

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE COMMISSION'S
INVESTIGATION INTO SFE ENERGY
OHIO, INC. AND STATEWISE ENERGY
OHIO, LLC'S COMPLIANCE WITH THE
OHIO REVISED CODE AND OHIO
ADMINISTRATIVE CODE AND POTENTIAL
REMEDIAL ACTION.

CASE NO. 20-1216-GE-COI

OPINION AND ORDER

Entered in the Journal on February 24, 2021

I. SUMMARY

{¶ 1} The Commission adopts the joint stipulation and recommendation entered into by Staff, SFE Energy Ohio, Inc., Statewise Energy Ohio, LLC, and Ohio Consumers' Counsel.

II. PROCEDURAL BACKGROUND

{¶ 2} SFE Energy Ohio, Inc. (SFE Energy) and Statewise Energy Ohio, LLC (Statewise) are retail natural gas suppliers as defined in R.C. 4929.01; are certified to supply competitive retail natural gas service (CRNGS) under R.C. 4929.20; and are subject to the jurisdiction of this Commission pursuant to R.C. 4929.24. Accordingly, SFE Energy and Statewise are required to comply with the Commission's minimum CRNGS standards set forth in Ohio Adm.Code Chapter 4901:1-29 and are otherwise subject to the provisions of Ohio Adm.Code Chapter 4901:1-27.

{¶ 3} SFE Energy and Statewise (the Companies) are also electric services companies as defined in R.C. 4928.01; are certified to provide competitive retail electric service (CRES) under R.C. 4928.08; and are subject to the jurisdiction of this Commission pursuant to R.C. 4928.16. Accordingly, the Companies are required to comply with the Commission's minimum CRES standards set forth in Ohio Adm.Code Chapter 4901:1-21 and are otherwise subject to the provisions of Ohio Adm.Code Chapter 4901:1-24.

{¶ 4} R.C. 4928.08, R.C. 4929.20, Ohio Adm.Code 4901:1-24-13, and Ohio Adm.Code 4901:1-27-13 allow the Commission to suspend, rescind, or conditionally rescind the certification of any electric services company or retail natural gas supplier issued under R.C. 4928.08 or 4929.20 if the Commission determines, after reasonable notice and opportunity for hearing, that the electric services company or retail natural gas supplier has failed to comply with any applicable certification standards or has engaged in anticompetitive or unfair, deceptive, or unconscionable acts or practices in this state. Additionally, R.C. 4928.16 and 4929.24 grant the Commission the authority to order any remedy or forfeiture provided under R.C. 4905.54 to 4905.60 and 4905.64, and to order restitution to customers and rescission of customer contracts.

{¶ 5} On March 9, 2020, the governor signed Executive Order 2020-01D (Executive Order), declaring a state of emergency in Ohio to protect the well-being of Ohioans from the dangerous effects of COVID-19. As described in the Executive Order, state agencies are required to implement procedures consistent with recommendations from the Department of Health to prevent or alleviate the public health threat associated with COVID-19. Additionally, all citizens are urged to heed the advice of the Department of Health regarding this public health emergency in order to protect their health and safety. The Executive Order was effective immediately and will remain in effect until the COVID-19 emergency no longer exists. The Department of Health is making COVID-19 information, including information on preventative measures, available via the internet at coronavirus.ohio.gov/.

{¶ 6} On June 30, 2020, Staff from the Commission's Service Monitoring and Enforcement Department (Staff) filed a letter (Staff Letter) in this docket alleging that the Companies have engaged in misleading and deceptive practices to market and enroll customers, including making false, misleading, and unconscionable statements to potential customers while engaging in unconscionable and egregious door-to-door sales tactics. As a result, Staff requested that the Commission formally open a proceeding under which Staff could continue to investigate and analyze the allegations against the Companies. Staff also recommended that, during the pendency of its investigation, the Commission consider

suspending, conditionally rescinding, or rescinding the Companies' CRES and CRNGS certifications.

{¶ 7} On July 1, 2020, the Commission issued an Entry opening an investigation to address the alleged unfair, deceptive, or unconscionable acts or practices of the Companies. Upon finding that the Companies should have the opportunity to respond to the allegations and to show cause why their certifications should not be suspended during the investigation, the Commission instructed the Companies to either file notice accepting voluntary suspensions of their CRES and CRNGS certifications, request a hearing to show cause, or provide a written response in lieu of that hearing. In the event that the Companies chose to request a show cause hearing, the Commission established a hearing date of July 15, 2020. On July 6, 2020, the Companies filed a request for hearing.

{¶ 8} On July 10, 2020, the attorney examiner issued an Entry setting forth a procedural schedule, which scheduled this matter for a prehearing conference on July 13, 2020, and a show cause hearing on July 20, 2020. The prehearing conference occurred as scheduled on July 13, 2020.

{¶ 9} On July 15, 2020, upon consideration of a joint motion for an extension of case deadlines filed by Staff and the Companies on July 14, 2020, the Commission directed the Companies to: (1) cease all marketing and enrollments of residential gas and electric customers; (2) cease all door-to-door marketing to small commercial and mercantile gas and electric customers; and (3) comply with all other representations made in the joint motion until further ordered by the Commission. Further, the Commission vacated the July 20, 2020 show cause hearing and instructed the attorney examiners to establish a new procedural schedule.

{¶ 10} On September 28, 2020, the attorney examiner (1) granted the motion to intervene filed by Ohio Consumers' Counsel on July 9, 2020, (2) granted motions of three attorneys for permission to appear pro hac vice, and (3) established a procedural schedule in the case.

{¶ 11} On October 13, 2020, Staff filed a report of investigation (Staff Report). On October 14, 2020, Staff filed attachments to the report of investigation (Staff Report Attachments). On October 21, 2020, Staff filed a letter of correction regarding the CRNGS status of Statewise (Correction Letter).

{¶ 12} On October 21, 2020, the parties participated in a prehearing conference to discuss discovery issues and plans for conducting the evidentiary hearing in the case using virtual hearing technology.

{¶ 13} On October 23, 2020, the attorney examiner issued a revised procedural schedule in the case.

{¶ 14} On November 20, 2020, and December 4, 2020, the parties filed joint motions for extension of time in regard to procedural deadlines in the case, citing to substantial progress that they were making toward negotiating a stipulated agreement that would potentially resolve all of the issues raised in the case. On November 23, 2020, and December 7, 2020, the attorney examiner granted the joint motions for extension of the deadlines in the case.

{¶ 15} On December 21, 2020, the parties (Stipulating Parties) filed a joint stipulation and recommendation (Stipulation).

{¶ 16} On January 5, 2021, Alla Magaziner-Tempesta filed testimony in support of the Stipulation on behalf of Staff, and James D. Williams filed testimony in support of the Stipulation on behalf of OCC.

{¶ 17} On January 19, 2021, the parties filed a joint motion for approval of the Stipulation and for Commission decision without a hearing, as well as a memorandum in support of the joint motion. In the memorandum in support, the parties jointly stipulate, for purposes of adjudicating this matter, that (1) the settlement would resolve all issues in the case, and (2) the Stipulation, Staff Letter, prefiled testimony of Alla Magaziner-

Tempesta, prefiled testimony of James D. Williams, Staff Report, Staff Report Attachments, and Correction Letter would be admitted into the evidentiary record.

III. DISCUSSION

A. *Summary of the Stipulation*

{¶ 18} The terms of the Stipulation filed on December 21, 2020, are intended to resolve all outstanding issues in this proceeding. A summary of the major provisions, which is not intended to supersede or replace the Stipulation, is as follows:

- (1) The Companies agree to a continuing suspension of all residential marketing activities and new customer enrollment in Ohio, and of all door-to-door marketing to small commercial and mercantile gas and electric customers in Ohio until March 15, 2021. During the period of the suspension, the Companies may continue to serve their existing customers provided that they submit an acceptable compliance plan to Staff.
- (2) The Companies will submit a compliance plan for resuming customer enrollment activities to Staff by January 15, 2021. The compliance plan must address enrollment practices, auditing processes for enrollments, and other corrective actions that the Companies will take to address the issues noted in the Staff Report. Further, the compliance plan must include:
 - (a) A list of vendors retained by the Companies since January 1, 2020, to perform Ohio outbound telemarketing and door-to-door marketing in Ohio.
 - (b) A plan for compliance with COVID-19 safety protocols, as addressed by (1) the Commission, and (2) state and local health guidelines and directives. The

plan will include 100 percent touchless enrollment and photographic documentation of required face coverings by independent sales representatives at the point of sale for as long as the Ohio Department of Health's social distancing and masking requirements remain in place.

- (c) A plan for the training, oversight, and supervision of all Ohio vendors and their independent sales representatives.
- (3) Should the Commission approve the Stipulation, the Companies agree to re-rate all retail electric and natural gas residential customers enrolled by the Companies through vendors iMarket Global, Inc. (iMarket) or 616 Marketing Consultants (616 Marketing) for the period from January 1, 2020, through June 30, 2020. The re-rate will (1) treat the impacted customers as though they remained as standard service offer or default rate customers, and (2) is expected to result in restitution payments to these customers in the combined amount of approximately \$105,000.
 - (4) Should the Commission approve the Stipulation, the Companies will perform an audit of the vendors Synegence LLC (Synegence) and Southeast Energy Consultants LLC (Southeast Energy) for the period from November 1, 2019, through June 26, 2020. For those customers, if any, who are found to have been enrolled by these vendors through misleading or deceptive sales practices, the Companies shall (1) re-rate the customers, and (2)

notify the customers of their right to terminate their contracts with the Companies at no cost or penalty.

- (5) Should the Commission approve the Stipulation, the Companies will provide notice to (1) all customers enrolled from November 1, 2019, to June 26, 2020, and (2) all customers enrolled in a hybrid and/or daily rate plan regardless of their enrollment date, that Staff has alleged that the Companies engaged in misleading enrollment practices that impacted the customer during their enrollment period and that customers may cancel their contracts without penalty.
- (6) Should the Commission approve the Stipulation, the Companies will timely re-rate and provide notice of the right to terminate service contracts, at no cost or penalty, to (1) all customers who complained to the Commission's call center during the period from January 1, 2020, through December 21, 2020, and (2) all customers who complain to the Commission's call center during the period from December 21, 2020, through 45 days after the date of the notice sent pursuant to the preceding paragraph. The Companies shall provide the Stipulating Parties with the amount of the re-rate total and the names of impacted customers.
- (7) The Companies will discontinue offering, and not renew existing customers, under the hybrid plan and/or daily rate plan effective December 21, 2020, until such time when the Commission might authorize the use of these plans.
- (8) When eligible to resume marketing activities, the Companies agree to retain, and deliver to Staff upon request, recordings of

all sales calls in Ohio that result in enrollment of residential customers for gas and/or electric service.

- (9) The Companies agree to pay a total forfeiture of \$174,000.
- (10) The Companies agree to re-rate, at a total cost not to exceed \$26,000, any customer enrolled in November or December 2019 who complains to the Commission's call center within four months of the approval of this Stipulation by the Commission. Should less than \$26,000 in re-rates be claimed by customers, the remaining amount shall be paid to the Commission as an additional forfeiture.

(Stipulation at 5-11.)

B. Consideration of the Stipulation

{¶ 19} Ohio Adm.Code 4901-1-30 authorizes two or more parties to Commission proceedings to enter into a written stipulation concerning the issues presented in the proceeding. Although not binding upon the Commission, the terms of such an agreement are accorded substantial weight. *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 125, 592 N.E.2d 1370 (1992), citing *Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155, 157, 378 N.E.2d 480 (1978). This concept is particularly valid where the stipulation is unopposed by any party and resolves all issues presented in the proceeding in which it is offered.

{¶ 20} The standard of review for considering the reasonableness of a stipulation has been discussed in a number of prior Commission proceedings. *See, e.g., In re Cincinnati Gas & Elec. Co.*, Case No. 91-410-EL-AIR, Order on Remand (Apr. 14, 1994); *In re Western Reserve Telephone Co.*, Case No. 93-230-TP-ALT, Opinion and Order (Mar. 30, 1994); *In re Ohio Edison Co.*, Case No. 91-698-EL-FOR, et al., Opinion and Order (Dec. 30, 1993); *In re Cleveland Elec. Illum. Co.*, Case No. 88-170-EL-AIR, Opinion and Order (Jan. 31, 1989); *In re Restatement of Accounts and Records*, Case No. 84-1187-EL-UNC, Opinion and Order (Nov. 26, 1985). The

ultimate issue for our consideration is whether the agreement, which embodies considerable time and effort by the signatory parties, is reasonable and should be adopted. In considering the reasonableness of a stipulation, the Commission has used the following criteria:

- (1) Is the settlement a product of serious bargaining among capable, knowledgeable parties?
- (2) Does the settlement, as a package, benefit ratepayers and the public interest?
- (3) Does the settlement package violate any important regulatory principle or practice?

{¶ 21} The Supreme Court of Ohio has endorsed the Commission's analysis using these criteria to resolve cases in a manner economical to ratepayers and public utilities. *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 559, 629 N.E.2d 423 (1994). The Supreme Court of Ohio stated in that case that the Commission may place substantial weight on the terms of a stipulation, even though the stipulation does not bind the Commission.

{¶ 22} The Stipulating Parties urge the Commission to approve the Stipulation in its entirety. The Commission addresses whether to approve the Stipulation in the context of the three criteria for evaluating the reasonableness of the Stipulation below.

1. IS THE STIPULATION THE PRODUCT OF SERIOUS BARGAINING AMONG CAPABLE, KNOWLEDGEABLE PARTIES?

{¶ 23} The Stipulating Parties represent that the Stipulation is a compromise of issues raised by parties with diverse interests, all of whom were represented by counsel and technical experts experienced in regulatory matters before the Commission (Magaziner-Tempesta at 3; Williams at 5).

{¶ 24} We find that the first part of the three-part test is satisfied here. Staff witness Alla Magaziner-Tempesta testified that the Stipulation is part of an open process during which all parties were given an opportunity to participate and represents a comprehensive, reasonable compromise of the issues raised by parties with diverse interests (Magaziner-Tempesta at 3). Additionally, OCC witness James D. Williams emphasized that, as a result of serious bargaining, residential customers are being provided numerous additional protections that would not otherwise have been provided (Williams at 5). Further, we note that the procedural record in the case demonstrates the active participation of counsel with varying client interests throughout the case, including during the fact-finding and negotiation phases of the case. For all these reasons, we conclude that all parties were adequately represented by knowledgeable counsel, who have extensive experience practicing before the Commission in utility matters, during the settlement process.

2. DOES THE STIPULATION, AS A PACKAGE, BENEFIT RATEPAYERS AND THE PUBLIC INTEREST?

{¶ 25} The Stipulating Parties represent that the Stipulation benefits customers and the public interest because it represents a just and reasonable resolution of all issues in this proceeding. Staff highlights the reasons for this determination as follows:

- (a) The Companies suspended marketing and customer enrollment for longer than eight months, which protected customers and allowed time for operational reviews.
- (b) The Companies will submit, and did submit, a compliance plan and adhere to enrollment, process audit, and other corrective actions to address the findings in the Staff Report.
- (c) The Companies will ensure appropriate restitution by re-rating customers that were enrolled through iMarket or 616 Marketing between January 1, 2020, and June 30, 2020, at a cost of approximately \$105,000.
- (d) The Companies will audit Synergence and Southeast Energy for the time period from November 1, 2019, through June 26, 2020, and for customers, if any, who are found to have been enrolled by

misleading and deceptive sales practices, provide for (1) re-rating, and (2) the right to terminate contracts without cost or penalty.

- (e) The Companies will send notice to (1) customers enrolled from November 1, 2019, to June 26, 2020, and (2) all customers enrolled on a hybrid and/or daily rate plan informing them of Staff's compliance allegations and their right to cancel contracts without penalty. The increased awareness of the allegations in this case, and the opportunity for customers to freely act on that awareness are both strongly supportive of consumer protection.
- (f) The Companies will re-rate and provide for contract termination, without cost, for customers who timely complained to the Commission's call center, or who make such complaints within 45 days of receiving mailed notice from the Companies as to the resolution of this case.
- (g) The Companies will terminate offering the hybrid and/or daily rate plan until authorized by the Commission.
- (h) The Companies agree to retain recordings of future sales calls to confirm compliance with state regulations.
- (i) The Companies will pay a forfeiture of \$174,000.
- (j) The Companies will pay an additional forfeiture of \$26,000, which is subject to reduction based on re-rate amounts to customers who (1) were enrolled in November and December 2019, and (2) make a claim within four months of the Stipulation approval.

(Magaziner-Tempesta at 3-9.)

{¶ 26} Additionally, OCC emphasizes that the Stipulation satisfies consumer protection analysis because (1) the Companies receive substantial penalties, (2) impacted consumers are restored to a status as though the alleged Company violations did not occur, and (3) the Companies will adhere to a compliance plan to protect against future violations (Williams at 6).

{¶ 27} We find that the second part of the three-part test is satisfied here. In making this determination, we highlight (1) the financial penalty that the Companies are receiving for the marketing violations at issue, (2) the voluntary stay of more than eight months of

marketing activities, and the fact that the Companies' return to marketing operations is conditioned upon adherence to Staff review and monitoring, (3) the re-rating requirements that compensate customers who were impacted by the alleged marketing violations, (4) the substantial protections associated with the customer notices that the Companies are required to issue, and (5) the requirement that the Companies audit vendors that marketed on their behalf and restore customer rights for those who were impacted by misleading and deceptive sales practices.

{¶ 28} In accepting the Stipulation recommendation, we emphasize the paramount importance placed on protecting consumers, physically and financially. We note that the Staff Report contained serious allegations regarding the Companies' unsafe and unconscionable conduct in the competitive retail electric and gas marketplace, which warrant serious consequences. This proceeding should serve as a reminder that the Commission, through its Staff, will monitor the competitive marketplace to identify unsafe and unconscionable acts, such as those demonstrated by the Companies, and we will promptly address such behavior, as we have done here.

3. DOES THE STIPULATION VIOLATE ANY IMPORTANT REGULATORY PRINCIPLE OR PRACTICE?

{¶ 29} The Stipulating Parties represent that the Stipulation does not violate important regulatory principles and practices, noting that implementation of its terms will result in upholding the Commission's regulatory principles and practices (Magaziner-Tempesta at 10).

{¶ 30} We find that the third part of the three-part test is satisfied here. In making this determination, we emphasize that the Stipulation (1) changes the Companies' treatment of its current customers, (2) ensures that those customers will receive restitution, (3) protects consumers against future alleged violations, and (4) deters other suppliers from engaging in the practices discussed in the Staff Report. We also note that adopting the Stipulation

will allow customers, both former and current, to trade uncertainty during litigation and have tangible benefits in the form of refunds.

C. *Acceptance of Proposed Record and Adjudication Without the Necessity of a Hearing*

{¶ 31} The Stipulating Parties move for the adjudication of this matter without a hearing, noting that proceeding without a hearing is the most expedient and efficient manner to bring this matter to a close. In order for the Commission to determine the matter, the Stipulating Parties propose an evidentiary record consisting of (1) the Stipulation, (2) Staff Letter, (3) Direct Testimony of James D. Williams filed on January 5, 2021, (4) Prefiled Testimony of Alla Magaziner-Tempesta filed on January 5, 2021, (5) Staff Report, (6) Staff Report Attachments, and (7) Correction Letter.

{¶ 32} We concur that this matter is appropriate for adjudication without the necessity of a hearing. There are no disputed matters between the parties and, as indicated above, our decision in this case protects consumers while sending a clear message that those who commit marketing violations will be severely sanctioned. Further, we accept the proposed evidentiary record, finding that it presents reliable evidence necessary to decide this case.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶ 33} On June 30, 2020, Staff filed a letter in this docket requesting that the Commission formally open a proceeding under which Staff could investigate and analyze marketing allegations against the Companies.

{¶ 34} On July 1, 2020, the Commission issued an Entry (1) opening an investigation to address the alleged unfair, deceptive, or unconscionable acts or practices of the Companies, and (2) providing the Companies the opportunity to respond to the allegations and to show cause why their certifications should not be suspended during the Staff investigation.

{¶ 35} On July 6, 2020, the Companies filed a request for hearing in accordance with the Entry issued on July 1, 2020.

{¶ 36} On July 10, 2020, the attorney examiner issued an Entry setting forth a procedural schedule.

{¶ 37} On July 14, 2020, the Companies and Staff submitted a joint motion for an extension of the deadlines in this case.

{¶ 38} On July 15, 2020, the Commission directed the Companies to: (1) cease all marketing and enrollments of residential gas and electric customers; (2) cease all door-to-door marketing to small commercial and mercantile gas and electric customers; and (3) comply with all other representations made in the joint motion until further ordered by the Commission. Further, the Commission instructed the attorney examiners to establish a new procedural schedule in the case.

{¶ 39} On October 13, 2020, the Staff Report was filed. On October 14, 2020, and October 21, 2020, Staff filed the Staff Report Attachments and Correction Letter, respectively.

{¶ 40} On December 21, 2020, the Stipulating Parties filed the Stipulation.

{¶ 41} On January 5, 2021, Alla Magaziner-Tempesta filed testimony in support of the Stipulation on behalf of Staff, and James D. Williams filed testimony in support of the Stipulation on behalf of OCC.

{¶ 42} On January 19, 2021, the parties filed a joint motion for approval of the Stipulation and for Commission decision without a hearing. The parties jointly stipulated, for purposes of adjudicating this matter, that (1) the settlement would resolve all issues in the case, and (2) the Stipulation, Staff Letter, prefiled testimony of Alla Magaziner-Tempesta, prefiled testimony of James D. Williams, Staff Report, Staff Report Attachments, and Correction Letter would be admitted into the evidentiary record.

{¶ 43} The Stipulation is reasonable and should be adopted, as it (1) is a product of serious bargaining among capable, knowledgeable parties, (2) as a package, benefits ratepayers and the public interest, and (3) does not violate any important regulatory principle or practice.

V. ORDER

{¶ 44} It is, therefore,

{¶ 45} ORDERED, That the Stipulation filed by the parties be approved, as further described in this Opinion and Order. It is, further,

{¶ 46} ORDERED, That the joint motion filed on January 19, 2021, be granted. It is, further,

{¶ 47} ORDERED, That a copy of this Opinion and Order be served upon all parties of record.

COMMISSIONERS:

Approving:

M. Beth Trombold
Lawrence K. Friedeman
Daniel R. Conway
Dennis P. Deters

MLW/hac

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Case No(s). 20-1216-GE-COI

Summary: Opinion & Order adopting the joint stipulation and recommendation entered into by Staff, SFE Energy Ohio, Inc., Statewise Energy Ohio, LLC, and Ohio Consumers' Counsel electronically filed by Heather A Chilcote on behalf of Public Utilities Commission of Ohio