Energy Choice Matters

July 9, 2009

Reliant Energy Performance Drives Upward Revision to NRG Adjusted EBITDA Outlook

The acquisition of Reliant Energy's ERCOT retail business is the primary driver in a $325 million increase in adjusted EBITDA guidance at NRG Energy, with the 2009 adjusted EBITDA outlook raised to $2.5 billion.

The Reliant retail acquisition accounted for approximately $200 million of the increase, NRG said, and is expected to contribute over $400 million in adjusted EBITDA for the year. Driving Reliant's financial performance in 2009 are lower power supply prices in ERCOT leading to higher energy margins for the retail business. The higher retail outlook was partially offset by recently announced and enacted price reductions of up to 20% for residential customers and other month-to-month plans.

"Reliant Energy's performance is exceeding our initial expectations to the point where we expect Reliant's EBITDA generation for our eight months of ownership in 2009 is greater than the acquisition price paid a couple of months ago," NRG CEO David Crane said.

NRG said that Reliant commercial and industrial sales channels have restarted and are generating profitable growth. Commercial and industrial margins are improving as well.

Reliant has also restarted its mass market sales channels at full force and is managing the mass business to reduce customer attrition.

Reliant's contribution compensates for the $75 million negative impact on adjusted EBITDA guidance for NRG's wholesale business which has experienced lower commodity prices, lower demand caused by current economic conditions particularly in the Northeast and higher property tax expense.

NRG also said yesterday that its board has rejected Exelon's revised tender offer, as the price still substantially undervalues NRG. Still, NRG said that the increased offer was a step in the right direction, though Exelon has said its revised offer is its best and final offer.

ICC Staff: Integrys Energy Services' Managed Product Does Not Meet Disclosure Rules

Illinois Commerce Commission Staff does not believe that Integrys Energy Services' proposed "managed service" electric product to be sold by New Illinois Cooperative Energy meets statutory pricing disclosure requirements, though Staff said the Commission should decline to issue a declaratory order on the matter due to lack of standing.

As only reported by *Matters*, Integrys Energy Services (Integrys) sought a declaratory ruling from the Commission regarding the applicability of Sections 16-115A and 16-115C of the Public Utilities Act, and Section 2EE of the Consumer Fraud and Deceptive Trade Practices Act, to a supply agreement the marketer has with New Illinois Cooperative Energy (NICE). Under the NICE agreement, NICE will offer its members electricity to be supplied by Integrys, with NICE responsible for marketing its product to the public. Integrys will not itself be engaged in the sale of the product to customers (Only in Matters, 3/25/09).

The main issue in the case is that the per kilowatt-hour rate customers will be paying will not be known ahead of time. Integrys' supply costs include a true-up component which is required because

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United Illuminating Reports June Migration Statistics

Electric Supplier Accounts	June '09 Residential	June '09 Business	June '09 Total	June '09 % of Migrated Customers	Change vs. May '09 Total
Clearview Electric, Inc.	100	39	139	0.3%	118
Consolidated Edison Solutions	3,603	1,041	4,644	9.9%	813
Constellation NewEnergy	307	3,107	3,414	7.3%	-18
Direct Energy Business	11	720	731	1.6%	63
Direct Energy Services	8,670	1,374	10,044	21.4%	2,009
Dominion Retail, Inc.	16,205	1,355	17,560	37.4%	35
Gexa Energy Connecticut	3	151	154	0.3%	24
Glacial Energy of New England	21	336	357	0.8%	-6
Hess Corporation		63	63	0.1%	3
Integrys Energy Services	3	1,728	1,731	3.7%	0
Liberty Power Delaware		5	5	0.0%	-19
MX Energy	1,113	761	1,874	4.0%	-110
Public Power & Utility, Inc.	3,911	1,019	4,930	10.5%	686
Sempra Energy Solutions	33	661	694	1.5%	12
Suez Energy Resources NA	1	191	192	0.4%	55
TransCanada	8	455	463	1.0%	0
Energy Plus	2		2	0.0%	2
Total All Suppliers	**33,991**	**13,006**	**46,997**	100.0%	3,667

Aggregate Data

Customer Load - Suppliers and UI (MWh)

	Residential - SS		Business - SS		Business - LRS		Total UI Territory	
	MWh	% of Class	MWh	% of Class	MWh	% of Class	MWh	% of Total
Suppliers	19,395	13.2%	120,478	63.6%	103,658	90.9%	243,531	54.1%
UI	127,783	86.8%	68,877	36.4%	10,322	9.1%	206,982	45.9%
Total	147,178		189,355		113,980		450,513	

Customer Count - Suppliers and UI

	Residential - SS		Business - SS		Business - LRS		Total UI Territory	
	Customers	% of Class	Customers	% of Class	Customers	% of Class	Customers	% of Total
Suppliers	33,991	11.8%	12,746	34%	260	88.7%	46,997	14.4%
UI	254,567	88.2%	24,929	66%	33	11.3%	279,529	85.6%
Total	288,558		37,675		293		326,526	

SS = Standard Service
LRS = Last Resort Service

Data as reported by UI

Horizon to Enter ERCOT Market

Horizon Power and Light is entering the ERCOT market, as the new owner of retailer TexRep5, LLC. TexRep5 was previously owned by Energy Services Group for purposes of completing the ERCOT test flight.

Horizon currently markets in the Mid-Atlantic and Northeast. It was founded by Neil Leibman who was one of the founders of Gexa Energy at the commencement of competition in ERCOT.

Trade names included on the TexRep5 REP certificate include Norwell Energy and AllStar Energy.

TexRep5 has contracted with Energy Services Group for EDI transaction processing and billing services. TexRep5 will contract with Luminant Energy for ongoing QSE operations.

Supplier Referral Law Does Not Prohibit All Mass Market Exit Fees, RESA Says

Statutory language creating a supplier referral program in Connecticut does not prohibit the imposition of termination fees on all customers eligible for standard service, the Retail Energy Supply Association, Constellation NewEnergy, and TransCanada Power Marketing said in comments at the DPUC.

As only reported in *Matters*, Dominion Retail has sought a declaratory ruling regarding termination fees, arguing that statutory language prohibits the imposition of such fees on residential and small commercial customers (Matters, 4/30/09).

Specifically, Connecticut General Statute § 16-244c(k)5 holds that, "Any customer that receives electric generation service from a participating electric supplier may return to standard service or may choose another participating electric supplier at any time, including during the qualifying electric offer, without the imposition of any additional charges." Section 16-244c(k) establishes parameters of the supplier referral program.

"Participating electric supplier" means, "an electric supplier that is licensed by the department to provide electric service, pursuant to this subsection, to residential or small commercial customers."

Dominion Retail has argued that the legislature's use of the word "including" in the statute must be construed as to give the termination fee prohibition applicability to the entire market, not just the referral program, because any other interpretation would make the term superfluous.

However, RESA argued that phrase "including during the qualifying offer" is required to eliminate the ambiguity that would exist without it. "In the absence of that phrase, one might reasonably conclude that the prohibition against additional charges would apply only after the expiration of the term of the qualifying offer," RESA said. Thus, holding that the termination fee prohibition only applies to customers in the referral program does not make the term superfluous, RESA said.

RESA further said that the term "pursuant to this subsection" limits the application of the termination fee prohibition to customers in the referral program. Since electric suppliers are not licensed pursuant to subsection (k) of C.G.S. § l6-244c, but, rather, are licensed under the provisions of C.G.S. § 16-245, "the legislature must have intended for the phrase 'pursuant to this subsection' to modify the phrase 'provide electric service,'" RESA concluded. Thus, the limitation only applies to suppliers serving customers pursuant to the referral program, RESA said.

TransCanada Power Marketing said that the statute's term of "participating" electric supplier limits the termination fee prohibition only to suppliers participating in the referral program, as the term is distinguished from the plain term "supplier" used elsewhere in the statute.

RESA stressed, however, that the termination fee prohibition only applies to a participating supplier's customers acquired through the referral program, and not the other mass market customers the supplier may be serving. In fact, the legislative policy underlying the referral program would be defeated if the statute was read to bar a participating electric supplier from imposing additional charges on customers receiving generation from such supplier outside of the referral program, RESA argued. Such an interpretation would discourage participation in the referral program, because the supplier would have to give up its right to collect liquidated damages not just from

the customers it acquires at a lower cost through the referral program (in which case the termination fee prohibition is a tradeoff accepted to aid acquisition), but would be prevented from imposing termination fees on customers it must acquire through other channels, which may come at a higher cost.

Given that the right to collect compensatory damages for breach of contract is one of the, "most basic elements of business transactions," RESA contended that the legislature would not have buried such a radical change on marketplace behavior such as limiting all termination fees in a subsection of the supplier referral law, based solely on the use of the word "including."

Constellation NewEnergy filed comments in support of RESA's position.

PUCO Grants Stay of FirstEnergy Utilities' Switching Fee

The Public Utilities Commission of Ohio granted the Northeast Ohio Public Energy Council's motion to stay the imposition of a $5 per account switching fee related to its governmental aggregation at Ohio Edison and Cleveland Electric Illuminating.

As only reported by *Matters*, NOPEC has argued the fee, which will exceed $2.5 million for NOPEC's aggregation, is impermissible under Ohio Administrative Code Chapter 4901:1-10-32(D), which holds that, "A switching fee shall not be assessed to customer accounts that switch to or from a governmental aggregation."

The FirstEnergy utilities have argued that imposing the fee on NOPEC's supplier, Gexa Energy, is not inconsistent with the prohibition on a customer switching fee (Matters, 6/25/09).

However, PUCO found that NOPEC has made a strong showing that it is likely to prevail on the merits, and found a stay of the switching fee to be appropriate during the pendency of the complaint.

While PUCO's order did not rule on the merits of NOPEC's complaint, the Commission did state that, "FirstEnergy has proposed a narrow interpretation of Rule 4901:1-10-32(D), O.A.C, arguing that the rule prohibits assessing a switching fee only on a customer that joins a governmental aggregation but does not prohibit assessing a switching fee on the governmental aggregation or the competitive supplier serving the aggregation."

"FirstEnergy's narrow interpretation is inconsistent with the Commission's statutory duty and with our intent in adopting the Rule. NOPEC is correct in its belief that the Commission adopted Rule 4901:1-10-32(D), O.A.C., as part of our statutory duty, contained in Section 4928.20(K), Revised Code, to review our existing rules and adopt rules that promote and encourage large-scale governmental aggregation. Thus, FirstEnergy's narrow parsing of the language of Rule 4901:1-10-32(D), O.A.C., under which FirstEnergy would be permitted to assess switching fees on a governmental aggregation or the supplier serving a governmental aggregation, but not the customers of the aggregation, is inconsistent with our intent in adopting this rule and the statutory authority underlying this rule," PUCO said.

The Commission further said that the function of switching customer accounts from one generation service provider to another generation service provider appears to be a distribution service or a billing and collection service. To the extent that this service is a distribution service function, FirstEnergy should seek recovery of those costs as it would any other distribution cost, PUCO stated.

PUCO also said that waiving the switching fee for governmental aggregators does not appear to be a subsidy of a competitive service by a noncompetitive service in violation of Section 4928.02(H), Revised Code, as alleged by FirstEnergy.

Lower Electric Questions Whether ICC Will Ask All ABC Applicants About Past Compliance

The conclusion reached in a proposed order regarding BlueStar Energy Services' complaint against Lower Electric under Illinois' ABC law, "will do little to protect consumers while at the same time harming competition in electric supply," Lower Electric said in exceptions.

As only reported by *Matters*, the proposed order 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 (Matters, 6/25/09).

Aside from reiterating its arguments made during the case, Lower outlined the impacts of the proposed order on the indirect sales channel market.

"Surely the Commission is aware that few, if any, ABCs immediately began providing the notices required in the ABC Law upon its effective date. Does the Commission intend to ask each ABC requesting a license if it has been complying with all of the ABC Law provisions since its enactment and then impose the same penalty being imposed on Lower Electric here if compliance was not immediate? If not, why not?" Lower asked.

Furthermore, since the proposed order would hold that past compliance is to be considered when granting a broker license, Lower noted that any party -- itself, BlueStar or another supplier or broker -- could intervene in any licensing proceeding and raise the question of past compliance if the Commission failed to do so.

"Adoption of the Proposed Order would leave the Commission with no option but to impose that penalty on virtually every ABC requesting a license," Lower said.

The proposed order's prospective suspension of licenses would follow the progressive discipline set out in the ABC law; that is, a minimum of one month for the first violation, six months for the second violation and two years for the third violation.

"This finding creates the potential for widespread disruption of the ABC business," Lower said.

"If BlueStar or any other entity can find three instances of an ABC failing to provide the required disclosure since the enactment of the ABC law, they can delay that ABC from obtaining a license for at least two years ... If the ABC is forced to admit that three customers did not receive disclosure, it would be unable to obtain a license for two years," Lower reasoned.

In the ICC's ABC rulemaking docket, a proposed order would define "attempts to procure" -- one of the conditions which makes an entity subject to licensing -- as meaning that the ABC has authority to procure electricity on behalf of the customer. Lower did not have such authority from the customer involved in the complaint. However, the proposed order in the complaint case defines attempts to procure more broadly, eschewing the procurement authority test recommended by an ALJ in the rulemaking docket.

MidAmerican Energy, which yesterday sought intervention in the complaint case, agreed with Lower Electric that, given the divergence of opinion on the applicability of licensing requirements to ABCs under the pending rulemaking docket and the proposed order, "it would be unfair to market participants potentially covered by ABC Law requirements, and who are trying to determine how to conduct their business in accordance with the law, if the Commission were to proceed with a complaint against a market participant before the present ambiguities can be resolved through the Commission's rulemaking process."

"Until rules are issued, and until the ambiguity is clarified through the rulemaking process, market participants will be left without clarity as to how to conduct their business, and without a reasonable degree of certainty as to whether or not certain conduct will constitute a violation of the ABC Law," MidAmerican said.

MidAmerican noted that if the Commission were to adopt the regulations proposed in the rulemaking proceeding proposed order, "it would have a direct impact upon the instant proceeding; likely warranting dismissal of the complaint with prejudice."

"Accordingly, it would be premature for the Commission to issue a final determination on the merits of the complaint in the instant proceeding, when a potentially dispositive issue could be resolved through the Commission's rulemaking process," MidAmerican said.

ICC Staff said that the complaint case proposed order should remove language regarding the interpretation of "attempts to procure" since such language is being considered in the rulemaking, and the Commission should not rule on an interpretation outside of that docket. Staff noted that the complaint case proposed order would nevertheless find Lower Electric to be an ABC under the Act, under the provisions requiring licensing of agents that attempt to sell electricity.

Lower countered that finding in the proposed order, stating that it does not have possession of electricity and never will, and thus cannot sell the commodity.

MidAmerican, which was not a party to the case but was referenced in the proposed order due to a legal opinion of the ABC law it had sought which became part of the record, asked that various references and suggestions regarding MidAmerican should be removed, since MidAmerican was not a party to the case. Among other things, the proposed order states that Lower was an agent for MidAmerican, which MidAmerican said was not correct, as Lower was instead an independent contractor. Accordingly, it is inappropriate to suggest potential liability for MidAmerican through an agency relationship for the alleged wrongdoing asserted against Lower, since Lower was not an agent of MidAmerican.

BlueStar Energy Services did not file a brief on exceptions in response to the proposed order.

Generators Say Mitigation, Lack of Stabilization Factors Will Doom Module E Market

Capacity suppliers argued that the Midwest ISO has failed to show that the Module E capacity construct provides resources with adequate revenues which preclude the need for "stabilization factors," such as a demand curve and/or forward procurement (ER08-394). Generators also contended that various mitigation measures proposed by the Midwest ISO in a compliance filing would make the voluntary capacity auction mandatory (Only in Matters, 6/18/09).

In response to a FERC directive, MISO said that the consideration of stabilization factors for the Module E construct is premature.

However, RRI Energy called MISO's assertions that capacity prices provide sufficient revenues for resources, "unsupported."

"These unsupported assertions fly in the face of empirical evidence from other regional transmission organizations ('RTOs') that previously attempted to utilize short-term resource adequacy mechanisms similar to those included in the current Module E design," RRI Energy said.

The FirstEnergy Companies noted that the price of capacity in the Midwest ISO prior to the recession was essentially zero except for the months of June, July, and August. "There is little evidence that a viable capacity market exists to provide adequate revenue for resources to ensure resource adequacy, much less to serve as a basis for the proposed extensive market monitoring by the IMM [Independent Market Monitor] and heavy-handed market mitigation and/or Commission sanctions," FirstEnergy said.

Duke Energy suggested adoption of both a multi-year forward procurement and a demand curve to assure adequate revenues for capacity resources needed for reliability. Recognizing the "pressing" need for a stabilization factor, Duke suggested at a minimum the MISO should implement a demand curve, which Duke said could be implemented prior to the June 1, 2010 commencement of the next Planning Year.

RRI also favored a critical review assessing the benefits of (i) the implementation of a sufficiently forward-looking Module E requirement; (ii) transitioning to an annual rather than monthly Module E requirement; (iii) accurate pricing methodologies for Module E resources; and (iv) remedies for load forecasting errors and gaps in the current Module E process. Integrys Energy Services likewise said that MISO must consider introducing a long-term formal capacity market

Various mitigation measures to be imposed by MISO only worsen capacity suppliers' ability to earn sufficient revenues, generators said. Such measures would turn the voluntary capacity auction into a must-offer market, suppliers added.

"In a VCA [voluntary capacity auction] where less than 1,400 MWs of capacity have cleared in total during the current three-month summer peak period, the Midwest ISO and IMM's market monitoring plan is a solution in search of a problem," FirstEnergy said.

Among other things, the tariff would define withholding as exporting universally deliverable Planning Resources to a capacity market with prevailing prices less than 50 percent of the Auction Clearing Price. Capacity suppliers reported that such a measure is unworkable.

"Comparing a bilateral export contract with the auction clearing price is meaningless. The

auction is so thinly traded, with prices that are so volatile (ranging from $10 one month to more than $10,000 the next to $1 the next), that market outcomes are completely unpredictable. Anyone who exported at a price of $5000 for the month of July apparently would have been guilty of potential withholding, while anyone who exported at a price of more than 50 cents in August apparently would not," Duke said.

Various suppliers, including FirstEnergy, noted temporal logistics associated with exports, which may include forward, multi-year commitments.

"For example, the RPM in PJM has a three-year forward horizon and a one-year commitment period, as compared to the Midwest ISO's one-month forward horizon and one-month commitment period. If a Midwest ISO supplier's capacity clears in the RPM auction, the supplier is obligated to supply that capacity three-years hence. If, in the intervening three years, the Midwest ISO capacity price spikes to be more than double the PJM RPM price, the Market Participant will sell Planning Resources into PJM at a price less than 50 percent of the ACP [Auction Clearing Price]. That supplier should not be subject to mitigation and/or Commission sanctions," FirstEnergy said.

Generators also noted that load would not be subject to similar mitigation measures.

"It is notable that there is no requirement for load to participate in the VCA [voluntary capacity auction]. Nor are there mitigation measures that would require bids to reflect the demand value of capacity such as the value of lost load. LSEs are free to submit 'low-ball' bids into the auction knowing that mitigated supplies -- resources that the Midwest ISO claims have a marginal cost close to zero -- must participate," RRI Energy cautioned.

The Midwest ISO tariff also fails to provide any substantive mitigation or penalties regarding "under-forecasting" of LSEs, RRI Energy added.

Duke said that the full range of tests applied to suppliers should be applied to LSEs, including a test on the import of uneconomic capacity; a threshold for physical withholding; and a test for economic withholding, assuming that the opportunity cost equals the financial penalty.

Briefly:

Pepco Utilities Modify Dispute Process in POR Plans

Similar to a change made by Allegheny Power (Only in Matters, 7/8/09), Pepco and Delmarva filed revisions to their Maryland Purchase of Receivables programs so that the utility will release disputed amounts withheld from the supplier upon notification by either the customer, Commission, or supplier that the dispute has been resolved. The prior language only permitted the customer to notify the utility that dispute had been resolved.

Sack Distributors Seeks Conn. Aggregator License

Connecticut petroleum wholesaler Sack Distributors has applied for a Connecticut electric aggregation license to pool non-residential customers. Sack Distributors said it is an agent with broker Taylor Consulting and Contracting.

BlueStar Opens Michigan Office

BlueStar Energy Services informed the Michigan PSC that it has opened a Michigan office, a prerequisite before a supplier can actively market to customers in the state, as BlueStar ramps up its entry efforts. BlueStar must wait for Staff to verify the office before serving customers. BlueStar also informed the Commission that it will file the requisite renewable energy and net metering plans, which BlueStar had previously received waivers from since it was not serving load.

PUCO Approves Settlement in Duke Delivery Rate Case

The Public Utilities Commission of Ohio approved a stipulation in Duke Energy Ohio's electric rate case that, among other things, withdraws Duke's original request to eliminate Rider SC (shopping credits) and agrees to the continuation of the rider as provided in Duke's electric security plan.

EPSA Counters APPA Deregulation Penalty Report

EPSA yesterday countered a May report from the American Public Power Association which

claimed consumers paid a $20 billion "deregulation penalty" in surplus costs to three PJM generating companies alone since 2001 (Matters, 6/2/09). Among other things, EPSA said that an APPA table on generators' Cash Flow from Operations for 2006 to 2008 for PSEG and Exelon mistakenly includes the results for the entire holding companies, not for just the generating companies. Applying the wrong data overstates Exelon Generation's Cash Flow from Operations by almost $6 billion, a 160 percent error, EPSA said. Another table on 2003 to 2008 Free Cash Flow results omitted a "significant" amount of shareholder dollars reinvested in generation facilities from the calculation of capital expenditures, resulting in a $13.4 billion overstatement, an error of almost 300 percent, EPSA added. EPSA's response can be found here.

Constellation Signs Texas School District

Constellation NewEnergy has signed an electricity supply agreement with the Fort Bend Independent School District in Fort Bend County, Texas near Houston. Under the competitively bid agreement, Constellation NewEnergy will supply 347,644 megawatt-hours of electricity to the district's 69 schools and additional operational facilities.

FERC Approves Southern Company Penalty for Buy/Sell, Shipper-Must-Have-Title Violations

FERC approved a stipulation with Southern Company Services under which Southern will pay a civil penalty of $350,000 for self-reported violations of the Commission's open access transportation program, specifically violations of the prohibition on buy/sell transactions and the shipper-must-have-title requirement.

Integrys ... from 1

the costs to supply the program cannot be known until Integrys' costs are finalized, which occurs approximately two months after the close of each calendar month. Therefore, the true-up component, which could be negative or positive, will be included in the program rate two months in arrears. Customers are thus not contracting for a specific kilowatt-hour rate, but rather for Integrys to serve them on a managed wholesale portfolio.

While Staff urged the Commission to decline to consider the declaratory relief petition, Staff said that, should the Commission rule on the petition's merits, it should find that Integrys' managed product fails to meet the disclosure requirements in Section 16-115A(e)(i) of the Public Utilities Act.

Section 16-115A(e)(i) requires that marketing materials contain, "information that adequately discloses the prices, terms and conditions of the products or services that the alternative retail electric supplier is offering or selling to the customer."

The contract which the customer would sign with Integrys states that the price, "shall be the NICE Program rate per kWh, which is a variable rate determined by Seller for program participants served by Ameren."

While Staff does not wish to discourage innovative retail electric offerings, especially offerings marketed to small business and residential customers, Staff argued that the Integrys-NICE product does not adequately disclose the price of electricity sold under the program.

A "variable rate determined by Seller for program participants" cannot be known by anyone except Integrys, Staff said, and even then only after the fact.

While Staff applauded various marketing and solicitation materials for the NICE program for explicitly informing customers that the rate will be variable on a monthly basis, and may exceed the default service rate, "the lack of any type of pricing information is still troubling," Staff said.

In particular, Staff noted that there is both no up-front disclosure of price, and there is no way for a customer to ascertain price, even retrospectively, since the price is neither capped, nor indexed to any other known price, nor ascertainable through any known formula or methodology, unlike other products currently offered which may lack an up-front price disclosure.

"[I]t is fair to say that the lack of any upper ceiling on the monthly NICE Program rate is Staff's overriding concern with the offer as presented," Staff added.

Regardless, Staff advised the Commission to

dismiss the application for declaratory relief, as Staff argued Integrys lacks standing in the matter. Since NICE is exclusively responsible for marketing of the program, NICE and not Integrys is the real party in interest, Staff said.

Additionally, Staff said declaratory relief may only be granted as to the applicability of a law. However, the Integrys petition seeks a determination of rights and responsibilities under a law, which is beyond the scope of declaratory judgments.

"[I]f [Integrys] succeeds in obtaining such a declaratory ruling, there is nothing to prevent every entity potentially subject to the statute from seeking such a ruling with respect to its own marketing program. In other words, the Commission might well be called upon to pre-approve each and every marketing plan an ARES [Alternative Retail Electric Supplier] or marketing agent for an ARES might choose to put forward. This is all the more likely as [an] ARES taking this step might expect such a declaration to insulate them from liability from claims arising under Section 2EE of the Consumer Fraud Act. The implications of this are as obvious as they are troubling," Staff cautioned.

Integrys had also sought a declaratory ruling on the applicability of Section 115C of the Act, relating to the regulation of agents and brokers. Staff said that the Commission should decline to address Section 115C in the instant case given it is being adjudicated in a current rulemaking as well as in a complaint docket (see related story). Staff further noted that the proposed orders in each docket, "recommend the adoption of two seemingly irreconcilable positions regarding the very matter at issue here: what activities confer 'agent, broker or consultant' status."

"The Commission will obviously be required to either adopt the principles stated in one or the other of the two Proposed Orders, or to reconcile the two Proposed Orders by some other means," Staff said.