

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Proper Procedures and Process)	
for the Commission’s Operations and Proceedings)	Case No. 20-591-AU-UNC
During the Declared State of Emergency and)	
Related Matters.)	

In the Matter of the Joint Application for Waiver of)	
the Restrictions on In-Person Marketing.)	Case Nos. 20-1040-GE-UNC
)	

**MEMORANDUM CONTRA APPLICATION FOR REHEARING TO SUSPEND
DOOR-TO-DOOR SALES BY ENERGY MARKETERS**

The June 17, 2020, Order in these cases permits competitive retail gas and electric suppliers to resume door-to-door marketing. The Order is reasonable and lawful. The application for rehearing of that Order should be denied.

Six separate entities (collectively, the “Joint Applicants”) have signed-on to the application for rehearing. Only one of these entities—Office of the Ohio Consumers’ Counsel—was a “party” in the underlying proceedings. The remaining Joint Applicants are strangers to these cases. They have never previously entered an appearance, nor sought leave to seek rehearing as an “affected person, firm, or corporation.”¹ So even if the Commission grants rehearing (and it should not), OCC is the only party with standing to participate.

The Joint Applicants allege two grounds for rehearing. Both are baseless. They first contend that “[t]he coronavirus pandemic has considerably worsened since the time of the PUCO’s ruling to resume door to door sales,” so door-to-door sales must again be halted “until

¹ R.C. 4903.10.

there is a vaccine, a cure or widespread immunity.”² Raw data on case counts does not tell the complete story. Over half of the 84,000 COVID-19 cases recorded in the state as of today are clustered in just 5 of Ohio’s 88 counties.³ The Governor reported last week that masks and social distancing are working in areas where these precautions are observed. There is no reason to believe that door-to-door marketing is causing COVID-19 to spread, or that suspending door-to-door marketing will cause cases to decline. There are no “changed circumstances” that justify singling-out and shutting down a segment of the Ohio economy.

The Joint Applicants also claim that the June 17 Order “lacked evidentiary support.”⁴ But the support for the Order could not be more clear. Both the initial suspension of door-to-door marketing and the decision to lift the suspension were informed by the Governor’s Executive Orders and guidance from the Ohio Department of Health. The Commission determined that public health directives applicable to other businesses in the state should also apply to competitive energy suppliers—under penalty of Commission sanctions for non-compliance. The Commission should not reverse course based simply on the Joint Applicants’ unsolicited, uninformed opinion about what they think public health policy *should* be.

Accordingly, the Retail Energy Supply Association (RESA), Direct Energy, LLC and Direct Energy Business, LLC (Direct), and Vistra Corp. respectfully request issuance of an order denying rehearing.

² App. Rehearing at 3-4.

³ <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/dashboards/overview>

⁴ App. Rehearing at 4.

ARGUMENT

The Commission may grant rehearing “if in its judgment sufficient reason therefor is made to appear.”⁵ The Joint Applicants offer two reasons for granting rehearing, but these arguments do not carry the day. RESA will address the Joint Applicants’ assignments of error in reverse order.

A. The Order is reasonable and supported by evidence.

The Joint Applicants’ second assignment of error claims the Commission “erred in issuing a decision that lacked evidentiary support and did not contain findings of fact or the reasons prompting its decision.”⁶ The Commission’s rationale is apparent from the four corners of the Order, so this is not a valid argument.

Governor DeWine declared a public health emergency on March 9, 2020.⁷ Soon thereafter, “the Commission directed CRES providers and CRNGS suppliers to immediately suspend, for all customer classes, all door-to-door and in-store marketing to customers as well as any other sales or solicitation practice that involves in-person contact in this state for the duration of the emergency, unless otherwise ordered by the Commission.”⁸

Ohioans lived and worked under the “Stay Safe Ohio” order for the remainder of March, all of April, and most of May. “On May 20, 2020, the Director of the Ohio Department of Health issued an Order to responsibly rescind requirements of the Stay Safe Ohio Order and lift the

⁵ R.C. 4903.10.

⁶ App. Rehearing at 4.

⁷ June 17 Order at ¶ 5.

⁸ *Id.* at 8.

mandatory requirements and restrictions that were needed during the initial phase of the COVID-19 pandemic.”⁹ Additionally, “[o]n May 29, 2020, the Director issued a revised Stay Safe Ohio Order that further lifts restrictions previously issued. Since May 29, 2020, the Director has issued additional Orders which open up various parts of the economy, including youth day camps, full dine-in service in restaurants and bars, and banquet facilities, subject to social distancing requirements.”¹⁰

The June 17 Commission Order finally lifted the suspension on door-to-door marketing. “At this point, *based on the Orders issued by the Director of the Ohio Department of Health*, we find that door-to-door solicitation of CRES and CRNGS may resume, subject to all relevant requirements and best practices issued by the Ohio Department of Health and any relevant local health authority.”¹¹

As revealed in the Order, the Commission has consistently followed the guidance of the Governor and Department of Health. The decision to suspend all in-person marketing in the first instance was prompted by the Governor’s March 9 Executive Order.¹² The decision to allow *some* in-person marketing (but not door-to-door) was based on Department of Health Guidance issued on May 20, 2020.¹³ And the decision to permit door-to-door marketing was not made until the Department of Health determined that it was safe for businesses that also interact with

⁹ *Id.* at ¶ 13.

¹⁰ *Id.*

¹¹ *Id.* at ¶ 15 (emphasis added).

¹² *See id.* at ¶¶ 5, 7.

¹³ *Id.* at ¶¶ 9-11.

people—such day camps, restaurants, bars, and similar establishments—to operate under certain precautions.¹⁴

To say the Commission “provided no explanation for how its decision was made”¹⁵ is to ignore the June 17 Order in its entirety. The Commission complied with R.C. 4903.09 by explaining what it was doing and why.

B. There are no “changed circumstances.”

The Joint Applicants argue that subsequent to lifting the suspension on door-to-door marketing, “circumstances for Ohioans in the pandemic have drastically changed for the worse.”¹⁶ Their point seems to be that with cases rising and no cure in sight, *any* activity that presents the slightest possible risk of transmitting COVID-19 should be prohibited. “The PUCO should use rehearing to suspend door to door sales until there is a vaccine, a cure, or widespread immunity for the public,” insist the Joint Applicants.¹⁷

There are several problems with this argument. First, the fact that cases are rising and no cure exists are not “changed circumstances.” These observations were true when door-to-door marketing was initially suspended, they were true when the suspension was lifted, and they remain true today.

Second, the quotes relied on to paint a doom-and-gloom scenario do not reflect current reality. The Governor reported on July 22 that the precautions taken to combat COVID-19 *are working*:

¹⁴ *Id.* at ¶ 13.

¹⁵ Mem. Supp. App. Rehearing at 10.

¹⁶ *Id.* at 1.

¹⁷ *Id.* at 4.

Our preliminary data indicate that the rate of increase in new cases has slowed in the high-risk counties where masks are already mandated, so we are cautiously optimistic that things are heading in the right direction," said Governor DeWine. "We believe that requiring masks statewide will make a significant difference and will be key to making sure other counties do not progress to a higher level of increased spread.¹⁸

Third, the Joint Applicants proposal to indefinitely—if not permanently—suspend door-to-door marketing is antithetical to State policy. Attitudes about the threat posed by the virus and how to respond to it run the gamut, from shutting down the economy and locking everyone in their homes, to carrying-on in a business-as-usual fashion. Ohio has charted a middle path, where the economy will be allowed to function so long as businesses observe common-sense precautions. This trade-off is reflected in official state policy:

Responsible RestartOhio is about protecting the *health* of employees, customers, and their families; supporting community efforts to *control the spread of the virus*; and, leading in *responsibly getting Ohio back to work*.¹⁹

Ohio's response to the pandemic has changed as circumstances have changed. Industry-specific precautions have been issued for businesses throughout the State, and the Commission has ordered retail suppliers to observe these precautions. The Commission lacks the resources and expertise to develop parallel public health policies for entities under its jurisdiction. While the Joint Applicants have the luxury of advocating policies that require businesses *other than their own* to completely shut down (under the standby mantra of "safety"), the State of Ohio and the

¹⁸ <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/resources/news-releases-news-you-can-use/gov-dewine-issues-statewide-mask-order-travel-warning>.

¹⁹ <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/responsible-restart-ohio/welcome/> (emphasis added).

Commission have recognized that public health is not the *only* interest that matters. The June 17 Order appropriately balances economic *and* public health interests.

The Joint Applicants point to the recently-announced investigation of a CRES/CRNG supplier as grounds to punish the entire industry. However, the isolated incident at issue in that investigation demonstrates the Commission and Staff are able to promptly investigate any alleged instances of non-compliance with the June 17 Order. The Commission has never before sanctioned an entire industry for the actions of one company, and it should not start now.

Finally, the Joint Applicants present no evidence linking a rise in COVID-19 cases to door-to-door marketing. Nor can they. This sales channel was suspended for half of March, all of April and May, and the better part of June. Yet cases rose during this period. There is no reason to believe that door-to-door marketing has had or will have any meaningful impact on the spread of COVID-19.

What the Joint Applicants characterize as “changed circumstances” are, in fact, circumstances that were not only foreseeable, but foreseen. That is why the Commission ordered CRES and CRNG suppliers to follow enhanced precautions—because COVID-19 is spreading throughout Ohio. If the virus were on the verge of being eradicated, these measures would not be necessary.

C. Most of the Joint Applicants lack standing to ask for rehearing.

On a final note, it is worth mentioning that OCC is the only Joint Applicant that intervened or otherwise made an appearance in Case No. 20-591-AU-UNC or 20-1040-GE-UNC. None of the other Joint Applicants were a “party” in these proceedings, so they have no right to seek or to participate in rehearing.

After the Commission enters an order, “any *party* who has entered an appearance in person or by counsel in the proceeding may apply for a rehearing in respect to any matters determined in the proceeding.”²⁰ Commission rules define a “party” as “[a]ny person who files an application, petition, long-term forecast report, or complaint,” “[a]ny person granted leave to intervene,” and “any other person expressly made a party by order of the commission.”²¹ “The making of a new party to a proceeding must be evidence by the record.” *City of Cleveland v. Pub. Utilities Comm’n*, 127 Ohio St. 432, 443–44, 189 N.E. 5, 9 (1934) (City of Cleveland “had no legal status on its application for rehearing in a matter to which it was not a necessary party to the final determination of the issues.”).

Other than OCC, none of the other Joint Applicants availed themselves of the opportunity to participate in these cases *before* the Commission issued its order. Their ability to participate now has been forfeited.

CONCLUSION

The June 17, 2020 Order lifting the suspension on door-to-door marketing is expressly based on, and entirely consistent with, the State of Ohio’s policies for combatting COVID-19. The application for rehearing should be denied.

²⁰ R.C. 4903.10 (emphasis added).

²¹ O.A.C. 4901-1-10(A)(1), (4) and (8).

Dated: July 27, 2020

Respectfully submitted,

/s/ Mark A. Whitt

Mark A. Whitt (0067996)

Lucas A. Fykes (0098471)

WHITT STURTEVANT LLP

The KeyBank Building, Suite 1590

88 East Broad Street

Columbus, Ohio 43215

Telephone: (614) 224-3911

Facsimile: (614) 224-3960

whitt@whitt-sturtevant.com

fykes@whitt-sturtevant.com

Attorneys for Retail Energy Supply

Association, Direct Energy, LLC and Direct

Energy Business, LLC

/s/ David F. Proaño

David F. Proaño (0078838)

BAKER & HOSTETLER LLP

127 Public Square, Suite 2000

Cleveland, Ohio 44114

Telephone: 216-861-7834

Facsimile: 216-696-0740

dproano@bakerlaw.com

Attorney for Vistra Energy Corp.

CERTIFICATE OF SERVICE

I certify that on July 27, 2020, a true and correct copy of the foregoing was served by email to the following:

robert.eubanks@ohioattorneygeneral.gov
steven.darnell@ohioattorneygeneral.gov
talAlexander@calfee.com
slessner@calfee.com
mbowen@calfee.com
joe.oliker@igs.com
bethany.allen@igs.com
michael.nugent@igs.com
mmakel@aepenergy.com
schmidt@sppgrp.com
dproano@bakerlaw.com

Attorney Examiner:

Anna.sanyal@puco.ohio.gov

Maureen.willis@occ.ohio.gov
ambrosia.wilson@occ.ohio.gov
amy.botschner.obrien@occ.ohio.gov
mwalters@proseniors.org
plee@seols.org
joemaskovyak@cohhio.org
sjagers@ohiopoveritylaw.org
dstinson@bricker.com
gkrassen@bricker.com

/s/ Mark A. Whitt

One of the Attorneys for Retail Energy
Supply Association

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Summary: Memorandum Memorandum contra Application for Rehearing to Suspend Door-to-Door Sales by Energy Marketers electronically filed by Ms. Valerie A Cahill on behalf of Retail Energy Supply Association and Direct Energy, LLC and Direct Energy Business, LLC