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June 25, 2013

**VIA ELECTRONIC FILING**

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, Filing Room  
Harrisburg, PA 17120

RE: Use of Fixed Price Labels for Products With a Pass-Through Clause, Docket No. M-2013-2362961; **REVISED COMMENTS OF DOMINION RETAIL, INC. TO TENTATIVE ORDER**

Dear Secretary Chiavetta:

Enclosed for filing with the Commission is Revised Comments of Dominion Retail, Inc. to Tentative Order in the above-captioned docket. The original Comments, served yesterday, contained errors which are corrected in this version. We apologize for any confusion.

Thank you for your attention to this matter. If you have any questions relating to this filing, please do not hesitate to contact my office.

Very truly yours,

Todd S. Stewart  
*Counsel for Dominion Retail, Inc.*

TSS/jld  
Enclosure

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

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**REVISED COMMENTS  
OF DOMINION RETAIL, INC.  
TO TENTATIVE ORDER**

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NOW COMES, Dominion Retail, Inc. d/b/a Dominion Energy Solutions (“DES”) and hereby offers its Comments on the Commission’s Tentative Order issued in the above-captioned matter on May 23, 2013. The crux of this matter is a serious concern that some Electric Generation Suppliers (“EGS”) are offering products to residential customers that are labeled as fixed-rate products, that in reality are not fixed rate products. While these offers purport to be at a fixed price, the disclosure statements for these products typically will contain provisions that would allow the EGS to change the over-all price based upon a change in any one of a number of little understood components of that over-all price. These so-called “pass-through” clauses allow EGSs to impose additional costs on customers, often without notice, and often in the shadow of large early termination fees if customers seek to walk away. While pass-through clauses are fairly common in contracts for commercial and industrial customers, where customers are more sophisticated and better able to manage the risk of such pass-through charges, they are not at all common for residential customers. DES always has understood that a product labeled as “fixed price” must be just that, the over-all price the customer is asked to pay cannot change over the agreed-to term. DES does not believe that any middle ground approach is likely to be better

understood by customers – fixed is fixed and everything else is variable. Accordingly, DES believes that insisting that the Commission’s current policy that a fixed-price contract be a fixed-price contract is the appropriate resolution of this issue.

As noted in the Commission’s Tentative Order, the *Electricity Generation Customer Choice and Competition* Act, 66 Pa. C.S. § 2807(d)(2), requires the Commission to establish regulations that require EGSs to “provide adequate and accurate customer information to enable customers to make informed choices regarding the purchase of all electricity services offered by that provider. Information shall be provided to consumers in an understandable format that enables consumers to compare prices and services on a uniform basis.” The Commission’s regulations at 52 Pa. Code § 54.1(a) echo that requirement. The Commission’s regulations also require that suppliers use terminology in their disclosure statements and contracts with customers that are consistent with the definition of those terms that are found in the Commission’s dictionary which is posted in the glossary at [www.PaPowerSwitch.org](http://www.PaPowerSwitch.org).

The Commission’s dictionary defines a fixed-price as “a fixed-electricity rate remains the same for a set period of time” and a variable price as “a variable electricity rate can change, by the hour, day, month, etc. according to the terms and conditions in the supplier’s disclosure statement.” The Commission is concerned that offers that include a label of fixed-price, but include provisions that would permit price changes 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.” (Tentative Order at p. 5). DES shares to Commission’s concern.

DES does not believe that residential customers are at all familiar with the concept of a pass-through clause, nor does DES believe that the alphabet soup of variables that can trigger

these pass-through clauses are generally known by, or readily discoverable by, the vast majority of residential customers. Nor are those customers in a position to determine whether the prices reflected in the pass through clauses are cost based and/or fair, which raises one more detrimental aspect of these clauses – most of the clauses we have seen are one-way ratchets. That is, the rates only increase, so even if the underlying costs were to recede during the life of the contract, the customer gets no prospective relieve. This is not to suggest that customers are incapable of understanding these clauses—these complex provisions are rare in the experience of most people, and unnecessarily complicate the process—possibly because those who employ them expect that customers simply will have no idea. Customers should not need to possess an in-depth knowledge of electricity markets and price components to shop for electricity, and but for these types of schemes, that would continue to be true.

For these reasons alone, pass-through clauses would be problematic even if they were prominently displayed, and properly noticed, which they normally are not. The mere inclusion of an element of variability in a contract that for all other purposes (as understood by the customer) is promoted as a fixed price deal, is deceptive and plainly violates the statutory requirement that prices be provided in an “understandable format that enables consumers to compare prices and services on a uniform basis.” 66 Pa. C.S. § 2807(d)(2).

In short, DES believes that a contract labeled as being “fixed-price” must be provided at a fixed price. DES believes, moreover, that the fixed-price must remain fixed at least for the initial term of the contract, whatever that might be. If an EGS is concerned that a change in regulation or law or other such charges could impact its ability to perform under a contract, it is free to include what is commonly known as a “regulatory-out clause” that would allow it to cancel its contracts in such circumstances (with appropriate notice) or reformulate the contract by

proposing new contract terms to the customer, so long as the customer consents to the new terms and conditions.

DES is concerned that the typical residential customer is not equipped to understand the concept of a pass-through clause, nor are they able to assess the risks of any particular element in a pass-through clause changing. These include such things as a change in regulation, or a change in capacity charges, transmission tags, ancillary costs, or any of the myriad of components that are typically “rolled-into” a residential price. Moreover, when the potential for variability is combined with large early termination fees, particularly in longer-term contracts, customers can become trapped in an ever increasing rate, that gets worse, and gives them no practical means of escape. It is also problematic that customers tend to believe that they can “set it and forget it” when they enter these longer term deals. These are all concerns shared by DES.

DES does not believe that a new definition, somewhere between “fixed” and “variable”, one that would allow a label of a “X year/month price with a pass-through clause” would adequately inform customers of the nature of the contract being offered. Without extensive explanation, customers would have no idea of the nature of the charges that might be passed through, or the risk of those charges being passed through and the impact that might have on their over-all rate. DES does not support a definition that allows variable rate contracts to be offered under a label that suggests anything other than that it is a variable rate contract. DES believes that the Commission must enforce the “fixed means fixed” requirement and require that contracts with rates that can vary due to future events be called variable rate contracts. EGSs must also explain the conditions of variability as currently required by the Commission’s regulations.

To do otherwise would violate the requirement that customers be provided clear and comparable pricing information. The definitions that everyone must use must be discrete (not overly broad), consistent and understandable. To do otherwise will cause customer confusion, bad public reaction, and will put complying EGSs into a competitively disadvantaged position.

Today's approach by some EGSs will potentially burden customers with variable and uncapped liabilities, whether the customer stays in the contract, with the possibility of substantial price increases, or attempts to leave, only to face a large early termination fee. For these reasons, DES believes that the combination of early termination fees and variable price contracts are contrary to best practices and would suggest that the Commission prohibit these, as well.

As stated above, DES believes that the typical regulatory-out clause, which allows the supplier to terminate a contract and/or propose new terms to the customer should be permitted, but a clause that would allow the pass-through of a multitude of charges without notice to customers and an opportunity for customers to switch away without penalty, should not be permitted.

In conclusion, DES does not believe that the middle ground position of revising the definitions to establish a new product category (an impliedly fixed price with a pass through, whatever that is) definition is workable. Customers simply are not able to meaningfully to manage the risk that comes with the variability of those parameters, nor will they be able to anticipate, understand or react-to price changes when they may occur and particularly over the longer (3 to 7 years) terms of these offers. Moreover, these particular terms that affect the price are often buried in fine print.<sup>1</sup> However, DES still believes that even with better notice and education requirements, customers will be confused and simply may accept these prices

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<sup>1</sup> If the Commission were to go this route, which we do not support, it would have to require, at a minimum, that any term or variability be included in typeface larger than the price, or at least the same size as the price that proposed and be found in the every part of the document where price is discussed, every time price is discussed.

believing that it is a better deal; when over the long term it may not be. We look forward to assisting the Commission as it deliberates this critical issue and thank the Commission for its efforts.

Respectfully submitted,



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