

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of Inspire Energy Holdings,)
LLC.) Case No. 23-720-GE-UNC

**RETAIL ENERGY SUPPLY ASSOCIATION’S MEMORANDUM CONTRA APPLICATION FOR
REHEARING BY OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

The Retail Energy Supply Association (“RESA”) urges the Public Utilities Commission of Ohio (“the Commission”) to deny the Office of the Ohio Consumers’ Counsel’s (“OCC”) Application for Rehearing. The Commission properly denied OCC intervention in this case as OCC was proposing a new standard of general applicability that should be raised in a rulemaking proceeding. If OCC is permitted to intervene in this case and have the Commission consider a standard of general applicability, it will encourage parties like OCC to intervene in all proceedings and raise issues not germane to the resolution of the case and will require parties like RESA to similarly intervene in proceedings it would otherwise not. Such an outcome is inconsistent with R.C. 4903.221 and Court precedent that requires standards of general applicability to be adopted in rulemakings and not on an ad hoc basis.¹

Inspire Energy Holdings, LLC (“Inspire”)’s memorandum contra to OCC’s rehearing also demonstrates that OCC’s requested relief is meritless on the facts as Inspire’s product was never listed on the apples-to-apples website, and its current offers are not above 2.5 times the Standard Service Offer (“SSO”) price.² Therefore there was

¹ *Infra* at pp. 4-5.

² R.C. 4903.221(B)(1)-(4);

not, and is not, anything to delist even if OCC's legal theory could properly be raised here. OCC's Application for rehearing should be denied.

I. BACKGROUND

On September 5, 2023, Staff and Inspire filed a Joint Application and Recommendation ("Settlement") to address concerns raised in an Amended Notice of Probable Noncompliance ("PNC Letter").³ As the Settlement indicated, Staff and Inspire exchanged information and worked together over a significant timeframe to reach what each of them believed was a reasonable resolution to Staff's concerns about a competitive retail electric service ("CRES") product offered by Inspire.

On September 29, 2023, OCC filed a Motion to Intervene.⁴ At the outset, OCC urged the Commission to consider "the very premise of allowing retail marketing."⁵ In their Motion, OCC argued the Settlement should be modified "to deter Inspire Energy ***and other marketers*** from offering future unconscionable rates."⁶ OCC's Motion to Intervene urged the Commission to "delist[] from the apples-to-apples website all unconscionable prices by Inspire and ***other*** [sic], being prices higher than 2.25 times the standard offer for natural gas."⁷ For retail electric offers, OCC argued that the SSO rate is currently too high for a comparison of 2.25 the current SSO rate, urged the Commission to create a benchmark SSO rate, and presumably then delist the offers at some level above the benchmark level.⁸ On its face OCC's Motion to Intervene advances several standards

³ Joint Stipulation and Recommendation, Exhibit A at p. 2 (September 2, 2023)(Hereinafter "Settlement").

⁴ Motion to Intervene by Office of The Ohio Consumers' Counsel (September 29, 2023)(hereinafter "OCC Motion to Intervene").

⁵ OCC Motion to Intervene at 3.

⁶ OCC Motion to Intervene at 3 (emphasis added).

⁷ OCC Motion to Intervene at 4 (emphasis added).

⁸ OCC Motion to Intervene at 4.

and processes that would apply to all CRES and competitive retail natural gas service (“CRNGS”) providers; standards that are also unlawful and unreasonable.

On November 6, 2023, RESA filed a Motion to Intervene to exclusively preserve its right to respond to OCC’s unlawful and unreasonable rulemaking proposals.⁹

On December 13, 2023, the Commission issued its Finding and Order adopting the Settlement. The Commission correctly concluded that OCC’s stated reason for intervention was to advance issues beyond the scope of this proceeding and which would be better raised in a rulemaking.¹⁰ The Commission found that beyond raising policy concerns inappropriate for this proceeding, OCC failed to explain how granting intervention would not unduly delayed nor contribute to the development of the resolution of the factual issues in the case. Accordingly, the Commission concluded that it “will not expand the scope of this case to comment on any policy made by OCC.”¹¹

On January 12, 2024, OCC filed an Application for Rehearing. OCC’s application for rehearing argues that its policy recommendations also applied to Inspire and were therefore appropriate to raise here. OCC’s Application for rehearing also fails to identify the specific factual issues it would help resolve had it been granted intervention and a hearing. OCC’s Application for rehearing further fails to demonstrate how the PUCO opening the case up with a procedural schedule and intervention by OCC, RESA, and potentially other parties would lead to either a more fully developed record on the specific facts at issue here or how OCC’s requested process would not unduly delay the

⁹ Motion to Intervene of the Retail Energy Supply Association and Memorandum in Support (November 6, 2023)(Hereinafter “RESA Motion”).

¹⁰ Finding & Order at 7-8 (December 13, 2023).

¹¹ Finding & Order at p. 7 ¶ 12.

proceeding. OCC bears the burden of demonstrating the order was unlawful and unreasonable and it has failed to do so.

II. ARGUMENT

It is clear, based on OCC's Motion to Intervene, that OCC was attempting to have the Commission engage in a rulemaking process. By questioning the very premise of the retail market, and by requesting the Commission delist all CRES and CRNGS providers from the apples-to-apples website for "unconscionably high prices" based on a unique standard OCC advances in this proceeding, OCC is seeking the Commission to engage in unlawful and unreasonable rulemaking.

Agencies like the Commission are subject to R.C. 111.15 and must comply with the statute's mandatory rulemaking requirements. Under R.C. 111.15(A)(1), a rule is defined as "any rule, regulation, bylaw, or standard having a general and uniform operation adopted by an agency." To adopt a rule, the Board must, among other things, publish and then file the proposed rule with the Joint Committee on Agency Rule Review ("JCARR"). Once the proposed rule clears the JCARR review process, it must be filed in final form with the Secretary of State.¹² If the proposed rule has an adverse impact on business, it must also include a business impact analysis.¹³ Strict adherence to these rulemaking requirements is required.¹⁴ Where an agency fails to comply with these mandatory rulemaking requirements, the rule has been struck down as invalid.¹⁵

¹² R.C. 111.15.

¹³ R.C. 111.15(D).

¹⁴ See *State ex rel. Ryan v. State Teachers Ret. Sys.*, 71 Ohio St.3d 362, 366 (1994).

¹⁵ *Id.*; *State ex rel. Bd. of Edn. of N. Canton Exempted Village School Dist. v. Holt*, 174 Ohio St. 55, 57 (1962).

In this proceeding, OCC advances several policy issues for the Commission's consideration that would qualify as a rulemaking requirement. First, OCC suggests that the Commission should consider the very issue of retail marketing. This standard would apply to all CRES and CRNGS providers, as well as other stakeholders. A holding by the Commission addressing the very issue of retail marketing would have general applicability and uniform operation and can only be considered as part of a rulemaking.

Second, OCC suggests that the Commission interpret R.C. 4928.08(D) and Rule 4901:1-21-05(D) O.A.C. and create a standard of unconscionability under the Statute and Rule. OCC's proposed unconscionability standard in its Motion to Intervene was 2.25 times standard offer of natural gas. OCC proposed that this apply to Inspire's natural gas offers, and all offers by other CRNGS providers.

Third, OCC asked the Commission to create a process and standard to develop a benchmark and threshold to determine when CRES offers are unconscionable. OCC suggests that the standard applicable to all CRES offers be based on a to-be-created benchmark SSO price and a threshold of 2.25 the benchmark. OCC's proposal would have applied to CRES providers beyond Inspire. It is clear that OCC's Motion to Intervene raised a requirement of general applicability not appropriate for consideration in this proceeding.

OCC's Application for rehearing fails to address how consideration of its rulemaking concept would help resolve issues of fact in this proceeding and would not unduly delay this proceeding. Moreover, the Commission cannot reconsider the very premise of retail marketing. Furthermore, OCC's conceptual standard fails under its own weight. OCC's 2.25 standard is proposed to be modified for CRES offers because the

current SSO rate reflects auction results when market prices were significantly increased. Creating a uniform standard of unconscionability that ignores the reality of fluctuations in wholesale market prices will not yield a lawful and reasonable outcome. Requiring parties to address the merits, or lack thereof, of rulemakings in non-rulemaking proceedings will result in judicial inefficiency as parties will be required to participate in countless extraneous proceedings and the Commission will be required to rule on these extraneous issues in every proceeding. As the Commission correctly noted, OCC will have an opportunity to present its policy recommendations in an appropriate proceeding that way parties like RESA can explain, once, why on the merits the proposal is unlawful and unreasonable.

Finally, despite having an opportunity to conduct discovery (which Inspire indicates OCC did avail itself of), and an opportunity to identify in its Motion to Intervene and Application for Rehearing specific issues with Staff's resolution of Staff's investigation into Inspire, OCC has only presented the Commission with a rulemaking standard it seeks to have adopted. Staff and Inspire set forth the specific facts at issue in the Settlement document itself, explained the steps Staff and Inspire undertook to remedy Staff's concerns, and set forth a proposed remedy to which both Staff and Inspire affirmed was a reasonable resolution of the issues. Staff and Inspire transparently and publicly disclosed the issues they were resolving. Outside of its rulemaking concept, which is inappropriate for this proceeding, OCC has yet to identify a fact that it would have helped develop had its intervention been granted. In fact, as Inspire pointed out, OCC's delist rulemaking concept would not have applied to the specific product offering Staff had issue

with because it was never listed on the apples-to-apples website.¹⁶ That product offering has also not been offered by Inspire for a while now, and in any event, according to Inspire, its other offerings on the apples-to-apples website would not fail OCC's 2.25 times the standard offer threshold.¹⁷ Accordingly, had OCC been granted intervention and a procedural schedule been adopted, OCC has not demonstrated that it would have presented the Commission with anything else that would change the outcome set forth in the Settlement. OCC's Application for Rehearing should be denied.

CONCLUSION

For the reasons set forth above, RESA respectfully requests that the Commission deny OCC's Application for Rehearing.

/s/ Matthew R. Pritchard

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January 22, 2024

COUNSEL FOR THE RETAIL ENERGY SUPPLY

¹⁶ Memorandum of Inspire Energy Holdings, LLC Contra the Application for Rehearing of Office of the Ohio Consumers Counsel at 6 (Jan. 22, 2024).

¹⁷ *Id.*

CERTIFICATE OF SERVICE

In accordance with Ohio Adm. Code 4901-1-05, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing *Memorandum Contra to the Office of the Ohio Consumers' Counsel's Application for Rehearing* was sent by, or on behalf of, the undersigned counsel for RESA to the following parties of record on January 22, 2024, *via* electronic transmission.

/s/ Matthew R. Pritchard

Matthew R. Pritchard

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