

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**Use of Fixed Price Labels for Products)
With a Pass-Through Clause)**

Docket No. M-2013-2362961

**Comments of the
National Energy Marketers Association**

The National Energy Marketers Association (NEM)¹ hereby submits comments regarding electric generation suppliers (EGSs) appropriate use of a “fixed price” label with respect to products incorporating pass-through and regulatory change clauses to consumers. These comments are submitted pursuant to the May 23, 2013, Tentative Order issued by the Commission. The Commission’s Office of Competitive Market Oversight (OCMO) and CHARGE reviewed the issue. The Tentative Order expressed the concern that EGSs offering fixed price products with pass-through clauses may have the potential to confuse and mislead consumers. However, the Tentative Order also recognized that many consumers find value in long-term product offerings and restrictions on the ability of EGSs to manage certain unhedgeable, unanticipated costs through regulatory change clauses would increase supplier risk and costs, which would limit or possibly preclude EGSs from making such offers available to mass market consumers. NEM agrees with this latter concern. NEM urges the Commission not to adopt overly proscriptive rule terminology and definitions that unnecessarily limit EGSs’ ability to make long-term fixed price offerings available to consumers. The Commission should

¹ The National Energy Marketers Association (NEM) is a non-profit trade association representing both leading suppliers and major consumers of natural gas and electricity as well as energy-related products, services, information and advanced technologies throughout the United States, Canada and the European Union. NEM’s membership includes independent power producers, suppliers of distributed generation, energy brokers, power traders, global commodity exchanges and clearing solutions, demand side and load management firms, direct marketing organizations, billing, back office, customer service and related information technology providers. NEM members also include inventors, patent holders, systems integrators, and developers of advanced metering, solar, fuel cell, lighting and power line technologies.

continue to permit EGSs to utilize the “fixed price” label for products that include a fully and properly disclosed regulatory change clause for unforeseeable, unhedgeable costs, such as Commission or FERC-approved charges and RTO-related charges.

The Commission Should Continue to Permit the Use of the Fixed Price Label in Contracts that Fully and Properly Disclose the Inclusion of Regulatory Change Provisions

The Tentative Order discusses a number of different potential ways to denominate long-term, fixed price products that include provision for the pass-through of regulatory-related cost changes.² (Tentative Order pages 9-10). In the Commission’s consideration of these proposals, NEM recommends that the use of commonly understood terminology, such as “fixed price,” continue to be permitted as a way to explain these types of long-term product offerings. Indeed, the use of a jargon-laden label such as “X-Year Price with Pass-Through Clause” is more likely to serve to complicate consumer communications and result in confusion. The Commission cannot capture or anticipate all of the products that EGSs may want to offer. Terminology should not be so narrowly defined to prevent product innovation from occurring to meet ever-changing consumer needs. Nor should it preclude EGSs from making reference to commonly understood terms, such as “fixed price,” that aid in promoting consumer understanding of the product being marketed.

² These proposals include:

- 1- ban the use of the "fixed price" label for contracts incorporating regulatory out clauses or pass through provisions and instead label those contracts as variable price contracts.
- 2- revise the definition of "fixed price" to recognize it may include a provision to call for the pass through of additional costs as a result of regulatory changes.
- 3- create a new term of "Long-Term Energy Price" to be defined as one that locks the energy price for a set term but with other components subject to variability based on market and regulatory changes.
- 4- create a new term of "X-Year Price with Pass-Through Clause." If a supplier invoked the clause, they would be required to provide advance notice to affected customers.

The appropriate focus should be on properly disclosing to consumers, in a clear and understandable manner, if a fixed price product includes a regulatory change clause. Moreover, an outright ban on the use of the “fixed price” label in conjunction with contracts incorporating regulatory change clauses with a requirement they be deemed “variable price” products would run contrary to consumer understandings, would overly restrict EGSs ability to communicate the overarching value of the product, and ultimately diminish the availability of fixed price products to consumers in the marketplace. It is for this reason that NEM recommends an approach consistent with Proposal 2 (Tentative Order, page 9), that the definition of a "fixed price" product indicate that it may include a provision to call for the pass through of additional costs as a result of regulatory changes. These regulatory changes would be in the nature of cost changes that are unhedgeable and not foreseeable by the EGS, such as Commission or FERC-approved charges and RTO-related charges.³

A regulatory change clause provides the supplier with the discretion as to whether or not to assess an increased charge to a consumer. In some instances, the supplier may conclude that the appropriate business decision is to forego passing through an increase in a regulatory charge in order to avoid consumer dissatisfaction. However, in those cases where a key regulatory cost component goes up significantly, the supplier needs the ability to pass the cost through, in order to mitigate what would otherwise be an enormous risk. The key consideration of the use of

³ NEM notes, for example, that the Texas electric competition regulations explicitly define a “fixed rate product” to allow that, “the price may vary from the disclosed amount solely to reflect actual changes in the Transmission and Distribution Utility (TDU) charges, changes to the Electric Reliability Council of Texas (ERCOT) or Texas Regional Entity administrative fees charged to loads or changes resulting from federal, state or local laws that impose new or modified fees or costs on a REP that are beyond the REP’s control.” 16 TX Admin. Code Section 25.475(b)(5). While the market structure of the Texas electric market may vary from that in Pennsylvania, it is important to consider that the Public Utility Commission of Texas finds it permissible to communicate fixed price products to consumers in this fashion.

regulatory change clauses in fixed price products should be focused on the proper and full disclosure of these provisions to consumers.

NEM also submits that an EGS's invocation of a regulatory change clause does not and should not trigger the multiple notices required of a supplier associated with a notice of price change under 52 Pa. Code § 54.5(g). The changes in service contemplated to be noticed under Section 54.5(g) are not akin to a supplier invoking a regulatory change clause. In the case of a change in price due to a regulatory change, the supplier has already communicated this term of service in the disclosure statement underlying the initial agreement.

The Electric Competition Dictionary Should Incorporate and Rely Upon Generally Understood Terms and Definitions to Facilitate Consumer Understanding

The Commission is additionally considering changes to the definitions of “fixed price” and “variable price” in the Electric Competition Dictionary. NEM is similarly concerned that the proposed definition of “fixed price” – “an all-inclusive price that will remain the same, for a set period of time of at least three billing cycles” (Tentative Order at 11), would contribute to consumer confusion rather than alleviate it and would unnecessarily restrict the ability of EGSs to market and offer stable, long-term pricing products. For instance, NEM is concerned that the incorporation of the artificial three billing cycle construct for fixed price products would be problematic and inconsistent with consumers general understanding of the term “fixed price.” NEM submits that marketing definitions and rules should incorporate commonly understood terms that permit EGSs to communicate products to consumers effectively and are also framed in a manner that provide EGSs with the latitude to continually find ways to innovate to meet consumer needs.

Conclusion

For the foregoing reasons, NEM recommends that the Commission should continue to permit EGSs to utilize the “fixed price” label for products that include a fully and properly disclosed regulatory change clause for unforeseeable, unhedgeable costs, such as changes in Commission, RTO, and FERC charges. NEM urges the Commission not to adopt overly proscriptive rule terminology and definitions that unnecessarily limit EGSs in their ability to communicate product offerings in a manner consistent with generally understood terms and to make long-term, fixed price offerings available to consumers.

Sincerely,

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