

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

⁴ *Id.* at 2.

fixed.⁵ Customer confusion created by the presence of pass-through clauses breeds an atmosphere of distrust and frustration with competitive retail electric service (CRES) suppliers, thereby threatening to shift customers off of their CRES contracts and onto the electric distribution utility's SSO.⁶ For the competitive marketplace to function appropriately, there must be trust between customers and their CRES suppliers.⁷

Mindful that a robust CRES marketplace should offer a diverse-array of products, OMAEG did not urge a wholesale ban on pass-through clauses; instead, OMAEG simply recommended that the clauses be stricken from fixed-rate contracts and further explained that if CRES suppliers desired to market contracts containing these clauses, the contracts should be appropriately labeled, in plain language, to put customers on fair notice that they could be subject to paying pass-through charges.⁸

On November 18, 2015, the Commission issued a finding and order detailing the results of its investigation which adopted many of OMAEG's recommendations.⁹ The Commission explained 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 [of] 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

⁵ Id.

⁶ Id. at 12-13.

⁷ Id. at 13.

⁸ Id. at 15.

⁹ *Fixed-Means-Fixed Order* at 11-12.

“fixed-rate.” While CRES providers may continue to offer products containing pass-through provisions, they must be labeled appropriately as variable or introductory rates.¹⁰

The Commission characterized its findings as its “fixed-means-fixed” guidelines, and explained that CRES providers must bring all “marketing for contracts being marketed into compliance with the ‘fixed-means-fixed’ guidelines” by January 1, 2016.¹¹

On December 15, 2015, the Retail Energy Supply Association (RESA) filed a motion to stay the requirement that all CRES providers modify their marketing materials until the Commission both rules upon RESA’s rehearing application *and* finalizes new rules which correspond to the “fixed-means fixed” guidelines.¹² RESA is seeking an expedited ruling.¹³ According to RESA, the Commission’s order lacks necessary details, thereby complicating CRES providers’ review process.¹⁴ RESA also submits that it is unwise to require changes to marketing materials given that certain aspects of the Commission’s “fixed-means-fixed” guidelines could change depending on the outcome of both the rehearing process and the upcoming rulemaking proceeding.¹⁵

While OMAEG shares RESA’s interest in ensuring clarity and certainty for all market participants, OMAEG is concerned that a stay could undo the benefits that the Commission’s “fixed-means-fixed” guidelines will undoubtedly bring to customers and the competitive retail market.

¹⁰ Id.

¹¹ Id. at 13.

¹² RESA Motion for a Stay and Motion for an Expedited Ruling at 2 (December 15, 2015).

¹³ Id.

¹⁴ Id. at 4.

¹⁵ Id. at 5.

II. Discussion

OMAEG commends the Commission for taking a decisive stand against unfair, misleading, deceptive, and unconscionable marketing practices that customers were witnessing in the CRES market. The “fixed-means-fixed” guidelines, which arose out of a stakeholder process lasting over a year-and-a-half, make it abundantly clear that the Commission will no longer tolerate customer confusion and injury to the competitive retail market generated by the presence of misleading pass-through clauses in fixed-rate contracts.

It is expected that these guidelines will restore trust between customers and their CRES suppliers. Additionally, the guidelines should be expected to provide a positive atmosphere for the competitive retail market to continue developing. These outcomes are in the public interest and promote several state policies, including “[e]nsur[ing] retail electric service consumers protection against unreasonable sales practices, market deficiencies, and market power”¹⁶ and “[r]ecogniz[ing] the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment.”¹⁷ Now is not the time for the Commission to backtrack from its resolute judgment about how to protect consumers from deceptive and misleading sales practices, improve customer experiences in the retail electric market, and ensure the longevity of a robust retail electric market.

While OMAEG agrees that all market participants are better off when there is clarity and certainty about the scope of regulatory requirements, allowing known deceptive and misleading practices to continue could invite the same or similar type of mischief that prompted the Commission to order this investigation in the first place, all to the detriment of customers and

¹⁶ R.C. 4928.02(I).

¹⁷ R.C. 4928.02(G).

the competitive market. Well aware of the rehearing process, the Commission chose to protect consumers and eliminate the deceptive and misleading practices as of January 1, 2016, providing CRES suppliers with more than six weeks to comply. The Commission's decision to select January 1, 2016 as a date to bring marketing materials into compliance with the state policy and the Commission's rules was sound regulatory practice. It is important to have a clear date as to when the revised contracts must conform to the Commission's guidelines so that customers are aware and may make the appropriate business decisions when entering into fixed-price contracts. Having the changes effective at the beginning of 2016 will assist in a clean transition. Further delaying the protection so aptly granted by the Commission will delay the protections afforded to customers. Asking the Commission to ignore its directives and stay the implementation of consumer protections on the possibility that the Commission may, at some future time, revise its guidelines or directives is misguided.

RESA is asking the Commission to condition the stay on two events. First, RESA requests that the stay remain in effect until the Commission is able to rule on RESA's application for rehearing.¹⁸ Although Ohio law requires the Commission to act upon RESA's, as well as other stakeholders', applications for rehearing within 30 days, the Commission may grant itself more time to further consider the issues. If more time is granted for the Commission to further consider the issues, any stay would unnecessarily deny consumers the protections that were granted in the Commission's November 18, 2015 *Fixed-Means-Fixed Order* for an undefined period of time. Second, RESA asks the stay to remain in effect until the Commission finalizes rule changes incorporating the features of the "fixed-means-fixed" guidelines.¹⁹ But again,

¹⁸ RESA Motion for a Stay and Motion for an Expedited Ruling at 3.

¹⁹ *Id.*

RESA is asking the Commission to prolong the implementation of important consumer protections for an undefined period of time. As is typical in most rulemaking proceedings, the Commission issues Staff-proposed rules for comment. It is not unusual for stakeholders to submit multiple rounds of comments and for the Commission to issue multiple entries addressing these comments before the Commission orders final rules. The rulemaking could be subject to additional delay through the Joint Committee on Agency Rule Review process.²⁰

Therefore, a stay could deny for many months the benefits that were expected to accrue to customers and the retail electric market as of January 1, 2016. Such a delay could encourage the inclusion of deceptive pass-through clauses in an effort to have contracts signed prior to the adoption of new rules, even though the Commission has made it quite clear that the concept of “fixed-means-fixed” should govern CRES behavior and ensuing contracts. A stay would erase the gains heralded by the adoption of the “fixed-means-fixed” guidelines.

Any difficulties in implementation cited by RESA should not cause the Commission to stay its order. To the contrary, the Commission should balance the interests presented by RESA against both the interests of protecting customers against deception and the interest in facilitating a robust competitive market.

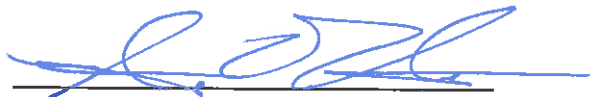
III. Conclusion

The Commission’s adoption of the “fixed-means-fixed” guidelines was a fitting response to some of the questionable conduct witnessed by customers in the CRES market. The guidelines should help to restore customers’ trust and facilitate their further participation in the competitive marketplace. Accordingly, RESA’s request for a stay should be denied and the

²⁰ It is OMAEG’s and RESA’s understanding that the Commission has not yet opened a rulemaking docket to implement the “fixed-means-fixed” guidelines.

Commission should not delay the effective date of these important guidelines and consumer protections.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'K. Bojko', is written over a horizontal line.

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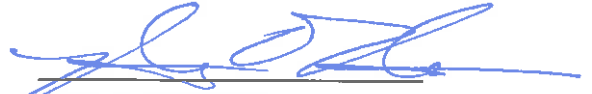
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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon the following parties via electronic mail on December 22nd, 2015.


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Summary: Memorandum Contra of The Ohio Manufacturers' Association Energy Group to The Retail Energy Supply Association's Motion For Stay And Motion For Expedited Ruling electronically filed by Debra A Gaunder on behalf of Ohio Manufacturers' Association Energy Group