

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

**In the Matter of the Application of Direct)
Energy Business, LLC and Direct Energy)
Services, LLC for Waivers of Certain)
Provisions of Chapters 4901:1-21 and)
4901:1-29, O.A.C., to Permit Third Party)
Verification by Digital Confirmation)**

Case No. 18-382-GE-WVR

**MEMORANDUM CONTRA APPLICATION FOR REHEARING
BY
DIRECT ENERGY BUSINESS, LLC AND DIRECT ENERGY SERVICES, LLC**

The September 26, 2019 Entry grants the request of Direct Energy Business Services, LLC and Direct Energy Services, LLC (collectively, Direct) to begin offering new CRES and CRNG customers an additional option for third-party verification. In addition to completing the verification process “live” over the telephone, customers now have the option of completing this process through text, e-mail, and other electronic means. The Office of the Ohio Consumers’ Counsel (OCC) does not believe customers should have these new options. OCC is entitled to its opinion, but it is not entitled to an order granting rehearing.

ARGUMENT

R.C. 4928.10 requires the Commission to adopt and enforce rules establishing minimum service requirements for competitive retail electric services. R.C. 4929.22 requires the adoption of rules for minimum service requirements applicable to competitive retail natural gas service. The rules for which a waiver has been granted were adopted under these chapters.

Neither R.C. 4928.10 nor 4929.22 *require* the Commission to make CRES or CRNG suppliers undertake third-party verification *in any form*, let alone a proscribed form. Nonetheless,

in the exercise of its authority to develop rules, the Commission decided to require third-party verification of telephone and door-to-door enrollments. The rules require third-party verification by telephone for one reason only—this was the only feasible technology available when the minimum service requirements were first developed.

Direct’s application asked for a limited waiver of those provisions of Chapters 4901:1-21 and 4901:1-29 that mandate third-party verification by telephone. Direct did not ask for, nor did the Commission grant, a waiver of third-party verification in its entirety. Nor did Direct ask that customers be *required* to use the new digital platform available to them. The waiver simply gives customers another choice.

In seeking rehearing, OCC offers nothing new. It raises the same arguments the Commission has already considered and rejected. The simple answer to both of OCC’s assignments of error is this: If the Commission may adopt rules requiring third-party verification by telephone, it may also grant waivers to allow third-party verification by alternative means, including text and e-mail.

A. Digital TPV maintains consumer protections.

OCC’s first assignment of error claims the “Entry is unjust, unlawful, and unreasonable because it does not effectively protect consumers against misleading, deceptive, unfair, and unconscionable acts and practices [.]” (OCC at 3.) OCC still hasn’t pointed to a single feature of digital TPV that allegedly makes this platform more susceptible to untoward behavior than telephone verification. It bears repeating telephone verification is not going away for customers who prefer that platform.

OCC tries to draw out two faults with digital TPV: (1) geolocational technology is not foolproof, so salespersons could still linger at a home and “coach” the consumer through the verification process, and (2) the lack of audio recordings means evidence of wrongdoing will not be documented. (*See* OCC at 3.) While geolocation data may not be infallible, it will be a good place to start in following up on complaints (if any) about improper “coaching.” Moreover, the lack of audio recordings is more than made up by three additional verifications not currently in place: “telephone number, owner name and premise verification.” (Direct Reply Comments at 4.) OCC has yet to explain how digital TPV is net-negative for consumers. The Commission, on the other hand, *did* adequately explain why digital TPV offers net-positives.

OCC’s commentary about why third-party verification is required in the first place misses the point. Every new applicable enrollment will continue to be subject to third-party verification. The questions required for digital verification are the same under current verbal TPV protocols. The method of answering questions is the only difference. As stated in the Entry, “Applicants must continue ensuring that all specific items listed in the rules are verified with the customer in clear, plain language regardless of whether the responses are electronic or telephonic.” (Entry at 6.) For consumers who prefer verbal verification over the telephone, that method remains available. For those who prefer to verify their enrollment in the way consumers are increasingly choosing to interact – by text, e-mail, and other electronic means – this option is now available. No consumer protections are being “reduced.”

Beyond idle speculation, OCC offers no supporting evidence that digital TPV will “put consumers at risk of harm.” (OCC at 4.) OCC has merely conjured a list of unlikely hypotheticals and challenged the Commission to prove that these hypotheticals will *not* happen. OCC bears the burden of supporting its assertions; neither Direct nor the Commission are

obligated to accept these assertions at face value and then set out to disprove them. Speculation about what is possible is no substitute for evidence of what is probable.

B. The Commission’s finding of “good cause” for the waiver is correct.

OCC claims that the Commission failed to establish “good cause” for the waiver. Saying this is so does not make it so.

It is quite a stretch to argue that the “good cause” standard for granting a waiver under the Commission’s rules implicates R.C. 4903.09, a statute that applies to “contested cases.” No hearing was held in this case because none was required, so there is no “transcript of all testimony” or “exhibits,” nor any factual disputes to be addressed and resolved through formal “findings of fact.” *Id.*

In any event, even if R.C. 4903.09 applies, the Commission substantially complied with the statute. It considered “Applicants’ request for a waiver; the comments by Applicants, OCC, Columbia Gas, Staff, and RESA; and the reply comments by Applicants and OCC.” (Entry at 6). Substantial information was provided to the Commission outlining the successful implementation of digital TPV in four states (Pennsylvania, Michigan, Maryland, and Delaware), where “nearly 23,000 of approximately 74,000 choice sales in these states occurred using the newly offered digital TPV process (the remaining 51,000 continued to use traditional telephone TPV).” (*Id.* at 3.) All of OCC’s arguments were considered and ultimately rejected. The Commission did everything it needed to do before finding Direct has “shown good cause for the requested waiver.” (*Id.* at 6.)

CONCLUSION

Direct did not present its waiver request as a quick-fix for every perceived shortcoming in “consumer protections” available to CRES and CRNG customers. The waiver simply gives

customers another option for interacting with third-party verifiers. It is hard to fathom why OCC thinks this is a bad thing. OCC's Application for Rehearing should be denied.

Date: November 7, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing document is being served via electronic mail this 7th day of November, 2019, upon the following:

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Summary: Memorandum Memo contra application for rehearing electronically filed by MARK A WHITT on behalf of Direct Energy Services LLC and Direct Energy Business LLC