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

SECOND ENTRY ON REHEARING

Entered in the Journal on March 29, 2017

I. SUMMARY

{¶ 1} The Commission grants, in part, the applications for rehearing filed by Noble Americas Energy Solutions LLC, FirstEnergy Solutions Corp., and Interstate Gas Supply, Inc., finding that the Commission's fixed-means-fixed guidelines should not apply to large mercantile customers.

II. PROCEDURAL HISTORY

{¶ 2} 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. Thus, the Commission 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.

{¶ 3} In March 2014, the Commission became aware, through consumer inquiries and informal complaints, that CRES suppliers 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 events.

{¶ 4} By Entry issued April 9, 2014, the Commission opened an investigation to determine whether it is unfair, misleading, deceptive, or unconscionable for a CRES provider 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). Timely comments were filed in this proceeding by multiple stakeholders.

{¶ 5} By Finding and Order issued November 18, 2015 (Order), the Commission determined that, in all CRES contracts, whether residential, commercial, or industrial, fixed should mean fixed. Consequently, the Commission ordered that, on a going-forward basis, CRES providers may not include a pass-through clause in a contract labeled as "fixed-rate," although CRES providers could continue to include regulatory out clauses available in limited circumstances. The Commission further held that CRES providers would have until January 1, 2016, to bring all marketing for contracts being marketed into compliance with the "fixed-means-fixed" guidelines set forth in the Order. The Commission continued to find that changes to the Commission's current rules should be initiated in order to provide clearer guidance to customers and CRES providers in the future, and directed the Commission's Staff to draft proposed rules and commence a rules proceeding.

{¶ 6} On December 15, 2015, the Retail Energy Supply Association (RESA) filed a motion for a stay of the January 1, 2016 deadline established by the Commission for all CRES providers to bring existing marketing materials into compliance with the Order. On December 22, 2015, OCC and the Ohio Manufacturers' Association Energy Group (OMAEG) filed memoranda contra RESA's motion for a stay.

{¶ 7} On December 18, 2015, applications for rehearing were filed by Ohio Consumers' Counsel (OCC), Noble Americas Energy Solutions LLC (Noble), FirstEnergy Solutions Corp. (FES), RESA, and Interstate Gas Supply, Inc. (IGS Energy). Memoranda contra applications for rehearing were filed by OCC; RESA; The Ohio Schools Council, Ohio School Boards Association, Buckeye Association of School Administrators, and Ohio Association of School Business Officials (collectively, Power4Schools), IGS Energy, and FES.

{¶ 8} On January 13, 2016, the Commission granted the applications for rehearing in order to further consider the issues raised in the applications.

III. APPLICATION FOR REHEARING

{¶ 9} As discussed, applications for rehearing were filed by OCC, Noble, FES, RESA, and IGS Energy. Memoranda contra applications for rehearing were filed by OCC, RESA, Power4Schools, IGS Energy, and FES. The assignments of error alleged in applications focused on several issues, discussed below.

A. Existing Contracts

{¶ 10} In its first assignment of error, OCC requests rehearing in order to seek the Commission's clarification that fixed-means-fixed in all currently existing CRES contracts. OCC argues that, as Ohio Adm.Code 4901:1-21-05(C) prohibits CRES providers from engaging in practices that are unfair, misleading, deceptive, or unconscionable, the Commission's determination that fixed means fixed means that any fixed-rate contracts cannot contain a pass-through provision as of the date of the Order, November 18, 2015.

Similarly, in its second assignment of error, OCC claims that the Commission should not have declined to rule on existing contracts, because, given the fixed-means-fixed ruling, there is no need to re-litigate the issue on a contract-by-contract basis. (OCC App. at 2-5.)

{¶ 11} In its memorandum contra OCC's application for rehearing, RESA asserts that administrative agencies have no power to pass retroactive laws that will impair vested rights in existing contracts or create new burdens, and that the Commission lacks authority to make the adjudications OCC requests (OCC Memo. at 1-2). In its memorandum contra, IGS makes the same argument and adds that, given the delay between the briefing in this case and the final order, it would be unjust to apply the Order to existing contracts. Further, IGS adds that OCC's proposal regarding existing contracts would violate due process and R.C. 4903.09. (IGS Memo. at 3-5.) In its memorandum contra, FES similarly asserts that the Order properly focuses on future contracts (FES Memo. at 2).

{¶ 12} In its fifth assignment of error, IGS also discusses existing contracts, asserting that the Order indicated that suppliers must bring their contracts into compliance with the Order by January 1, 2016, but did not specifically exempt pass-through clauses in existing contracts. IGS contends that, to the extent the Order applies to contracts entered into prior to the date of the Order, it violates the Ohio Constitution's prohibition against retroactive application of laws. (IGS App. at 16-18.)

{¶ 13} In its memorandum contra IGS's application for rehearing, OCC asserts that the Order does not violate the Ohio Constitution because the Order interprets and clarifies the language and does not alter existing contracts (OCC Memo. at 5-6).

{¶ 14} Initially, the Commission notes that the Order found that "on a going-forward basis" CRES providers must abide by fixed-means-fixed guidelines and "bring all marketing for contracts being marketed" into compliance with the guidelines by January 1, 2016. Further, the Commission specifically "emphasize[d] that we make no ruling with

respect to existing contracts[.]" (Order at 11-2.) Consequently, to the extent it was unclear whether existing contracts were exempted from the guidelines, the Commission clarifies that they are, and denies IGS's application for rehearing on this matter. Further, the Commission finds that OCC's request that the Commission include existing contracts in the fixed-means-fixed guidelines should be denied. As stated above, the Commission specifically declined to rule on existing contracts, issued guidelines on a "going-forward" basis, and, further, made no finding whether pass-through clauses in existing contracts are misleading, deceptive, or unconscionable. Further, regarding issues that may be present in existing contracts, the Commission continues to find it is appropriate for concerned customers to bring a complaint case. (Order at 12.) Accordingly, the Commission finds that OCC's application for rehearing on this issue should also be denied.

B. Regulatory-Out Clauses

{¶ 15} In its third assignment of error, OCC argues the Commission should not have allowed regulatory-out clauses to continue to exist in fixed-rate contracts. According to OCC, this would allow a CRES provider to leave a CRES contract when circumstances become uneconomic for the CRES provider, but does not have a similar recourse for when circumstances become uneconomic for the customer—for example, if prices with competing CRES providers drop (OCC App. at 5-6). On the other hand, in its application for rehearing, Noble requests that the Commission grant rehearing on the regulatory-out clause issue to find that, if a mercantile customer terminates a CRES contract before the end of its term due to the invocation of a change of law provision, the reasonable liquidation costs of a forward hedge are not considered an early termination penalty. Noble asserts that this will prevent CRES providers from losing the change in value in the forward hedge and allow the non-terminating party to retain the benefit of their bargain. (Noble App. at 3-4.) IGS argues that requiring affirmative customer consent in such circumstances is arbitrary, unfair, and unworkable, as customers will have every incentive to seek another offer if they may leave a contract without penalty (IGS App. at 15-16).

{¶ 16} In its memorandum contra OCC's application for rehearing, RESA asserts that the Order did not provide CRES providers with a unilateral right to escape a contract and OCC fails to recognize the distinction between a change in law, rule, or tax, which may trigger a regulatory-out clause, and other circumstances that may make a contract less economically viable which would not constitute a regulatory-out (RESA Memo. at 2-3). Similarly, IGS, in its memorandum contra, asserts that OCC's proposal to allow customers to leave a contract without penalty due to market-based price changes is unlawful and unreasonable, as it misunderstands regulatory-out provisions and is detached from market fundamentals, as it misunderstands the purpose of a fixed-price long-term retail contract (IGS Memo. at 6-7). In its application for rehearing, FES asserts that OCC's proposal amounts to allowing consumers to breach contracts and reflects a misunderstanding of the purpose and circumstances in which a regulatory-out clause may be used (FES Memo. at 3).

{¶ 17} RESA further seeks rehearing on the Commission's findings regarding regulatory-out clauses. RESA argues that there can be costs that CRES providers cannot control and the Commission has unfairly concluded that the only means of redress available to CRES suppliers is through a regulatory-out clause and having the CRES customers affirmatively consent to the new terms. Thus, RESA submits that the Commission's limitation on regulatory-out clauses and prohibition against a penalty is vague, unclear, and unfairly exposes CRES providers to significant risks. RESA contends that passing through costs, such as taxes, should be permitted when allowed by the contract terms, and that it is unreasonable to require CRES providers to obtain affirmative customer consent each time there is a change in taxes. Further, RESA asserts that the Commission does not outline what constitutes limited circumstances for permitting a regulatory-out clause nor discuss whether a more flexible regulatory-out clause is permitted in variable and introductory-rate contracts, such as one that permits adjustments without affirmative customer consent. Finally, RESA argues that allowing a customer to exit a contract with no penalty upon rejection of proposed changes could be

disastrous, as CRES providers may have already acquired energy to serve such a customer. (RESA App. at 13-15.)

{¶ 18} In its memorandum contra, Power4Schools argues that the regulatory-out provision set forth in the Order reasonably balances the risks to both CRES providers and customers, and that the CRES providers' arguments would place all of the risk of unforeseen and unknown changes on the customers. Additionally, Power4Schools asserts that the regulatory-out clause may place a check on a CRES providers' conduct in deciding whether to pass-through the costs of an event to ensure the event was a valid regulatory event. Power4School argues that, with a regulatory-out, customers would be free to switch to another supplier choosing not to pass on the costs. (Power4Schools Memo. at 7.)

{¶ 19} The Commission finds that OCC's argument ignores the limited circumstances under which a regulatory-out clause may be invoked. As discussed in the Order, regulatory-out clauses are intended to be invoked only in very limited circumstances, such as, as its namesake indicates, a regulatory change in law for which a CRES provider would be unable to hedge. Clearly, a change such as the general rise and fall of prices offered in the market would not constitute a circumstance under which a CRES provider could invoke a regulatory-out clause, or a change in which a customer should be entitled to leave a contract. A customer desiring to benefit from a general drop in prices in the CRES market has options such as choosing a variable-rate contract instead of a fixed-rate contract. Additionally, as the Commission pointed out in the Order, the Commission has a statutory duty not only to protect customers, but to encourage availability and diversity of reasonably priced electric supplies. As stated in the Order, a blanket elimination of all regulatory out clauses could result in much higher rates in fixed-price contracts for customers or elimination of the offering of these contracts in the CRES market altogether. (Order at 12.) However, we will also clarify that, when a CRES provider invokes the regulatory opt out clause, it is the CRES provider's responsibility to return the customer to the standard service offer unless the customers affirmatively

consents to new prices, terms, or conditions. Absent such affirmative consent, the invocation of the regulatory opt out clause will terminate the contract and the CRES provider may not retain the customer even under the previous contract's prices, terms and conditions. Instead, the CRES provider must return the customer to the standard service offer after a reasonable period for renegotiation of the contract.

{¶ 20} Further, in the Order, the Commission specifically discussed its statutory duty to protect consumers against confusing CRES contract labels in developing its fixed-means-fixed guidelines. In doing so, the Commission found that both statutory duties would be fulfilled by an appropriate balance: prohibiting pass-through clauses, but continuing to permit regulatory-out clauses in fixed contracts in limited circumstances. (Order at 12-13.) The Commission continues to believe this is the appropriate balance, and, consequently, denies OCC's, Noble's, IGS's, and RESA's applications for rehearing on this matter.

C. Larger Commercial and Industrial Customers

{¶ 21} In its application for rehearing, Noble argues that the differences between mercantile and non-mercantile customers supports treating their respective CRES contracts differently. More specifically, Noble asserts that mercantile customers are businesses experienced in making product purchases, unlike small commercial and residential customers, and that the Commission should not mandate mercantile customer labeling, which will negatively impact the marketplace as the simple labels of "fixed," "variable," and "introductory" are insufficient to explain all important aspects of a product to consumers. As an example, Noble points out that certain suppliers could label a contract as fixed-price even though it has a pass-through provision in its change-of-law provision or that is tied to specific volumes. (Noble App. at 1-3.)

{¶ 22} Similarly, in its application for rehearing, FES asserts that the Order unreasonably does not take into account the differences between customer classes. FES asserts that the Commission should restrict its fixed-means-fixed guidelines to residential

and small commercial customers, as many of the Commission's rules do, as larger customers are more sophisticated and various factors that are included in a bill do not permit an offer to be given a simple label such as "fixed." Additionally, FES notes that, in the Pennsylvania Public Utility Commission (PPUC) decision discussed by the Commission in the Order, the PPUC did not place such a restriction on CRES contracts for industrial customers. (FES App. at 5-6.)

{¶ 23} IGS also asserts that the Order unjustly and unreasonably determined that pass-through clauses should be prohibited in fixed-price contracts with commercial and industrial customers on the basis that they are unfair, deceptive, and unconscionable. IGS argues that, if a pass-through clause is included and properly disclosed in a contract with a commercial or industrial customer, the supplier has committed no wrongdoing, as commercial and industrial customers are sophisticated purchasers that are represented by counsel and review closely and understand the terms of their contracts. (IGS App. at 12-13.)

{¶ 24} In its memorandum contra, Power4Schools asserts that the fixed-means-fixed guidelines should not be limited to residential and small commercial customers. Power4Schools contends that, "[i]f large commercial and industrial customers are sophisticated enough to understand that a fixed-rate contract with a pass-through clause doesn't necessarily mean 'fixed,' then they are sophisticated enough under the [Order] to understand that a variable-rate contract with a pass-through clause does not necessarily signify a fluctuating energy rate." Therefore, CRES providers continue to be permitted to offer products with a non-fluctuating rate for energy supply that contain a pass-through clause for unforeseen costs—only such a contract now cannot be labeled as fixed-rate. Power4Schools argues that large commercial and industrial customers understand this distinction. Power4Schools further points out that different guidelines should not apply to different customer classes, citing, for example, Ohio's schools: as public school boards and administrators include both small commercial and large commercial customers, applying

different rules to the schools would result in confusion among these groups. (Power4 Schools Memo. at 5-6.)

{¶ 25} The Commission acknowledges that large mercantile customers are typically sophisticated purchasers represented by counsel. Thus, the protections afforded to small commercial and residential customers may not always be necessary. See, e.g., Ohio Adm.Code 4901:1-21-05(A). Further, we note that because of the higher levels of sophistication and consumption, large mercantile customers may have more complex contracts and billing procedures. As a result, requiring specific contract labels could be a limiting factor for these customers. Therefore, we find that the fixed-means-fixed guidelines should not apply for mercantile customers. In making this distinction, we are cognizant that utilities have varying definitions of large and small commercial customers and R.C. 4928.01(A)(19) only differentiates between mercantile and non-mercantile customers. Consequently, we will revisit whether the fixed-means-fixed guidelines should be further limited to small commercial customers and whether "small commercial customers" should be more stringently defined in the future rules proceeding. Accordingly, the applications for rehearing for Noble, FES, and IGS are granted in part and denied in part. We note, however, that while we limit the fixed-means-fixed guidelines to non-mercantile customers, we are not limiting the ability of CRES providers to include regulatory-out clauses in contracts with mercantile customers.

D. Contract Labels

{¶ 26} RESA next argues that the Commission's imposition of a mandatory and limited set of labels applicable to all Ohio CRES contracts has wide ranging, unintended, and harmful consequences for customers and CRES suppliers, and the decision to require such labeling should be revisited. RESA explains that the Commission decision provides that contracts must be labeled as fixed-, variable-, or introductory-rate, and that alternate labels could confuse customers. RESA argues that some customers, particularly larger commercial and industrial customers, do not rely on the contract categories from the

Apples-to-Apples chart and do not need such labels. RESA further contends that not all Ohio CRES contracts in existence today would fall into one of the three labels on the Apples-to-Apples chart—such as real-time pricing contracts that are not priced per kWh, or hybrid products with both fixed and variable components. Consequently, RESA argues that the Commission's ruling will limit future products and runs afoul of state policy to encourage availability and diversity of suppliers and products. (RESA App. at 6-13.)

{¶ 27} Similarly, IGS asserts that the Order's proposed definition of "fixed-price" is unjust and unreasonable, as it would require fixed-price contract prices to be provided only on a kilowatt hour basis for all customers—even where commercial and industrial customer prices may contain several components that cannot be specified in a kWh price. IGS further claims that commercial and industrial customers typically do not enter into contracts for an all-inclusive price per kWh because they do not want them, and that a more workable framework would allow suppliers to structure their contracts for commercial and industrial customers in the way the customer desires without adding labels that may be confusing. (IGS App. at 13-15.)

{¶ 28} In its memorandum contra RESA's application for rehearing, Power4Schools asserts that it is more appropriate for RESA to make arguments about the nuances of potential contract labels in the rules proceeding (Power4Schools Memo. at 3-4).

{¶ 29} The Commission finds that some clarification regarding label requirements is necessary. As implied by RESA, we clarify that, for residential customers, all contracts must be labeled as either "fixed," "introductory," or "variable" rates. For non-mercantile commercial customers, we strongly encourage that CRES providers similarly label contracts or take additional steps to ensure that their customers fully understand the terms and conditions and how the contract price may vary. As this may not have been evident in the Order, CRES providers have six months from the issuance of this Entry in order to comply with this clarification. Regarding RESA's and IGS's applications for rehearing on these issues, we find they should be denied. The Commission acknowledges that future

innovative CRES products could possibly be inadequately represented by the "fixed", "variable", or "introductory" labels currently utilized by the Commission's Apples-to-Apples chart. However, the Commission finds that the appropriate place to resolve issues of possible alternative labels for products is in the rulemaking that the Commission directed Staff to commence in the Order, where such nuances in products may be thoroughly discussed by all interested stakeholders. Further, if a CRES provider desires to use an alternate label on such a product in the interim, the CRES provider may seek a waiver of the guidelines, provided the proposed label does not constitute a misleading, deceptive, unfair, or unconscionable marketing practice. With respect to mercantile customers, we believe that this protection is unnecessary and inappropriate because mercantile customers tend to be more sophisticated and to be represented by counsel and because contracts between mercantile customers and CRES providers tend to be more complex. Moreover, we will revisit this guidance in the future rules proceeding to determine if this guidance should be extended to a more stringently defined class of small commercial customers.

E. Rules Proceeding

{¶ 30} FES asserts in its application for rehearing that the Order is unreasonable and unlawful because it does not comply with R.C. 119.03. Specifically, FES argues that R.C. 119.03 contains the steps agencies must follow when adopting or amending rules. FES argues the Commission has not followed this statute because it has adopted new language into its rules and has found that the changes should be effective on January 1, 2016, without a notice, opportunity to be heard, or the procedures required by the Common Sense Initiative. (FES App. at 4.) Similarly, RESA asserts in its application for rehearing that the definitions adopted in the Order were done outside of a rule review proceeding, which was procedurally improper and denied parties the opportunity to address them.

{¶ 31} In its memorandum contra, OCC asserts that the Order need not comply with R.C. 119.03, because no rules were established by the Order. OCC specifies that the Order interpreted already existing rules and called for the commencement of a new rules proceeding. (OCC Memo. at 2-3.) Similarly, Power4Schools asserts in its memorandum contra that the Commission did not engage in rulemaking, but merely interpreted its existing rules. Power4Schools also asserts that the Commission is exempted from the provisions of the Administrative Procedures Act pursuant to R.C. 119.01(A)(1). (Power4Schools at 3.)

{¶ 32} The Commission finds that FES's and RESA's application for rehearing on these grounds should be denied, as the Commission has made no changes to its current rules. As the Order explicitly sets forth, the Commission issued guidelines representing "our interpretation going forward of the Commission's current rules contained in Ohio Adm.Code 4901:1-21-05." The "new language" to which FES and RESA refer are definitions the Commission set forth for its Staff to use in drafting proposed rules. The Commission specifically stated that a proceeding for proposed rules should be initiated in order to provide clearer, more specific guidance for CRES providers and customers in the future. (Order at 13-14.) As with all Commission rules proceedings, the proceeding for the proposed rules must and will comply with all statutory requirements, including the procedures required by the Common Sense Initiative.

F. Matters Beyond the Scope of Investigation

{¶ 33} In its fourth assignment of error, OCC claims that some CRES contracts begin as fixed-rate, but after a certain amount of time, are automatically renewed as a variable-rate contract. OCC claims that this may create the perception that a contract is fixed-rate, when it may become a variable-rate contract after it automatically renews. (OCC App. at 7-8.)

{¶ 34} In its memorandum contra OCC's application for rehearing, RESA argues that Ohio Adm.Code 4901:1-21-11(F) already protects customers from automatic renewal

where the renewal term exceeds one month and, further, that this issue is outside the scope of the Commission-ordered investigation (RESA Memo. at 3-4). In its memorandum contra, IGS also argues that Ohio Adm.Code 4901:1-21-11(F) sufficiently protects customers (IGS Memo. at 8-9). FES similarly contends that OCC has asked for new prohibitions in CRES contracts that are not relevant to this docket and rehearing is inappropriate on an issue that was never actually heard (FES Memo. at 4).

{¶ 35} The Commission finds that rehearing on this assignment of error should be denied. As stated in the Order, the Commission opened this investigation to explore very specific questions regarding marketing practices within the general CRES market. The Commission expressly declined to address OCC's argument, finding that it went beyond the scope of the questions regarding pass-through clause practices that were issued for comment and, thus, beyond the scope of this investigation. (Order at 25-27.) The Commission continues to find that this issue is beyond the scope of the investigation.

G. Other Issues

{¶ 36} In its application for rehearing, FES argues that the Order is unreasonable because it will needlessly cause prices to rise. FES asserts that CRES providers face various unforeseeable contingencies that may affect pricing during contract performance. Thus, the Commission's guidelines may prevent new suppliers from entering Ohio and may cause active suppliers to eliminate products or raise prices, which will negatively affect customers. (FES App. at 4-5.)

{¶ 37} In its memorandum contra, OCC asserts that the fixed-means-fixed guidelines will not cause customer rates to rise. OCC asserts that FES has failed to explain why labeling a fixed-rate contract as fixed will cause customers to pay more. OCC argues that the Order finds that CRES providers may continue to offer products with pass-through provisions, but must appropriately label said contracts as variable or introductory-rate. (OCC Memo. at 3.) Similarly, in its memorandum contra, Power4Schools emphasizes that the Order permits CRES providers to continue to offer

non-fluctuating energy charges with a pass-through clause for unforeseen contingencies, but only finds that such a contract must now be labeled as variable. Hence, the risk premium does not change if the product is defined as variable instead of fixed. Further, Power4Schools points out that, while CRES providers could recover costs if a contingent event arose, they would not be obligated to do so, just as most CRES providers declined to recover the increased ancillary costs associated with the 2014 polar vortex. Power4Schools concludes that, as CRES providers have the ability to market the exact same product, albeit with a different label, the only motivation for FES's argument can be that it wishes to conceal the risks that customers assume for a pass-through event by labeling a contract as fixed-rate. (Power4Schools at 4-5.)

{¶ 38} As discussed above, the Commission notes in the Order its dual statutory duties to protect customers and to encourage the availability and diversity of reasonably priced electric supplies. Further, the Commission found in the Order that the appropriate balance is to prohibit pass-through clauses, but continue to permit regulatory-out clauses in limited circumstances. (Order at 12-13.) Again, the Commission finds that this is an appropriate balance and denies FES's application for rehearing on this issue.

{¶ 39} In its application for rehearing, RESA asserts that the Commission's determination lacks evidentiary support because the Commission investigation did not gather data or analyze all Ohio CRES providers' responses to the additional PJM charges, and cites to no concrete facts or evidence to support its decision. Further, RESA argues that the Commission initiated the investigation based on the actions of one CRES provider, and thus does not warrant widespread application of the new guidelines to every CRES contract. RESA adds that it is unfair to impose fixed-means-fixed guidelines on CRES contracts, when some electric distribution utility (EDU) tariffs are designated as fixed, but can vary based on changes in rider costs and seasons. (RESA App. at 4-6.)

{¶ 40} In its memorandum contra, FES asserts that RESA's argument that the investigation was initiated due to the actions of one CRES provider is a misstatement of

the Commission order that initiated this docket (FES Memo. at 1-2). In its memorandum contra RESA's application for rehearing, OCC asserts that RESA has mistaken the scope and purpose of the investigation. OCC asserts that the focus of the investigation was whether CRES contracts are unfair, misleading, deceptive, and/or unconscionable. Additionally, OCC contends that EDU tariffs are unlike CRES contracts, as the tariffs are subject to regulatory oversight and approval by the Commission. (OCC Memo. at 6-7.)

{¶ 41} The Commission finds that RESA's application for rehearing should be denied on this issue. The Commission notes that this Commission-ordered investigation was opened solely to examine whether it is unfair, misleading, deceptive, or unconscionable to market contracts as fixed-rate when the contracts include pass-through clauses within the general CRES market. Further, in the Order, the Commission clarified that it was not appropriate to consider comments or make determinations regarding complaints made about specific contracts with specific CRES providers, as such concerns are more appropriately resolved in a complaint case (Order at 27). We also find no merit in RESA's argument that guidelines applied to CRES contracts should also apply to EDU tariffs. As OCC noted, EDU tariffs are already subject to Commission approval and regulatory oversight. Consequently, the Commission concludes that this investigation was appropriately conducted and the guidelines are appropriately applied to the general CRES market.

{¶ 42} In its first assignment of error, IGS asserts that the Order is in conflict with Ohio Adm.Code 4901:1-21-05 by prohibiting pass-through provisions in fixed-price contracts, because the rule indicates offers must include "for fixed-rate offers, the cost per kilowatt hour for generation service and, if applicable, transmission service", "the amount of any other recurring or nonrecurring CRES provider charges", and "a statement of any contract contingencies or conditions precedent." IGS asserts that any of these provisions could be utilized to include a pass-through position—and, consequently, that the rule specifically permits pass-through clauses. (IGS App. at 8-12.)

{¶ 43} In its memorandum contra, OCC counters that the Commission followed the requirements of Ohio Adm.Code 4901:1-21-05 when it held that pass-through provisions should be prohibited in fixed-rate contracts. OCC points out that this rule also provides requirements for variable rate offers—which may contain properly disclosed pass-through clauses. Consequently, while IGS is correct that the rule permits pass-through clauses, OCC asserts that the Commission has found that variable rate contracts cannot be marketed as fixed-rate contracts. (OCC Memo. at 4.)

{¶ 44} The Commission finds that IGS's application for rehearing should be denied on this issue. As pointed out by OCC, the rule cited addresses requirements for both fixed- and variable-rate contracts. The Commission declines to read the meaning proffered by IGS into this rule, and maintains the interpretation of the rule we set forth in the Order: that fixed means fixed.

{¶ 45} In its sixth assignment of error, IGS argues that the Order is unlawful and unreasonable because it did not grant IGS's motion to intervene. In support, IGS argues that it has a real and substantial interest in this proceeding. (IGS App. at 18-19.)

{¶ 46} Initially, the Commission notes that parties are not required to intervene in a Commission-ordered investigation in order to participate. Nevertheless, IGS's motion to intervene was not granted due to an oversight and the Commission finds that IGS's motion to intervene is reasonable and should be granted.

IV. ORDER

{¶ 47} It is, therefore,

{¶ 48} ORDERED, That the applications for rehearing filed by Noble, FES, and IGS be granted in part and denied in part as set forth herein. It is, further,

{¶ 49} ORDERED, That the applications for rehearing filed by OCC and RESA be denied as set forth herein. It is, further,

{¶ 50} ORDERED, That the motion to intervene filed by IGS be granted as set forth in paragraph 46. It is, further,

{¶ 51} ORDERED, That a copy of this Entry be served upon the Electric-Energy List Serve.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Asim Z. Haque, Chairman

Lynn Slaby

M. Beth Trombold

Thomas W. Johnson

Lawrence K. Friedeman

NW/vrm

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Barcy F. McNeal
Secretary