

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

---

**REPLY COMMENTS OF THE  
OMA ENERGY GROUP**

---

**I. INTRODUCTION**

The Public Utilities Commission of Ohio (Commission) opened an investigation on April 9, 2014 in the above-captioned docket to determine whether it is unfair, misleading, deceptive, or unconscionable for competitive retail electric service (CRES) suppliers to market contracts as fixed-rate contracts or variable contracts with a guaranteed percent off of the SSO rate when such contracts include pass-through clauses. The Commission posed eight questions related to the issue to interested parties, and directed such parties to file comments responding to those questions. The Commission also provided interested parties with an opportunity to file reply comments. The Ohio Manufacturers' Association Energy Group (OMAEG) and many other interested parties filed comments on May 9, 2012. OMAEG hereby submits its reply comments to the initial comments filed by other interested parties in the proceeding.

**II. REPLY COMMENTS**

OMAEG's reply comments generally address other parties' comments on the questions posed by the Commission. Like OMAEG's comments, these reply comments are organized by 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?**

Generally speaking, parties' responses to this question fit into one of three categories: (1) "fixed means fixed," and any deviation from that presumption when marketing or labeling a contract is unfair, misleading, deceptive, or unconscionable; (2) pass-throughs should be permitted in fixed-rate contracts if they are clearly and conspicuously disclosed; or (3) the commodity price is fixed, so including a pass-through clause as a contingency is distinguishable, and thus, not misleading. As discussed in OMAEG's initial comments, OMAEG generally concurs with those parties whose comments fall into category one, stating that fixed-rate contracts should be fixed.<sup>1</sup> If a contract is not labeled or marketed as a "fixed-rate" contract, if any pass-throughs are clearly and conspicuously disclosed, rather than buried in the contract, and if the charges to be passed through to customers are consistent with the remaining concerns expressed in its comments herein, the inclusion of pass-throughs in CRES supplier contracts, as reflected in category two, may be appropriate.

OMAEG, however, takes issue with the representation made in the third category of responses that including a pass-through clause as a contingency in a fixed-rate contract is not misleading because the commodity price is fixed.<sup>2</sup> Although the commodity price may be fixed, charges associated with other terms of the contract are decidedly not fixed. Representing these variable costs as mere contingencies deceptively downplays the significance that such costs can have on consumers' bills.

---

<sup>1</sup> See generally, Comments of the Office of the Ohio Consumers' Counsel (OCC), Ohio Partners for Affordable Energy, Ohio Schools Council, et al. (collectively, Power4Schools), and the City of Perrysburg.

<sup>2</sup> See Comments of FirstEnergy Solutions (FES) at 4.

In a March 2014 letter from FES to customers which allegedly notified customers that a “pass-through event” had occurred in January, FES stated that as a result of the occurrence of the event, “[t]he electric generation costs for the month of January for your accounts served by [FES] will be adjusted through a charge which will appear as a separate line item on your bill but will not change your contract price.” Citing to this passage in its initial comments, Power4Schools insightfully notes, “[s]emantics 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.”<sup>3</sup> Given this scenario, OMAEG contends that the inclusion of pass-through clauses and charges in fixed-price contracts is misleading and should be prohibited.

Notably, nearly all consumer groups submitting comments in this proceeding stated that the use of the term “fixed-rate” contracts by CRES suppliers is misleading when the contracts to which the name refers include pass-through charges. The confusion and frustration are not limited to one consumer group; rather, all have expressed consternation at the marketing or labeling of such contracts as fixed rate or fixed price contracts by CRES suppliers. This fact, without more, warrants remedial action by the Commission.

**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?**

Numerous parties contend that under no circumstances should a CRES supplier be permitted to pass through RTO charges to customers in the context of fixed price contracts. OMAEG agrees, as the presence of a pass-through clause in a fixed-rate contract is extremely misleading and confusing to customers, and therefore, fixed-rate contracts should not contain pass-through clauses. As noted by others, it is imperative to maintain fixed-priced contracts even

---

<sup>3</sup> See Comments of Power4Schools at 5, fn 3.

though some of the underlying components (e.g., RTO charges) of those fixed-price contracts may fluctuate. If a CRES supplier chooses to protect itself against changes to existing law or tariffs that create or impose new costs or additional requirements on the CRES suppliers, then such provisions must be properly disclosed and notice must be provided, explicitly stating that the charges are not included under the fixed-rate. However, as explained by OMAEG, the CRES supplier should be prohibited from labeling, marketing, or otherwise referencing the contract as an unequivocal fixed-rate contract.<sup>4</sup>

If the CRES supplier desires to pass through all or any RTO charges (those beyond a new charge or additional requirement), or increases to existing RTO charges or requirements, such contract is not a fixed-rate contract and should not be deemed or named as such.

As noted by Ohio Energy Group (OEG) in its comments, RTO market fluctuations should not constitute a pass-through event in a fixed-rate contract:

[T]he language of the pass-through clause . . . specifically refers to . . . types of significant regulatory changes that could invoke additional charges to the customer beyond [its] agreed-upon fixed rate[.] The increased ancillary service costs that the CRES provider seeks to pass through to the OEG member do not meet any of these contractual requirements[.] . . . [T]he increased ancillary costs at issue in this instance were incurred by the CRES provider merely due to RTO market fluctuations. This is exactly the type of cost that “fixed-price” contracts are intended to protect customers from having to pay.<sup>5</sup>

The City of Perrysburg also commented insightfully on these circumstances, noting as follows:

[T]hese are not new charges. FES knew or should have known that it was subject to PJM charges of some amount, and it knew or should have known that the amount may have changed based on different conditions.

In putting together its bid proposal, it made a specific business decision on how to price the risk of increased PJM charges, just as it makes business decisions on

---

<sup>4</sup> See Comments of OMAEG at 5; see also Comments of OCC at 4-5, 9; Comments of Power4Schools at 7; and Comments of AARP at 2.

<sup>5</sup> See Comments of OEG at 5.

how to price the risk of increased commodities costs or other costs that impact the overall cost of electricity. Its price to the City reflects those predictive decisions, some of which are good and some of which may not be good. [. . .]

If FES is allowed to pass along increased (rather than actually new) costs, there would appear to be no logical stopping point.<sup>6</sup>

Both OEG and the City of Perrysburg make important points about the nature of the RTO charges that a CRES supplier may attempt to pass through to customers, and the implications of passing those charges on to customers. The ancillary service costs that a CRES supplier may attempt, in many circumstances, to pass through to customers have resulted from RTO market fluctuations. They are not the result of significant regulatory changes that create or impose new or additional charges. Therefore, such ancillary service costs should not be passed through to customers under a fixed-rate contract, even if such contract contains a pass-through clause. Further, permitting a CRES supplier to pass these types of charges through to customers fosters an environment in which CRES suppliers may seek to pass through any charges that do not directly correlate with its price expectations for generation-related services. In fact, in some circumstances, CRES suppliers may be rewarded for poor business decisions through the ability to pass on costs relating to such decisions to customers. These scenarios are untenable and the Commission should prohibit them from occurring.

- 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?**

No, increased costs “imposed” by an RTO and billed to CRES suppliers should not be categorized as a pass-through event that may be billed to customers in addition to the basic

---

<sup>6</sup> See Comments of the City of Perrysburg at 1-2.

service price established and set forth in a fixed-price CRES contract. As noted in OMAEG's initial comments, including additional charges for increased existing costs or costs that were higher than otherwise anticipated by the CRES supplier when a contract is characterized as a fixed-rate contract should be prohibited, as the contract is not a fixed-rate contract, but rather, a variable rate contract.<sup>7</sup> The Commission should not permit such increased costs to be passed through under contracts labeled, marketed, or otherwise characterized as fixed-rate contracts.

As noted by OCC in its initial comments,

'[T]he price presented to residential and small commercial consumers [in fixed rate contracts] is supposed to be all-inclusive.' Thus all RTO charges are already included in the contract's fixed rate and their increase during the contract's term would not qualify as a 'pass-through' event. To attempt to treat the increase as a pass-through event is unfair, misleading, deceptive or unconscionable under Ohio Adm. Code 4901:1-21-03(A).<sup>8</sup>

As OCC reasons in its comments, the supposedly inclusive nature of a fixed-rate contract with a CRES supplier, and consumers' expectations of the same, render pass-through charges in fixed-rate contracts resulting from increased costs to CRES suppliers misleading, deceptive, and unconscionable.<sup>9</sup> The Commission should not, therefore, permit CRES suppliers to pass such increased costs through to customers.

- 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?**

As explained in OMAEG's and others' initial comments, increased existing costs, higher than anticipated costs, or abnormally high costs billed to CRES suppliers may not, in good faith,

---

<sup>7</sup> See Comments of OMAEG at 6-7.

<sup>8</sup> See Comments of OCC at 10 (citing the Pennsylvania Public Utility Commission's (PaPUC) decision in *Guidelines for Use of Fixed Price Labels for Products with a Pass-Through Clause*, 2013 Pa. PUC LEXIS 321, Tentative Order at \*12).

<sup>9</sup> Id.

be categorized as pass-through events to be billed to customers with fixed-price contracts.<sup>10</sup> To the extent that a CRES supplier intends to assess increases in any charges to customers on account of certain pass-through events, such charges must be explicitly enumerated in the supply contract. Further, the supply contract may not permissibly be labeled, marketed, or otherwise characterized as a fixed-rate contract because the rate provided for in the contract may vary.<sup>11</sup>

In its comments, OCC contends that there is

[N]o type of ‘pass-through’ event that may invoke the application of the ‘pass-through’ clause in a ‘fixed-rate’ contract. If a CRES provider desires the implementation of a ‘pass-through’ clause, it must be marketed as a ‘variable rate’ contract as long as it meets the protections set forth in Ohio Adm. Code 4901:1-21-05.<sup>12</sup>

OMAEG concurs with the rationale supporting OCC’s argument on this issue. As stated above, pass-through events should only be permitted if a contract is not labeled or marketed as an unequivocal “fixed-rate” contract, if any pass-throughs are clearly and conspicuously disclosed, and if the charges to be passed through to customers are consistent with the remaining concerns expressed herein.

- 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 so far down in the fine print or on a second page of the terms and conditions)?**

As noted in its initial comments, OMAEG believes that burying charges or potential increases in existing charges through a pass-through mechanism in the fine print of a contract, as opposed to incorporating such charges in the body of a contract, is egregious and unquestionably

---

<sup>10</sup> See Comments of OMAEG at 10.

<sup>11</sup> Id.

<sup>12</sup> See Comments of OCC at 10 (citing the PaPUC decision in *Guidelines for Use of Fixed Price Labels for Products with a Pass-Through Clause*, Final Order at 25).

misleading, deceptive, unconscionable, and unfair to consumers.<sup>13</sup> OMAEG also concurs with the argument advanced by OCC on this issue:

The very nature of less prominently presenting the “pass-through” clause when CRES contracts are marketed as “fixed rate” offers and/or where the contract[ ] purports to be a “fixed rate” contract evidences an intention to evade customer detection. . . . [Additionally], the less prominent verbiage found in the terms and conditions is often overly-complicated and not understandable to the average citizen, further demonstrating an attempt to prey upon customers’ inability to understand the utility/energy industry.<sup>14</sup>

Like OCC, OMAEG likewise contends that the practice of including, less prominently than the provisions evidencing the fixed price, a pass-through clause in a CRES supplier contract is misleading, unconscionable, and deceptive, and further, violates Section 4928.10, Revised Code, and Chapter 4901:1-21, Ohio Administrative Code.<sup>15</sup>

**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 definitions be required in residential and small commercial contracts, or only residential contracts?**

As noted in its initial comments, OMAEG contends that for the sake of transparency and consumer protections, acronyms, including but not limited to abbreviations such as RTO, NERC, of such acronyms in CRES supplier contracts, should be defined in CRES contracts.<sup>16</sup> Providing such definitions in the text of such contracts will cost suppliers very little, but will grant consumers valuable peace of mind. Further, as noted by OCC, the Commission “should not only ensure that CRES contracts define such acronyms, but [should also ensure] that those definitions

---

<sup>13</sup> See Comments of OMAEG at 11.

<sup>14</sup> See Comments of OCC at 12.

<sup>15</sup> Id.

<sup>16</sup> See Comments of OMAEG at 12.



are briefly explained in a way that is understandable to the layperson signing the contract.”<sup>17</sup> Providing understandable definitions for terms that many consumers may consider difficult to understand is an easy method by which CRES suppliers may provide consumers with valuable information and increase consumer confidence in the CRES market.

**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?**

Yes, permitting pass-through clauses in residential and small commercial CRES contracts labeled as “fixed-rate” contracts may negatively impact the CRES market in Ohio and, in some cases, has arguably already adversely impacted the Ohio market. As noted by Power4Schools,

[A]s 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 Utilit[y] Commission observed as much in its investigation of this same issue.<sup>18</sup>

Given these circumstances, OMAEG urges the Commission to find that pass-through clauses may not be permissibly utilized in CRES contracts which are marketed or labeled as fixed-price or fixed-rate contracts.

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

In order for a contract with a pass-through clause that has an otherwise fixed-rate to be marketed or represented in a manner that is not misleading, deceptive, unconscionable, or otherwise unfair, it must be titled in a way that (1) does not represent that it is unequivocally a

---

<sup>17</sup> See Comments of OCC at 13.

<sup>18</sup> See Comments of Power4Schools at 9.

fixed-rate contract, and (2) makes reference to the pass-through clause included therein.<sup>19</sup> A title such as “Pricing Agreement and Potential Cost Pass-Throughs” or “Price with Pass-Through” would alert the customer to the presence of a pass-through clause in its agreement with the supplier which could cause the rate agreed upon by the parties to vary.<sup>20</sup> Another permissible, understandable title for such contracts was the title proposed by OEG in its comments, “conditional fixed-price.”<sup>21</sup> This title alerts customers that there is some set of circumstances under which the fixed nature of the contract may be varied.

### **III. CONCLUSION**

Representing a contract as a “fixed-rate” contract when it includes a pass-through clause that permits a CRES supplier to pass on certain costs it incurs to customers and, thus, vary the contract’s fixed rate, is misleading, deceptive, unconscionable, and unfair to consumers. Contracts including such pass-through clauses should not be permitted to be unequivocally labeled, marketed, or characterized as fixed-rate contracts. Additionally, the occurrence of scenarios constituting “pass-through events” for purposes of passing costs through to customers should be recognized under very limited circumstances as, discussed herein.

OMAEG thanks the Commission for the opportunity to submit comments on these important issues.

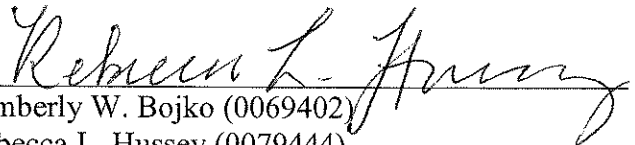
---

<sup>19</sup> See OMAEG Comments at 14.

<sup>20</sup> Id.

<sup>21</sup> See OEG Comments at 3.

Respectfully submitted,

A handwritten signature in cursive script, reading "Rebecca L. Hussey". The signature is written in dark ink and is positioned above a horizontal line.

Kimberly W. Bojko (0069402)

Rebecca L. Hussey (0079444)

Mallory M. Mohler (0089508)

Carpenter Lipps & Leland LLP

280 Plaza, Suite 1300

280 North High Street

Columbus, Ohio 43215

Telephone: (614) 365-4100

Email: Bojko@carpenterlipps.com

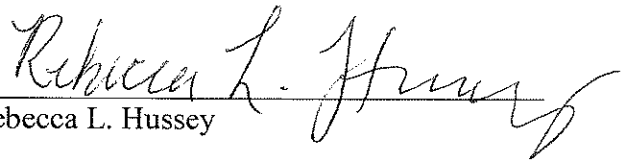
Hussey@carpenterlipps.com

Mohler@carpenterlipps.com

*Counsel for OMA Energy Group*

## CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon the following parties via electronic mail on May 27, 2014.

  
Rebecca L. Hussey

stnourse@aep.com  
mjsatterwhite@aep.com  
Amy.Spiller@duke-energy.com  
Jeanne.Kingery@duke-energy.com  
rocco.dascenzo@duke-energy.com  
elizabeth.watts@duke-energy.com  
judi.sobecki@aes.com  
burkj@firsenergycorp.com  
vparisi@igsenergy.com  
joliker@igsenergy.com  
mswhite@igsenergy.com  
haydenm@firstenergycorp.com  
jmcdermott@firstenergycorp.com  
scasto@firstenergycorp.com  
jlang@calfee.com  
mhpetricoff@vorys.com  
cgoodman@energymarketers.com  
srantala@energymarketers.com  
trhayslaw@gmail.com  
mberedo@ci.perrysburg.oh.us  
tyler.teuscher@dplinc.com  
bcrockett@championenergyservices.com  
mfrye@palmerenergy.com  
dona.seger-lawson@dplinc.com  
jwarrick@energyprofessionals.com  
cgelo@napower.com

philip.sineneng@thompsonhine.com  
joseph.clark@directenergy.com  
stephanie.chmiel@thompsonhine.com  
Ricks@ohanet.org  
tobrien@bricker.com  
dborchers@bricker.com  
dboehm@bkllawfirm.com  
mkurtz@bkllawfirm.com  
jkylercohn@bkllawfirm.com  
sam@mwncmh.com  
fdarr@mwncrnh.com  
mpritchard@mwncmh.com  
William.wright@puc.state.oh.us  
Michael.schuler@occ.ohio.gov  
cmooney@ohiopartners.org  
jmills@city.cleveland.oh.us  
mkimbrough@keglerbrown.com  
asonderman@keglerbrown.com  
Schmidt@sppgrp.com  
Sarah.merrick@sutherland.com  
eagleenergy@fuse.net  
Sandra.coffey@puc.state.oh.us  
shopson@napower.com  
kjoseph@napower.com  
bwhite@noblesolutions.com  
arobinson@napower.com

**This foregoing document was electronically filed with the Public Utilities**

**Commission of Ohio Docketing Information System on**

**5/27/2014 5:21:41 PM**

**in**

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

Summary: Reply Comments filed by OMAEG electronically filed by Ms. Rebecca L Hussey on behalf of OMAEG