

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

COMMENTS OF IGS ENERGY

I. INTRODUCTION

During early 2014, PJM assigned unusually high balancing and operating reserve (“BOR”) charges to load serving entities. The imposition of these charges and the possible application of “pass-through clauses” contained in fixed-price and guaranteed savings contracts of competitive electric service (“CRES”) providers prompted the Public Utilities Commission of Ohio (“Commission”) to open an investigation to determine whether “it is unfair, misleading, deceptive, or unconscionable to market contracts as fixed-rate contracts or as variable contracts with a guaranteed percent off the [standard service offer] rate when the contracts include pass-through clauses.”¹ The Commission requested comments to a series of questions to assist its investigation.

Interstate Gas Supply, Inc.’s (“IGS” or “IGS Energy”) Comments are provided below. From a high level, IGS believes that customers should be fully informed about products and services they purchase from a CRES provider. And, as a general rule, a fixed-rate contract should not change for the duration of the term of the contract.

¹ Entry at 1 (citations removed).

These principles aside, it is important to keep in mind that the Commission cannot regulate prices offered by CRES providers. Thus, the focus of this proceeding should be upon marketing practices of CRES providers and the disclosures contained in contracts and offers. Accordingly, IGS believes the Commission should not limit the type of products a CRES provider can offer, but rather suggests the following disclosure requirements be implemented by the Commission. If a CRES offers a fixed price that contains a pass-through clause, the CRES must disclose the pass through clause accordingly:

- Residential Customers: Any material offer/advertisement for a fixed-rate contract must conspicuously and clearly disclose any pass-through clause. The disclosure must disclose the nature (types of costs) of the pass-through and the events that would trigger the pass-through. Further, upon enrollment in the product, the customer must acknowledge the pass-through either through a recorded verification or through a line-item initial.
- Commercial/Industrial Customers: The contract must disclose the nature (types of costs) of the pass-through and the events that would trigger the pass-through. Upon enrollment in the product, the customer must acknowledge the pass-through either through a recorded verification or through a line-item initial.

To be clear, the disclosure requirements above should only apply to pass-through clauses and should not be applicable if a CRES provider offers a fixed price but does not reserve the right to pass through charges to the customers. Further, the Commission should distinguish between a pass-through clause and a regulatory out/force majeure clause which would allow a provider to terminate a contract, but not pass on charges to customers. Regulatory out or force majeure clause should not trigger the above disclosure requirements.

II. RESPONSES 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?**

As discussed above, it is not necessary to prohibit the inclusion of pass-through clauses in fixed-rate contracts. That being said, it is important that any material offer/advertisement to a residential customer for a fixed-rate contract must conspicuously and clearly disclose the presence and nature of a pass-through clause and the events that would trigger the pass-through. Because commercial and industrial customers are typically more sophisticated with energy procurement matters, IGS recommends that any contract with commercial/industrial customers disclose the nature of the pass-through and the events that would trigger the pass-through, with acknowledgement of such clause through a line-item initial or recorded voice verification.

- 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?**

As discussed above, yes, but only if the pass-through clause is clearly disclosed in a manner befitting the customer's class as already discussed herein.

- 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?**

Yes, a CRES should be allowed to pass on these charges, but only if the pass-through clause is clearly disclosed in a manner befitting the customer's class, as already discussed herein.

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?

The Commission should not attempt to regulate the type of costs that may be subject to a pass-through clause—rather, the focus should be on whether the type of cost was adequately disclosed to the customer. Thus, the type of events subject to the pass-through should be limited to the type of events that are clearly and conspicuously disclosed to the customer. With respect to residential customers, it would be limited to the types of costs disclosed to the customer in each material offer/advertisement. With respect to commercial/industrial customers, it would be limited to the types of costs disclosed to the customer in the contract and acknowledged by the customer, as already discussed herein.

E. Is it unfair, misleading, deceptive, or unconscionable when a CRES provider prominently advertises a fixed price, but the contract also 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)?

As discussed above, the disclosure of a pass-through clause should be clear and conspicuous. IGS would not object to requiring the pass-through clause to be included on the front page of the contract/advertisement and in the same size font as the contract/ advertisement.

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?

IGS would not object to requiring that the contract/advertisement define these terms.

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?

Potentially. To the extent that a CRES provider includes an inconspicuous pass-through clause, it may be able to offer lower prices to unwitting customers knowing that it will bear less risk, whereas other CRES providers who elect not to include pass-through clauses must build that risk into their offers. Additionally, to the extent that a CRES provider invokes a pass-through clause and it negatively impacts customers' shopping experience, it may produce a negative view of competitive providers more generally and have a tendency to discourage customers from participating in the competitive market.

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

IGS would not recommend a CRES provider place an alternate label on a contract with a pass-through clause. Rather than using a different label, any pass-through clause should be clearly and conspicuously disclosed and the inherent nature of the product should be fairly and accurately described in marketing and solicitation materials.

III. CONCLUSION

IGS appreciates the opportunity to file comments in this proceeding. Consumer protection is an important goal. But it is important to keep in mind that the Commission cannot regulate prices offered by CRES providers. Accordingly, and as discussed

herein, rather than limiting the type of products a CRES provider can offer to customers, IGS recommends that the Commission focus on the manner, clarity, and effectiveness of disclosures communicating the existence of pass-through clauses and the consequent ramifications of their implementation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing *Comments of IGS Energy* was served this 9th day of May 2014 via electronic mail upon the following:

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Summary: Comments of IGS Energy electronically filed by Mr. Joseph E. Olier on behalf of IGS Energy