

COMMONWEALTH OF PENNSYLVANIA



OFFICE OF CONSUMER ADVOCATE

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June 24, 2013

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17101

RE: Use of Fixed Price Labels for Products with
a Pass-Through Clause
Docket No. M-2013-2362961

Dear Secretary Chiavetta:

Enclosed for filing please find the Office of Consumer Advocate's Comments in the above-referenced proceeding.

If you have any questions, please feel free to contact me at the number listed above.

Respectfully Submitted,

A handwritten signature in cursive script that reads "Jennedy S. Johnson".

Jennedy S. Johnson
Assistant Consumer Advocate
PA Attorney I.D. # 203098

Enclosure

cc: Office of Competitive Market Oversight
Retail Markets Investigation (E-Mail only)
Patricia Wiedt, Law Bureau
Dan Mumford, Manager – Bureau of Consumer Services

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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
OFFICE OF CONSUMER ADVOCATE

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Dated: June 24, 2013

I. INTRODUCTION

The Office of Consumer Advocate (OCA) files these Comments in accordance with the Pennsylvania Public Utility Commission's (Commission) Tentative Order entered May 23, 2013. Use of Fixed Price Labels for Products with a Pass-Through Clause, Docket No. M-2013-2362961 (Tentative Order entered May 23, 2013) (Tentative Order). In its Tentative Order, the Commission sought comment on the proposal of the Commission's Office of Market Oversight (OCMO) to provide guidance to electric generation suppliers (EGS) as to the appropriate use of the "fixed price" label when presenting products with pass-through clauses to potential customers and to provide for additional labeling options. Tentative Order at 1. The impetus for these comments was some EGSs offering "fixed-price" rate products to residential customers but including in their disclosure statements provisions that allow the EGS to change the rate based on a government agency, Regional Transmission Organization (RTO), or other entity action that imposes costs on the supplier. Id. at 2. The OCA agrees with the Commission's concern that: "these types of offers might be misleading, especially when the EGS prominently advertises a fixed price and buries the pass-through clause far down in the fine print in the disclosure statement, or even on a second page." Id. at 5. The OCA supports the steps the Commission is taking through this Tentative Order to protect electric customers. The OCA appreciates the opportunity to comment on this issue and provides the following in response to the questions presented in the Commission's Tentative Order.

II. COMMENTS

The Commission' Electric Competition Dictionary defines both fixed price and variable price:

Fixed Price: A fixed electricity rate will remain the same, for a set period of time.

Variable Price: A variable electricity rate can change, by the hour, day, month, etc. according to the terms and conditions in the supplier's disclosure statement.

Electric Competition Dictionary, available at: PaPowerSwitch.com. In its Tentative Order, the Commission rightly notes the myriad of problems associated with allowing an EGS to label an offer as being "fixed-price" when the rate can, in fact, be changed by pass through costs. It states:

We are primarily concerned that these offers might be misleading, especially when the EGS prominently advertises a fixed price and buries the pass-through clause far down in the fine print in the disclosure statement, or even on a second page. These provisions, based on examples examined by OCMO, are not always presented along with the pricing information in the disclosure. While consumers are expected and encouraged to carefully review the disclosure statements, presenting a product as having a fixed price that in fact can vary for any number of reasons could be seen as misleading. Additionally, even if a consumer read the entire disclosure, most are not sophisticated enough to understand what is meant by terms such as "RTO, NERC, PJM," etc., and just what kind of pricing changes could result. If an EGS were to invoke such a clause and pass through costs to the customer via an increase in the rate, residential and small commercial customers are likely to be confused and dissatisfied with the EGS as well as the marketplace. As a result, these customers may be unwilling to shop for their electricity supply in the future. Additionally, customer dissatisfaction could lead to complaints to the Commission, legislators and possibly the media. The combination of these potential effects could have a very adverse effect on the competitive retail market.

Tentative Order at 5.¹

Customer dissatisfaction and confusion can be compounded by the fact that, in some cases, customers may not be able to exit the contract without paying a substantial early cancellation penalty. This is especially relevant given that many of the contracts with this type of language have been multi-year contracts. Further, consumer education efforts have not gotten into this level of detail. Consumer education efforts have included the distinctions between, and the pricing of, generation/transmission/distribution charges – and the use of a bundled "price to

¹ The OCA would note that using the term "fixed price" to describe a price that may actually change could also cause a breach of the Unfair Trade Practices and Consumer Protection Law. See Section A, below.

compare” when shopping. This issue presents a new element that does not neatly fit into traditional consumer education contexts.

It is for these reasons, that the OCA supports the Commission’s determination in the Tentative Order that the “status quo is unacceptable” and that “presenting a price as being ‘fixed’ but subject to change due to pass through clauses poses enough serious concern that something has to be done to either prohibit this practice or to accommodate it in a way that is more transparent and fairer to consumers.” Tentative Order at 8. To address these issues, the Commission proposed a “Policy Statement in the Use of Pricing Labels for Competitive Electric Generation Service.” Tentative Order, Appendix A (Policy Statement). The OCA will address the Proposed Policy Statement in detail below.

A. Fixed Price Label – “Fixed” Means “Fixed”

Sections (a) and (b) of the Commission’s Policy Statement make clear that the term “Fixed Price” can only be used when the price is completely fixed for entirety of the term of the contract. It states:

(a) The Commission’s “Electric Competition Dictionary” that is referenced at 52 Pa. Code § 54.3 and maintained on file in the Commission’s Office of Communications shall be revised to reflect the following changes to the definition of “Fixed Price.”

Fixed Price: A ~~fixed electricity~~ AN ALL-INCLUSIVE rate PRICE THAT will remain the same, for a set period of time OF AT LEAST THREE BILLING CYCLES.

(b) An EGS product described as a “Fixed Price” must not change in price during the term of the agreement, consistent with the definition. The price must be included in the disclosure statement.

The OCA supports the Commission’s proposal and submits that it offers a much-needed protection for consumers. Chapter 54 requires that customers be able to compare prices on an apples-to-apples basis. It states: “[i]nformation shall be provided to customers in an

understandable format that enables the customers to compare prices and services on a uniform basis.” 52 Pa.Code § 54.1(a). These Sections will ensure that the offers listed as “fixed” are all subject to the same pricing conditions and should therefore facilitate customer shopping.

The OCA further submits that by establishing a plain language definition of “fixed price,” *i.e.* that “fixed” means “fixed,” the Commission ensures that these type of EGS offers will not run afoul of the Unfair Trade Practices and Consumer Protection Law. The Unfair Trade Practices and Consumer Protection Law (UTPCPL)² deems it unlawful to engage in “unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.”³ The UTPCPL defines unfair methods of competition and unfair or deceptive acts or practices as, *inter alia*,⁴ “engaging in any [] fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding.”⁵ Under UTPCPL, it is not necessary to prove intention to deceive or actual deception; “rather, it need only be shown that the acts and practices are capable of being interpreted in a misleading way.”⁶ In the context of advertisements or solicitations, “[t]he test for the court is to determine the overall impression arising from the totality of what is said, as well as what is reasonably implied, in the

² 73 PA. STAT. § 201-1, *et seq.* (2012).

³ Id. at § 201-3.

⁴ Another potentially applicable statutory definition is “Representing that goods or services have... characteristics ... that they do not have....” Id. at § 201-2(4)(v).

⁵ Id. at § 201-2 (4)(xxi) (referred to as the “catchall provision”); see also Commonwealth ex rel. Zimmerman v. Nickel, 26 Pa. D. & C.3d 115, 120 (1983)(stating an act is deceptive or unfair if it has the ‘capacity to tendency’ to deceive”).

⁶ Peoples Benefit Services, Inc., 923 A.2d 1230, 1236 (2007) (citing Nickel, 26 Pa. D. & C.3d at 120.).

advertisement or solicitation.”⁷ “Thus, if what is presented has a tendency to mislead the casual reader or listener, it may be subject to restraint.”⁸

For the forgoing reasons, the OCA supports Sections (a) and (b) of the Commission’s proposed Policy Statement.

B. Modification to the Definition of “Variable Price”

The proposed Policy Statement would modify the definition of “Variable Price” as follows:

(c) The Commission’s “Electric Competition Dictionary” shall be revised to reflect the following changes to the definition of “Variable Price.”

Variable Price: A **AN ALL-INCLUSIVE** variable electricity ~~rate~~ **PRICE THAT** can change, by the hour, day, month, etc. according to the terms and conditions in the supplier’s disclosure statement.

While the proposed language change is acceptable to the OCA, the OCA would note that it is equally important that variable price offers comply with the disclosure requirements of Chapter 54. Variable rate contracts must identify the actual methodology or formula that will govern the calculation of the variable rate and the limits of that variability. Chapter 54 specifically requires that both the conditions and limits of the variability must be disclosed. It states:

(c) The contract’s terms of service shall be disclosed, including the following terms and conditions if applicable: ...

(2) The variable pricing statement, if applicable, must include:

- (i) Conditions on variability (state on what basis the prices will vary).
- (ii) Limits on price variability.

⁷ Peoples Benefit Service, Inc., 923 A.2d at 1236 (citing Commonwealth v. Hush-Tone Indus., Inc., 4 Pa. Commw. 1 (1971)); see also Commonwealth v. Foster, 57 D. & C.2d 203 (1972) (stating that “the test of whether a statement is deceptive is based on the *net* impression it is likely to make upon a person of average intelligence, and not whether it may be literally or technically construed to not constitute a misrepresentation”) (emphasis added).

⁸ Nickel, 26 Pa. D. & C.3d at 132.

52 Pa.Code § 54.5(c)(2). The point of this provision is to ensure that customers will actually be able to determine how their rate is calculated and the maximum exposure they face regarding price changes. The OCA submits that disclosures that lack specificity, do not state what aspect of the “wholesale market” might be used to change the customer’s price, and do not specify limits cannot be viewed as complying with protections of Chapter 54.

To address this concern, the OCA recommends that the Commission make clear that disclosure statements for variable rate contracts must meet disclosure standards at 52 Pa.Code § 54.5. The OCA also recommends that the Commission add a paragraph into its Policy Statement to provide additional guidance EGSs regarding the terms of variable price contracts. This guidance would be similar to the language proposed by the Commission for the pass-through clause. The OCA recommends that the following language be added to the Policy Statement:

An EGS using the label or description “Variable Price” to describe a product must include in its disclosure statement the conditions of and limits on the price that can be charged in accordance with 52 Pa.Code Section 54.5(c)(2). The EGS must also include an clear explanation--including any formula, index or adder--of what method or calculation will be used in calculating the price. This information must be included in the same paragraph or section of the disclosure statement that contains the pricing information. EGSs must, in the “definitions” section of the disclosure statement, define any terms or acronyms used to calculate its variable rate that are not commonly understood by residential consumers.

The OCA also recommends that the EGS be required to specify the potential rate impact in their disclosure statements. By way of example, variable rate contract disclosures could include an example of how the price of their contract would have changed in the past 12-24 months if the contract had been in place with the methodology included in the supplier’s contract. Obviously, there should not be any promise that historical changes in the index or methodology will guarantee future price changes, but at least the customer will understand the

nature of the variability to which he or she has agreed and see the range of change in price that has occurred in the recent past. Such a disclosure is required, for example, for variable rate mortgages under the Truth in Lending Act.⁹

C. Creation of the “Price with Pass-Through” Clause

In the proposed Policy Statement, the Commission adds the “Price with Pass-Through” clause to address the type of EGS offer that was the impetus for this Tentative Order. The Policy Statement reads as follows:

(d) A definition of “Price With Pass-Through Clause” will be added to the “Electric Competition Dictionary”:

PRICE WITH PASS-THROUGH CLAUSE: AN ALL-INCLUSIVE PRICE SUBJECT TO CHANGE BASED ON VARIOUS FACTORS AS SPECIFICALLY DESCRIBED IN A “PASS-THROUGH CLAUSE” IN THE SUPPLIER’S DISCLOSURE STATEMENT.

(e) An EGS using the label or description “Price With Pass-Through Clause” to describe a product must include the price in the disclosure statement. The price must be coupled with the “pass-through clause” in the same paragraph or section of the disclosure statement. The “pass-through clause” must list the factors that could result in rate changes under the clause. EGSs must, in the “definitions” section of the disclosure statement, define any terms or acronyms used in the “pass-through clause” that are not commonly understood by residential consumers.

(f) If an EGS, at any time, applies the “Pass-Through Clause” and passes along a price change to customers, the EGS shall provide notice of the price change to the affected customers. The notice shall be provided prior to implementing the price change. The notice may be provided electronically as long as the customer has been informed to expect electronic notices. The notice procedure shall be included in the supplier’s disclosure statement.

The OCA supports the Commission’s addition to the Policy Statement as it gives the consumer a clear indication that the price of the product being offered is not truly fixed, but can be adjusted. In this regard, Section (f) the Policy Statement also makes mandatory EGS

⁹ Truth in Lending Act, 15 U.S.C. § 1601 *et seq.* For example, for variable rate credit application and solicitations, creditors must disclose the fact that the rate may vary and state how the rate will be determined, including the index or formula and any margin added.

notice to customers of the EGS's intent to use the pass-through mechanism. As utilization of the pass-through clause will, in reality, effect a price change triggering disclosure rules of Chapter 54, it is proper that customers receive notice of any change. See 52 Pa.Code § 54.5.

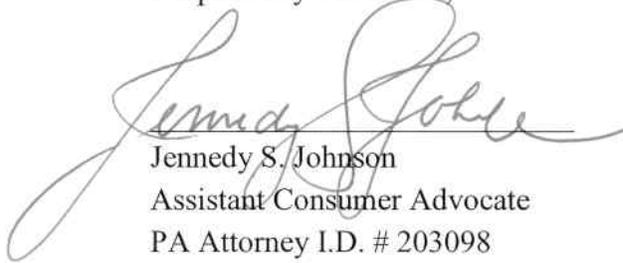
Another layer of consumer protection is found in Section (e), which requires that the EGS provide the price and the pass through clause information in the same paragraph. This, coupled with the requirement that the EGS define any terms or acronyms in the "definitions" section of the disclosure statement, will allow the consumer to better understand all terms and conditions of the offer as well as the breadth of factors that could impact the rate he or she is charged.

Finally, as the Commission notes, pass through costs are difficult for the Commission to monitor and for the consumer to understand. Section (e) ensures that the pass through costs should be clearly identified in the disclosure statements. Theoretically, these costs could include complying with new PUC regulations (marketing regulations, new switching procedures, licensing fees, consumer education assessments, etc.), EDC fees (POR discounts, tariff fees for services provided, etc.), costs of complying with possible new environmental regulations, and the costs of new reserve margins or other wholesale energy costs imposed by the RTO. The OCA submits that to enhance the ability of the Commission and a typical residential customer to monitor potential changes, the disclosure statement should be drafted as narrowly and precisely as possible.

III. CONCLUSION

The OCA appreciates this opportunity to provide Comments on the Tentative Order. The OCA supports the Commission's proposed Policy Statement as it requires a level of specify that will serve to ensure that customers have all the information necessary to make and informed decision on electric shopping and that all are given adequate notice of any proposed increases in the rate they are charged.

Respectfully Submitted,



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Dated: June 24, 2013
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CERTIFICATE OF SERVICE

Use of Fixed Price Labels for Products :
With a Pass-Through Clause : Docket No. M-2013-2362961
:

I hereby certify that I have this day served a true copy of the Office of Consumer Advocate's Comments, upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code §1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 24th day of June 2013.

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