

Energy Choice Matters

March 4, 2008

CUB Says Unreasonable Termination Fees Violate Illinois Law

CONTINUING COVERAGE

The Citizens Utility Board, along with AARP and Citizen Action Illinois, took aim at energy retailers' termination fees in a formal complaint filed with the ICC over U. S. Energy Savings' sales practices (Matters, 3/3/2008).

What we think will be most interesting to alternative gas and electricity suppliers in Illinois is CUB's assertion that Energy Savings' contractual language regarding termination fees constitutes, "an illegal penalty for cancellation of service under Illinois law."

According to CUB, Illinois courts have ruled that when it's doubtful whether a contract provision should be deemed as one for a penalty or for liquidated damages, the courts are inclined to regard it as a penalty.

"Termination fees in the thousands are not a reasonable estimate of the damages that would actually result from a breach of the contract," CUB claimed, "and therefore constitute an impermissible means to punish nonperformance."

Among the allegations in the complaint are that Energy Savings agents slammed customers after informing customers agents were only gathering information and not switching customers' provider; sales agents claimed to represent LDCs or the ICC; agents told customers they were signing a petition to lower heating bills; and agents promised savings while customers saw higher bills.

Illinois AG Lisa Madigan is suing Energy Savings over similar allegations (Matters, 2/13/08). CUB had previously settled similar claims against the retailer after a 2006 formal complaint.

Mulcahy Out at Energy Savings Income Fund

Brennan Mulcahy resigned as CEO of Energy Savings Income Fund amid missed sales targets as former CEO and current executive chair Rebecca MacDonald and current president Ken Hartwick assume co-CEO roles for the retailer. Mulcahy, CEO since 2005, will continue as a consultant during an interim period, Energy Savings said.

"For two consecutive years, the Fund has fallen short of its customer aggregation targets," MacDonald noted. "Steps have been taken to address this challenge and we will continue to improve our customer interaction, ensuring that sales practices are consistent with the highest standards," she added.

In an interview with Canada's Globe & Mail, MacDonald said Energy Savings wants to move into different energy products and pursue a different path for growth. MacDonald doesn't necessarily want to be married to door-to-door sales and wants more offerings.

The retailer also wants to impose more control on regional managers who are independent sales agents that operate with certain autonomy.

Part of the strategy includes vertical integration with generation in the next five years.

Previously announced Energy Savings sales and profits for the quarter ending Dec. 31 were up from a year ago, however. Sales rose to C\$449 million from C\$422 a year earlier, while profit nearly doubled to C\$28 million. But customers growth for the quarter was only 3%.

Constellation Files Expected Suit Against Md.

CONTINUING COVERAGE

In an anticipated move, Constellation's Baltimore Gas and Electric Company and Calvert Cliffs Nuclear Power Plant filed suit in the U. S. District Court in Baltimore to recover \$386 million in nuclear decommissioning credits appropriated to ratepayers in 2006's SB1 (Matters, 3/3/2008). The suit also seeks to affirm the 1999 BGE restructuring settlement which, Constellation points out, was approved by the PSC and twice upheld by state courts.

"The sanctity of an agreement is a basic tenet of business and cannot be selectively and unilaterally changed many years later, particularly after the other party has fully performed its obligations under the agreement," said Constellation CEO Mayo Shattuck.

"This means a contract is a contract, and the state must abide by the rule of law," Shattuck added.

Mich. Customer Choice Coalition Faults House Bills

Michigan's Customer Choice Coalition (CCC) yesterday attacked pending legislation in the House Energy and Technology Committee that would, "tell renewable and conventional energy entrepreneurs that Michigan is closed for business."

"Competition, choice and free markets are better solutions to Michigan's energy policies than monopolies, increased regulation and restrictions on entrepreneurs," argued Sen. Wayne Kuipers, R-Holland, sponsor of SB 427, which would call for all energy providers to compete to meet future electricity needs.

The House legislation would hand complete control of Michigan's electric needs to DTE and Consumers Energy while tying the hands of the Michigan PSC, the CCC observed.

The House bills would exclude competitors from building new generation, re-monopolize the electric system and restrict the ability of the PSC to control rates by allowing file-and-use rates that could automatically go into effect, the CCC said.

The CCC noted that since restructuring, Michigan power prices have increased slower than those in the rest of the Midwest.

But in Wisconsin, which has a similar regulatory scheme as proposed by the utilities and now backed by the governor, has seen the highest electric rates in the Midwest, hurting manufacturing jobs, the CCC claimed.

The CCC pointed to two major IPP developments in Midland and Rogers City as proof that choice does not have to be revoked in order for new generation to be built.

Grocery wholesaler and retailer Spartan Stores told lawmakers that electric choice has saved it more than half a million dollars annually, while the Middle Cities School Association reported that schools have saved \$22 million through competition.

HB 5524 would essentially close the Michigan market by making customers choose whether to shop for power or remain on (or return to) utility service within 90 days of the act's effective date. Customers choosing utility service would not be eligible to switch to competitive retailers.

HB 5523 would allow utilities to implement rate hikes without PSC approval, subject to refund upon issuance of a final order.

HB 5521 would allow utilities to get guaranteed, up-front cost recovery for generation investments and allow utilities to recover cost-overruns simply by presenting "evidence" that the overruns are reasonable.

Constellation Slams Possible Long-Term REC Contracts in Conn.

The DPUC should not authorize electric distribution companies (EDCs) to enter into long-term contracts for RECs, Constellation NewEnergy told regulators in reply comments (07-06-61).

Long-term, EDC-backed renewable contracts could lead to another round of stranded costs paid by customers, NewEnergy cautioned.

Wholesale default service suppliers currently assume the risk of fluctuating REC values when providing full requirements service, NewEnergy pointed out. Allowing

EDCs to buy RECs on long-term contracts would transfer those risks to customers.

Long-term EDC renewable contracts are simply not needed to spur green power development, NewEnergy added.

Noble Environmental Power, a green power developer pushing for EDCs to enter into long-term REC contracts, has admitted in testimony that it has been able to finance projects without long-term contracts and that the, "lack of long-term contracts may not present an impediment to financing in all cases," NewEnergy reminded.

Noble has about 800-1,000 MW of wind power under development in New Hampshire, Vermont and Maine, as well as an equivalent amount in New York, without long-term contracts with EDCs backing the projects, NewEnergy said.

NewEnergy blamed the "twin impediments of community opposition and inadequate transmission," not financing, as the true barriers to greater renewable generation.

Allowing EDCs to buy RECs on long-term contracts would move Connecticut away from competitive markets and would "be the proverbial camel's nose under the tent," NewEnergy claimed.

"CL&P has already indicated its intention to enter into long-term contracts for energy and capacity generally (see Docket No. 06-01-08PH01) and has argued at the Legislature that it should be allowed to build generation once again," NewEnergy observed.

Long-term REC contracts backed by EDCs would stifle technological innovation, the competitive retailer added, because renewable developers would know in advance that utilities will be required to enter into long-term, fixed-priced agreements.

Under a long-term contract regime, there is no incentive to keep costs down or to invest in research and development for new technologies, NewEnergy explained.

But Noble Environmental Power warned that REC shortages are more likely to occur without EDC renewable contracts, thus costing ratepayers more money.

Noble reiterated its view that default service procurement, bought for only six months to three years (depending on customer

size) is not compatible with green power development which needs 10-year contracts to attract financing.

EDC REC contracts should only be for new resources, Noble added.

United Illuminating does not favor DPUC mandates for specific amounts of REC purchases via long-term contracts but does want the Department to preserve EDC flexibility to buy RECs at cost if such a policy proves beneficial to customers.

UI echoed Noble's concern that retailers can now buy RECs on long-term contracts, then resell them to customers as wholesale suppliers in default service procurements, with RECs marked up to reflect suppliers' risk. UI sees retailers' push to completely foreclose the ability of EDCs to buy long-term RECs as protecting their competitive position in selling RECs to retail customers.

Connecticut Light & Power also opposed mandates for EDCs to buy RECs on long-term contracts but, similar to UI, urged the DPUC to give utilities flexibility.

TransCanada Says ISO New England Improperly Excluded FCA Bid

TransCanada Power Marketing filed a complaint at FERC (EL08-43) against ISO New England over the ISO's disqualification of a composite offer by TransCanada in the recent Forward Capacity Auction (FCA).

In composite offers, separate capacity resources are bid together, such as offering winter megawatts from an existing resource paired with summer megawatts from a new capacity resource. Each part of the bid is called a "component."

TransCanada argues that the ISO's Jan. 10 disqualification of TransCanada's composite offer was inconsistent with FERC's order that the ISO use, "the same review process as it applied to other composite offers to ensure that the component resources have available capacity."

It wants FERC to order ISO-NE to accept TransCanada's offer into the FCA at the floor price that was established in the auction.

The ISO had rejected TransCanada's offer on the basis that a component of the offer had

already been bid into the FCA by H. Q. Energy Services, and accepting TransCanada's Jan. 10 offer would thus double-count capacity.

But the ISO knew, TransCanada argued, that the earlier HQ bid was going to be disqualified because HQ did not have transmission capacity to back the offer, and thus HQ did not have a right to bid in the component capacity TransCanada used in its Jan. 10 bid.

No double counting would have occurred, TransCanada explained, and TransCanada's Jan. 10 capacity, was, in fact, available.

Briefly:

Pepco Utilities Would "Pursue" New Generation in Md. If Granted Authority

Maryland utilities Pepco and Delmarva would "pursue" building and owning new generation should policymakers decide to choose that option for the state's energy industry, Pepco Holdings CEO Dennis Wraase said on earnings call yesterday. An analyst also questioned whether Pepco was considering selling (or creating a joint venture/spinning off) its competitive generation business, and whether it had retained a bank to advise it on options. Officials replied they always examine ways to maximize shareholder value but would not discuss specifics. We reported Pepco earnings yesterday (Matters, 3/3/08).

Pepco Energy Services Calls OPC Fears Unfounded

The competitive electric and gas markets in the District of Columbia have, "settled out," since the start of competition, and the remaining competitive suppliers are long-term and responsible participants operating in a generally stable regulatory environment, Pepco Energy Services (PES) told the DC PSC (FC 1009) in reply comments on proposed rules for a utility code of conduct (Matters, 2/21/08). Thus, fears of exploitation have, "no foundation in reality, and should not be the basis for further intrusive regulation on the scale proposed by the OPC [Office of the People's Counsel]," PES argued. PES pointed to the implementation of a Consumer Bill of Rights since the PSC originally started its code of conduct rulemaking, and noted the rights

"exhaustively" address consumer protection issues that OPC is trying to introduce into the code of conduct.

ConEd Development Filing Deficient, FERC Says

FERC wants more information from Consolidated Edison Development (CED) and North American Energy Alliance regarding the sale of CED's power plants to the investor group (EC08-36). Noticing the initial filing as deficient, FERC asked the applicants to describe all of the non-market-based rate contracts at issue in the proposed transaction, including reliability must run (RMR) agreements. FERC also wants information regarding what ratepayer protection mechanisms the applicants propose. Several munis had earlier asked FERC to make sure the transaction does not extend or increase payments in RMR contracts at several CED plants (Matters, 2/15/08), but CED responded prices in the RMR pacts cannot change without settling parties' (which includes several of the munis) consent.

MRTU Go-Live Date to be Set By Month's End

The California ISO hopes to set a new Market Redesign and Technology Upgrade implementation date by late March, it told FERC in a monthly update (ER06-615). The ISO started its Integrated Market Simulation – Update 2 (IMS-U2) February 19th as planned, and will be able to set a new MRTU go-live date by the end of the month if testing and market simulation continue as expected.

FERC Sets Incentive ROE for AEP-Allegheny Line

FERC granted a 14.3% Return on Equity for the \$1.8 billion Potomac-Appalachian Transmission Highline (PATH) project, a joint venture between American Electric Power and Allegheny Energy (ER08-386). The ROE includes a 50 basis point adder for participation in an RTO. FERC found the 14.3% ROE, suggested by the applicants, to be in the high end of the

zone of reasonableness for ROE, but not at the very high end of 16%, and appropriate for the, “demonstrable risks or challenges faced by PATH.” Commissioner Suedeen Kelly dissented in part, arguing the ROE should have been set after an evidentiary hearing. Commissioner Jon Wellinghoff also dissented in part, noting while the majority rejected the applicant’s proposed proxy adder group (used to compare the reasonableness of the ROE), and found the midpoint of the corrected proxy group to be nearly 100 basis points lower, the Commission still accepted the proposed 14.3% ROE. The PATH project would cross 290 miles using 765 and 500 kV lines, linking an AEP substation near St. Albans, W.Va., with an Allegheny substation in Kempton, Md.

N.Y. PSC Hosting Smart Meter Workshop

The New York PSC staff is hosting an advanced metering workshop April 14-15 at the Desmond Hotel in Albany (Case 00-E-0165 et. al.). The staff hopes to develop minimum functional requirements for utility advanced meter systems by increasing its knowledge and understanding of the, “rapidly evolving and technically complex,” field. The conference will consider an overview of advanced meter systems, smart grid systems and their relationship to advanced meter systems; advanced meter communication protocols and platforms; meter data access issues; and advanced meter and system capabilities.

Duke CEO Wants Other Customers to Subsidize His Ratepayers GHG Costs

Duke Energy CEO Jim Rogers wants the nation’s electricity customers to pick up the burden his customers would face should the federal government pass carbon legislation. Rogers suggested a “lockbox” funded by a 3 mill tax on all electricity sales to fund research and development into low-carbon technology as “more fair” to customers’ whose power comes from coal than the proposed carbon credits auction in the Lieberman-Warner bill. Customers in states using mostly coal power could see prices rise up to 60% under an auction system, Rogers claimed. Rogers

estimated his tax would generate \$11 billion annually.

Calif. PUC Would Institute Green Power Transmission Rulemaking

The California PUC, in a draft decision posted yesterday, would open a new rulemaking to improve transmission access to renewable energy generation, consider additional streamlining of existing regulatory processes, and address issues identified in the California Renewable Energy Transmission Initiative (RETI) which require PUC action. The rulemaking would examine how to implement Pub. Util. Code § 1002.3 (which requires the PUC to investigate cost-effective demand-side solutions as alternatives to transmission projects) when evaluating grid projects designed to boost access to renewables.