

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

**In the Matter of the Commission's Review of)
Chapter 4901:1-25 of the Ohio) Case No. 12-2053-EL-ORD
Administrative Code, Regarding Market)
Monitoring.)**

**THE RETAIL ENERGY SUPPLY ASSOCIATION'S
MEMORANDUM CONTRA
THE OHIO CONSUMERS' COUNSEL'S APPLICATION FOR REHEARING**

Pursuant to Rule 4901-1-35, Ohio Administrative Code, the Retail Energy Supply Association ("RESA") submits this Memorandum Contra the November 14, 2014 Application for Rehearing filed by the Ohio Consumer's Counsel ("OCC"). RESA is a broad and diverse group of retail energy suppliers who share the common vision that competitive retail energy markets deliver a more efficient, customer-oriented outcome than a regulated utility structure. Several RESA members are certificated as competitive retail electric service ("CRES") providers, are active in the Ohio retail electric and natural gas markets, and provide service to residential, commercial, industrial and governmental customers.¹ RESA files this memorandum contra because the OCC erroneously claims that the Commission cannot treat as confidential the highly sensitive, competitive market information that the Commission regularly receives pursuant to Chapter 4901:1-25, Ohio Administrative Code ("OAC"). The Commission is statutorily authorized to treat the information confidentially and to establish a process for the public to seek access to the information.

¹ RESA's members include: AEP Energy, Inc.; Champion Energy Services, LLC; Consolidated Edison Solutions, Inc.; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; GDF SUEZ Energy Resources NA, Inc.; Homefield Energy; IDT Energy, Inc.; Integrys Energy Services, Inc.; Interstate Gas Supply, Inc. dba IGS Energy; Just Energy; Liberty Power; MC Squared Energy Services, LLC; Mint Energy, LLC; NextEra Energy Services; Noble Americas Energy Solutions LLC; NRG Energy, Inc.; PPL EnergyPlus, LLC; Stream Energy; TransCanada Power Marketing Ltd. and TriEagle Energy, L.P. The comments expressed in this filing represent only those of RESA as an organization and not necessarily the views of each particular RESA member.

Moreover, the process is reasonable and fair. Accordingly, OCC's application for rehearing should be rejected.

I. Background

Chapter 4901:1-25, OAC, addresses the Commission's collection of certain data from electric distribution utilities ("EDUs"), CRES providers and government aggregators, pursuant to Section 4928.06, Revised Code. That statute specifically authorizes the Commission to adopt rules needed to carry out Chapter 4928, Revised Code. Moreover, and very importantly, Section 4928.06(F), Revised Code, states the following:

An electric utility, electric services company, electric cooperative, or governmental aggregator subject to certification under section 4928.08 of the Revised Code shall provide the commission with such information, regarding a competitive retail electric service for which it is subject to certification, as the commission considers necessary to carry out this chapter. An electric utility shall provide the commission with such information as the commission considers necessary to carry out divisions (B) to (E) of this section. **The commission shall take such measures as it considers necessary to protect the confidentiality of any such information.** * * * (Emphasis added.)

The Commission established the rules in Chapter 4901:1-25 in accordance with Section 4928.06(F), Revised Code. Currently, Rule 4901:1-25-02(A)(5) specifies the following:

- (5) The information contained in the reports provided to the commission and/or staff pursuant to paragraph (A) of this rule shall be treated in the following manner:
 - (a) Any information filed pursuant to paragraphs (A)(1) and (A)(2)(a) to (A)(2)(c) of this rule shall be deemed to be public information.
 - (b) Any information filed pursuant to paragraphs (A)(2)(d), (A)(3), and (A)(4) of this rule shall be deemed to be confidential information, unless and until the interconnection applicant or customer owner may make, or agree to make, such information public.

The information treated confidentially is:

- **4901:1-25-02(A)(2)(d)**: EDU information related to interconnection applications by those seeking to become interconnection service customers.
- **4901:1-25-02(A)(3)**: CRES information related to providing generation service, per EDU service territory, including (a) the numbers of customers and amount of sales by customer class and subclass; and (b) total billed revenues by customer class and subclass.
- **4901:1-25-02(A)(4)**: Aggregation activity per EDU service territory, including (a) the number of customers by customer class in each aggregation group; (b) total customers in each aggregation group; (c) total customers by customer class; and (d) total customers.

The Commission initiated this proceeding to review its administrative rules in Chapter 4901:1-25, OAC. In January 2014, the Commission requested comments on Staff-proposed revisions to the rules in that chapter. The Staff's proposal did not recommend any changes in the confidential treatment afforded the information in Rules 4901:1-25-02(A)(2)(d), (A)(3), and (A)(4). In other words, the Staff proposed to continue the existing approach and to continue to treat that information as confidential. Comments were filed on February 26 and March 13, 2014.

In its October 15, 2014 Finding and Order, the Commission adopted revisions to Rule 4901:1-25-02(A)(5). The adopted rule continues to keep confidential the information in Rules 4901:1-25-02(A)(2)(d), (A)(3), and (A)(4). What the Commission changed was to include a new process for individuals to seek disclosure of the information received per Rules 4901:1-25-02(A)(2)(d), (A)(3), and (A)(4) and for the party who reported the information to the Commission to respond.

II. OCC's Application for Rehearing is without merit.

OCC claims in its Application for Rehearing that allowing the information to be held confidentially without the filing of a motion for protection undermines the Public Records Law, and two other statutes that consider Commission records to be public records.² OCC's point is that, by

² Sections 4901.12 and 4905.07, Revised Code. Both of these statutes reflect that the Commission records being public shall be "consistent with the purposes of Title XLIX [49] of the Revised Code."

making the public request the information instead of treating it as a public record, the Commission is shifting the burden to the public for obtaining the market data in Rules 4901:1-25-02(A)(2)(d), (A)(3), and (A)(4). OCC also claims that the public needs this very information to effectively exercise customer choice.³

- A. OCC completely ignores the specific statutory authority pursuant to which the Commission is permitted to protect the confidentiality of market-monitoring information required in Chapter 4901:1-25 and which supersedes the general public records statutes.**

The General Assembly directed the Commission to gather market information from EDUs, CRES providers and aggregators.⁴ Sections 149.43 (the Public Records Law), 4901.12 and 4905.07, Revised Code, generally would establish the basis for treating the market information received by the Commission as public records. However, the General Assembly provided specific authorization in Section 4928.06(F), Revised Code, allowing the Commission to treat the information confidentially. Where the General Assembly has provided a later specific authorization that conflicts with an earlier general authorization, that specific special authorization prevails over the general statutory authority.⁵ This is precisely the situation here.

Although the general public records statutes exist, the General Assembly specifically authorized the Commission to treat the market information gathered under Rule 4901:1-25-02 as confidential, as the Commission considers necessary. Just as that very specific delegation of authority allows, the Commission has considered it necessary and for years has treated the market information received per Rules 4901:1-25-02(A)(2)(d), (A)(3), and (A)(4) as confidential. OCC's application for rehearing does not allege any reason(s) or circumstance(s) that warrant a reversal.

³ OCC Application for Rehearing at 5.

⁴ Section 4928.06, Revised Code.

⁵ Sections 1.51 and 1.52. Also, see, *State v. Cravens*, 42 Ohio App.3d 69, 73, 536 N.E.2d 686 (1st Dist. Hamilton County 1988), citing *Davis v. State Personnel Bd. of Review* (1980), 64 O.S.2d 102, 105, 18 O.O. 345, 347, 413 N.E.2d 816, 818.

Furthermore, nothing in the general public records statutes that OCC cites requires the Commission to reverse itself at this point.

Moreover, the newly adopted process in Rule 4901:1-25-02(A)(5), by which the public can seek to obtain the market information, is fair and balanced. It too is within the specific delegated authority for the Commission “take such measures” as necessary to protect the confidentiality of the market information.

B. The public does not need the market information in Rules 4901:1-25-02(A)(2)(d), (A)(3), and (A)(4) to effectively exercise customer choice.

OCC boldly states that all the information in Rules 4901:1-25-02(A)(2)(d), (A)(3), and (A)(4) is “needed” for customers to effectively exercise customer choice. Twice later, OCC backpeddles by claiming instead that customers “may want” access to such information in order to make more informed decisions.⁶ OCC specifically states that customers may want to know the size and reliability of a CRES provider or its ability to serve the residential class.⁷

It is simply wrong to state that the information in Rules 4901:1-25-02(A)(2)(d), (A)(3), and (A)(4) must be made public because the customer “needs” it in order to effectively exercise customer choice. The information provided pursuant to Rule 4901:1-25-02(A)(2)(d) – the EDU interconnection application information – is not even related to exercising customer choice. Moreover, customers all across Ohio have exercised customer choice effectively for years without the market information in Rules 4901:1-25-02(A)(2)(d), (A)(3), and (A)(4) being publicly available. Nothing has changed in the competitive market that justifies a reversal in the Commission’s position on this point.

OCC also argued that customers “may want” to know certain information about specific EDU interconnection applications, suppliers, and aggregators, and that possible desire to know

⁶ OCC Application for Rehearing at 5.

⁷ *Id.*

necessitates that all information required Rules 4901:1-25-02(A)(2)(d), (A)(3), and (A)(4) be publicly available each time it is reported to the Commission, specifically to know the size and reliability of a CRES provider or its ability to serve the residential class. This claim likewise does not justify a complete overhaul in the confidential treatment afforded the market information. The EDU interconnection applications (information required per Rule 4901:1-25-02(A)(2)(d)) do not establish a supplier's reliability or ability to serve the residential class. Also, an aggregation group's size by customer class or otherwise (information required per Rule 4901:1-25-02(A)(4)) do not establish a supplier's reliability or ability to serve the residential class. Additionally, the number of a supplier's customers and amount of sales by customer class and subclass (information required per Rule 4901:1-25-02(A)(3)) do not establish a supplier's reliability or ability to serve the residential class. Similarly, the amount of billed revenues by customer class and subclass do not establish a supplier's reliability or ability to serve the residential class.

III. Conclusion

WHEREFORE, RESA requests that the Commission deny OCC's application for rehearing for all of the reasons stated herein.

Respectfully submitted,



M. Howard Petricoff
Gretchen L. Petrucci
Vorys, Sater, Seymour and Pease LLP
52 E. Gay Street
Columbus, OH 43215
614-464-5414
mhpetricoff@vorys.com
glpetrucci@vorys.com

Attorneys for the Retail Energy Supply Association

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 courtesy copy of the foregoing document is also being served (via electronic mail) on the 24th day of November 2014 upon all persons/entities listed below.



M. Howard Petricoff

burkj@firstenergycorp.com
joseph.clark@directenergy.com
maureen.grady@occ.ohio.gov
edmund.berger@occ.ohio.gov
stnourse@aep.com
mjsatterwhite@aep.com

haydenm@firstenergycorp.com
scasto@firstenergycorp.com
thomas.mcnamee@puc.state.oh.us
william.wright@puc.state.oh.us
bryce.mckenney@puc.state.oh.us
james.lynn@puc.state.oh.us