

Before the Public Utilities Commission of Ohio

**In the Matter of the
Commission's Review of the
Rule in Ohio Administrative
Code Chapter 4901:1-42**

Case No. 20-1195-EL-ORD

Comments of the Retail Energy Supply Association

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I. Introduction

In this proceeding, the Public Utilities Commission of Ohio is reviewing its rules concerning green marketing programs offered by competitive retail electric service providers and electric distribution utilities. The Commission has asserted authority in these rules that is beyond that provided by the authorizing statute, R.C. 4928.70, and neglected to incorporate a level review of programs offered by electric distribution utilities that is necessary to fulfill the Commission's statutory duties. To remedy these concerns, the Commission should adopt several revisions to Rule 4901:1-42-03 of the Ohio Administrative Code.

II. The proposed revision of Rule 4901:1-42-02 does not change the scope of the current rules

R.C. 4928.70(A) provides that the Commission may periodically review a green pricing program offered in this state as part of competitive retail electric service and at the conclusion of that review make recommendations to improve or expand the program

¹ The statements expressed in this filing represent the position of the Retail Energy Supply Association as an organization, but may not represent the view of any particular member of the Association. Founded in 1990, RESA is a broad and diverse group of retail energy suppliers dedicated to promoting efficient, sustainable, and customer-oriented competitive retail energy markets. Delivering value-added electricity and natural gas service to retail, residential, commercial, and industrial customers, RESA members operate throughout the United States. More information on RESA can be found at www.resausa.org.

subject to the review. To carry out the reviews authorized by this section, the Commission is directed to adopt rules. R.C. 4928.70(B). Under its rulemaking authority, the Commission adopted Chapter 4901:1-42. In the Matter of the Adoption of Chapter 4901:1-42, Ohio Administrative Code, Regarding Green Pricing Programs, to Implement Am. Sub. S.B. 315, Case No. 12-2157-EL-ORD, Finding and Order (Apr. 2, 2014), rehearing denied, Entry on Rehearing (May 28, 2014) (“Green Marketing Rules Proceeding”).

In the entry requesting comments in this five-year review of Chapter 4901:1-42, the Commission staff has proposed a clarification of Rule 4901:1-42-02(A). The division currently states, “This chapter addresses the review of green pricing programs offered in this state as part of competitive retail electric service, pursuant to section 4928.70 of the Revised Code. Parties affected by these rules include all Ohio [electric distribution utilities] and [competitive retail electric service] providers serving or soliciting retail electric customers in Ohio.” Although the division accurately describes the scope of the Commission’s authority under R.C. 4928.70, the Staff recommends that the Commission delete the phrase “as part of competitive retail electric service, pursuant to section 4928.70 of the Revised Code.” Entry, Attachment A at 1 (Feb. 24, 2021). The Entry provides the following rationale for the proposed change:

Staff evaluated the rules contained in Ohio Adm.Code Chapter 4901:1-42. Following its review, Staff recommends the following amendment to the rules: (a) Ohio Adm.Code 4901:1-42-02 would be amended to delete language unnecessary to determining application of the rules provisions, thereby clarifying that the rule applies to electric distribution utilities and competitive retail electric service providers.

Id., ¶ 6.

Given that the second sentence of the current division expressly provides that the rule applies to both distribution utilities and competitive retail electric service providers, the proposed change has no apparent effect. The deletion, therefore, does not appear to be necessary. If something else is intended, the explanation offered in the Entry is incomplete and no change should be made until the import of such a change is clarified.

III. The Commission should revise Rule 4901:1-42-03(B) so that it conforms to Ohio law

“[T]he Public Utilities Commission is a creature of the General Assembly and may exercise no jurisdiction beyond that conferred by statute.” *Dayton Comms. Corp. v. Pub. Utils. Comm’n of Ohio*, 64 Ohio St. 2d 302, 307 (1980). The Commission’s authority under R.C. 4928.70 is limited to conducting “periodic reviews.” Despite this limit, Rule 4901:1-42-03(B) provides that program or marketing materials must be submitted to the Commission staff not later than four calendar days after being distributed to customers or after the product included in such programs is offered to Ohio customers or within five days at any time at the request of Commission staff. As indicated in prior comments, the submission requirement is not a periodic review since it applies continuously. *Green Marketing Rules Proceeding, Initial Comments of the Retail Energy Supply Association* at 3-5 (Nov. 19, 2012). Thus, the continuous requirement to submit marketing materials to the staff exceeds the Commission’s authority under R.C. 4928.70(A).

Because the current submission requirement exceeds the Commission’s authority under R.C. 4928.70(A), the Commission should revise Rule 4901:1-42-03(B) as follows:

(B) (1) The commission ~~staff~~ may initiate a periodic review of a green marketing program of an Ohio EDU and CRES provider.

~~(2) Upon initiation of a review authorized by this division, Any program or marketing materials being used by an Ohio EDU or CRES provider that address green pricing programs shall be provided to commission staff as provided by order of the commission in the entry initiating the review. ~~not later than four calendar days after being distributed to customers or after the product included in such programs is offered to Ohio customers. Additionally, program or marketing materials requested by staff for a periodic review should be provided to staff by email or facsimile within five calendar days.~~~~

IV. The Commission should clarify the green marketing rules so that they make explicit that an electric distribution utility must comply with other provisions of Ohio law as a predicate to making a green generation offer

Although electric distribution utilities must provide a competitive service offering as a default service, the statutory requirements governing the service do not direct electric distribution utilities to offer green products. See R.C. 4928.14 and 4928.141. Instead, the electric distribution utility may offer something other than default service only if it has specific authorization for the competitive service as part of an electric security plan. R.C. 4928.143(B)(2). Besides the need for authorization of a green tariff offering under the applicable electric security plan, the electric distribution utility also must conform such offers to the applicable accounting and other separation requirements established in its corporate separation plan. R.C. 4928.17. Although Rule 4901:1-42-03(C) directs electric distribution utilities to comply with reporting requirements under Chapter 4901:1-25, the current rules do not direct compliance with the statutory requirements that apply specifically to an electric distribution utility that markets green generation services.

The need for this specific direction has become increasingly apparent as electric distribution utilities seek to extend their services in new directions. As part of a settlement opposed in part by some environmental groups, the FirstEnergy affiliated electric distribution utilities recently implemented a residential offering that expands

default service to include load management options. In the Matter of the Filing by Ohio Edison Co., The Cleveland Electric Illuminating Co. and The Toledo Edison Co. of a Grid Modernization Plan, Case Nos. 16-481-EL-UNC, *et al.*, Opinion and Order ¶ 38 (July 17, 2019) (“FE Grid Modernization Case”). Closer to the issues presented in this review, Ohio Power is seeking authority to offer a “green tariff” under which it will attempt to sell off its excess inventory of renewable energy credits. In the Matter of the Application of Ohio Power Co. to Amend its Tariff, Case Nos. 20-1603-EL-ATA, *et al.*, Application (Oct. 16, 2020) (“Ohio Power Green Tariff Case”). Each of these products introduces an option available to default service customers that competitive suppliers have sought to fill for years.

In the case of time-differentiated rates, the lack of adequate metering and access to metering information have thwarted those efforts by competitors. The limits preventing offers by competitive retail electric service suppliers, however, will begin to diminish, and the Commission approved a provision in the FirstEnergy case that will terminate the availability of the time-differentiated option when three products offered by competitive retail electric service providers are available. FE Grid Modernization Case, Opinion and Order ¶ 38 (July 17, 2019). This termination provision is recognition that the competitive retail electric service providers, not the electric distribution utility, should be driving the growth of new generation products that will be possible when adequate metering is available. Additionally, the effect of the termination provision is to limit the ability of an electric distribution utility to leverage its relationship with distribution

customers, access to customer information, and utility resources in ways that would adversely affect competition.²

Similar interests affect the green generation service market. In the Ohio Power Green Tariff case, Ohio Power finds itself in the difficult position of having a surplus inventory of renewable energy credits as a result of the passage of House Bill 6. It seeks to liquidate some of those credits through a bypassable “green tariff.” Ohio Power Green Tariff Case, Application *passim*. If this proposal is approved, Ohio Power will be positioned to leverage its distribution business to liquidate the surplus inventory in ways unavailable to competitive retail electric service providers.³

The simple solution to this problem is for the Commission to withhold authorization of green marketing programs by electric distribution utilities in electric security plan cases and discontinue those already in place once the opportunity arises.⁴ The market for green power would not suffer as there are many competitive retail electric service providers, including utility affiliates, that provide green products.⁵ Further, a

² For a discussion of the need to prevent leveraging behavior by monopolies to thwart competitive harms, see Lina M. Kahn, Amazon’s Antitrust Paradox, 126 Yale L.J. 710, 737-39 (2017).

³ Ohio Power is not the first to seek authority to market renewable energy certificates to its distribution customers. Duke Energy Ohio currently offers customers the option of purchasing “units” that are linked to its purchase of renewable energy certificates. Duke Energy Ohio, PUCO Electric No. 19, Sheet No. 79.5, viewed at <https://puco.ohio.gov/static/empliibrary/files/docketing/tariffs/Electric/Duke%20Energy%20Ohio%20-%20Electric/PUCO19%20Schedulesof%20Rates,%20Classifications,%20Rules%20and%20Regulations.pdf> (viewed Mar. 15, 2021).

⁴ A principle pursued by RESA provides, “Clean energy alternatives such as energy efficiency, demand response, and renewables are best delivered by competitive retail suppliers offering market-based solutions rather than through regulated distribution companies. *The regulated distribution companies should be a competitively neutral conduit for the provision of these value-added services by the competitive market.*” RESA Statement of Principles, viewed at <https://www.resausa.org/about-us/resa-principles> (emphasis added).

⁵ On the Apples to Apples comparison for Ohio Power residential customers on March 15, 2021, for example, there were 53 offers providing for 76% to 100% renewable content, including one from a electric distribution affiliate. See <http://www.energychoice.ohio.gov/ApplesToApplesComparision.aspx?Category=>

prohibition would avoid the difficult monitoring that would be necessary to assure that the electric distribution utility has not violated separation requirements when it is marketing green generation products to its own distribution customers.

Short of a prohibition, however, the Commission should provide notice in the green marketing rules that it intends to monitor and check separation violations. Just as it incorporated the reporting requirements of Chapter 4901:1-25 in Rule 4901:1-42-03(C), the Commission should incorporate additional reporting requirements specific to electric distribution utilities by revising Rule 4901:1-42-03 to include a new division (G) providing:

(G) An Ohio EDU shall maintain sufficient documentation to verify that its green pricing program is in compliance with its authorization under section 4928.143 and section 4928.17 of the Revised Code and Chapter 4901:1-35 and Chapter 4901:1-37 of the Administrative Code.

V. **Conclusion**

Under R.C. 4928.70(A), the Commission is authorized to review periodically green marketing programs. Its current rules simultaneously are too broad and too narrow. The recommendations offered in these Comments seek to resolve both concerns.

Respectfully submitted,

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Certificate of Service

I certify that on March 24, 2021 a copy of the Comments of the Retail Energy Supply Association was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio. A copy of the Comments was emailed to counsel listed below.

/s/ Frank P. Darr

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