

**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.)

**APPLICATION FOR REHEARING OF THE PUCO’S ENTRY GRANTING A
WAIVER OF CONSUMER PROTECTION RULES
BY
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

The PUCO’s rules are intended to 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 marketers cannot change a consumer’s gas or electric supplier unless the consumer consents. The rules also provide that marketers must obtain proof of consumers’ consent to a change in their utility supplier. Natural gas marketers must obtain independent third-party verification of consumers’ consent to change their natural gas supplier when the transaction is completed by telephone.¹

In this case, the Public Utilities Commission of Ohio (“PUCO”) has allowed a marketer to bypass this consumer protection when customers change their natural gas supplier through the use of “chat” technology.² Changing a consumer’s natural gas supplier through chat technology is akin to a telephonic transaction because the

¹ Ohio Adm. Code 4901:1-29-06(E). There is no similar requirement for changes to consumers’ electric service through a telephonic transaction.

² Entry (September 26, 2019) (“Entry”).

marketer's representatives engage in a real-time chat "conversation" with consumers.³ Thus, chat transactions have a similar risk for consumer abuse as telephonic transactions. Changing a consumer's natural gas supplier by using chat technology should require the same consumer protections as telephonic transactions.

Instead of independent third-party verification of consumers' changes to their natural gas supplier by chat technology, the PUCO will rely on the transcript of the chat to verify the transaction.⁴ The ruling is in effect until the PUCO issues an order in its five-year review of the electric and natural gas marketing rules.⁵ Those rulemakings were initiated more than a year ago, yet no procedural schedule has been established for them. Thus, consumers could "temporarily" lose an important consumer protection regarding the marketing of natural gas service for a substantial time.

The Office of the Ohio Consumers' Counsel ("OCC") files an Application for Rehearing of the PUCO's Entry. The Entry was unjust and unreasonable in the following respects:

1. The Entry is unjust and unreasonable because a transcript of a chat transaction, produced by the marketer's representative, is not an adequate substitute for the consumer protections that independent third-party verification provides against misleading, deceptive, unfair, and unconscionable acts and practices in the marketing, solicitation, and sale of retail natural gas service.
2. The Entry is unjust and unreasonable because it does not provide that consumers would automatically receive the marketer's chat transcript via email immediately after a chat ends.

³ See Application (April 10, 2018) at 3.

⁴ See Entry., ¶10.

⁵ *Id.*, ¶15.

The PUCO should grant OCC's Application for Rehearing and modify the Entry.
The grounds for this Application for Rehearing are set forth in the accompanying
Memorandum in Support.

Respectfully submitted,

Bruce Weston (0016973)
Ohio Consumers' Counsel

/s/ Terry L. Etter

Terry L. Etter (0067445), Counsel of Record
Amy Botschner O'Brien (0074423)
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel

65 East State Street, 7th Floor
Columbus, Ohio 43215-4213
Telephone [Etter]: (614) 466-7964
Telephone [Botschner O'Brien]: (614) 466-9575
terry.etter@occ.ohio.gov
amy.botschner.obrien@occ.ohio.gov
(willing to accept service by e-mail)

**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. 18-604-GE-WVR
LLC for Waivers of Enrollment)
Requirements in Rules 4901:1-21-06(C))
and 4901:1-29-06(B), Ohio Administrative)
Code.)

MEMORANDUM IN SUPPORT

I. INTRODUCTION

Ohio law protects consumers against unlawful changes of their utility service provider. The law requires the PUCO to adopt rules prohibiting switching, or authorizing the switching of, a customer’s supplier of utility service “without the prior consent of the customer in accordance with appropriate confirmation practices, which may include independent, third-party verification procedures.”⁶

The PUCO’s rules require that changes to a consumer’s natural gas supplier resulting from a telephonic solicitation must be verified through a telephone call to an independent third-party verifier.⁷ In this case, Constellation⁸ plans to use chat technology to market natural gas to consumers. Changing a consumer’s natural gas supplier through chat technology is akin to a telephonic transaction because the marketer’s representatives engage in a real-time chat “conversation” with consumers. Thus, chat transactions contain similar risks for misleading or deceptive sales practices as telephonic

⁶ R.C. 4928.10(D)(4); R.C. 4929.22(D)(3).

⁷ Ohio Adm. Code 4901:1-29-06(D)(6)(b).

⁸ Constellation NewEnergy, Inc. and Constellation NewEnergy – Gas Division, LLC.

transactions. Changing a consumer's natural gas supplier by using chat technology should require the same consumer protections as telephonic transactions.

Constellation plans to replace independent third-party verification of changes in consumers' utility supplier by chat technology with a time and date stamped transcript of the chat "conversation."⁹ The marketer's proposal lacks the independence of a third party verification which is an important consumer protection against marketer abuses. Further, the PUCO's ruling lacks (but should have) a requirement that a transcript of the chat is automatically sent to the consumer when the chat ends.

On September 26, 2019, the PUCO granted Constellation's request, with some modifications. The PUCO granted the waiver until completion of the pending rulemakings concerning retail utility services.¹⁰ There has not even been a procedural schedule established in either of the rulemakings for the PUCO to hear this issue, so consumers might be subject to the reduced consumer protections in the waiver for a long time before the PUCO hears the matter.

As discussed below, the Entry is unjust and unreasonable. The PUCO should modify the Entry as OCC recommends in this Application for Rehearing.

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,¹¹ "any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect

⁹ Application at 4.

¹⁰ Entry, ¶15.

¹¹ In this instance, the Entry (at ¶18) orders that Constellation's waiver be granted and thus serves the same purpose as a PUCO order.

to any matters determined in the proceeding.” OCC intervened in this proceeding¹² and participated through filing comments and reply comments.

R.C. 4903.10 requires that an application for rehearing must be “in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful.” In addition, Ohio Adm. Code 4901-1-35(A) states: “An application for rehearing must be accompanied by a memorandum in support, which shall be filed no later than the application for rehearing.”

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: “If, 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 the Entry is met here.

III. DISCUSSION

- A. **The Entry is unjust and unreasonable because a transcript of a chat transaction, produced by the marketer’s representative, is not an adequate substitute for the consumer protections that independent third-party verification provides against misleading, deceptive, unfair, and unconscionable acts and practices in the marketing, solicitation, and sale of retail natural gas service.**

The PUCO acknowledged that its rules for retail utility service are consumer protection rules. The PUCO noted that retail utility service rules are intended, among other things, to “protect customers against deceptive, unfair, and unconscionable acts and

¹² See *id.*, ¶4.

practices in the marketing, solicitation, and sale of [retail utility service] and in the administration of any contracts for such services.”¹³ But Constellation’s proposal does not adequately protect consumers against unscrupulous marketing practices like independent third-party verification does.

In our Initial Comments, OCC expressed concern that the transcript of a chat regarding a residential customer’s utility service could be manipulated to change the customer’s utility service without the customer’s approval.¹⁴ OCC is concerned because the company conducting the chat is a representative of Constellation, and lacks the necessary independence required for reliable consumer protection.¹⁵ Constellation describes the chat company’s protocols in protecting sensitive customer information but does not speak to the protections surrounding the reliability of the transcript itself.¹⁶ The chat company, Constellation, or both might be motivated to manipulate the transcript to make it falsely show that the customer had signed up for Constellation’s service.

A chat transcript that is produced by a representative of a marketer is a poor substitute for a recording by an independent third-party verifier. Independent third-party verification is needed to protect consumers. The PUCO should modify the Entry and require independent third-party verification of changes to residential consumers’ natural gas supplier through chat technology.

¹³ *Id.*, ¶12.

¹⁴ OCC Initial Comments at 6.

¹⁵ *See* Application at 6.

¹⁶ *Id.*

B. The Entry is unjust and unreasonable because it does not provide that consumers would automatically receive the marketer's chat transcript via email immediately after a chat ends.

In its application, Constellation stated that customers would receive an emailed copy of the chat transcript immediately after requesting it.¹⁷ The PUCO Staff, however, recommended that the transcript be provided to the customer, the PUCO, or the PUCO Staff within three business days after it is requested.¹⁸ OCC agreed with the PUCO Staff's recommendation, so long as independent third-party verification would also be required.¹⁹ The PUCO's Entry adopted the PUCO Staff's recommendation, but failed to include independent third-party verification.²⁰

Constellation states that it can provide consumers with an immediate transcript of the chat. It should do so. The PUCO should modify the Entry so that consumers automatically are sent the chat transcript at the end of a chat.

At a minimum, consumers should be immediately emailed a transcript of the chat upon their request. If the PUCO requires consumers to take this step of requesting, then the ways consumers may request the chat transcript should include the display of a button on the chat screen that consumers can click to have the transcript sent.

IV. CONCLUSION

The independent third-party verification required by the PUCO's rules helps protect consumers from marketers' bad acts. By allowing Constellation to avoid these

¹⁷ Application at 5. *See also* Entry, ¶10.

¹⁸ PUCO Staff Comments at 5.

¹⁹ OCC Reply Comments (August 15, 2019) at 5.

²⁰ Entry, ¶13.

consumer protections, the PUCO substantially increased the risk of harm for consumers.

To protect consumers, the PUCO should modify the Entry as recommended by OCC.

Respectfully submitted,

Bruce Weston (0016973)
Ohio Consumers' Counsel

/s/ Terry L. Etter

Terry L. Etter (0067445), Counsel of Record

Amy Botschner O'Brien (0074423)

Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel

65 East State Street, 7th Floor

Columbus, Ohio 43215-4213

Telephone [Etter]: (614) 466-7964

Telephone [Botschner O'Brien]: (614) 466-9575

terry.etter@occ.ohio.gov

amy.botschner.obrien@occ.ohio.gov

(willing to accept service by e-mail)

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Application for Rehearing was served on the persons stated below via electronic transmission, this 28th day of October 2019.

/s/ Terry L. Etter _____
Terry L. Etter
Assistant Consumers' Counsel

The PUCO's e-filing system will electronically serve notice of the filing of this document on the following parties:

SERVICE LIST

Andrew.shaffer@ohioattorneygeneral.gov
cmooney@opae.org

msettineri@vorys.com
glpetrucci@vorys.com

Attorney Examiner:

Stacie.cathcart@puco.ohio.gov
Michael.williams@puco.ohio.gov

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

10/28/2019 3:21:57 PM

in

Case No(s). 18-0604-GE-WVR

Summary: App for Rehearing Application for Rehearing of the PUCO's Entry Granting a Waiver of Consumer Protection Rules by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Etter, Terry L.