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June 24, 2013

Via Electronic Filing

Rosemary Chiavetta, Secretary
PA Public Utility Commission
PO Box 3265
Harrisburg, PA 17105-3265

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

Dear Secretary Chiavetta:

Enclosed for electronic filing please find the Retail Energy Supply Association's ("RESA")
Comments to the Tentative order dated May 23, 2013 with regard to the above-referenced
matter.

Sincerely,



Deanne M. O'Dell

DMO/lww
Enclosure

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**THE RETAIL ENERGY SUPPLY ASSOCIATION'S
COMMENTS TO TENTATIVE ORDER
DATED MAY 23, 2013**

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I. INTRODUCTION

In this proceeding, the Commission seeks comment on the appropriate labels for various types of product pricing in retail electric supplier marketing and transactional documents. The Commission asserts in its Tentative Order that products marketed and described by electric generation suppliers (“EGSs”) as “fixed price” but which include provisions allowing for price changes – whether as a result of passing through charges or because an introductory period ends – are not true “fixed price” products since the prices are subject to change during the term of the contract. The Commission is concerned that customer confusion and dissatisfaction may result from these characterizations leading to an adverse effect on the competitive retail market.¹ As a result, the Commission proposes to clarify the standard product definitions in its “Electric Competition Dictionary” and seeks comments on the appropriate parameters for marketing a product as “fixed price.”²

The Retail Energy Supply Association (“RESA”)³ recognizes the legitimate concerns raised by the Commission in its Tentative Order on this issue and notes that complicated issues related to pricing and cost components are implicated by this proceeding. Importantly, practically all retail contracts contain some type of “change in law” or “change in regulation” provision. Some suppliers, however, may rely on these provisions to adjust a contract price to

¹ *Use of Fixed Price Labels for Products With a Pass-Through Clause*, Order entered May 23, 2013, Docket No. M-2013-2362961 at 5.

² It is RESA’s understanding that this initiative is limited to competitive market offers and would not impact the retail market enhancement initiatives currently underway such as the Standard Offer Customer Referral Programs.

³ RESA’s members include: AEP Energy, Inc.; Champion Energy Services, LLC; ConEdison Solutions; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; GDF SUEZ Energy Resources NA, Inc.; Hess Corporation; Homefield Energy; IDT Energy, Inc.; Integrys Energy Services, Inc.; Just Energy; Liberty Power; MC Squared Energy Services, LLC; Mint Energy, LLC; NextEra Energy Services; Noble Americas Energy Solutions LLC; NRG, Inc.; PPL EnergyPlus, LLC; Stream Energy; TransCanada Power Marketing Ltd. and TriEagle Energy, L.P. The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of RESA.

account for any and all increased costs of operations driven by adjustments to various cost components while other suppliers exercise change of law provisions in only rare and limited circumstances. In both situations the product is marketed to the customer as a fixed price product but the manner in which the supplier chooses to exercise the change of law clause makes a true apples-to-apples comparison of the different products difficult if not impossible.

Further complicating this issue is identifying what types of “changes” may be appropriately included in a change of law provision in a fixed price product. There are many components that suppliers need to factor into pricing a fixed price product. Some changes that occur may never have been contemplated – such as new taxes – while other components may change but only in rare and unforeseen circumstances which the supplier cannot reasonably predict.

Permitting all suppliers the flexibility to adjust prices (increases or decreases) driven by regulatory and legislative policies that are completely unforeseeable is important and reasonable. Limiting this ability of suppliers in a product labeled as “fixed price,” may lead to EGSs choosing not to offer “fixed price” products to consumers. Such a result would not be in the public interest because it would limit the variety of products in the market and could lessen competitive activity. Therefore, RESA recommends that any changes to the Commission’s current definitions seek to balance the interest of consumers in having price certainty under fixed price products with the ability of suppliers to adjust prices based in certain limited circumstances that are completely unforeseeable and beyond their control.

Unfortunately, the labels as proposed by the Commission would require that any product (fixed or variable) with a “change in law” or “change in regulation” provision would have to be characterized as a “Price with Pass Through.” Because virtually all contracts in the marketplace

contain such provisions, this change would perpetuate customer confusion because it would essentially require all suppliers to re-label all of their products as “Price with Pass Through” products. Even though some suppliers may be offering true fixed priced products with no intention to adjust prices except in very limited and rare circumstances, these suppliers will have to label their products as “Price with Pass Through” if there is any type of force majeure or change in law/regulation provision included.

Rather than proceed in this way, RESA supports defining a fixed product in a way that gives suppliers limited and narrow flexibility to adjust prices to absorb the impact of a defined set of unforeseeable and unknowable costs that might be imposed on them and which impact their ability to offer the same price throughout the contract term. As discussed further below, RESA recommends that the Commission: (1) establish a definition of “fixed price” that enables suppliers to adjust a fixed price product in limited and unforeseen situations; and, (2) establish a stakeholder process to fully explore the various cost components that could trigger a supplier’s desire to adjust a fixed price to determine whether or not adjustments for such components may occur in a fixed price product. For those cost components that the Commission ultimately concludes may not trigger an adjustment of a fixed price, the product may be labeled as a Price With Pass-Through Clause should the supplier wish to reserve the ability to pass through such costs.

While RESA is proposing changes to the Commission’s proposed definition for fixed price products to enable this defined flexibility, RESA recognizes that there may be varying opinions about how various cost components should be addressed. Specific clarity on this issue from the Commission would be useful and RESA recommends continued stakeholder

discussions with the goal of developing an illustrative list of examples to offer suppliers clear guidance.

The Commission also proposes to limit the definition of a variable price to be all inclusive. RESA does not support the addition of the phrase “all-inclusive” in the definition of variable price because it limits the ability of a supplier to include a regulatory change clause in the contract. Variable price products are, by their nature, clearly marketed to consumers in a manner that discloses the fact that the price is variable. Accordingly, the consumer is on notice that the price may change according to the terms of the contract, including as a result of changes in laws or regulations. Thus, EGSs marketing variable priced products, even if they include the ability to adjust a price as a result of a change in law or regulations, should be able to continue to label such products as variable instead of using the new price with pass through label.

Finally, RESA supports the Commission’s recommendations regarding the use of pass-through clauses in disclosure statements and the requirement that EGSs provide notice prior to implementing the price adjustment. By requiring suppliers to list the factors that could result in a price change, to define relevant terms and to provide notice, consumers will be given appropriate information about these products. RESA supports the concept that pass-through clauses be a clear and concise as possible so as not to mislead consumers.

II. COMMENTS

A. RESA Supports Limiting The Ability Of Suppliers To Pass Through Costs Under Fixed Price Agreements To Certain Limited Situations While Maintaining Flexibility To Pass Through Entirely Unforeseeable Costs

The Commission seeks comments on whether to prohibit the use of the term “fixed” when charges may be passed through to customers or to accommodate it in a way that is more

transparent and fairer to customers.⁴ RESA understands the Commission is concerned about marketing a product as fixed price when it contains language that would permit the pass-through of a broad array of charges that the supplier knows may increase the advertised price within the contract term. This results in a “variable” product labeled as a “fixed price” product. To address this concern, the Commission considered the following proposals:

- Ban the Use of Fixed Price Label “Fixed” means “Fixed”
- Revised the Definition of Fixed Price and Establish Variety of Parameters
- Create a Third Label – Long-Term Energy Price
- Create a Third Label – Price With Pass-Through Clause

After consideration of these approaches RESA recommends that the Commission: (1) establish a definition of “fixed price” that enables suppliers to adjust a fixed price product in limited and unforeseen situations; and, (2) establish a stakeholder process to fully explore the various cost components that could trigger a supplier’s desire to adjust a fixed price to determine whether or not adjustments for such components may occur in a fixed price product. For those cost components that the Commission ultimately concludes may not trigger an adjustment of a fixed price, the product may be labeled as a Price With Pass-Through Clause. Importantly, it should be noted that this would not prohibit suppliers from offering products that seek to pass through certain cost items. By creating the new Price with Pass-Through Clause product category, suppliers would maintain their ability to design flexible products that fix some components and pass through others. However, this approach would enhance transparency by requiring full and clear disclosure under the Price with Pass-Through Clause label.

⁴ Tentative Order at 8.

1. The Commission Should Establish A Definition Of “Fixed Price” That Enables Suppliers To Adjust A Fixed Price Product In Limited And Unforeseen Situations

As drafted, the Commission’s proposed definition for a fixed price product does not permit suppliers to adjust a fixed price for any costs imposed on them (whether to increase the customer price or to decrease it). RESA believes this is too restrictive as suppliers may experience entirely unforeseeable increased costs to provide service. If suppliers are required to bear the entire risk of such price changes, then the following would likely result: (1) suppliers would not offer long-term products to customers; (2) suppliers would include higher risk premiums in long-term offers to lessen their risk; or, (3) suppliers would refrain from labeling any product a “fixed price” product, thereby making the offerings appear more risky from the customer’s standpoint, and making them less likely to shop. Any of these results would hamper the retail electricity market and reduce the options available to customers.

To address this concern, RESA recommends that the Commission adopt a definition for fixed price product that enables suppliers to exercise flexibility to adjust prices in limited circumstances. An example of a definition that would permit this flexibility is as follows:

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, except that the price may vary from the disclosed amount solely to reflect new fees, taxes or costs on an EGS that are unforeseeable, beyond the EGS' control and are imposed through actual changes in federal, state or local laws/statutes or regulations.

2. The Commission Should Establish A Stakeholder Process To Fully Explore The Various Cost Components That Could Trigger A Supplier's Desire To Adjust A Fixed Price To Determine Whether Or Not Adjustments For Such Components May Occur In A Fixed Price Product

While RESA's proposed language permits suppliers flexibility to adjust a fixed price in limited circumstances, RESA recognizes that the implementation of the definition will be subject to interpretation. In reality, applying a one size fits all label to all of the product types and customer contracts that exist in the marketplace is difficult. To address this, RESA believes that further guidance from the Commission about how to apply this definition in reality is important because this issue implicates a number of complex types of cost components.

On one end of the spectrum, events may occur at various levels which can impact the cost at which a supplier can provide service and are not foreseeable at the time a contract is executed. If, for example, the Commonwealth increases the Alternative Energy Portfolio Standard requirements to obligate suppliers to purchase a larger percentage of energy from solar resources, this type of change is entirely beyond the control of the supplier. Other examples of cost changes that are completely unforeseeable include changes to state mandated taxes or the creation of new taxes.

On the other end of the spectrum, suppliers also need to take into consideration various cost components which may not change during the contract term or, conversely, may change significantly. Changes to these components can adversely affect the supplier's cost of service. For example, a significant increase in the discount of the Purchase of Receivables program could materially impact a supplier's cost to provide service. Likewise, significant changes to other cost components under the purview of PJM or FERC can have a significant impact on the ability of a supplier to provide service at the price set forth in a fixed price contract. While the fact that

these items may possibly change is not completely unforeseeable, the timing of the changes and the magnitude of changes is unforeseeable.

Because identifying the various specific cost components and then determining how they should be treated is complicated, RESA supports further discussion of this issue before any direction from the Commission is provided about which specific cost components may lead to an adjusted fix price. To achieve this, RESA recommends that a stakeholder process be convened. The purpose would be to develop regulatory requirements that balance the need of customers to have price certainty under fixed price agreement and the need for suppliers to protect themselves against unforeseen and unpredictable cost increases. In the process, the stakeholders would identify the specific cost components and general cost change scenarios that can lead to increased costs. Ideally, the stakeholder process would produce a consensus list of cost components and change scenarios that: (1) could be passed through under a fixed price product utilizing typical change in law or regulation language; and, (2) would only be permissible if the original product was labeled as a "Price with Pass-Through Clause." However, to the extent that stakeholders do not reach consensus, Commission staff leading the process would recommend the specific list of permissible cost components for fixed price products for the Commission's consideration.

RESA submits the following as the list of cost components and cost change scenarios that would be considered as part of this stakeholder process

- New Wholesale Cost Items Approved by FERC or PJM
- Changes to the Pennsylvania Gross Receipts Tax
- New Taxes Applicable to EGSs
- Changes to Sales Tax
- Changes or Adjustments to Existing and Known Wholesale Cost Components (NITS, RTEP, RMR/Generation Deactivation, Ancillary Services, ELR, etc.)
- Changes to Capacity Prices under the PJM RPM Auction

- Changes to Individual Customer Capacity and Transmission Tags (also known as Peak Load Contribution or Peak Load Share Values)
- Changes to Individual Customer Usage Characteristics (for example, deviation from a bandwidth provision)
- Changes to Line Losses or Unaccounted for Energy

3. The Newly Proposed Label Of “Price With Pass Through Clause” Is Appropriate For Some Costs

The Commission is also proposing to create a new label titled “Price With Pass-Through Clause.” Specifically, the Commission proposes the following:

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.

RESA supports the ability of suppliers being able to pass through certain costs that may not be appropriately passed through under a fixed price product label. A product that has some requirements that are fixed and other components that are labeled as pass-through and are subject to change (whether or not there is a change in law that triggers such an event) should not be labeled as a fixed product.

For example, transmission or capacity pass through products are commonly offered to commercial and industrial customers. RESA’s recommendation would not prohibit EGSs from offering such products. EGSs would still be permitted to design and market products that pass through any of these items, however, EGSs could not market these products as “Fixed Price” products. Rather, these products would have to be labeled under the Commission’s newly defined “Price with Pass Through” product with appropriate disclosure in contract terms and conditions and accompanying marketing materials. The classification of certain cost components would be more fully explored in the context of the stakeholder process RESA recommends.

4. Other Issues Regarding Fixed Price Products: Defining The Period Of Time And Labeling Introductory Products

In its Tentative Order, the Commission notes that a price for one or two months could be called “fixed” and concludes that a short-term price is more accurately described as “variable” or “introductory.”⁵ Therefore the Commission proposes to require that a fixed price product be offered for at least three billing cycles. RESA supports this proposal with the caveat that even in that time frame, suppliers should be able to exercise their limited ability to adjust the fixed price consistent with the discussion above.

Regarding the use of “introductory” or short term pricing (i.e. less than three billing cycles if the Commission’s proposal is implemented), RESA recommends that the product be labeled consistent with what occurs at the end of the introductory price period. Thus, if the product will be fixed thereafter consistent with the Commission’s definition then it would be labeled as a “fixed product.” Likewise the product would be labeled as variable or price with pass through if those events occur at the end of the introductory period.

B. The Definitions of Variable Priced Products and Price With Pass-Through Clause

In addition to addressing the definition of a fixed price product, the Commission also seeks comment on its proposed definitions for Variable Price. Specifically, the Commission proposes the following:

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.

The Commission’s proposal to add the phrase “all inclusive” to its definition of variable price, however, is problematic because it does not seem to recognize that even in a variable price

⁵ Tentative Order at 11.

contract suppliers may want the flexibility to adjust the price based on unforeseen circumstances. As discussed in the previous section, a supplier may face unknown and unanticipated increased costs during the term of a contract which could not have been factored into the price when the contract was developed. Therefore, even under a variable price contract, a supplier may want to reserve the ability to adjust the variable price to account for these costs.

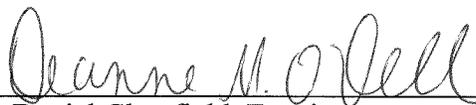
Under the Commission's proposal, however, any product with a "change in law" or "change in regulation" provision (fixed or variable) would have to be characterized as a "Price with Pass Through." Because virtually all contracts in the marketplace contain such provisions, this change would perpetuate customer confusion because it would essentially require all suppliers to re-label all of their products as "Price with Pass Through" products. Importantly, variable price products are clearly marketed to consumers in a manner that discloses the price variability. Therefore, EGSs marketing a variable price product – even if it contains a separate pass through clause – should be able to continue to label such product as variable.

For these reasons, RESA recommends that the Commission remove the use of the term "all inclusive" in its proposed definition of variable price and make clear that a variable price product may also include a pass through clause.

III. CONCLUSION

RESA appreciates the efforts of OCMO and the Commission to construct pricing labels that are operationally feasible and provide the appropriate level of customer protections. After careful consideration of this issue, RESA recommends that the Commission: (1) establish a definition of “fixed price” that enables suppliers to adjust a fixed price product in limited and unforeseen situations; and, (2) establish a stakeholder process to fully explore the various cost components that could trigger a supplier’s desire to adjust a fixed price to determine whether or not adjustments for such components may occur in a fixed price product.

Respectfully submitted,



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