

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

FINDING AND ORDER

The Commission finds:

- (1) R.C. 4928.02 provides, in pertinent part, that it is the policy of the state to "[e]nsure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service;" "[e]nsure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs;" "ensure diversity of electricity supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers[.]" "recognize the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment;" and "ensure retail electric service consumers protection against unreasonable sales practices[.]" Additionally, R.C. 4928.06 requires the Commission to ensure that the state policies enumerated in R.C. 4928.02 are effectuated and to adopt rules to carry out and enforce these policies. Consequently, the Commission finds that it has the authority, and the duty, to examine competitive retail electric service (CRES) contracts in order to ensure the availability of reasonably priced CRES, diversity of CRES supplies and suppliers, and protection for customers against unreasonable sales practices.
- (2) In March 2014, the Commission became aware, through 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. Such pass-through clauses allow the CRES supplier to pass through to the customer the additional costs of certain pass-through events.

- (3) By Entry issued April 9, 2014, the Commission opened 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 SSO rate when the contracts include pass-through clauses (collectively referred to herein as “fixed-rate” contracts). In order to assist in the investigation, the Commission sought comments and reply comments on a series of questions (Issues (a) through (h)) set forth in the Entry.
- (4) Motions to intervene in this proceeding were filed by the office of the Ohio Consumers’ Counsel (OCC); the Ohio Energy Group (OEG); the city of Cleveland (Cleveland); Ohio Schools Council, Ohio School Boards Association, Buckeye Association of School Administrators, and Ohio Association of School Business Officials (collectively, School Advocates). No memoranda were filed contra the motions to intervene in this proceeding.
- (5) The Commission finds that the motions to intervene filed by OCC, OEG, Cleveland, and the School Advocates are reasonable and should be granted.
- (6) Timely comments were filed by Ohio Partners for Affordable Energy (OPAE); Association of American Retired Persons (AARP); Eagle Energy, LLC (Eagle); Lucas County Board of Commissioners, city of Toledo, city of Sylvania, village of Ottawa Hills, city of Perrysburg, city of Northwood, city of Maumee, village of Holland, and village of Waterville (collectively, Lucas County); Energy Professionals of Ohio (EPO); OEG; IGS Energy (IGS); Dayton Power and Light Company (DP&L); North American Power and Gas, LLC (NAPG); FirstEnergy Solutions Corp. (FES); Champion Energy Services, LLC (Champion); School Advocates; the Retail Energy Supply

Association (RESA)<sup>1</sup>; The National Energy Marketers Association (NEMA); Noble Americas Energy Solutions (Noble); Ohio Manufacturers' Association Energy Group (OMAEG); and OCC. Timely reply comments were filed by IGS; NAPG; FES; School Advocates; RESA; Noble; OMAEG; and OCC.

- (7) The Commission has reviewed the comments and reply comments and has made certain conclusions detailed below. Additionally, the Commission notes that some commenters did not answer the specific questions set forth in the Entry, but filed general comments addressing the investigation or issues beyond the scope of the investigation. The Commission will address those comments at the end of this Order.

Comments on Issues (a) and (g)

- (8) The Commission elects to address Issues (a) and (g) together. Issue (a) inquired 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 and, if so, whether the labeling of such a contract should be prohibited in all CRES contracts, residential and small commercial contracts, or only residential contracts. Issue (g) inquired whether permitting pass-through clauses in residential and/or small commercial CRES contracts labeled as fixed-rate contracts could have an adverse effect on the CRES market.

OCC asserts that it is unfair, misleading, deceptive, and unconscionable to market or label a contract as fixed-rate when it contains a pass-through clause that provides the marketer with discretion to pass on charges to consumers in addition to the rate stated in the contract. OCC contends that such a pass-through clause violates Ohio Adm.Code

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<sup>1</sup> 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.

4901:1-21-05(A)(1) and 4901:1-21-05(C)(8)(c), and, further, points out that the Pennsylvania Public Utility Commission (PPUC) found that “presenting a product as having a fixed price that in fact can vary for any number of reasons could be seen as misleading.”<sup>2</sup> Finally, OCC contends that the Ohio Consumer Sales Practices Act (CSPA) provides that it is unconscionable for a supplier to take advantage of a customer’s inability to understand an agreement. OCC asserts that customers cannot be adequately educated to understand pass-through provisions and the components that can trigger them. (OCC at 3-7.) Similarly, AARP asserts that the Commission should explore specific CRES disclosure and marketing conduct and take actions to enforce Ohio law and regulations (AARP at 2).

Lucas County also asserts that it is unfair, misleading, deceptive, or unconscionable to market or label a contract as fixed-rate when the terms and conditions contain a pass-through clause pursuant to R.C. 4928.10 and Ohio Adm.Code 4901:1-21-05, applicable to both residential and small commercial customer contracts. Further, Lucas County asserts that any pass-through charges included in a fixed-price contract are superseded and automatically rewritten pursuant to Ohio Adm.Code 4901:1-21-02. (Lucas County at 6-8.)

DP&L does not directly address the Commission’s question; however, stresses that the Commission has an obligation to customers to identify and investigate potential unfair, deceptive, or unconscionable acts, and to consider rescinding a CRES provider’s certificate or imposing other penalties if the Commission finds that the CRES provider engaged in any such act (DP&L at 2-3).

OMAEG asserts that the label “fixed-rate” implies that a contract has rates that are stable, do not vary or fluctuate, and are definite. OMAEG also cites the conclusion of the PPUC in its investigation that “customers are best served by labels and terms that are precise, straightforward,

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<sup>2</sup> See *Guidelines for Use of Fixed Price Labels for Products With a Pass-Through Clause*, Pa. Pub. Util. Comm. No. M-2013-2362961, Final Order (November 14, 2013).

transparent, and in plain language. Given this, 'fixed means fixed' appears to be the outcome that most faithfully meets these expectations." Further OMAEG argues that, pursuant to Ohio Adm.Code 4901:1-21-11 and 4901:1-21-12, pass-through clauses are not permissible contents in fixed-rate contracts. (OMAEG at 2-4.) Similarly, OEG asserts that CRES providers should not be permitted to label or market any service contract as fixed-rate when it contains a pass-through clause, regardless of whether the contract is residential, small commercial, or commercial (OEG at 1).

The School Advocates argue that the public understands the term "fixed" to mean fixed and argue that a pass-through clause in a fixed-rate contract does not comply with Ohio Adm.Code 4901:1-21-05(A)(1)(a),(b) and 4901:1-21-12(A)(7) because CRES providers are required to disclose the cost per kilowatt hour for generation service and the amount of any other recurring or non-recurring charge in contracts. The School Advocates further argue that this practice violates Ohio Adm.Code 4901:1-21-08(C)(8) because it offers a fixed price without disclosing all recurring and nonrecurring charges and claims a specific price guarantee exists, when none does. Consequently, the School Advocates conclude that labeling a contract with a pass-through clause as fixed-rate should be prohibited in all CRES contracts, whether residential or small commercial. (School Advocates at 6-7).

NEMA asserts that it is not unfair, misleading, deceptive, or unconscionable for a CRES supplier to market or label a contract as fixed-rate when it contains a pass-through clause, as long as the CRES supplier has properly disclosed the pass-through clause to the consumer in the terms and conditions. NEMA asserts that pass-through clauses serve an important function to CRES suppliers in managing their costs. (NEMA at 3.) Similarly, EPO argues that, for commercial and industrial customers, the Commission should allow *maximum flexibility in designing products* and that such contracts should be permitted to pass through regulatory costs, as CRES providers cannot hedge against these costs (EPO at 2). RESA and Noble contend

that the answer to this question depends on what type of charges and circumstances are involved in the pass-through clause, and urges the Commission to find that pass-through clauses are not per se unfair, misleading, deceptive, or unconscionable. RESA and Noble cite new taxes or new rules and regulations that become effective after execution of the contract as situations out of the control of the CRES provider. (RESA at 9-11; Noble at 1.)

IGS asserts that it is unnecessary to prohibit inclusion of pass-through clauses in fixed-price contracts as long as such contracts for residential customers clearly and conspicuously disclose the presence and nature of the pass-through clause and the events that may trigger the pass-through. IGS asserts that such contracts for commercial or industrial customers should disclose the nature of the pass-through and triggering events. Regardless of customer class, IGS recommends that, upon enrollment, the customer should be required to acknowledge the pass-through via recorded verification or line-item initial (IGS at 2-3.)

NAPG asserts that it is not unfair, misleading, deceptive, or unconscionable to market a fixed-rate contract that contains a pass-through clause, as the Commission's rules recognize that additional recurring and non-recurring charges may apply and, along with FES, argues that such clauses have been utilized in fixed-rate products as a standard practice for years (NAPG at 2; FES at 6). IGS makes similar assertions in its reply comments, specifically citing Ohio Adm.Code 4901:1-21-05(A)(1) (IGS Reply at 2). FES also contends that pass-through clauses protect the vendor and prevent significantly higher fixed prices for the customer because of rare, unforeseeable events (FES at 6).

In reply, OCC strongly opposes suggestions that there should be some exceptional situations under which CRES providers may market a fixed-rate contract with a clause that allows pass-through charges, such as for new regulatory costs, or that there should be a distinction between fixed-rate and fixed-price contracts. OCC reiterates its stance that there should be no such exceptions

or nuances because customers understand a fixed rate to be fixed. (OCC Reply at 3-7.)

In its reply comments, OMAEG notes that it generally agrees with parties, responding "fixed means fixed" to this question, and that it disagrees with the comment that a pass-through clause as a contingency in a fixed-rate contract is not misleading because the commodity price is fixed. OMAEG asserts that, although the commodity price may be fixed, charges associated with other terms in the contract are not fixed. (OMAEG Reply at 2-3.)

In its reply comments, the School Advocates oppose FES' contention that pass-through clauses are a contingency, and thus, lawful pursuant to Ohio Adm.Code 4901:1-21-05(A)(1)(d) and 4901:1-21-12(A)(8), arguing that, when identifying the contingency, the clause must identify the amount that customers will be charged in order to be lawful (School Advocates Reply at 3).

In reply, NAPG argues that the School Advocates' assertion that a pass-through clause does not comply with the Commission's rules because CRES providers cannot disclose the specific amount of such a charge is erroneous. NAPG contends that the rules require the same disclosures regardless of whether a contract is fixed-rate, percent-off, or variable. Hence, NAPG argues that the rules simply require that the contract identify the pass-through event requiring the charge and specify that the CRES provider cannot anticipate or plan for the charge. (NAPG Reply at 3-4.) In its reply comments, FES makes a similar argument (FES Reply at 3-4).

In reply to various commenters, FES asserts that, in the free market, it is incumbent upon the customer to educate himself about the terms of an offer prior to accepting an offer, and that customers are free to reject an offer. Additionally, in response to the comments of OMAEG and OEG, FES asserts that large manufacturers are particularly responsible for reading and understanding pass-through clauses, since they clearly have sufficient resources to hire counsel and are experienced in contracting. In support,

FES points out that the PPUC declined to extend its guidance on the use of pass-through clauses in fixed-price contracts to large commercial and industrial customers. (FES Reply at 7-9.) Finally, FES opposes IGS' recommendations for line-item initial, arguing that this is unworkable in a market where customers can contract via mail, telephone, or internet, as well as in the context of opt-out governmental aggregations (FES Reply at 11).

OCC asserts that permitting pass-through clauses in residential CRES contracts that purport to be fixed-rate or variable with a guaranteed percent-off the SSO has an adverse effect on the CRES market. OCC points out that the PPUC found that, if CRES suppliers "were to invoke such a clause and pass through costs to the customer via an increase in the rate, residential and small commercial customers are likely to be confused and dissatisfied with the [suppliers] as well as the marketplace." OCC also argues that customers may be unwilling to shop in the future, the popularity of long-term contracts could decline, and the Commission's call center will experience difficulties. (OCC at 15-16.) AARP adds that permitting pass-through clauses in fixed-rate contracts harms consumers because they will not be able to compare such offers fairly with fixed-rate offers that do not contain such clauses (AARP at 5). Lucas County contends that this practice negatively affects a customer's ability to shop and substantially harms competition (Lucas County at 11).

OMAEG answers this question in the affirmative, and asserts that, in some cases, this practice has already adversely affected the CRES market in Ohio by creating an atmosphere of consumer distrust and frustration with CRES suppliers (OMAEG at 12-13).

The School Advocates assert that such clauses tend to undermine the credibility of the CRES market, foster customer complaints to the Commission, and precipitate customer movement to the SSO, as observed by the PPUC in its investigation (School Advocates at 9-10).



NEMA asserts that prohibition of pass-through clauses could have an adverse effect on the CRES market, as it would increase the costs and risks to CRES suppliers offering fixed-price contracts and, in turn, could decrease the availability of and increase the price of fixed-price products (NEMA at 5-6). RESA and Noble argue that permitting unfair, misleading, and unconscionable practices harms CRES providers who follow the rules, but that the market will not be bettered if the Commission promulgates generalized rules instead of merely enforcing violations (RESA at 13; Noble at 1).

IGS asserts that there is a potential adverse effect because some CRES providers who include a pass-through clause in a fixed-price contract may be able to offer lower prices, whereas other CRES providers must build that risk into their offers. Additionally, IGS points out that customers of CRES providers who invoke a pass-through clause may develop a negative view of competitive providers and be discouraged from participating in the market (IGS at 5). NAPG asserts that inclusion of such clauses has not negatively impacted customer acceptance of agreements; however, NAPG contends that, if such clauses are prohibited in fixed-rate products, CRES providers will likely no longer offer fixed-rate products (NAPG at 6). Similarly, FES states that, if such clauses are prohibited, suppliers are likely to charge customers a much higher premium in fixed-price contracts, even though a contingency invoking the clause may never occur (FES at 10-11).

In its reply comments, OCC stresses that the price advantage touted by several marketers associated with pass-through offers does not justify subjecting consumers to a departure from the Revised Code and the Commission's rules. OCC further responds that CRES suppliers who offer a fixed-rate product should be required to bear all risks associated with that product, and that CRES providers will still be able to offer products with a pass-through charge if they market that product as a variable-rate product. (OCC Reply at 7-8.)

In reply, the School Advocates argue against FES' proposition that suppliers are likely to charge customers more if pass-through clauses are prohibited in fixed-rate contracts, asserting that CRES providers can still offer products with pass-through clauses, but must label them as variable-rate contracts (School Advocates Reply at 5-6).

Commission Conclusion on Issues (a) and (g)

- (9) Regarding whether a contract may be labeled as "fixed-rate" when it contains a pass-through clause, commenters fell into two main groups. OCC, AARP, Lucas County, OMAEG, OEG, and the School Advocates all generally made the argument that "fixed means fixed," or that a pass-through clause should never be permitted in a contract that is labeled as "fixed-rate." Other commenters, including NEMA, EPO, NAPG, and FES argued for maximum flexibility for CRES suppliers, including the ability to market as fixed-rate a contract containing a pass-through clause. Several other commenters including RESA, Noble, and IGS argued that the clauses should be permitted in fixed-rate contracts with certain restrictions or safeguards.

Parties urging the Commission to find that fixed means fixed offered as support assertions that a product labeled as fixed that can, in fact, vary in price is misleading; that customers cannot be adequately educated to understand pass-through provisions and triggering mechanisms; that the clauses violate Ohio Adm.Code 4901:1-21-05(A)(1), 4901:1-21-05(C)(8)(c), 4901:1-21-08(C)(8), and 4901:1-21-12; and that customers need labels and terms that are straightforward and in plain language. Additionally, multiple of the fixed-means-fixed parties urge the Commission to apply this requirement to all customer classes.

Parties urging the Commission to allow pass-through clauses in fixed-rate contracts contend that use of such clauses is not unfair, misleading, deceptive, or unconscionable where the terms and conditions of the contract properly disclose the clause, and that customers

are responsible for understanding their contracts. Additionally, these parties generally assert that pass-through clauses allow suppliers to manage costs that they cannot hedge against and cannot control, such as new taxes, rules, or regulations. Banning of these clauses in fixed-rate contracts, these parties argue, would result in suppliers being unable to manage their costs and/or customers experiencing significantly higher fixed prices due to the potentiality of rare and unforeseeable events. Further, parties argue that, particularly in the case of commercial and industrial customers, the Commission should allow for maximum flexibility in designing products, and that these larger, sophisticated customers are particularly responsible for reading and understanding all parts of their contracts, including pass-through clauses, as they are or have resources to be represented by counsel.

Initially, the Commission notes that this investigation and the resulting conclusions have required the Commission to be mindful of the state policies regarding CRES enumerated in Finding (1) of this Order. As such, in reaching the conclusions below, the Commission has attempted to find a reasonable balance that works to encourage availability and diversity of electric suppliers and reasonably-priced products, and provide flexibility to the developing market, all while protecting consumers from unreasonable sales practices.

In consideration of the factors discussed above, the Commission finds that, in all CRES contracts, whether residential, commercial, or industrial, fixed should mean fixed. In so finding, the Commission is mindful of the need for straightforward language and terms for CRES customers. The Commission further notes that harm to the CRES market and shopping rates could occur when customers are dissatisfied with their contracts as a result imposition of charges that were unexpected by that customer. Consequently, the Commission finds that, on a going-forward basis, CRES providers may not include a pass-through clause in a contract labeled as "fixed-rate." While CRES providers may continue to offer products

containing pass-through provisions, they must be labeled appropriately as variable or introductory rates. The Commission does not find that use of an alternate label would increase customer understanding.

The Commission emphasizes that we make no ruling with respect to existing contracts—although a customer holding an existing contract with such a provision would be free to pursue a complaint with the Commission against the CRES provider.

While the Commission has thoroughly considered its statutory duty to protect consumers against confusing labels in developing the fixed-means-fixed axiom, the Commission is also mindful of its statutory duty to encourage availability and diversity of reasonably priced electric supplies. The Commission recognizes that circumstances may occasionally arise over which a CRES provider has no control and no ability to hedge, such as a regulatory change in law. The Commission finds it would be inappropriate to require CRES providers in those circumstances to remain bound by an uneconomic contract with no opportunity for redress. Not only would such a requirement be inequitable for a CRES provider, but could affect consumers as well, as it could result in CRES providers charging much higher rates in fixed-price contracts in attempt to hedge, or elimination of fixed-price contracts from the market.

Consequently, the Commission believes that the fixed-means-fixed axiom should be balanced by continuing to permit regulatory-out clauses that would be available for CRES suppliers in very limited circumstances, which must be delineated in plain language in the clause. Regulatory-out clauses allow a supplier to revise a contract by proposing new contract terms to the customer. If the customer affirmatively consents to the new terms, the contract would remain in place with the new terms. However, customers could affirmatively reject or passively reject the proposed terms by inaction. A customer rejecting the terms would then be permitted to pursue another CRES provider or the default service without being subjected to

any penalty. The Commission further finds that regulatory-out clauses must be clearly and conspicuously stated in the contract; that any acronyms in the regulatory-out clause must be defined within the contract; and that the clause must specify to a reasonable extent the circumstances under which it could be invoked.

The Commission finds that the "fixed-means-fixed" guidelines discussed above represent our interpretation going forward of the Commission's current rules contained in Ohio Adm.Code 4901:1-21-05, which govern CRES marketing and solicitation. Consequently, the Commission finds that CRES providers shall have until January 1, 2016, to bring all marketing for contracts being marketed into compliance with the "fixed-means-fixed" guidelines set forth in this Finding.

Additionally, the Commission finds that changes to the Commission's current rules should be initiated in order to provide clearer, more specific guidance for customers and CRES providers in the future. The Commission notes that the comments filed in this case indicate that there are divergent interpretations of the terms "fixed-price" and "variable-price." While the Commission's rules governing CRES in Ohio Adm.Code Chapter 4901:1-21 do not define these terms, the following definitions are available on the Commission's Energy Choice Ohio website: "Fixed Price: A fixed electricity or natural gas rate that will remain the same, for a set period of time" and "Variable Price: A variable rate can change, by the hour, day, month, etc., according to the terms and conditions of the supplier's contract." The Commission finds that definitions should be incorporated into the Commission's rules governing CRES in Ohio Adm.Code Chapter 4901:1-21 and, thereafter, should be modified on the Energy Choice Ohio website. The Commission is persuaded by the definitions recently adopted by the PPUC in its investigation of fixed-price labels and pass-through clauses, and finds that the definitions should be modified as follows: "Fixed Price: An all-inclusive per kWh price that will remain the same for at least three billing cycles or the term of the contract,

whichever is longer” and “Variable Price: An all-inclusive per kWh price that can change, by the hour, day, month, etc., according to the terms and conditions in the supplier’s disclosure statement.” Additionally, the Commission finds that addition of the following definition is warranted to encompass those contracts that vary in price for a limited period of time: “Introductory Price: For new customers, an all-inclusive per kWh price that will remain the same for a limited period of time between one and three billing cycles followed by a different fixed or variable per kWh price that will be in effect for the remaining billing cycles of the contract term, consistent with terms and conditions in the supplier’s ‘disclosure statement.’”

The Commission directs Staff to draft proposed rules consistent with these findings and finds that a rules proceeding should be commenced.

Comments on Issues (b), (c), and (d)

- (10) Issue (b) inquired whether a CRES supplier may include a pass-through clause in a fixed-rate contract that serves to collect a regional transmission organization (RTO) charge, and whether such a practice is unfair, misleading, deceptive, or unconscionable.

OCC asserts that a CRES supplier may not charge customers for any pass-through clause in a fixed-rate contract, as it is unfair, misleading, deceptive, and unconscionable in violation of R.C. 4928.10 and Ohio Adm.Code 4901:1-21 (OCC at 9). AARP agrees and points out that the PPUC has rejected the use of a fixed-price label for products with a pass-through clause (AARP at 2-3). Lucas County also contends that a CRES provider cannot pass through an RTO charge, as this practice is inconsistent with the applicable rules and unfair, misleading, deceptive, and unconscionable (Lucas County at 9).

OMAEG asserts that, as the presence of a pass-through clause in a fixed-rate contract is extremely misleading and confusing to all classes of customers, fixed-rate contracts should not contain pass-through clauses. OMAEG

acknowledges, however, that CRES suppliers need some protection against changes to existing law or tariffs that create new costs or additional requirements over which CRES suppliers have no control. Consequently, OMAEG asserts that, in the limited circumstance where regulatory agencies or RTOs create such a new charge or additional requirement, costs should be permitted to be passed on to customers after disclosure and notice. (OMAEG at 4-6.) OEG contends that CRES providers should only be permitted to include a pass-through clause to collect an RTO charge if a contract is not labeled as a "fixed-rate" contract and the pass-through clause is specific and prevalently displayed (OEG at 2).

The School Advocates argue that it is unfair, misleading, deceptive, and unconscionable to include a pass-through clause in any fixed-rate contract, including for RTO charges, as RTO charges should be contemplated and included in the fixed rate at the time the contract is executed (School Advocates at 7).

NEMA and EPO contend that CRES suppliers should be permitted to include a pass-through clause that serves to collect an RTO charge, as CRES suppliers cannot foresee or hedge for such charges (NEMA at 4; EPO at 3). Similarly, RESA and Noble repeat their stance that passing through RTO costs is not per se misleading or deceptive, unless the marketer has impressed upon the customer that the RTO costs are incorporated into the fixed price when they are not (RESA at 11; Noble at 1).

IGS agrees that CRES suppliers should be permitted to pass through RTO charges in a fixed-rate contract, but only if the pass-through clause is clearly disclosed in a manner befitting the customers' class (IGS at 3). NAPG asserts that, with full and complete disclosure, CRES suppliers should be permitted to pass through charges for unanticipated, unavoidable charges, such as new or increased wholesale cost items approved by the Federal Energy Regulatory Commission (FERC) or an RTO such as PJM Interconnection, LLC (PJM), increases in existing taxes, imposition of new taxes, capacity price increases, and/or

increases in wholesale cost components and ancillary services (NAPG at 2-3). FES contends that a pass-through clause in a fixed-rate contract may encompass an RTO charge or whatever contingency events fall within the language of the clause (FES at 7).

In its reply comments, OMAEG notes its agreement with OEG and Lucas County that RTO market fluctuations should not constitute a pass-through event in a fixed-rate contract, as these are not the result of significant regulatory changes that create or impose new or additional charges (OMAEG Reply at 4-5).

- (11) Issue (c) inquired whether increased costs imposed by an RTO and billed to a CRES supplier may be categorized as a pass-through event that may be billed to customers in addition to the basic service price pursuant to a fixed-price CRES contract, and whether such a practice is unfair, misleading, deceptive, or unconscionable.

OCC and AARP contend that neither an RTO charge nor any other charge that is billed to a CRES provider should be passed through to residential customers in such contracts, as such a practice is unfair, misleading, deceptive, or unconscionable under Ohio Adm.Code 4901:1-21-03(A) (OCC at 10; AARP at 3). Lucas County asserts that, if a contract is marketed as fixed-price, it cannot include any other additional charges (Lucas County at 9).

OMAEG asserts that 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 with fixed-rate contracts, as this would make the contract a variable rate contract. OMAEG points out that, 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. Further, OMAEG argues that, 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, including



mere increases in costs for the same services, higher than anticipated costs, or costs that significantly exceed historical levels. OMAEG points out that these are neither new nor additional requirements and, consequently, should not be categorized as a pass-through event that may be billed to customers under a fixed-price contract, regardless of customer class. (OMAEG at 6-9.) Similarly, OEG contends that it is unfair, misleading, deceptive, and unconscionable for a CRES provider to categorize cost increases that result solely from temporary RTO market price fluctuations as a pass-through event, and that the only costs that should be categorized as such are those resulting from significant regulatory changes, such as a new RTO tariff modification or newly-imposed federal requirements (OEG at 2).

The School Advocates argue that CRES providers should not be permitted to hedge their fixed-rate contracts by placing the risk of RTO price increases upon the customer, and that a pass-through event may be defined only as an unforeseen event, not an event in which customer charges, such as a monthly fluctuating ancillary charge, increases more than a CRES provider may have liked. The School Advocates continue that a fairer alternative for passing through costs for unforeseen events is use of a regulatory-out clause, which allows a CRES provider to notify the customer of its intent to terminate the contract unless a reformulated rate can be negotiated. (School Advocates at 7-8.)

NEMA asserts that increased costs imposed by an RTO and billed to CRES suppliers should be categorized as pass-through events that may be billed to consumers with fixed-price contracts (NEMA at 4). RESA and Noble repeat their argument that this practice is not per se unconscionable if it was properly disclosed to the consumer at the time the consumer entered into the agreement (RESA at 11; Noble at 1). Similarly, IGS answers this question in the affirmative, but only where the pass-through clause is clearly disclosed in a manner befitting the customer's class (IGS at 4).

NAPG agrees that such a practice is not unfair, misleading, deceptive, or unconscionable where the pass-through clause is fully and fairly disclosed (NAPG at 3). FES also asserts that, if increased costs imposed by an RTO are included in the "pass through" events defined in the contract, such costs may be billed to customers (FES at 8).

In its reply comments, OMAEG agrees with OCC's comments that the inclusive nature of a fixed-rate contract, and consumers' expectations, render pass-through charges in such contracts resulting from increased costs to CRES suppliers misleading, deceptive, and unconscionable (OMAEG Reply at 5-6).

In its reply comments, IGS disagrees with OEG's and the School Advocates' argument that only certain costs may be recovered through a pass-through clause, on the basis that these arguments are unsupported by statute or the Commission's rules (IGS Reply at 3).

- (12) Issue (d) inquired whether, 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.

OCC and AARP continue to assert that a CRES supplier may not include a pass-through clause in a contract that is labeled or marketed to consumers as a fixed-rate contract, as such a practice is unfair, misleading, deceptive, and unconscionable (OCC at 10; AARP at 3). AARP adds that, if the Commission allows some pass-through charges, it should also adopt proper disclosures and sales representations that must accompany such a contract, and cites conclusions of the PPUC that suppliers must notify the customer and receive affirmative consent to change the price of a contract that has been disclosed and marketed as fixed-price (AARP at 3-4). Lucas County asserts that this question contains a misstatement because, according to Lucas County's analysis, a contract cannot contain both a fixed price and a pass-through clause, as Ohio Adm.Code

4901:1-21-02 automatically rewrites such a contract to eliminate the pass-through clause (Lucas County at 9).

OMAEG reiterates its assertion that the only event that should invoke the application of a pass-through clause contained in a fixed-price contract is a change to existing law or an RTO tariff that creates or imposes new costs or additional requirements on the CRES supplier that are not under the CRES provider's control (OMAEG at 10). OEG asserts that CRES providers should not be permitted to stretch the language of a pass-through clause beyond its reasonable bounds in order to recover costs from customers that are not recoverable under the terms of the contract (OEG at 3-5). The School Advocates maintain that increased costs are not legitimate pass-through events (School Advocates at 8).

NEMA asserts that events that may invoke the application of a pass-through clause include charges approved by the Commission or FERC, as well as RTO-related charges (NEMA at 4). Similarly, EPO agrees that regulatory costs may be passed through (EPO at 3). RESA and Noble recommend that pass-through charges should not be limited to a particular type of event, as it is impossible to create an exhaustive list, but that it is more important that such clauses be fully explained (RESA at 12; Noble at 1).

IGS contends that the Commission should not attempt to regulate the types of costs that may be passed through, but that the focus should be on whether the types of events were clearly and conspicuously disclosed to the customer (IGS at 4). NAPG submits that transmission-related cost increases or increases resulting from a change in law or regulation, at minimum, should qualify for pass-through treatment (NAPG at 4). FES repeats its argument that any event defined in the agreement as a pass-through event should invoke the pass-through clause (FES at 8).

In its reply comments, OMAEG concurs with OCC's comment that pass-through events should only be permitted if a contract is not labeled or marketed as a fixed-rate contract (OMAEG Reply at 6-7).

Commission Conclusions on Issues (b), (c), and (d)

- (13) The Commission finds that, given our decision in Finding (9), the questions presented in Issues (b), (c), and (d) are moot.

Comments on Issue (e)

- (14) Issue (e) concerned whether it is 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).

OCC and AARP reiterate their comments that pass-through clauses should not be permitted in any fixed-rate contracts, even if the pass-through term is more prominently displayed (OCC at 11-12; AARP at 5).

OMAEG answers this question in the affirmative, and cites the PPUC decision finding that burying such charges or potential increases in existing charges in the fine print of a contract is misleading (OMAEG at 11). Similarly, OEG argues that, if a pass-through clause is included in any CRES provider contract, it should be in bold type to give better notice to customers (OEG at 3)

The School Advocates maintain that inclusion of such a pass-through clause is already unfair, misleading, deceptive, or unconscionable, and that any attempt to make the clause less conspicuous is even more egregious. However, the School Advocates assert that, if the Commission permits such clauses, CRES providers should be required to place the clauses in bold, large type in close proximity to the rate. (School Advocates at 9.)

NEMA contends that it is impractical to present all contract information at the beginning of a contract due to space constraints (NEMA at 5). EPO asserts that CRES suppliers should have maximum flexibility in designing contracts (EPO at 3). RESA and Noble assert that whether a

disclaimer is sufficient depends on the facts, but that a pass-through clause that is conspicuously visible to a reasonable person is not misleading, deceptive, or unconscionable (RESA at 12; Noble at 1).

IGS states that it would not object to requiring a pass-through clause to be included on the first page of the contract or advertisement in the same size font as the remainder of the contract or advertisement (IGS at 4). NAPG asserts that full and fair disclosure of a pass-through clause can be assured by bold font, larger point type than surrounding text, or both, or by requiring discussion of upstream charges as part of third-party verification (NAPG at 4-5). FES states that, as long as the pass-through clause is disclosed in the terms and conditions, it is not unfair, misleading, deceptive, or unconscionable, and notes that FES discloses such clauses on the single-page agreement in a font size equal to all other terms (FES at 8-9).

In its reply comments, OCC disagrees that customers will benefit from conspicuous disclosure of pass-through clauses, arguing that customers cannot benefit from more conspicuous disclosure of something they do not understand (OCC Reply at 9-10). OMAEG concurs with OCC's comment that the practice of including a pass-through clause that is displayed less prominently than the provisions regarding the fixed price is misleading, unconscionable, and deceptive (OMAEG Reply at 7-8).

In its reply comments, FES opposes other commenters' suggestions that pass-through provisions be required to be emphasized on the basis that such a requirement is too rigid given the different formats that CRES supplier agreements can take (FES Reply at 11-12).

#### Commission Conclusion on Issue (e)

- (15) As with the previous questions, the Commission again finds that, given our decision in Finding (9), the question presented in Issue (e) is moot.

Comments on Issue (f)

- (16) Issue (f) concerned whether a pass-through clause that refers to acronyms such as "RTO," "NERC,"<sup>3</sup> or "PJM" should be required to define these acronyms, and whether this requirement should apply in residential and small commercial contracts, or only residential contracts.

OCC maintains that costs imposed by an RTO and billed to a CRES provider may not be categorized as a pass-through event that may be billed to customers with a fixed-price contract, but asserts, along with AARP that, to the extent any CRES contract contains references to the acronyms listed or any other utility- or energy-specific terminology, the contract should contain definitions for those acronyms. OCC and AARP add that the definitions should also be explained in plain language, or in a manner understandable to a layperson. (OCC at 13; AARP at 5.) Lucas County asserts that acronyms should not be defined because residential and small business owners will not understand the definitions, and will become confused, as the "jargon is already way too deep" (Lucas County at 10-11).

OMAEG asserts that, for sake of transparency and consumer protection, CRES contracts should always clearly define acronyms (OMAEG at 12). The School Advocates claim that, not only should acronyms be defined, but an explanation should be given as to the entities' relationship to the CRES provider and how that relationship could cause rates to increase (School Advocates at 9).

NEMA states that the definition of acronyms may serve to confuse customers, as it may describe entities with which the general public is unfamiliar. NEMA recommends that the contract should disclose the source of pass-through clause charges with enough specificity to be accurate to the consumer. (NEMA at 4.) RESA and Noble point out that the Commission's website includes a comprehensive glossary of terms and that, consequently, the need to define

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<sup>3</sup> North American Electric Reliability Corporation.

an acronym depends on the acronym and the customer audience (RESA at 12-13; Noble at 1).

Eagle Energy asserts that contracts should clearly define acronyms, especially if they are used in such a way that they affect price (Eagle at 1). IGS states that it would not object to a requirement that the contract or advertisement define the terms enumerated (IGS at 5). NAPG states that it is appropriate to identify acronyms referring to upstream entities or regulatory bodies by name in both residential and small commercial terms and conditions (NAPG at 5). FES does not answer this question, but asserts instead that the Commission should address any concerns with customer understanding by developing customer education focused on common industry terms found in retail electric contracts (FES at 9).

In its reply comments, OCC asserts that prohibition of pass-through clauses will eliminate the need to describe complicated terms such as RTO, PJM, and NERC (OCC Reply at 10).

#### Commission Conclusion on Issue (f)

- (17) The Commission finds that a pass-through clause that refers to acronyms such as "RTO," "NERC," or "PJM" should contain definitions for these acronyms in all applicable contracts, whether variable-price or introductory-price, and whether residential, small commercial, larger commercial, or industrial. The Commission agrees with the overwhelming number of commenters that definitions for acronyms will help to ensure clarity and consumer protection. The Commission directs Staff to draft proposed rules consistent with this finding.

#### Comments on Issue (h)

- (18) The final question issued for comment, Issue (g), inquired as to what alternative labels should be used on contracts with a pass-through clause that have an otherwise fixed rate.

OCC asserts again that costs imposed by an RTO and billed to a CRES provider may not be passed through and billed to customers with fixed-rate contracts, as this practice violates Ohio law. OCC and AARP reiterate their argument that fixed means fixed and, as a result, OCC, AARP, and the School Advocates argue a contract that contains a pass-through clause should be labeled as a variable-price contract. (OCC at 17-18; AARP at 5-6; School Advocates at 10) Lucas County asserts that labeling does not matter, as pass-through clauses are prohibited in fixed-price contracts (Lucas County at 11).

OMAEG recommends that agreements that incorporate a pass-through clause should include a reference to the pass-through clause in the pricing attachment, such as "Pricing Agreement and Potential Cost Pass-Throughs" or "Price with Pass-Through" (OMAEG at 14). OEG also asserts that a label should be used that fairly and honestly conveys to customers that the agreed-upon rate may be increased subject to certain future conditions and suggests such contracts be labeled as "Conditional Fixed-Rate" (OEG at 1).

NEMA cautions that alternative labels will result in consumer confusion about fixed-rate products (NEMA at 6). RESA and Noble contend that labeling should be at the CRES providers' discretion and the Commission should judge in particular circumstances whether a communication was free from misrepresentation and intent to mislead (RESA at 13-14; Noble at 1).

IGS and NAPG do not recommend alternate labels, but clear and conspicuous disclosure of pass-through clauses (IGS at 5; NAPG at 6). FES also objects to alternative labels, and asserts that, instead, the Commission should focus on customer education about pass-through clauses (FES at 11).

In its reply comments, OCC urges the Commission to reject FES' position regarding education, arguing that consumers remain confused by the complexities of the retail electric market despite Commission efforts at education, and that customers should not be required to master these



complexities in order to participate fairly in Ohio's electric market. Further, OCC opposes other commenters' proposals for alternative labels, arguing that they will create confusion for customers. (OCC Reply at 8-9, 10-11.) Similarly, in its reply, NAPG points out that the variety and lack of consistency among the proposals suggests that the labels will generate confusion (NAPG Reply at 5).

In its reply comments, OMAEG agrees with OEG that an acceptable label for contracts containing pass-through clauses with an otherwise fixed rate could be "Conditional Fixed-Price" (OMAEG Reply at 10).

#### Commission Conclusion on Issue (h)

- (19) The Commission concludes that an alternative label should not be required on a contract with a pass-through clause that has an otherwise fixed rate as, given our previous findings, such a contract may only be marketed appropriately as a variable or introductory-rate contract. As such, the Commission finds that an alternative label would be unhelpful and may further confuse customers.

#### General comments and comments specifically pertaining to actions by FES

- (20) Although the Commission opened this investigation to explore specific questions regarding marketing practices within the general CRES market, multiple parties filed comments beyond the questions asked and/or specifically filed comments and reply comments regarding conduct by FES. The Commission will address those comments and reply comments here.

OCC argues that the Commission's investigation should not focus on the RTO charges in fixed-rate contracts, but should also focus on prohibition of the automatic renewal of fixed-rate contracts at a month-to-month variable rate (OCC at 8-9).

OPAE comments that the questions asked by the Commission place the risk of unforeseen events onto

customers and that, rather than requiring complex contract disclosures, the Commission should standardize CRES contracts for residential and small commercial customers. OPAE argues that residential and small commercial customers should have no responsibility to navigate details of their contracts. (OPAE at 5-6.) Similarly, Eagle asserts that the Commission's Staff should review standard contract provisions prior to their use by a CRES provider (Eagle at 1). Champion also urges the Commission to standardize customer contracts, and notes that, in Texas, residential and small non-residential customers receive standardized terms of service (Champion at 2-3).

Lucas County asserts that the actions of FES announcing that it would impose an "RTO Expense Surcharge" caused the Commission to initiate this investigation. Lucas County points out that, although FES guaranteed residential participants six percent off the price-to-compare, and small business participants four percent off the price-to-compare, that the three percent expense surcharge sought by FES would eliminate as many as nine months of those savings. FES argues that this practice by FES is forbidden by Ohio Adm.Code 4901:1-21-17, and requests that the Commission take action under Ohio Adm.Code 4901:1-21-15 and apply strong sanctions against FES. (Lucas County at 1-12.)

The School Advocates similarly assert that the Commission's investigation is too narrow and that the Commission should investigate the lawfulness of FES' attempt to pass through increases in PJM ancillary service costs that, the School Advocates allege, were contemplated and included in the fixed rate agreed upon. The School Advocates also urge investigation into imposition of fines on FES for violations of Ohio Adm.Code 4901:1-21-03, 4901:1-21-05, and 4901:1-21-12. (School Advocates at 2-3.) Noble Americas, while not naming a specific CRES provider, similarly contends that the actions taken by a few CRES providers have, and will, negatively impact consumers, other CRES providers, and the industry if they have engaged in misleading or deceptive marketing and

urges the Commission to investigate the actions of the few CRES providers attempting to pass through charges to fixed-rate customers (Noble Americas at 1-2).

In its reply comments, FES asserts that a number of the comments directed toward FES have ulterior motives. More specifically, FES asserts that a number of the commenters now argue that the terms and conditions of their contracts with FES were misleading because these commenters see an opportunity to avoid a proper charge. FES maintains that this investigation is an inappropriate forum to interpret a specific CRES provider's contract or adjudicate a CRES provider's exercise of its contractual rights. Further, FES asserts that a number of the commenters who are competitors of FES are urging investigation of FES' rights to exercise a pass-through clause in order to inflict potential harm on FES. (FES Reply at 1-6.)

- (21) In response to these comments and reply comments, the Commission declines to make determinations regarding specific CRES providers' contract terms with specific customers. As indicated in the questions issued for the comment, the Commission sought comments on contract terms within the general CRES market. The Commission finds that it is not appropriate to consider comments or make determinations in this investigation regarding complaints made about specific contracts with specific CRES providers. Any such complaints are more appropriately filed as complaint cases outside of this investigation. Further, the Commission declines to consider comments filed that go beyond the scope of the questions issued for comment.

It is, therefore,

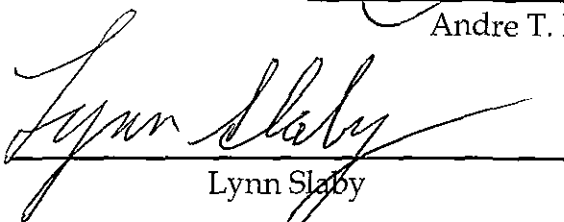
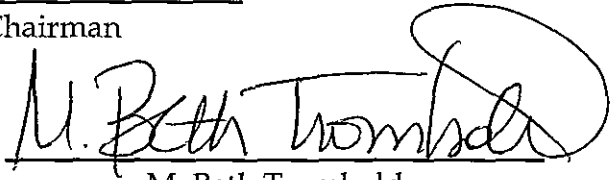
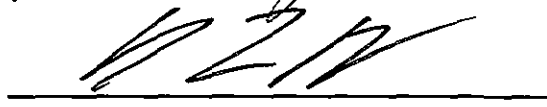
ORDERED, that CRES providers shall have until January 1, 2016, to bring products being marketed into compliance with the "fixed-means-fixed" guidelines set forth in this Finding and Order. It is, further,

ORDERED, That Staff draft proposed rules and a rules proceeding be commenced consistent with this Finding and Order. It is, further,

ORDERED, That a copy of this Finding and Order be served upon all competitive retail electric service providers, Ohio Consumers' Counsel, and all other interested parties of record. It is, further,

ORDERED, That a copy of this Finding and Order be served upon the Electric-Energy List Serve.

THE PUBLIC UTILITIES COMMISSION OF OHIO

  
Andre T. Porter, Chairman  
Lynn Slaby  
M. Beth Trombold  
Asim Z. Haque  
Thomas W. Johnson

MWC/sc

Entered in the Journal

**NOV 18 2015**



Barcy F. McNeal  
Secretary