

# Energy Choice Matters

November 26, 2008

## **PUCO Rejects FirstEnergy Market Rate Offer**

PUCO rejected the descending-clock competitive solicitation process which underpinned FirstEnergy's proposed Market Rate Offer (MRO), determining that FirstEnergy has not demonstrated that the proposal will result in an open, fair, and transparent competitive solicitation (08-936-EL-SSO).

But PUCO's order, "adds criteria that are not in the law and requires compliance with rules that are not yet in effect," FirstEnergy said in a statement. "The Commission's role is to follow the law, not create new law," FirstEnergy said.

While weighing rehearing options, "we will pursue a competitive procurement strategy that ensures our Ohio customers have a secure supply of power if our Electric Security Plan is not approved and accepted by December 28, 2008," FirstEnergy added.

According to PUCO's order, FirstEnergy has not shown that the reverse auction MRO format is the superior method to result in the best possible prices for consumers, as the Commission raised concerns about the market power of affiliate FirstEnergy Solutions (FES). "The record in this proceeding demonstrates that, at the time of the auction, there will be a significant concentration of generation available for bidding under the control of a single party, the Companies' affiliate, FES, and that the reverse auction format may allow a bidder holding a significant concentration of the generation to strategically withhold some of its generation to ensure a higher price," PUCO found.

Furthermore, the full requirements, slice-of-system approach does not provide a clear product definition as required by the Revised Code, PUCO said, since the size of the load following tranches will vary hourly. FirstEnergy has not shown that the load following product will enable potential bidders to properly assess the risks of bidding, the Commission held (Matters, 9/9/08). FirstEnergy has not addressed the potential for future changes with respect to resource adequacy in the Midwest ISO planning reserve sharing group, and how such changes would impact FirstEnergy's product definition, PUCO said.

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## **ESCOs Seek Rehearing of Applicability of UBP Order to Large C&Is**

ESCOs filed for rehearing of the New York PSC's Uniform Business Practices order which, among other things, applies new marketing and disclosure to rules to all customers, even large C&Is, and permits the PSC to release customers from contracts without penalty for an ESCO's failure to follow any aspect of the UBPs (Matters, 10/28/08).

The Retail Energy Supply Association, in a rehearing request, urged the Commission to limit the new marketing and disclosure standards, including a Schumer Box, to residential customers, arguing that applying the rules to all customers is at odds with the record in the proceeding. The National Energy Marketers Association suggested that the applicability of the Commission's order on natural gas customers using more than 5,000 Dth per year, and electricity customers using more than 500,000 kWh per year, should be postponed for six months to ensure all critical issues and nuances are considered for large commercial and industrial customers.

While the Commission cited the challenge of distinguishing between customer classes as supporting its decision, RESA countered that there is no evidence in the record that indicates ESCOs or utilities experience any material difficulty in distinguishing between residential and commercial customers. Residential customers are, in fact, clearly delineated by specific service classifications, usage levels, and patterns, RESA said.

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## MidAmerican to Seek Market-Based Rates As MISO Market Coordination Customer

MidAmerican Energy Company expects to request market-based rate authority for all transactions in its balancing authority area, whether in the Midwest ISO markets or outside these markets, upon becoming a Market Coordination Customer of the Midwest ISO, it told FERC yesterday.

MidAmerican currently lacks authority to make sales at market-based rates in its balancing authority area.

Market Coordination Service is the MISO proposal to extend the benefit of LMP energy sales to transmission owners outside of the MISO footprint without requiring such transmission owners to cede control of their grid to MISO. Several stakeholders have raised concerns about the proposal, fearing it will prompt members to leave MISO to avoid various cost burdens of full membership (Matters, 11/13/08, 6/16/08).

MidAmerican, "sees no practical way to become a Market Coordination Customer or to transact at locational marginal prices in its balancing authority area without, at a minimum, receiving market-based rate authority for transactions in the Midwest ISO day-ahead and real-time markets," MidAmerican said.

During a recent technical conference, FERC Staff asked how MidAmerican plans to support its request for market-based rate authority, and whether conditions, "would have changed the basis on which we made our prior determination of market-based rate authority."

MidAmerican responded yesterday by stating it expects to submit an Order No. 697-compliant market power analysis using the Midwest ISO market footprint as the relevant geographic market. MidAmerican's participation as a Market Coordination Customer is the primary change in conditions that MidAmerican will use to support its request.

MidAmerican also said that it would find no value in Market Coordination Service over transmission-owning membership in the Midwest ISO if several conditions were placed on Market Coordination Service, such as those suggested by ITC Transmission.

ITC had suggested that Market Coordination Customers should be subject to the same tariff requirements as MISO transmission customers to pay for regional expansion facilities, and should have to integrate their planning process within the MISO process.

## FERC Directs PJM to Address Illinois Concerns on LDAs

FERC said it was premature to address a statement from PJM in which PJM said that it will not be feasible to complete a review of the methodology for determining Locational Delivery Areas (LDAs) under the Reliability Pricing Model (RPM) in time for Commission approval of any changes prior to the May 2009 RPM auction (EL05-148).

In a September order dismissing the complaint from RPM Buyers (Matters, 9/22/08), FERC directed PJM to study several aspects of RPM, including the methodology for determining the LDAs and the specific reliability requirements, i.e., (1) loss of load expectation (LOLE) criteria; (2) the basis for defining LDAs electrically rather than on a service area basis; and (3) rules pertaining to incremental auctions and the need to address changes in LDA import capability.

PJM said last month that any LDA review could not be completed before the May 2009 auction, as many months of analysis are needed to evaluate changes to the installed reserve margin and the LDA reliability requirements (Matters, 10/22/08).

FERC said it is premature to rule on PJM's statement now, and that the Commission will address the LDA issue among all the aspects of RPM design that the Commission required PJM to address in an upcoming December 15 filing.

The Commission further directed PJM to address in the December filing the Illinois Commerce Commission's LDA concerns and potential solutions. The ICC had voiced its concern that PJM is seeking to defer the important task of properly defining LDAs solely based on difficulties associated with studying transmission constraints, and is ignoring the important economic aspects of LDA definition which do not need to be deferred.

The Illinois Commission noted that if certain LDAs had been determined to be constrained,

as suggested by the market monitor, ComEd zone customers would be paying \$200 million less for the 2011/2012 delivery year.

Should PJM be unable to update the LDAs for the 2009 auction, the ICC urged that PJM should eliminate the Capacity Emergency Transfer Limit (CETL) / Capacity Emergency Transfer Objective (CETO) pre-auction ratio test screen as an interim mitigation measure. Both the Brattle Group and the market monitor have said that the test does not provide an adequate measure of LDA separation, the ICC observed. "Permitting the base residual auction to be conducted without a remedy for that defect will result in load in non-constrained areas being assessed unjust and unreasonable charges for capacity," the ICC argued.

Areas determined as constrained in prior base residual auctions should be modeled as constrained in the 2012/2013 auction, the ICC added, including the South Western Mid-Atlantic Area Council (SWMAAC), MAAC, and Eastern MAAC load areas.

## **IOUs Seek Hearing on Community Choice Aggregation Bonding, Exit Fees**

Southern California Edison and Pacific Gas and Electric have asked for evidentiary hearings for Phase 3 of the California PUC's community choice aggregation (CCA) rulemaking, due to material disputes of facts concerning bonding requirements, exit fees, and return to utility service provisions (R. 03-10-003, Matters, 11/13/08).

The utilities do not believe additional workshops will be effective in resolving the issues. Among the issues in dispute are:

- The risks to bundled utility customers from the involuntary return of CCA customers to utility service;
- Whether Cost Responsibility Surcharge (CRS) payments from departing CCA customers provide any hedge or "offset" against the risks associated with an involuntary return of CCA customers to utility service;
- The degree to which CCAs may be more or less prone to sudden cessation of operations compared to competitive retailers, because CCAs are formed but not financially backed by governmental entities, and

- Whether mechanisms other than a bond, letter of credit or other bankruptcy-remote financial protection mechanism are sufficient to protect against cost shifting to bundled service customers.

## **Briefly:**

### **Glacial Receives Maine Electric License**

The Maine PUC granted Glacial Energy of New England a competitive electricity provider license to serve non-residential customers at Central Maine Power, Bangor Hydro-Electric and Maine Public Service. Glacial intends to offer an indexed product in Maine, and said it is currently in the process of obtaining an Ontario license and will soon file for licenses in California and Michigan. Glacial contracts with Energy Services Group for EDI and WeatherBank for certain forecasting needs.

### **ICC Sets Status Hearing on Ameren POR Plan**

The Illinois Commerce Commission set a status hearing on Ameren's utility consolidated billing and POR filing for December 9.

### **PUCO Conditionally Accepts Duke AAC Adjustment**

PUCO conditionally approved Duke Energy's proposal to update Rider AAC (Annually Adjusted Component), resulting in a revenue requirement of \$136 million (Matters, 11/11/08). Rider AAC is bypassable, and reflects environmental compliance, Homeland Security and tax charges. Approval is subject to the Commission's acceptance, without significant modification, of a Stipulation in Duke's Electric Security Plan docket which addresses the Ohio Consumers' Counsel's concerns about the AAC modification.

### **Maine PUC Denies Dismissal of Maine Power Connection Review**

The Maine PUC denied motions to dismiss the CPCN proceeding for the Maine Power Connection, which would link the isolated Maine Public Service territory with ISO New England (Matters, 8/12/08). Industrials and cooperatives had moved for dismissal since ISO-NE has not yet ruled on whether the costs of the line will be socialized. However, given the ongoing ISO-NE process to determine cost treatment, the PUC

noted it will waive the standard 180-day CPCN timeline to allow stakeholders to present and respond to new information as it develops.

### **CenterPoint Says AMS Settlement Anticipated By December 9th**

Parties in CenterPoint Energy's advanced metering system docket are working diligently toward settlement, and expect to file a unanimous settlement on or about December 9, if talks progress as anticipated, parties said in a status report. Parties would target approval of the settlement at the December 18 PUCT open meeting, if the settlement is filed as anticipated. Settlement talks have been extended because CenterPoint, at the request of stakeholders, amended the deployment plan to include complete deployment to 2.4 million customers, rather than 250,000 as originally proposed in May (Matters, 9/19/08).

### **Occidental to Pay LaaR Fine**

Occidental Power Services would pay a \$212,000 fine for Load acting as Resource (LaaR) violations under a settlement with PUCT Staff. On December 12, 2007, Occidental Power Services failed to meet the requirement to deploy 95% of its 391 MW of scheduled LaaRs within 10 minutes of ERCOT instruction. The settlement is subject to Commission approval.

### ***FirstEnergy MRO ... from 1***

"Testimony at the hearing indicates that a procurement process where the Companies obtain blocks of wholesale power, rather than full requirements service, may result in a significantly reduced cost of wholesale generation, including consideration of the fact that the Companies would need to be compensated for absorbing the quantity risk," PUCO observed.

PUCO ruled that FirstEnergy's plan does not meet the statutory requirement for oversight by an independent third party. FirstEnergy had proposed using the Brattle Group as the independent third party to administer its competitive bidding process (CBP); however, industrials questioned the independent status of Brattle, since Brattle has been retained by FirstEnergy affiliates for expert testimony in Ohio and Pennsylvania regulatory proceedings.

"It is not sufficient that the CBP manager simply be a third party as FirstEnergy claims; the CBP manager must be 'independent' as well," the Commission found.

"Although the Commission does not intend to impugn the integrity or reputation of the CBP manager retained by FirstEnergy, the Commission finds that the CBP manager retained by FirstEnergy has an appearance of a conflict of interest in this case," PUCO said, noting Brattle was selected at the sole discretion of FirstEnergy in a closed process.

PUCO rejected FirstEnergy's proposed nonbypassable Rider CRT, which would have collected certain generation costs from shopping customers. Specifically, Rider CRT would have included competitive procurement expenses not covered by the tranche fees; actual uncollectible expense amounts related to the provision of default generation service; and delta revenues for special contracts and unique arrangements. Recovery of any delta revenues from unique arrangements or economic development contracts should be in a separate rider, PUCO said. The remaining components are all generation related and thus should be avoidable, PUCO added.

PUCO further ruled that because the precise duties of the Midwest ISO market monitor are in flux (due to a recent FERC order, see Matters, 10/17/08), FirstEnergy's application failed to demonstrate that the RTO market monitor has the ability to take actions to identify and mitigate market power or the Companies' conduct, as required by statute.

The Commission also determined that FirstEnergy has not shown pricing information is available from a single source which represents actual transactions for both peak and off-peak power, and that such pricing information includes specific information regarding the quantities of electricity traded in such transactions for the period specified in the statute. FirstEnergy had argued data from ICE, NYMEX and other sources met the pricing information requirement.

FirstEnergy has not adequately addressed questions regarding corporate separation in its application, PUCO said. FirstEnergy's MRO also did not address time-differentiated and dynamic retail pricing, nor did it show that time-of-day rates or interruptible rates are impractical.

## ***N.Y. UBPs ... from 1***

Furthermore, the Public Service Law, Commission regulations, the UBPs and State consumer laws all differentiate marketing and consumer protection standards on the basis of customer class, RESA pointed out. One example is the Home Energy Fair Practices Act, which is only applicable to residential customers. Additionally, Commission regulations dealing with the provision of gas, electric and steam service impose alternate regulatory obligations and consumer rights depending upon the type of customer class, and the rescission period for ESCO contracts is only afforded to residential customers, RESA noted.

Moreover, the Legislature has specifically established that the statutory requirements and restrictions codified in the Door-To-Door marketing statute are limited to the sale of "consumer goods or services" which are defined as goods or services acquired "primarily for personal, family or household purposes," RESA observed, showing that lawmakers intend consumer regulation to be tailored to particular customer classes. In making the cited provisions applicable to only certain customers, policymakers recognize that, "it is not necessary to burden commercial customers with all the regulations made applicable to residential customers," RESA argued, and the Commission should follow such guidance in the UBP marketing standards.

RESA contended that the record contained no persuasive evidence that commercial customers are unable to assimilate and understand information regarding the purchase of natural gas or electricity from an ESCO. "Just as they are able to acquire various resources and assets to manage the many aspects of the business operation for which they do not have detailed knowledge (e.g., commercial real estate property, equipment, inventory, etc.), commercial customers can apply the same skills and capabilities to the purchase of energy commodity service," RESA said.

Commercial customers will still be amply protected even without new marketing standards, RESA noted. ESCOs will still be subject to disciplinary actions for failing to honor sales agreements or for violations of other UBP provisions (such as slamming). ESCOs'

marketing activities are also subject to numerous state laws governing fraudulent and misleading behavior.

The Commission should not apply its contract release provision to commercial customers, RESA said, because such customers, "are attuned to the art of commercial negotiations and are fully aware of the consequences associated with executing a binding agreement."

"More to the point, such customers will leave no stone unturned in the event they want to unwind a binding contract after market conditions change and more favorable terms become available," if they know they can petition the PSC for a contract release without termination fee, RESA cautioned.

Logistically, contracts for larger customers are lengthier and more complex -- the products of long and intense negotiations and bargaining. Inclusion of sophisticated and nuanced customized terms in the Customer Disclosure Statement would not work, as all the required information would not fit on a single page, RESA noted.

RESA wants the in-person marketing standards, which require an ID badge and several statements regarding the nature of competitive supply, to apply only to door-to-door marketing, and not sales calls requested by customers.

The effective date for the new sales agreements and ID badge requirements should be at least 90 days after completion of the Staff review of ESCO compliance filings, RESA said. NEM suggested a "safe harbor" period if the Commission does not extend the effective date to at least 60 days after the date of any ruling on rehearing.

Since customers may now contact only their utility to stop ESCO service, NEM asked that utilities be required to advise customers to contact their ESCO to determine any contractual requirements with the ESCO.