BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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Use of Fixed Price Labels for Products	:	**Docket No.**	**M-2013-2362961**
With a Pass-Through Clause	:		
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<u>COMMENTS OF CONSTELLATION NEWENERGY TO THE COMMISSION'S MAY 23, 2013 TENTATIVE ORDER</u>

I. Introduction

Constellation NewEnergy, Inc. ("Constellation"), an indirectly, wholly-owned subsidiary of Exelon Corporation ("Exelon"), is licensed electric generation supplier ("EGS") in Pennsylvania offering products and services to all customer classes in all of the large electric distribution service territories. Constellation is also a retail electricity supplier in 16 other states and the District of Columbia, and offers natural gas, renewable energy products, and services to homes and businesses across the United States and Canada.

Constellation appreciates the opportunity to respond to the proposals of the Pennsylvania Public Utility Commission's ("Commission") Office of Competitive Market Oversight ("OCMO") for the appropriate use of the "fixed price" label when presenting products with pass-through clauses to potential customers. Constellation shares OCMO's goals of ensuring customer satisfaction with electric choice and agrees wholeheartedly that those who are confused and dissatisfied with their EGS will be dissatisfied with the marketplace in general. No stakeholder in the electric industry is served by customer dissatisfaction as it has a direct and meaningful adverse effect on the competitive retail market. Accordingly, satisfying its customers is of paramount importance to Constellation and that conviction is reflected in our recommendations herein.

II. Executive Summary

At the outset, Constellation notes OCMO's acknowledgement that the structure of contracts for commercial and industrial customers is necessarily different than those for small businesses and residential customers. As OCMO noted, EGSs have for many years entered into fixed price contracts containing pass-through provisions with commercial and industrial customers which are not comparable to residential and small commercial contracts. Constellation agrees with OCMO that large industrial customers are more experienced than residential and small commercial customers when shopping for electric generation service and since nearly 95% of industrial customers have been shopping for years, it is not necessary to address the structure of contracts for that customer class. Accordingly, Constellation seeks clarification from the Commission that its recommendations in the Tentative Order are applicable only to the contracts for residential and small commercial consumers (25kW and less).[1]

With those contracts in mind, it is necessary to clearly distinguish between (1) "fixed price" contracts with pass-through provisions as part of the initial pricing structure and (2) "fixed price" contracts where all EGS charges are included in the fixed pricing structure, but, where change in law or other provisions are included to address unforeseen circumstances not contemplated when negotiating the fixed price ("Risk Management Clauses") that may allow the EGS to potentially pass through additional charges under a defined set of conditions.

[1] Based upon this understanding, Constellation's comments included herein are applicable to the definitions as applied to residential and Small Commercial Customers only.

Constellation agrees with OCMO that the first contract example (where some charges are "fixed" but other charges are being "passed through" as negotiated from the outset) does not fit under the current definition of "fixed price" as defined in the Commission's "Electric Competition Dictionary" as available on PAPowerSwitch.com. Constellation agrees that these types of hybrid pricing structures also do not fit under the definition of "variable price" either and deserve an entirely new label, as suggested by OCMO.

However, in the second instance in which the pricing structure of the contract is an "all-in fixed price" for the term of the contract, but, contains a Risk Management Clause for protection against unforeseen circumstances, use of the "fixed price" label is entirely appropriate. Risk Management Clauses are common in all types of contracts and exist in a variety of forms. They can allow a party to pass on additional costs (e.g., "change" provisions), modify the terms of the contract (e.g., "hardship" clauses) or release them from their contract obligations altogether (e.g., "force majeure" and "material adverse event" provisions) none of which were contemplated or known at the time the contract was negotiated. Risk Management Clauses don't alter the agreed upon terms and conditions of the negotiated contract, *unless*, the unforeseen circumstance they were designed to protect against actually happens. When drafted properly, these provisions clearly put both parties on notice of their rights and obligations if the Risk Management Clause is triggered.

Including a Risk Management Clause in a fixed price contract is not misleading if it is clearly defined and prominently displayed near the explanation of the fixed price term. In fact, requiring an EGS to call the contract something other than "fixed price" simply because a Risk Management Clause is included would be misleading. It would improperly imply to customers that the pass through of costs through the Risk Management Clause will more likely occur than not. In fact, Constellation has never passed through charges associated with any Risk Management Clause to residential customers in Pennsylvania under any of its fixed price contracts. Additionally, prohibiting the use of the "fixed price" label for these truly fixed price products will confuse customers who will compare them to contracts that include both fixed and variable pricing components. For these reasons, an EGS should be allowed to describe a truly fixed price product as just that, even if the contract includes a Risk Management Clause allowing for pass through of charges under certain and limited circumstances and upon proper notice to the customer.

In order to ensure that customers do not have a negative experience with competitive electric choice, Constellation agrees with OCMO that customers should be able to exit a contract, without paying an early cancellation penalty, *in lieu* of paying any pass through costs imposed as a result of Risk Management Clauses. As the Commission acknowledged, it would be extremely difficult for many EGSs to enter into long-term fixed price contracts, which are desired by many customers, without protection from unforeseen changes that make the original contract price a true hardship to uphold. Those that do continue to offer long-term fixed price contracts will likely include higher risk premiums in their offers to guard against unknown changes, and consumers may not fully realize the economic benefits of the competitive market. Allowing EGSs to include Risk Management Clauses, while at the same time allowing customers to reject them and exit the contract penalty free, protects all parties involved. Labeling it a fixed price product under those circumstances is truthful and fits within the current definition.

In summary, contracts including any type of pass-through clauses as part of the initial pricing structure in combination with some fixed price components are not in fact truly "fixed price" contracts. Labeling them as such will result in consumer frustration and confusion. Fixed should mean Fixed, absent extraordinary occurrences. Products that have built-in pass-throughs while fixing energy costs require an additional label in the Electric Competition Dictionary.

However, events that trigger Risk Management Clauses are in fact extraordinary and are thus not of the same character as contract terms that pass through costs as a normal course of business. The cost certainty longer term Fixed Price products provide represent a fundamental value proposition to consumers, especially in markets with frequently-changing Prices to Compare. Customer confusion and frustration with commonly used Risk Management Clauses can easily be avoided through: 1) prominent and clear disclosure of potential pass-through costs in the Disclosure Statement; 2) advance notice to consumers of the amount of the charge; and 3) waiver of any cancellation fee.

III. Comments on 'Possible Solutions'

As noted above, there does not need to be a change to the "fixed price" definition for truly fixed price products with Risk Management Clauses. However, a third pricing category should be created for 'hybrid' contracts that include both fixed and pass-through charges from the outset. Constellation agrees with OCMO that under all circumstances, the disclosure statement must be transparent and fair to consumers. With that in mind, Constellation responds to the specific recommendations set forth in the Tentative Order.

A. *Ban the Use of Fixed Price Label – "Fixed" Means "Fixed"*

Constellation does not recommend banning the use of a "fixed price" label for offers containing Risk Management Clauses for all the reasons identified above. We disagree specifically with OCMO's statement that doing so would "resolve all of the concerns that have been raised about their possible misleading nature and the potential for consumer dissatisfaction and confusion down the road." As stated above, not being able to call these truly fixed price contracts “fixed price” would be misleading to customers who would necessarily believe the pass through of charges through the Risk Management clause was inevitable, when in most circumstances, they will never be realized at all. Additionally, banning the use of “fixed price” would undeniably limit the amount and length of fixed price product offerings to customers, and raise the offers for those that remain, which would increase rather than decrease consumer dissatisfaction.

B. *Revise Definition of Fixed Price and Establish Variety of Parameters*

Constellation does not agree that that the current fixed price definition needs to be revised to accommodate Risk Management Clauses. Constellation does agree, however, with OCMO’s recommendation that a fixed price label may only be used to describe contracts with Risk Management Clauses if the following conditions are met: 1) use of enforceable language specifically tied to changes in regulatory requirements; 2) prominent disclosure of potential pass-through costs in the Disclosure Statement; 3) advance notice to consumers of the amount of the charge; and 4) waiver of any cancellation fee.

Constellation feels confident that these parameters can be met in a way that is not confusing to customers. As acknowledged by OCMO, most EGSs have been using these clauses in residential contracts all along. While there has been some confusion to customers based on the way certain disclosure statements are drafted and based on certain EGS practices, there have been significantly more customers than not who have had no confusion, issues, or complaints with this structure. Ensuring that all EGSs adhere to the above conditions will alleviate what confusion currently may exist.

C. Create a Third Label – Long-Term Energy Price

The creation of a third label such as "Long-Term Energy Price" where a product could be defined as one that locks in some charges but passes through others is not applicable to "fixed price" contracts with Risk Management Clauses. Rather, this label could and should be used only for 'hybrid' contracts where a combination of fixed and pass through charges are used as part of the initial and negotiated pricing structure.

D. Create a Third Label –Price With Pass-Through Clause

It is not misleading to label a truly fixed price contract "fixed price" simply because it contains a Risk Management Clause, so long as the criteria outlined in Section III.B. above are followed. On the contrary, including the words "pass through" in the label of the product will unquestionably lead consumers to believe pass through charges are part of the initial price, not that they may under a limited and defined set of circumstances be realized. It will turn many consumers off of a product that is truly desired because it provides budget certainty, particularly when they are free to exit the contract without penalty if the pass-through charges are triggered.

IV. Conclusion

For all reasons set forth above, Constellation respectfully recommends the Commission not modify the definition of Fixed Price for truly fixed price products that contain Risk Management Clauses. The Commission should adopt OCMO's required conditions for use of the Fixed Price label for contracts with Risk Management Clauses, specifically: 1) use of enforceable language specifically tied to changes in regulatory requirements; 2) prominent disclosure of potential pass-through costs in the Disclosure Statement; 3) advance notice to consumers of the amount of the charge; and 4) waiver of any cancellation fee. Additionally, Constellation also suggests the Commission create a third pricing label for contracts that include both fixed and pass through charges as part of the initial pricing structure, as those contracts do not fit within the current definitions for "fixed" or "variable" pricing.

Respectfully submitted,

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On Behalf of
Constellation NewEnergy

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