

**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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**MEMORANDUM CONTRA MOTION FOR STAY AND EXPEDITED RULING  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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**I. INTRODUCTION**

On April 9, 2014, the Public Utilities Commission of Ohio (“PUCO”) opened this docket to investigate whether it was unfair, misleading, deceptive or unconscionable for consumers to be marketed contracts as “fixed-rate contracts” or “percentage-off the price-to-compare contracts” when such contracts included “pass-through” provisions.<sup>1</sup> On November 18, 2015, the PUCO issued a Finding and Order, and held that “CRES providers may not include a pass-through clause in a contract labeled as “fixed-rate.” The PUCO found that “CRES shall have until January 1, 2016, to bring all marketing materials for contracts into compliance with the “fixed-means-fixed” guidelines set forth in this Finding.”<sup>2</sup> And the Order also stated that changes to the PUCO’s current rules should be initiated to provide clearer, more specific guidance for customers and CRES providers in the future.<sup>3</sup> The PUCO’s Order was effective November 18, 2015 and now the Retail Energy Supply Associations (“RESA”) seeks to circumvent compliance with the PUCO’s Order by requesting a stay. RESA also requested an expedited ruling, stating

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

<sup>2</sup> Finding and Order at 13.

<sup>3</sup> *Id.*

that “RESA cannot certify that no one objects to the issue of an immediate ruling on its motion for a stay.”<sup>4</sup>

The PUCO has adopted a test to determine whether a requested stay should be granted. The PUCO considers the following:<sup>5</sup>

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

## **II. ARGUMENT**

### **A. RESA is unlikely to prevail on the merits.**

RESA filed Initial Comments in this case on May 9, 2014 and Reply Comments on May 27, 2014, objecting to the PUCO’s investigation to determine whether it is unfair, misleading, deceptive, or unconscionable to market contracts as fixed-rate contracts or as variable contracts with a guaranteed percent off the SSO rate when the contracts include pass-through clauses. The PUCO ruled that “CRES providers may not include a pass-

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<sup>4</sup> RESA Motion at 8.

<sup>5</sup> *In re Investigation into Modification of Intrastate Access Charges*, Case No. 00-127-TP-COI, Entry on Rehearing at 5 (Feb. 20, 2003).

through clause in a contract labeled as “fixed-rate” contract.”<sup>6</sup> RESA argued against such a finding in its Comments<sup>7</sup> and Reply Comments.<sup>8</sup> But RESA lost. In this Motion, RESA again argues that the PUCO’s finding regarding fixed-rate contracts is wrong.<sup>9</sup> Because the PUCO has now heard RESA’s arguments multiple times, it is very unlikely that RESA will prevail on the merits. RESA fails to meet the first prong of the test to have a stay ordered.

**B. RESA failed to show that it would suffer irreparable harm absent the stay.**

The second question to be answered when granting a stay is whether RESA has shown that it would suffer irreparable harm absent the stay. RESA’s claim of irreparable harm is that it will suffer harm due to spending further time, expenses, and resources for numerous changes to marketing materials that may be warrantless.<sup>10</sup> Nowhere in RESA’s Motion is there any quantification of the time, expenses, or resources that will be needed to make the numerous changes to marketing material. And RESA states that the “CRES providers would be required to incur expenses, and to commit time and resources needlessly, in duplicative efforts, or even inconsistent efforts.” RESA’s Motion simply makes these assertions and fails to describe what the needless, duplicative and inconsistent efforts are. There is no substantiation of a claim or demonstration of

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<sup>6</sup> Order at 11.

<sup>7</sup> “For the foregoing reasons, the Commission should not declare, prohibit, and/or dictate terms for all CRES contracts ...[t]his includes declaring *per se* violations when the term ‘fixed-rate’ is used.” RESA Initial Comments at 14.

<sup>8</sup> “[T]he Commission should not establish new automatic violations when the term ‘fixed-rate’ is used.” RESA Reply Comments at 6.

<sup>9</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.” Motion at 4.

<sup>10</sup> Motion at 7.

irreparable harm in RESA's motion; therefore RESA does not meet the irreparable harm requirement.

**C. The stay will cause substantial harm to other parties.**

The third requirement for the issuance of a stay is whether granting a stay will cause substantial harm to other parties. If the PUCO grants the requested stay, customers will be substantially harmed by being subject to paying pass-through charges on contracts labeled, and understood by customers to be, fixed-rate contracts. This case originated because the PUCO became aware, through consumer inquiries and informal complaints, that CRES suppliers were including pass-through clauses in the terms and conditions of fixed-rate contracts.<sup>11</sup> The PUCO "opened an investigation to determine whether it is unfair, misleading, deceptive, or unconscionable to market contracts as fixed-rate contracts or as variable contracts with a guaranteed percent off the SSO rate when the contracts include pass-through clauses."<sup>12</sup> The PUCO ultimately decided this practice of entering fixed rate contracts that were not fixed to be unfair, misleading, deceptive, and/or unconscionable. Therefore, in order to protect customers from the continuing misleading labeling of CRES contracts, the PUCO held that CRES providers may not include a pass-through clause in a contract labeled as "fixed-rate."<sup>13</sup> Customers will be harmed by potentially paying more pass-through charges under fixed-rate contracts if CRES providers are not required to follow the PUCO's directive. The PUCO must not grant the stay because granting the stay will substantially harm customers.

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<sup>11</sup> Order at 2.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 11.

**D. Granting a stay is not in the public interest.**

Based upon the PUCO rules, the public interest is served by prohibiting CRES from engaging in marketing, solicitation, or sales acts, or practices that are unfair, misleading, deceptive, or unconscionable in the marketing, solicitation, or sale of a CRES product.<sup>14</sup> The public interest is served when misleading contract provisions that support pass-through charges on fixed rate contracts are finally removed from all Ohio contracts. Based on the investigation and finding, the inclusion of pass-through clauses in fixed-rate CRES contracts is misleading. Delaying the January 1, 2016 date in which all marketing of CRES contracts that include pass-through provisions must cease is unreasonable and harmful to the public interest. The PUCO Order shows that it is in the public interest to not allow CRES providers to include a pass-through clause in a contract labeled as “fixed-rate.” It only stands to benefit customers if they are not required to potentially pay variable (pass-through) charges when served under a fixed rate CRES contract. It is in the public interest to follow the PUCO’s directive and stop passing through variable costs on fixed-rate contract.

RESA devotes one sentence supporting its argument that granting the stay is in the public interest – “Also, granting a stay on the changes to the marketing 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.”<sup>15</sup> RESA’s contention is that it benefits the public interest when no conflicting information is provided.<sup>16</sup> There could be no less conflicting information for a consumer than to

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<sup>14</sup> Ohio Adm. Code 4901:1-21-05(C).

<sup>15</sup> Motion at 8.

<sup>16</sup> RESA Motion at 8.

understand that under a fixed-rate contract fixed means fixed. It would seem that the only interest benefitted would be RESA, not the public, if a stay is granted. Therefore, the stay should not be granted.

### **III. CONCLUSION**

RESA's Motion for Stay is simply a third bite at the apple. RESA has filed Initial Comments and Reply Comments in this proceeding. The PUCO did not rule in RESA's favor. But that does not mean a stay is an appropriate remedy. RESA has failed to meet the PUCO's standard for granting stays; therefore, OCC requests that the PUCO deny RESA's request for Stay.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the Memorandum Contra has been served via electronic service upon the following parties of record this 22<sup>nd</sup> day of December, 2015.

/s/ Jodi Bair  
Jodi Bair  
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Summary: Memorandum Memorandum Contra Motion for Stay and Expedited Ruling by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Bair, Jodi Ms.