

**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

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**INITIAL COMMENTS  
OF  
THE OHIO SCHOOLS COUNCIL, OHIO SCHOOL BOARDS ASSOCIATION,  
BUCKEYE ASSOCIATION OF SCHOOL ADMINISTRATORS  
AND OHIO ASSOCIATION OF SCHOOL BUSINESS OFFICIALS**

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***I. INTRODUCTION***

The Ohio Schools Council, Ohio School Boards Association, Buckeye Association of School Administrators and Ohio Association of School Business Officials are non-profit groups of public school boards and public school administrators who seek to share best practices and information concerning the operation of educational institutions. These groups' members include all of Ohio's 612 public school boards of education, as well as 55 educational service center boards and 49 career technical center boards. Among their services, they offer their members group purchasing programs for a host of goods and services, including an electricity purchasing program, known as "Power4Schools." Power4Schools is designed to reduce the schools' cost of electricity, which is purchased and delivery arranged through a third party competitive retail electric service ("CRES") provider under a master contract. Savings on the cost of electricity are passed on to school district participants. Power4Schools operates throughout the state, serving nearly 600,000 school children and, to date has saved participating schools an estimated \$20 million since initiating third party supplies.

FirstEnergy Solutions (“FES”) is the CRES provider that serves Power4Schools. By letter dated March 2014 (attached), FES sent notice to Power4Schools’ participating school districts that during the month of January 2014, PJM incurred extremely high costs for ancillary services (reserve generation) due to extreme weather conditions. The letter advised that PJM invoiced these costs to all suppliers serving customers in the PJM footprint, including FES, and that FES considered these “additional costs and charges” to be a “Pass-Through Event,” for which Power4Schools members’ bills would be adjusted by 1 to 3 percent of their annual electric generation expenditure. The charge is expected to be reflected on bills rendered after June 1, 2014.

Electricity costs are a sizable component of each school district’s operating budget, and any increase is an extremely serious issue for the schools and the public that supports them, especially considering the fragile state of school funding in the state.<sup>1</sup> This seriousness is exacerbated by the fact that FES is not attempting to pass through new or additional charges levied by PJM, but is attempting to recover “increases” in PJM ancillary service charges that were contemplated when entering the contract and were known to fluctuate monthly. Power4Schools strenuously contests that these increased ancillary service charges constitute a pass-through event.

## ***II. THE SCOPE OF THE COMMISSION’S INVESTIGATION IS TOO NARROW***

The Commission’s investigation, at this point, appears to be focused generically on whether Ohio Admin. Code Rules 4901:1-21-03 and 4901:1-21-05 prohibit including pass-through clauses in fixed-rate contracts. The background provided above shows a more serious

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<sup>1</sup> In the 2012-2013 biennium, Ohio school districts received about **\$2.8 billion less** in state and federal funds than they would have received under a continuation of fiscal year 2011 funding levels. See *In Re Columbus Southern Power Company and Ohio Power Company*, PUCO Case No. 11-346-EL-SSO, Testimony of Howard B. Fleeter, at 5.

question under FES' contracts, which is whether a pass-through event occurred at all.<sup>2</sup> Power4Schools respectfully proposes that the investigation be expanded to focus on the lawfulness of FES' attempt to pass through increases in PJM ancillary service costs that were contemplated and included in the fixed-rate agreed upon. Such an investigation should include the extent to which the Commission would exercise its authority and impose fines on FES for violations of Ohio Admin. Code Rules 4901:1-21-03, 4901:1-21-05, and 4901:1-21-12, as discussed further below.

### ***III. INITIAL COMMENTS***

As a basis for its comments, Power4Schools relies upon the relevant portions of Ohio Admin. Code Rules 4901:1-21-03, 4901:1-21-05, and 4901:1-21-12, which were adopted pursuant to the legislative directives of Ohio Rev. Code § 4928.10. Ohio Admin. Code Rules 4901:1-21-03 provides:

#### **4901:1-21-03 General provisions.**

(A) Competitive retail electric service (CRES) providers shall not engage in unfair, misleading, deceptive, or unconscionable acts or practices related to, without limitation, the following activities:

- (1) Marketing, solicitation, or sale of a CRES.
- (2) Administration of contracts for CRES.
- (3) Provision of CRES, including interactions with consumers.

Ohio Admin. Code Rule 4901:1-21-05 provides in relevant part:

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<sup>2</sup> This issue has been presented to the Pennsylvania Public Utility Commission in *Petition for Declaratory Order, Utility Workers of America, et al.*, Docket No. P-2014-2415108 (filed April 8, 2014) (<http://www.puc.state.pa.us/pcdocs/1278551.pdf>) ("*Petition of UAW*").

**4901:1-21-05 Marketing and solicitation.**

(A) Each competitive retail electric service (CRES) provider that offers retail electric generation service *to residential or small commercial customers* shall provide, in marketing materials that include or accompany a service contract, sufficient information for customers to make intelligent cost comparisons against offers they receive from other CRES providers.

(1) For fixed-rate offers, such information shall, at minimum, include:

(a) *The cost per kilowatt hour* for generation service.

(b) The *amount* of any other recurring or nonrecurring CRES provider charges.

(c) A statement that the customer will incur additional service and delivery charges from the electric utility.

(d) A statement of any contract contingencies or conditions precedent.

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(C) No CRES provider may engage in marketing, solicitation, or sales acts, or practices, which are unfair, misleading, deceptive, or unconscionable in the marketing, solicitation, or sale of a CRES. Such unfair, misleading, deceptive, or unconscionable acts or practices include, but are not limited to, the following:

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(8) Advertising or marketing offers that:

(a) Claim that a specific price advantage, savings, or *guarantee exists* if it does not.

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(c) Offer a fixed price for CRES without disclosing the *cost per kilowatt hour and all recurring and nonrecurring charges*.

Emphasis supplied. Ohio Admin. Code Rule 4901:1-21-12(A) provides in relevant part:

**4901:1-21-12 Contract disclosure.**

(A) All competitive retail electric service (CRES) provider customer contracts shall include, but not be limited to, the following information:

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(7) An itemized list and explanation of all prices and fees associated with the service such that:

(a) For fixed-rate offers, such information shall, at minimum, include the *cost per kilowatt hour* for generation service; the *amount* of any other recurring or nonrecurring CRES provider charges, and a statement that the customer will incur additional service and delivery charges from the electric utility.

Emphasis supplied.

- (a) **Is it unfair, misleading, deceptive, or unconscionable to market or label a contract as fixed-rate when it contains a pass-through clause in its terms and conditions? If so, should the labeling of a contract containing a pass-through clause be prohibited in all CRES contracts; residential and small commercial contracts; or only residential contracts?**

As a practical matter, under customary usage, the public understands the term “fixed” to mean “fixed.” The public is accustomed to the terminology when deciding between fixed and variable rates for many products, including their mortgages, certificates of deposit and credit cards, to name a few. When agreeing to a fixed-rate product the public expects the rate to stay the same during the term of the contract. Additional charges, no matter how cleverly explained,<sup>3</sup> will operate to increase the fixed rate per kWh agreed upon in the contract. That the public expects fixed rates to remain unchanged is made evident by the public outcry over the increased

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<sup>3</sup> In its March 2014 letter (attached), after notifying customers of the “pass-through event,” FES cleverly states that, “As a result, the electric generation costs for the month of January for your accounts served by FirstEnergy Solutions will be adjusted through a charge which will appear as a separate line item on your bill but will not change your contract price.” Emphasis added. Semantics aside, it remains that customers will pay more per kWh for their electric supply in January than the fixed rate they expected as contained in their contract. Power4Schools submits that the Commission should consider this misleading and deceptive language when considering whether FES should be sanctioned for violating Ohio Admin. Code Rules 4901:1-21-03, 4901:1-21-05, and 4901:1-21-12.

charges FES proposes and its subsequent decision not to pass the increase through to residential customers. See, *e.g.*, the public comments filed in this case.

As a legal matter, the rules are clear. For a fixed-rate offer, a CRES must disclose the **cost per kilowatt hour** for generation service and the **amount** of any other recurring or non-recurring charge in its contracts and related marketing material. Rules 4901:1-21-05(A)(1)(a) and (b); 4901:1-21-12(A)(7). A pass-through clause in a fixed-rate contract does not comply with the rules, as the specific amount of the pass-through charge is unknown and not identified in the contract and, by necessity, cannot be identified in the marketing materials. Thus, failure to include the amount of the pass-through charge in a contract and associated marketing materials violates the general provisions of Ohio Admin. Code Rule 4901:1-21-03(A).

Moreover, the practice violates specific examples of unfair, misleading, deceptive or unconscionable acts or practices related to marketing materials, as contained in Ohio Admin. Rule 4901:1-21-05(C)(8). In this regard, Rule 4901:1-21-08(C)(8)(c) makes explicit that it is an unfair, misleading, deceptive, or unconscionable act to offer a fixed price for CRES without disclosing ***all recurring and nonrecurring charges***. Further, Rule 4901:1-21-08(C)(8)(a) prohibits claiming a **specific price guarantee** if none exists. A contract that provides for a fixed-rate “guarantees” that rate. Charging customers additional costs for a “pass-through event” increases that rate and violates that guarantee.

Rule 4901:1-21-05(A) and the Commission’s other consumer protection rules have traditionally provided protection to small commercial customers, in addition to residential customers, for the reason that small commercial customers may not have the staff, time, resources or sophistication to learn the terminology and nuances of the competitive retail electric markets in Ohio, an area in which experts often disagree. No convincing reason exists to change

that practice with respect to this issue. Labeling a contract containing a pass-through clause as “fixed-rate” should be prohibited in all CRES contracts, residential and small commercial.

- (b) May a CRES supplier include a pass-through clause in a fixed-rate contract that serves to collect a regional transmission organization (RTO) charge? Is such a practice unfair, misleading, deceptive, or unconscionable?**

As stated above, Power4Schools believes it is unfair, misleading, deceptive or unconscionable to include a pass-through clause in any fixed-rate contract for any charges, including for RTO charges. Moreover, RTO charges are contemplated and included in the fixed rate at the time the parties enter the contract. Permitting a CRES provider to charge for RTO charges in addition to the fixed rate merely masks the variable nature of the rate, and serves as a mechanism only to ratchet up the contract price. The practice is unfair, misleading, deceptive or unconscionable.

- (c) May increased costs imposed by an RTO and billed to CRES suppliers be categorized as a pass-through event that may be billed to customers in addition to the basic service price pursuant to fixed-price CRES contracts? Is such a practice unfair, misleading, deceptive, or unconscionable?**

CRES providers should not be permitted to hedge their fixed-rate contracts by placing the risk of RTO price increases upon the customer. A pass-through event should be defined as an unforeseen event, not an event in which customary charges, such as monthly fluctuating ancillary service charges, increase more than the CRES provider may have liked.

CRES providers have other, fairer, alternatives for passing through pricing for unforeseen events to their customers, specifically regulatory-out clauses. Under these clauses, if an unforeseen event occurs that significantly increases the CRES providers’ costs, the CRES provider can notify the customer of its intent to terminate the contract unless a reformulated contract rate can be negotiated in a set number of days. If not, the CRES provider and customer can walk away from the contract without penalty.

The regulatory-out clause has other benefits because it brings market forces to bear on CRES providers' conduct. Consider, for example, that all CRES providers have regulatory-out clauses in their contracts, but only CRES Provider A makes the decision to pass-through PJM's ancillary service cost increases. Under a regulatory-out clause, customers would be free to switch to one of the many suppliers choosing not to assess the increased costs (likely at a lower price), placing a check on CRES Provider A's conduct and assuring the validity of the regulatory event.<sup>4</sup> As stated previously, the Commission should expand the scope of its investigation and inquire whether a pass-through event occurred at all in January 2014, considering that FES appears to be the sole CRES provider in Ohio that seeks to recover PJM's increased ancillary service charges.

Permitting a CRES provider to charge for increased RTO charges in addition to the fixed rate merely masks the variable nature of the rate. The practice is unfair, misleading, deceptive or unconscionable.

**(d) If increased costs imposed by an RTO and billed to CRES suppliers may be categorized as a pass-through event that may be billed to customers with fixed-price CRES contracts, what types of pass-through events should invoke application of the pass-through clause by a CRES supplier?**

As stated previously, Power4Schools does not agree that any increased costs are legitimate pass-through events.

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<sup>4</sup> Power4Schools is concerned that cold weather alone may not have been to blame for the increase in FES' ancillary service costs (although, even cold weather in January is a foreseen event to be planned for), and that FES could share some responsibility for not securing sufficient generation to meet its reserve obligations. See *Petition of UAW*, at 6. Consider also FES' admission during its earnings call on May 6, 2014, that FES was short on generation during the polar vortex due to two unplanned outages (at the Beaver Valley and Bruce Mansfield generating facilities); as well as that FES likely benefitted from the increase in wholesale electric prices in January, and any claim of harm could be considerably mitigated.



- (e) **Is it unfair, misleading, deceptive, or unconscionable when a CRES provider prominently advertises a fixed price, but the contract also contains a pass-through clause that is significantly less prominent (i.e., is displayed far down in fine print or on a second page of the terms and conditions)?**

As stated previously, Power4Schools believes it is unfair, misleading, deceptive or unconscionable to include a pass-through clause in a fixed-rate contract. That a CRES supplier would attempt to make the clause less conspicuous is even more egregious. If the Commission were to permit such clauses (or regulatory-out clauses), Power4Schools recommends that CRES providers be required to place the clause in bold, large type in close proximity to the flat-rate per kWh rate, with sufficient explanation that customers' electric bills will increase if the clause is invoked.

- (f) **Should a pass-through clause that refers to acronyms such as "RTO," "NERC," or "PJM" be required to define the acronyms? Is so, should definitions be required in residential and small commercial contracts, or only residential contracts?**

Yes, not only should the acronyms be defined, an explanation should be given as to the entities' relationship to the CRES provider and how that relationship could cause their rates to increase. As stated previously, no convincing reason exists to change the practice of providing the benefit of the Commission's consumer protection rules to small commercial customers.

- (g) **Could permitting pass-through clauses on residential and/or small commercial CRES contracts labeled as fixed-rate contracts have an adverse effect on the CRES market?**


Yes, as seen by the public outcry over FES' proposal to pass through the PJM ancillary charges, the use of pass-through clauses in fixed-rate contracts would tend to undermine the credibility of the CRES market, foster customer complaints to the Commission, and precipitate customer movement to the SSO. The Pennsylvania Public Utilities Commission observed as much in its investigation of this same issue. See *Guidelines for Use of Fixed Price Labels for*

*Products with a Pass-Through Clause*, Docket No. M-2013-2362961 (November 14, 2013), at 5-6.

**(h) What alternative label should be used on a contract with a pass-through clause that has an otherwise fixed rate?**

As stated previously, a contract with a pass through clause is a variable contract and a separate label likely only would serve to confuse customers. The Commission's rules already provide consumer protections when CRES providers offer variable rate contracts specifically that, at a minimum, there be a clear and understandable explanation of the factors that will cause the price to vary. See Rule 4901:1-21-05(A)(2).

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the following parties of record by e-mail and/or regular U.S. mail, this 9<sup>th</sup> day of May 2014.



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