Energy Choice Matters
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N.Y. ESCOs Confirm Price Premium in Contracts Since UBP Changes

Every ESCO contract executed since a New York PSC order modifying marketing rules in the Uniform Business Practices on October 27 has contained a risk premium due to the possibility the PSC could release customers from sales agreements without termination fees for any potential violation of the UBPs, Chris Kallaher, Director of Government & Regulatory Affairs for Direct Energy Services, said during a technical conference yesterday.

Given the language of the PSC's written order, ESCOs face the potential of having their termination fees nullified even in cases where slamming did not occur and ESCOs had proper customer authorization for enrollment, but where they violated a more technical aspect of the UBPs (Matters, 10/28/08).

The practical effect of the order, Kallaher noted, is to give customers a "healthy list" of possible claims to make against an ESCO apart from anti-slamming provisions. When ESCO contracts become above-market, sophisticated customers, with the help of clever lawyers, will be able to pick apart their ESCO agreement and the solicitation process to find any inconsistency with the UBP requirements, and use such as grounds to leave the contract early without penalty. Because the UBPs apply to all customers, sophisticated large C&I customers, whom Kallaher believes do not need the additional protections beyond contractual remedies, could manipulate the release provision.

PSC Staff attempted to assuage ESCOs' fear by noting the potential remedies listed in the order, only one of which is a customer's release from contract without termination penalty, was meant as a guide, and that the Commission will exercise its discretion in choosing which remedies to use. As a

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NOPEC Urges FERC to Reject FirstEnergy Affiliate Waivers Due to Captive Customers

The Northeast Ohio Public Energy Council has taken its battle against FirstEnergy's proposed electric security plan (ESP) to FERC, where it opposed as premature an application by FirstEnergy for waivers of prior Commission approval for sales between its competitive affiliates and Ohio distribution utilities (ER09-134 et. al).

The protest comes as NOPEC and FirstEnergy have increasingly traded jabs about the expiration of NOPEC's current supply arrangement with FirstEnergy, the fate of a 5% discount currently offered, and nonbypassable surcharges contained in the ESP.

NOPEC said FERC should defer on acting on FirstEnergy's application to lift affiliate restrictions until PUCO decides on a Standard Service Offer mechanism for FirstEnergy for the period after December 31, 2008. FirstEnergy has applied to implement an ESP, with generation sourced from FirstEnergy Solutions, and also filed an alternate Market Rate Option with competitive bidding.

FirstEnergy's application to waive affiliate restrictions is inappropriate, NOPEC said, because FirstEnergy customers remain captive, and FERC protection is needed against cross-subsidization. Despite the legal existence of retail choice, no competitive retailer is currently offering generation service to residential or small business customers at the FirstEnergy utilities, NOPEC said. NOPEC pointed to testimony submitted by FirstEnergy in its ESP application at PUCO, where FirstEnergy confirmed that it does not forecast any shopping in its service territories during 2009.

Furthermore, NOPEC argued that the FirstEnergy ESP would create several barriers to

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Commerce Faces Investors

Commerce Energy CEO Gregory Craig insisted there was light at the end of the tunnel for the troubled retailer, while describing the current situation as "tenuous" as Commerce reported a steep third quarter loss and raised doubts about its ability to continue as a going concern absent credit provided in a potential asset sale to Universal Energy Group (Matters, 11/13/08).

Analysts on an earnings call were displeased with the $16 million price of the proposed Universal deal and asked if Commerce could extract more value from selling its books in different markets individually. Craig noted the difficulty in finding multiple buyers in the current credit environment, and the challenge of executing multiple sales before a December 22 deadline for finding replacement credit.

With $20 million of its $23 million in annual bad debt attributed to its now-sold ERCOT operations, Craig said Commerce's bad debt problems were behind it, as it does not face the same collection problems in its other markets, which will primarily be California gas and electric and Florida gas, with some gas customers in Nevada, Georgia and Pennsylvania.

Commerce reported updated revenue numbers for the year ending July 31 yesterday (see below), which show that the five markets involved in the potential Universal sale now account for about 28% of revenue, compared with our estimate yesterday of 33% based on Commerce's 8-K for the previous quarter. The five markets involved in the Universal sale would be Ohio gas and Pennsylvania, New Jersey, Maryland and Michigan electric.

Year Ending July 31, 2008	Dollars (thousands)	% Revenue
Retail Electricity Sales:		
Texas	$ 174,212	38%
Pennsylvania/New Jersey	59,945	13%
California	54,481	12%
Maryland	29,905	7%
Michigan and Other States	6,177	1%
Total Retail Electricity Sales	324,720	71%
Retail Natural Gas Sales:		
Ohio	34,609	8%
California	24,108	5%
Georgia	257	—
HESCO Customers	73,909	16%
All Other States	1,662	—
Total Natural Gas Sales	134,545	29%
Excess Energy Sales	—	—
APX settlement	—	—
Other	536	—
Net Revenue	$ 459,801	100%

PUCT Staff Suggest Stakeholder Comments on Alternative Ratemaking

PUCT Staff have suggested that the Commission collect comments on alternative ratemaking methodologies for distribution utilities to determine whether to open a full rulemaking on the subject (36358). Alternative ratemaking would permit utilities to periodically adjust their rates outside of a full, traditional rate proceeding to account for a discrete set of costs, such as additional investment in the utility's distribution infrastructure or distribution operation and maintenance expense.

If implemented at the ERCOT distribution providers, the practical effect would be more frequent adjustment of distribution rates paid by REPs, which, depending on how the Commission ultimately rules on "fixed" and bundled/all-in pricing in Electricity Facts Labels (Matters, 10/7/08), could have retail pricing and market implications.

Alternative ratemaking is meant to cure regulatory lag in collections, as well as reduce the increasing expenses of contested rate cases.

AEP has been in discussions with Staff about alternative proposals. Mechanisms are currently in place to expedite the recovery of costs associated with electric transmission systems, under the transmission cost of service program, and one alternative distribution ratemaking methodology could mirror the existing transmission provision.

Staff suggests soliciting stakeholder comment on whether the Commission has authority to provide by rule for a process that permits electric utilities to periodically adjust their distribution rates outside of a full, traditional rate proceeding. The matter is to be discussed at the Nov. 20 open meeting.

National Grid Cautions Muni/IOU Joint Transmission Ventures Could Dilute Open Access

FERC must be careful to ensure than any mandate for joint ownership transmission agreements between IOUs and public entities not subject to FERC Open Access Transmission Tariff requirements would not limit open access, National Grid said in post technical conference comments on barriers to transmission investment (AD08-13).

Public power entities have sought to increase the use of joint ownership agreements between IOUs and munis, cooperatives and similar entities to boost grid investment, and have recommended policy changes which could increase such joint ownership, such as priority in transmission rights.

However, FERC should not, "encourage bad forms of joint ownership arrangements in which the joint owners may limit open access by securing priority or physical rights to new transmission without subjecting such rights to an OATT," National Grid insisted.

Due to open access concerns, "the Commission should think twice about imposing generic policies to establish joint ownership or to rely on the joint ownership model to satisfy the bulk of the country's transmission needs," Grid said.

The Large Public Power Council expressly asked for the opposite in comments, arguing that joint ownership projects in RTO or OATT regions should respect the rights of the public entities jointly constructing the projects.

"The Commission must respect municipal utilities' obligation to operate their ownership portion of jointly owned facilities for the benefit of their customers, and in compliance with the basic principles and requirements governing their specific governance, business and operating models," the Large Public Power Council said.

"As to transmission rights, when utilities that are members of an ISO partner with entities not belonging to an ISO, the non-participating entity must be able to enter into agreements under which they can exercise physical, firm transmission rights independent of the ISO's particular tariff provisions, cost assessments, congestion management and financial rights rules," the large munis argued.

"LPPC emphasizes that municipal entities that choose not to participate as members of the ISO do not want to impose their business model on the ISO or its members; they are simply looking for a similar accommodation," the large muni group claimed.

The Large Public Power Council further argued that munis involved in joint ownership projects in RTOs should not have to bear RTO administrative costs if the munis do not take or use the services underlying the charges.

"In other words, where a municipality opts to use its capacity independent of ISO management, there is no reason why any system-wide ISO charges should be assessed to the municipal, including charges for system-wide marginal losses, system improvement or administrative costs," the large munis said.

FERC should also give private and public partners the flexibility to negotiate mutually agreeable provisions regarding operational and physical control of jointly owned facilities. "There is no inherent reason why the municipal portion of a jointly-owned facility may not be scheduled under the municipal's tariff, independent of protocols (including ISO protocols) applicable to the IOU portion," the Large Public Power Council reasoned.

Briefly:

Discount Power Receives Conn. License

The Connecticut DPUC granted Discount Power an electric supplier license to serve residential, commercial, industrial and municipal customers. The start-up marketer intends to offer a floating 5% guaranteed-off-utility-rate product for residential customers with no specific term or security deposit. Discount Power's standard commercial contract also includes a floating 5% discount off utility commodity rates, but requires a one-year commitment with automatic renewal. Discount Power estimated enrolling 24,000 customers (nearly all residential) with 45 MW of load and 290,000 MWh of usage in its first 12 months (Matters, 9/19/08).

PUCT Reminds REPs of Performance Report Changes, New Prepaid Data

The PUCT reminded all REPs yesterday of changes in quarterly performance measures and Disconnect for Non-Pay reports, including a new requirement for REPs with prepaid customers to file data on disconnection and reconnection. REPs providing prepaid service must report the number of times a prepaid meter was disconnected for failure to maintain a positive balance, the number of reconnects after disconnect for failure to maintain a positive balance, and the number of reconnects after disconnect completed within two hours as required by P.U.C. Subst. R. 25.498(h)(5). Disconnect for Non-Pay reports, starting today, will only be filed quarterly in the same package as the performance metrics. REPs were also reminded they must submit to the PUCT the sales and usage information required by EIA Form 826, even if the EIA does not require the REP to report the data. Reports are now to be filed in Project 36141.

W Power REP Certificate Relinquished

The PUCT granted the application of W Power and Light to relinquish its REP certificate as it no longer serves customers. The REP's parent, Amen Properties, sold most customers to Green Mountain Energy (Matters, 7/22/08) as Amen looks to focus on the less credit-intensive brokering and consulting business via its Priority Power Management subsidiary (Matters, 7/11/08).

Direct, Aeroplan Ink Rewards Program Deal

Direct Energy and Canadian-based loyalty program Aeroplan announced a multi-year partnership that will allow Aeroplan Members to accumulate Aeroplan Miles with Direct Energy's natural gas and electricity plans in British Columbia, Alberta and Ontario. Depending on the energy products purchased, members may earn anywhere from 2,500-10,000 miles upon signing a multi-year contract with Direct, starting in 2009. Aeroplan miles can be redeemed for airline flights and other merchandise, hotel, car rental and experiential rewards.

Pa. PUC Approves Key Segment of TrAIL Project

The Pennsylvania PUC approved an agreement that permits construction of a 1.2-mile portion of the Trans-Allegheny Interstate Line (TrAIL), which serves as the starting point for the line which is one of two interstate transmission projects the Maryland PSC considers essential for reliability in the 2011-2012 timeframe, for which it recently ordered utility-issued RFPs for backstop demand response. The Maryland PSC is still watching transmission developments to determine the need for other backstop measures, such as utility-procured generation (Matters, 11/7/08).

Pennsylvania PUC Chairman James Cawley said the PUC approved the line despite federal policies that discourage regional cooperation, citing PJM's postage stamp rate for high voltage transmission. "More sound policies would rationally allocate most costs to beneficiaries, while allocating a smaller portion to all customers given the long term uncertainty and overall grid-wide reliability benefits of a well interconnected grid," Cawley said. The PUC stayed consideration of another 35-mile portion of the line, which is intended to address only local reliability issues, pending a collaborative process.

Andeler Corp. Picks ePsolutions

Andeler Corp., a Lubbock-based REP specializing in serving multi-family housing, has selected ePsolutions' emPower software for backoffice and EDI needs.

PUCT Staff Recommend Re-Adoption of Procedural Rules

PUCT Staff recommended re-adoption of the Commission's Chapter 22 procedural rules without modification (35576). Although parties have made suggested changes to the rules, such as CenterPoint Energy's recommendation for narrower discovery and a shorter intervention period (Matters, 6/25/08), Staff explained such issues are to be taken up in a separate case, as the instant project is merely to review whether the current rules are still necessary.

Pa. PUC OKs Pine-Roe GCR

The Pa. PUC approved a total gas cost billing rate of $10.3845/Mcf at Pine-Roe Natural Gas, reflecting a $0.7312/Mcf hike in the GCR rate.

RBS Gets Mich. Electric License

The Michigan PSC granted The Royal Bank of Scotland an alternative electric supplier license. RBS had filed for new licenses in the jurisdictions where its subsidiary Sempra Energy Solutions operates. Sempra's marketer will act as a vendor for RBS, handling billing, scheduling and other backoffice functions.

Mich. PSC OKs Consumers PSCR, Securitization Charges

The Michigan PSC authorized Consumers Energy to charge a maximum power supply cost recovery (PSCR) factor of $0.02058/kWh in 2008. The PSC also approved an increase in

Consumers Energy securitization bond and tax charges, effective Dec. 1. As part of a periodic true-up, Consumers will raise the bond principal and interest securitization surcharge from 1.269 mills/kWh to 1.358 mills/kWh, and the tax surcharge from 0.535 mills/kWh to 0.611 mills/kWh.

NJR Reports Record Wholesale Results

New Jersey Resources Energy Services reported record earnings in the nine months ended Sept. 30, posting "net financial earnings" of $47.0 million versus $40.1 million a year earlier. Net financial earnings exclude all unrealized and some realized derivative impacts. The Energy Services unit, which includes gas customer supply, storage and transportation, posted GAAP net income of $71.9 million, versus $21.3 million a year ago, for the nine-month period. Fourth quarter net income, traditionally softer due to seasonality, was $100 million on a GAAP basis, but the amount included $102 million in unrealized hedging gains. Parent New Jersey Resources posted net income of $78.8 million for the quarter, which included $87.3 million in unrealized hedging gains

Mich. PSC Reconciles Michigan Gas Utilities Corp. GCR

The Michigan PSC accepted a settlement reconciling Michigan Gas Utilities Corporation's gas cost recovery (GCR) revenues and expenses for the 12-month period ended March 31, 2007. The settlement found a $1.36 million net over-recovery that will be rolled into the company's 2007-2008 GCR gas expenses and reconciliation.

DRAM Changes Name, Adds Members

The Demand Response and Advanced Metering Coalition (DRAM) has changed its name to the Demand Response and Smart Grid Coalition (DRSG) and announced four new members -- Cpower (ConsumerPowerline), Conservation Services Group, Corporate Systems Engineering and Google.

NYISO: Supplies Ample for Winter

The New York ISO yesterday forecast a winter peak of 25,293 MW, with total supply of 40,375 MW, although the system is summer peaking. The forecasted winter peak for New York City is 7,860 MW. The total available supply from generators in New York City is expected to be 10,085 MW, providing a winter capacity margin of 22%. New York City also has an import capability in excess of 5,500 MW and a potential demand response of over 500 MW.

SERNA Reports Higher Revenue

Suez Energy Resources North America saw an increase in quarterly sales of 253 million euros year-over-year, parent GDF Suez said, while Suez's merchant plants saw 101 million euros in higher revenue, primarily from higher prices.

DESC Signs Energy Curtailment Specialists

The Defense Energy Support Center (DESC) has approved a Master Demand Response Agreement with Energy Curtailment Specialists.

N.Y. UBPs ... from 1

practical matter, Staff does not anticipate having the resources to review the specifics of every potential complaint from customers alleging UBP violations, and dissecting every facet of an ESCO's solicitation and contracting process for an individual account to determine if a specific customer should be released from a contract. Rather, Staff anticipates that when patterns arise in a series of customer complaints, that's when any potential use of the contract exit remedy would be undertaken by the Commission. Only "systemic" behavior would likely compel Staff to use the remedy of allowing customers to exit contracts without penalties, Staff said.

Staff further noted that the current UBPs already make ESCOs liable for any excess charges that customers should not have paid because of slamming, but ESCOs noted slamming is a specific action that is more easily identified than technical violations of any section of the UBP, which they are now liable for. Staff confirmed that in Staff's view, violations of the marketing standards would not constitute slamming.

Furthermore, while Staff's intention might be to enforce the contract exit remedy in a reasonable matter, the Order makes no assurance on how it will be enforced, thus leaving the door open for large ESCO liabilities, Kallaher noted. Staff members can leave the Commission and take with them their philosophy of the Order, while the Order's language is permanent.

ESCOs' fears are compounded by the fact the remedies apply to all customers, not just residential customers and small C&Is, making the potential liabilities much higher, and increasing the likelihood that sophisticated customers could seek to take advantage of the new remedy -- even where only minor UBP violations occurred that did not impact their solicitation or enrollment decision.

The Commission never noticed stakeholders that extending the new marketing rules to large C&Is was on the table, Usher Fogel noted, representing the Retail Energy Supply Association and the Small Customer Marketer Coalition. As such, stakeholders did not address many logistical problems and implications of extending the marketing standards to large C&I customers, and a record was not developed on the issue in the case, Fogel said. The original petitions in the case involved residential customer protections, and a subsequent issuance from the PSC asked about extending protections to small C&Is, but the Commission did not indicate it was considering applying the rules to all customers, Fogel noted.

One of the biggest problems, Fogel reported, is that since October 27, all ESCO agreements in New York must contain a Customer Disclosure Statement (Schumer Box) on the front page listing key terms, one of which is price. ESCO agreements for large C&I customers can run in excess of 450 pages, with the definition and determination of "price" perhaps taking three pages, Fogel noted. Condensing those terms into a Schumer box is impractical, and also unnecessary given that large C&Is have lawyers and technical Staff drafting complex ESCO agreements, marketers said.

In response to a question regarding how to reflect monthly service fees in the Schumer Box, Staff suggested that the fee should be listed as a line item, rather than rolled into the per-unit commodity price.

The UBPs also hold that ESCO sales reps must always wear badges during solicitations outside of their office -- meaning teams of ESCO sales reps wearing $500 suits and meeting with Fortune 500 clients will still require badges, Fogel pointed out. Staff, however, noted badges are required for security purposes internally at many companies these days and did not see a big problem.

Staff further emphasized that UBPs are, and always have been, applicable to all customer classes, which is why the new marketing rules apply to all customers. In case a part of the UBPs only targets one customer class (such as the residential rescission period), the UBPs clearly state such.

Staff conceded the question of applicability "wasn't an easy issue" and grappled with it for some time. But Staff reiterated that the challenge in delineating a clear line between small C&Is, such as Mom and Pop stores needing the same protection as residential customers, and large sophisticated customers drove the Commission's decision. Each utility has its own rate classifications and cutoffs, and customers themselves may not know their annual demand or usage if the cutoff was determined by that method, Staff pointed out.

Staff suggested that ESCOs should come up with an appropriate waiver request for certain customers in their forthcoming rehearing petitions, while not offering it as a Staff supported solution yet. Staff also urged ESCOs to be very specific in detailing the risks and challenges of conforming their large C&I contracts to the new UBPs in their requests, to facilitate Commission understanding and show a real, rather than theoretic, problem.

The marketing standards appear to apply to brokers and other agents, Staff said, although it depends on the ABC's relationship with the ESCO, and things do "get a little dicey." In Staff's view, if an agent/broker or other contractor is "marketing" a product for an ESCO, then that agent must follow the marketing standards and other provisions in the UBPs. If the agent/broker has a contractual relationship with the ESCO, or acts like a vendor, then they would be subject to the UBPs, Staff further reasoned.

The UBPs probably do not apply to ABCs that act as the agent of customers -- that is, they are sought by and used by customers to get price quotes from ESCOs, Staff said. However, it gets complicated because even ABCs which represent customers and "solicit" ESCOs for quotes, rather than marketing ESCOs to customers, will have contractual relationships with ESCOs.

Staff reminded ESCOs that each has a packet of compliance documents due November 26, which includes things like new sales agreements meeting the modified UBPs and sample sales rep badges. SCMC and RESA petitioned for the due date to be extended to January 26.

The new UBPs would not apply to ESCOs selling an unbundled demand response product where the product is not bundled with a commodity, at least for the time being, Staff said.

Staff rejected arguments from the Public Utility Law Project regarding PULP's interpretation of the Home Energy Fair Practices Act, under which PULP said customers wishing to drop to the utility must have their request honored within five business days, based on language covering institution of utility service. Such a schedule would require an off-cycle meter read, which some party would have to pay for. PULP pointed to ESCO contracts stating that drops may take anywhere up to 45 days to 10 weeks (depending on commodity) as inconsistent with HEFPA, but Staff said the Commission has not interpreted HEFPA to require five-business day drops.

NOPEC ... *from 1*

competition and, if adopted, "would permanently end Ohio's feeble retail competition," thus making customers all the more captive. NOPEC pointed to various nonbypassable surcharges, including a 1¢/kWh Minimum Default Service (MDS) charge to recover costs which, "do not yet exist and may not exist." NOPEC believes the fee is a standby charge prohibited by law. A proposed three-year deferral of generation rates for Standard Service Offer customers -- without a similar deferral credit for shopping customers -- would also inhibit competition at FirstEnergy, NOPEC added (Matters, 9/11/08).

The cumulative effect of the deferral credit and the Minimum Default Service charge would make the price that competitive retailers can offer 26% more expensive than the price FirstEnergy can offer under the ESP, NOPEC said.

"[I]t is surprising that Applicants justify their waiver request on the basis of retail competition, when the anticompetitive provisions of the ESP proposed by the FirstEnergy Utilities would put the final nail in the coffin of retail competition in their service territory by making it practically impossible," NOPEC told FERC.

About 400,000 NOPEC customers have been supplied by FirstEnergy, with generation sourced from FirstEnergy Solutions, since Jan. 1, 2006, when NOPEC's provider, Green Mountain Energy, left Ohio. At that time, FirstEnergy agreed to provide a 5% residential discount, that Green Mountain Energy had been providing, through December 31, 2008.

NOPEC wants the 5% discount extended until PUCO implements a new multi-year SSO plan for FirstEnergy, which may not be until March if PUCO decides to adopt an interim "bridge" ESP proposed by FirstEnergy. FirstEnergy has refused to offer the discount beyond the December expiration, noting it had no obligation to offer it in the first place, and that FirstEnergy helped out NOPEC when NOPEC lost its supplier.

NOPEC, however, pointed out it withdrew opposition to a FirstEnergy rate case as part of negotiations for the discounted supply, and told its members in a letter, "FirstEnergy clearly has the capacity to extend its 5 percent discount for several months."

"It would mean little to the health of this big corporation's profit margin but substantial savings to your residents' pocketbooks," NOPEC asserted in the letter, which also claimed FirstEnergy has been permitted to continue to collect stranded costs, under new names, beyond the intended December 31, 2005 expiration.

NOPEC has signed a letter of intent with FPL Energy Power Marketing for full requirements generation after its deal with FirstEnergy expires. However, the FPL Energy deal is contingent on resolution of the elimination or modification of the FirstEnergy generation price deferral and Minimum Default Service charge contained in the ESP.

NOPEC believes it is premature for FERC to grant a blanket waiver of affiliate restrictions without knowing whether PUCO will implement the ESP, containing what NOPEC considers anticompetitive provisions, or the market rate option. If the market rate option is adopted, FERC would still retain oversight of

FirstEnergy's competitive bidding process, and the affiliate restriction waivers would not raise as much concern. However, if the ESP is adopted without modification to its nonbypassable charges and deferrals, retail customers will remain captive and require FERC protection against affiliate abuse, NOPEC said.

Additionally, NOPEC noted that new Ohio legislation contains a "significantly excess earnings" prohibition on the FirstEnergy utilities. "Real potential exists for the captive customers of the FirstEnergy Utilities to subsidize the [competitive affiliates] as a means for the FirstEnergy Utilities to circumvent the potential for experiencing 'significantly excess earnings' under the new Ohio law," NOPEC asserted.

FirstEnergy has also asked for the FERC waiver on affiliate sales because they are necessary to assure uninterrupted service to default service customers after Dec. 31, 2008, when a current supply agreement between the utilities and FirstEnergy Solutions, approved by FERC, expires.

However, NOPEC said that under FERC regulations, when a jurisdictional agreement on file with the Commission expires by its own terms, its terms and conditions actually remain in effect if the parties do not act to terminate it by filing the required notices at least 60 days before the termination. Thus, until a notice of termination is filed, the current FirstEnergy Solutions agreement remains in effect, notwithstanding the agreement's expiration by December 31, 2008, NOPEC argued.