

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

On April 9, 2014, the Public Utilities Commission of Ohio (“Commission”) opened an investigation as to whether it was unfair, misleading, deceptive or unconscionable to market contracts as “fixed-rate contracts” or “a percentage-off the price-to-compare contracts,” if such contracts also included “pass-through” provisions.¹ The Commission sought comments in response to a series of questions. The Retail Energy Supply Association (“RESA”)² timely filed initial comments on May 9, 2014, as did 17 other commentators. Having reviewed the 17 other sets of comments, RESA finds no issues or complaints which indicate that the contract issues being investigated by the Commission are either industry-wide or involve a circumstance not already contemplated by the Commission’s current rules. That being the case, the Commission should utilize its policing authority and address any individual instances it finds of

² RESA is a national trade association of energy suppliers who provide competitive retail electric service (“CRES”). Many of the RESA members are active in Ohio, and some RESA members provide CRES in all the Commission-regulated service areas for all classes of customers. RESA’s members include: AEP Energy, Inc.; Champion Energy Services, LLC; ConEdison *Solutions*; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; GDF SUEZ Energy Resources NA, Inc.; Homefield Energy; IDT Energy, Inc.; Integrys Energy Services, Inc.; Interstate Gas Supply, Inc. dba IGS Energy; Just Energy; Liberty Power; MC Squared Energy Services, LLC; Mint Energy, LLC; NextEra Energy Services; Noble Americas Energy Solutions LLC; NRG Energy, Inc.; PPL EnergyPlus, LLC; Stream Energy; TransCanada Power Marketing Ltd. and TriEagle Energy, L.P. The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of RESA.

misrepresentation, fraud or, in the case of complaints brought to it, for an alleged breach of contract.

I. The individual complaints that gave rise to the issues in this proceeding can and should be analyzed under the existing statutes and administrative rules.

A variety of interested stakeholders provided arguments and opinions regarding CRES contracts and “pass-through” provisions in response to the Commission’s Entry. The vast majority of the comments took the position that the Commission’s existing statutory authority and administrative rules *already address* the issues of concern to the Commission.³ As stated in more detail in RESA’s Initial Comments, the Commission has the authority to make sure that the CRES products and services are not sold in a fashion that is misleading, unfair, deceptive, or unconscionable.⁴ That statutory authority clearly requires the Commission to police and remedy past wrongdoing, rather than take quasi-legislative action to set rates and services in the competitive marketplace.

Some commentators⁵ have suggested that the Commission create contract boilerplate language to be used by all suppliers in all contracts. While RESA, in its comments, did not oppose definitions to guide customers in their education and understanding of industry terms, the Commission should not dictate the exact language used in contracts. Though RESA shares the goal of customer awareness, restricting the wording of contracts by administrative rules would result in limiting products and stifling innovation. As RESA noted in its original comments,

³ See, e.g., Ohio Consumers’ Counsel (“OCC”) Initial Comments at 4-5, wherein it argues that Rule 4901:1-21-05, Ohio Administrative Code (hereinafter “Rule XXXX”) prohibits pass-through clauses; Ohio Schools Council et al. Initial Comments at 3-7, wherein they argue that pass-through clauses violate Rules 4901:1-21-05, 4901:1-21-08 and 4901:1-21-12; Lucas County et al. Initial Comments at 2-9, wherein they argue that pass-through clauses violate Rules 4901:1-21-05, 4901:1-17, and 4901:1-21-03; and FirstEnergy Solutions Corp. Initial Comments at 5-6, wherein it argues that pass-through clauses are consistent with Rule 4901:1-21-05.

⁴ See, RESA Initial Comments at 2-8, and in particular the discussions regarding three statutes in Chapter 4928, Revised Code, and the statutory language in Section 4928.16, Revised Code.

⁵ Ohio Partners for Affordable Energy Initial Comments at 5; Champion Energy Services LLC Initial Comments at 2.

retail market constructs change often for a number of reasons.⁶ Power and transmission prices are dynamic. PJM is considering changes to its capacity and other processes. The Commission's own Retail Market Investigation Order⁷ will soon result in new and different "smart" retail products. All of these foreseeable changes are in addition to the normal vagaries of the electric security plan three-year cycle. Dictating contract language by administrative rules reviewed every five years for products that have a fraction of that shelf life is imprudent. It will result in out-of-date rules which will force suppliers to seek waivers in order to implement new products.

Additionally, new rules are only needed if the old rules are ambiguous or inadequate to prevent fraud or misrepresentation. Thus, an unintended consequence of the Commission finding that common terms and conditions must be developed through rules in order for the Commission to address fixed-price contract pass-through clause issues would be to exonerate anyone who has used a hidden pass-through on the basis that the current rules do not prevent such conduct. In short, new rules cannot address the issues arising out of the January 2014 weather events; new rules only address future events. RESA believes that the Commission already has adequate rules to address instances of alleged deceptive practices both for this past winter and for the future.

Most commentators, including RESA, believe that the Commission not only has the statutory authority to police and enforce, but also that the Commission should look at the specific facts and circumstances that precipitated the concerns raised by the Commission in this docket.⁸ Given that formal and informal complaints have been lodged with the Commission, the next step

⁶ RESA Initial Comments at 2, 4-8.

⁷ *In the Matter of the Commission's Investigation of Ohio's Retail Electric Service Market*, Case No. 13-3151-EL-COI, Finding and Order (March 23, 2014) and Entry on Rehearing (May 21, 2014).

⁸ Ohio Schools Council et al. Initial Comments at 3; City of Perrysburg Initial Comments; AARP Initial Comments at 2; Noble Initial Comment; and The Dayton Power and Light Company Initial Comments at 2-3.

should be a detailed review of the specific complaints received⁹ followed by the appropriate action based on the merits of the claims.

The Commission should use its enforcement authority not only because it is consistent with the statutory paradigm, but the use of its enforcement authority makes practical sense too. The complaint process will allow the Commission to analyze all the facts and circumstances that actually existed between the contracting parties. It will also allow the Commission to distinguish between change-in-law provisions versus pass-through provisions, a distinction RESA pointed out in its Initial Comments.¹⁰ The Commission will therefore, reach a conclusion based on the specific situation and, if a specific remedy is warranted, the Commission can craft an appropriate and targeted remedy.

II. No generic or sweeping changes are needed for the CRES market in Ohio because of the consumer inquiries and informal complaints.

As for the state of the Commission rules on CRES contracts, it should be noted that the Commission has just completed its five-year review of its administrative rules¹¹ addressing enrollment and CRES minimum standards. The operation of renewal clauses and termination fees were the subject of that review. Less than three months have gone by since the Commission issued its Entry on Rehearing in the CRES contract rules five-year review, Case No. 12-1924-EL-ORD. In that Entry on Rehearing, the Commission explicitly rejected OPAE's petition to require affirmative consent on CRES contract renewals.¹² The issue of whether the Commission

⁹ The Commission noted in its April 9, 2014 Entry at 1 that it has received consumer inquiries and informal complaints that CRES suppliers "have included pass-through clauses in the terms and conditions of fixed-rate or price contracts and variable contracts with a guaranteed percent off the standard service offer (SSO) rate."

¹⁰ RESA Initial Comments at 9-11.

¹¹ *In the Matter of the Commission's Review of its Rules for Competitive Retail Electric Service Contained in Chapters 4901:1-21 and 4901:1-24 of the Ohio Administrative Code*, Case No. 12-1924-EL-ORD, Finding and Order (December 18, 2013), Entry on Rehearing (February 26, 2014), and Supplemental Finding and Order (March 26, 2014). It is anticipated that the rules in Chapters 4901:1-21 and 4901:1-24 will be submitted to the Joint Committee on Agency on Rule Review in the near future.

¹² Entry on Rehearing, Case No. 12-1924-EL-ORD at 4.

should amend its rules to prohibit customers from agreeing to month-to-month renewals at the end of the primary term is procedurally complete. Thus, OCC's comments in this investigation asking the Commission to revisit month-to-month variable rate evergreen provisions to fixed-rate contracts¹³ is simply a collateral attack on the final order in the CRES rule proceeding. It is also outside the context of this proceeding as it does not address pass-through clauses in fixed-rate contracts. In its original Opinion and Order in the CRES contract rule review, the Commission noted that customers should have choice. The Consumers' Counsel does not want customers to be able to choose the default mode after the primary term of their contract; like OPAE, they want all customers to default to standard service. OCC's request is outside the scope of this proceeding and represents an issue upon which the Commission has recently issued a final ruling.

In sum, no facts since the Commission completed its final order in Case No. 12-1924-EL-ORD have arisen or are addressed in the initial comments to warrant re-examination of the rule review. This first Commission-ordered investigation of marketing practices in the CRES market produced no comments alleging that numerous active CRES providers used misleading information or rendered unfair or illegal charges on customers. Ultimately, the facts may or may not show that a particular CRES provider implemented or intended to implement some of its contracts in a fashion that was deceptive or unconscionable, but there is no evidence that would demonstrate that such practices are widespread. The Commission should now determine if the claims filed with it have merit, and if so, grant the appropriate relief for those customers who were harmed and the appropriate penalties for the CRES provider who violated the rules. What should be avoided now are additional, over-reaching regulations that would not remedy or

¹³ Initial Comments of the Office of the Consumers' Counsel at 8-9.

address any wrongdoing during the polar vortex period, but would add cost and unnecessary limitations on the products and services being offered by CRES providers in the future.

III. Conclusion

For the foregoing reasons, the Commission should not declare, prohibit, and/or dictate new additional requirements for all CRES contracts or CRES marketing activities more generally in light of the concerns raised in this proceeding. Likewise, the Commission should not establish new automatic violations when the term “fixed-rate” is used. Instead, the Commission must evaluate, through the hearing process, whether, given the facts, a CRES provider has misled customers. If so, that CRES provider should be required to make restitution to the customers harmed and be otherwise penalized as warranted. This is the appropriate manner in which to evaluate the issues and address specific acts of market misbehavior without compromising the continued development of a robust market offering a variety of products and services, and efficient prices.

Respectfully Submitted,




M. Howard Petricoff (0008287)
Gretchen L. Petrucci (0046608)
VORYS, SATER, SEYMOUR AND PEASE LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
Tel. (614) 464-5414
Fax (614) 464-6350
mhpetricoff@vorys.com
glpetrucci@vorys.com

Attorneys for the Retail Energy Supply Association

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Reply Comments were served this 27th day of May 2014 by electronic mail, upon the persons listed below.



M. Howard Petricoff

Keenia Joseph
Christina Gelo
Seth Hopson
Alexander Robinson
North America Power and Gas, LLC
20 Glover Avenue
Norwalk Ct 06851
kjoseph@napower.com
cgelo@napower.com
shopson@napower.com
arobinson@napower.com

Michael J. Schuler
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
michael.schuler@occ.ohio.gov

Donald Marshall
Eagle Energy, LLC
4465 Bridgetown Road, Suite 1
Cincinnati OH 45211-4439
eglenrg@aol.com

Craig G. Goodman, Esq.
Stacey Rantala
National Energy Marketers Association
3333 K Street, NW, Suite 110
Washington, DC 20007
cgoodman@energymarketers.com
srantala@energymarketers.com

Barbara A. Langhenry
John Mills
Harold Madorsky
City of Cleveland Law Department
601 Lakeside Avenue, City Hall - Room 106
Cleveland, Ohio 44114-1077
blanghenry@cityxcleveland.oh.us
jmills@city.cleveland.oh.us
hmadorsky@city.cleveland.oh.us

Colleen L. Mooney
Ohio Partners for Affordable Energy
231 West Lima Street
Findlay, OH 45840
cmooney@ohiopartners.org

David F. Boehm
Michael L. Kurtz
Jody Kyler Cohn
Boehm, Kurtz & Lowery
36 East Seventh Street, Suite 1510
Cincinnati, Ohio 45202
dboehm@BKLLawfirm.com
mikurtz@BKLLawfirm.com
jkylercohn@BKLLawfirm.com

Kevin Schmidt
88 East Broad Street, Suite 1770
Columbus, OH 43215
schmidt@sppgrp.com

Joseph Olikier
Matthew White
IGS Energy
6100 Emerald Parkway
Dublin, OH 43016
joliker@igsenergy.com
mwhite@igsenergy.com

Margeaux Kimbrough
Andrew J. Sonderman
Kegler Brown Hill & Ritter LPA
65 East State Street
Columbus, OH 43215
mkimbrough@keglerbrown.com
asonderman@keglerbrown.com

Mark A. Hayden
Jacob A. McDermott
Scott J. Casto
FirstEnergy Service Company
76 South Main Street
Akron, OH 44308
haydenm@firstenergycorp.com
jmcdermott@firstenergycorp.com
scasto@firstenergycorp.com

Kimberly W. Bojko
Rebecca L. Hussey
Mallory Mohler
Carpenter Lipps & Leland LLP
280 North High Street, Suite 1300
Columbus, OH 43215
bojko@carpenterlipps.com
hussy@carpenterlipps.com
mohler@carpenterlipps.com

Judi L. Sobecki
The Dayton Power and Light Company
1065 Woodman Drive
Dayton, OH 45432
judi.sobecki@aes.com

Glenn S. Krassen
Bricker & Eckler LLP
1001 Lakeside Avenue, Suite 1350
Cleveland, OH 44114
gkrassen@bricker.com

Dane Stinson
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215-4291
dstinson@bricker.com

Brenda Crockett
Champion Energy Services LLC
1500 Rankin Rd., Suite 200
Houston, TX 77073
bcrockett@championenergyservices.com

Roy Boston
Noble Americas Energy Solutions
1901 Butterfield Road, Suite 660
Downers Grove, IL 60515
rboston@noblesolutions.com

Luke Russell
AARP Ohio
17 South High Street, #800
Columbus, OH 43215
lrussell@aarp.org

Mathew Beredo
City of Perrysburg
201 W. Indiana Ave
Perrysburg, OH 43551
mberedo@ci.perrysburg.oh.us

Thomas R. Hays
Leslie Kovacik
trhayslaw@gmail.com
leslie.kovacik@toledo.oh.gov

Timothy G. Dobeck
City of Parma
6611 Ridge Road
Parma, OH 44129-5593
law@cityofparma-oh.gov

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