

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

**COMMENTS
BY**

**LUCAS COUNTY BOARD OF COMMISSIONERS, CITY OF TOLEDO, CITY OF
SYLVANIA, VILLAGE OF OTTAWA HILLS, CITY OF PERRYSBURG, CITY OF
NORTHWOOD, CITY OF MAUMEE, THE VILLAGE OF HOLLAND, AND THE
VILLAGE OF WATERVILLE**

1. Introduction

We thank the Commission for asking each of our communities to comment.

In late March FirstEnergy Solutions announced that it intended to impose a “RTO Expense Surcharge” for higher than typical January charges from PJM. The announcement indicated that the Surcharge would apply to every residential and small commercial customer participating in our communities’ governmental aggregations as well as to many, many other community aggregation programs. FES actions caused the staff to initiate an investigation and the Commission itself to docket this investigation.¹

¹ FES in a subsequent public announcement stated that it would not seek the Surcharge against the residential customers, but continued to assert its authority to do so under its “contracts” with residents. It still intends to collect the Surcharge from small commercial customers. Thus, FES intends to presently bill small commercials for the Surcharge and may in the future seek extra charges against both residential and small commercial customers.

FES prepared and sent opt-out notices that “guaranteed” residential participants 6% off the Price to Compare. It likewise “guaranteed” small business participants 4% off the Price to Compare each month. The FES surcharge would eliminate not just the promised savings for January but, if the full 3% charge was imposed, it would eliminate as many as 9 months savings.

FES actions are in violation of the PUCO’s Rules at Chapter 4901: 1-21 and its conduct is “unfair, misleading, deceptive or unconscionable” under OAC 4901: 1-21-03 and -05. The Commission asks about similar practices and acts and these, too, would violate Chapter 4901: 1-21 and be “unfair, misleading, deceptive or unconscionable.”

2. Issues Here

The Commission focuses its inquiry on OAC 4901: 1-21-03 and 4901: 1-21-05, and asks for comments on whether conduct like FES’s is “unfair, misleading, deceptive or unconscionable.” The numbered questions asked seem almost rhetorical given FirstEnergy Solutions’ actions and the current clear prohibitions against such conduct.²

In addressing the Commission’s specific questions, we begin with narrative comments that address the specific facts and issues involved in the FES Surcharge. The narrative is germane to the numbered questions and to staff’s continued investigation into the FES matter. We specifically ask that this information be included in the staff’s investigation.

While the Commission questions are focused on 4901:1-21-03 and -05, the County urges the Commission not to overlook other specific regulations. The most important of these to our aggregation members are contained in the “Opt-out Rule” at OAC 4901: 1-21-17.

² See, OAC 4901: 1-21-02, 03, -05, and -17. As discussed in Section 4 of our comments, at times several of the questions seem to suggest that the current regulations would allow FES’s conduct. Ohio Chapter 4901: 1-21 clearly prohibits FES acts and practices.

3. OAC 4901: 1-21-17 Prevents FES From Collecting the Surcharge or Any Future Extra Charges

A. The Opt-out Rule

Our communities each entered into contracts with FES to supply the residents and small businesses in each of our opt-out governmental aggregations. Under these contracts, FES was responsible for preparing the required opt-out notices sent to our members

It was FES's obligation—and in its own business interests—to make sure that any charge or fee it sought was “clearly disclosed” and met all the requirements of the Opt-out Rule at OAC 4901: 1-21-17. Otherwise FES is prohibited from collecting the charge or fee. OAC 4901: 1-21-17 (C).

The purpose of the opt-out rule is to permit shopping. When the opt-out notice arrives, customers are provided the opportunity to select a different supplier or remain with the utility supply by opting out without imposition of a termination fee. Thus, the opt-out rule requires plain language and specific disclosures so that potential customers can easily understand and compare the aggregation price versus competing offers. This allows a customer to choose the best deal as they see it.

To achieve this, the Opt-out Rule requires:

(A) . . . The notice, written in plain language, shall, at a minimum, include:

3) Disclosure of the price that the governmental aggregator will charge customers for electric generation service. If the price is a fixed rate, the governmental aggregator shall express the price in cents per kilowatt hour. If the governmental aggregator offers a variable rate, the governmental aggregator shall provide an understandable description of the factors that will cause the price to vary (including any associated indices) and disclose how frequently the rate will change. [Remainder omitted.]

It prevents a CRES or electric service company from collecting charges not clearly and properly disclosed:

(C) No governmental aggregator or electric services company serving a governmental aggregation may impose any terms, conditions, fees, or charges on any customer served by a governmental aggregation unless the particular term, condition, fee, or charge was clearly disclosed to customers at the time the customer chose not to opt-out of the aggregation.

The opt-out rule thus makes sure that no one may profit by not being up front with a potential customer. It also insures that CRES providers play on a level field.

B. The Opt-out Notices FES Sent

The opt-out notices FES sent contain only a fixed price term. This was 6% off the Price to Compare for residential customers and 4% off the Price to Compare for Commercial customers.³

(i) Residential Opt Outs

FES sent the first opt-out to every eligible residential customer in our aggregations on April 18, 2011. It states:

As a member of this aggregation you are guaranteed to pay 6 percent less for the competitive portion of your electric supply through May 2014 than if you had not joined the community's governmental aggregation.

It told the Eligible Residential Customer this would result in savings of \$30 to \$40 yearly.

FirstEnergy Solutions sent a series of "refresh" opt out notices about every six months. The refresh notices go to potential new eligible customers; for example, those who recently moved in. FES sent the last of these December 2, 2013. It states, "The chart below shows the details of this program." In the chart it prominently states, "Price: 6% off the Price to Compare Until May 2014."

³ FES prepared and filed with the Commission the opt-out notices at docket number 00-2027, which are incorporated by reference. The opt-out notices for the three year service period ending May 2014 begin with the March 28, 2011 docket entry. This service period includes the January 2014 monthly service for which FES now seeks the Surcharge. This docket is for Lucas County but FES filed and sent out the same opt-out notices for each community.

(ii) Small Commercial Opt Outs

FES on April 18, 2011 also sent opt-out notices to all eligible small commercial customers. These stated:

As a member of the aggregation, you are guaranteed each month to pay 4% less for the competitive portion of your electric supply through May 2014 than if you had not joined the community's government aggregation program.

The December 2, 2013 refresh opt out sets out in its chart: "Price: 4% off Price to Compare. Term End Date May 2014."

(iii) FES Is Prohibited from imposing An RTO Expense Surcharge or Any Future "Extra Charge"

Each FES opt-out notices contained only a fixed price term (6% off the Price to Compare for residents, and 4% off the Price to Compare for small commercial) for the service period ending May 2014.

It was FES obligation—and in its own business interests—to make sure that *any other* terms, conditions, fees, or charges sought was "clearly disclosed" in the opt-out notices and met all the requirements of the Opt-out Rule. Because FES disclosed only the fixed fee, OAC 4901: 1-21-17 prohibits FES from imposing the RTO Expense Surcharge it now seeks or from seeking any future "extra" costs.

As discussed in the next section, it is also impossible for FES or any CRES provider to promise a fixed price and then seek additional variable costs. FES's acts and practices are "unfair, misleading, deceptive, and unconscionable" under Rules 4901: 1-21-03 and -05.

Let us now turn to the specific questions the Commission asked in Paragraph 2 of the Entry.

4. Comments on Questions in Paragraph 2 of the Entry

No one knows its residents and small businesses better than we as local governments do. Our experience is not just from our role as governmental aggregators, but is built upon thousands and thousands of transactions with residents and small businesses. Every day we help even our most educated citizens with simple forms or registrations because they are not familiar with them. Many of our law departments are responsible for enforcing consumer protection standards.

The Commission's Entry asks only about OAC 4901: 1-21-03 and -05. In addition to the Opt-out Rule discussed above, Rule 4901: 1-21-02 is a critical component in the protection of customers. It provides:

(E) The rules in this chapter supersede any inconsistent provisions, terms and conditions of each CRES provider's contracts or other documents describing service offerings for customers or potential customers in Ohio.

This rule is a more potent form of the Opt-out Rules prohibition that forbids companies like FES from imposing charges not in an opt-out notice. This rule automatically rewrites any inconsistent Terms and Conditions to conform to the fixed price offers made to residents and small businesses.

Paragraph 2 (A)

This is actually two questions, the first concerns the practice of providing a clear fixed price later contradicted by "pass thru" charges in the Terms and Conditions.. The second concern whether residents and small businesses should be equally protected from such abuses.

Hidden "Pass Thru" Charges: It is absolutely "unfair, misleading, deceptive or unconscionable" to market or label a contract as fixed rate when the subsequent terms

and conditions contain a “pass through” clause. (See, for example, OAC 4901: 1-21-05 and ORC 4928.10.⁴)

A contract cannot be both fixed and variable. It simply is impossible to tell a resident or small business that there is a fixed price and then later say the opposite. The offense is made worse when the “pass through” or extra charges are buried in a separate document, placed in fine print, and/or written in industry jargon.

4901: 1-21-05 (A) requires that all marketing materials for variable rate contracts contain “a clear and understandable explanation of the factors that will cause the rate to vary.” Thus, the CRES has a legal duty to include any variable charge in the marketing materials. As a result, the CRES cannot collect a charge not disclosed. More importantly, if the CRES states in marketing materials or in the contract that there is fixed 6% off then that is the end of the story.

The Commission asks if such pass through charges should be prohibited. **This practice is already prohibited.** 4901:1-21-05 (C) specifically makes the failure to comply with the disclosure requirements of 4901: 1-21-5 (A) “unfair, misleading, deceptive or unconscionable.”

Further 4901:1-21-02 (E) clearly states:

(E) The rules in this Chapter supersede any inconsistent provisions, terms, and conditions of each CRES provider’s contracts or other documents or other documents describing service offerings for customers or potential customers.

In sum, the “pass thru charges” are superseded because they are inconsistent with the Rules. Then OAC 4901: 1-21-2 steps in and “automatically rewrites” the Terms and Conditions to eliminate the “pass through” charge. Second, the practice and acts are also are “unfair, misleading, deceptive or unconscionable” under OAC 4901: 1-21-5 (C).

⁴ Revised Code 4928.10 requires the PUCO rules to protect customers. It requires customers to be provided “adequate, accurate and understandable pricing and terms and conditions of service.”

FES's misuse of the "Price to Compare" system is especially troublesome. The Price to Compare is PUCO's signature project to (1) educate and protect people and (2) to promote shopping. FES's false and deceptive "guaranteed 6% off of the Price to Compare" torpedoed that system. The integrity of this system affects every person in Ohio. Customer confidence in the Price to Compare must be ironclad.

The issue at hand is not one of closing an unforeseen loop hole in the Rules. Instead there are clear existing Rules that prohibited FirstEnergy Solutions acts and practices. We urge the Commission to enforce its Rules. It is not just our aggregation members who are affected, but many other governmental aggregations and individual residents and businesses who shopped and selected FES as their supplier.

Application to Residents and Small Businesses: The current rules apply to both residents and small businesses (small commercials). Based on our experience, the rules should apply to both. They are the same people.

Consider a resident who is a doctor. She will not understand electric industry jargon like "transmission and ancillary charges" any better as a homeowner or as the owner of her small clinic. An insurance broker will not understand jargon like "RTO or regional transmission organization" any better in his living room at his small insurance office.

A CRES provider just has an enormous disparity in sophistication and bargaining power. The current Rules properly prevent the abuse of both residents and the same people in their small businesses like hair dressers, tattoo parlors, painters, secretarial services, lunch counters, and store front churches.

To promote fair competition, it is absolutely necessary that disclosures to mom and pops and to "mom and pop" businesses be clear, understandable, and fair. We support any changes to the current rules that enhance these protections for both residents and small businesses alike.

Paragraph 2 (B)

No, a CRES provider cannot pass thru an RTO charge in a fixed price contract for the reasons set forth in our Narrative Comments and in answer to Paragraph 2(A) above. The RTO “pass thru charges” are not just inconsistent with the Rules, but also, far worse, under 4901: 1-21-5 (A) and (C) the pass thru charges are “unfair, misleading, deceptive or unconscionable.”

Paragraph 2 (C)

No, the increased cost imposed by PJM cannot be passed thru. A CRES provider cannot pass thru an PJM or RTO charge in a fixed price contract for the reasons set forth in our Narrative Comments and in answers above. The RTO “pass thru charges” are not just inconsistent with the Rules, but also, far worse, under 4901: 1-21-5 (A) the pass thru charges are “unfair, misleading, deceptive or unconscionable.”

Paragraph 2 (D)

No charge should pass through. It does not matter what the charge is labelled. If the charge is not clearly disclosed in marketing materials it cannot be collected. If the charge does not meet the disclosure rules it cannot be collected. If the CRES markets a fixed rate or has a fixed price contract then it cannot include any other additional charges.

In sum, no other cost, fee, or charge can be passed thru under a fixed price contract. It is an oxymoron. See, our answer above and our Narrative Comments.

Paragraph 2 (E)

The question contains a misstatement. The Contract would not contain both the clearly disclosed fixed price terms and the hidden/jargon variable pass thru term. OAC 4901: 1-21-02 automatically rewrites the contract to eliminate the inconsistent pass thru provision. If the resident or customer also received marketing materials that promised a fixed price then, again under 4901: 1-21-02, the contract would be rewritten to remove the pass thru charge and all other charges not properly disclosed.

For the reasons set forth in the Answers above and in our Narrative Comments, it is “unfair, misleading, deceptive or unconscionable.”

Paragraph 4 (F)

This is two questions. The first concerns industry PJM jargon and the second again asks if there should be different rules for residents and small commercial customers.

PJM Jargon: In our experience, a convenience store owner would not understand what an “RTO” is or what a “Regional Transmission Authority” is. Or that PJM is a Regional Transmission authority. The jargon is already way too deep. If we proceed to define for him what “transmission and ancillary charges” are, then it is piling on. The more you explain, the more lost he gets.

This is not an academic exercise. The facts are, FES prominently assured the store owner he was “guaranteed to get 4% off from the price to compare each month.” Now FES is attempting to impose a surcharge upon him based on language in the fine print of its Terms and Conditions:

In addition to the Generation Charge described above, FES will charge you for any and all fees, costs, and obligations imposed by a Regional Transmission Organization (“RTO”), such as the Midwest ISO or successor organizations, that are not otherwise reimbursed by the Electric Utility to Supplier, regardless of whether such charges are greater than, less than, or equal to the charges Customer currently pays for these services to the Electric Utility (“Midwest ISO/Transmission and Ancillary Charges”). FES will pass these Midwest ISO/Transmission and Ancillary Charges, which may be variable, through to you and you will receive no discount or percent-off of these Midwest ISO/Transmission and Ancillary Charges. (FES 2011 “Terms and Conditions”).

There is no possible way that further “explanation” would help this. It is “unfair, misleading, deceptive or unconscionable.”

We again refer the Commission our answers above and Narrative Comments.

The Current Rules Apply Equally to Residents and Small Businesses: As set out in the answer to 2 (A) these requirements are and do should apply to both residents and small businesses.

Trying to draw a distinction would require that small business owners have a significantly better understanding of the energy market. More and more of our residents are self-employed businesses simply because they had no other options. They are not trained business professionals; but small “contractors”, secretarial services, or cleaning services trying to scratch out a living. They do not understand RTO, or generation charges, or PJM. They do not even understand the separate charges on their electric bill. They just pay the light bill.

In fact, this is true across the board regardless of the small business owner’s education and business experience. In explaining our aggregations to both residents and small businesses, we can assure you that their knowledge of electric supply in either case is very, very low.

Paragraph 4 (G)

Under the current Rules, pass thru charges are not permitted in a fixed price contract. (See Answers above and our Narrative Comments.) Further, it is absolutely clear that such conduct guts a customer’s ability to shop. It substantially harms competition and is extremely unfair to honest, plain speaking competitors.

Paragraph 4 (H)

The issue is not one of labelling! It does not matter what the variable charge is labelled. The current Rules prohibit pass thru or any other charges in a fixed price contract. Thus it would be “unfair, misleading, deceptive or unconscionable”. (See Answers above and our Narrative Comments.)

5. Conclusion

The Commission's investigation was triggered by FES unprecedented actions to impose an RTO Expense Surcharge on customers with a fixed contract. FES's conduct caused everyone to examine things that otherwise lay dormant. That examination shows FES's "pass thru charges" are "unfair, misleading, deceptive or unconscionable." This is not an issue of needing to write better rules. This is an enforcement issue.

We urge the Commission to promptly take action under 4901: 1-21-15 to protect the public and to apply strong sanctions to FirstEnergy Solutions. A clear message must be sent that consumers can rely on the deal they were offered. A clear message must be sent that "unfair, misleading, deceptive or unconscionable" attacks on the integrity of the Price to Compare system will always end in swift and strong penalties.

We also would welcome any changes to the Rules that better protect both our residents and small businesses. These changes should foster simplicity and make the shopping experience easier for folks. We know that the Commission is truly concerned about this as your investment in the updated "Apples to Apples" website shows.

Finally, we thank the Commission for this opportunity to comment.

Respectfully submitted,

Lucas County Board of Commissioners

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CERTIFICATE OF SERVICE

I hereby certify that a copy of these *Comments* was served on the persons stated below
via electronic transmission, this 9nd day of May 2014.

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Summary: Comments Comments by the Lucas County Board of Commissions, City of Toledo, City of Sylvania, Village of Ottawa Hills, City of Perrysburg, City of Northwood, City of Maumee, Village of Holland and the Village of Waterville in Case No. 14-568 electronically filed by Mr. Thomas R. Hays on behalf of Lucas County Board of Commissioners and City of Toledo and City of Sylvania and Village of Ottawa Hills and City of Perrysburg and City of Northwood and City of Maumee and The Village of Holland and The Village of Waterville