

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**MEMORANDUM CONTRA
OF
THE RETAIL ENERGY SUPPLY ASSOCIATION**

I. Introduction

The Energy Professionals of Ohio ("EPO") filed a motion on April 5, 2016, asking the Public Utilities Commission of Ohio ("Commission") to "clarify" that Rule 4901:1-21-12(B), Ohio Administrative Code, only applies to residential and small commercial customer contracts, and further to "clarify" what fees must be disclosed and that only the existence of a fee must be disclosed. EPO's motion should be denied because Rule 4901:1-21-12(B) expressly states it only applies to residential and small commercial customer contracts, and the opportunity to seek clarification in this proceeding passed long ago as the deadline for applications for rehearing was January 17, 2014. If the Commission agrees with EPO that clarification is necessary, the Commission should open a rulemaking proceeding to allow all interested parties to provide thorough comments on the fee disclosure rule. EPO should not be allowed to use a motion to seek clarification on a rule after the deadline for rehearing has passed, and the Commission should deny the motion on that basis.

Moreover, regardless of whether the existing rule requires clarification, RESA agrees that the disclosure rules could be improved to provide additional customer protections and

transparency to the retail electric market. The reason is simple. The rules at issue in this proceeding relate to disclosures *within competitive retail electric service ("CRES") contracts*. But, the fees disclosed in the CRES contract are the result of relationships the customer has entered into with brokers or other representatives much earlier than the consummation of the agreement with the CRES provider. Disclosures in CRES contracts, thus, do not actually provide the customers with the information they need until after the arrangement between the customer and the broker is already entered into.

This approach is backwards. Rather than placing the burden on CRES providers to regulate brokers and third parties, the focus should be on the disclosures that exist between parties in a fiduciary relationship with a customer at the time the relationship is formed. Thus, to provide greater transparency and consumer protection, RESA recommends that the Commission open a new rulemaking proceeding with the goal of establishing disclosure requirements applicable to parties in a fiduciary relationship with a customer.

II. Background

The Commission initiated this docket on June 25, 2012, to review its rules in Chapters 4901:1-21 and 4901:1-24 of the Ohio Administrative Code. Through a series of rulings in this docket,¹ the Commission approved modifications to its CRES rules, including revising Rule 4901:1-21-12(B)(7).² More than two years after the Commission issued its final Entry on Rehearing, EPO requests clarification and apparently, revision, of Rule 4901:1-21-12(B)(7) to establish that:

- Fee disclosure is required for residential and small commercial contracts only;

¹ A Finding and Order was issued on December 18, 2013; an Entry on Rehearing was issued on February 26, 2014; a Supplemental Finding and Order was issued on March 26, 2014; and an Entry issued on October 15, 2014, in this proceeding.

² Revised Rule 4901:1-21-12(B)(7) went into effect on December 1, 2014.

- Fee disclosure is required for all third party entities that serve to connect retail customers with CRES providers, including brokers, governmental aggregators and exclusive independent agents of CRES providers; and
- Fee disclosure on residential and small commercial CRES contracts be understood to mean the existence of a fee and not the fee amount, or alternatively, that all fees charged by third parties who are paid to consult on or sell CRES provider contracts, including brokers, governmental aggregators, and independent agents of CRES providers, shall be disclosed.

EPO has not requested that the Commission open a rulemaking proceeding to address the existing rule and any clarification that may be necessary or desired.

III. Argument

- A. Rule 4901:1-21-12(B)(7) expressly and unambiguously states that only CRES contracts with residential and small commercial customers must include an explanation of all prices and all fees associated with the service.**

EPO seeks to “clarify” that Rule 4901:1-21-12(B)(7) only applies to residential and small commercial customers. No clarification is necessary as the plain language of the Commission’s rule states:

- (B) All CRES provider contracts with residential and small commercial customers shall include, but not be limited to, the following information (to be stated in clear and understandable language):**

* * *

- (7) An itemized list and explanation of all prices and all fees associated with the service such that: * * *.**

(Emphasis added.)

The introductory part of Rule 4901:1-21-12(B) was not altered as part of this proceeding and has been in effect for numerous years without issue. Thus, as Rule 4901:1-21-12(B) expressly and unambiguously states that only CRES contracts with residential and small commercial customers must include the items listed under the rule, there is no reason why the Commission needs to “clarify” this point for EPO. More helpful than seeking to clarify

unambiguous language, would be to revisit the definition of a “small commercial customer” through a rulemaking proceeding to develop a threshold level that better matches the type of small commercial customer contract properly subject to fee disclosure.

B. EPO’s use of a motion to seek clarification of broker and governmental aggregator fee disclosures in this proceeding is improper, and any clarification of the rule should be accomplished through a separate rulemaking.

EPO also asks this Commission to apply Rule 4901:1-21-12(B)(7) to all “third party entities that serve to connect retail customers with CRES suppliers”³ and to define fee disclosure as only the existence of the fee and not the fee amount.⁴ As an alternative, EPO asks the Commission to require disclosure of all fee amounts charged by third parties who are paid to consult on or sell CRES provider contracts.⁵ EPO, however, should have made these requests prior to the January 17, 2014 application for rehearing deadline. It did not, and therefore the Commission cannot consider this motion.

Unlike EPO, RESA filed a timely application for rehearing seeking clarification of Rule 4901:1-21-12(B)(7).⁶ RESA stated that “RESA is not clear whether the Commission intends for the contract to disclose all CRES fees, all [electric distribution utility] fees, fees not otherwise included in the CRES price (per kWh) or something else.”⁷ The Commission did not alter its prior ruling on the rule, but did provide some clarification to RESA’s request, stating that “the change to Ohio Adm. Code 4901:1-1-21-12(B)(7) was made to require disclosure of all fees including those by brokers, governmental aggregators, etc., and does not require disclosure of

³ EPO motion at 4.

⁴ *Id.* at 5.

⁵ *Id.* at 6.

⁶ See Application for Rehearing by the Retail Energy Supply Association dated January 17, 2014 at 21.

⁷ *Id.*

cost components such as postage.”⁸ The Commission also expressly noted that it “does not find that any changes to the proposed rule are necessary.”⁹

Although RESA’s members have operated under the Commission’s revised rule since December 2014, when it became effective, RESA continues to believe that further clarification of the Commission’s fee disclosure rule may be helpful to CRES providers, brokers and aggregators. Any such clarification, however, should take place through a Commission-initiated rulemaking proceeding and not through motion practice. Such a rulemaking proceeding could seek input on whether fee disclosure should apply to brokers, governmental aggregators or third parties that are in a fiduciary relationship with a customer – i.e., where the customer believes the broker, aggregator or third party is acting on the customer’s behalf. For example, the rulemaking could evaluate whether such parties should disclose at the outset of the relationship with the customer any fees or termination fees that may apply.

Further, as discussed above, a separate rulemaking proceeding could also be used to develop a more realistic definition of a “small commercial customer” relative to fee disclosures or to better clarify what constitutes being a broker (versus a consultant).

Just as important, reviewing Rule 4901:1-21-12(B)(7) in a different rule proceeding ensures that all interested stakeholders will have an equal opportunity to present initial comments and reply comments for the Commission’s consideration.

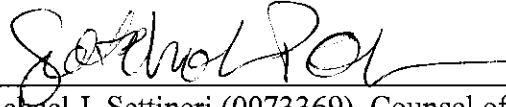
IV. Conclusion

For the foregoing reasons, EPO’s motion should be denied. Further clarification of the Commission’s fee disclosure rule would be helpful. To the extent the Commission agrees, a separate docket should be opened and a rulemaking proceeding should be initiated.

⁸ Entry on Rehearing, issued on February 26, 2014 at 20.

⁹ *Id.*

Respectfully submitted,



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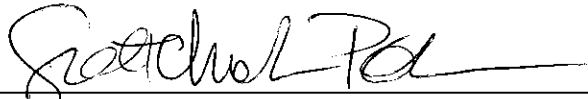
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Summary: Memorandum Memorandum Contra electronically filed by Mrs. Gretchen L. Petrucci on behalf of Retail Energy Supply Association