

Before the Public Utilities Commission of Ohio

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

Case No. 20-1195-EL-ORD

Reply Comments of the Retail Energy Supply Association

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I. Introduction

In initial comments in this review of the rules to implement R.C. 4928.70, Citizens’ Utility Board of Ohio has urged the Public Utilities Commission of Ohio Commission to further insinuate itself into the sales process. Initial Comments by the Citizens’ Utility Board of Ohio (Mar. 24, 2021) (“CUB Comments”). The Commission should reject CUB’s recommendations because they are unnecessary and legally unsupported.²

II. The recommendations to expand disclosure requirements exceed the Commission’s rulemaking authority

CUB urges the Commission to “set a baseline requirement for all green offers to include environmental disclosure information easily accessible to every customer during the course of the enrollment.” CUB Comments at 5. As a baseline, it sets out

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.

² Additionally, the Commission should pull back and revise Chapter 4901:1-42 so that these rules conform with the Commission’s legal authority. Comments of the Retail Energy Supply Association (Mar. 24, 2021).

requirements for certain disclosures. *Id.* at 6. The proposed change to the rules is not necessary, and it exceeds the Commission’s authority under R.C. 4928.70(A).

Consumer protections including the provision of clearly stated and truthful customer materials are fundamental to an efficient generation market.³ Consistent with that understanding, Rule 4901:1-42-03(A) provides, “Any Ohio EDU or CRES providers offering a green pricing program shall ensure that any program or marketing materials distributed to customers accurately portray the product.” If there is a problem with the promotion of a product, the Commission under current rules can recommend changes to marketing practices on a review by review basis.⁴ Thus, the proposed change is unnecessary because the current rules already address the concerns alleged by CUB.

Moreover, the proposed rule change exceeds the Commission’s authority under the applicable statute. 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

³ A core principle of RESA is support of effective consumer protections including

- Not engaging in unfair, deceptive, or misleading conduct as defined by applicable state and federal statutes and regulations.
- Not making false or misleading representations of competitive products and services, including misrepresenting rates, prices, or customer savings.
- Using plain language, including words and images that facilitate customer understanding of competitive products and services.
- Providing customers with written information, upon request, or with a link to a website at which information can be obtained, in response to all customer inquiries.
- Using reasonable efforts to provide accurate and timely information about products, services, and customers’ cancellation rights.
- Ensuring that any product or service offering made by a competitive retail electric provider contains information designed to be understood by the customer, including but not limited to providing any written information to customers in the language used during a sales call or on-site visit or negotiation of the contract.

<https://www.resausa.org/about-us/resa-principles>.

⁴ Part of CUB’s argument is based on behavior it implies is intended to mislead customers though it fails to demonstrate that any customers have been misled. CUB Comments at 3. If a company engages in unlawful behavior, the solution is administrative enforcement actions or complaint cases directed at the illegal behavior. R.C. 4928.16.

service and at the conclusion of that review make recommendations to improve or expand the program subject to the review. To carry out the reviews authorized by this division, the Commission is directed to adopt rules. R.C. 4928.70(B). In its rules, the Commission may not exceed the authority provided to it by the General Assembly. *Central Ohio Joint Vocational School Dist. Bd. of Educ. v. Bureau of Employment Servs.*, 21 Ohio St. 3d 5, 10 (1986); *Sterling Drug, Inc. v. Wickham*, 63 Ohio St. 2d 16 (1980).⁵ Thus, the rules that the Commission may adopt are limited to the conduct of periodic reviews and recommendations to improve or expand the program subject for review.

Despite the limits found in the authorizing statute, CUB proposes that the Commission revise its rules to direct the conduct of the enrollment process and dictate the disclosures. There is no authority for the Commission to engage in those activities under R.C. 4928.70.

In apparent recognition that R.C. 4928.70 cannot be stretched to cover the expansion of Commission authority by rulemaking that CUB seeks, it also relies on the state energy policy. CUB Comments at 6-7. That reliance, however, is misplaced. When there is a specific directive to the Commission that limits its authority, reliance on a more general statement of authority is not sufficient to support an action by the Commission. *Columbus S. Power Co. v. Pub. Utils. Comm'n of Ohio*, 67 Ohio St. 3d 535 (1993). In this instance, the specific limits on Commission actions under R.C. 4928.70(A) control.

⁵ This statement regarding the limits on agency authority to issue rules is consistent with the frequent admonition of the Ohio Supreme Court that the Commission is a creature of statute and may not exceed the authority provided to it by the General Assembly. *Dayton Comms. Corp. v. Pub. Utils. Comm'n of Ohio*, 64 Ohio St. 2d 302, 307 (1980).

III. Conclusion

CUB proposes expansion of the Commission's authority through rulemaking that is both unnecessary and illegal. Accordingly, the Commission should reject those recommendations.

Respectfully submitted,

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Certificate of Service

I certify that on April 7, 2021 a copy of the Reply 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 document was emailed to counsel listed below.

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