**CHARGE**

DISCUSSION DOCUMENT

AGENDA ITEM # 63

**FIXED PRICES WITH VARIABLE COMPONENTS**

**IN RESIDENTIAL CONTRACTS**

The Office of Competitive Market Oversight (OCMO) has become aware, through the filing of informal complaints, and inquiries from suppliers and EDCs, of a pricing practice that has raised some concerns. OCMO is presenting this issue to CHARGE to gather information, encourage discussion, and solicit opinions as to this practice.

**THE ISSUE:**

There are suppliers offering fixed-rate products to residential customers, but include in their disclosure statements provisions that allow the supplier to change the rate based on an RTO, government agency, etc. action that imposes costs on the supplier.

Here are two examples of this type of provision:

EXAMPLE ONE: *In addition to the charges described above, if any regional transmission organization or similar entity, EDC, governmental entity or agency, NERC and other industry reliability organization, or court requires a change to the terms of the Agreement, or imposes upon [SUPPLIER] new or additional charges or requirements, or a change in the method or procedure for determining charges or requirements, relating to your electric supply under this Agreement (any of the foregoing, a “Pass-Through Event”), which are not otherwise reimbursed to [SUPPLIER], Customer agrees that [SUPPLIER] may pass through any additional cost of such Pass-Through Event, which may be variable, to Customer. Changes may include, without limitation, transmission or capacity requirements, new or modified charges or shopping credits, and other changes to retail electric customer access programs. If the Agreement is terminated, you can return to your EDC or select another EGS.*

EXAMPLE TWO:  *Governmental, EDC, Regional Transmission Organization (RTO) Actions: If action is taken by federal or state governmental authorities, EDC’s or RTO’s which significantly changes the way [SUPPLIER] does business with Customer, [SUPPLIER] may change its price to Customer, or terminate this Agreement upon thirty (30) days written notice, after which Customer can obtain electricity directly from your EDC.*

These provisions, based on what we have seen, are not always presented along with the pricing information. In some cases, the exception language is far-down the disclosure – or on the second page - well past the pricing paragraphs that usually appear early in the disclosure.

In some cases, the customer may not be able to exit the contract without paying a substantial early cancellation penalty (although in some cases, as seen in the example above, the supplier can cancel the contract). Some of the contracts we have seen with this type of language have been multi-year contracts.

These types of charges and contact provisions are not unusual with large commercial/industrial users – but this practice appears to be filtering down to the residential/small commercial level.

To date, we are not aware of the Commission formally ruling one way or the other on the appropriateness and legality of this type of disclosure provision.   

**DEFINITIONS (from glossary on PaPowerSwitch.com):**

**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”.

**CONCERNS:**

* **Presenting this as a “Fixed Rate” product.**

Is it appropriate to call this a “fixed rate” product when the rate could vary? Does not “fixed” mean “fixed?” Should the rate instead be presented as a “variable rate” – with the conditions of variability being the conditions currently outlined in the “exceptions” paragraph such as those in the above examples? Are there additional concerns if the supplier’s advertising refers only to a “fixed rate” with no mention of possible exceptions?

* **Consumers lack of understanding.**

Residential/small commercial customers, even if they read the entire disclosure, may not be sophisticated enough to understand what is meant by terms such as “RTO,” “NERC,” etc., and just what kind of pricing changes could result. Their exposure appears to be unlimited, in that none of the provisions we have seen mention a cap, ceiling, etc. Consumer education efforts, to date, have not gotten into this level of detail – nor is it likely to ever do so for practical reasons. Consumer education efforts have included the distinctions and pricing of generation/transmission/distribution – and the use of a bundled “price to compare” when shopping. This issue presents a new element which does not neatly fit into traditional consumer education contexts.

* **Inability to monitor.**

The residential/small commercial consumer has no reasonable method of determining what these charges are, if and how they were accrued, how they were allocated, etc. It is also questionable to what extent a regulator could even make these determinations. Does a supplier’s claim that they were assessed these costs and are simply passing them along strictly as a “pass-through” have to be accepted? What if one of the component costs linked to these charges decreases instead of increasing? What occurs if a customer files a complaint about the charges?

Additionally, the language in these exception paragraphs is often very broad – theoretically permitting a supplier to assess additional charges anytime, in the supplier’s opinion, it incurs additional costs. This could possibly include the cost of 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, etc. The paragraphs we have seen do not mention ceilings or caps on additional charges – so theoretically – the customer’s exposure is unlimited.

Finally, there is concern and confusion as to if these charges are intended to recover *unanticipated* costs (for if the costs can be anticipated – should those costs not be incorporated into the rate to begin with)? If these charges are for unanticipated costs – then the argument begins over what can be called *anticipated* v. *unanticipated* costs. For example, is a “generation deactivation” assessment from PJM truly “unanticipated?” Information on these matters is available from PJM and it is generally understood that this type of assessment is coming as generation is deactivated.

**ARGUMENTS IN SUPPORT OF THESE CHARGES:**

In informal discussions, the arguments we have heard in defense of this type of contract provision:

* Suppliers will not offer long-term fixed prices if they cannot adjust for things beyond their control.
* Suppliers will have to incorporate a higher “risk premium” in the rate; thus inflating rates in general.
* This is standard language that they use in all contracts in other jurisdictions and is not unusual.

**POSSIBLE OPTIONS:**

* Status quo.
* Can identify it as a fixed rate; but the exception language has to accompany the pricing language – in the same paragraph/section of the disclosure.
* Can identify it as a fixed rate; but only if some sort of ceiling or cap is provided.
* Can identify it as a fixed rate; but notice requirements apply and customer can cancel without penalty.
* Such offers have to be presented as a VARIABLE RATE – with the conditions of variability described.
* Creation of a third billing option: FIXED WITH VARIABLE SURCHARGE or FIXED WITH POSSIBLE VARIABLE SURCHARGE.
* A combination of some of the above options.
* Other ideas?

See the following two attachments:

* 52 Pa. Code § 54.5. Disclosure statement for residential and small business customers.
* Renewal notice guidelines

**ATTACHMENT ONE:**

**Customer Information / Disclosure regulations:**

**52 Pa. Code § 54.5:**

**§ 54.5. Disclosure statement for residential and small business customers.**

 (a)  The agreed upon prices in the disclosure statement must reflect the marketed prices and the billed prices.

 (b)  The EGS shall provide the customer written disclosure of the terms of service at no charge whenever:

   (1)  The customer requests that an EGS initiate service.

   (2)  The EGS proposes to change the terms of service.

   (3)  Service commences from a default service provider.

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

   (1)  Generation charges shall be disclosed according to the actual prices.

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

     (i)   Conditions of variability (state on what basis prices will vary).

     (ii)   Limits on price variability.

   (3)  An itemization of basic and nonbasic charges distinctly separate and clearly labeled.

   (4)  The length of the agreement, which includes:

     (i)   The starting date.

     (ii)   The expiration date, if applicable.

   (5)  An explanation of sign-up bonuses, add-ons, limited time offers, other sales promotions and exclusions, if applicable.

   (6)  An explanation of prices, terms and conditions for special services, including advanced metering deployment, if applicable.

   (7)  The cancellation provisions, if applicable.

   (8)  The renewal provisions, if applicable.

   (9)  The name and telephone number of the default service provider.

   (10)  An explanation of penalties, fees or exceptions, printed in type size larger than the type size appearing in the terms of service.

   (11)  Customer contact information that includes the name of the EDC and EGS, and the EGS’s address, telephone number, Commission license number and Internet address, if available. The EGS’s information shall appear first and be prominent.

   (12)  A statement that directs a customer to the Commission if the customer is not satisfied after discussing the terms of service with the EGS.

   (13)  The name and telephone number for universal service program information.

 (d)  Customers shall be provided a 3-day right of rescission period following receipt of the disclosure statement.

   (1)  The 3-day right of rescission is 3 business days.

   (2)  The 3-day right of rescission begins when the customer receives the written disclosure.

   (3)  The customer may cancel in writing, orally or electronically, if available.

   (4)  Waivers of the 3-day right of rescission are not permitted.

 (e)  Definitions for generation charges and transmission charges, if applicable, are required and shall be defined in accordance with the ‘‘Common Electric Competition Terms.’’ Definitions for each of the nonbasic services, if applicable, are required. The definition section of the bill must be distinctly separate.

 (f)  The EGS shall include in the customer’s disclosure statement the following statements which may appear together in a paragraph:

   (1)  ‘‘Generation prices and charges are set by the electric generation supplier you have chosen.’’

   (2)  ‘‘The Public Utility Commission regulates distribution prices and services.’’

   (3)  ‘‘The Federal Energy Regulatory Commission regulates transmission prices and services.’’

 (g)  Disclosure statements must include the following customer notification:

   (1)  ‘‘If you have a fixed term agreement with us and it is approaching the expiration date or whenever we propose to change our terms of service in any type of agreement, you will receive written notification from us in each of our last three bills for supply charges or in corresponding separate mailings that precede either the expiration date or the effective date of the proposed changes. We will explain your options to you in these three advance notifications.’’

 (h)  If the default service provider changes, the new default service provider shall notify customers of that change, and provide customers with its name, address, telephone number and Internet address, if available.

NOTE: Subsection (g)(1) of this regulation has been superseded by guidelines. See *Order and Appendix A on Interim Guidelines Regarding Advance Notification by an Electric Generation Supplier of Impending Changes Affecting Customer Service; Amendment re: Supplier Contract Renewal/Change Notices*. Docket No. M-2010-2195286. Dated September 23, 2010.

These guidelines are attached as ATTACHMENT TWO.

**ATTACHMENT TWO**

**Interim Guidelines Regarding Advance Notification by an Electric Generation Supplier of Impending Contractual Changes Affecting Customer Service**

I. The purpose of these interim guidelines is to set forth advance customer

notification schedules for the following:

(a) Approaching expiration of a fixed term agreement, or;

(c) Proposed changes in terms of service, including, but not limited to, an

increase in generation charges or contract termination for reasons other than

failure to pay for services rendered and/or EGS service abandonment.

II. An electricity generation supplier, shall provide advance notification to its residential and small business customers of an approaching expiration of a fixed term agreement or any proposed changes in terms of service in accordance with the following guidelines:

(a) An Initial Notice shall be provided to each affected customer fifty-two to ninety days prior to the expiration date of the fixed term agreement or the effective date of the proposed change in terms. The Initial Notice shall include the following:

(i) A general description of the proposed change in terms of service;

(ii) The date when such change is to be effective or when the fixed term agreement is to expire;

(iii) An explanation of why such a change is necessary;

(iv) A statement indicating when a follow-up Options Notice will be issued with details regarding the proposed change, and;

(v) A statement explaining that the Options Notice will discuss the customer’s options with respect to such proposed change in terms of service or expiring fixed term agreement.

(b) The Options Notice shall be provided to each affected customer at least forty-five days prior to the expiration date of the fixed term agreement or the effective date of the proposed change in terms. This notice shall include the following:

(i) A statement advising the consumer of the specific changes being proposed by the EGS and informing the customer of its options, including the customer’s ability to select another EGS within a certain time period, accept the proposed changes, or return to the EDC for provider of last resort service;

(ii) Information regarding any new pricing or renewal pricing;

(iii) The EDC’s or provider of last resort supplier’s price to compare. If the price to compare is subject to change quarterly or otherwise as set forth in the EDC’s default service plan, the notice should inform the customer of the frequency of the change and that the current price to compare can be obtained by contacting the EDC or accessing [www.pa.powerswitch.com](http://www.pa.powerswitch.com) OR THE OFFICE OF CONSUMER ADVOCATE’S “ELECTRIC SHOPPING GUIDE AT [WWW.OCA.STATE.PA.US](http://WWW.OCA.STATE.PA.US). If the EDC’s price to compare for the proposed contract term is not yet established, an estimated price to compare should be provided and should be clearly labeled as an “estimated” price to compare. The notice should also include an approximate date that the actual price to compare will be established, and a statement that the customer can contact the EDC or access [www.papowerswitch.com](http://www.papowerswitch.com) OR USE THE OFFICE OF CONSUMER ADVOCATE’S “ELECTRIC SHOPPING GUIDE” AT [WWW.OCA.STATE.PA.US](http://WWW.OCA.STATE.PA.US) to obtain this information when it is available. The EDC shall be the source of the estimated AND ACTUAL price to compare AND SHALL BE RESPONSIBLE FOR CALCULATING THE ESTIMATED AND ACTUAL PRICE TO COMPARE. THE EDC SHALL CALCULATE AND POST ON ITS WEBSITE THE ESTIMATED PRICE TO COMPARE NO MORE OFTEN THAN QUARTERLY AND NO EARLIER THAN THREE MONTHS BEFORE THE EFFECTIVE DATE OF THE ACTUAL PRICE TO COMPARE. THE EDC SHOULD EXERCISE GOOD FAITH AND USE A REASONABLE METHOD TO CALCULATE THE ESTIMATED PRICE TO COMPARE, AND AS LONG AS THIS IS THE CASE, THE EDC SHOULD NOT BE HELD LIABLE FOR THE ERROR IF THE ACTUAL PRICE TO COMPARE VARIES FROM THE ESTIMATED PRICE TO COMPARE;

(iv) Any rules that might apply to a customer’s return to provider of last resort service, including, for example, but not limited to, a mandatory twelve- month stay rule;

(v) Instructions on exercising its options, including selecting an alternative supplier;

(vi) A date certain for any action required by customers to exercise their available options, including what will occur if customers fails to respond to the notice as set forth in paragraph (d), and;

(vii) Appropriate telephone numbers and internet addresses for the Office of Consumer Advocate ([WWW.OCA.STATE.PA.US](http://WWW.OCA.STATE.PA.US)) and Commission’s websites regarding ~~ElectriChoice~~ choice (http://www.papowerswitch.com).

(c) In the instance where the proposed change in terms of service is beneficial to the consumer, such as in the case of a decrease in generation charges or the removal of a contract penalty provision, the EGS may, at its option, provide the customer with one advance notification forty-five to ninety days prior to the effective date of the proposed change.

(d) In the event that the customer does not respond to the renewal notice, a fixed term agreement may be converted to a month-to-month agreement, either at the same terms and conditions or at revised terms and conditions, as long as the agreement converts from a fixed term to a month-to-month agreement and contains no cancellation penalties. Alternatively, a fixed term agreement may be converted to another fixed term agreement as long as the new agreement includes a customer-initiated cancellation provision that allows the customer to cancel at any time for any reason and contains no cancellation penalties, in the event that the customer does not respond to the notice. THE RENEWAL NOTICE AND ANY SUBSEQUENT NOTICES TO THE CUSTOMER CONCERNING THE CUSTOMER’S CONTRACT OR CONTRACT TERMS, SHALL INCLUDE A STATEMENT WHICH INFORMS THE CUSTOMER THAT THE NEW MONTH-TO-MONTH OR FIXED TERM AGREEMENT MAY BE CANCELLED AT ANY TIME (SUBJECT TO THE APPLICABLE SWITCHING RULES AND PROCEDURES AS SET FORTH IN THE EDC’S TARIFF) BY THE CUSTOMER FOR ANY REASON WITHOUT PENALTY.  THIS STATEMENT MUST BE PROMINENTLY DISPLAYED ON THE NOTICE.  IF THE EGS CONTACTS THE CUSTOMER OR THE CUSTOMER CONTACTS THE EGS BY TELEPHONE CONCERNING THE CUSTOMER’S CONTRACT, THE EGS MUST, DURING THE CALL, INFORM THE CUSTOMER THAT THEY MAY CANCEL AT ANY TIME WITHOUT PENALTY (SUBJECT TO THE APPLICABLE SWITCHING RULES AND PROCEDURES AS SET FORTH IN THE EDC’S TARIFF).  THESE REQUIREMENTS SHALL REMAIN IN PLACE UNTIL THE CUSTOMER AFFIRMATIVELY ENTERS INTO A NEW AGREEMENT WITH THE EGS, OR ANOTHER EGS, OR RETURNS TO DEFAULT SERVICE WITH THE EDC.