments prior to a final decision being issued by the Commission. Moreover, without a stay, CRES providers will be required to expend the time, resources and money making changes that may not actually correspond with the Commission's final decision in this matter or the final rule revisions adopted in the subsequent Commission docket. Accordingly, RESA requests that the Commission stay the requirement that all CRES providers modify their marketing materials until the Commission has ruled upon the RESA rehearing petition and finalized rule changes. RESA is asking that this requested stay apply equally to all CRES providers (not just RESA members). Additionally, in light of the very limited time remaining prior to January 1, RESA requests an expedited ruling on this motion for a stay, pursuant to Rule 4901-1-12(C), Ohio Administrative Code.

Further details regarding the reasons supporting RESA's motion for a stay and RESA's motion for an expedited ruling are set forth more fully in the attached Memorandum in Support.

Respectfully submitted,



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**MEMORANDUM IN SUPPORT  
OF THE RETAIL ENERGY SUPPLY ASSOCIATION'S  
MOTION FOR A STAY  
AND  
MOTION FOR AN EXPEDITED RULING**

**I. Introduction**

In the spring of 2014, the Public Utilities Commission of Ohio (“Commission”) opened this docket to investigate whether it was unfair, misleading, deceptive or unconscionable to market contracts as “fixed-rate contracts” or “percentage-off the price-to-compare contracts,” when such contracts also included “pass-through” provisions. An initial ruling was issued in November 2015, requiring all competitive retail electric service (“CRES”) providers to make changes to their marketing materials roughly 6 weeks later.<sup>7</sup> The Retail Energy Supply Association (“RESA”) has significant concerns regarding the Commission’s November conclusions and soon will be filing an application for rehearing arguing for revisions.

The November Entry requires all CRES providers to amend their marketing materials to apply the “fixed-means-fixed” concept to all fixed-price contracts. While the intent of what the Commission is seeking is understandable, as will be addressed in the petition for rehearing, the details necessary to review marketing materials is missing, and clarification or modifications will be necessary before contract materials can be reviewed. For example, the Finding and Order requires the marketing materials for fixed-price contracts be brought into compliance with the Commission’s interpretation of “fixed price” under Rule 4901:1-21-05. Rule 4901:1-21-05(A) defines a “fixed rate offer” as one expressed in cents per kilowatt-hour (“kWh”). For residential customers who are metered and billed only for kWh that is a sensible rule. For large commercial and mercantile customers whose cost of electric service depends on variables such as demand

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<sup>7</sup> Some of the mandated changes are based on language that had not been presented in this docket. Plus, the mandate to change CRES marketing materials will take place prior to any final conclusions being reached by the Commission.

and a contribution to the coincidental peak, prices cannot be fixed on a cents per-kWh basis. It should also be noted that Rule 4901:1-26-05 only applies to residential and small commercial customers, whereas the November Finding and Order applies to all customers. Even for residential customers, the current rule may be too simplistic as the price per kWh will have to be adjusted for the time of use if residential customers signs up for real-time pricing. The logical place to address these important nuances is a rulemaking proceeding. The Commission in its November Finding and Order has provided for a rulemaking. RESA intends to participate in the upcoming rulemaking proceeding.<sup>8</sup> RESA also intends to file for rehearing of the November Finding and Order to address needed clarifications and possible amendments to the Commission's approach to "regulatory out" provisions as well as price adjustment clauses. RESA believes that it is unfair and unreasonable to require piecemeal changes in the CRES providers' marketing materials when it is clear that changes in the Commission's initial ruling will be under consideration in rehearing and then again with new or additional rules.

**II. CRES providers should not be required to make changes by January 1, 2016, as they may not correspond with a final Commission ruling in this proceeding or the final Commission ruling in the upcoming rule proceeding.**

Section 4903.10, Revised Code, makes clear that CRES providers will have to comply with the January 1, 2016, even though RESA files an application for rehearing:

Where such application for rehearing has been filed before the effective date of the order as to which a rehearing is sought, the effective date of such order, unless otherwise ordered by the commission, shall be postponed or stayed pending disposition of the matter by the commission or by operation of law. In all other cases the making of such an application shall not excuse any person from complying with the order, or operate to stay or postpone the enforcement thereof, without a special order of the commission.

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<sup>8</sup> RESA does not believe that rulemaking docket has been opened yet.

The November Finding and Order was effective upon its entry on the Commission's journal,<sup>9</sup> which was November 18, 2015, and RESA's application for rehearing will be filed after its effective date. Thus, the application for rehearing will not stay or postpone the January 1, 2016 deadline.

Yet, the Commission's November Finding and Order is undeniably not the last ruling the Commission will issue on the topic that has been investigated in this proceeding. However, the January 1, 2016 deadline imposed by the Commission will require CRES providers to make changes to their marketing materials before final rulings are issued. This is unfair and unreasonable. Moreover, it is not good regulatory policy to require piecemeal changes that may be for naught.

**III. The lack of a final ruling will require all CRES providers to spend countless hours, incur unknown expenses and require significant resources to comply. A stay is a just and reasonable response until final rulings are issued and final rules are implemented.**

RESA's soon-to-be-filed application for rehearing will ask the Commission to reconsider its November Finding and Order in this case. Undoubtedly, RESA would like a favorable ruling on its application for rehearing. However, a ruling on the rehearing is unlikely to be issued prior to the January 1, 2016 deadline for changes to the marketing materials.<sup>10</sup> Moreover, it is a fact that a final ruling in the future rulemaking will not take place prior to January 1, 2016. Accordingly, RESA requests a stay until the Commission rules on its rehearing application in this proceeding and the related rule revisions are finalized and implemented.

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<sup>9</sup> Section 4903.15, Revised Code.

<sup>10</sup> If the rehearing is substantively addressed prior to January 1, 2016, it is unlikely that CRES providers will have sufficient time to make any necessary changes to their Ohio marketing materials based on that ruling.

The Commission has adopted a four-factor test to determine whether a requested stay should be granted in a Commission proceeding. Specifically, the Commission considers:<sup>11</sup>

- Whether there has been a strong showing that the party seeking the stay is likely to prevail on the merits;
- Whether the party seeking the stay has shown that it would suffer irreparable harm absent the stay;
- Whether the stay would cause substantial harm to other parties; and
- The public interest.

RESA satisfies all four factors listed above. RESA's application for rehearing will be filed in just a few days and will seek reconsideration of multiple aspects of the November Finding and Order such as the adopted "guideline," the limited "labels" with which every future CRES product must adhere, and the definitions that were adopted outside of a rule review proceeding and never presented during this proceeding (and thus had not been previously considered by commenters). RESA believes that a strong showing will be presented and it will prevail on the merits.

Moreover, as explained, RESA members (as well as other CRES providers) will suffer irreparable harm – further time, expense, and resources for numerous changes to marketing materials that may be warrantless, depending on the outcome of its rehearing application and the outcome of the future rulemaking proceeding. If this requested stay is not granted, but the RESA rehearing is granted and/or rule revisions result in other changes, CRES providers would be required to incur extensive expenses, and to commit time and resources needlessly, in duplicative efforts, or even inconsistent efforts.

The stay will not result in *substantial* harm to others because the Commission's interpretation will remain in effect unless otherwise modified on rehearing. Moreover, the only

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<sup>11</sup> See, *In re Investigation into Modification of Intrastate Access Charges*, Case No. 00-127-TP-COI, Entry on Rehearing at 5 (February 20, 2003); *In re Columbus Southern Power Company and Ohio Power Company*, Case No. 08-917-EL-SSO, Entry at 3 (March 30, 2009).

CRES provider against whom there have been complaints filed at the Commission is not passing through charges anymore and there is no reason to believe that other CRES providers will take such actions. A stay on mandating changes to the marketing materials will only toll the time for making changes for a temporary period – until the Commission issues final decisions in this proceeding and in the rulemaking.

Also, granting a stay on the changes to the marketing materials is in the public interest as it will ensure that conflicting information is not provided to the public prior to the final determinations in this proceeding and the related rulemaking. Lastly, RESA points out that its request for a stay is to apply equally to all CRES providers in Ohio.

**IV. An expedited ruling on this motion for a stay is appropriate given the impending January 1, 2016 deadline.**

Upon RESA's review and consideration of the Commission's Finding and Order, RESA is quickly asking for this stay. It even has filed this stay motion prior to its application for rehearing in order to given the Commission an advanced understanding of its concerns. Without an expedited ruling on this motion for a stay, numerous employees of CRES providers throughout Ohio will have to spend time, resources and money to review and change multiple marketing materials in the little time remaining before January 1, 2016.

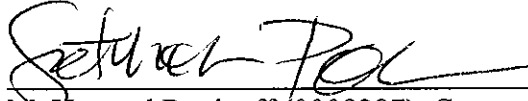
RESA cannot certify that no one objects to the issue of an immediate ruling on its motion for a stay.

**V. Conclusion**

RESA requests that the Commission issue an expedited ruling and impose a stay on the requirement to make changes to CRES marketing materials until the Commission rules on RESA's application for rehearing in this proceeding and until the Commission finalizes rule

revisions in the upcoming rule proceeding. The Commission should also apply this requested stay equally to all CRES providers in Ohio.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "M. Howard Petricoff", written over a horizontal line.

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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 15<sup>th</sup> day of December 2015 upon all persons/entities listed below:

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