BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

APPLICATION FOR REHEARING

BY

NOBLE AMERICAS ENERGY SOLUTIONS LLC

I. Introduction

The Public Utilities Commission of Ohio ("Commission") opened this investigation to determine whether it was unfair, misleading, deceptive or unconscionable for Competitive Retail Electric Service ("CRES") providers to market retail electric products as "fixed-rate contracts" or "percentage-off the price-to-compare contracts" when those contracts contain "pass-through" provisions.

The Commission sought comments from stakeholders in April 2014 on a series of questions, lettered (a) through (h), and Noble Americas Energy Solutions LLC ("Noble") filed comments in the docket. The Commission issued a decision ("Finding and Order") on November 18, 2015, that provided a guideline for CRES provider contracts and directed Commission Staff to commence a rulemaking to implement the results of the decision.

Noble is a party or an affected person by that decision and therefore may apply for rehearing pursuant to Section 4903.10, Ohio Revised Code, and Rule 4901-1-35, Ohio Administrative Code.

II. Bases for Rehearing

A. The difference between mercantile and non-mercantile customers support treating CRES provider mercantile contracts for retail electric products differently than those for non-mercantile customers

Noble has applied for rehearing because the Commission's Finding and Order does not recognize the distinction between mercantile and non-mercantile customer types. Noble notes initially that of the eight questions presented by the Commission to stakeholders during the course of the investigation and which form the foundation to the November Finding and Order, none recognize or address the mercantile/non-mercantile customer distinction present in Ohio law and rules. The difference between mercantile and other customer types is that mercantile customers are businesses that are experienced in making product purchases, unlike what is typically experienced among small commercial and residential customers. Basically, when a CRES provider contracts with a mercantile customer, it is a business-to-business transaction, so products sold to mercantile customers warrant a different consideration than those sold to residential customers, for instance. This difference is acknowledged

and reflected in how the Ohio Revised Code ("ORC") distinguishes between mercantile and non-mercantile customers:[1]

> "Mercantile customer" means a commercial or industrial customer if the electricity consumed is for nonresidential use and the customer consumes more than seven hundred thousand kilowatt hours per year or is part of a national account involving multiple facilities in one or more states.

Noble believes that the distinction drawn by the ORC between mercantile and non-mercantile customer types support not imposing artificial and potentially misleading labels on CRES provider contracts commonly used to serve mercantile customers. Noble supports establishing a small commercial customer threshold at a reasonably low level, consistent with how other states have set such limits. However, Noble also recognizes that the current status of the Ohio rules only delineates between mercantile and non-mercantile customers, so Noble recommends that the distinction be made using the current statute cited above. Under this approach the threshold for contract labels should be defined on a mercantile and non-mercantile basis with no labeling requirement for mercantile customer contracts, as is the current status of the market in Ohio and elsewhere. It is worth noting that although utility standard service offer ("SSO") service can change periodically, and could be fairly characterized as a "variable" rate, the Commission has not imposed a labeling requirement on those or other changeable utility service charges.

In its Finding and Order, the Commission draws no distinction between mercantile and non-mercantile customer types, nor does it provide distinction between a variable rate component and an index-based component. Instead, the Commission has introduced labeling provisions (i.e., "Variable" and "Introductory") to all CRES provider contracts that are typically only associated with residential products. These terms typically represent a product that is not tied to an identifiable rate or index, is subject to change at the supplier's discretion and the customer typically has the right to terminate the contract at any time. It is common for mercantile customer contracts to have both fixed and non-fixed components. Another common product is index-based pricing that simply references a third-party published index rate, such as an ISO index price, but is not considered "variable" in typical market jargon. An example of this is an hourly-priced product based on the PJM index, which is publically posted. Mercantile customers are familiar with this concept, and actively employ this type of product to manage their electricity spending. Moreover, it does a disservice to the supplier and customer community to designate such a contract "variable" when, in fact, such products are (a) tied to a transparent index and (b) the variability is a function of the market, not based on supplier's discretion. Failure to recognize the difference between variable and indexed pricing, partially fixed/partially indexed, etc. undermines the value to customers of having access to all of the wholesale and retail products that are now available and introduces additional levels of confusion in the market.

Mandating mercantile customer contract labeling provisions will likely have negative impacts on the marketplace. Simple labels are not sufficient mechanisms to explain all important aspects of a product to consumers. For example, certain suppliers could label a contract as fixed even though it has a pass-

[1] ORC Section 4928.01(A)(19).

through provision buried in the change of law provision or tie it to specific volumes, or include other language around customers load that essentially creates a pass-through situation because of something the customer did associated with their usage and not something market- or market-price related. As it stands, this could compromise a fair, competitive marketplace since the customers may now have a false sense of security that the contracts themselves are rate regulated because it says fixed in the label instead of actually reading them to ascertain the risks to which they are agreeing. In order to be effective, the Commission will still need to investigate and penalize such practices. The best way to prevent deceptive practices is to police and penalize violations under its existing authority without unduly encumbering the entire market with new labeling requirements or other requirements, particularly in the mercantile space. Noble believes that a full consideration of the events that have led to the Commission's investigation in this case clearly show that it is not the existence of pass-through provisions that have given rise to customer complaints, but rather the deceptive marketing practices, misleading contract(s) and abuse of such provisions by a small – perhaps only one – set of CRES providers. That is where the problem and solution undoubtedly lies.

B. On rehearing, the Commission should clarify that if a mercantile customer terminates a CRES provider contract before the end of its term due to the invocation of a change in law provision, the reasonable liquidation costs of a forward hedge are not considered an early termination penalty.

The Commission in its Finding and Order stated that if a CRES supplier invokes its change of law provision, they are required to present a contract to customers, which proposes new contract terms to the customer. Subsequently, the customer could then "affirmatively accept or passively reject the proposed terms" and pursue another CRES provider "without being subjected to any penalty." Order at 12-13. Noble believes that while the Commission intends that change of law provisions are needed to manage changed circumstances and better align customer-supplier risks, the description provided could be understood that any CRES provider that invokes a change of law not accepted by the customer, risks losing the change in value of the forward hedge. Such costs largely depend on volumes remaining on the contract and forward price movement, and such costs can reach into the millions of dollars. Generally, a penalty is a non-cost-based charge to provide an incentive to either do, or not do, a certain act. In this context, that act is to not terminate early a residential retail electric supply contract. That is different from a liquidation provision that is intended to allow the non-terminating party to retain the benefit of their bargain by allowing them to collect their hedging costs/losses. Noble does not believe that the Commission intended that reasonable hedge liquidation costs be foregone by CRES providers serving a mercantile customer if they invoke a change of law provision. Therefore, Noble seeks clarification upon rehearing that the Commission does not intend that hedge liquidation costs be considered penalties that cannot be collected from mercantile retail electric customers if a change of law provision is invoked.

III. Conclusion

Noble intends to participate in the upcoming rulemaking and workshop that has been initiated to implement the directions of the Commission. However, Noble does not believe that the current Finding

and Order will bring certainty to CRES providers or customers, unless it is modified to recognize the difference between mercantile and non-mercantile customers and to clarify that penalties do not include forward hedge liquidation costs. If the result of this process is that most CRES provider contracts now have to incorporate the word "variable" across the top of the document (or worse yet, label it as "fixed" and find sneaky ways to imbed pass-throughs), then the opportunity to address the bad actions of a single – or very few – entities that caused this problem will go unchanged, with predictable results.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned certifies that a courtesy copy of the foregoing document is also being served (via electronic mail) on the 18th day of December 2015 upon all persons/entities listed below:

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