

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**MEMORANDUM CONTRA APPLICATIONS FOR REHEARING FILED BY
FIRSTENERGY SOLUTIONS CORP., INTERSTATE GAS SUPPLY, INC.,
NOBLE AMERICAS ENERGY SOLUTIONS LLC, AND THE RETAIL ENERGY
SUPPLY ASSOCIATION
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION

On April 9, 2014, the Public Utilities Commission of Ohio (“PUCO”) opened this docket to investigate whether it was unfair, misleading, deceptive or unconscionable for consumers to be marketed contracts as “fixed-rate contracts” or “percentage-off the price-to-compare contracts” when such contracts included “pass-through” provisions.¹ On November 18, 2015, the PUCO issued a Finding and Order (“Order”), and held that “CRES providers may not include a pass-through clause in a contract labeled as “fixed-rate.” The PUCO found that “CRES shall have until January 1, 2016, to bring all marketing materials for contracts into compliance with the “fixed-means-fixed” guidelines set forth in this Order.”² And the Order also stated that changes to the PUCO’s current rules should be initiated to provide clearer, more specific guidance for customers and CRES providers in the future.³ The PUCO’s Order was effective November 18, 2015.

¹ Entry at 2.

² Order at 13.

³ *Id.*

On December 18, 2015, FirstEnergy Solutions Corp. (“FES”), Interstate Gas Supply, Inc. (“IGS”), Noble Americas Energy Solutions LLC (“Noble”), and the Retail Energy Supply Association (“RESA”) filed Applications for Rehearing of the PUCO’s November 18, 2015 Order.⁴ These parties raise no new issues. The PUCO should deny their requests for rehearing.

II. ARGUMENT

A. **The PUCO’s Order does not need to comply with R.C. 119.03 because there were no rules established by the November 18, 2015 Order.**

FES argues that the PUCO’s Order initiated a rule change proceeding and thereby must comply with the statutory obligation to provide notice and an opportunity to be heard. FES alleges that such a process would have to include a business impact analysis and recommendations for the common sense initiative office.⁵ FES is correct that the PUCO Order required that a rules proceeding should be commenced;⁶ however, the November 18th Order made no new rules. In fact, the PUCO Order interpreted already existing rules. The PUCO found “that the ‘fixed-means-fixed’ guidelines discussed represent our *interpretation*.”⁷ And the Order states that:

[T]he commission finds that changes to the Commission’s current rules should be initiated in order to provide clearer, more specific guidance for customer and CRES providers in the future. The

⁴ Direct Energy Business LLC (“Direct”) missed the filing deadline for Applications for Rehearing and filed a correspondence letter on December 22, 2015, five days after Applications for Rehearing were due, attempting to make its request for rehearing through a letter. Direct’s backdoor attempt at rehearing must be ignored as it was untimely and improper according to R.C. 4903.10. Because the deadline for rehearing is controlled by statute, and Direct missed the statutory deadline, the PUCO has no jurisdiction to entertain Direct’s arguments.

⁵ FES Application for Rehearing at 4.

⁶ Order at 14.

⁷ Order at 13 (emphasis added).

Commission notes that the comments filed in this case indicate that there are divergent interpretations of the terms ‘fixed-means-fixed’ 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.⁸

As expressly provided in the Order, the PUCO performed its statutory duty to interpret the terms of a contract. The PUCO made no pretense of creating a rule. There was no obligation under R. C. 119.03 to follow the rulemaking requirements. FES’ arguments should be rejected.

B. The PUCO’s Order determining that fixed-means-fixed will not cause customers’ rates to rise.

FES claims that the PUCO Order will prevent new suppliers from entering Ohio and that the price all customers will pay for CRES will increase.⁹ But FES does not explain why labeling a contract fixed-means-fixed will cause customers to pay more. If FES or any other CRES chooses to pass non-fixed costs on to CRES customers, they can do so in a variable contract. The solution is simple – to pass on unexpected and changing costs, use a variable contract. The PUCO ruled that CRES provider 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.”¹⁰ FES and all other CRES providers can pass through variable costs. How this will cause prices to increase is a mystery. FES offered no explanation of the cost increase relationship to the PUCO Order. FES’

⁸ Order at 13.

⁹ FES Application for Rehearing at 1

¹⁰ Order at 11 – 12.

argument that the Order is unreasonable because it will needlessly cause prices to rise should be dismissed.

C. The PUCO followed the mandate of the Ohio Adm. Code 4901-21-05 when it held that pass-through provisions are prohibited in fixed-price contracts offered to customers.

IGS argues that because Ohio Adm. Code 4901:1-21-05 contains a provision stating that in CRES contracts, offers must include “[t]he amount of any other recurring or nonrecurring CRES provider charges” and also a “statement of any contract contingencies or conditions precedent”¹¹ that fixed contracts must be allowed to contain these variable terms in fixed contracts. IGS’ argument is that because the rule defines variable and contingencies, the PUCO intended to allow these terms in a fixed-rate contract.

However, the same rule that IGS cites, also provides that CRES offers shall include “[f]or a variable rate offers, a clear and understandable explanation of the factors that will cause the price to vary, including any related indices, and how often the price can change.”¹² Thus, the Ohio Adm. Code 4901:1-21-05 specifically allows CRES providers to include varying pricing in their contracts, but variable rate contracts cannot be marketed as fixed rate contracts. IGS’ statement in its Application for Rehearing that “[t]he specific language of that portion of the rule, however, indicates that suppliers may include a properly disclosed pass-through clause”¹³ is correct – that a pass-through clause though cannot be included in a contract labeled as fixed. IGS misapplies Ohio Adm. Code 4901:1-21-05. Its request for rehearing should be rejected.

¹¹ IGS Application for Rehearing at 10.

¹² Ohio Adm. Code 4901:1-21-05(3).

¹³ IGS Application for Rehearing at 9.

D. The PUCO's Order applying to contracts entered into prior to the Order date does not violate the Ohio Constitution's prohibition against retroactive application of laws because the Order interprets and clarifies the language and does not alter the contracts.

IGS claims that “[i]n this instance, retroactive application of the new regulation would be arbitrary and capricious.”¹⁴ IGS misconstrues the PUCO Order in this proceeding. The PUCO Order, by no means, established a “new regulation.” The PUCO Order affirmatively found that there is a need for straightforward language and terms for CRES customers.¹⁵ The Order stated:

[O]n 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.”¹⁶

Ohio law requires the PUCO to establish CRES rules that ensure consumers are provided with adequate, accurate, and understandable pricing and terms and conditions of service.¹⁷ The PUCO opened this case 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 included pass-through clauses.¹⁸ The PUCO concluded that “in all CRES contracts, whether residential, commercial, or industrial, fixed should mean fixed.”¹⁹ Therefore, if there are contracts in existence today where there was any question about the meaning of the “fixed” contract,

¹⁴ IGS Application for Rehearing at 17.

¹⁵ Order at 11.

¹⁶ *Id.* at 12.

¹⁷ Ohio Rev. Code 4928.10(A)(1).

¹⁸ Order at 2.

¹⁹ *Id.* at 11.

there is now an answer. When interpreting “fixed” contracts, the PUCO clarified that fixed contracts do not contain variable terms.

In keeping with the Ohio Adm. Code Section 4901:1-21-05(C), no CRES provider may engage in practices which are unfair, misleading, deceptive, or unconscionable.²⁰ The PUCO has now clearly opined that in interpreting the terms of CRES contracts, fixed means fixed, which means that fixed contracts cannot contain any pass-through provisions. This holding became effective on November 18, 2015. Unlike IGS’ claim, the PUCO holding interprets the terms of CRES contracts and does not create a new regulation. There is no longer any ambiguity regarding the meaning of fixed. The PUCO’s orders are effective when issued.²¹ Therefore, the PUCO should dismiss the IGS argument that the November 18th Order constitutes the retroactive application of a new regulation in contravention of the Ohio Constitution.

E. The PUCO’s proceeding was not an investigation into the CRES providers’ response to additional PJM charges as asserted by RESA. Therefore there is no requirement that the record contain cites to PJM’s Polar Vortex charges.

RESA states that “[t]here is nothing in the record to demonstrate, that on a widespread basis, CRES providers inappropriately responded after they incurred the additional PJM charges following the Polar Vortex.”²² RESA mistakes the scope and purpose of the PUCO’s investigation here. There was neither intent nor any requirement that the PUCO analyze or investigate the PJM charges following the Polar Vortex. The intent behind this case is whether CRES contracts are unfair, misleading, deceptive, and unconscionable, in contravention of the Ohio Adm. Code 4901:1-21. The PUCO record

²⁰ Ohio Adm. Code 4901:1-21-05(7)(C).

²¹ Ohio Rev. Code 4903.15.

²² RESA Application for Rehearing at 5.

in this case contains evidence necessary to make the finding that it made – fixed-means-fixed. RESA's application for rehearing should be denied.

F. The PUCO's Order that fixed-means-fixed in CRES contracts does not conflict with the treatment of utility fixed-price offerings.

RESA argues that the PUCO finding that “fixed-means-fixed” is inconsistent with the labeling approved in the past by the PUCO for utility-offered services and provides an example of Ohio Edison's Advanced Metering Infrastructure Rider. The tariff language states that the charge is a fixed monthly charge, however, it is updated and reconciled on quarterly basis. But this is not an apples-to-apples comparison.

Unlike CRES rates charged to customers, the rate that a utility charges for a service (Advanced Metering Infrastructure Rider) is subject to regulatory oversight and approval by the PUCO. Prior to approving a utility rate, a case is opened at the PUCO. Parties may intervene, conduct discovery, and present evidence to the PUCO. Parties are given the opportunity to argue about the costs that the utility passes on to customers. This situation is not at all comparable to CRES rates that include pass-through charges on a fixed CRES contract. That CRES rate is not subject to the same regulatory transparency requirements or a thorough examination of costs. RESA's argument that the PUCO's November 18th Order is discriminatory to CRES suppliers is inaccurate and should be rejected.

G. Imposing a limited set of labels applicable to all Ohio CRES contracts provides customers with a clear understanding of the CRES product.

RESA states that the definitions adopted in the November 18, 2015 decision are too limited and do not allow for consideration of hybrid products.²³ RESA further contends that the definitions adopted were done outside of a rule review proceeding and parties had no opportunity to address them.²⁴ The PUCO's Order could not be clearer. CRES providers may not include a pass-through clause in a contract labeled as "fixed-rate."²⁵ While CRES providers may continue to offer products containing pass-through provision, they must be labeled appropriately as variable or introductory rates.²⁶ Additionally, the PUCO found that changes to the current rules needed to be initiated in order to provide clearer, more specific guidance for customers and CRES providers.²⁷ RESA will have an opportunity to address its concerns regarding the hybrid products and other issues relating to providing a variety of CRES products in the upcoming rule proceeding that the PUCO ordered to be initiated.²⁸ But the holding of the November 18th Order protects the interests of consumers because it clarifies the definition of fixed CRES contracts.

III. CONCLUSION

OCC appreciates the PUCO Order in this case that is intended to protect Ohio's consumers. The protection established by the PUCO's November 18, 2015 Order-- that

²³ RESA Application for Rehearing at 9.

²⁴ *Id.* at 10.

²⁵ Order at 11.

²⁶ *Id.*

²⁷ *Id.* at 13.

²⁸ *Id.*

fixed-means-fixed-- is needed to prevent customers from being victims of unfair, deceptive, misleading, and unconscionable terms in CRES supplier contracts. For the reasons discussed in this Memorandum, the OCC respectfully requests that the PUCO deny the Applications for Rehearing filed by FES, IGS, Noble, and RESA.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Memorandum Contra has been served via electronic service upon the following parties of record this 28th day of December, 2015.

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