

**BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO**

**In the Matter of the Commission-
Ordered Investigation of Marketing
Practices in the Competitive Retail
Electric Services Market.**

Case No. 14-568-EL-COI

REPLY COMMENTS OF FIRSTENERGY SOLUTIONS CORP.

I. Introduction

Pursuant to the Public Utilities Commission of Ohio's ("Commission") Entry dated April 9, 2014 (the "Entry"), FirstEnergy Solutions Corp. ("FES") submits these Reply Comments on marketing practices in the retail electric market. The Commission requested written comments from interested parties to address a number of questions regarding "pass through clauses," provisions which are in contracts for various competitive retail electric service ("CRES") products, including fixed price products. FES's initial comments explained that the use of pass through clauses in fixed price and other CRES products is a standard retail electric industry practice that CRES providers for years have used openly, is permitted by Ohio law, and is in no way unfair, misleading, deceptive or unconscionable. Instead, pass through clauses are a necessary measure for providing longer term savings to consumers while mitigating risk associated with fixed price products, and protecting a CRES provider's business against an unforeseen contingency. While electric distribution utilities ("EDUs") often obtain Commission approval to pass along unexpected, uncontrollable costs to customers, a CRES provider must mitigate its exposure through its contracts. It is for these reasons that in its initial comments FES urged the Commission to instead focus on better education for consumers rather than attempting to interpret contracts, dictate their terms, or craft unwieldy product labels.

While the Entry focuses this investigation on the future use of pass through clauses in Ohio retail electric supply contracts, several commenters construe some questions in the Entry to reference a specific instance of an individual CRES provider (i.e., FES) exercising its contractual rights. As a result, a number of participants' initial comments are compromised by ulterior motives. Some customers, seeing a potential opportunity to avoid a proper charge, disingenuously profess in comments that they are unable to comprehend a single page of terms and conditions. Some profess an inability to comprehend fundamental concepts of electric markets to such a degree that they call into question the General Assembly's judgment that the policy of the State of Ohio should be to allow customers direct access to competitive retail electric service. This professed inability to understand contract terms extends to the comments of even the most sophisticated large commercial and industrial and municipal customers, customers who often agree to terms of electric supply contracts with the assistance of counsel. Also, competing CRES providers, perceiving an opportunity to disadvantage a competitor, defend a standard type of clause they themselves use, but suggest that there is something about their competitor's invocation or disclosure of the clause that merits scrutiny and sanctions. As a result, the Commission is receiving a poor record with which to examine an issue that is important to the future of retail electric competition in Ohio. As explained below, this is the incorrect forum and proceeding to interpret a private contract or adjudicate FES's exercise of its contractual rights. In this investigation, the Commission should maintain its forward looking focus on identifying ways to improve Ohio's competitive retail electric market without impairing private contracts.

Another example of how ulterior motives have caused this discussion to deteriorate is the selective quotation of the Commission's CRES marketing rules ("CRES Rules")¹ by several

¹ Ohio Administrative Code ("OAC") 4901:1-21-1 through 4901:1-21-18.

commenters in a misleading attempt to portray pass-through clauses as if they are currently prohibited by the Commission. To the contrary, as FES noted in its initial comments, the current CRES Rules anticipate the inclusion of pass-through clauses and require their disclosure to customers. OAC 4901:1-21-05(A)(1)(d) and (A)(2)(d) require CRES providers to provide customers, in marketing materials that include or accompany a service contract, with “[a] statement of any contract contingencies or conditions precedent.” OAC 4901:1-21-12 (B)(8) requires CRES Providers to include in small commercial or residential contracts “[t]he terms and conditions of service, including any restrictions, limitations, contingencies, or conditions precedent associated with the service or product offered.”

Notwithstanding these rule provisions, some commenters selectively quote the CRES Rules to describe a pass-through event as something other than a contingency, such as a “recurring or nonrecurring” charge.² For example, the Office of the Consumer Counsel (“OCC”) cites to OAC 4901:1-21-05 (A)(1)(b) and (A)(2)(b) to state that the “Commission’s rules require that “[f]or fixed-rate offers, such information shall, at a minimum, include...the cost per kilowatt hour for generation [and] the amount of any other recurring or nonrecurring CRES provider charges.” Through selective quoting, the OCC creates the misleading impression that pass-through clauses are currently prohibited, because no “amount” can be presented given that such clauses address unknowable contingency events. The OCC conspicuously omits reference to 4901:1-21-05(A)(1)(d) and (A)(2)(d). A more intellectually honest review of the CRES Rules demonstrates

² See PUCO Case No. 14-0568-EL-COI (“Investigation”), Ohio Manufacturers Association Energy Group (“OMA”), Initial Comments at pp. 3-4 (citing to OAC 4901:1-21-12(A)(7) and failing to cite OAC 4901:1-21-12(8) dealing with contract contingencies); see Investigation, Ohio Partners for Affordable Energy (“OPAE”), Initial Comments at pp. 3-4 (citing CRES disclosure and marketing rules while ignoring rule provisions establishing disclosure of contingency provisions); and see Investigation, Lucas County Bd. 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, (“Lucas County et. al.”), Initial Comments at p. 7 (citing to OAC 4901:1-21-5 (A) while ignoring provisions dealing with “contingencies” under (A)(1)(d) or (A)(2)(d)).

that the CRES Rules contemplate and allow the use of contingency clauses in CRES supplier contracts. A constructive assessment of CRES industry practices requires consideration of the full text of the cited regulations.

II. Replies to Other Parties' Comments

A. This Is An Inappropriate Forum and Proceeding to Interpret a CRES Provider's Contract or Adjudicate a CRES Provider's Exercise of Its Contractual Rights

Several commenters' initial comments exceed the scope of the Entry by arguing against FES's pass-through of certain PJM Interconnection ("PJM") charges related to January's extreme weather under the provisions of FES's agreements with customers. FES disagrees with these arguments regarding the terms of FES's agreements, and the nature of the events that led to FES's decision to pass through PJM charges. FES will not respond to these arguments further, because this investigation is not meant to litigate the specific terms to which FES's customers agreed, or the terms to which any other supplier's customers agreed, or the applicability of FES's contracts to the events of January. Under Ohio law, matters of private contract interpretation are left to the civil courts not to the Commission. The Commission is not the proper forum to engage in an interpretation of contracts, in this investigation or otherwise.

Rather, as the Entry makes clear, this investigation relates to the use of pass-through clauses generally, and their use in future retail electric supply contracts in Ohio. With respect to the general use of pass through clauses in fixed price or percent off agreements, the CRES Rules addressing contingency provisions make it abundantly clear that clauses providing for unforeseen events or circumstances are permitted. Moreover, FES and others explained in initial comments that pass-through clauses have been openly used in Ohio by CRES suppliers for years, and, in the case of governmental aggregations, terms and conditions containing such clauses are posted to

public Commission dockets for Commission and public review. The inclusion of pass-through clauses and other contingency provisions in CRES supplier contracts violate no Commission rules.

In addition, the initial comments of several parties who are predominately competitors of FES argue that the Commission should not move to restrict or eliminate suppliers' use of pass-through clauses, but encourage the Commission to investigate whether to impose sanctions on suppliers that were driven by January's extreme events to exercise their right to pass the costs through (i.e., on FES). The Retail Energy Supply Association ("RESA"), for example, supports the continued use of pass-through provisions, stating "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..."³ RESA further argues that the Commission's statutory authority regarding CRES and CRES contracts is "specific and targeted" and that the Commission cannot dictate what products CRES providers offer and the prices of those products.⁴ Yet ironically, RESA also appears to encourage Commission action against certain suppliers for the manner in which they "implemented" their contracts:

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.⁵

Noble Americas Energy Solutions LLC ("Noble") agrees with all of RESA's comments, and, based on its purported review of "sample contracts made publicly available," states "there is little doubt that an investigation of the CRES providers that are attempting to pass-through charges to Fixed Rate customers is warranted...."⁶

³ Investigation, RESA Initial Comments at p. 11.

⁴ RESA Initial Comments at 2, 4.

⁵ *Id.* at p. 3

⁶ Investigation, Noble Initial Comments at p. 1.

These parties, as competitors of FES, have the ulterior motive of exploiting this Commission investigation to inflict potential harm on their competition. These commenters ignore the internal inconsistency of their arguments. On the one hand they caution the Commission against exceeding the limits of its jurisdiction over the CRES market, and of the goals of the Ohio Legislature in establishing a competitive market for generation services in Ohio. On the other hand, they press the Commission to scrutinize how competing CRES providers like FES “implemented” their contractual rights in response to the unforeseeable events of January, the actions taken by PJM, and the related costs. These commenters’ unsupported insinuations that disclosures were inadequate, and attempts at interpretations of another supplier’s contracts are inappropriate and beyond the scope of the inquiries in the Entry. These attacks contribute nothing to this investigation and the Commission should not be swayed by them. These commenters are clearly serving their own competitive interests rather than attempting to support competition and enforcement of Commission rules.

Commenters that support the use of pass through clauses yet encourage sanctions against FES are right that the Commission’s powers are limited with respect to dictating the structure and nature of CRES suppliers’ pricing or contracts. These commenters are right that there is nothing inherently wrong with pass-through clauses, and that such provisions are an important risk mitigation tool in the industry. However, they are wrong to press for Commission action against suppliers like FES, who fairly disclose their terms as required by the CRES Rules. It bears repeating that FES does not hide pass through provisions, early termination fees, taxes – or any term of service, for that matter. Every FES customer receives a copy of the contract applicable to the offer they accepted, and are always free to contact FES to have their questions answered.

B. Ohio State Policy Recognizes That Ohio Businesses and Consumers Are Able to Comprehend and Participate in a Competitive Retail Electric Market and Enter Into Retail Electric Supply Contracts

Several commenters suggest customers are incapable of dealing with direct access to a competitive retail electric service market. Based on this faulty premise, OPAE, AARP, OCC, Ohio Energy Group (“OEG”) and OMA oppose the use of pass-through clauses in fixed price or percent off agreements with CRES suppliers. The OCC, OPAE and AARP ask the Commission to ban the use of pass through clauses in fixed price agreements, and dictate the terms CRES suppliers are allowed to use in their contracts. OPAE goes so far as to suggest that smaller customers should not be expected to read and understand the details of their contracts at all. It states “No risk or responsibility should be placed on individual residential and small commercial customers to police the contracts of CRES providers or to navigate the fine-line details of such contracts.”⁷

These comments fail to recognize that the Ohio General Assembly has mandated a free market for retail electric supply, and that in a free market customers are not only free to select offers they like, but also free to reject those they do not. In order to make this choice wisely it is incumbent upon customers to educate themselves about the terms of the offers they are accepting. In opening Ohio to competitive retail electric service, the Ohio General Assembly recognized that Ohio customers are capable of educating themselves and reviewing and understanding contracts. A customer that decides to shop needs to develop a basic understanding of agreement terms used in the competitive retail market, which can involve some technical or complex concepts. This is precisely why FES’s initial comments recommend that the Commission look to developing more tools for consumers to educate themselves, rather than inappropriately attempting to dictate CRES

⁷ Investigation, OPAE, Initial Comments at p. 5.

contract terms or product descriptions. While customers choosing to shop in a competitive market undertake a responsibility to educate themselves, in Ohio customers are free to remain on their utility's Standard Service Offer rate. No one in Ohio is forced to shop with a CRES supplier.

Notwithstanding customers' need to become informed when entering into an electric supply agreement, the terminology in an electric supply agreement is similar to that found in other agreements consumers enter into every day. For example, credit card and loan agreements may include references to the Prime Rate or LIBOR. These terms are essential parts of financial agreements into which consumers routinely enter. Even the agreements that customers agree to when they open a new piece of software or sign up for website services include technical terms the average consumer may not understand without some study. Courts routinely uphold these agreements, recognizing that beneficial economic activity would be severely dampened if no responsibility were placed on the consumer to understand what they agree to. FES supports requirements that agreements be clear and written in plain language, but in the CRES market there are some terms that do not lend themselves to further simplification in a reasonable amount of space. Accordingly, an obligation is necessarily placed on the customer to read and understand what they are agreeing to before they accept an offer. This is not a deception, but rather a reality of the competitive electric market, which Ohio's General Assembly enacted.

OEG and OMA take the concept of sparing customers the responsibility to understand what they sign to a ridiculous extreme. Their comments suggest that even the larger commercial and industrial customers they count among their members should not be required to read and understand pass through clauses in their fixed price agreements. OMA essentially argues that its members are not "sophisticated" enough to be expected to negotiate and understand agreements

they enter into. This is incredulous, since large manufacturers clearly have sufficient resources to hire their own counsel, are experienced with contracting for the various elements necessary to produce their goods, and are widely recognized as sufficiently sophisticated and able to manage the risk of such pass-through charges. For this reason, even the Pennsylvania Public Utility Commission (“PA PUC”) order, cited multiple times by OMA, declined to extend its guidance on the use of the fixed-price label for products with a pass through clause to supplier contracts with large commercial and industrial customers, the vast majority of which have been shopping for several years and have the expertise and sophistication to understand pass through mechanisms.⁸ This Commission should not be moved by OMA members’ attempts to shed their sophistication when it might help them evade charges they willingly agreed to accept.

While FES believes consumer education for smaller customers is a better solution for Ohio than what the PA PUC devised in its recent pass through order, even the PA PUC recognized that larger customers can take care of themselves and have the resources available to ensure they fully understand their agreements before entering into them.

C. A Pass Through Clause Does Not Change a Customer’s Fixed Price and Is Critical to the Allocation of Risk Between Customer and Supplier

OMA also incorrectly asserts that passing through costs in a fixed price agreement changes that fixed price. Passing through a cost without any markup when the contract terms exclude it from the services for which the fixed price is offered does not alter the fixed price. Indeed, CRES contracts with large customers like OMA’s members routinely split out various elements of CRES

⁸ *Guidelines for Use of Fixed Price Labels for Products with a Pass-Through Clause*, Pennsylvania Public Utility Commission, Docket No. M-2013-2362961, Final Order at p. 30 (Nov. 14, 2013), Tentative Order at p. 7 (May 23, 2013).

service and assess different costs to each. The contract may fix energy but provide for transmission or capacity costs to be directly passed through. Or, the contract may fix all but transmission. If the passed-through portion of such a contract changes, the fixed portion remains fixed. They are exclusive pricing provisions, just as costs related to pass-through clauses are excluded from pricing.

In its initial comments, FES explained that any action to preclude the use of pass through clauses in a CRES supplier's existing agreements, especially those with larger customers, would upset the economic balance that resulted in the specific fixed price. OMA's and OEG's comments effectively ask the Commission to regulate CRES pricing by shifting risks that customers agreed to bear to CRES suppliers *after* those risks have materialized. While the Commission has the authority to regulate to prevent anticompetitive or unfair, deceptive, or unconscionable acts or practices by CRES providers, it does not have the authority to regulate CRES provider pricing.

OEG's and OMA's members have enjoyed a lower fixed rate during the terms of their contracts, with the understanding that they would be subject to the risk of contingencies. Now that a contingency has materialized, they are seeking to avoid their contractual obligations. These large sophisticated customers cannot credibly argue that they were confused by the term "fixed" or any other term in their contracts. Commission intercession on behalf of OEG's and OMA's members would not only interfere with the bargains they struck, but also cause the Commission to exceed the policing of marketing practices and encroach into regulation of CRES supplier prices.

D. Any Concerns With Pass Through Clauses or Other Contract Terms Can Be Addressed Without New Requirements That Harm Ohio's Competitive Retail Electric Markets and Competitors

Several commenters suggested specific changes to how the Commission could, by rule or order, modify the use of pass through clauses in the future. Again, the Commission's answer to any concerns is to expand education for small business and residential customers. The CRES Rules already require disclosure of contract contingencies. When the existing rules are coupled with easy to find resources to better understand terms commonly used in the CRES market, small customers have the tools they need to ensure they understand their agreements. Also, the Commission's proposed new CRES rules, likely to become effective soon, will impose font size requirements on CRES contracts, eliminating any concerns with "fine print."⁹

While Interstate Gas Supply, Inc.'s ("IGS") comments do not suggest that the Commission prescribe the contents of pass through clauses, or restrict their use in fixed price or percent off contracts, IGS suggests that pass through clauses should be specifically agreed to through in-line signatures or initials by customers. IGS's suggested in-line signature requirement is cumbersome and unworkable in a market where customers can sign up for a product via mail, telephone, or internet. It is even more unworkable in the context of "opt-out" governmental aggregation, authorized under Ohio law, where customers only act affirmatively to *prevent* enrollment with a supplier.¹⁰ Because there are multiple methods under which a customer may enroll with a CRES supplier in Ohio, IGS's suggestion will not work.

Other commenters, including OEG, recommended that pass through provisions be required to be in bold print or "all caps." Either requirement is too rigid given the many different formats that CRES supplier agreements can take. While no contract term should be hidden or buried in fine print, even key terms like price and term length are not required to be in bold print or "all caps,". If there is any concern about legibility, the Commission's new proposed rules will address

⁹ PUCO Case No. 12-1924-EL ORD.

¹⁰ See Ohio Revised Code 4928.20.

them. Once the new rules become effective, CRES agreements for small customers will be in at least 10 pt. font, and printed in dark ink on light tinted paper. Consumers will have no trouble reading their agreements once all CRES providers' agreements are compliant. Even without the imminent font size requirement, FES has heard no complaints about legibility of its agreements.

In addition, Champion Energy recommends drastic changes, not only to pass through clauses but to the entire small customer agreement. Champion points to the restructured retail electric market in Texas in support of a suggestion that the Commission create standard CRES contract terms for small customers which all suppliers must use.

The Commission should reject Champion's recommendation as a matter of law and policy. The Commission lacks authority to dictate specific contract terms in the manner Champion suggests. Further, Champion's suggestion would harm suppliers and customers alike. Suppliers would be restricted in the different types of products they could offer, and innovation for new or unique products and services would suffer. CRES providers would be hesitant to come up with unique offers if Commission approval of new terms were required, and then made available to competing suppliers as "standard terms" for their use. Customers would then lose the potential benefits of these new products too.

In its initial comments, FES explained that many customers are willing to take the risk of occasionally being subject to pass through costs if it means they receive a lower fixed price. Other customers may be so risk averse that they prefer paying a higher fixed price with no contingencies. Thus, market forces will dictate the prevalence of pass through clauses in the CRES market. If nobody wants them, then no CRES providers will offer them. Champions' suggestion will eliminate many such distinctions between suppliers and stifle these market forces.

Champion's comments also fail to recognize that, in Texas, the retail market was designed to encourage customers to shop. Texas did this by imposing disincentives to customers remaining on default service. In Ohio, it is nearly the opposite situation, the Commission reviews each utility's ESP or MRO to ensure that default service remains a stable and affordable option for customers that choose not to shop with a CRES supplier. If all an Ohio customer wants is a standardized, "plain vanilla" set of terms, then they can have that with the Standard Service Offer in Ohio without any penalty. The Commission should not be moved by Champions' inapt comparisons to the Texas market to attempt to standardize contract terms.

III. Conclusion

For the reasons stated above, the Commission should maintain the forward looking nature of its investigation and not attempt to adjudicate private contractual disputes. To the extent there are concerns about the use of pass through clauses or other terms and conditions of supplier contracts, the answer is to provide new tools to consumers so they can educate themselves about terms commonly found in CRES provider agreements. The Commission should not be swayed by some parties' selective quotation of regulations, and others' claimed sudden lapses in sophistication. Pass through clauses and other contingency provisions are allowed by the Commission's rules, are common and openly used in the industry, and provide important benefits to both customers and suppliers.

Respectfully submitted,

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This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

5/27/2014 5:00:16 PM

in

Case No(s). 14-0568-EL-COI

Summary: Reply Comments electronically filed by Mr. Scott J Casto on behalf of FirstEnergy Solutions Corp.