

**BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO**

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

COMMENTS OF FIRSTENERGY SOLUTIONS CORP.

I. Introduction

Pursuant to the Public Utilities Commission of Ohio’s (“Commission”) Entry dated April 9, 2014 (the “Entry”), FirstEnergy Solutions Corp. (“FES”) submits these Comments on marketing practices in the retail electric market. The Commission requested written comments from interested parties to address a number of questions regarding “pass through clauses,” provisions which are in contracts for various competitive retail electric service (“CRES”) products, including fixed price products. In a pass through clause, the parties agree that the CRES provider may pass through to the customer the costs imposed on the CRES by unforeseen events, such as the action of a government entity, regional transmission organization (“RTO”) or other entity. The Entry poses questions suggesting that the inclusion or enforcement of a pass-through clause in a contract for a fixed price product may be “unfair, misleading, deceptive, or unconscionable.”

As explained below, the use of pass through clauses in fixed price and other CRES products is a standard retail electric industry practice and is in no way unfair, misleading, deceptive or unconscionable. Pass through clauses have been openly used in CRES provider contracts in Ohio across all customer classes for several years, in accordance with Ohio statutes and the Commission’s regulations and orders. Pass through clauses are a necessary measure for mitigating risk associated with fixed price products and protecting a CRES provider’s business against an unforeseen contingency. While electric distribution utilities (“EDUs”) often obtain Commission

approval to pass along unexpected, uncontrollable costs to customers, a CRES provider must mitigate its exposure through its contracts. Whether to invoke the clause in response to an unforeseen event is a business decision a CRES provider does not take lightly.

The clauses benefit customers, by enabling CRES providers to offer customers lower prices and maximize customer savings, and the clauses enable more CRES providers to enter into Ohio's retail electric market and offer products that appeal to customers. With the pass-through clause, customers purchasing fixed price products pay lower prices while an increase in charges to the customer as the result of a pass through event is unlikely. If a pass through event occurs and the CRES provider elects to pass through the costs, the CRES provider will pass through the actual costs, with no mark-up. Without the pass through clause, however, the CRES provider's uncertainty will result in a definite increase in the fixed commodity price, whether or not a pass through event actually occurs. Further, the price increase will reflect the CRES provider's evaluation and pricing of the risk, not the actual cost of any actual pass through event.

FES respectfully urges the Commission to focus on increasing customer education, rather than attempting to interpret contracts, prescribe their terms, or craft product labels. Prescribing contract terms or product labels will increase generation pricing, eliminate some popular products from Ohio's electric market, confuse customers and diminish interest in competitive market products. An emphasis on customer education can ensure customers understand retail contract terms, including pass through clauses, without regulatory control of registered CRES providers' contract terms, marketing practices and business plans. This investigation provides the Commission with an excellent opportunity to increase customers' understanding of the existence, meaning and purpose of a pass through clause and other retail electric contract terms, as well as the impact of uncontrollable events in wholesale power markets, and assist customers in making

informed shopping decisions. Such enhanced customer education will ensure that customers' attention is immediately drawn to the necessary information regarding a fixed price product, including the existence and scope of a pass through clause.

For the reasons explained further below, FES respectfully recommends that the Commission address any concerns with future CRES provider contract terms and marketing activities by focusing on customer education regarding the inclusion of pass through clauses and other contract terms, why they are included in the contract, and what they mean for the customer. Further, to the extent the Commission identifies any desired regulatory changes, any changes to Commission rules, orders, or Ohio law must apply only prospectively, to new customers or future renewals of existing customers, to avoid harm to Ohio's developing competitive retail electric market.

II. Comments

A. A Pass Through Clause Provides Value to Customers and Important Protection Against Contingencies

CRES providers face innumerable unforeseeable contingencies that could affect pricing over the period of contract performance. These contingencies include market wide risks that are outside the control of the contracting parties, such as potential action by state regulators or actions at the FERC or PJM that affect wholesale markets. While a CRES provider can hedge commodity risk, it cannot hedge risks that it cannot predict. The costs of these contingencies are unforeseeable and essentially unbounded. Many CRES providers are unable to assume the regulatory risks that unforeseen costs will be imposed or shifted to CRES providers by RTO, regulatory agency, legislative or court action during the term of a contract, particularly for longer term offers. Contrary to what some commenters may suggest, a higher risk premium is no substitute for the

mitigation a pass through clause ensures, since there is no reliable way to hedge against all possible regulatory risks. If not properly mitigated, such risks could endanger a CRES provider's ability to continue serving its customers under contract. For this reason, a CRES provider may exclude the costs of such contingencies from the fixed commodity price, and instead make clear in the agreement that such costs will be passed through at no more than actual cost. The pass-through clause is an important protection that enables CRES providers to offer products at a lower price while mitigating their risk.

It is important to recognize that a pass through clause is included as a contingency. The commodity price never changes. Further, not all pass-through clauses are drafted so that they would automatically pass through the costs of unforeseen events and regulatory changes to customers. Rather, many pass through clauses require the CRES provider to make a business decision about a pass-through event, and the CRES provider may choose not to pass through the cost of the pass through event to customers. Whether to enforce a pass through clause is a decision a CRES provider does not take lightly.

A pass through clause not only protects a CRES providers' business but ensures valuable savings to customers throughout the term of a contract. The clause allows a supplier to offer lower fixed prices by not including the cost of the excluded risk in the price, and to charge only the direct costs of the contingency with no mark-up on the rare occasion when an event occurs. Without a pass through clause, CRES providers would be compelled to include a risk premium large enough to protect themselves from remote contingencies, the nature and magnitude of which are impossible to predict. If the ability to use this sort of contingency clause in a fixed price CRES contract is eliminated, customers will be subject to higher prices. Pass through clauses provide beneficial savings to consumers in spite of the inherent risk of unforeseeable events and costs.

B. The Competitive Retail Electric Industry in Ohio Has Openly Used Pass Through Clauses for Years to Protect Against Unpredictable Risks

The inclusion of pass through clauses in contracts for fixed price products is a common retail electric industry practice, and has been for years. Attached as **Appendix A** are examples of pass through clauses found in various Ohio CRES providers' fixed price offers. While some may suggest the inclusion of pass through clauses in fixed price and other contracts recently came to light, FES respectfully submits that these clauses have been openly included in contracts by Ohio's registered CRES providers for years and have not been concealed. CRES providers have furnished terms and conditions with pass through clauses to the Commission, e.g., in connection with the submittal of CRES provider marketing materials; in information about active offers provided to the Commission's director of service monitoring and enforcement department pursuant to OAC 4901:1-21-03(D); and in materials filed in connection with opt-out governmental aggregation programs which are posted on-line at each aggregation community's certification docket.

Pass through clauses are also commonly used in fixed price agreements in other industries to mitigate unforeseeable risks. This is illustrated by the Federal Acquisition Regulations ("FAR"), which govern purchasing contracts entered into by federal government agencies. The FARs recognize that fixed price contracts will need to exclude contingencies from the fixed price portion of the agreement. FAR § 16.203-1.

C. The Use of Pass Through Clauses Is Consistent With Ohio Law and the Commission's Rules and Orders

CRES providers have used pass through clauses to protect against unforeseen contingencies in reliance on Ohio law. The Commission's rules recognize that CRES providers

may need to exclude or condition their service if certain contingencies arise. To that end, OAC 4901:1-21-05(A)(1)(d) and (A)(2)(d) require CRES providers to provide customers with “[a] statement of any contract contingencies or conditions precedent.” Similarly, OAC 4901:1-21-12 (B)(8) requires CRES Providers to include in small commercial or residential contracts “[t]he terms and conditions of service, including any restrictions, limitations, contingencies, or conditions precedent associated with the service or product offered.” These regulations have remained intact through rule reviews, including recent modifications to the CRES rules in Case No. 12-1924-EL-ORD, as well as throughout the Commission’s extensive investigation of the state of Ohio’s retail electric market in Case No. 12-3151-EL-COI.

III. Responses to Questions Posed By the Entry

(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?

No. The inclusion of a pass-through clause in a product labeled as “fixed-rate” is not misleading. As explained above, pass through clauses are a common retail electric industry practice and are used in other industries as well. They protect the vendor, while preventing customers from being charged significantly higher fixed prices as a result of rare, unforeseeable events. In light of the prevalence of these clauses, and the fact that Ohio registered CRES providers have used them openly for years, their use in products advertised as “fixed-rate” cannot fairly be called misleading.

Further, the Commission should not attempt to prohibit the use of these or any other clauses in contracts for competitive retail electric service, or create any other barriers to a competitive

retail electric market. If the Commission were to prohibit labelling these products as “fixed price,” effectively eliminating pass through clauses in fixed price contracts, it would unnecessarily interfere with the freedom of contract between electric consumers and CRES providers. Furthermore, if customers in the CRES market come to see these provisions as problematic they will choose products that do not include such provisions the next time they shop for electric supply. If pass through clauses are disfavored by buyers, market forces will see to it that sellers stop including such provisions in customer contracts.

(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?

Yes, a CRES provider’s pass-through clause in a fixed-rate contract may encompass an RTO charge. Indeed, the clause may encompass whatever contingency events fall within the clause’s language. A clause accounting for such contingencies is consistent with Commission regulations that recognize that CRES provider agreements may include contingency provisions.¹ Prohibiting such clauses would alter CRES provider pricing and may eliminate certain products, and therefore exceeds the Commission’s authority, which does not extend to regulation of CRES provider prices.² Further, any attempt to prescribe how CRES providers price their products, or protect against any contingencies, runs counter to the Commission’s overarching objectives of encouraging more CRES providers and competitive generation products to enter Ohio’s retail electric market and encouraging product innovation. There is nothing unfair, misleading, deceptive, or unconscionable about a competitive business entering into contracts with its customers that include a pass through clause that extends to charges imposed by an RTO.

¹ See e.g. OAC 4901:1-21-05(A)(1)(d) & (A)(2)(d), and OAC 4901:1-21-12 (B)(8).

² ORC § 4928.05.

(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, if the contract between the CRES provider and customer allows it. If increased costs imposed by an RTO and billed to CRES providers are included among “pass through events” defined in a fixed price contract, such increased costs may be billed to customers in addition to their fixed price charges. Enforcing the terms of a contract is not unfair, misleading, deceptive or unconscionable.

(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?

Any event that qualifies as a “pass through event” as defined in the agreement allows a CRES provider to invoke the agreement’s pass through clause. Without a contingency provision, the customer’s fixed price would likely have been higher. It is important, as a matter of law³ and policy, for the Commission to refrain from attempting to alter the application of a pass through clause or any other provision in a competitive contract.

(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)?

An offer of competitive retail electric service is usually accompanied by the terms and conditions of service. The terms and conditions of service include the essential commercial terms

³ ORC § 4928.05.

of the offer. For a retail electric contract the price and contract length are typically presented up front. The terms and conditions may provide further detail about what is covered by the “fixed price” and whether there are any exclusions or contingencies that the “fixed rate” will not cover. In FES’s case, small commercial and residential terms and conditions – which are presented on a single page – disclose the exclusion of costs related to contingent “Pass-Through Events” in the “Pricing” section itself, in a font size equal to all other terms of the agreement. FES does not hide pass through provisions, early termination fees, taxes – or any term of service, for that matter. Every FES customer receives a copy of the contract applicable to the offer they accepted, and are always free to contact our call centers to ask questions. As long as these details are disclosed in the terms and conditions, there is nothing unfair, misleading, deceptive, or unconscionable about this practice.

(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?

FES recommends that the Commission address any concerns with pass through clauses going forward by focusing on consumer education. The Commission could develop enhanced customer education focused on common industry terms found in pass through clauses and other retail electric contract terms; explaining variable prices and how variable charges may be determined; explaining the influence of events in wholesale power markets on retail charges; and providing definitions of acronyms such as “RTO,” “NERC” and “PJM.” Enhanced customer education would provide an excellent vehicle for the Commission and other stakeholders to re-educate customers about how to read their contracts, understand the terms of their contracts and make fully informed shopping decisions.

(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?

No. As explained above, the use of pass through clauses is common in the retail electric industry. Every CRES provider has the ability to include such a clause in its contracts, just as every CRES provider may choose to offer variable priced products or any other type of competitive product. With the flexibility for each CRES provider to develop its own competitive contracts, the Ohio retail electric market has developed robustly and provided consumers with hundreds of millions of dollars in savings. As explained above, without the ability to protect themselves from contingencies in fixed price contracts, suppliers are likely to charge customers a much higher risk premium in fixed prices, even though a contingency may never occur. Much of the savings that competition has brought Ohio consumers will disappear.

Without the ability to pass through the costs of unpredictable and unforeseeable events, CRES suppliers will also be more likely to offer customers more variable products, where the customer directly bears the risk of all contingencies and is exposed to market volatility. If the Commission took steps to try to limit pass through clauses in residential or small commercial contracts, it would *harm* the CRES market and needlessly interfere where market forces would otherwise operate effectively. The Commission should allow market forces to determine which products CRES providers offer and under what contract terms. If consumers prefer agreements without any contingencies, they will choose contracts without contingency provisions. This will in turn encourage CRES providers to offer higher priced products without pass through clauses in order to remain competitive. Accordingly, FES respectfully urges the Commission to allow buyers

and sellers in the market to make decisions regarding their preferred contract terms, and instead focus on consumer re-education to address any concerns.

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

No alternative label should be used. Prescriptive rules for labeling products incorrectly presume customers cannot be educated about pass through clauses. FES respectfully submits that the Commission should focus on customer education, rather than crafting new, potentially confusing product labels that will diminish customer interest in competitive electric offers. Such rules will significantly reduce the number of fixed price offers to Ohio customers, and likely eliminate long-term fixed price offers in Ohio because customers would be confused and unreceptive to the perceived "new" product offering. An attempt to craft an acceptable label to fit every potential CRES product is unworkable in a market where innovation is encouraged, is bad policy, and is unnecessary to address any concerns with customers' awareness of pass through clauses in retail electric contracts. Prescribing the labels CRES providers use for their generation prices will harm competition and competitors by essentially eliminating a common retail electric industry practice in Ohio, raising prices, and requiring CRES providers to assume unknown regulatory risks if they are to continue offering popular fixed price products.

Instead, any concerns are best addressed through the use of customer education that explains pass through clauses and other contract terms, explains why they are included in the contract (e.g., the risk the pass through clause is intended to address and its value to customers), and what this means for the customer. Rather than approaching the issue by restricting CRES providers' ability to market their products effectively by imposing overly restrictive labels and

descriptions which will only confuse and discourage customers from buying the product, the better approach is one that educates customers and ensures they are making truly informed decisions.

IV. Conclusion

For the reasons stated above, there is nothing unfair, misleading, deceptive, or unconscionable about the presence of pass through clauses in CRES provider contracts. Such clauses are contemplated in the Commission rules, are common and openly used in the industry, and provide important benefits to both customers and suppliers.

Respectfully submitted,

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ATTACHMENT

A

OH CRES Provider Residential Terms & Conditions: Pass-through Examples

Supplier A

2. Basic Service Prices....Also, [Supplier A] will charge you for any and all fees, costs, and obligations for transmission services imposed by a Regional Transmission Organization (“RTO”), such as PJM Interconnection, LLC, or an Independent System Operator (ISO), such as the Midwest Independent Transmission System Operator (MISO) or any successor organizations (collectively, referred to as the RTO), that are not otherwise reimbursed to [Supplier A], regardless of whether such charges are greater than, less than, or equal to the charges the Customer currently pays for these services (“RTO/ Transmission and Ancillary Services Charges”). [Supplier A] will pass through to you any RTO/Transmission and Ancillary Services Charges, which may be variable, related to [Supplier A]’s providing electricity to you and any additional or increased fees or charges that are beyond [Supplier A]’s reasonable control. That could include, but not be limited to, fees for switching, disconnecting, reconnecting or maintaining electric service or equipment, changes to capacity related charges, transmission or transmission-related charges, or changes to retail electric customer access programs, that are imposed by law, rule, regulation or tariff, or PUCO rule or order. These charges or fees will be passed through to you and added to your price.

Supplier B

Change in Pricing and Other Terms

In addition to [Supplier B]’s right to revise the price, terms and conditions of this Contract as provided in the “**Renewal**” section above, this Contract may be revised at any time by Constellation Energy upon the occurrence of any event beyond its reasonable control that materially increases the obligations of [Supplier B] or the cost of performing such obligations under this Contract. If we request such a change, [Supplier B] will provide you notice of the changed prices and/or terms and conditions and you will have an opportunity to terminate this Contract without any further obligation by notifying us in writing within 30 days after the date of the notice of the new prices and/or terms and conditions, in which case your retail electric service will terminate effective as of the next meter read date after expiration of the required notice period. You will remain responsible for any unpaid balance as of the termination date but we will not assess a termination payment.

Supplier C

11. Force Majeure (Uncontrollable Forces)....In addition, you may be required to pay any additional or increased fees or charges that are generally beyond [Supplier C]’s reasonable control including, but not limited to, fees for switching, disconnecting, reconnecting or maintaining electric service or equipment, or transmission or transmission-related charges, that

are imposed by law, rule, regulation or tariff, or Commission rule or order. These charges or fees will be passed through to you and added to your price.

Supplier D

16. Miscellaneous

e. *Change in Law.* The Agreement is subject to any future legislation, orders, rules, regulations or Utility tariff or policy changes. If there is a change in any law, rule or pricing structure, including but not limited to a change in Capacity charges, that results in Company from being prevented, prohibited or frustrated from carrying out the terms of the Agreement, Company may terminate this Agreement or change your Rate.

Supplier E

3. Price:

a. Rate: For each billing cycle of Initial Term, Buyer shall pay the Fixed Rate per kWh electronically on Seller's website at the time of electronic enrollment or verbally during the telephonic enrollment process, multiplied by the billing cycle usage for the Accounts. Both Parties recognize that Seller's charges include tariff charges that are set forth by the Utility, transmission provider, regional transmission organization or independent system operator ("RTO/ISO"), the Federal Energy Regulatory Commission, PUCO, and/or any other state or governmental agency having jurisdiction (each an "Authorized Entity"). Seller may pass through to Buyer, without markup as a separate line item or as an updated Fixed Rate, (a) any increase in such tariff charges or (b) other increase in Seller's cost to provide electricity that result from an addition to, a change in, or change in interpretation by an Authorized Entity of, or change in administration by an Authorized Entity of, tariffs, operating protocols, laws, regulations, or other requirements of an Authorized Entity, as applicable.

Supplier F

Change in Law or Regulation: In the event that there is a change (including changes in interpretation) in law, regulation, rule, ordinance, order, directive, filed tariff, decision, writ, judgment, or decree by a governmental authority, regulatory body or the regional Independent System Operator ("ISO"), or in the event any of the foregoing which is existing as of the date of this Agreement is implemented or differently administered, including, without limitation, changes in tariffs (including, but not limited to transmission or capacity costs), protocols market rules, load profiles, and such change results in [Supplier F] Incurring additional costs and expenses in providing the services contemplated herein, these additional costs and expenses may, at our option, be assessed to you in your monthly bills for service as additional pass-through charges, to the extent permitted by applicable law or regulatory rules.

Supplier G

Actions of Governmental and Regulated Entities – If action is taken by the Utility, applicable regional transmission organization, transmission provider, or any federal, state or local governmental authorities which materially changes the amounts charged by such entities to us or charged by such entities to our wholesale supplier and charged to us, or which materially changes the manner in which we provide Service to you, we may, in our sole discretion, elect to adjust the price for Service under this Agreement to account for any such cost increases or other changes.

Supplier H

Renewal Notice; Notification of Changes:...[Supplier H] reserves the right, with thirty (30) days' notice, to amend this Agreement to adjust its service to accommodate any change in regulations, law, tariff, other change in procedure required by any third party that may affect [Supplier H]'s ability to continue to serve you under this Agreement, or to make other changes as [Supplier H] sees fit. To the extent [Supplier H] should amend for any reason other than a change in regulations, law, tariff or other change in procedure required by any third party that may affect [Supplier H]'s ability to continue to serve you under this Agreement, you will have the right to cancel this Agreement by providing written notice to [Supplier H] within thirty (30) days of the date of the notice.

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

5/9/2014 4:24:32 PM

in

Case No(s). 14-0568-EL-COI

Summary: Comments of FirstEnergy Solutions Corp. electronically filed by Mr. Jacob A McDermott on behalf of FirstEnergy Solutions Corp.