Energy Choice Matters

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Draft Illinois Order Holds ABC Law Applicable Despite Open Rulemaking; Would Find Against Lower Electric

The code of conduct provisions under the Illinois ABC law apply to any person or entity acting as an ABC on and after the effective date of the law, irrespective of whether the licensing requirements have been finalized by the Illinois Commerce Commission, a proposed order by an ALJ would find in BlueStar Energy Services' complaint against Lower Electric (Matters, 12/2/08).

Accordingly, the ALJ's draft would find that Lower Electric violated the ABC law, and would impose a one month suspension of Lower's ABC license immediately upon receipt, should Lower ever apply for a license.

Among other things, the ABC law requires agents, brokers and consultants required to be licensed under the Act to disclose anticipated remuneration from their activity to customers, in writing. The ICC had previously affirmed that the law took effect on October 11, 2007. BlueStar filed a complaint against Lower alleging that Lower failed to disclose remuneration during a customer solicitation.

Lower argued, however, that the remuneration disclosure could not be required of ABCs until the ICC established a licensing process. The ALJ rejected that argument, stating that the law required ABCs to constrain their behavior immediately, and to obtain a license when a process was developed. "It is unreasonable to conclude that the General Assembly found certain acts and omissions [to be] inimical to the public interest, yet contemplated their indefinite continuance [until a licensing order is issued]," the ALJ said.

Lower had further argued that until the licensing regulations were set by the ICC, it was uncertain whether Lower would fit the definition of an ABC, and be subject to the ABC law. However, the ALJ concluded that the "requirements for licensure" that the Commission must establish under

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Dominion Peoples Settlement Would Re-open Door for Possible POR Program

A settlement among several parties in Dominion Peoples 1307(f) proceeding to reconcile purchased gas cost rates in Pennsylvania could re-open the door for Dominion Peoples to elect to introduce a Purchase of Receivables program. The stipulation was signed by Dominion Peoples, the PUC Office of Trial Staff, Office of Consumer Advocate, Office of Small Business Advocate, and the Retail Energy Supply Association.

The PUC's Stakeholders Exploring Avenues for Removing Competition Hurdles (SEARCH) initiative required LDCs to either file a voluntary POR program by March 31, 2009, or include updated cost of service data in their next 1307(f) or base rate proceeding to permit the unbundling of costs related to gas procurement and supply.

Dominion Peoples elected not to implement a POR program, and filed cost of service data in the instant 1307(f) review. However, some stakeholders questioned whether the data filed in the case was sufficient to achieve the goals under the Commission's SEARCH order.

Under the settlement, Dominion Peoples supplemented its cost of service data to include current

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PUCO Maintains Nonbypassable Rate Stabilization Charge in Dayton Electric Security Plan

The Public Utilities Commission of Ohio approved a stipulation among most parties to institute an electric security plan at Dayton Power & Light, which will see the continuation of the current nonbypassable Rate Stabilization Charge through December 31, 2012, except for certain governmental aggregation customers (Matters 2/25/09).

The Commission held that, as a package, the settlement benefits ratepayers and the public interest and should be adopted without modification. Under such a finding, the Commission dismissed the only protest of the settlement by Cargill Incorporated, which had argued that all shopping customers should be able to avoid the Rate Stabilization Charge under the same conditions as aggregation customers (Only in Matters, 3/27/09).

Under the stipulation, the current Rate Stabilization Charge will continue as a nonbypassable charge though 2012, to compensate DP&L for providing stable rates and acting as the POLR. Since customers will be paying the unavoidable charge, customers leaving DP&L for competitive supply and returning to DP&L will be allowed to return at the Standard Service Offer price.

The settlement, however, does provide for one exception under which the Rate Stabilization Charge will be bypassable. For 2011 and 2012 only, if customers in a governmental aggregation agree to return to DP&L at market rates, rather than the Standard Service Offer, they may avoid the Rate Stabilization Charge.

Cargill argued that since the Rate Stabilization Charge acts as a POLR charge, it should be bypassable for any shopping customer who agrees that any return to bundled service would be priced at market rates. Cargill noted that PUCO made POLR charges bypassable when ruling on the AEP Companies' electric security plan.

However, PUCO rejected Cargill's argument, noting that in the AEP case, its ruling was the result of full litigation, not a settlement. With the stipulation filed for DP&L's electric security plan, PUCO said it must determine whether the settlement, as a package, benefits ratepayers and the public interest. The Commission's holding in the AEP case addressed a single provision in a case which was not stipulated and is not binding upon the Commission with respect to DP&L, PUCO said.

In that vein, the Commission declined to adopt Cargill's recommendation, finding that stipulating parties reached an appropriate compromise under which all parties receive substantial benefits pursuant to the stipulation, but no party receives everything it may have sought in litigation.

Cargill had said DP&L will receive over $150 million in revenues by collecting the rate stabilization rider during 2011 and 2012.

Under the unopposed parts of the settlement, DP&L will implement a bypassable fuel recovery rider to recover retail fuel and purchased power costs, based on least cost fuel and purchased power being allocated to retail customers. The rider will initially be established at 1.97¢ per kWh, an amount which will be subtracted from DP&L's residual generation rates.

DP&L will make a filing by November 2009 at PUCO to establish a revised fuel rider to become effective January 1, 2010. Thereafter, the utility will file quarterly adjustments for recovery of the cost of fuel and purchased power. DP&L will also withdraw its request for the deferral of fuel costs for 2009-2010 under the stipulation.

The stipulation includes a bypassable rider for alternative energy resource compliance, and nonbypassable economic development and energy efficiency riders (though qualified mercantile customers may opt out of the efficiency charge).

DP&L will meet with competitive suppliers at least annually to discuss customer choice issues and related tariff provisions. DP&L will post a supplier hotline telephone number on its website and designate an individual to serve as the primary contact for competitive suppliers in resolving operational and other issues.

Under the settlement, DP&L will withdraw its application in the electric security plan case to provide behind-the-meter services, but may file a separate application for such services.

DP&L may also apply for separate riders to

recover costs of new environmental legislation (such as carbon), transmission cost recovery rider (TCRR) costs, and RTO costs not included in the TCRR.

Gexa Says Ohio Utilities May Not Indirectly Charge Aggregation Customers a Switching Fee

New Ohio retail market rules which will take effect before Gexa Energy enrolls customers in the Northeast Ohio Public Energy Council aggregation "clearly" prohibit the imposition of a switching fee, Gexa said in countering the latest argument from Ohio Edison and Cleveland Electric Illuminating (Matters, 6/17/09).

What originally started as a complaint due to the timing of new retail rules has evolved into the interpretation of the new rules, with larger, market-wide implications. As only reported in *Matters*, NOPEC originally filed a complaint because customer enrollments with new aggregation supplier Gexa were likely to occur before the new rules took effect, with the FirstEnergy utilities intending to impose the current $5 per customer switching fee on Gexa as provided under the tariff (for a total of $2.5 million). The FirstEnergy companies argued that as the new rules prohibiting a switching fee for aggregation customers were not yet in effect, they had to follow their tariff.

However, the FirstEnergy utilities subsequently argued in a supplemental filing that, even when the new rules take effect, the new rules will not prevent them from charging an aggregation supplier a switching fee. The FirstEnergy companies noted that the relevant language prohibits the imposition of a switching fee on, "customer accounts that switch to or from a governmental aggregator." Such language, the distribution companies argued, prevents them from charging a customer the switching fee, but does not impact their ability to charge the supplier a switching fee as provided in their tariff.

However, Gexa contended that, "FirstEnergy cannot do indirectly what it is forbidden to do directly, by charging a Certified Supplier the fee to pass on to customers."

Gexa noted that the intent of the rule prohibiting the switching fee on customers is to promote large-scale governmental aggregation as a means to achieving the state's policy of, "ensur[ing] a diversity of electricity supplies and suppliers, and customer choice."

Gexa reported that the new rule prohibiting switching fees on governmental aggregations will take effect June 26, before any enrollments with Gexa occur. Enrollments will thus be governed by the new rule.

While the FirstEnergy companies said an earlier commitment to incorporate the new rule into their electric security plan (ESP) is no longer valid, as the security plan was amended, Gexa argued that the amended security plan is, "replete with references to the applicability of the initial ESP application, clearly making the initial application's provisions effective unless they conflict with the amended application."

While the amended security plan requested waivers of any Commission rules "in effect" that were inconsistent with the plan, such waivers cannot apply to the new rule prohibiting aggregation switching fees, Gexa said, since the new rule was not in effect when the waivers were granted.

Separately, NOPEC asked for several waivers regarding rules for governmental aggregation opt-out notices, due to the timing of the aggregation's start, driven by the FirstEnergy companies' auction for standard service supplies.

NOPEC wishes to begin service in July. However, O.A.C. 4901:1-21-17(F) requires NOPEC to docket its final opt-out notice no more than thirty days but no less than ten days prior to sending the opt-out notices to customers. NOPEC is concerned that the ten-day minimum filing requirement, together with the time required to finalize and print the notices, and coupled with a 21-day opt-out period, will prevent the commencement of service to customers by July 2009 as planned. NOPEC said PUCO Staff has already reviewed the notice, and argued that the 10-day minimum period is not required.

Additionally, Commission rules provide that the time period for a customer to choose to opt out of the aggregation shall extend at least twenty-one days from the date of the postmark on the written notice. NOPEC said that it will send opt-out notices via bulk mail, which will not contain a postmark date - an event not

contemplated by the rules. NOPEC requested that the postmark requirement be waived, and that NOPEC be allowed to use a date listed on its opt-out notice to serve as the start of the 21-day opt-out period.

Finally, Commission rules define a governmental aggregation program as lasting at least one year. However, NOPEC's agreement with Gexa only provides pricing through June 2010 (with service from June 2010 through May 2011 subject to future negotiation), and NOPEC will provide customers with the ability to opt out of service beyond June 2010. Thus, if the aggregation does not start in July 2009 as intended, due to timing issues, the initial aggregation through June 2010 will only last 11 months, short of the definition under Commission rules. Accordingly, NOPEC sought a waiver of the 12-month minimum time requirement.

N.Y. PSC Approves Iberdrola Code of Conduct

The New York PSC approved a joint proposal for a code of conduct among the Iberdrola companies which will allow existing agreements among Community Energy, NYSEG, Rochester Gas & Electric and certain NYSEG/RG&E customers to continue in their current form for their remaining terms (07-M-0906, Matters, 12/11/08). An updated code of conduct was ordered as part of the Iberdrola-Energy East acquisition.

Prior to Iberdrola acquiring NYSEG and RG&E, its Community Energy subsidiary had entered into agreements to market RECs to NYSEG and RG&E customers. Such agreements are scheduled to expire December 31, 2009, except for customer-specific agreements with two customers with expiration dates no later than June 30, 2010.

The joint proposal is supported by the Energy East utilities, PSC Staff, Energetix, NYSEG Solutions and Multiple Intervenors. Reliant Energy and Earth Kind Energy participated in the collaborative process to develop the joint proposal but did not sign it, due to concerns which were not previously raised in the Iberdrola-Energy East merger proceeding. No parry filed comments opposing the proposal.

The joint proposal will not impose any restrictions on an affiliate's use of the same name, trade names, trademarks, service name, service mark or a derivative of a name, of Iberdrola, Energy East, NYSEG or RG&E, or in identifying itself as being affiliated with Energy East or the distribution companies.

If a customer requests from NYSEG/RG&E information about securing any service or product offered within the service territory by an unregulated affiliate, the distribution companies must offer to provide a list of all companies that are qualified and approved pursuant to governmental or utility standards (including retail access standards) as providers of similar products or services. While this list may include Iberdrola and Energy East affiliates, the list must provide information by company in alphabetical order, and in no way may place greater emphasis on or promote any company in which Iberdrola or Energy East has a financial interest.

The distribution companies will be prohibited from providing sales leads involving customers in their service territories to any unregulated affiliate, and will be prohibited from giving any appearance that they represent any unregulated affiliate.

Under the joint proposal, NYSEG and RG&E will not conduct competitive behind-the-meter energy services, although they will be permitted to provide solutions to customer reliability and deliverability issues related to transmission and distribution.

Briefly:

Infinite, Liberty Report Revenues

Two Florida-based and privately held retail suppliers reported 2008 revenues as part of a *Florida Trend* ranking. Infinite Energy posted 2008 revenues of $780 million, up 42% from $548.5 million in 2007. Liberty Power reported 2008 revenues of $303 million, up 57% from $193 million in 2007.

CenterPoint Suspends Disconnections

CenterPoint Energy announced it implemented an extreme weather moratorium on disconnects yesterday, due to the issuance of a heat advisory from the National Weather Service. CenterPoint will not perform disconnects as long

as the heat advisory is in effect, plus the following two business days, per PUCT rules. That means that Monday, June 29 would be the earliest day that CenterPoint would be able to execute new DNP orders from Competitive Retailers, if the Heat Advisory expires and temperatures subside. As first reported by *Matters* yesterday, consumer advocates are seeking a summer disconnect moratorium from the PUCT (Matters, 6/24/09).

Court Backs FERC Authority over ICR

The U.S. Court of Appeals for the District of Columbia affirmed FERC's authority to establish the installed capacity requirement in organized markets, dismissing an appeal from Connecticut load representatives. On a prior remand, FERC said that installed capacity requirements in ISO New England have a significant and direct effect on jurisdictional rates and services, and therefore fall within the Commission's jurisdiction. The Court agreed, finding that since the capacity requirement does not require any entity to install new capacity, FERC's approval of the requirement does not run afoul of the Federal Power Act's provision prohibiting FERC from direct regulation of generation facilities.

Nstar Files to Lower Cost of Gas

Nstar has applied to lower its gas supply rate to 24 cents per therm, down 37 percent from the current price of 38 cents, effective July 1.

NextEra, Mirant Seek Forward Capacity Market Waivers

NextEra Energy Power Marketing sought a waiver at FERC from ISO New England's Forward Capacity Auction deadlines to challenge the ISO's calculation of the Qualified Capacity of NextEra's jointly owned Seabrook Nuclear Generating Station for the third Forward Capacity Auction. NextEra said it had challenged the ISO's calculation in the two prior auctions (to reflect an additional 25 MW of summer and winter capacity from uprates), but inadvertently neglected to do so for the third auction before the deadline, with the error simply, "an oversight of the need to repeatedly challenge ISO-NE's calculation." Separately, Mirant also sought a waiver from FERC to allow its two diesel units on Martha's Vineyard with a combined capacity of 13.75 MW to participate in the Forward Capacity Auction for the 2012-2013 Delivery Year. Due to the complexity of the Forward Capacity Market rules and the re-listing process, Mirant said it inadvertently failed to make an election by February 3 as required by ISO rules.

eMeter Launches Monitoring Program for Customers

eMeter Corporation yesterday unveiled Energy Engage, an online, consumer engagement solution that encourages conservation by enabling users to understand the relationship between energy consumption, cost and carbon output. Pilot participants with Pepco's ongoing PowerCentsDC program will be the first to use the product, which provides accurate daily billing information, real-time event driven alerts to budget variations, and access to local community guidance and advice, including text and email alerts of usage and cost information.

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subsection (d) of the Act do not define an ABC.

"The definition of an ABC is expressly set forth in another subsection of the law (subsection (b)) and is not dependent upon - nor can it be altered by - administrative regulations. An ABC, as defined by the statute itself, is a person or entity that performs certain actions (attempted procurement or sale of retail electricity, for or to a customer). A person or entity that performs those actions is an ABC, whether or not there are licensing regulations and whether or not a license has been obtained once regulations are in place," the ALJ held.

"Accordingly, the Commission concludes that the conduct provisions in subsection (e) of the ABC Law, including the disclosure obligations in subsection (e)(1), applied to any person or entity acting as an ABC on and after the effective date of the law, irrespective of whether the licensing requirements mandated by subsection (d) of the law have been promulgated by the Commission," the ALJ added.

Lower also argued that since it lacked authority to purchase electricity on behalf of a customer, it was not subject to the ABC law.

However, the ALJ found that, "customer

purchasing authorization is not an element in the statutory definition of an ABC in subsection (b) of the statute."

"To the contrary, the text of the law more apparently suggests that an authorization requirement would be contrary to the law's stated intentions. The ABC Law is not merely aimed at purchasing agents. It is aimed at persons and entities engaged in a broader range of electricity procurement activities. For example, by its terms, the ABC Law regulates consultants (the "C" in ABC), a category of persons who render expert advice without (at least necessarily) having purchasing authority. Lower's interpretation of the ABC definition would allow such a person to avoid the safeguards afforded by licensing (including among others, the technical competence requirement of subsection (d)(1)), while depriving customers of the ABC Law's protections against deceptive acts. Even an agent with a customer's authority to solicit bids and screen them (but not make purchasing decisions) would avoid the ABC Law's obligations - thereby frustrating its purposes - if Lower's purchasing authority requirement were read into the law," the ALJ said.

The ALJ added, however, that since the proposed regulations in the licensing rulemaking have yet to come before the Commission, the draft decision will not reach any conclusions regarding the definition of an ABC under those regulations. Rather, the proposed order bases its conclusions on the statutory definition in effect at the time of Lower Electric's actions.

Lower Electric had also contended that it met one of the exemptions from the remuneration disclosure requirement, since it was acting as an exclusive agent of a retail supplier (Strategic Energy) in the offer leading to the complaint. However, Lower, at other times and in other solicitations, represented other suppliers.

The ALJ concluded that the exemption from the remuneration disclosure does not apply to specific transactions -- to qualify for the exemption, an ABC must only represent one supplier in all transactions.

"[W]hen an ABC agrees to act in the marketplace on behalf of more than one ARES [alternative retail electric supplier] or other electricity provider, it is an ABC," and subject to the disclosure requirements, the ALJ said.

Permitting ABCs to avoid the disclosure of remuneration when representing multiple suppliers in the market, but only representing one supplier in a specific solicitation, would allow ABCs to circumvent the intent of the ABC law by allowing them to present offers to customers one at a time - presumably starting with the offer most beneficial to the agent, the ALJ said.

The ALJ further stressed that for any ABCs employing the exclusivity exemption, disclosure to the customer of the exclusive relationship with a supplier (as required under the act) must be explicit. Simply presenting a single offer to customers, with no statement that the ABC is an exclusive agent of a supplier, does not suffice as disclosing exclusivity to the customer, the ALJ said.

The ALJ affirmed that suspension of an ABC license can be prospectively imposed before an ABC applies for or obtains a license. The law contemplates a penalty for ABCs that contravene the statute before licensing rules are in place, as well as unlicensed ABCs that commit such violations after licensing rules are promulgated, the ALJ held.

If Lower in fact acquires an ABC license, the ALJ's draft would impose the minimum suspension of one month upon such licensure. "Although the ABC Law allows for longer suspension for an initial violation (arguably, for any time between one and six months), the Commission is not inclined to impose a more lengthy penalty in our first enforcement proceeding under the ABC Law," the proposed order says,

The ALJ is mindful that Lower, which is also a certified retail supplier, may never apply for an ABC license, thus avoiding license suspension.

"Nonetheless, the Commission is obliged to proceed with enforcement of the ABC Law's conduct requirements against parties 'required to be licensed.' At the least, Lower - and other retail electricity stakeholders who monitor such matters - will have been made aware of our commitment to enforcing the conduct provisions in the ABC Law. It thus becomes more likely that Lower and others will find it necessary to both obtain a license (when available) and adhere to the law's conduct requirements in

order to continue in the retail electricity marketing business. Electricity sellers will be reluctant to be represented in the marketplace by agents that are unlicensed or prone to conduct violations, which can both tarnish the seller's reputation and expose the seller to enforcement action," the ALJ said.

Dominion Peoples. ... from 1

cost estimates for storage inventory balances and cash working capital costs; and current throughput and peak day allocation factors for each sales and transportation rate class;

Additionally, the uncertainty over Dominion Peoples' future ownership was cited as one reason the LDC did not wish to commit to a POR program at this time. Parent Dominion Resources has entered into an agreement to sell the LDC to SteelRiver Infrastructure Fund (formerly a subsidiary of Babcock & Brown), with review of the sale ongoing at the PUC.

The settlement holds that, within 30 days of a PUC order in its sale application, Dominion Peoples will file either a notice of intent to establish a POR program, or a notice of intent to file an updated cost of service study. If Dominion Peoples elects to offer a voluntary POR program, it will file the plan within 90 days of an order in the acquisition proceeding. If Dominion Peoples does not elect to institute a POR program, the updated cost of service study will be filed at the earlier of its next base rate case, or the annual purchased gas cost 1307(f) proceeding scheduled to be filed on or about April 1, 2011.