

Energy Choice Matters

July 18, 2008

REPs Argue that Price Changes Are Appropriate for Month-to-Month Auto-Renewals

The appropriate pricing for automatic renewals and the definitions of fixed, variable and indexed products dominated stakeholder comments on a PUCT Staff strawman regarding revised customer disclosures and other general REP provisions (35768, Matters, 7/8/08).

Automatic Renewals

REPs warned the Commission that the strawman's apparent prohibition on price changes for auto-renewals of fixed-price contracts (a specific provision we broke in our exclusive analysis) would greatly increase REP risk and damage the competitive market.

"A key component of providing value to customers is keeping customer retention costs minimal," Integrys Energy Services argued, and allowing auto-renewals is "essential" to that objective. Integrys Energy Services reported that while it does not currently serve small customers in Texas, it is considering where to expand its direct mass market business, and Texas is a market under consideration.

The strawman, however, would effectively eliminate auto-renewals, Integrys Energy Services noted, because wholesale prices are almost guaranteed to have changed since the initial customer enrollment. Under the strawman language, auto-renewals would only be practical for index-based products with a complete pass-through of all transmission and ancillary charges, Integrys Energy Services reasoned.

Greater information disclosures regarding automatic renewals would better protect customers, Integrys Energy Services suggested. For example, the initial Electricity Facts Label (EFL) could

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PUCT Approves 18-GW CREZ Scenario

ERCOT's independence from FERC rate regulation could be "toast" due to transmission building to access wind resources geographically located in SPP, Commissioner Julie Parsley cautioned in withholding support from Competitive Renewable Energy Zone (CREZ) Scenario 2, which was generally approved by the Commission yesterday, though a final order must still be written (33672).

Scenario 2 includes integrating 18 GW of wind at the cost of \$4.93 billion (Matters, 6/13/08).

Parsley is concerned that bringing in power from wind farms located in the SPP region to ERCOT cannot be considered anything else but interstate commerce and would jeopardize ERCOT's independence. At least the current ERCOT direct current ties can be shut off if necessary to preserve jurisdiction, Parsley noted.

Chairman Barry Smitherman, who voted with Commissioner Paul Hudson for Scenario 2, replied that he's talked informally with FERC officials about jurisdiction and is committed to keeping ERCOT independent. However, he noted that the Commission doesn't have power over congressional will, pointing to EPACT '05 which made ERCOT subject to national reliability rules.

Parsley generally favored a more measured and staged approach to transmission building, and was worried about the impact of more wind on the dispatch of current and new nuclear plants, suggesting it could chill nuclear development.

Smitherman noted that ERCOT has testified it won't back down nuclear units during times of low load and high wind generation, instead stating that wind would be curtailed. Smitherman urged that a similar provision be applied to cleaner coal units to encourage their construction.

Briefly:

FERC Tweaks CAISO Underscheduling Measures

FERC accepted with modifications the California ISO's interim measures to address the potential economic incentive for load serving entities to underschedule in the day-ahead market, to be in effect from the start of the Market Redesign and Technology Upgrade until the implementation of convergence bidding (ER06-615-013). FERC found that CAISO's proposal to allow LSEs to underschedule up to 15% of demand in the day-ahead market provides a reasonable amount of flexibility. However, sharing a concern raised by the Western Power Trading Forum, FERC eliminated the proposed "free pass" for LSEs to underschedule more than 15% of demand for 5% of the trading hours each month without penalty. FERC accepted CAISO's proposed graduated interim scheduling charges for larger instances of underscheduling.

FERC Addresses Impact of Generation Retirement Cancellations on PJM Queue

FERC granted PJM's request for a declaratory order on the impact of generator retirements on interconnection projects (Matters, 6/3/08), finding that PJM can consider generator retirements announced prior to an interconnection customer's queue date when conducting interconnection studies for that customer's project, and could conduct re-studies for that customer's project based on the reversals of such retirements (EL08-55).

FERC Directs Stakeholders to Probe Splitting SEMA

FERC denied a complaint from several Massachusetts munis that wanted ISO New England to use Post First Contingency Switching or Special Protection Systems to reduce Local Second Contingency Protection Resource charges in Southeastern Massachusetts (SEMA), since FERC agreed such measures would degrade reliability on Cape Cod (Matters, 4/29/08). However, FERC set the matter of whether the current cost allocation that is the result of the current single SEMA region is just and reasonable for hearing (i.e., whether or not the current SEMA region should be divided into two regions). FERC held the hearing in

abeyance pending the ISO-NE stakeholder process.

FERC Sets Amaranth Hearing

FERC ordered a hearing to determine whether certain natural gas futures trading activities by Amaranth Advisors LLC, its affiliated entities and two individual traders violated the Commission's anti-manipulation regulations (IN07-26). FERC reiterated that it has jurisdiction under section 4A of the Natural Gas Act to impose penalties for manipulative trading of NYMEX NG Futures Contracts that has a clear and direct effect on physical jurisdictional natural gas sales prices. FERC also determined that it can reasonably exercise personal jurisdiction over former Amaranth trader Brian Hunter, and Amaranth International Limited, for purposes of setting the matter for hearing to resolve the disputed facts surrounding that jurisdiction.

FERC Clarifies MBR Rule

FERC yesterday clarified that with respect to Market Based Rates and Order No. 697-A (RM04-7), market-based rate sellers performing the indicative screen analysis may allocate the simultaneous import limit (SIL) capability on a pro rata basis (after accounting for the seller's firm transmission rights) based on the relative shares of the seller's (and its affiliates') and competing suppliers' uncommitted generation capacity in first-tier markets.

EnergyConnect Enters New England

EnergyConnect yesterday launched its FlexConnect demand response platform in ISO New England.

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explain how the price will be determined at the end of the contract, and REPs could be required to send a clear notice of the change in price prior to the end of the contract term.

Gexa Energy made similar arguments, and noted that the strawman's approach to auto-renewals is appropriate when the contract fails to specify what would occur with the customer's pricing at the end of the stated term of service. However, if at the time of customer enrollment the pricing provisions that will go into effect at the end of the stated term of service are clearly

disclosed, then the customer's price after the stated service term should be permitted to change. Gexa explained that a REP may need to charge a different rate after expiration of the stated service term because the length of the customer's service at that point is unpredictable and cannot therefore be hedged.

Liberty Power added that the ability to have a fixed-rate contract roll-over onto a month-to-month variable contract is "essential" to allow for continuity of service during the customer's "shopping stage," or the period between the end of a customer's initial contract term and enrolling in a new plan or product, without significantly increasing the price of the initial term.

The Texas Energy Association of Marketers (TEAM) agreed that when properly disclosed, REPs should be able to automatically renew customers onto a market-based monthly product at the end of their term.

TEAM added that some customers have desired to automatically renew onto another term product, and argued that customers should have that option where:

1. The provision for automatic renewal for a term is properly disclosed in the initial terms of service; and
2. The customer received notice of the pending termination of their contract near the end of their contract term (at least 45 days before the end), and the customer has the ability to opt-out of the automatic renewal to a term product.

Reliant Energy recommended that for a fixed price product that includes automatic renewal, the default price for the renewal term should be the same price the customer was charged during the final billing period of the contract term, unless a material change notice is issued that changes the price at or after the expiration of the contract term.

Direct Energy offered two scenarios for fixed product automatic renewals. First, REPs that disclose in the initial contract that the contract automatically renews onto a monthly variable price should be allowed to execute such a renewal without additional notice requirements. Second, where the REP does not include in the initial contract such an automatic renewal provision (fixed to monthly variable), REPs should be able to automatically renew customers onto a monthly variable rate without

affirmative consent by providing 45-days notice to customers regarding the change to the customer's price or product after the expiration of the initial term. Without that ability a REP, who did not otherwise receive the customer's consent at the time of initial enrollment for post-term pricing arrangements, "may be obligated to perpetually serve a customer on a price originally intended for a specified term, until the customer consents to a renewal offer, selects another product, or cancels service," Direct explained.

Material Changes

Several REPs supported development of Commission-provided standard language to be used by REPs for material change provisions in contracts, but Reliant, Direct and TEAM opposed standard language, arguing that the Commission could set clear guidelines and requirements on what constitutes a material change to allow REPs to tailor language to specific products and for parties to have the right to define the balance of risk.

Texas Legal Services Center (TLSC) and Texas Ratepayers' Organization to Save Energy (ROSE) urged the Commission to adopt standard language regarding material changes.

TLSC and ROSE argued that a material change should include:

- (i) an increase of 5% or more in the price of a variable price product;
- (ii) any change in the formula or method for determining the price of a variable price product;
- (iii) any change in the term of a product;
- (iv) any change in the frequency in which bills are issued;
- (v) adding of charges that may be imposed on the customer by the REP; and
- (vi) any change in the ownership of the REP.

TLSC and ROSE also argued that 60 days' notice should be provided for material changes, instead of 45.

The Steering Committee of Cities Served by Oncor has "serious concerns" regarding the use of material change clauses since they create "negative option" provisions. "Presumably, the material terms of the contract were what formed the basis of a consumers' decision to choose a REP's offering. Yet under the Revised Strawman Rule, the REP can change the contract without penalty by presenting a

consumer with a 'take-it-or-leave-it' modification to a material term - the customer will not have the option of holding the REP to its original bargain. Furthermore, the customer is not given the same right. The Revised Strawman Rule does not give a consumer the authority to change the material terms of his retail plan if they no longer suit him, and an attempt to terminate the contract in the alternative could be met with a cancellation penalty. This asymmetry is inappropriate in a market in which retail service is provided under a contract struck by two willing parties."

The Cities suggested that REPs be required to obtain the customer's affirmative consent for material changes to the contract.

TXU Energy asked for greater clarity regarding the how to apply the 45-day notice period for material changes because of the timing of bills and switches. For example, it may be that some REPs read the requirement as allowing a change to go into full effect on bills issued 45 days or more after the notice is provided. However, because electric bills are for service provided over the preceding 30 days, if a bill is not prorated then such practice could result in the change being applied to the customer's usage that occurred as early as 15 days after the notice was provided. At the other end of the spectrum, a REP could read the rule as requiring that the price or other change not impact the customer for 45 days after the notice is sent. Consequently, the first change the customer would experience would be on a bill approximately 75 or more days after the notice is provided, for service provided during the preceding 30 days.

TXU also noted that advanced metering may make a shorter time period more appropriate than the 45-day period.

Product Definitions

TXU proposed that products be defined as "fixed," "indexed," or "variable." Fixed and indexed plans would not allow the REP to have discretion to change the price or the formula upon which the customer's price of electricity is based, respectively, without 45 days advance notice, and changes could not be made during any term of a fixed or indexed contract. However, the price of a fixed product could change due to changes in TDSP fees or law or

regulatory charges.

A variable product would be one that can change at the REP's discretion, but changes in price must be preceded by 45-days written notice to give customers adequate protection.

TXU's fixed-price product definition would also include price structures that do not result in "flat" prices because, for example, they include seasonal, time-of-use, or usage block factors. TXU believes the inclusion of such components in a price structure should not inherently make the structure indexed or variable. Rather, if a plan's components are fixed (i.e., prices within a given season are fixed for such season and prices for a given usage block or time of day are calculated using a fixed price for electricity) such that a fixed, average, annualized price can be calculated for the plan, then such a product should be considered fixed because the REP is promising not to increase the individual price components, or the average, annualized price, during the term of the contract.

Reliant also recommended a fixed, indexed and variable distinction, and argued that the variable price product be limited to only month to month service because the REP has significant flexibility in how to change the price.

Gexa suggested that rather than defining "products" the rule should define types of "charges." The definition of fixed and variable charges, combined with increased disclosure on the EFL as to how fixed and variable charges or a combination of those charges apply to a specific product, would increase customer clarity without the need to introduce the concept of an "indeterminate" price product into the market.

The Texas Electricity Professionals Association (TEPA) urged that fixed product term lengths be flexible to allow customers to accept a blend and extend option that produces a lower rate.

Pricing Disclosures

TXU urged the Commission to reject the strawman's provision which would allow EFLs for promotional prices, since such EFLs would not have to disclose the non-promotional price (instead allowing a separate EFL to be sent later with the subsequent price). TXU cautioned that an EFL with only a promotional price listed would, "provide inadequate disclosure of the actual price of products during the customer's enrollment

process."

TXU believes a "teaser" price should not be permitted to form the basis for an EFL, which is the document consumers use to provide an "apples to apples" comparison of electricity prices when shopping for products from REPs. EFLs associated with plans including promotional rates should state the promotional price and the regular price that will be effective after the expiration of the promotional price as components of the price, but should also disclose the average price per kWh that takes into account both the promotional price and the regular price, TXU recommended. Enrollment authorizations for such plans should also include the average price per kWh that takes into account both the promotional and regular price.

Gexa pointed out that due to decisions of certain municipalities, there are geographic regions within some TDSP service areas in which additional charges (such as those for underground facilities) will be billed to customers, making inclusion of such recurring TDSP charges problematic in pricing disclosures. REPs would either have to produce separate pricing for each municipality, or include the highest overall set of charges as part of the standard price for all customers in the overall TDSP service territory. Because municipalities do not fall within uniform zip codes, separate pricing would not be a viable method of presenting the customer an accurate price under the current strawman definitions, Gexa reasoned, and suggested language be revised to only include TDSP charges uniformly applied throughout the service area in pricing disclosures.

TEAM added that separate EFLs for the same product due to underground facilities fees would create market confusion. Furthermore, for term products, there is no coincidence of term between the start and end date of the unique surcharge and the start and end date of the product term chosen by the customer, TEAM pointed out.

Aside from logistical problems, reflecting any charge that appears in three or more billing periods in a calendar year as a recurring charge which must be rolled into the disclosed price is at odds with the policy goal of transparency, TXU reasoned. Charges are camouflaged by being rolled into the kWh price, which has the

effect of the customer receiving less information regarding what they are really paying for, TXU argued.

EnergyComNetwork also claimed that it would be burdensome to make REPs include specific amounts for non-recurring TDSP charges in their Terms of Service (TOS) since they vary by service areas, and may change. REPs would be forced to send out a revised TOS anytime such changes occur, which presumably would be treated as a material change to the contract. EnergyComNetwork recommended that a range of likely costs, with notation that charges may vary, be included in the TOS in cases where the REP is merely passing through the TDSP charge.

TXU pointed out that an EFL for an indexed product (or variable product under the strawman) cannot possibly include the price for the "first month of service" as proposed, because the initial billing month will not be known. TXU suggested that the EFL for indexed plans could be required to include example prices based on likely outcomes of the index, or the current price for such indexed product at the time the EFL is disclosed to the customer.

TEAM also objected to the strawman's provision that requires REPs to either disclose their billing formula or provide detailed pricing methodology for all variable products. Such requirements would inhibit the ability of small to mid-size REPs to effectively compete in the competitive retail market through the development of sophisticated pricing models, which today are protected as trade secrets, TEAM argued.

EFLs

Integrus Energy Services argued that providing better customer information would protect customers better than artificially limiting products through imprecise delineations. Enhanced customer information could be improved by expanding the EFL to include certain questions that must be answered for the product such as:

- What charges are fixed?
- What charges are variable?
- When will the variable charges change?
- What rate will I have at the end of the initial contract term?

Requiring answers that are specific to the

product in response to standard questions would provide useful information to customers, without limiting the types of products that REPs can offer, Integrys Energy Services observed.

TEAM made a similar recommendation and suggested that the EFL be revised to include a standardized set of disclosure questions or product features that all REPs would be required to place on their EFLs.

Reliant suggested changing the EFL to delete benchmark emissions information and fuel types in favor of simply disclosing how much renewable energy is in a product, which is what customers really care about, Reliant argued. The EFL would show a product's renewable content compared with the statewide average under Reliant's plan.

TLSC and ROSE want the following items added to the EFL:

- Spot market purchase: REPs should be required to disclose the percentage of power purchased on the spot market for a given product as this is an important indicator of price volatility for the consumer.

- Financial integrity information: REPs should be required to tell consumers how their deposits and prepayments are held as this is an important indicator of the REP's financial integrity. The EFL shall state in bold print either that:

(A) [Name of REP] does protect customer funds and prepayments by segregating those funds into a separate trust fund, [or]

(B) [Name of REP] commingles its customer funds with its own assets and customer funds if [Name of REP] defaults on its financial obligations.

- Disclosure of REP surcharges: If the Commission allows REPs to tack on additional surcharges for move-ins, move-outs, disconnections, and reconnections in addition to TDSP charges, REPs should be required to make a statement that customers may be subject to these additional charges on the EFL.

Terms of Service

Reliant opposed the strawman's requirement that the REP must have a separate TOS for each product type, since a standard TOS may be more efficient as many provisions are the same for different products, such as itemization of non-recurring charges, description of deposits, anti-discrimination language, disconnection fees

and so forth.

Reliant recommended that disclosures which are generally the same across product types should be included in the TOS, and all disclosures that generally vary by product type should be included in the EFL.

But TLSC and ROSE argued that the TOS should be "unique and complete" for each product, since allowing a TOS document to cover more than one product is confusing to the consumer. Frequent references to the other contract documents are also confusing and should be kept to a minimum, TLSC and ROSE added.

Small Commercial Protections

TEPA argued that the current threshold for the designation of small commercial customers (50 kW) is set too low. "While there is no precise manner to determine the designation, it has been our experience that many customers with annual consumption of even one megawatt lack the knowledge and can not devote the time to understand the rules and procedures surrounding the restructured market," TEPA said in urging the Commission to examine the issue.

TEAM suggested that small commercial customers be given the ability to waive certain customer protection rules as long as the waiver is clear and conspicuous (a right currently enjoyed by customers with aggregated load over 50 kW). TEAM reported that current customer protection rules unnecessarily limit the flexibility of product offerings that could be made available to certain small commercial customers. In some cases, small customers have specifically requested product features from TEAM members that members are unable to offer under the current rules.

Customer Relocations

Gexa argued that if a customer moves within the same TDSP service area and the REP wishes to continue service under the same terms, the termination fee should not be waived if the customer switches REPs.

TEAM added that early termination fees should not be waived if the customer moves to another TDSP area but the REP wishes to continue service under the same terms and pricing.

TOS, EFL, YRAC, Contract End Date Distribution

Online customer service tools are a method of competitive differentiation and one way that REPs try to attract and retain customers, Gexa pointed out, but REPs have different strategies on their use. Thus requiring all REPs to offer customers their contract start and end dates via the web would be burdensome for REPs not currently utilizing online customer care.

Liberty opposed the strawman's provision that would require the TOS, EFL and YRAC to be presented to the customer at least once in a 12-month period as overly burdensome, although it should be noted REPs are currently required to send customers an EFL and YRAC once a year. Liberty noted the strawman also requires those documents to be available by request, precluding a need for a yearly mailing.

Mailing the YRAC and TOS each year is a large, and arguably unneeded, expense for REPs, Reliant noted, which adds to product costs and carries an adverse environmental impact in printing and mailing the documents.

Liberty also argued that REPs only be required to provide EFLs to be posted on the Power to Choose website, rather than requiring them to be posted on the REP's own website if the REP uses online enrollment. Liberty claimed that REPs may offer custom pricing through online enrollment which would create thousands of EFLs.

Customer Prepayment Devices

EnergyComNetwork argued that the EFL requirement for REPs to combine electric charges with charges for any other product required by the REP in order to receive a particular electric service should not include any fee related to a Customer Prepayment Device or System. Any such fee should be listed separately so that the EFL does not provide an incorrect portrayal of the commodity price, EnergyComNetwork said. EnergyComNetwork compared the fee to deposit requirements which are not required to be listed in the kWh price.

EnergyComNetwork also stressed that in cases where a customer moves, REPs using a customer prepayment device should be allowed to charge a removal fee or relocation fee, referencing the proposed §25.495(c)(5) which includes language stating that "[t]here will be no

penalties, or termination fees billed to the customer as a result of the relocation of the customer."

Customer Transfers

TEAM opposed extending the current 30-day notice period regarding the transfer of customers between REPs to match the 45-day material change notice period, since a longer time period exposes the market to undue risk by decreasing the ability of a REP to smoothly transition customers. Lengthening the notice period increases the chances that, instead of a smooth transition, customers could be moved to POLR because of REP failure, TEAM explained. In cases of REP bankruptcy, ERCOT suspension or where a REP loses its QSE agreement, customer transfers may be a last-ditch effort to avoid a mass POLR transition, TEAM noted, and thus should not be held up by lengthening notice provisions.

Contract Disputes

Liberty raised concerns regarding the strawman's provision that any vagueness, obscurity, or ambiguity in the contract will be construed against the REP in the case of disputes, pointing to the subjective nature of those terms. "Customers should not simply be able to declare contract terms to be vague or ambiguous without providing a preponderance of evidence to support their claim," Liberty argued. Liberty suggested contract law is the best approach in determining ambiguity, other case specific interpretations, and outcomes.

REP Financial Capability

Direct Energy argued that before any changes to the Commission's information disclosure rules are implemented, the first priority should be to review the financial capabilities of the REPs in the market today and the required standards for new entrants seeking REP certification, to ensure that REPs who are and will be making commitments to customers through various information disclosures can and do live up to those commitments.

REP Report Card

TLSC and ROSE proposed a REP report card as follows, which should be a part of the regular information disclosures to customers

and potential customers.

(i) REP Report Card. The information required in this section shall be included by a REP in the "REP Report Card."

(1) The REP Report Card shall inform customers of the following information regarding the REP's customer service:

(A) Physical location of the REP's call center and its hours of operation.

(B) The number of complaints about the REP received by the commission per thousand customers by customer class for each of the past five years or for each year the REP has been in business if less than five years.

(C) The number of customer protection rule violations found by the Commission per thousand customers by customer class for each of the past five years or for each year the REP has been in business if less than five years.

(D) Average number of hours or days the REP takes to resolve a customer's complaint after a complaint is forwarded to the REP by the commission.

(E) Average hold time (call initiation to live response) for customer service calls.

(2) The REP Report Card shall inform customers of the following information regarding the REP's business operations:

(A) The date the REP's application for certification was approved by the Commission.

(B) States other than Texas where the REP does business.

(C) REP's current ownership and affiliations, and any changes in ownership over the past 5 years.

(D) Location(s) of Texas office(s).

(E) Any fines assessed by the Commission for rules violations and a short description of the violation.

(F) Lobbying expenses for the past five years as reported to the Texas Ethics Commission.

(G) REP's current credit rating with Standard & Poor's, Moody's Investor Services, or any other nationally recognized rating agency

(3) The REP Report Card shall inform customers of the following information regarding the REP's environmental record:

(A) Rating of the environmental impacts of power sold as reported by Powerscorecard.org.

(B) Services or products offered in addition to electricity such as energy efficiency audits and financing for efficiency improvements.