**BEFORE**
**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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# SECOND APPLICATION FOR REHEARING BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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**SECOND APPLICATION FOR REHEARING**
**BY**
**THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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The Office of the Ohio Consumers' Counsel ("OCC") files this application for rehearing[1] to prevent harm to residential customers through unfair, misleading, deceptive, or unconscionable acts or practices in the marketing of electric service contracts to them. The Public Utilities Commission of Ohio ("PUCO") initiated this investigation more than three years ago to determine whether certain practices by marketers of competitive retail electric service ("CRES") are unfair, misleading, deceptive, or unconscionable. Specifically, the PUCO investigated the marketing of contracts as fixed-rate contracts or as variable contracts with a guaranteed percent off the standard service offer ("SSO") rate when the contracts include pass-through clauses (collectively, referred to herein as "fixed-rate" contracts).

After receiving comments and reply comments, the PUCO in its November 18, 2015 Finding and Order ("Order"), logically determined that fixed should mean fixed in all residential, commercial, and industrial marketer contracts. In light of this finding, the PUCO ordered that, on a going-forward basis, marketers may not include a pass-through

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[1] This application for rehearing is authorized under R.C. 4903.10 and Ohio Adm. Code 4901-1-35.

clause in a contract labeled as "fixed-rate." But the PUCO permitted regulatory out clauses in limited circumstances. Under a regulatory out clause, a marketer may revise a contract by proposing new contract terms to the customer where there is a change in law for which a marketer would be unable to hedge.

In response, several interested stakeholders filed applications for rehearing, including OCC and the Retail Energy Supply Association's ("RESA"). RESA had argued that the PUCO's imposition of mandatory contract labels in residential, commercial, and industrial CRES contracts had harmful and unintended consequences. RESA also argued that the PUCO's limitation on regulatory out clauses and prohibition against a penalty was vague, unclear, and unfairly exposed marketers to significant risks.

On rehearing, the PUCO denied RESA's application for rehearing and properly clarified that, "for residential customers, all contracts must be labeled as either 'fixed,' 'introductory,' or 'variable' rates."[2] The PUCO's directive was necessary to protect unsophisticated customers from exploitation. The PUCO correctly recognized the disparity in customer sophistication between residential and commercial/industrial customers, the latter often being represented by counsel.[3] The PUCO also aptly noted that any issues related to alternative contract labels for innovative marketer products would be sufficiently addressed in the rulemaking proceeding that the PUCO directed its Staff to commence in its Order.

On rehearing, the PUCO also clarified that:

> when a CRES provider invokes the regulatory [ ] out clause, it is the CRES provider's responsibility to return the customer to the standard

[2] Second Entry on Rehearing at ¶ 29 (March 29, 2017) ("Second EOR").

[3] *Id.*

> service offer unless the customers [sic] affirmatively consents to new prices, terms, or conditions. Absent such affirmative consent, the invocation of the regulatory opt out clause will terminate the contract and the CRES provider may not retain the customer even under the previous contract's prices, terms and conditions.[4]

However, in its Fourth Entry on Rehearing, in response to another RESA application for rehearing, the PUCO stripped residential customers of the very consumer protection measures it established in its Second EOR.[5] Without balancing the risk to residential customers, the PUCO granted RESA rehearing. The PUCO agreed with RESA that the question of labeling contracts is better addressed through the rulemaking process. Accordingly, the PUCO withdrew its directive to require all residential marketer contracts to be labeled as fixed, variable, or introductory until the rulemaking proceeding on CRES standards has been completed. By removing these labeling guidelines, the PUCO removes critical measures necessary to protect against unfair, misleading, deceptive, or unconscionable acts or practices regarding marketer contacts.

Accordingly, in addition to the rehearing issues raised in OCC's application for rehearing filed on December 18, 2015, the PUCO's September 27, 2017 Fourth EOR is unreasonable and unlawful in the following respects:

> ASSIGNMENT OF ERROR NO. 1: The PUCO's Fourth Entry on Rehearing is unreasonable and unlawful. It fails to require marketers to label their contracts and thus allows unfair, misleading, deceptive, or unconscionable language in customer contracts.

> ASSIGNMENT OF ERROR NO. 2: The Fourth Entry on Rehearing is unreasonable and unlawful because it appears to overturn the "fixed-means-fixed" guidelines established in the Opinion and Order and affirmed in its Second Entry on Rehearing. The PUCO should clarify that its "fixed-means-fixed" guidelines are not altered by its decision in the Fourth Entry on Rehearing.

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[4] Second EOR at ¶ 19.

[5] Fourth Entry on Rehearing at ¶ 12 (September 27, 2017) ("Fourth EOR").

ASSIGNMENT OF ERROR No. 3: The Fourth Entry on Rehearing is unreasonably and unlawfully vague concerning the application of regulatory out provisions. The PUCO should clarify that if a marketer invokes a regulatory out provision and is unwilling to provide service under the existing contract and the customer does not affirmatively consent to new contract terms, the marketer must transfer the customer to the utility's standard service offer if the customer has not selected a new supplier.

The reasons in support of this application for rehearing are set forth in the accompanying Memorandum in Support. The PUCO should grant rehearing and abrogate or modify its Fourth EOR as requested by OCC.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT**

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## I. INTRODUCTION

The PUCO, through this investigation, has sought to ensure that residential customers are not being exploited by marketers. The PUCO has acted to protect residential customers from unfair, misleading, deceptive, or unconscionable marketer contracts advertised as fixed-rate contracts containing pass-through clauses. The PUCO's November 18, 2015 Order and its Second EOR were steps in the right direction for implementing reasonable consumer protection measures.

However, the PUCO's September 27, 2017 Fourth EOR abruptly changed course and deprived residential consumers of those reasonable consumer protection measures. The PUCO also opened the door again for marketers to include hidden fees and charges in residential CRES contracts masked by legalese, complex terms and conditions – all without the benefit of familiar and widely used labels. The PUCO should clarify, modify, or abrogate its Fourth EOR to require all residential marketer contracts to contain clear and understandable language that discloses any pass-through costs or variable/introductory (i.e., low rates that are intended to entice customers to switch suppliers but will increase over time) rates in order to protect residential customers.

## II. STANDARD OF REVIEW

Applications for rehearing are governed by R.C. 4903.10. The statute allows that, within 30 days after issuance of a PUCO order, "any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding." OCC filed comments and reply comments in this proceeding.

In considering an application for rehearing, R.C. 4903.10 provides that "the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear." The statute also provides: "[i]f, after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed." As shown herein, the statutory standard to modify or abrogate the Fourth EOR is met in this case.

## III. ASSIGNMENTS OF ERROR

**ASSIGNMENT OF ERROR NO. 1: The PUCO's Fourth Entry on Rehearing is unreasonable and unlawful. It fails to require marketers to label their contracts and thus allows unfair, misleading, deceptive, or unconscionable language in customer contracts.**

In its November 18, 2015 Order, the PUCO explained that marketers had been including pass-through clauses in fixed-rate or fixed-price contracts and variable contracts with a guaranteed percent off the SSO rate. Consumers raised their concerns with the PUCO through informal complaints in hopes that the PUCO would remedy this unfair, misleading, deceptive, and/or unconscionable practice.

In its Second EOR, the PUCO required marketers to disclose and label all residential customer contracts as either "fixed," "introductory," or "variable," rates. This was a reasonable and meaningful protection for consumers against marketers' unfair, misleading, deceptive, or unconscionable acts or practices. Nonetheless, RESA filed an application for rehearing of the PUCO's Second EOR. RESA asserted that "[r]equiring CRES providers to label residential contracts as fixed, variable, or introductory is unreasonable and unlawful."[6] RESA argued that "[n]o provision of Chapter 4901:1-21 requires a marketer to use any specific words to describe a product in either marketing materials or contracts . . . ."[7]

Contrary to RESA's claims, in its Fourth EOR the PUCO held that its clarification of its Second EOR to require specific disclosures in the form of labels was lawful. The PUCO correctly explained that "Ohio Adm. Code 4901:1-21-03 prohibits CRES providers from engaging in 'unfair, misleading, deceptive, or unconscionable acts or practices' related to the marketing, solicitation or sale of a CRES, and it is the PUCO's duty to give guidance to CRES providers as to the meaning of 'unfair, misleading, deceptive, or unconscionable acts or practices.'"[8] Therefore, it is entirely proper for the PUCO to require certain disclosures, such as labels, in CRES contracts.

Notwithstanding its holding and explanation, the PUCO then erroneously granted rehearing on this issue and withdrew its directive for these reasonable and lawful disclosures. By removing the requirement that all residential CRES contracts contain the widely used and familiar "fixed," "variable," or "introductory" labels, the PUCO has

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[6] RESA Application for Rehearing at 6 (April 28, 2017).

[7] *Id.* at 7.

[8] Second EOR at ¶ 12.

failed to timely address the unfair, misleading, deceptive, and unconscionable practices customers have complained about.

It has been over three years since the PUCO ordered this investigation in response to customer complaints. In that time, the PUCO has failed to require reasonable contract disclosures for residential customers who may not be familiar with marketers or skilled in interpreting complex and technical contracts drafted by skilled attorneys.

Requiring all residential marketer contracts to be labeled as "fixed," "variable," or "introductory," in order to protect against unfair, misleading, deceptive, or unconscionable practices in CRES contracts, is not unlawful or unreasonable. The PUCO agreed. Indeed, the PUCO recognized that it has a duty carry out the State's policy to "[e]nsure retail electric service consumers protection against unreasonable sales practices, market deficiencies, and market power"[9] and to enforce its established rule that CRES "providers shall not engage in unfair, misleading, deceptive, or unconscionable acts or practices related to . . . administration of contracts for CRES."[10] Requiring widely used and familiar disclosures, such as "fixed," "variable," or "introductory," gives meaning to this rule, carries out the State's policy, and is critical to protecting residential consumers who do not have the sophistication or industry acumen to understand complex CRES contracts.

Further, these terms are already used in the PUCO's rules. Under the PUCO's rules, marketers shall include an itemized list and explanation of all prices and all fees associated with the service regarding "fixed-rate offers," "per cent-off discount rates,"

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[9] R.C. 4928.02(I)

[10] Ohio Adm. Code 4901:1-21-03(A).

and variable-rate offers."[11] Requiring marketers to disclose and label their contracts with terms that are straightforward and in plain language is consistent with and supported by existing rules.

Accordingly, the PUCO should reaffirm its guidelines issued in its Second EOR to require all residential marketer contracts to be disclosed and/or labeled as "fixed," "variable," or "introductory," until such time as the rules can be specifically revised to clarify this interpretation. However, if the PUCO continues to find that the precise mandatory labeling of residential CRES contracts should only be considered in rulemaking proceedings, the PUCO, at a minimum, should require residential CRES contracts to contain plain and ordinary language to sufficiently disclose whether the contract is fixed-rate, variable, or introductory.

**ASSIGNMENT OF ERROR NO. 2: The Fourth Entry on Rehearing is unreasonable and unlawful because it appears to overturn the "fixed-means-fixed" guidelines established in the Opinion and Order and affirmed in its Second Entry on Rehearing. The PUCO should clarify that its "fixed-means-fixed" guidelines are not altered by its decision in the Fourth Entry on Rehearing.**

As discussed above, the PUCO in its Order logically determined that fixed should mean fixed in all residential, commercial, and industrial marketer contracts. In so finding, the PUCO prohibited marketer from including pass-through clauses in contracts labeled as "fixed-rate" contracts.[12] In its Second EOR, the PUCO clarified its Order and reasonably and properly required all residential marketer contracts to be labeled as "fixed," "variable," or "introductory."[13] The PUCO later withdrew this labeling

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[11] *See* Ohio Adm. Code 4901:1-21-12(B)(7).

[12] Order at 11.

[13] Second EOR at ¶ 29.

requirement in its Fourth EOR. Although the PUCO found that its guidelines were lawful, it agreed that the question of labeling contracts was better addressed through the rulemaking process.

The PUCO's Fourth EOR is unreasonable and unlawful. It allows marketers to continue practices that may mislead or deceive consumers. To cure this error, the PUCO should clarify that even though its Fourth EOR removes the affirmative requirement that all residential marketer contracts be labeled "fixed," "variable," or "introductory," the Fourth EOR does not reverse the PUCO's finding that marketers may not include pass-through clauses in any CRES contracts labeled as "fixed-rate" contracts. Otherwise, fixed does not mean fixed and consumers may be victimized by unfair, misleading, deceptive, and unconscionable marketer practices.

**ASSIGNMENT OF ERROR NO. 3: The Fourth Entry on Rehearing is unreasonably and unlawfully vague concerning the application of regulatory out provisions. The PUCO should clarify that if a marketer invokes a regulatory out provision and is unwilling to provide service under the existing contract and the customer does not affirmatively consent to new contract terms, the marketer must transfer the customer to the utility's standard service offer if the customer has not selected a new supplier.**

In its Order, the PUCO permitted fixed-rate marketer contracts to contain regulatory out clauses that would be available for CRES providers in very limited circumstances.[14] In its Second EOR, the PUCO clarified that "when a CRES provider invokes the regulatory [ ] out clause, it is the CRES provider's responsibility to return the customer to the standard service offer unless the customers [sic] affirmatively consents to new prices, terms, or conditions."[15]

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[14] Order at 12.

[15] Second EOR at ¶ 19.

But in its Fourth EOR, the PUCO granted RESA's rehearing and stayed this requirement. The PUCO went on to require that "following the invocation of a regulatory out clause, a CRES provider may continue to serve a customer who does not give affirmative consent to new contract terms and conditions at the existing contracts [sic] terms and conditions."[16] The Fourth EOR is unreasonably and unlawfully vague.

The PUCO's Fourth EOR leaves open for interpretation what marketers must do when they choose to invoke the regulatory out clause but are otherwise unwilling to continue to provide service under the contract's existing terms and conditions to customers who do not affirmatively consent to new contract terms and conditions. To correct this error, the PUCO should clarify that in the event a marketer invokes a regulatory out provision, and is unwilling to continue service under the existing contract to a customer who does not affirmatively consent to the new contract terms, the marketer must transfer the customer to the utility's standard service offer if the customer has not selected a new supplier. If the PUCO fails to clarify its Order, consumers may be disadvantaged by a marketer's unfair, misleading, deceptive, and unconscionable marketing practices.

## IV. CONCLUSION

The PUCO should grant rehearing on these claims of error and clarify, modify, or abrogate its September 27, 2017 Fourth EOR accordingly. Granting rehearing is necessary to ensure residential customers are afforded reasonable protections against unfair, misleading, deceptive, or unconscionable acts or practices related to the marketing, solicitation, or sale of a marketer's service.

[16] Fourth EOR at ¶ 18.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Second Application for Rehearing was served via electronic mail on the following parties on October 27, 2017.

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Summary: App for Rehearing Second Application for Rehearing by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Etter, Terry L.