

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Joint Application of)
Constellation NewEnergy, Inc. and)
Constellation NewEnergy – Gas Division,) Case No. 18-0604-GE-WVR
LLC for Waivers of Enrollment)
Requirements in Rules 4901:1-21-06(C))
and 4901:1-29-06(B), Ohio)
Administrative Code.)

**INITIAL COMMENTS REGARDING CONSTELLATION’S PROPOSED
PROCESS FOR CHANGING CONSUMERS’ ENERGY SUPPLIER
BY
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

I. INTRODUCTION

In this case, a marketer seeks to short-cut consumer protections adopted by the Public Utilities Commission of Ohio (“PUCO”). PUCO rules help protect consumers in the marketing of electric and natural gas service. Ohio Adm. Code 4901:1-21-06(C) and 4901:1-29-06(B) provide that consumers must consent to a change in their utility supplier and that marketers must obtain proof of consumers’ consent.

Constellation New Energy, Inc. and Constellation NewEnergy – Gas Division, LLC (collectively, “Constellation”) want to enroll customers through on-line chat technology instead of through the processes required by the PUCO.¹ Constellation claims that a large percentage of consumers would use “chats” if available.²

¹ See Application (April 10, 2018) at 1.

² *Id.* at 1-2.

Constellation contends that the PUCO’s rules do not allow for the use of online “chat” technology to comply with the rules.³ Constellation has applied for a waiver of the rules. The PUCO may waive a retail electric or natural gas service marketing rule for good cause shown.⁴

The Office of the Ohio Consumers’ Counsel (“OCC”) files initial Comments on the application.⁵ Constellation’s proposal lacks specificity regarding which rules must be waived. It also removes a key consumer protection – independent third-party verification. Constellation has not shown good cause for its waiver request and its application should be denied. If the PUCO is inclined to approve the application, however, it should require independent third-party verification of customer enrollments through “chat” technology. Consumers need this protection and the PUCO should require it.

II. RECOMMENDATIONS

A. Constellation has failed to meet the good cause standard the PUCO requires in order to approve this waiver request.

Constellation claims that there is good cause for its waiver request. For support of this assertion, Constellation contends that its proposal is not prohibited by Ohio law, advances the PUCO’s minimum enrollment requirements, and furthers the policy of the State of Ohio.⁶ Constellation’s position does not withstand scrutiny and thus Constellation has not shown good cause for the waiver.

³ *See id.* at 2.

⁴ Ohio Adm. Code 4901:1-21-02(C); Ohio Adm. Code 4901:1-29-02(C).

⁵ *See* Entry (June 26, 2019), ¶5.

⁶ Application at 7-9.

Constellation’s “state law” claim is based on the notion that the General Assembly did not specifically prohibit the use of “an online, interactive enrollment mechanism” and thus the PUCO can find good cause for the waiver.⁷ Thus, according to Constellation’s position, if something is not prohibited, it is good. If that were the case, the PUCO would never have to scrutinize any proposal that is not specifically prohibited by Ohio law. Constellation’s argument is contrary to Ohio law, which specifically directs the PUCO to adopt rules specifying minimum consumer protections for retail electric and natural gas service.⁸

Constellation ignores the fact that the law requiring minimum standards for competitive electric service was passed in 1999 and the law requiring minimum standards for competitive natural gas service was passed in 2001. “Chat” technology was either nonexistent or in the nascent stage of use at that time, so the General Assembly would not have addressed the technology. Constellation’s “state law” argument is without merit.

Constellation’s argument that the waiver advances the PUCO’s enrollment rules is flawed. Constellation asserts that it would use new technology that is readily available and thus it would further develop the competitive market in Ohio.⁹ But just because technology exists doesn’t mean that the PUCO should allow it to be used with reduced consumer protections. Consumers should have the same level of protection against marketers’ abuses, regardless of the technology used by the marketer.

Constellation also claims that its proposal would further state policies to promote diversity of energy suppliers and promote competition through flexible regulatory

⁷ *Id.* at 7.

⁸ R.C. 4928.10; R.C. 4929.22.

⁹ Application at 8.

treatment.¹⁰ Constellation bases this claim on the perceived customer expectation that “chat” technology would be available and the perceived notion that customers want to use “chat” technology.¹¹ However, these perceptions are suspect, as they are based on data supplied by a software company that sells “chat” software and thus has a vested interest in promoting the use of “chat” software.

Constellation’s arguments are without merit and flawed. Constellation has not shown good cause for the waiver and its application should be denied.

B. Constellation’s application should not be approved because it lacks specificity as to which protections should not be available to consumers through its proposed marketing method, and thus does not contain sufficient information for the PUCO to make a reasoned decision concerning the application.

Constellation asks that it should not have to comply with Ohio Adm. Code 4901:1-21-06(C) and 4901:1-29-06(B) “to the extent” the PUCO “deems necessary.”¹² But those rules require marketers to comply with other rules that protect consumers by requiring proof of customer consent to change their energy supplier. Ohio Adm. Code 4901:1-21-06(C) states that electric service marketers “are prohibited from enrolling potential customers without their consent and proof of that consent as delineated in paragraph (D) of this rule.” Similarly, Ohio Adm. Code 4901:1-29-06(B) prohibits natural gas marketers from enrolling customers “without consent and proof of that consent as delineated in paragraphs (C), (D), and (E) of this rule.”¹³ These rules are mandated by R.C. 4928.10(D)(4) and R.C.

¹⁰ *Id.* at 8-9.

¹¹ *Id.* at 9.

¹² *Id.* at 1.

¹³ The rule erroneously refers to paragraph (C), which does not contain requirements for consumer consent to change natural gas providers. Rather, the paragraph prohibits natural gas providers from enrolling a customer who still has an outstanding balance with the incumbent provider. The rule correctly should refer to paragraphs (D), (E), and (F). These comments will discuss the correct paragraphs.

4929.22(D)(3), which prohibit switching of electric and natural gas suppliers without prior consent and appropriate confirmation practices.

Constellation does not mention whether it seeks to avoid compliance with only portions of Ohio Adm. Code 4901:1-21-06(D) and Ohio Adm. Code 4901:1-29-06(D), (E), or (F). And it does not identify the portion(s) of these rules with which it should not have to comply. Thus, the application lacks specificity.

As Constellation points out, Ohio Adm. Code 4901:1-21-06(D) and Ohio Adm. Code 4901:1-29-06(D), (E), and (F) include requirements for changing customers' energy suppliers by mail, facsimile, direct solicitation, telephone, and the Internet.¹⁴ Each method has specific requirements that must be met before a marketer may lawfully change a customer's energy supplier. Although Constellation describes its proposed method for marketing its services to customers,¹⁵ it does not specify which rules may be inapplicable to its proposed use of "chat" technology. Constellation also does not explain why "chat" technology may require different regulatory treatment than the enrollment methods identified in the rules.

The PUCO and the public should not have to guess which rules Constellation believes should not apply to its proposed method to market its products to customers. Constellation has the burden of showing there is good cause for its requested waiver.¹⁶ But the lack of specificity in Constellation's waiver request does not allow the PUCO to make a reasoned decision as to which rules might not be applicable to Constellation's proposal. The PUCO should not approve Constellation's application.

¹⁴ *Id.* at 2.

¹⁵ *Id.* at 3-6.

¹⁶ *See* Ohio Adm. Code 4901:1-21-02(C); Ohio Adm. Code 4901:1-29-02(C).

C. Independent third-party verification of a change to a consumer's energy supplier is a key consumer protection that should be required if Constellation can use "chat" technology to market electric and natural gas service to residential consumers.

If the PUCO allows Constellation to use "chat" technology to market to residential consumers (which it should not), independent third-party verification would be a necessary consumer protection. Although Constellation proposes to use the Internet for changing consumers' energy supplier, its proposal is akin to the process for changing consumers' energy supplier through telephonic means. In Internet enrollment, consumers merely fill out an online form without any direct contact with the marketer's representatives. "Chat" technology, however, allows the marketer's representatives to engage in a real-time "conversation" with consumers. This is similar to consumers speaking by telephone with marketer representatives.

The PUCO's rules require retail electric and natural gas marketers to verify customer telephonic enrollments through an independent third party.¹⁷ Both the marketer and the independent third-party verifier must maintain recordings of their conversations with consumers. The independent third-party recording helps deter marketers from falsifying customer enrollments. OCC is concerned that "chat" technology can be manipulated to circumvent Ohio law and the PUCO's rules, and thus independent third-party verification is needed to protect consumers.

¹⁷ Ohio Adm. Code 4901:1-21-06(D)(2); Ohio Adm. Code 4901:1-29-06(E)(1). The PUCO has temporarily waived the independent third-party verification requirement only for natural gas marketers and only for inbound sales calls from customers (which excludes inbound calls that are transferred from a call center representative to a telemarketer) on a trial basis, so long as the marketer maintains a time- and date-stamped recording of the entire conversation – including the sales portion, the enrollment portion, and the verification portion – and all the specific items listed in the rule are verified with the customer in clear, plain language. *See* Case No. 17-2358-GA-WVR, Entry (November 14, 2018), ¶¶17-18.

Because of the similarity between telephonic enrollment and the use of “chat” technology to enroll customers, enrollment by “chat” technology should have the same independent third-party verification requirements as telephonic enrollment. Consumers need this protection and the PUCO should require it.

III. CONCLUSION

Constellation has the burden of showing good cause for its proposed waiver of PUCO rules that protect consumers, but it has not made the required showing. If, however, the PUCO allows Constellation to use “chat” technology to market electric and natural gas service to residential customers, the PUCO should require independent third-party verification of all enrollments. This is a necessary consumer protection.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Comments was served on the persons stated below via electronic transmission, this 1st day of August 2019.

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Summary: Comments Initial Comments Regarding Constellation's Proposed Process for Changing Consumers' Energy Supplier by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Etter, Terry L.