BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

In The Matter of the Commission's Review of Ohio Adm.Code Chapters 4901:1-21, 4901:1-23, 4901:1-24, 4901:1-27, 4901:1-28, 4901:1-29, 4901:1-30, 4901:1-31, 4901:1-32, 4901:1-33, AND 4901:1-34 Regarding Rules Governing Competitive Retail Electric Service and Competitive Retail Natural Gas Service.	)	Case Nos. 17-1843-EL-ORD 17-1844-EL-ORD 17-1862-EL-ORD 17-1845-GA-ORD 17-1846-GA-ORD 17-1847-GA-ORD 17-1848-GA-ORD 17-1849-GA-ORD 17-1850-GA-ORD 17-1851-GA-ORD 17-1852-GA-ORD

REPLY COMMENTS OF AEP ENERGY, INC.
IN RESPONSE TO THE
COMMENTS BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

AEP Energy, Inc. ("AEP Energy") submits these Reply Comments to respond to § II.A.7. of the initial Comments by the Office of the Ohio Consumers' Counsel ("OCC"), filed on October 8, 2021.

Under the Public Utilities Commission of Ohio's longstanding minimum service standards for competitive retail electric service ("CRES") providers (Ohio Adm.Code Chapter 4901:1-21) and for competitive retail natural gas service ("CRNGS") providers (Ohio Adm.Code Chapter 4901:1-29), a CRES or CRNGS provider is permitted to use an Ohio utility's name or logo. The CRES minimum service standards simply require a CRES provider that does so to "conspicuously disclose [the] affiliate relationship." Ohio Adm.Code 4901:1-21-05(C)(8)(g). Similarly, the CRNGS minimum service standards require a CRNGS provider that uses an Ohio utility's name or logo to "fully disclose, in an appropriate and conspicuous type-size, an affiliate relationship or branding agreement on advertising or marketing offers that use [the] Ohio utility's name and logo." Ohio Adm.Code 4901:1-29-05(D)(8)(f). Ohio's corporate separation

rules also require electric utilities to include information in their corporate separation plans regarding any affiliate's use of the utility's "name and logo." Ohio Adm.Code 4901:1-37-05(B)(6).

OCC, in § II.A.7. of its initial Comments, proposes modifying Ohio Adm.Code 4901:1-29-05(D)(8)(f) and adding a new regulatory restriction to Ohio Adm.Code 4901:1-21-05(C)(8)(h) to prohibit any CRES or CRNGS provider that is "affiliated with a distribution utility" from "solicit[ing], market[ing], or advertis[ing] to consumers using the same or similar name or logo of the distribution utility." (OCC Comments at 12-13.) OCC argues that "do[ing] business under the name of [a] regulated distribution utility" is "an unfair and misleading marketing practice" (*id.* at 10) because it "could easily cause customer confusion and create an unfair competitive advantage for the marketer" (*id.* at 11). Yet the Commission has rejected these very same arguments, from OCC and other companies, for over twenty years, and OCC offers no new evidence or arguments to support a reversal of the Commission's longstanding and current policies.

I. The Commission has long declined to prohibit CRES providers from using a name or logo that is the same as, or similar to, a utility's name or logo.

On the electric side, the Commission first considered restrictions on an affiliate's use of a utility's name or logo after the passage of S.B. 3 (1999). In a 1999 rulemaking order, the Commission originally required the code of conduct in electric utilities' corporate separation plans to include language that would prevent any electric utility affiliate from using "the electric utility name or logo * * * in any material circulated by the affiliate" in Ohio without a "plain[,] legible" disclosure that the affiliate was "not the same company as the electric utility" and "not regulated by the [Commission]." *In the Matter of the Commission's Promulgation of Rules for Electric Transition Plans and of a Consumer Education Plan, Pursuant to Chapter 4928,*

Revised Code, Case No. 99-1141-EL-ORD, Finding and Order (Nov. 30, 1999), Attachment I at 45-46. Approximately two months later, however, the Commission modified the rule *sua sponte* to require only that electric utilities "provide information in their transition filings" relating to any affiliate's "use of the name and logo of the electric utility" to "ensure retail electric service consumers protection against unreasonable sales practices, market deficiencies, and market power." *In the Matter of the Commission's Promulgation of Rules for Electric Transition Plans and of a Consumer Education Plan, Pursuant to Chapter 4928, Revised Code*, Case No. 99-1141-EL-ORD, Entry at ¶ 2 and Attachment at 4-5 (Jan. 20, 2000).

Four years later, OCC argued that the Commission should amend its corporate separation rules for electric utilities to prohibit "EDUs and their CRES affiliates [from using] the same or similar names/logos" to aid the "continued development of the retail competitive market in Ohio[.]" *In the Matter of the Commission's Review of Chapter 4901:1-20, Ohio Administrative Code*, Case No. 04-48-EL-ORD, Finding and Order at 8 (July 28, 2004). The Commission declined to do so, noting that it had "fully considered this topic" in the prior rulemaking and "[did] not believe a reversal [was] warranted." *Id.* at 9. The Commission explained that it would "not presume that all * * * similar names/logos are automatically unreasonable" and agreed with comments from AEP operating companies that "requir[ing] changes to existing advertising and changes to existing names and logos" would unnecessarily "create new customer confusion when so much time has passed under [the] rule and when [the Commission was] not convinced that * * * the names/logos [were] continuing to create confusion." *Id.*

Then, in a 2012 rulemaking, Eagle Energy, LLC ("Eagle") again recommended that the Commission amend its CRES marketing rules to "either prohibit affiliates from adopting a similar name to the EDU or, at a minimum, adopt the disclosure requirements" for CRNGS

providers. *In the Matter of the Commission's Review of its Rules for Competitive Retail Electric Service Contained in Chapters 4901:1-21 and 4901:1-24 of the Ohio Administrative Code*, Case No. 12-1924-EL-ORD, Finding and Order at 17 (Dec. 18, 2013). The Commission rejected Eagle's proposal, stating that "the Commission does not believe that an unaffiliated [*sic*] CRES supplier should necessarily be prohibited from using the incumbent utility's name and/or logo, absent other circumstances indicating that the use of the name and/or logo is unfair, misleading, or deceptive." (Citation omitted.) *Id.* at 18.

In sum, interested parties have proposed at least twice that the Commission modify its rules to prohibit CRES providers from using a name or logo that is the same as, or similar to, an electric distribution company's name or logo. The Commission has declined each time, holding that a CRES provider's use of an incumbent utility's name or logo is not, by itself, unreasonable, deceptive, unfair, or misleading.

II. The Commission also has long declined to prohibit CRNGS providers from using a name or logo that is the same as, or similar to, a utility's name or logo.

On the natural gas side, this issue first arose in 1998, in the context of the Commission's investigation of the natural gas distribution companies' customer choice programs. In that case, some of the interested parties argued for a complete prohibition on "the use of the name and logo (or similar names and logos) of the regulated company by the affiliated marketing company in promotional and advertising spots * * *." *In the Matter of the Commission's Investigation of the Customer Choice Program of Columbia Gas of Ohio, Inc.*, Case Nos. 98-593-GA-COI *et al.*, Finding and Order at 20 (June 18, 1998). The Commission rejected that suggestion, instead agreeing with Staff's proposal that "any affiliate use of the LDC name and logo should be accompanied by a full disclosure of the affiliate relationship * * * in an appropriate and conspicuous type-size." *Id.* at 24. The Commission explained on rehearing that the disclosure

requirement allowed customers "to make objective decisions and * * * give nonaffiliated marketers the ability to fairly compete with affiliated marketers." *In the Matter of the Commission's Investigation of the Customer Choice Program of Columbia Gas of Ohio, Inc.*, Case Nos. 98-593-GA-COI *et al.*, Entry on Rehearing at 6 (Aug. 6, 1998). At OCC's suggestion, the Commission subsequently included that disclosure requirement in its minimum service standards for CRNGS providers. *In the Matter of the Commission's Review of its Rules for Competitive Retail Natural Gas Service at Chapters 4901:1-27 Through 4901:1-34, Ohio Administrative Code*, Case No. 06-423-GA-ORD, Opinion and Order at 17 (Sept. 13, 2006).

A related issue arose in a 2010 complaint case. OCC, the Northeast Ohio Public Energy Council ("NOPEC"), and two other organizations filed a complaint against Interstate Gas Supply, Inc. ("IGS"), arguing that IGS's operation under the name Columbia Retail Energy ("CRE") and its use of Columbia's "starburst" logo, pursuant to a Service Mark Licensing Agreement with NiSource Retail Services, constituted an unfair, misleading, deceptive, or unconscionable marketing practice. *See In the Matter of the Complaint of the Ohio Consumers' Counsel et al. v. Interstate Gas Supply, Inc.*, Case No. 10-2395-GA-CSS, Opinion and Order at 2-3, 11 (Aug. 15, 2012). The complainants asserted that IGS's use of the CRE name caused customer confusion and that IGS's existing customer disclosures were inadequate. *See id.* at 11-14. The Commission dismissed the complaint, finding that the complainants had "offered no evidence that IGS's use of the CRE name and starburst logo [was] unfair, misleading, deceptive, or unconscionable" and that IGS's disclosures were "appropriately crafted" to inform consumers of "the relationship * * * between IGS, Columbia, and NiSource." *Id.* at 17.

That same year, in the Commission's five-year review of its alternative rate plan rules, Ohio Partners for Affordable Energy ("OPAE") filed comments suggesting that the

Commission's filing requirements for exemption applications be amended to prohibit affiliated or non-affiliated CRNGS providers from using "any portion of the name of [a] regulated entity." *In the Matter of the Commission's Review of the Alternative Rate Plan and Exemption Rules Contained in Chapter 4901:1-19 of the Ohio Administrative Code*, Case No. 11-5590-GA-ORD, Finding and Order at 19-20 (Dec. 12, 2012). Staff advised that the proposed amendment was "not appropriately addressed in this rule at this time" and the Commission agreed, rejecting OPAE's proposal. *Id.* at 20.

The next year, in a rulemaking proceeding, NOPEC argued that Ohio Adm.Code 4901:1-29-05 should be modified to prevent "an unaffiliated * * * CRNGS supplier [from using] the incumbent utility's name and logo." *In the Matter of the Commission's Review of its Rules for Competitive Retail Natural Gas Service Contained in Chapters 4901:1-27 through 4901:1-34 of the Ohio Administrative Code*, Case No. 12-925-GA-ORD, Finding and Order at 37 (Dec. 18, 2013). The Commission also rejected NOPEC's proposal, citing the opinion in OCC's complaint case against IGS and holding that "the Commission does not believe that an unaffiliated CRNGS supplier should necessarily be prohibited from using the incumbent utility's name and/or logo, absent other circumstances indicating that the use of the name and/or logo is unfair, misleading, or deceptive." *Id.* at 37-38.

Thus, on the natural gas side, interested parties have proposed at least three times that the Commission modify its rules to prohibit CRNGS providers from using a name or logo that is the same as, or similar to, a natural gas distribution company's name or logo. The Commission has declined each time, holding that a CRNGS provider's use of an incumbent utility's name or logo is not, by itself, unreasonable, deceptive, unfair, or misleading.

III. The Commission should again reject OCC's proposal.

OCC's comments in these proceedings simply repeat the arguments that it and other interested parties have made so many times before. OCC asserts that it "goes without saying" that it is "an unfair and misleading marketing practice [for a marketer] to do business under the name of [a] regulated distribution utility[,]" because the "marketer's use of the regulated utility's name (or parent company name) and similar logo could easily cause customer confusion and create an unfair competitive advantage for the marketer." (OCC Initial Comments at 10-11.) OCC has been making these same arguments, in various proceedings, since at least 2004. However, OCC's latest comments offer no justification to reverse the Commission's thoroughly considered and longstanding policies on marketers' use of electric or natural gas distribution utilities' names or logos. And, as the AEP operating companies noted in Case No. 04-48-EL-ORD, *see supra*, changing the Commission's policies after twenty years would most likely *create* confusion among AEP Energy's existing customers. For all of these reasons, AEP Energy recommends that the Commission reject the proposed amendments in § II.A.7. of OCC's initial Comments.

Respectfully submitted,

/s/ *Eric B. Gallon*
Eric B. Gallon (0071465)
Porter, Wright, Morris & Arthur LLP
41 South High Street, 30th Floor
Columbus, Ohio 43215
Telephone: (614) 227-2190
Email: egallon@porterwright.com

(willing to accept service by e-mail)

Counsel for AEP Energy, Inc.

CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned certifies that a true and accurate copy of the foregoing was served upon the following interested parties at the e-mail addresses on this 22nd day of October, 2021.

/s/ Eric B. Gallon
Eric B. Gallon

Citizens' Utility Board	mfleisher@dickinsonwright.com
Constellation NewEnergy Inc. **Constellation NewEnergy – Gas Division, LLC**	glpetrucci@vorys.com
Energy Harbor	talexander@beneschlaw.com khehmeyer@beneschlaw.com
Industrial Energy Users-Ohio	mpritchard@mcneeslaw.com rglover@mcneeslaw.com bmckenney@mcneeslaw.com
Interstate Gas Supply, Inc.	bethany.allen@igs.com joe.oliker@igs.com michael.nugent@igs.com evan.betterton@igs.com
Ohio Consumers' Counsel	angela.obrien@occ.ohio.gov ambrosia.wilson@occ.ohio.gov
Ohio Energy Group	mkurtz@BKLlawfirm.com kboehm@BKLlawfirm.com jkylercohn@BKLlawfirm.com
Retail Energy Supply Association	mjsettineri@vorys.com glpetrucci@vorys.com fdarr2019@gmail.com

Southstar Energy d/b/a/ Ohio Natural Gas	aemerson@porterwright.com
Staff of the Public Utilities Commission of Ohio	john.jones@ohioattorneygeneral.gov

15122591v3

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

10/22/2021 5:00:09 PM

in

Case No(s). 17-1843-EL-ORD, 17-1844-EL-ORD, 17-1862-EL-ORD, 17-1845-GA-ORD, 17-1846-GA-OR

Summary: Reply Comments electronically filed by Mr. Eric B. Gallon on behalf of AEP Energy, Inc.