

**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 THE OMA ENERGY GROUP

I. INTRODUCTION

Based upon information received in March 2014, the Public Utilities Commission of Ohio (Commission) opened an investigation on April 9, 2014 in the above-captioned docket to determine whether it is unfair, misleading, deceptive, or unconscionable for competitive retail electric service (CRES) suppliers to market contracts as fixed-rate contracts or variable contracts with a guaranteed percent off of the SSO rate when the contracts include pass-through clauses. Pursuant to its April 9, 2014 Entry, the Commission posed eight questions to interested parties, and directed such parties to file written comments responding to those questions by May 9, 2014. As an interested party, the Ohio Manufacturers' Association Energy Group (OMAEG) hereby submits its comments on the questions posed by the Commission.

II. COMMENTS

OMAEG's comments closely follow the questions posed by the Commission in its April 9, 2014 Entry and, as such, will be addressed in order herein.

- 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?**

Section 4928.02(I), Revised Code, provides that it is the policy of this state to “[e]nsure retail electric service consumers protection against unreasonable sales practices[.]” Rule 4901:1-21-02(A)(2)(c), Ohio Administrative Code (O.A.C.), further provides that the rules in Chapter 21 (CRES rules) are intended to “[p]rotect consumers against deceptive, unfair and unconscionable acts and practices in the marketing, solicitation, and sale of CRES and in the administration of any contract for that service.” Thus, the question posed by the Commission relates directly to the interpretation of statutory provisions and rules relating to CRES and compliance with those statutes and regulations by CRES suppliers.

In response to the Commission’s inquiry into whether it is 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, OMAEG submits that the answer to this question lies squarely within the definition of the word “fixed.” As applied to the term rate, “fixed” means “rendered stable or permanent; not fluctuating or varying; definite.”¹ Indeed, when seeking a fixed-rate contract, customers are seeking rates that are stable, do not vary or fluctuate, and are definite. The essence of a fixed-rate contract is just that; the rate detailed therein is fixed. It does not vary based upon the underlying costs used to formulate the fixed rate. Many customers seek surety when securing their rates, realizing that, despite the less significant charges that may be associated with a varying rate, a fixed rate contract will provide them with stability and the ability to predict energy costs. The price associated with a fixed-rate contract is worth more to

¹ See <http://dictionary.reference.com/browse/fixed?s=t>.

those customers than obtaining energy at lower costs, because their energy costs will not be riddled by volatility.

The Pennsylvania Public Utility Commission (PaPUC) recently investigated the misleading effect of “fixed-price” offers that include pass-through clauses and offered guidance to CRES suppliers as to the appropriate use of the fixed-price label in CRES supplier contracts.²

The PaPUC concluded:

Based on all of the above, we are convinced that our original proposal from the Tentative Order—that a “fixed price” product must not change in price during the term of the agreement—is the appropriate policy. As PPL EnergyPlus noted, customers are best served by labels and terms that are precise, straightforward, transparent and in plain language. Given this, “fixed means fixed” appears to be the outcome that most faithfully meets these expectations.³

Similarly, Rule 4901:1-21-11, O.A.C., governing CRES contract administration, provides in paragraph (A) that CRES suppliers “shall arrange for the provision of competitive retail electric service by contracting with their customers. In the administration of such contracts, CRES suppliers are prohibited from engaging in unfair, deceptive, misleading, and unconscionable acts and practices.” Further, Rule 4901:1-21-12(A)(7), O.A.C., provides that all CRES supplier customer contracts must include an itemized list and explanation of all prices and fees associated with the service such that

(a) For fixed-rate offers, such information shall, at minimum, include the cost per kilowatt hour for generation service; the amount of any other recurring or nonrecurring CRES provider charges, and a statement that the customer will incur additional service and delivery charges from the electric utility,

(b) For variable-rate offers, such information shall, at minimum, include: a clear and understandable explanation of the factors that will cause the price to vary, including any related indices, and how often the price can change; for discounted rates, an explanation of the discount and the basis on which any discount is

² See *Guidelines for Use of Fixed Price Labels for Products with a Pass-Through Clause*, Pennsylvania Public Utility Commission Docket No. M-2013-2362961, Final Order (November 14, 2013).

³ *Id.* at 24.

calculated; the amount of any other recurring or nonrecurring CRES provider charges; and a statement that the customer will incur additional service and delivery charges from the electric utility.⁴

Pursuant to the language of this rule, OMAEG submits that pass-throughs are not permissible contents of fixed-rate contracts. Given these provisions, and the aims of countless customers when deciding to secure a fixed-rate contract, it is, in fact, unfair, misleading, deceptive, and unconscionable to label and/or market a contract as a fixed-rate contract when it contains a pass-through clause for various costs or charges or an increase in such costs or charges. If a contract is labeled or marketed as a “fixed-rate” contract, the rate contained therein and the underlying components must not vary.

Pass-through clauses have no place in fixed-rate contracts, as they result directly in a variance of the rate assessed to customers. This is true no matter how sophisticated the customer. Accordingly, labeling a contract containing pass-through clauses for a variety of costs as a fixed-rate contract should be prohibited in all CRES contracts. Any variances to pure fixed-price contracts must be clearly disclosed in the terms and conditions of the contract and reflected in the contract label.

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?

Given that the presence of a pass-through clause in a fixed-rate contract is extremely misleading and confusing to all classes of customers as explained above, fixed-rate contracts should contain no pass-through clauses.

⁴ See Rule 4901:1-21-12(A)(7)(a) and (b), O.A.C.

Nonetheless, in order to obtain a contract with a stable, “fixed” price in the industry at a reasonable price, OMAEG recognizes the need for CRES suppliers to have some protection against changes to existing law or tariffs that create or impose new costs or additional requirements on the CRES suppliers that the CRES suppliers have no control over, and thus, cannot hedge against. If there is truly a case where a regulatory agency or the regional transmission organization (RTO) enacts or is authorized to create and impose a new charge or additional requirement on CRES suppliers, that cost should be allowed to be passed on to customers after proper disclosure and notice. Only in this very limited circumstance should an exception exist to the “fixed-price” construct. Nevertheless, proper notice needs to be provided to the customer of the existence of such pass-through clause contained within its “fixed-price” contract.

If CRES suppliers wish to include a pass-through clause in the customer contract for a new RTO charge or additional requirement imposed upon the CRES supplier after the contract was entered into, the presence of that pass-through clause and the type of charge that the contract intends to pass through to customers under certain specified circumstances must be disclosed to customers and should be evident in the title of the contract. The CRES supplier should be prohibited from labeling, marketing, or otherwise referencing the contract as an unequivocal fixed-rate contract. The mere presence of a pass-through clause in the terms and conditions section of a contract evidences that the rate agreed to therein could be, in actuality, a variable rate.

If the CRES supplier desires to pass through all or any RTO charges (those beyond a new charge or additional requirement), or increases to existing RTO charges or requirements, such contract is not a fixed-rate contract and should not be deemed or named as such. The ability of

the CRES supplier to pass RTO charges or increases to RTO charges through to customers should also be explained, in plain English, and set forth clearly and conspicuously as a term in the contract. For purposes of CRES supplier contracts, “clear and conspicuous” notice of the presence of a term in the contract should mean notice that would be apparent to the reasonable consumer. The reasonable consumer standard, further, should be applied equally across all types of consumers. For instance, embedding a pass-through clause for RTO charges in a commercial contract should not be permissible based upon the misplaced theory that commercial customers, for instance, are more sophisticated than residential customers with regard to their electric service contracts. For consumer protection purposes, all CRES supplier contracts must be easily understandable and transparent. The presence of pass-through clauses, such as those that may presently be included in alleged “fixed-rate” contracts, is very confusing to customers, lacks substantial transparency, and should be prohibited.

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?

No, increased costs imposed by an RTO and billed to CRES suppliers should not be categorized as a pass-through event that may be billed to customers in addition to the basic service price established and set forth in the fixed-price CRES contracts. Such practice would, in fact, be unfair, misleading, deceptive, and unconscionable.

Including additional charges for increased existing costs or for costs that were higher than otherwise anticipated by the CRES supplier when a contract is characterized as a fixed-rate contract should be prohibited, as the contract is not a fixed-rate contract. Instead, it is a variable

rate contract. These increased costs cannot be permitted to be passed through under contracts labeled, marketed, or otherwise characterized as fixed-rate contracts. A fixed-price contract may not include a pass through clause that allows the fixed price to be increased for increases in costs for an existing requirement or obligation of the CRES supplier billed by the RTO or for costs for existing services that happen to be higher than what was otherwise anticipated by the CRES supplier when reconciled and billed by the RTO. Just as the customer takes the risk that the underlying costs may decrease in a fixed-price contract, the CRES supplier takes the risk that the underlying costs may increase. These risks are inherent in the context of a fixed-price contract and cannot be unilaterally modified or creatively interpreted by the CRES supplier.

To the extent a CRES supplier wishes to make an otherwise fixed-rate contract available to customers with the possibility of a pass-through of certain RTO costs to customers, the contract must not be labeled or advertised as an unqualified fixed-rate contract. Additionally, the possibility of the pass-through event(s) and an explanation of what may constitute such an event(s) must appear clearly and conspicuously in the main text (not a footnote or other boilerplate language) of the contract, and be labeled as a variable rate contract.

The PaPUC is currently assessing the question presented above in the context of a petition filed last month contesting certain RTO charges that a CRES supplier intends to pass through to customers.⁵ In that matter, certain customers filed a petition for declaratory relief requesting a ruling on “whether language that permits [FirstEnergy Solutions (FES)] to increase the bills to residential customers because PJM billed FES more for generation-related costs than

⁵ See *Utility Workers Union of America, et al. v. FirstEnergy Solutions Corp.*, Pennsylvania Public Utility Commission Docket No. P-2014-2415108, Petition for Declaratory Order (April 8, 2014).

FES might have expected.”⁶ Specifically, the petitioners requested from the PaPUC a legal ruling concerning the “meaning of the provision in the ‘fixed price’ contract” which states that FirstEnergy Solutions (FES) “can increase its bills to residential customers if PJM ‘imposes on FES new or additional charges or requirements.’”⁷ In support of their petition for a declaratory order, the petitioners argued that obtaining a ruling from the PaPUC on the meaning of the relevant provision in the applicable FES “fixed price” contract “may obviate the need for numerous parties to file complaints with the Commission or seek other legal remedies.”⁸

The scenario explored in *Utility Workers of America, et al. v. FirstEnergy Solutions Corp.* is the same scenario explored in this investigation: whether certain costs associated with an alleged pass-through event may be properly charged to customers with fixed-rate contracts. Although the language allegedly permitting the CRES supplier to pass through certain charges to customers may vary in different contract scenarios, the underlying question explores the same theme and offers a constructive example to the Commission’s pending questions and investigation.

The petitioners in *Utility Workers of America, et al. v. FirstEnergy Solutions* contend that under the terms of the “fixed-price” contracts at issue therein, FES may not permissibly increase customers’ bills in order to recover “extremely high ancillary costs” billed to FES by PJM Interconnection (PJM).⁹ The petitioners argue that PJM has not imposed on FES new or additional charges or requirements such that the charges at issue may be passed through to customers under the terms of the customers’ contracts with FES.¹⁰ The petitioners contend that

⁶ See *Utility Workers Union of America, et al. v. FirstEnergy Solutions Corp.*, Pennsylvania Public Utility Commission Docket No. P-2014-2415108, Petition for Declaratory Order at ¶14 (April 8, 2014).

⁷ Id. at ¶16.

⁸ Id. at ¶15.

⁹ Id. at ¶¶12, 14.

¹⁰ Id. at ¶¶17-18.

the charges that FES intends to assess to customers are charges associated with synchronized reserve service, and that FES is not required to purchase such service from PJM; it is free to procure spinning reserve elsewhere.¹¹ More specifically, the petitioners allege and state the following:

PJM has for many years had a requirement for load-serving entities to provide spinning reserve, which is an essential service to maintain the stability of the grid. FES apparently made a business decision to not own or contract for enough generation to meet its reserve obligation. Consequently, FES ended up purchasing spinning reserves from PJM's Synchronized Reserve Market. This was not a new or additional charge "imposed" on FES by PJM. Indeed, the cost was not "imposed" at all: FES made a business decision to purchase the required reserves from PJM rather than providing those reserves itself or through a contract with a private party. That is, the cost was borne by FES due to its failure to meet its existing obligation through owned or contracted-for resources. Nothing new or different was "imposed" on FES by PJM or anyone else.¹²

The petitioners' argument that no new or additional costs or requirements were imposed by PJM such that the CRES supplier could pass through the costs to customers belies an important concept that should be taken into consideration as the Commission decides whether CRES suppliers can permissibly pass through RTO charges to customers with fixed-rate contracts: to the extent that the charges assessed to the CRES supplier are not new charges or additional requirements imposed upon the CRES supplier by an RTO, they should not be passed through to customers. Mere increases in costs for the same services, higher than anticipated costs, or costs that significantly exceed historical levels are neither new charges nor additional requirements, and, as such, should not be categorized as a pass-through event that may be billed to customers under a fixed-price contract (even assuming that pass-through clauses are permitted in fixed-price contracts, as discussed herein). Again, this is true no matter how sophisticated the customer.

¹¹ Id. at ¶19.

¹² Id.

- 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?**

As explained above, increased existing costs, higher than anticipated costs, or abnormally high costs billed to CRES suppliers may not, in good faith, be categorized as pass-through events to be billed to customers with fixed-price contracts. To the extent that a CRES supplier intends to assess increases in any charges to customers on account of certain pass-through events, those charges should be delineated in the supply contract. Further, the supply contract may not permissibly be labeled, marketed, or otherwise characterized as a fixed-rate contract because the rate provided for in the contract may vary. Instead, the contract is a variable rate contract and should be designated as such.

As explained above, the only event that should permissibly invoke the application of a pass-through clause contained in a fixed-price contract (if such are allowed) is a change to existing law or an RTO tariff that creates or imposes new costs or additional requirements on the CRES supplier that the CRES supplier has no control over. If a regulatory agency or the RTO enacts or is authorized to create and impose a new charge or additional requirement on CRES suppliers, that cost should be allowed to be passed on to customers after proper disclosure and notice. Only in this very limited circumstance should an exception exist to the “fixed-price” contract construct. Nevertheless, proper disclosure and notice needs to be provided to the customer of the existence of such pass-through clause contained within its “fixed-rate” contract. Such disclosure must be clearly made in the terms and conditions of the contract, as well as in the contract label.

- 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 so far down in the fine print or on a second page of the terms and conditions)?**

Inherently, yes, advertising a fixed price while including a pass-through clause for the assessment of certain other charges not included in the fixed-rate or increases in charges embedded in the fixed-rate is misleading, deceptive, unconscionable, and unfair to consumers.

In Pennsylvania, the PaPUC also answered this question affirmatively. In its investigation regarding the misleading effect of “fixed-price” offers that include pass-through clauses, the PaPUC stated:

We are primarily concerned that these offers can be misleading, especially when the [CRES supplier] prominently advertises a fixed price but places the pass-through clause far down in the fine print in the disclosure statement. These provisions, based on examples examined by [the PaPUC’s Office of Competitive Market Oversight], are not always presented along with the pricing information in the disclosure statement. While consumers are expected and encouraged to carefully review the disclosure statements, presenting a product as having a fixed price that in fact can vary for any number of reasons could be seen as misleading.¹³

As noted by the PaPUC, burying such charges or potential increases in existing charges through a pass-through mechanism in the fine print of a contract, as opposed to the body of a contract, is egregious. It stands to reason, therefore, that including a pass-through clause in a contract that prominently advertises a fixed price but significantly less prominently contains a pass-through clause is also misleading, deceptive, unconscionable, and unfair to consumers.

- 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**

¹³ See *Guidelines for Use of Fixed Price Labels for Products with a Pass-Through Clause*, Pennsylvania Public Utility Commission Docket No. M-2013-2362961, Final Order at 5 (November 14, 2013).

definitions be required in residential and small commercial contracts, or only residential contracts?

For the sake of transparency and consumer protections, acronyms, including but not limited to abbreviations such as RTO, NERC, and PJM, should always be clearly defined in all CRES contracts. The level of understanding of the terms and concepts appearing in CRES contracts varies widely within and across customer classes. As noted by the PaPUC when considering whether such terms should be defined in customer contracts, “even if a consumer read the entire disclosure, most are not so well-versed in wholesale electric markets that they understand what is meant by terms such as ‘RTO, NERC, PJM,’ etc., and just what kind or magnitude of pricing changes could result” from the imposition of pass-through charges.¹⁴ Defining these terms in customer supply contracts promotes transparency and alleviates significant customer confusion regarding the charges that are or may be included in customer bills and the charges that are or may be included in the customer’s fixed-price or variable contract. The creation of transparency, minimization of customer confusion, and implementation of sound policy far outweigh the de minimis effect on the requirement of CRES suppliers to define such 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?

Yes, permitting pass-through clauses in residential and small commercial CRES contracts labeled as “fixed-rate” contracts may have and, in some cases, has arguably already adversely impacted the CRES market in Ohio. The use of misleading marketing techniques, such as including pass-through clauses in purportedly fixed-rate contracts, creates an atmosphere of

¹⁴ Id.

consumer distrust of and frustration with CRES suppliers. In order for Ohio's electric markets to run smoothly, a certain level of trust and cooperation must be maintained between suppliers and consumers. A breakdown in trust and cooperation between consumers and suppliers may result in consumers seeking assistance from the Commission and/or requesting additional Commission oversight of CRES markets, which may cause a shift from the deregulation practices and principles driving Ohio markets in favor of greater administrative regulation and oversight.

Additionally, the relief sought in Pennsylvania concerning the meaning of a pass-through provision embedded in a fixed-price contract is not a situation isolated to the state of Pennsylvania. Ohio customers have seen similar customer notices from a CRES supplier invoking an alleged pass-through event for an increase in costs for the same services under a fixed-price contract. The CRES supplier alleges that certain costs assessed to it significantly exceeded historical levels, and thus, are properly classified as a pass through event. Ohio customers have received notices informing them that such pass-through events have occurred and additional charges for increased costs will be assessed to customers via a separate line item on customers' bills. As explained herein, mere increases in costs for existing services under the contract or abnormally high costs for those same services billed by PJM through PJM's reconciliation process and normal course of business are neither new nor additional charges or requirements. Accordingly, the inclusion by CRES suppliers of such pass-through clauses in fixed-price contracts has already adversely impacted customers and a dispute has risen as to the application of the pass-through clause, as well as the appropriateness of the assessment and collection of such charge. The disputed charge being assessed to customers in excess of their fixed price will adversely affect customers, as well as the CRES market.

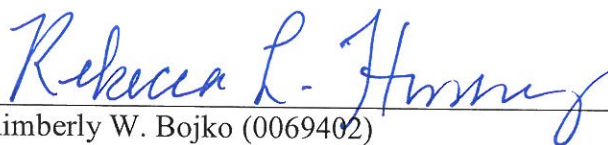
h. What alternative label should be used on a contract with a pass-through clause that has an otherwise fixed rate?

In order for a contract with a pass-through clause that has an otherwise fixed-rate to be marketed or represented in a manner that is not misleading, deceptive, unconscionable, or otherwise unfair, it must be titled in a way that (1) does not represent that it is unequivocally a fixed-rate contract, and (2) makes reference to the pass-through clause included therein. For instance, if a CRES supplier makes use of a base customer supply agreement and a pricing attachment that together constitute the agreement between the supplier and customer, to the extent that the agreement incorporates a pass-through clause, at a minimum, the title of the pricing attachment should include a reference to the presence of a pass-through clause in the agreement. A title such as "Pricing Agreement and Potential Cost Pass-Throughs" or "Price with Pass-Through" would alert the customer to the presence of a pass-through clause in its agreement with the supplier which could cause the rate agreed upon by the parties to vary. Transparent labeling, marketing, and other characterizations associated with the contents of an agreement, such as the example included herein, represent an extremely low cost adjustment for CRES suppliers that may promote trust and cooperation between suppliers and consumers.

III. CONCLUSION

Representing a contract as a "fixed-rate" contract when it includes a pass-through clause permitting a CRES supplier to pass on certain costs it incurs to customers and, thus, vary the contract's fixed rate, is misleading, deceptive, unconscionable, and unfair to consumers. Such contracts should not be permitted to be labeled, marketed, or otherwise characterized as fixed-rate contracts. Additionally, pass-through events should only be permitted under very limited circumstances as discussed herein. Further, if a pass-through clause is present in a contract, any agreement used to memorialize the pricing agreed upon by the parties should include a reference to the pass-through clause that is included in the agreement. Transparency regarding the contents of agreements between electricity suppliers and customers is a key to maintaining a robust electric marketplace in Ohio, and the suggestions included in these comments would promote cooperation and trust between suppliers and customers. OMAEG thanks the Commission for the opportunity to submit comments on these important issues.

Respectfully submitted,

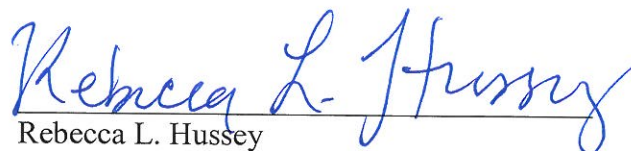


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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon the following parties via electronic mail on May 9, 2014.


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Summary: Comments on behalf of Ohio Manufacturers' Association Energy Group
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