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Via E-FILE

May 9, 2014

Public Utilities Commission of Ohio
PUCO Docketing
180 E. Broad Street, 10th Floor
Columbus, Ohio 43215

In re: Case No. 14-568-EL-COI

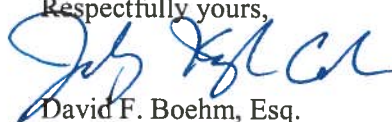
Dear Sir/Madam:

Please find attached the PUBLIC VERSION of the COMMENTS OF THE OHIO ENERGY GROUP and its MOTION FOR PROTECTIVE ORDER for filing in the above-referenced matter.

The original and three (3) copies of the CONFIDENTIAL PAGES for filing under seal will follow by overnight mail.

Copies have been served on all parties on the attached certificate of service. Please place this document of file.

Respectfully yours,

A handwritten signature in blue ink, appearing to read "Jody Kyler Cohn", is written over the typed name of David F. Boehm.

David F. Boehm, Esq.

Michael L. Kurtz, Esq.

Jody Kyler Cohn, Esq.

BOEHM, KURTZ & LOWRY

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Encl

**BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission-Ordered Investigation of : Case No. 14-568-EL-COI
Marketing Practices in the Competitive Retail Electric Service :
Market. :

PUBLIC VERSION

**COMMENTS OF THE
THE OHIO ENERGY GROUP**

The Ohio Energy Group (“OEG”) submits these Comments in response to the Public Utilities Commission of Ohio’s (“Commission”) April 9, 2014 Entry in the above-captioned proceeding. OEG will first address the list of questions set forth in the Commission’s Entry. OEG will then provide a specific example of a pass-through clause contained in one of its members’ contracts and how the competitive retail electric service (“CRES”) provider who is party to the contract is improperly interpreting that provision.

I. RESPONSE TO COMMISSION QUESTIONS.

- a) **Is it unfair, misleading, deceptive, or unconscionable to market or label a contract as fixed-rate when it contains a pass-through clause in its terms and conditions? If so, should the labeling of a contract containing a pass-through clause as a fixed-rate contract be prohibited in all CRES contracts; residential and small commercial contracts; or only residential contracts?**

CRES providers should not label and/or market any service contract (residential, small commercial, large commercial, etc.) as “fixed-rate” when the contract contains a pass-through clause. The main reason why customers enter into “fixed-rate” contracts is that such contracts provide certainty regarding what rate that customer will pay for power over a given length of time. Continuous exposure to additional costs is exactly what customers seek to avoid by entering into such contracts. A better practice is to label contracts that provide a fixed-rate subject to a pass-through clause as “conditional fixed-rate” contracts. This label more fairly and honestly conveys to customers that the agreed-upon contract rate may be subsequently increased subject to certain future conditions.

- b) May a CRES supplier include a pass-through clause in a fixed-rate contract that serves to collect a regional transmission organization (RTO) charge? Is such a practice unfair, misleading, deceptive, or unconscionable?**

A CRES provider should be permitted to include a pass-through clause that serves to collect a regional transmission organization charge in a service contract. This is reasonable since parties can contract to various service terms that satisfy their individual needs. However, the contract should not be labeled/marketed as a “fixed-rate” contract, the pass-through clause should be prevalently displayed within the contract (in bold type), and the pass-through clause should provide specificity to the customer regarding exactly how and when that clause will apply.

- c) May increased costs imposed by an RTO and billed to CRES suppliers be categorized as a pass-through event that may be billed to customers in addition to the basic service price pursuant to fixed-price CRES contracts? Is such a practice unfair, misleading, deceptive, or unconscionable?**

The answer to this question depends upon which specific type of RTO cost increase the CRES provider is seeking to categorize as a “pass-through event.” It is unfair, misleading, deceptive, and unconscionable for a CRES provider to categorize cost increases resulting solely from temporary RTO market price fluctuations as a “pass-through event” that may be billed to customers on top of their agreed-upon fixed rate. Such a policy defeats the very purpose of entering into “fixed-rate” contracts, which are aimed at stabilizing a customer’s rates in the midst of such market volatility. After a “fixed-price” service contract is entered into, customers do not receive the benefit of any temporary RTO market fluctuations that result in cost decreases to the CRES provider. Likewise, those customers should not be harmed by any temporary RTO market fluctuations that result in cost increases to the CRES provider.

The type of RTO cost increases that may be more appropriately categorized as “pass-through events” are those that result from significant regulatory changes, such as newly-approved RTO tariff modifications or newly-imposed federal requirements. These events represent changes beyond the natural fluctuations of the RTO markets. Unlike cost increases resulting merely from market fluctuations, which parties anticipate and try to protect against by entering into “fixed-rate” contracts, significant regulatory changes may not be anticipated. Hence, it may be reasonable to categorize such significant regulatory changes as “pass-through events” and seek to impose increased costs resulting from such changes to customers.

- d) **If increased costs imposed by an RTO and billed to CRES suppliers may be categorized as a pass-through event that may be billed to customers with fixed-price CRES contracts, what types of pass-through events should invoke the application of the pass-through clause by a CRES supplier?**

See OEG's response to question (c).

- e) **Is it unfair, misleading, deceptive, or unconscionable when a CRES provider prominently advertises a fixed price, but the contract contains a pass-through clause that is significantly less prominent (i.e., is displayed far down in the fine print or on a second page of the terms and conditions)?**

Yes. As an initial matter, such a contract should be labeled as a "conditional fixed-priced" contract rather than a "fixed-price" contract. Additionally, if a pass-through clause is included in any CRES provider contract, it should be presented in bold type so as to give better notice to the customer of the potential for their agreed-upon rate to be subsequently increased should certain future conditions occur.

- f) **Should a pass-through clause that refers to acronyms such as "RTO," "NERC," or "PJM" be required to define these acronyms? If so, should definitions be required in residential and small commercial contracts, or only residential contracts?**

OEG takes no position on this question.

- g) **Could permitting pass-through clauses in residential and/or small commercial CRES contracts labeled as fixed-rate contracts have an adverse effect on the CRES market?**

OEG takes no position on this question.

- h) **What alternative label should be used on a contract with a pass-through clause that has an otherwise fixed rate?**

As discussed above, such a contract should be labeled as a "conditional fixed-priced" contract rather than a "fixed-price" contract.

II. IMPROPER INTERPRETATION OF PASS-THROUGH CLAUSE LANGUAGE.

Not only should a CRES provider avoid labeling/marketing a service contract as "fixed-price" when it contains a pass-through clause. A CRES provider should not attempt to stretch the language of a pass-through clause included within a "fixed-price" contract beyond its reasonable bounds in order to recover costs from customers that are not recoverable under the terms of the contract.

For example, one CRES provider in Ohio is currently attempting to recover increased ancillary service costs from an OEG member by improperly categorizing those increased costs as a “Pass-Through Event” in their otherwise “fixed-price” contract. On March 19, 2014, the OEG member received a letter from the CRES provider indicating that the CRES provider incurred increased ancillary service costs in January due to the extremely cold weather that took place that month. The CRES provider notified the OEG member that it considered the increased ancillary service costs to be a “Pass-Through Event” and that it expected to increase the customer’s bill by 1% to 3% of its annual generation expenditure to recover those costs.

The OEG member’s service contract outlines the CRES provider’s supply obligations and the customer’s payment obligations. The CRES provider supply obligation provision states, in part:

[REDACTED]

The customer payment obligation provision states, in part:

[REDACTED]

The [REDACTED] referred to the provision above is entitled [REDACTED] and sets forth a specific cents/kWh rate that the OEG member will pay over the term of the agreement.

The OEG member’s “fixed-price” contract also contained a pass-through clause in [REDACTED] under the heading [REDACTED] which was referred to in the CRES provider obligation section set forth above. That pass-through clause provides:

[REDACTED]

[REDACTED]

The language of the pass-through clause included in the OEG member's contract specifically refers to [REDACTED] types of significant regulatory changes that could invoke additional charges to the customer beyond their agreed-upon fixed rate. Those regulatory changes occur if [REDACTED]

[REDACTED]

The increased ancillary service costs that the CRES provider seeks to pass through to the OEG member do not meet any of these contractual requirements. These increased RTO charges were not the result of [REDACTED]

[REDACTED]

[REDACTED] Rather, the increased ancillary costs at issue in this instance were incurred by the CRES provider merely due to RTO market fluctuations. This is exactly the type of cost that "fixed-price" contracts are intended to protect customers from having to pay. Accordingly, it is unfair, misleading, deceptive, and unconscionable for a CRES provider to seek to stretch the language of a pass-through provision beyond its reasonable bounds in order to recover charges that are not recoverable under the terms of the service contract.

Respectfully submitted,



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COUNSEL FOR THE OHIO ENERGY GROUP

May 9, 2014

**BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission-Ordered Investigation of : Case No 14-568-EL-COI
Marketing Practices in the Competitive Retail Electric Service :
Market :

**MOTION FOR PROTECTIVE ORDER OF THE
THE OHIO ENERGY GROUP**

Pursuant to Ohio Adm. Code §4901-1-24, the Ohio Energy Group (“OEG”) moves for a protective order keeping confidential certain information contained in OEG’s Comments in the above-captioned proceeding filed contemporaneously with this Motion. The aforementioned information involves terms and conditions of a service contract between an OEG member and a competitive retail electric service (“CRES”) provider that are subject to confidential treatment under the terms of that contract. A memorandum in support of this Motion and three unredacted copies of OEG’s Comments are attached.

Respectfully submitted,



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May 9, 2014

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**BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission-Ordered Investigation of : Case No 14-568-EL-COI
Marketing Practices in the Competitive Retail Electric Service :
Market :

**MEMORANDUM IN SUPPORT OF
THE OHIO ENERGY GROUP'S
MOTION FOR PROTECTIVE ORDER**

Ohio Adm. Code §4901-1-24(A) provides that upon motion of any party, the Public Utilities Commission of Ohio ("Commission"), its legal director, deputy legal director, or an attorney examiner may issue a protective order providing that "[a] *trade secret or other confidential research, development, commercial, or other information not be disclosed or be disclosed only in a designated way.*" The Commission can protect such information to the extent that state or federal law prohibits the release of the information and where non-disclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code.

R.C. §4905.07 provides that all facts and information in the possession of the Commission shall be public, except as provided in R.C. §149.43, and as consistent with the purposes of R.C. Title 49. Under R.C. §149.43(A)(1)(v), "public records" do not include records the release of which is prohibited by state or federal law.

R.C. §1333.61(D) defines a "trade secret" as:

[I]nformation, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses, or telephone numbers, that satisfies both of the following:

(1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.

*(2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.*¹

¹ The Supreme Court of Ohio has also adopted a six-factor test to analyze whether information is a trade secret under the statute. *State ex rel. The Plain Dealer v. Ohio Dept. of Ins.* (1997), 80 Ohio St. 3d 513, 524-25, 87 N.E.2d 661.

Ohio law prohibits the release of information meeting the definition of a trade secret. R.C. §§1331.61 and 1333.62.

Here, the information that OEG seeks to protect constitutes proprietary, trade secret information that warrants the Commission's protection. That information derives independent economic value from not being publicly available. Indeed, public disclosure of the contract information redacted by OEG would harm both the CRES provider and the OEG member involved by providing their competitors with business information about the terms and conditions of their service contract. Further, the confidential information is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. The OEG member who takes service under the contract at issue is required by the contract to protect its terms and conditions from disclosure to any third party, except in order to comply with any applicable law, regulation, or any exchange, control area or independent system operator rule, or in connection with any court or regulatory proceeding. Non-disclosure of this information will not impair the purposes of Title 49. The Commission and its Staff will still have full access to the information in order to fulfill their statutory obligations.

For the foregoing reasons, OEG respectfully requests that the Commission grant its motion for a protective order covering the redacted information in the Comments submitted by OEG in the above-captioned proceeding.

Respectfully submitted,



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May 9, 2014

CERTIFICATE OF SERVICE

I hereby certify that true copy of the foregoing was served by electronic mail (when available) or ordinary mail, unless otherwise noted, this 9TH day of May, 2014 to the following:



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Summary: Comments PUBLIC Comments of the Ohio Energy Group (OEG) and Motion for Protective Order electronically filed by Mr. David F. Boehm on behalf of Ohio Energy Group