

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

Pursuant to Rule 4901-1-35 of the Ohio Administrative Code (“OAC”), the Retail Energy Supply Association (“RESA”)¹ files this Memorandum Contra to the December 18, 2015 Application for Rehearing filed by the Office of the Consumers’ Counsel (“OCC”). RESA urges the Public Utilities Commission of Ohio (“the Commission”) to deny the OCC application for rehearing in its entirety.

In its first two grounds for rehearing, OCC argues that the Commission should clarify its November 18, 2015 Finding and Order that Competitive Retail Electric Service (“CRES”) providers are prohibited from assessing any pass through charges in currently existing “fixed rate” contracts and that it is unreasonable and unlawful to require individual customers to bring complaints before the Commission in order to enforce that Order.

As pointed out by IGS at page 17 of its December 18, 2015 Application for Rehearing, neither the General Assembly nor administrative agencies have the power to pass retroactive laws that will impair vested rights in existing contracts or create new burdens. If the

¹ 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.

Commission's Order were applied retroactively to existing contracts, individual rights would be affected. Unlike the administrative rulemaking that the Commission is about to embark on in this case, an "adjudication" is the determination by an agency of the rights, duties, privileges and benefits or legal relationships of specific persons. *See*, Section 119.01(D), Revised Code. An adjudication that an existing contract may be in violation of the law requires a complaint to be filed so that the specific facts can be presented at a hearing after notice is given to both parties. The Commission is simply without authority to make the adjudications that OCC is requesting without following the statutory process set forth in Section 4905.26, Revised Code.

Further, the Commission specifically stated that a customer holding an existing fixed-rate contract with a pass-through provision would be free to pursue a complaint against the CRES provider.²

The Commission simply cannot engage in retroactive regulation and cannot adjudicate specific rights without following the complaint statute process. OCC's first two grounds for rehearing must be rejected.

In its third ground for rehearing, OCC argues that the Commission's November 18, 2015 Order unlawfully fails to protect consumers but it allows CRES providers to abandon a contract when it becomes economic to the CRES provider. OCC also states on page six of its application for rehearing that "throughout Section 4928 of the Ohio Revised Code, there are requirements that the Commission must look out for consumers' interests." This statement is simply not true and reflects a misunderstanding of Ohio law.

Section 4928.10, Revised Code, imposes upon the Commission the duty to promulgate rules containing certain basic consumer protections. However, it is the prospect of competition

² Order at 12.

among suppliers, not the efforts of a paternalistic governmental agency, that will ultimately protect consumers in this state.

Contrary to OCC's argument, the Commission did not provide CRES providers with a unilateral right to escape a contract. The Commission did allow CRES providers to use in limited circumstances the concept of a "regulatory out" clause in a contract. OCC fails to distinguish between the concept of a "regulatory out" clause which is triggered by a change in law, rule or tax, and changes in other circumstances that may make a contract less economically viable.

The limited "regulatory out" clause would appear to be triggered only by a change in law, regulation or a tax. Other circumstances would not trigger the "regulatory out" clause. The CRES provider will not be able to dispense with its duties if conditions other than a change in law, regulation or tax exists that makes the contract less economically viable.

OCC's request for the Commission to "extend the ability to consumers to exit a contract when it becomes an uneconomic burden for the consumer without penalty" would completely abolish the concept of contract law as we know it. OCC's third ground for rehearing must be rejected.

In its fourth and final ground for rehearing, OCC asks the Commission to forbid a fixed-rate contract from being automatically renewed and changed into a variable rate contract.

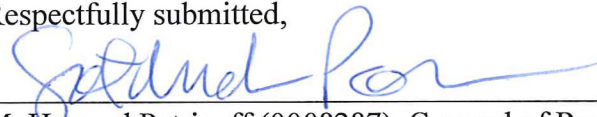
Rule 4901:1-21-11(F) of the OAC already protects consumers from such automatic renewal where the renewal term exceeds one month. This same rule allows automatic renewals from a fixed-rate contract to a variable-rate term contract if the renewal term is on a month-to-month basis. In such a situation, when the customer goes from a fixed-rate contract to a variable-rate month-to-month contract, the customer is only subject to the new variable rate for

one month at a time. Under the existing rules, the customer can either terminate the contract at the end of the fixed-rate term or can terminate after one month without penalty. In such a case, the customer would have the option to choose a new competing CRES supplier or default to the electric distribution utility. Moreover, pursuant to Rule 4901:1-21-12(B)(14) of the OAC, an automatic renewal provision that does not require affirmative consent by the customer must be disclosed conspicuously in a highlighted statement and contained in the original terms and conditions of contract; and is, therefore, part of the bargained-for exchange between the customer and CRES provider upon initial enrollment. The Commission's current rule provides customers with adequate protection.

This ground raised by OCC on rehearing is outside the scope of the Commission ordered investigation and the Commission should not permit OCC at this stage of the proceeding to expand the scope of this COI inquiry. As the current rules offer adequate protection, the Commission should deny this fourth ground for rehearing.

For the foregoing reasons, the Commission should deny all four grounds for rehearing raised by OCC.

Respectfully submitted,



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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 28th day of December 2015 upon all persons/entities listed below:

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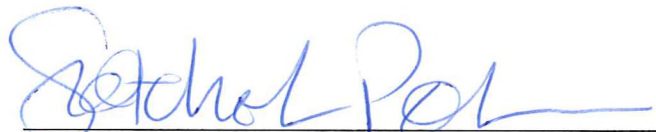
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Summary: Memorandum Memorandum Contra electronically filed by Mrs. Gretchen L. Petrucci on behalf of Retail Energy Supply Association