

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**REPLY COMMENTS OF
THE ENERGY PROFESSIONALS OF OHIO**

1. Introduction

On April 5, 2016 the Energy Professionals of Ohio (EPO) filed a motion for clarification regarding a Public Utilities Commission of Ohio (Commission) Entry on Rehearing in Case No. 12-1924. In its motion the EPO noted that the market had developed since the Entry and that several questions had arisen which needed clarification. On April 20th, 2016 the Retail Energy Supply Association (RESA) filed a memorandum contra the EPO's motion for clarification asking the Commission to deny the EPO's motion because the rule in question was unambiguous and that the EPO's comments were not filed timely.¹ RESA further opines in its memorandum contra that a new rulemaking process should be set up with "the focus should be on the disclosures that exist between parties in a fiduciary relationship with a customer the time the relationship is formed." The EPO disagrees with the first two arguments made by RESA against the EPO memorandum. Additionally, the EPO argues that a new rulemaking process is not necessary as the EPO is not seeking new

¹ RESA Memorandum Contra at 1.

² RESA Memorandum at 3.

³ Entry on Rehearing dated 2.26.2014, paragraph 34, Case No. 12-1924-EL-ORD

language, changes to existing language, or a change in policy – just a clarification of existing language.

2. Argument

- a. RESA contends that Rule 4901:1-21-12(B)(7) is unambiguous and does not need clarification. If that is the case, with respect to the limited issue of the size of customer that the rule applies to, the EPO and RESA are in agreement and no clarification is needed. Further clarification is needed to understand whom all the disclosure requirements apply to.**

RESA states in its memorandum contra that “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 the EPO.”² This is a relief to the members of the EPO as it has been past actions in the marketplace by members of RESA that led to the confusion of the EPO’s members. If the RESA memorandum is intended to clear up confusion related to which customer contracts must include some type of fee disclosure the EPO is grateful. It is settled and the EPO and RESA agree – the rule applies only to small commercial and residential customers.

However, even RESA’s clarification of how its members operate does not fully fix the issue at hand: that being to whom exactly the Commission wants disclosure requirements to apply. The EPO notes that the Commission in its Entry on Rehearing stated “governmental aggregators, brokers, etc.”³ The “etcetera” in question leaves open the option for further Commission clarification. The EPO reiterates its suggestion that all third parties, including exclusive independent agents, who are paid a fee on a retail contract be required to disclose. At the risk of sounding redundant, the EPO notes that there are three

² RESA Memorandum at 3.

³ Entry on Rehearing dated 2.26.2014, paragraph 34, Case No. 12-1924-EL-ORD

general “channels” by which retail contracts are transacted: direct sales by a CRES supplier, via a broker/aggregator, or via an exclusive independent agent of a CRES supplier. Exclusive independent agents are paid a fee to sell the CRES’s products. Requiring disclosure of broker/aggregator fees but not exclusive independent agent fees creates an unlevel playing field by which EPO members must compete.

b. RESA’s position that the EPO’s motion for clarification be denied because it is filed out of time should be ignored as procedurally incorrect.

RESA states in its memorandum contra that the “opportunity to seek clarification in this proceeding passed long ago as the deadline for applications for rehearing was January 17th, 2014.”⁴ The EPO didn’t exist by January 17th, 2014. Further, this argument misses the mark, as the EPO is not seeking an application for rehearing or any change in Commission rules. The EPO simply seeks a clarification of what existing language this docket means.

The EPO filed its articles of incorporation on January 31, 2014⁵. A full two weeks after the deadline for applications for rehearing were due. The EPO has faced a similar challenge to its participation in PUCO matters in Case Nos. 13-2385-EL-SSO and 13-2386-EL-AAM where it filed a motion to intervene out of time. The attorney examiner in the case sided with the EPO noting that extraordinary circumstances existed “where the EPO was engaged in the formation of the association and required some time to determine the direction from its membership.”⁶

The circumstances before us in this proceeding regarding the formation of the EPO and deadlines for comments are similar. As before, the EPO literally had no way of

⁴ RESA memorandum at 1.

⁵ EPO’s Articles of Incorporation found at the Secretary of State’s website: http://www5.sos.state.oh.us/ords/f?p=100:7:0::NO:7:P7_CHARTER_NUM:2265192

⁶ Entry dated 5.21.2014, Case Nos. 13-2385-EL-SSO and 13-2386-EL-AAM

commenting in the manner RESA suggests. Additionally, parties are free to seek clarification of a Commission order at any point. The EPO seeks no new language in any Commission rule. The EPO seeks no change in the Commission's policy requiring disclosure. The EPO simply seeks clarification as to whom disclosure applies and how it is to be done. As such, the Commission should ignore RESA's arguments and find that the EPO did not file an application for rehearing but rather filed a motion for clarification.

c. RESA's suggestion that a separate rulemaking proceeding be opened should be denied outright.

RESA's suggestion that the Commission open a new rulemaking to consider only those instances where a fiduciary relationship exists between a customer and a third party, perhaps intentionally, leaves out independent exclusive agents of RESA's members. Exclusive independent agents of CRES suppliers act on behalf of the CRES supplier and not the customer. Therefore, they are not in a fiduciary relationship. They remain a third party that is paid a fee on the contract, however. While RESA missed this discussion point in its memorandum, it's not relevant to the general issue of disclosure. Simply clarifying that retail contracts for small commercial and residential customers must include disclosure of any third party fees, if there are any, protects all customers no matter how the contract is derived. Further, because the EPO is simply seeking clarification of the existing disclosure rule, no new rulemaking proceeding is necessary. The Commission left itself room for further clarification in its Entry on Rehearing by stating "The Commission clarifies that the change to Ohio Adm. Code 4901:1-21-12(B)(7) was made to require disclosure of all fees including those by brokers, governmental aggregators, *etc.*,"⁷ [emphasis added]. Clarifying

⁷ Entry on Rehearing dated 2.26.2014, paragraph 34, Case No. 12-1924-EL-ORD

that the “etc.” to mean all third parties to a contract, brokers, governmental aggregators, and exclusive independent agents of CRES suppliers alike, is not changing the substance of the rule.

3. Conclusion

The Commission should deny RESA’s request to deny the EPO’s motion for clarification and RESA’s suggestion that a new rulemaking procedure be opened because the EPO is not seeking an application for rehearing, is not seeking a change in commission rules, is not seeking a change in Commission policy, but is simply seeking clarification of what “etc.” means. The Commission has already listed a few third parties in its Entry on Rehearing in this case along with “etc.” The EPO simply asks the Commission to clarify if it meant a level playing field and that ***all*** third parties who are paid a fee on a contract must disclose. Further, the EPO seeks clarification of whether the existence of a fee or the fee amount is to be disclosure.

Respectfully Submitted,

/s/ Kevin Schmidt

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Certificate of Service

I hereby certify that a copy of the foregoing was served this 27th day of April, 2016, via email upon the parties below.

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This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

4/28/2016 9:05:03 AM

in

Case No(s). 12-1924-EL-ORD

Summary: Reply of the Energy Professionals of Ohio electronically filed by Mr. Kevin R Schmidt on behalf of The Energy Professionals of Ohio