Energy Choice Matters

January 16, 2009

PUCT Asks Lawmakers to Consider Granting Authority for Commission to Order Restitution

Consistent with a discussion at a December open meeting (Matters, 12/19/08), the PUCT recommended that the state Legislature should consider authorizing the Commission to order violators to make restitution or pay restoration damages for economic injuries incurred by their violation of statutes or Commission rules, in addition to any administrative penalty that may be assessed. The Commission made the suggestion in its final scope of electric competition report (filed yesterday in docket 35631).

The Commission said it has the authority to issue administrative penalties for violations of statute or Commission rules. It also has the authority to adjudicate consumer complaints relating to basic customer protections, which includes the authority to require a utility or REP to make a customer whole for fraudulent or misleading practices or charging a rate that is different from the rate in a Commission-approved tariff.

The Commission has concluded, however, that it does not have broad authority to require restitution for injuries to participants in the wholesale electricity market. The ability of a party that has been injured by the conduct of another participant in the wholesale market to obtain effective relief has been confounded by a decision from a federal court that limits the ability of a market participant to obtain redress under the anti-trust laws. The basis for this decision was the court's view that the Commission was the appropriate venue for redressing economic injuries incurred through participation in the wholesale market.

As to the POLR process, the PUCT updated lawmakers on its ongoing rulemaking. One concept

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FERC Issues $12 Million in Fines, Disgorgement Relating to "Fraudulent" Open Season Bidding

FERC yesterday approved four stipulation and consent agreements, representing more than $8 million in civil penalties and approximately $4 million in disgorgement, and issued two orders to show cause resulting from an 18-month investigation into allegedly fraudulent conduct in open season bidding for natural gas transportation capacity on the Cheyenne Plains Natural Gas Company pipeline. The civil penalties in this case reflect that bidding conduct occurred on a single day and was not continuing in nature, FERC said.

The settlements resolve investigations by FERC's Office of Enforcement (OE) into whether bidding by Tenaska Marketing Ventures LLC and its affiliates; ONEOK Energy Services Company and its affiliates; Klabzuba Oil & Gas FLP; and Jefferson Energy Trading Company LLC (Jetco), Wizco, Inc. and Golden Stone Resources LLC; in Cheyenne's March 2007 open season violated FERC's anti-manipulation regulation, 18 C.F.R. § 1c.1. The Tenaska settlement also resolves bidding by Tenaska on two other pipelines, Colorado Interstate Gas Company (CIG), and Northern Natural Gas Company.

Separately, in two orders to show cause, FERC directed Seminole Energy Services and four of its affiliates, and National Fuel Marketing Company LLC and three of its affiliates, to show why they should not be found to have perpetrated a fraud in violation of 18 C.F.R. § 1c.1 (2008) in connection with their bidding for, and use of, interstate natural gas transportation capacity on Cheyenne, and why they should not pay a civil penalty and be subject to disgorgement of unjust profits.

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Pa. PUC Adopts Rules for EDC Efficiency Plans, Addresses Duquesne Issue

The Pennsylvania PUC yesterday established an energy efficiency and conservation program which sets requirements for most of the state's electric distribution companies (EDCs) to reduce energy demand and consumption within their service territories.

The PUC's order sets the standards that each EDC's energy efficiency and conservation plan must meet, and provides guidance on the procedures to be followed for submittal, review and approval of all aspects of the EDC plans. Plans must be filed with the Commission by July 1, 2009, and EDCs must make use of at least one independent conservation service provider to implement their plans.

In approving a motion made by Commissioner Kim Pizzingrilli, the PUC ruled that for Duquesne Light Company, the cost cap under the efficiency mandate will define electric distribution company total annual revenue as including generation revenues collected by an EDC for a competitive supplier that uses consolidated billing. Act 129 limits program budgets to 2% of the total annual EDC revenues as of December 31, 2006, but Duquesne noted that such a cost limitation could be interpreted in a manner that makes compliance very difficult for it, due to the high level of retail choice sales in its territory. Approximately half of Duquesne's retail customer load was receiving generation supply service from an electric generation supplier (EGS) at the end of 2006, including about 50% of its commercial and 85% of its industrial customers. Duquesne would have been limited to a substantially smaller program budget than the other EDCs if it had to exclude all generation revenues collected by EGSs. Furthermore, if Duquesne does not meet its Act 129 targets, it would be subject to mandatory financial penalties that it cannot recover in rates.

Pizzingrilli argued that the General Assembly intended the Act to be competitively neutral, and not disadvantage EDCs that have active retail electric markets. Thus, by counting revenue received by Duquesne via consolidated bills for competitive supply, Duquesne's program budget will be closer to a level of parity with the other companies, ensuring that Duquesne has a more meaningful opportunity to comply with the provisions of Act 129, Pizzingrilli said.

Under Act 129, the EDCs must reduce electricity consumption by 1 percent by May 31, 2011, and by 3 percent by May 31, 2013. The Act also requires a 4.5 percent reduction in peak demand by May 31, 2013.

As required under the Act, the Commission established:

- Consumption forecast guidelines;
- Requirements for filing peak demand data;
- Standards to ensure measures are applied equitably to all customer classes;
- EDC cost recovery guidelines; and
- Guidelines for determining allowable costs and allocation of costs to customer classes.

The Commission also established processes for:

- Conservation service provider contract review;
- Energy efficiency and conservation plan approval;
- Plan effectiveness evaluation;
- Cost-benefit analysis approval;
- Consumption reduction requirement analysis;
- Measurement of annual consumption and peak demand reductions;
- Recommendations for additional measures;
- Competitive bidding and approval of contracts with conservation service providers;
- Compliance with consumption reduction requirements; and
- Participation of conservation service providers.

Briefly:

McCall Leaving Luminant

Luminant disclosed yesterday that COO Michael McCall gave notice that he would resign effective January 31, 2009, to pursue other personal and professional opportunities. As part of a severance agreement, McCall will be paid approximately $2.1 million, largely representing the payment of his 2008 annual incentive bonus and a previously granted retention bonus award.

FCM Settlement to Include Just and Reasonable Standard for Third-Party Review

FERC directed parties to the ISO New England Forward Capacity Market settlement to refile the settlement such that the standard of review applicable to non-settling third parties is the "just and reasonable" standard. The order was on remand from the U.S. Court of Appeals for the D.C. Circuit, which found FERC could not authorize the original settlement's use of the "highly-deferential public interest" standard of review for future rate challenges brought by non-settling parties.

CAISO Sets Solar Forecasting Workshop

The California ISO has scheduled a solar symposium for January 29 to bring together solar companies and forecasters with CAISO staff. CAISO said the intent of the workshop is to ensure solar technologies are on equal footing with other renewable resources already participating in the ISO's wholesale electricity markets, and said solar power could benefit from accurate and timely high-tech forecasting and communication tools as well as industry collaboration, similar to the existing Participating Intermittent Resource Program.

FERC Denies NRG Complaint over Entergy Bonuses

FERC denied a complaint from NRG Energy against Entergy Services regarding the inclusion of bonus compensation in Entergy Services' formula rate for transmission service under its open access transmission tariff (Matters, 6/30/08). The Commission concluded that based on the information provided, and without prejudice to NRG submitting a new complaint on the issues, NRG had not met its burden of demonstrating that Entergy's existing rate formula is no longer just and reasonable. NRG had alleged the bonuses are paid to employees based on the financial performance of the company, including specifically the performance of unregulated generation units, and thus have no relation to the quality of the transmission service provided by Entergy.

MPS Reports Review of Maine Power Connection Alternatives

Maine Public Service yesterday put out a press release stating it and Central Maine Power are exploring alternatives to the Maine Power Connection, which would link the isolated Northern Maine market with NEPOOL. MPS and CMP first disclosed their intentions last month, covered in our earlier story (Matters, 1/1/09). CMP and MPS will consider alternatives, such as revising the size of the project (either making it smaller, or possibly larger and expanding the line into Canada), pursuing a participant funding approach, and identifying an approach that avoids having MPS join ISO-NE. Industrials and cooperatives have petitioned the PUC to dismiss the case given the project no longer serves a purpose, citing Aroostook Wind Energy's withdrawal of interest in funding.

Scope Report ... *from 1*

being debated is creating an "insurance pool" for mass transitions which would be used to either mitigate POLR rates, waive (or extend the time) for POLR customer deposits, and allow recovery of POLR-related bad debt by REPs. The Commission said, "It is not clear whether the Commission has the authority to adopt and require the funding of such a risk pool arrangement," and suggested lawmakers may want to consider permitting POLR service to be partially funded from a source other than POLR REPs.

The Commission also told lawmakers that, if they wish to encourage distributed renewable generation, several remaining statutory barriers must be eliminated, such as statutorily permitting third-party ownership of distributed renewable generation systems, and amending requirements which currently hold that distributed generation owners must officially register as power generators.

Furthermore, if Legislature intends to provide additional opportunities for distributed renewable generation, it may want to establish that the customer's REP has an obligation to buy excess energy from the owner of the distributed renewable generation facility and establish a pricing principle for these sales, such as the REP's avoided cost (the cost to the REP of acquiring energy from its customers from another source). Currently, the REP has no obligation to buy excess energy, and rates are struck via negotiation.

Turning to ERCOT, the PUCT recommended that lawmakers give the Commission authority over ERCOT's issuance of debt. While the Commission approves the fees that permit

ERCOT to recover its costs of operating, current law does not require the Commission's approval for ERCOT to incur debt. Without this authority, it is possible that ERCOT could incur additional debt that might require a higher fee, in order to pay the principal and interest on the debt as they come due, the PUCT said.

The PUCT also requested that the Legislature make the two non-Chair members of the PUCT non-voting members of the ERCOT board. Currently only the Chair of the PUCT is granted this status. The status would allow the other two commissioners to attend executive board sessions.

The Commission also suggested that lawmakers consider allowing the PUCT to issue informal guidance to the persons that it regulates, particularly with respect to outlining whether a particular course of conduct would, in the agency's view, be consistent with the laws and regulations that the agency administers. Several similar agencies are empowered to make such advisory opinions. In the electricity business, providing clarification to a company concerning issues such as the purchase of assets or the acquisition of another company could provide valuable advice and permit it to avoid expensive regulatory proceedings, without impairing the Commission's authority.

The PUCT noted that customer education funding has dwindled to $750,000 annually from the original $12 million, yet the needs for education have expanded from basic shopping awareness to include energy conservation and efficiency, renewable energy and advanced metering. Thus, the Commission requested increased funding, as it will need "significantly" more funding to create and disseminate information for the public on these topics.

The final report also maintained draft recommendations calling for authority to order advanced meter deployment, and authority to keep enforcement investigation data confidential to protect the investigation.

Open Seasons ... *from 1*

FERC said its Enforcement Hotline received calls from other Cheyenne open season market participants, who claimed some marketers submitted bids on behalf of multiple affiliates in order to "game" the pro rata allocation method used by Cheyenne to allocate the capacity among multiple bidders in order to increase their share of the capacity at the expense of those not engaging in such alleged "gaming." OE commenced an investigation of the Cheyenne open season and similar open seasons held on CIG and Northern Natural.

FERC's investigation found that five different groups of entities accounted for 27 of the 47 winning bids, and obtained 57 percent of capacity. Put another way, 20 percent of the bidders secured more than 50 percent of the capacity awarded by means of their multiple bidding. Based on all of the facts and circumstances of each case, FERC's Enforcement Office maintains that these entities violated 18 C.F.R. § 1c.1 in connection with their submission of multiple bids with the intent to defeat the pro rata allocation method relied upon by Cheyenne to ensure fair allocation of scarce and valuable capacity.

However, Commissioner Philip Moeller, in dissenting from the orders, said the findings violate the "principle of fundamental fairness" that requires FERC to inform those subject to its regulation, in advance, of what they must do to avoid penalties. "This Commission should not impose penalties in the range of millions of dollars for conduct that reasonably may be viewed as consistent with Commission policy," Moeller said.

Moeller noted that the Commission has had a longstanding policy on whether interstate pipelines should allow affiliated companies to bid during certain open seasons. This policy provides that during those open seasons, affiliates may bid on pipeline capacity. This policy has controlled the process for seventeen years. In 1991 FERC stated, "[W]e do not read [the open season bidding] procedures as prohibiting [the pipeline] from accepting separate bids from a parent shipper and its affiliates, as long as each affiliate (which is a separate entity under law) submits one bid," Moeller said.

While Moeller agreed that the policy needs to be changed, he noted that FERC's staff reports found that the 1991 precedent on affiliate bidding is consistent with a Commission requirement that staff could decide after-the-fact which bids were "legitimate." The staff then reasoned that an affiliate bid is legitimate if the affiliate needed the capacity to serve wholesale customers or retail customers of the affiliate, or if the affiliate needed the capacity to transport gas owned by the affiliate.

"This presumably means that taking on the risk of financial loss by bidding on capacity in an effort to make a profit is not legitimate. Perhaps this means that a bidder cannot release capacity once received, as any such release would violate the requirement that the capacity be used for gas owned by the affiliate or to serve customers of the affiliate. And if every affiliate in a group of affiliates needs to submit legitimate bids, then all bidders must submit legitimate bids, even if their bid was not submitted with a group of affiliates," Moeller said,

"While I could support staff's interpretation for 'legitimate' bids (after that definition was appropriately clarified and explained), staff's interpretation was not disclosed to the bidders on the Cheyenne open season until after they learned that staff sought millions of dollars in penalties from them," Moeller observed.

Moeller further noted that FERC declined to address the issue of legitimate bidding after Trailblazer Pipeline open seasons in 2002, even though the Commission was faced with the very issue. When Trailblazer Pipeline argued that it would, "have no basis for distinguishing between legitimate and illegitimate bids by affiliated entities," the Commission did not provide any definition for "legitimate", nor did it explain that staff was authorized to define "legitimate" bids after-the-fact. For that reason, bidders were not aware that the Commission would hold that bids were not legitimate when a bidder risked financial loss by bidding on capacity in an effort to make a profit, Moeller said.

As part of its investigation of Trailblazer's open season process, staff asked Trailblazer to notify the industry that bidders could "game" auctions by using affiliate bids. "Yet notification by a pipeline is not equivalent to a Commission order - and the notice did not prohibit the practice of affiliate bidding," Moeller noted.

The settlements approved as are follows:

Tenaska:
Civil Penalty: $3,000,000
Disgorgement: $1,972,842

ONEOK:
Civil Penalty: $4,500,000
Disgorgement: $1,914,495, plus interest

Klabzuba:
Civil Penalty: $300,000

Jetco, Wizco, and Golden Stone:
Civil Penalty: $585,000

Show Cause Orders

In the first show cause order, FERC directed Seminole Energy Services LLC and its affiliates Seminole Gas Company LLC, Seminole High Plains LLC, Lakeshore Energy Services LLC and Vanguard Energy Services LLC to show why they should not be found to have: (1) violated 18 C.F.R. § 1c.1; and (2) engaged in prohibited buy-sell transactions to consolidate the capacity they acquired in Seminole Energy Services. The order also requires the Seminole entities to show why they should not be assessed civil penalties of $4.25 million and disgorge $452,194, plus interest, in unjust profits, as well as any payment received from entities settling FERC's OE investigation of bidding on Cheyenne in March 2007.

In the case of National Fuel Marketing Company LLC and its affiliates NFM Midstream LLC, NFM Texas Pipeline LLC and NFM Texas Gathering LLC, FERC directed them to show why they should not be found to have: (1) violated 18 C.F.R. § 1c.1; and (2) engaged in transactions that violate the Commission's "shipper-must-have-title" requirement. The order also requires the NFM entities to show why they should not be assessed $4.5 million in civil penalties and be required to disgorge any payment received from entities settling FERC's OE investigation of bidding on Cheyenne in March 2007.