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

Initial Comments
of The Retail Energy Supply Association

I. Introduction

On April 9, 2014, the Commission issued an Entry opening an investigation as to whether it was unfair, misleading, deceptive or unconscionable to market contracts as "fixed-rate contracts" or "a percentage-off the price-to-compare contracts" if such contracts also included "pass-through" provisions, which could result in the customers paying more than the price labeled "fixed" or the "price-to-compare" minus the discount.[1] The April 9th Entry also asked for comments and posed eight specific questions. The following comments are from the Retail Energy Supply Association ("RESA").[2] RESA is a national trade association of energy suppliers who provide competitive retail electric service ("CRES"). Many of the RESA members are active in Ohio, and some RESA members provide CRES in all the Commission-regulated service areas for all classes of customers.

[1] April 9, 2014 Entry at 2.
[2] RESA's members include: AEP Energy, Inc.; Champion Energy Services, LLC; ConEdison *Solutions*; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; GDF SUEZ Energy Resources NA, Inc.; Homefield Energy; IDT Energy, Inc.; Integrys Energy Services, Inc.; Interstate Gas Supply, Inc. dba IGS Energy; Just Energy; Liberty Power; MC Squared Energy Services, LLC; Mint Energy, LLC; NextEra Energy Services; Noble Americas Energy Solutions LLC; NRG Energy, Inc.; PPL EnergyPlus, LLC; Stream Energy; TransCanada Power Marketing Ltd. and TriEagle Energy, L.P. The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of RESA.

For more than 40 years, Ohio has had statutorily established electric service areas and has designated a single supplier of generation for each such service area. Section 4933.82, Revised Code. Since by design each such service area had only a single monopoly provider, the General Assembly granted the Commission supervisory authority over the electric utilities in order to prevent them from charging monopolistic rents. The Commission was required to approve both price and terms of service, and the rates for electric generation were based on a cost of service. Section 4909.18, Revised Code. The Commission also was given general supervisory authority over the investor-owned utilities. Sections 4905.04, .05, and .06, Revised Code.

The era of franchised monopoly service with the direct regulation of product and price for electric service came to a close with the passage of Senate Bill 3 in 1999 and Senate Bill 221 in 2007. Now, for investor-owned utilities, CRES is considered a competitive service per Section 4928.03, Revised Code, and the Commission has limited authority over CRES providers. Competition prevents the charging of monopolistic rents, while the new CRES providers are free to be innovative in the development of products and are incentivized by the market to be efficient as to the cost of providing service.

The task for the Commission is different under the restructured paradigm in which the wire service is still provided by the regulated utilities,[3] while the generation and other competitive services are supplied by the CRES providers. For instance, the Commission cannot and should not dictate what products the CRES providers offer or what those competitive services should cost. Such an order would both reduce competition and stifle innovation. While restructuring limited the authority of the Commission over the sale of generation, but it has multiplied the number of generation suppliers and product offerings to customers. In the pre-

[3] Section 4928.03, Revised Code, limits a utility to supplying competitive service to just ensure full electric service in case of a default.

restructuring days, the Commission knew in each service area who the single provider was and could audit its books to see what it was charging. Currently, there are over 30 active certificated CRES providers in Ohio, and customers are free to move among and between them as those customers please. Thus, while both legally and practically the Commission cannot send auditors to monitor pricing and service terms for generation and mandate future changes, customers can choose to not pay something by switching to a different contract. It is for this reason that the Commission must instead police on a complaint basis, applying the standard as to whether the actions taken violated the standards for marketing and sales disclosures.

Finally, while the General Assembly chose not to grant the Commission general supervisory authority over the suppliers of generation, it gave the Commission new tools: (a) the Commission is the forum for hearing complaints; (b) the Commission can monitor the market and institute investigations; and (c) the Commission, while it cannot directly control the CRES prices and products, has been given authority to make sure that those competitive products and services are not sold in a fashion that is misleading, unfair, deceptive, or unconscionable. The design and wording of the statutory authority clearly envision that the Commission be more a policeman than a quasi-legislative body that sets rates and services in the competitive marketplace.

RESA expects that this first Commission-ordered investigation of marketing practices in the CRES market will find that the 30 or so active CRES providers did not uniformly mislead or unfairly charge customers. The facts may or may not show that a particular CRES provider implemented some of its contracts in a fashion that was deceptive or unconscionable. If so, then the Commission should rectify the situation with the appropriate relief for the customers who were harmed and the appropriate penalties for the CRES provider who violated the rules. In

sum, what ought to come out of the Commission's first investigation of CRES marketing practices is an investigation of past wrongdoing, and if wrongdoing has taken place, the appropriate restitution for the customers who were harmed and a penalty against the CRES provider who broke the rules. What should not happen is the establishment of over-reaching future regulations designed, in a generalized manner, to limit the products and services being offered by CRES providers in an effort to prevent possible future violations.

II. The Commission's statutory authorization as related to CRES and CRES contracts is specific and targeted.

When the Ohio General Assembly completed its statutory scheme for CRES in Ohio, it granted the Commission authority over CRES providers as to: (1) licensing (Section 4928.08, Revised Code); (2) monitoring (Sections 4928.06(C) and (F), Revised Code); and (3) complaints concerning certain issues arising from CRES sales (Section 4928.16, Revised Code). This grant of authority is certainly important. However, it is not the comprehensive, general supervisory authority that the Commission has over electric distribution utilities and other utilities, which includes authorizing rates, service terms, and mandating services.[4]

Since the Commission is a state agency created by statute, as opposed to an entity granted authority and powers under the Ohio constitution, the Commission has only the authority that the Ohio General Assembly specifically delegated to it.[5] If there is not a specific statute authorizing the Commission to act, even if the desired action would be of assistance in carrying out the

[4] The jurisdiction specifically conferred by statute upon the Commission over public utilities of the state "is so complete, comprehensive and adequate s to warrant the conclusion that it is likewise exclusive." *State ex. rel. N. Ohio Tel. Co. v. Winter* (1970), 23 Ohio St.2d 6, 9, 52 O.O.2d 29, 260 N.E.2d 827, quoting *State ex. rel. Ohio Bell Tel. Co. v. Cuyahoga Cty. Court of Common Pleas* (1934), 128 Ohio St. 553, 557, 1 O.O. 99, 192 N.E. 787. See, also, *Corrigan v. Illum. Co.* (2009), 122 Ohio St.3d 265, 2009-Ohio-2524.

[5] *Tongren v. Pub. Util. Comm.* (1999), 85 Ohio St.3d 87, citing *Columbus S. Power Co. Pub. Util. Comm.* (1993), 67 Ohio St.3d 353, 620 N.E.2d 835; *Pike Natural Gas Co. v. Pub. Util. Comm.* (1981), 68 Ohio St.2d 181, 22 O.O.3d 410, 429 N.E.2d 444; *Consumers' Counsel v. Pub. Util. Comm.* (1981), 67 Ohio St.2d 153, 21 O.O.3d 96, 423 N.E.2d 820; and *Dayton Communications Corp. v. Pub. Util. Comm.* (1980), 64 Ohio St.2d 302, 18 O.O.3d 478, 414 N.E.2d 1051.

state's energy policy, the Commission cannot act. Thus, when confronted with whether the Commission could ban, *per se*, a type of contract, the action to ban it would have to be tied to a direct grant of authority under a state statute.[6] Since the statutes are often broad grants of authority, state agencies like the Commission are permitted to promulgate rules that detail how the statutory authority is to be carried out. Nonetheless, rules and Commission action cannot exceed the scope of the authorizing statute(s).

There are three statutes which grant the Commission authority over CRES contracts, and they warrant review here: (1) Section 4928.10, Ohio Revised Code; (2) Section 4928.16, Ohio Revised Code; and (3) Section 4928.06, Ohio Revised Code.

First is Section 4928.10, Ohio Revised Code. This statute is the most comprehensive statute authorizing the Commission to take action with regard to CRES contracts. The statute is entitled "Minimum Service Requirements for Competitive Services." Those minimums include:

- A prohibition against unfair, deceptive, and unconscionable acts and practices in the marketing, solicitation, and sale of power by a CRES provider.
- A prohibition against unfair, deceptive, and unconscionable acts and practices in the administration of any contract by a CRES provider.
- Presentation of the key terms of the sales agreement in an understandable format.

[6] For example, Section 4928.02, Revised Code, is the Ohio Energy Policy. This statute does not have specific grants of authority to the Commission, but it is instructive to the Commission to use its specific authority to carry out the state energy policy. Thus, Section 4928.02, Revised Code, can indirectly be used to strengthen Commission action, but there would have to also be a specific empowering statute as the basis. Thus, the Commission can turn to its authority under Section 4928.10, Revised Code, to hear complaints on misrepresentation and use the energy policy addressing consumer protection as support for specific relief. It could not, on its own, use Section 4928.02, Revised Code (the Energy Policy) to regulate a new aspect of serving consumers as part of a new consumer protection plan.

Regarding this last bullet point, the statute identifies four key terms and instructs the Commission to promulgate rules to assure that retail customers receive the following information and treatment in the CRES customer contracts:

> (A) Within the contract, disclosure of pricing and service terms which are adequate, accurate, and understandable; and the conditions under which a customer may rescind a contract without penalty.
>
> (B) Service termination, which shall include disclosure of the terms identifying how customers may switch or terminate service, any required notice, and any penalties.
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> (C) Disconnection and service termination, which shall include a requirement of disclosure of the conditions under which a customer may rescind a decision to switch its supplier without penalty; and a specification of any required notice and any penalty for early termination of contract.
>
> (D) Generation resource mix and environmental characteristics of power supplies.

The Commission has *already* taken action with regard to the authorization granted in Section 4928.10, Revised Code, through its adoption of rules in Chapters 4901:1-21 and 4901:1-24, Ohio Administrative Code. The approved rules adopted under Section 4928.10, Revised Code: (a) incorporate the statutory requirements listed in Section I above, (b) provide that CRES providers give certain retail contract information to the Commission; and (c) prohibit certain language from being in the CRES customer contracts. Below is a summary of those rules:

- Rule 4901:1-21-12, Contract Disclosure –The retail customer contract must contain the information listed in the rule, which corresponds with the statutory requirements (A) through (D) above.

- Rule 4901:1-21-05(A) and (C), Marketing and Solicitation – This rule requires specific information which the CRES must provide detailing the calculation of fixed-rate offers and variable-rate offers. This rule makes failure to provide such information a per se unfair, deceptive, and/or unconscionable practice.

- Rule 4901:1-21-06(D), Customer Enrollment – This rule requires provision of specific information in the contract depending on the means of customer enrollment.

- Rule 4901:1-21-07(B), Credit and Deposits – This rule requires disclosure in the contract of (1) the policies regarding creditworthiness and deposits, including the amount, allocation and the return of any deposit; and (2) whether interest will be paid on the deposits and the applicable rate of interest.

- Rule 4901:1-21-09(D)(3), Environmental Disclosure – This rule requires disclosure of environmental data with each customer contract.

- Rule 4901:1-21-11(D)(4) and (H), Contract Administration – This rule requires a number for each version of standard contract (including changes in contract price), prohibits a contract from limiting the right to complain to the Commission, and prohibits residential and small commercial contracts from requiring alternative dispute resolution.

- Rule 4901:1-21-13(A), Net Metering Contracts – This rule requires that these types of customer contracts comply with Rules 4901:1-21-11 and -12.

Moreover, just earlier this year, the Commission completed a comprehensive review of Chapter 4901:1-21, Ohio Administrative Code.[7] It is expected that the Commission will soon be submitting those rule changes to the Joint Commission on Agency Rule Review for finalization.

The second statute is Section 4928.16, Revised Code, which is entitled "Commission Jurisdiction." This statute grants to the Commission the authority to hear complaints, or initiate complaints concerning CRES. The statute expressly exempts mercantile customers, when they agreed by contract to resolve their contract differences with a CRES provider using arbitration. The implication is that non-mercantile customers and residential customers cannot take their disputes to a forum other than the Commission.

[7] *In the Matter of the Commission's Review of its Rules for Competitive Retail Electric Service Contained in Chapters 4901:1-21 and 4901:1-24 of the Ohio Administrative Code*, Case No. 12-1924-EL-ORD, Finding and Order (December 18, 2013), Entry on Rehearing (February 26, 2014), and Supplemental Finding and Order (March 26, 2014).

On the subject of proper forum, Section 4928.16, Revised Code, makes the Commission the proper forum for concerns about the limited items listed Section 4928.10, Revised Code. Those are claims of fraud or misrepresentation in either enrollment or contract administration, and claims of reporting violations.

The third statute is Section 4928.06, Revised Code. Under this authority, the Commission is authorized to look at whether a service previously approved as competitive under Section 4928.04, Revised Code, is no longer competitive. However, the focus of the Commission's questions in this proceeding does not involve that question and, therefore, Section 4928.06, Revised Code, is not involved in this matter.

III. The statutory authority does not include an ability for the Commission to set CRES rates or to determine whether a particular CRES is required or valuable.

As noted above, the Commission only has those powers expressly delegated to it by the Ohio General Assembly. What the above explanation also illustrates is that the grant of authority under those statutes as to CRES is much different that it is as to utilities:

(1) The statutes do not provide the Commission with authority to set CRES rates or design products other than to set minimum standards.

(2) The statutes do not give the Commission authority to dictate future actions, outside of correcting prior bad acts.

Given these limits, it is clear that the General Assembly has a policing role for the Commission to hear complains and investigate violations of minimum standards, not a regulatory role to establish future services. Utilities under the Commission's supervisory authority may be made to file ten-year future service plans.[8] By contrast, CRES providers are required to account for prior years' conduct.[9]

[8] *See*, Section 4935.04(C), Revised Code.
[9] *See*, Section 4928.06(F), Revised Code.

IV. The Commission's questions.

The Commission has presented eight questions. Unfortunately, there are so many variables that none of the eight questions can be answered with an unequivocal "yes" or "no."

> Question 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 as a fixed-rate contract be prohibited in all CRES contracts; residential and small commercial contracts, or only residential contracts?

Answer: Before responding to this question, it is important to note that the phrase "pass-through clause" could be interpreted to mean a myriad of charges and circumstances. "Pass-through clause" could refer to contract language that includes (1) change in law or tariff clauses, (2) changes in the implementation or administration of PJM tariffs, (3) products that fix the cost of energy but pass through other charges, or (4) something much broader.[10] It is important to identify exactly to what the Commission is referring before the question is answered. With that said, one cannot *per se* state that having a pass-through clause is unfair, misleading, deceptive or unconscionable in all circumstances. There are risks in supplying generation that are simply not within the control of the CRES supplier. Several examples of appropriate pass-through provisions can better demonstrate this point. If, for example, the General Assembly issued a new kilowatt-hour tax, which was not known or knowable at the time the contract was executed, then the risk of a new tax, if not the subject of a pass-through clause, must be borne by the CRES provider, which would result in higher prices to the customer to cover that risk. If the ability to pass through costs related to changes in law was eliminated, the uncertainty of such changes would create a high-risk premium payable by consumers. Instead, contracts in the CRES

[10] In the parlance of retail marketing there is generally a distinction made between "pass-through clauses," which address discrete price adjustments based on known factors such as particular PJM charge and "change of law" or "regulatory-out" provisions which involve unspecified changes arising out of an unanticipated new law, or regulatory order / rule.

industry, like in many other industries, have consumers carry that risk via a pass-through, which eliminates the need for a premium to address that uncertainty, and ultimately results in a lower price to the customer. If it makes more economic sense to have the customer take the risk for something like legal changes in kilowatt-hour consumption taxes, then pass-through clauses themselves may be a very acceptable way to identify risk and apportion whether the buyer or seller should takes the risk. At the end of the day, it is not the pass-through clauses that are inherently unfair, misleading or deceptive *per se*, it may only be how the pass-through clauses are applied in specific circumstances and whether such circumstances are properly disclosed.

Similar to taxes is the cost of new rules or regulations that become effective after the retail contract is executed. A commonly used type of pass-through clause is one that excludes the premium needed to offset the risk of changes in regulation by the RTO or the Commission. Regulatory changes are out of the control of the CRES provider. If PJM imposes a new fee, the exact amount of such fees discretely, or the risk of such fees generally, must be part of the cost of the CRES paid by the retail customer. Once again, it is not the existence of a mutually agreed upon clause (which elects a discrete charge for the new RTO fee, in lieu of bundled price that includes new RTO fees) that is harmful; it is the absence of a true agreement on the pass-through provision or the charging of a fee that is not covered by the pass-through clause. It should be noted that regulatory changes can create credits as well as debits. For example, in January 2013, the Commission changed the terms of Columbia Gas of Ohio's balancing fee rider, requiring the utility to directly bill that fee to customers.[11] Since most of the gas contracts at that time had the cost of balancing included as an integral part of the cost per hundred cubic feet as well as a change of law pass-through clause, the amount of the balancing fee was simply credited to the

[11] *In the Matter of the Application to Modify, in Accordance, with Section 4929.08, Revised Code, the Exemption Granted Columbia Gas of Ohio, Inc., in Case No. 08-1344-GA-EXM*, Case No. 12-2637-GA-EXM, Opinion and Order at 16-17 (January 9, 2013).

retail customers. Similarly, last year in The Dayton Power and Light Company ("DP&L") Electric Security Plan case, network transmission fees which had been paid by the CRES providers to PJM Interconnection were switched so that DP&L was billed by PJM and DP&L directly billed the customer for those fees.[12]

In sum, the common pass-through clauses in use today are not *per se* fair or unfair; whether a particular pass-through clause is unfair or misleading depends on the facts surrounding the agreement, the wording of the clause and the implementation. That is why Section 4928.16, Revised Code, gives the Commission both investigation and forum responsibilities to hear complaints from consumers and respond to the complaints.

> Question 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?

Answer: There is nothing *per se* that makes passing on RTO costs misleading or deceptive. What is deceptive is leaving the impression with a reasonable retail customer that the RTO costs are incorporated in the fixed price per kWh when in fact they are not.

> Question 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?

Answer: Once again, what is potentially a violation of the statute and Commission rules are facts showing the retail customer was misled or promised something that was not provided. A pass-through of RTO costs is not *per se* unconscionable, if it was properly disclosed to the consumer at the time the consumer entered into a supply agreement, especially if it was at that time a standard service provision to pass through such charges, like NITS and RTEP charges.

[12] *In the Matter of The Dayton Power and Light Company for Approval of its Electric Security Plan*, Case Nos. 12-426-EL-SSO et al, Opinion and Order at 36 (September 4, 2013); Entry *Nunc Pro Tunc* (September 6, 2013).

> Question 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 the application of the pass-through clause by a CRES supplier?

Answer: Pass-through charges should not be limited to a particular type of event. Moreover, it is impossible to craft an exhaustive list of events that can justify invoking a pass-through clause. It is more important that all pass-through clauses be clearly explained, including the nature of the event or events that can result in its implementation.

> Question 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 the fine print or on a second page of the terms and conditions)?

Answer: Once again, whether a disclaimer in advertising is sufficient depends on the facts. If the fixed price is in bold type at the top of the page and the pass-through is in minuscule print at the bottom and even partially obscured by a picture, then the Commission may find that such disclosure is insufficient and as such misleading, deceptive or unconscionable. On the other hand, if the pass-through is properly explained and conspicuously visible so that a reasonable person can understand it, then the Commission should conclude that such presentation is not misleading, deceptive or unconscionable.

> Question F: Should a pass-through clause that refers to acronyms such as "RTO," "NERC," or "PJM" be required to define these acronyms. If so, should the definitions be required in residential and small commercial contracts, or only residential contracts?

Answer: Foremost, the Commission should be mindful of the balance necessary between the length of a contract and visibility of key terms and provisions. Conveniently, the Commission's new website, *www.energychoice.ohio.gov*, includes a fairly comprehensive "Glossary of Terms" including definitions for a number of frequently used industry acronyms. That said, the need to define an acronym depends on the acronym and the customer audience. If the acronym is well

known, it may not need an explanation or definition. Further, over time, acronyms and short names go in and out of the public understanding. Ten years ago, HTML would have had to be explained, but not DOS. Today, that is probably reversed.

> Question G: Could permitting pass-through clauses in residential and/or small commercial CRES contracts labeled as fixed-rate contracts have an adverse effect on the CRES market?

Answer: Permitting unfair, misleading and unconscionable practices harms the CRES providers who follow the rules. The market is not helped, though, if the Commission promulgates generalized rules to address potential unfair practices instead of enforcing violations, which would, in effect, limit the products and offerings that CRES that are already in full compliance under the rules can offer.

> Question H: What alternative label should be used on a contract with a pass-through clause that has an otherwise fixed rate?

Answer: Conveying marketing information to prospective customers is a difficult task that changes over time as society and the market change. That should be left up to the CRES providers. The current Commission rules do require all charges to be disclosed to a customer.[13] The Commission should judge, with a view to the totality of the circumstances in the particular instance, whether the communication was free from misrepresentation and intent to mislead.

To sum up the answers to the questions, if all the Commission does is adopt a rule that, in the future, makes it a *per se* violation to have both a pass-through clause and to use the term "fixed rate" in the marketing material, the likely result is that the term "fixed-rate" will disappear from marketing materials in Ohio. What will not disappear is the existence of the risks for increases due to taxes, changes in regulations, new fees and changes from the RTO, and expected

[13] Rules 4901:1-21-05(A) and 4901:1-21-12(B)(7), Ohio Administrative Code.

weather and market conditions are apportioned between buyer and seller. What the Commission's investigation should lead to is enforcement, which will reduce unfair practices. .

Overall, the Commission must be the agency in which abuses are discovered, heard and judged. Although it might be more expedient to declare something unfair *per se*, that approach will ultimately not be as successful in reaching the state energy policy goals (Section 4928.02, Revised Code) as the more difficult task of policing instances of unfair or unconscionable practices. Enforcement by fiat retards innovation and creativity, both of which will be necessary to take full advantage of the new Advanced Metering Infrastructures. Pass-through clauses may be a useful way to apportion the rewards to customers of using the interval data to use their energy more efficiently.

If the Commission finds that one or more CRES providers have misled customers by promising one thing and delivering another, then there should be a complaint either by the customer or the Staff, a chance for the CRES provider to be heard and present its defense, and an impartial decision issued.

V. Conclusion

For the foregoing reasons, the Commission should not declare, prohibit, and/or dictate terms for all CRES contracts beyond the authorization set forth in Section 4928.10, Revised Code. This includes declaring *per se* violations when the term "fixed-rate" is used. Instead, the Commission must perform the more targeted and discrete task of evaluating through the hearing process whether, given the facts, a CRES provider has misled customers. If so, that CRES provider should make restitution to the customers harmed and be penalized. That is not the easy path, but it is the road that will lead to a robust market with a variety of products and services, and efficient prices.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Initial Comments was served this 9th day of May 2014 by electronic mail, upon any persons listed below and will be served by electronic mail on all others who file initial comments in Case No. 14-568-EL-COI.

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