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

FOURTH ENTRY ON REHEARING

Entered in the Journal on September 27, 2017

I. SUMMARY

{¶ 1} The Commission grants the application for rehearing filed by the Retail Energy Supply Association.

II. HISTORY OF PROCEEDING

{¶ 2} R.C. 4928.02 provides, in pertinent part, that it is the policy of the state to "[e]nsure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service;" "[e]nsure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs;" "ensure diversity of electricity supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers[;]" "recognize the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment;" and "ensure retail electric service consumers protection against unreasonable sales practices[.]" Additionally, R.C. 4928.06 requires the Commission to ensure that the state policies enumerated in R.C. 4928.02 are effectuated and to adopt rules to carry out and enforce these policies. Thus, the Commission has the authority, and the duty, to examine competitive retail electric service (CRES) contracts in order to ensure the availability of reasonably priced CRES, diversity of CRES supplies and suppliers, and protection for customers against unreasonable sales practices.

{¶ 3} In March 2014, the Commission became aware, through consumer inquiries and informal complaints, that CRES suppliers included pass-through clauses in the terms and conditions of fixed-rate or price contracts and variable contracts with a guaranteed percent off the standard service offer (SSO) rate. Such pass-through clauses allow the CRES supplier to pass through to the customer the additional costs of certain events.

{¶ 4} By Entry issued April 9, 2014, the Commission opened an investigation to determine whether it is unfair, misleading, deceptive, or unconscionable for a CRES provider to market contracts as fixed-rate contracts or as variable contracts with a guaranteed percent off the SSO rate when the contracts include pass-through clauses (collectively referred to herein as "fixed-rate" contracts). Timely comments were filed in this proceeding by multiple stakeholders.

{¶ 5} By Finding and Order issued November 18, 2015 (Order), the Commission determined that, in all CRES contracts, whether residential, commercial, or industrial, fixed should mean fixed. Consequently, the Commission ordered that, on a going-forward basis, CRES providers may not include a pass-through clause in a contract labeled as "fixed-rate," although CRES providers could continue to include regulatory out clauses available in limited circumstances. The Commission further held that CRES providers would have until January 1, 2016, to bring all marketing for contracts being marketed into compliance with the "fixed-means-fixed" guidelines set forth in the Order. The Commission continued to find that changes to the Commission's current rules should be initiated in order to provide clearer guidance to customers and CRES providers in the future, and directed the Commission's Staff to draft proposed rules and commence a rules proceeding.

{¶ 6} On December 18, 2015, applications for rehearing of November 18, 2015 Order were filed by Ohio Consumers' Counsel (OCC), Noble Americas Energy Solutions LLC (Noble), FirstEnergy Solutions Corp. (FES), RESA, and Interstate Gas Supply, Inc. (IGS Energy). Memoranda contra applications for rehearing were filed by OCC; RESA;

The Ohio Schools Council, Ohio School Boards Association, Buckeye Association of School Administrators, and Ohio Association of School Business Officials (collectively, Power4Schools), IGS Energy, and FES.

{¶ 7} On January 13, 2016, the Commission granted the applications for rehearing in order to further consider the issues raised in the applications. Thereafter, on March 29, 2017, the Commission issued a Second Entry on Rehearing that granted in part and denied in part the applications for rehearing filed by Noble, FES, and IGS, and denied the applications for rehearing filed by OCC and RESA.

{¶ 8} On April 28, 2017, RESA filed an application for rehearing of the Commission's March 29, 2017 Second Entry on Rehearing.

{¶ 9} Subsequently, on May 24, 2017, the Commission granted rehearing for the limited purpose of further consideration of the matters raised by RESA in the April 28, 2017 application for rehearing.

III. DISCUSSION

{¶ 10} R.C. 4903.10 states that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined in that proceeding, by filing an application within 30 days after the entry of the order upon the journal of the Commission.

{¶ 11} In its application for rehearing, RESA raised two assignments of error. In its first assignment of error, RESA claims that requiring CRES providers to label residential contracts as fixed, variable, or introductory is unreasonable and unlawful. RESA contends that the current rules do not require labels as no provision of Ohio Adm.Code Chapter 4901:1-21 requires a CRES provider to use any specific words to describe a product in either marketing materials or contracts. RESA agrees with the Commission's acknowledgment that certain CRES products could be inadequately

represented by the three options of fixed, variable or introductory but claims that CRES suppliers should not be required to seek waivers of the guidelines because the rules do permit any label or no label at all. Finally, RESA claims that the labeling requirement is counterproductive at this stage of the Commission's investigation. RESA argues that it is not fair to revise contract labels now and revise them again if and when the rules are changed.

{¶ 12} The Commission finds that rehearing on this assignment of error should be granted and that the guidance that residential contracts should be labeled as fixed, variable, or introductory should be stayed pending the outcome of the rulemaking on the CRES standards. We disagree with RESA that our clarification in the Second Entry on Rehearing was unlawful. Ohio Adm.Code 4901:1-21-03 prohibits CRES providers from engaging in "unfair, misleading, deceptive, or unconscionable acts or practices" related to the marketing, solicitation or sale of a CRES, and it is the Commission's duty to give guidance to CRES providers as to the meaning of "unfair, misleading, deceptive, or unconscionable acts or practices."

{¶ 13} Nonetheless, we do agree that the question of labeling contracts is better addressed through the rulemaking process. The Commission has opened Case No. 17-1843-EL-ORD to conduct this rulemaking and a workshop has been scheduled for October 3, 2017. *In the Matter of the Commission's Review of Chapter 4901:1-21 of the Ohio Administrative Code,* Case No. 17-1843-EL-ORD, Entry (September 1, 2017). The Commission continues to maintain that identifying residential customer contracts as fixed, variable or introductory will reduce customer confusion since these labels are widely used for a variety of consumer products, and customers are familiar with the plain meaning of such labels. However, in order to reduce potential disruptions to the competitive retail electric service market, we conclude that it is better to address this issue during a complete review and reform of all CRES standards rather than through a piecemeal approach.

{¶ 14} In its second assignment of error, RESA alleges that requiring CRES providers to transfer to default service customers who do not affirmatively consent to new contract terms and conditions following the invocation of a "regulatory out" provision is unreasonable and unlawful. RESA claims that the Second Entry on Rehearing fundamentally changes when a CRES supplier invokes a regulatory out clause by requiring the CRES supplier to return the customer to the standard service offer after a reasonable time for renegotiation of the contract. RESA alleges that this violates state policy codified in R.C. 4928.02(B) which recognizes the principle of freedom of contract. RESP posits that freedom of contract means that the parties decide for themselves how they will allocate rights and responsibilities.

{¶ 15} Further, RESA claims that returning the customer to the standard service offer after the triggering of the regulatory out clause violates prohibitions against slamming. RESA reasons that failure to accept the new terms and conditions offered by the CRES supplier does not equate to affirmative consent by the customers to return to the standard service offer. RESA claims that the "automatic drop" required by the Second Entry on Rehearing is particularly absurd in situations where the CRES supplier is willing to serve the customer under the same terms and conditions as existed prior to the triggering of the regulatory out clause. Moreover, RESA speculates that an event triggering a regulatory out clause would likely affect all CRES providers as well as the standard service offer; thus, customers would not be able to avoid any new costs because the customers would be charged these same costs under the standard service offer.

{¶ 16} The Commission notes that regulatory out clauses should be invoked in very limited circumstances, such as a regulatory change or a change in law for which a CRES provider is unable to hedge. Thus, the regulatory out clause is intended to protect CRES providers from contracts which have become uneconomic due to circumstances beyond the CRES provider's control. Therefore, we are not persuaded that our ruling was erroneous by RESA's claim that it is absurd for a CRES supplier to return a customer

to standard offer service, after triggering the regulatory out clause, when the "supplier is willing to serve under the same terms and conditions" that were in place prior to the invocation of the regulatory out clause. A CRES supplier who is willing to serve under the existing contract's terms and conditions should not invoke the regulatory out clause in the first place.

{¶ 17} Likewise, we reject RESA's arguments that the Second Entry on Rehearing is at tension with prohibitions against slamming. When a CRES provider has triggered the regulatory out clause, the existing contract is terminated and each parties' rights and responsibilities under the contract are at an end. Customers who do not have a contract with a CRES provider are served through the standard service offer and returning such customer to the standard service offer does not constitute slamming.

{¶ 18} Nevertheless, the Commission will grant rehearing and stay our guidance that CRES providers, following the invocation of a regulatory out provision, must transfer to default service customers who do not affirmatively consent to new contract terms and conditions. Thus, following the invocation of a regulatory out clause, a CRES provider may continue to serve a customer who does not give affirmative consent to new contract terms and conditions at the existing contracts terms and conditions. As with the issue of contract labeling discussed above, we believe that a piecemeal approach to these issues runs the risk of disrupting the market for competitive retail electric services. Instead, all issues regarding regulatory out clauses should be, and will be addressed in the rulemaking process in Case No. 17-1843-EL-ORD. These issues include, for example, an explicit definition of when a regulatory out may be invoked, standard language for regulatory out clauses, and standards for customer notice in the event a regulatory out clause is invoked.

IV. ORDER

{¶ 19} It is, therefore,

{¶ 20} ORDERED, That the application for rehearing filed by RESA be granted as specified above. It is, further,

{¶ 21} ORDERED, That a copy of this Entry on Rehearing be served upon the Electric-Energy Listserv.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Asim Z. Haque, Chairman

M. Beth Trombold

Thomas W. Johnson

Lawrence K. Friedeman

Daniel R. Conway

GAP/sc

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SEP 27 2017

Barcy F. McNeal
Secretary

Summary: Entry Fourth Entry on Rehearing that the application filed by RESA be granted as specified. electronically filed by Docketing Staff on behalf of Docketing