

**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.)

**APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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The Office of Consumers' Counsel ("OCC") files this application to preserve its right to appeal a decision by the Public Utilities Commission of Ohio ("PUCO") that could require customers to pay added unlawful charges to CRES providers. The PUCO determined in this proceeding that in customer contracts for generation service, fixed-means-fixed. However, the Order was unreasonable and unlawful in the following respects:

ASSIGNMENT OF ERROR 1: The PUCO's Order is unreasonable because it did not mandate that in currently existing contracts, the fixed-means-fixed language does not allow customers to be charged for variable costs.

ASSIGNMENT OF ERROR 2: According to R.C. 4903.15, the PUCO Order interpreting that fixed-means-fixed was effective immediately. It is unreasonable and unlawful to require individual customers to bring complaints before the PUCO to enforce the PUCO Order.

ASSIGNMENT OF ERROR 3: The PUCO's Order unlawfully failed to protect consumers as required by R.C. 4928.10 when it allows CRES providers to abandon a contract when it becomes uneconomic to the CRES.

ASSIGNMENT OF ERROR 4: By not prohibiting the automatic renewal of fixed-rate contracts into variable rate contracts, the PUCO unreasonably and unlawfully allows CRES to avoid compliance with the PUCO's ruling that fixed-means-fixed and thereby fails to provide the necessary consumer protections set forth in R.C. 4928.10.

The reasons in support of this application for rehearing are set forth in the accompanying Memorandum in Support. The PUCO should grant rehearing and modify its Opinion and Order as requested by OCC.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

The Public Utilities Commission of Ohio (“PUCO”) opened this investigation into whether it is wrong for competitive retail electric suppliers (“CRES”) to levy unanticipated additional charges on the bills of Ohio’s electricity customers who signed contracts for what was marketed to them as a “fixed-rate” contract. The PUCO held that fixed-means-fixed. As such, CRES providers may not include a pass-through clause in a contract --enabling CRES to charge customers for variable rates--labeled as “fixed-rate.”¹ On November 18, 2015, the PUCO ruled that on a going-forward basis, CRES, may not include a pass-through clause in a contract labeled as “fixed-rate.”²

In accordance with R.C. 4903.10, the Office of the Ohio Consumers’ Counsel (“OCC”), files this Application for Rehearing asking the PUCO to reconsider certain provisions of the November 18, 2015 Order that negatively affect Ohio’s residential utility consumers. In order to fulfill its duties under Title 49 of the Revised Code and particularly, Ohio Rev. Code Section 4928.10, the PUCO should reverse its decision as it relates to currently existing contracts, and prohibit the automatic renewal of “fixed-rate”

¹ Order at 11.

² Order at 11.

contracts to variable contracts, containing pass-through costs that were not a part of the original contract.

II. ARGUMENT

A. The PUCO's Order is unreasonable because it did not mandate that in currently existing contracts, the fixed-means-fixed language does not allow customers to be charged for variable costs.

The PUCO Order affirmatively found that there is a need for straightforward language and terms for CRES customers.³ The Order stated:

[O]n a going-forward basis, CRES providers may not include a pass-through clause in a contract labeled as 'fixed-rate'. While CRES providers may continue to offer products containing pass-through provisions, they must be labeled appropriately as variable or introductory rates.”⁴

But the PUCO gave the CRES providers until January 1, 2016 to bring all marketing for contracts into compliance with the Finding.⁵

OCC seeks rehearing in order to clarify that fixed-means-fixed in all CRES contracts that currently exist. The PUCO opened this case to determine whether it is unfair, misleading, deceptive, or unconscionable to market contracts as fixed-rate contracts or as variable contracts with a guaranteed percent off the SSO rate when the contracts included pass-through clauses.⁶ The PUCO concluded that “in all CRES contracts, whether residential, commercial, or industrial, fixed should mean fixed.”⁷

Therefore, if there are contracts in existence today where there was any question about

³ Order at 11.

⁴ Order at 12.

⁵ Order at 13.

⁶ Order at 2.

⁷ Order at 11.

the meaning of the “fixed” contract, there is now an answer. When interpreting “fixed” contracts, the PUCO clarified that fixed contracts do not contain variable terms.

In keeping with the Ohio Adm. Code Section 4901:1-21-05(C), no CRES provider may engage in practices which are unfair, misleading, deceptive, or unconscionable.⁸ The PUCO has now clearly opined that in interpreting the terms of CRES contracts, fixed means fixed, which means that fixed contracts can not contain any pass-through provisions. This holding became effective on November 18, 2015. There is no longer any ambiguity regarding the meaning of fixed. The PUCO’s orders are effective when issued.⁹ Therefore, the PUCO should eliminate any confusion in its Order by clarifying that, as of November 18, 2015, CRES providers are prohibited from assessing any pass through charges in currently existing "fixed rate" contracts.

B. According to R.C. 4903.15, the PUCO Order interpreting that fixed-means-fixed was effective immediately. It is unreasonable and unlawful to require individual customers to bring complaints before the PUCO to enforce the PUCO Order.

The PUCO Order stated that the PUCO was making no ruling with respect to existing contracts – although a customer holding an existing contract with such a provision would be free to pursue a complaint against the CRES provider.¹⁰ The OCC seeks rehearing of this provision because the PUCO unequivocally found that fixed means fixed and there should be no pass-through provisions in fixed contracts that are effective now.¹¹

⁸ Ohio Adm. Code 4901:1-21-05(7)(C).

⁹ Ohio Rev. Code 4903.15.

¹⁰ Order at 12.

¹¹ Order at 11.

To require individuals to bring their own complaints violates the Ohio Revised Code's mandate that the PUCO must adopt rules specifying minimum service requirements "[f]or the protection of consumers in this state." These requirements are to include "a prohibition against unfair, deceptive, and unconscionable acts and practices in the marketing, solicitation, and sale of [. . .] competitive retail electric service and in the administration of any contract for service."¹²

The Revised Code also mandates that the PUCO rules include additional consumer protections such as ensuring that consumers are provided with a document containing "adequate, accurate and understandable pricing and terms and conditions of service . . . before the consumer enters into the contract for service."¹³ The PUCO has a duty to protect consumers in this state and also has a duty to include additional consumer protections.¹⁴ Since the PUCO has already determined that fixed means fixed, there is no need to re-litigate the issue on an individual basis.

To ask consumers to go to the time and expense of filing a complaint when the matter is already determined is not in the public interest and does not protect consumers. The PUCO itself acknowledged that it has a "statutory duty to protect consumers against confusing labels in developing the fixed-means-fixed axiom."¹⁵ However, to require that consumers spend time and money to file a complaint at the PUCO, bear the burden of proving that fixed means fixed, and participate in a hearing, is unreasonable and is not protecting consumers against the misleading labeling of a contract that the PUCO has

¹² Ohio Rev. Code. 4928.10.

¹³ Ohio Rev. Code. 4928.10(A)(1).

¹⁴ Ohio Rev. Code. 4928.10(A)-(G).

¹⁵ Order at 12.

already found to be misleading. By not adequately protecting consumer in this regard, the PUCO is violating its duties under Ohio Revised Code Section 4928.10.

OCC requests that the PUCO reconsider the requirement that customers holding existing contracts must pursue a complaint against CRES providers in order to receive the benefit of the contract that they are already entitled to. Fixed means fixed and the CRES must adhere to words in their existing contracts that the PUCO has now interpreted.

C. The PUCO's Order unlawfully failed to protect consumers as required by R.C. 4928.10 when it allows CRES providers to abandon a contract when it becomes uneconomic to the CRES.

The PUCO recognized its statutory duty to protect consumers against confusing labels in developing the fixed-means-fixed action and further stated that it was mindful of its statutory duty to encourage diversity of reasonably priced electric supplies.¹⁶ But the PUCO went on to recognize that circumstances may occasionally arise over which a CRES provider has no control and no ability to hedge, such as a regulatory change in law.¹⁷

In such instances, the PUCO found it would be inappropriate to require CRES providers to remain bound by an uneconomic contract with no opportunity for redress.¹⁸ Though the PUCO recognized there may be circumstances that become uneconomic for the CRES provider, it ignores the fact that there may be circumstances that become uneconomic for the consumer. CRES providers should not have a unilateral right to escape a contract. A contract represents a balance of the interests of both parties to the contract. What if the consumer signs on to a three year contract at a competitive fixed

¹⁶ Order at 12.

¹⁷ Order at 12.

¹⁸ Order at 12.

rate of \$0.10/kWh and in the second year of the contract, competitive electricity prices drop to \$0.05/kWh? The circumstances have become very uneconomic for the consumer, as he is now paying twice more for electricity than the market price. If the CRES has a contractual out provision for uneconomic circumstances that may arise, fundamental fairness would dictate that such a provision must also be provided to the consumer.

When opening the electricity to competition, the legislature expressed concerns regarding consumer protections. It charged the PUCO to establish minimum service requirements for the protection of consumers in this state.¹⁹ Throughout Section 4928 of the Ohio Revised Code, there are requirements that the PUCO must look out for consumers' interests: "For the protection of consumers in this state, the public utilities commission shall adopt rules ... specifying the necessary minimum service requirements ... of competitive retail service."²⁰ And further that the PUCO's rules shall "[p]rovide consumers with adequate, accurate and understandable pricing and terms and conditions of service."²¹ If the CRES provider is permitted to dispense with its duties under a contract whenever it faces an uneconomic circumstance, that opportunity must also be afforded to the customers.

The OCC requests that the PUCO extend the ability to consumers to exit a contract when it becomes an uneconomic burden for the consumer without penalty.

¹⁹ Ohio Rev. Code 4928.10.

²⁰ Ohio Rev. Code 4928.10.

²¹ Ohio Rev. Code. 4928.10(A)(1).

D. By not prohibiting the automatic renewal of fixed-rate contracts into variable rate contracts, the PUCO unreasonably and unlawfully allows CRES to avoid compliance with the PUCO's ruling that fixed-means-fixed and thereby fails to provide the necessary consumer protections set forth in R.C. 4928.10.

Some CRES contracts are initiated with the customer as fixed-rate contract, but after a certain amount of time are automatically renewed as a variable rate contract. Variable rate contracts can renew on a month-to-month basis without any further notice to customers. The CRES supplier may create a perception that the contract has a “fixed-rate” price advantage but adds a provision to the contract where it automatically renews in a few months at a variable contract rate. Thus, the fixed rate contract quietly disappears for customers (without notice) after a certain period of time. The automatic renewal of a fixed-rate contract into a variable rate contract hurts customers by allowing the marketer to automatically charge those customers a variable-rate after having enticed them with an initial “fixed-rate.”

In the PUCO Order, the PUCO declined to “make determinations regarding specific CRES providers’ contract terms with specific customers.”²² But the OCC is not asking the PUCO to rule on a specific CRES contract. Just as the PUCO ruled on the fixed-means-fixed provisions contained in numerous CRES contracts, the OCC asks the PUCO to forbid a fixed contract from being automatically renewed and changed into a variable rate contract. To allow this type of automatic renewal goes against the specific holding that fixed-means fixed. Automatic renewals from fixed-rate contracts into variable-rate contracts should be prohibited entirely.

Pursuant to the PUCO holding that fixed-means-fixed, the CRES suppliers should not be able to avoid complying with this finding by automatically rolling fixed-rate contracts over to a

²² Order at 27.

variable contract without additional notice to the customer. The PUCO is charged with the protection of consumers in a competitive retail market,²³ The PUCO should reconsider its ruling and prohibit the automatic renewal of a fixed-rate contract into a variable rate contract.

III. CONCLUSION

OCC commends the PUCO for opening up this investigation on the deceptive market practices that some CRES have engaged in where customers are sold a fixed rate contract, which ends up being a contract with fixed and variable components. And OCC appreciates and agrees with the Commission's ruling that "fixed-rate" means "fixed-rate." The OCC requests, however, that the PUCO provide further protections to customers, as requested in this rehearing application. Such additional consumer protections are needed to avoid unfair, deceptive, misleading and unconscionable business practices that have been employed by some of the CRES suppliers doing business in this state.

Respectfully submitted,

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²³ Ohio Rev. Code Section 4928.10.

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Application for Rehearing was served on the persons stated below via electronic transmission, this 18th day of December, 2015.

/s/ Jodi Bair
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Summary: App for Rehearing Application for Rehearing by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Bair, Jodi Ms.