

**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

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

I. INTRODUCTION

Of all of the investigations the Commission has conducted over the years, this is probably the easiest to resolve. The simple question asked is whether it is unfair, misleading, deceptive or unconscionable for competitive retail electric service (“CRES”) providers to market a “fixed rate” per kWh contract to residential and small commercial customers and, in subsequent clauses, reserve the right to pass-through additional, unquantified costs to them...in the CRES providers’ discretion...as they see fit. Of course it is unfair, misleading, and deceptive – and it’s patently unlawful.

Too much reliance has been placed on the Pennsylvania Public Utility Commission’s investigation of this same issue. The Ohio Commission was way ahead of the curve on this issue when it promulgated rules pursuant to R.C. 4928.10 and required CRES providers to include in fixed rate contracts the “amount” of all recurring and non-recurring charges. O.A.C. 4901:1-21-05(A)(1)(b), 4901:1-21-12(A)(7)(a). Contracts marketed as “fixed rate” that contain pass-through clauses and don’t disclose the amount of the charge mislead the public and clearly are unlawful. Such pass-through clauses are so patently unlawful that the Commission’s rules

already consider them void. See, O.A.C. 4901:1-21-02(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.”).

Accordingly, the questions and comments in this proceeding focus too much on the appropriateness of pass-through clauses in fixed-rate contracts. Because the Commission already has anticipated this issue and provided clear remedies, the focus of this investigation should be on preventing any CRES provider from invoking such a clause and providing the appropriate sanctions if it does. To that end, the Commission should order all CRES providers to refrain from invoking a pass-through clause until its investigation is complete.

II. ARGUMENT

A. The Commission’s Investigation Should be Expanded to Prevent CRES Providers from Invoking Pass-Through Clauses in Fixed-Rate Contracts and to Impose Sanctions on Those CRES Providers That Do.

In its initial comments, Power4Schools¹ noted that the issue at hand involved a more serious question than the interpretation of O.A.C. 4901:1-21-03 and 4901:1-21-05, and asked the Commission to expand its investigation to those CRES providers, namely FirstEnergy Solutions (“FES”), who had noticed their intention to invoke pass-through clauses as a result of the extreme weather events that occurred in January 2014. A diverse group of commenters concur

¹ 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.

with Power4Schools that the Commission should investigate and impose sanctions upon those CRES providers that violate its fixed-rate contract rules.²

Pass-through clauses in fixed rate contracts are unlawful *per se* under the Commission's rules because they don't identify the "amount" of this non-recurring charge. O.A.C. 4901:1-21-05(A)(1)(b), 4901:1-21-12(A)(7)(a). For this reason, these clauses in fixed-rate contracts are void. O.A.C. 4901:1-21-02(E).

FES goes to great lengths to manufacture authority for including pass-through clauses in fixed-rate contracts. Throughout its comments, it relies on the argument that O.A.C. 4901:1-21-05(A)(1)(d) and 4901:1-21-12(A)(8) permit CRES contracts and their related marketing material to include "contingencies." It reasons that pass-through clauses are a contingency and, thus, pass-through clauses in fixed-rate contracts are lawful. FES Initial Comments, at 6. Power4Schools would accept FES's argument if, when identifying the contingency, the clause also identified the "amount" that customers would be charged if the contingent event occurred. See R.C. 1.51 (O.A.C. 4901:1-21-05(A)(1)(b) and 4901:1-21-12(A)(7)(a), which require disclosure of the "amount" of non-recurring charges, must be construed consistently with O.A.C. 4901:1-21-05(A)(1)(d) and 4901:1-21-12(A)(8), which require disclosure of contingencies). FES' argument lacks any semblance of merit.

Power4Schools renews its request that the Commission expand its investigation to prevent CRES providers from invoking such clauses or, if they do, to impose the full extent of sanctions provided by law.

² See, e.g., Noble America Energy Solution LLC, at 1; Dayton Power & Light, at 2-3; AARP, at 2; Lucas County Board of Commissioners, et al., at 8, and Retail Energy Suppliers Association ("RESA"), at 3.

1. The Commission has Clear Jurisdiction to Prevent or Remedy the Invocation of a Pass-Through Clause in a Fixed-Rate Contract.

RESA claims that the Commission’s jurisdiction is limited to “policing” the past conduct of CRES providers, and that it lacks authority to prohibit pass-through clauses in fixed-rate contracts *per se*.³ RESA Initial Comments, at 8. This is incorrect and without merit. The Commission has clear authority under R.C. 4928.10 to declare prospectively what acts or practices constitute unfair, misleading, deceptive and unconscionable conduct. Indeed, the Commission has done so. See, *e.g.*, O.A.C. 4901:1-21-05(C). R.C. 4928.16 gives the Commission the complementary authority to sanction those CRES providers that disregard its rules.

FES argues that R.C. 4928.05 prevents the Commission from exercising jurisdiction to prevent or remedy invocation of a pass-through clause in a fixed-rate contract. FES Initial Comments, at 7. R.C. 4905.28(A) provides that a competitive retail electric service is not subject to R.C. Chapters 4905 and 4909, among others, “except as otherwise provided by this chapter.” Emphasis supplied. R.C. 4928.16(A)(1) clearly authorizes the Commission or a consumer to initiate a R.C. 4905.26 complaint against a CRES provider regarding the generation services they are certified to provide. Moreover, R.C. 4928.16(A)(2) gives explicit authority for the Commission or a consumer to initiate a R.C. 4905.26 complaint against a CRES provider for violating the minimum service standards promulgated pursuant to R.C. 4928.10, which include

³ As opposed to a complete ban on pass-through clauses in fixed-rate contracts, CRES providers would limit enforcement to complaints against specific CRES provider conduct. In other words, in logic meant only to protect their margins, CRES providers would have lay customers bear not only the costs that the more-savvy CRES providers fail to anticipate when entering a contract, but also the costs to bring CRES providers into compliance with state law...fully aware that the customer likely lacks the knowledge and financial wherewithal to commence litigation. The Commission should reject this transparent position out of hand. See RESA Initial Comments at 9, 11; IGS Energy Initial Comments, at 1-4; North American Gas and Electric Initial Comments, at 1-2, 4; National Energy Marketers Association, at 3-4; Energy Professionals of Ohio, at 2; FES Initial Comments, at 8.

the rules protecting consumers against unfair, misleading, deceptive, and unconscionable acts and practices. *Id.*

In addition, R.C. Chapter 4928 provides the Commission with several remedial options for violations of its rules, in addition to customers' other remedies at law. The remedies available to the Commission include rescinding the offending CRES provider's certificate (R.C. 4928.16(B)(1)), ordering restitution to its harmed customers (*Id.*), and assessing a forfeiture of up to \$1,000 for each violation, with every day the violation continues considered a separate violation. R.C. 4905.54. The Commission has exercised this authority. See, e.g., *In the Matter of the Commission-Ordered Investigation of Ameritech Ohio Relative to Its Compliance with Certain Provisions of the Minimum Telephone Service Standards Set Forth in Chapter 4901:1-5*, Ohio Administrative Code, Case No. 99-938-TP-COI (Opinion and Order, July 20, 2000; Entry on Rehearing, September 19, 2000). Power4Schools asks the Commission to exercise this authority once again if a CRES provider invokes a pass-through clause in a fixed-rate contract.

B. No Valid Reason Exists to Permit Pass-Through Clauses in Fixed-Rate Contracts When CRES Providers Can Offer the Exact Same Product in a Variable-Rate Contract.

As stated previously, pass-through clauses in fixed rate contracts are unlawful *per se* under the Commission's rules because they don't identify the "amount" of this non-recurring charge. O.A.C. 4901:1-21-05(A)(1)(b), 4901:1-21-12(A)(7)(a). Yet, CRES providers maintain that the Commission should not prohibit these unlawful clauses, as long as adequate disclosure is made to customers. CRES providers reason, unconvincingly, that prohibiting pass-through clauses in fixed-rate contracts will cause fixed-rate prices to rise to account for the additional risks of a pass-through event.⁴

⁴ See FES Initial Comments, at 6; RESA Initial Comments, at 9.

The CRES providers' position lacks any merit. Pass-through clauses, in and of themselves, are not unlawful. They only are unlawful when inserted into a fixed-rate contract because they don't quantify the amount of the charge. If that practice is prohibited, as it should be, CRES providers still may offer the same per kWh product with a pass-through clause, but must label it as a variable-rate contract. With the product properly labeled, customers then can compare the product at issue with a truly fixed-rate product (which will include the risk premium associated with a potential pass through event). Proper labeling will provide customers with an accurate basis to compare the two products and, more importantly, provide the customer with full disclosure of the products they're considering, as the CRES providers request.

The ability of CRES providers to offer the exact same product when correctly labeled as a variable-rate contract, begs the question: "Why do CRES providers want the ability to market a contract with a pass-through clause as fixed rate rather than variable-rate?" The answer is evident: labeling the contract as fixed-rate conceals the risks that consumers assume for a pass-through event, while labeling the contract as variable-rate exposes those additional risks.

III. CONCLUSION

The issue presented by this investigation is not a difficult one. Pass-through clauses in fixed-rate contracts are unlawful and void under the Commission's existing rules. Although that conclusion should be self-evident, Power4Schools asks the Commission to make it explicit and find that such clauses are prohibited *per se*. Moreover, considering the clarity of the law on this issue, Power4Schools renews its call for the Commission to expand the scope of this investigation to prevent CRES providers from invoking such clauses or, if they do, to impose the full extent of sanctions provided by law. The Commission also should order all CRES providers to refrain from invoking a pass-through clause until its investigation is complete.

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 27th day of May 2014.



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Summary: Reply Comments of Power4Schools electronically filed by Teresa Orahod on behalf of Glenn S. Krassen