Energy Choice Matters

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N.Y. PSC Rules Security Interest in Receivables Begins When Gas Flows Through Meter

The New York PSC ruled that the KeySpan LDCs may require ESCOs to grant KeySpan a priority security interest in all accounts receivable purchased by the LDC, but clarified that the security interest attached to unbilled receivables pertains only to the charges associated with the amount of gas that has passed through the meter but that has not yet been billed. The ruling came in an order on KeySpan Energy Delivery New York and KeySpan Energy Delivery Long Island's billing services agreements (BSA).

As only reported by *Matters*, the proposed billing services agreements require that participating ESCOs grant the LDC a first priority security interest in all of the ESCO accounts receivable and the proceeds and products of all the ESCO accounts receivable (Only in Matters, 12/10/08). Several ESCOs, including Just Energy, objected to the proposed security requirement, noting that under typical ESCO credit arrangements, neither billed nor unbilled receivables may be pledged as collateral without the consent of the ESCO's secured senior creditors.

Just Energy first noted that it cannot grant the utility a first priority interest in the billed receivables because it does not retain any interest in those receivables once billed under POR. With respect to unbilled receivables, Just Energy argued that such unbilled receivables far exceed the obligations which are to be secured by those receivables.

While the PSC denied Just Energy's argument that the Uniform Business Practices limit any security interest to only billed receivables, the Commission agreed that the KeySpan billing services

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FirstEnergy Ohio Utilities' Move to PJM Will Raise Rates, Industrials Say

The integration of FirstEnergy's American Transmission Systems Inc. (ATSI) assets into PJM will likely lead to higher retail rates than what would be seen if the transmission system remained part of the Midwest ISO, several industrial customers said in PUCO and FERC filings.

The Ohio Energy Group noted that energy pricing at the MISO Cinergy Hub has been far less than the PJM West Hub. For the twelve months ending September 13, 2009, the PJM West Hub real time energy market price averaged $11.07/MWh higher than the Cinergy MISO Hub and $11.53/MWh higher in the day ahead market, OEG said. Even the FirstEnergy Ohio distribution companies noted the disparity when filing for an electric security plan in 2008, OEG noted. The FirstEnergy distribution companies submitted testimony concluding that sourcing energy from the PJM West Hub versus the Cinergy MISO Hub was more expensive by $7.54/MWh in 2009, $5.71/MWh in 2010 and $3.79/MWh in 2011. Given that the jurisdictional load of the three FirstEnergy Ohio utilities in 2008 was 58.4 million MWh, every $1/MWh increase in energy costs results in approximately $58.4 million paid by Ohio consumers, OEG said.

Nucor Steel noted that PJM's Reliability Pricing Model has no equivalent in the Midwest ISO, "meaning that the RPM could result in increases in costs that would be borne by Ohio retail customers."

OEG added that because regulated utilities in the MISO multi-state region must build capacity

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Timing of ConEd/O&R Capacity Release Changes Would Harm Competition, Hess Says

Proposals from Consolidated Edison and Orange & Rockland to implement weighted average pricing for the release of capacity to ESCOs on November 1, 2009, "will subject ESCOs to additional, unrecoverable costs of serving customers," potentially making the service territories less competitive, Hess Corporation said in comments at the New York PSC (09-G-0567, 09-G-0568).

Revisions by FERC in Order 712 allow LDCs in retail unbundling environments to price capacity at the LDCs' weighted average cost, rather than the current maximum pipeline rate.

Hess said that it is "troubled" by the lack of advance notice provided by the two LDCs, with tariff filings to implement the new capacity release pricing submitted on July 20. Although ConEd and O&R had discussed the change with ESCOs at the end of June, the LDCs did not indicate what the effective date would be. Hess noted many contracts for this winter are typically negotiated and executed during the summer to achieve a November 1 enrollment and start date. The timing of the ConEd LDCs' filing means that many supply contracts, executed prior to July 20, will not contain the revised capacity pricing as a component of the supply rate, Hess said.

"Hess expects that the impact of the new pricing mechanism would be to increase capacity costs significantly," with such costs largely unrecoverable from current customers. Citing its large load behind both ConEd and O&R, Hess said that it faces a "substantial financial impact," absent a delay in the capacity release pricing changes.

Without the ability of ESCOs to recover these costs through their contracts, the LDCs' territories, "could become less competitive, which ultimately would harm customers," Hess said.

Accordingly, Hess asked the PSC to delay the revised capacity release pricing until November 1, 2010. Hess noted that other New York LDCs have agreed to delay implementation of weighted average pricing until at least the winter of 2010-2011.

A delay would not adversely impact the ConEd LDCs, Hess said, since the Capacity Release Surcharge Adjustment ensures that the LDCs are kept whole for any variance between their expected costs, charged to ESCOs, and the actual costs they pay to the pipelines, which are reflected in their rates.

A delay would also not harm customers, Hess said, as under the new pricing customers should ultimately pay approximately the same net amount as they are currently paying. The only difference from the change is that fewer costs will be paid to O&R through the Capacity Release Surcharge Adjustment reconciliation, and more costs will be paid in ESCO rates.

New York PSC Seeks Review of Rest-of-State Mitigation Measures

A "thorough" review of the New York ISO's rest-of-state mitigation rules is required as a result of the NYISO's petition to apply generator-specific mitigation measures on three generators, the New York PSC said in comments at FERC.

As first reported in *Matters*, NYISO asked for the unit-specific mitigation measures to address conduct that constitutes an exercise of market power, but that does not trigger the conduct and impact mitigation thresholds set forth in the Market Mitigation Measures (Matters, 9/7/09).

For instance, the PSC noted that the current conduct threshold for energy bids in the rest-of-state market is the lower of 300% or $100/MWh above reference levels.

"Thus, suppliers could triple their energy bids without even crossing the NYISO's conduct thresholds. Such excessive thresholds leave consumers at risk of significant harm from market power abuse," the PSC said.

The PSC also urged FERC to investigate whether any violations occurred, tariff or otherwise, to determine if refunds are appropriate. The PSC noted that guarantee payments in the Real-Time Market totaled approximately $15 million for July and August 2009 combined. The New York Transmission Owners similarly said that the proposed mitigation should be applied retrospectively.

The Independent Power Producers of New York urged FERC, if it approves the mitigation petition, to hold that such approval does not restrict stakeholders from developing market rules that may obviate the need for application of new mitigation rules on generators committed for reliability purposes or, if new mitigation rules are necessary, mitigation rules that differ from those approved by the Commission. "The Commission should not predetermine the outcome of the stakeholder process," IPPNY said.

IPPNY noted that there will likely be much discussion by stakeholders regarding the argument from Dr. David Patton, NYISO's Independent Market Advisor, that generators committed for reliability purposes should not be allowed to incorporate a fixed cost component into their bids.

"The inherent flaw with Dr. Patton's theory, as he recognizes in his affidavit, is that it may be possible that generators needed for reliability will not be able to receive adequate revenues to stay in operation if they cannot recover their fixed costs (operations/maintenance, capital costs, debt repayment, and a return on investment) in their guarantee payments," IPPNY said. As Dr. Patton noted, this result occurs when a reliability need is not fully reflected into the market.

"IPPNY believes the best approach to resolving this matter, which should be pursued in the stakeholder process, is to resolve the underlying failure of the NYISO's software to model these constraints appropriately so that they may be reflected through the clearing prices."

IPPNY opposed the NYISO's request for a waiver of the normal six-month time limit for proposed mitigation measures.

"If the Commission approves the New Mitigation Rules and grants the NYISO's waiver request, there will be little pressure on market participants and the NYISO to consider whether new comprehensive mitigation measures are warranted and, if so, to design such measures. The New Mitigation Rules could continue indefinitely," IPPNY said.

Briefly:

PUCT Sets Internet Broadcasting Assessments

The PUCT adopted Staff's proposed allocation of costs for the assessment to fund free internet broadcasts of Commission meetings (Matters, 9/18/09). As only reported by *Matters*, the costs assigned to REPs with more than 250,000 Texas customers are (figures rounded):

- CPL Retail Energy $6,000
- Direct Energy $7,400
- Reliant Energy Retail Services $29,500
- Stream Energy $6,600
- TXU Energy Retail Company $40,500

PUCO Grants Early Bird Power Gas Broker License

The Public Utilities Commission of Ohio granted Early Bird Power a natural gas aggregator/broker license (Only in Matters, 8/25/09).

Amerex Brokers Seeks Ohio Licenses

Amerex Brokers applied for an Ohio natural gas broker license to serve all sizes of non-residential customers at all four LDCs. Amerex also applied for an Ohio electric broker license to serve all sizes of non-residential customers in all utility areas open to choice.

Md. PSC Sets Additional EDF Hearing, Reschedules Gas Conference

The Maryland PSC scheduled an additional day of hearings regarding EDF's investment in Constellation's nuclear unit on September 29, to focus on changes in the transaction documents (Matters, 9/25/09). A status conference will be held October 2 to determine if additional hearing dates are needed. The additional hearing date prompted the PSC to reschedule its retail gas winter supply conference to October 13.

Merrill Lynch, MAG Energy Seek Ontario Wholesale Licences

Merrill Lynch Commodities Canada has applied to the Ontario Energy Board for an electricity wholesaler licence. Separately, MAG Energy Solutions also applied for an electricity wholesaler licence.

Renewable Marketers Say Carbon Regulation Bill as Drafted Would Harm Voluntary Market

The Renewable Energy Marketers Association said last week that the current draft of carbon regulation being debated in Congress would have unintended consequences for renewable energy projects financed through voluntary purchases of renewable energy. REMA said that in order to maintain the ability of voluntary renewable energy purchases by end-use customers to provide additional carbon emission reductions under a cap-and-trade program, voluntary use of renewable energy must result in either the retirement of allowances or in the lowering of the cap.

Delmarva Ordered to File Updated IRP

The Delaware PSC ordered Delmarva Power to file a new integrated resource plan that complies with updated IRP regulations (including the consideration of environmental externalities) no later than May 31, 2010. The Commission closed the docket considering Delmarva's current IRP.

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agreement is overly broad. While the value of unbilled receivables generally equals the supplier's rate multiplied by the estimated consumption for its aggregate load for one billing period (i.e. the gas that has flowed through the meter but will not be billed until the meter is read at the end of that customer's cycle), this is not true for long-term, fixed-price contracts, the PSC observed. "[W]hen the supplier has entered into multi-year fixed price contracts for gas supply ... a very broad security interest could extend to the value of the unbilled receivables plus the value of the remaining term on the contract," the Commission noted.

The Commission held that the point at which the gas flows through the meter, at which time it is clear that the gas will be consumed by the customer, shall be the point at which LDCs may impose a first priority security interest in accounts receivable.

Accordingly, the Commission ruled that the KeySpan LDCs shall revise their billing services agreement to reflect that a first priority security interest may only be required of billed receivables and unbilled receivables which have flowed through the customer's meter.

The Commission also ordered the KeySpan LDCs to revise the discount rate included in the billing services agreement, to reflect changes that the companies have agreed to make but which are not contained in the current agreement.

Among other things, the KeySpan utilities agreed that ESCOs would not be charged for POR implementation costs, which were originally included as 0.4% of a total 3.3% discount. The LDCs reserve the right to collect any ongoing incremental operating costs associated with the POR program. The LDCs also agreed that the uncollectibles component of the discount rate shall reflect the rate case uncollectible expense component of the Merchant Function Charge (1.48% at KEDNY and 0.75% at KEDLI), rather than the originally proposed 1.48% for both LDCs.

The Commission also accepted the LDCs' revisions to remove credit and collection costs from the discount rate, and to recover such costs from ESCOs separately on a per dekatherm basis rather than on a percentage of receivables basis. The PSC approved the LDCs' proposal to reconcile the credit and collection costs annually based on differences between recoveries and the annual credit and collection expenses. The Small Customer Marketer Coalition had argued that such reconciliation amounted to introducing recourse to the POR program, but the Commission disagreed since no ESCO will be held responsible for receivables not collected from its specific customers. ESCOs are not made liable for their customers' non-payment, the PSC noted.

The Commission ordered that the billing services agreement used for both KeySpan New York and KeySpan Long Island shall be uniform.

The KeySpan LDCs were directed to refund several charges to ESCOs from receivables purchased prior to the Commission's order. In particular, the KeySpan LDCs were directed to make ESCOs whole for charging ESCOs the 0.4% implementation discount on receivables that the LDCs later agreed to eliminate. Additionally, the LDCs charged ESCOs an erroneous 1.42% credit and collections expense, which is instead to be reconciled annually. The over-recovery of credit and collections expense that may have occurred will be addressed as part of the LDCs' annual gas cost reconciliation filing.

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pursuant to state commission requirements and their obligation to serve, the other members of MISO indirectly receive the benefit, at no cost, of this region-wide regulatory requirement to build generation that has resulted in a very significant reserve margin. "By contrast, the assumption in PJM is that new generation can only be built upon the payment to all generation owners of an explicit RPM capacity payment," OEG noted.

The Midwest ISO rebutted claims from FirstEnergy that a move to PJM would result in economic efficiencies flowing from PJM's commitment process, "since PJM uses a unit commitment process that is identical to that used by the Midwest ISO for day-ahead, intra-day and real-time commitment."

"Indeed, the only difference between the two-commitment processes is that the resultant day-ahead and real-time energy prices in PJM are higher than those in the Midwest ISO," MISO said. MISO reported that from January 2006 to July 2009, PJM prices were higher than Midwest ISO prices by $12.53 during Real-Time and $10.20 during peak hours.

"Whereas FirstEnergy's marketing affiliate, Solutions, will benefit from the energy price consequences of the PJM commitment process, the same may not be said for the retail customers of the ATSI Utilities, who could be required to pay higher prices as a result of PJM's allegedly more efficient commitment process," MISO argued.

MISO also countered FirstEnergy's claims that PJM's model is more conducive to a retail choice environment. MISO noted that it has committed to accommodate load movements among retail providers in the same manner as in ISO New England, the New York ISO and PJM, one of the PJM benefits cited by FirstEnergy.

Additionally, FirstEnergy had claimed that PJM integration would allow end users to participate in demand management programs to a greater degree.

However, MISO said that, "FirstEnergy's claim that PJM access to customer-owned demand response markets will benefit load is a tail that is trying to wag the dog. As with energy prices, consumers will pay substantially more for capacity in PJM, even allowing for demand response, than they would pay if ATSI remained a member of the Midwest ISO."

"PJM's RPM auction mandates purchases by all load-serving entities of their full supply needs (as determined by PJM) from a central market. The Midwest ISO provides states with more control over the level of reserve requirement and the arrangements by which those requirements are satisfied. In PJM, consumers face highly erratic prices for capacity, ranging from $16.46 to $174.29 per MW-day for the RPM planning periods 2010/2011 to 2012/2013. Such volatility makes hedging by all loads, particularly alternative retail suppliers, difficult," MISO said.

"RPM provides existing resources capacity prices well in excess of the marginal cost of production. These capacity costs are passed through to retail customers and dwarf any offsetting compensation that may be achieved through demand response programs," MISO concluded.

"Finally, the FirstEnergy filing begs the question whether membership in an RTO could actually decrease competition in the generation market of a retail access state," MISO said. Considering FirstEnergy to be *de facto* vertically integrated due to the presence of generation, transmission and distribution under a common corporate holding company structure, MISO claimed that, "a vertically integrated electric utility, moving its transmission system from an energy-only RTO market to a market with capacity payments, could inadvertently increase its generation market power by forcing competitors in the retail load-serving market to bear a proportionate share of generation costs previously stranded by retail access."

Due to cost concerns, OEG recommended that PUCO require the FirstEnergy utilities to repeat the recent POLR auction used for Ohio default service for at least the next two-year period beginning June 1, 2011, rather than using FirstEnergy's proposed out-of-time Fixed Resource Requirement Integration Plan to catch up to the three-year PJM auction process.

The Ohio Consumers' Counsel similarly noted that the FirstEnergy utilities' default service auction produced a reduction in the wholesale price of generation and transmission service of over $1 billion per year on an annualized basis compared to FirstEnergy's originally proposed sole-source contract under the electric security plan.

"The results ... demonstrate that a bidding procedure for wholesale generation and transmission supply has already worked well for service to FirstEnergy's Ohio EDUs under the MISO footprint. FirstEnergy's statement that the bidding process would work better under PJM is largely unexamined and unexplained in the August Filing ... The advantages that FirstEnergy cites regarding PJM markets are principally related to generation opportunities to provide capacity under the RPM construct used by PJM. The RPM construct has not been shown to be superior to MISO's method of providing for 'long-term commitments from capacity resources to ensure resource reliability,'" OCC said.

OCC noted that FirstEnergy Solutions (FES) procured approximately 62 percent of the generation supply that was bid in the most recent default service auction, "a large reduction in generation resource commitments by FES to provide SSO service in Ohio."

"The proposed RTO Realignment could serve the purpose of helping market FES generation, a purpose that is not connected with planning and operating the transmission system," OCC claimed.

The Northeast Ohio Public Energy Council also raised competitive concerns regarding the move to PJM, specifically with regards to the integration auctions used to procure capacity for periods in which the Base Residual Auction has already occurred. NOPEC observed that the FirstEnergy Ohio utilities would be the default entities purchasing capacity at the integration auctions on behalf of ATSI-connected load. An LSE could only opt out of this arrangement by demonstrating to the "reasonable satisfaction" of FirstEnergy that the LSE satisfies PJM's capacity requirements for the load served by the LSE, NOPEC noted.

"However, a FirstEnergy affiliate - FirstEnergy Solutions Corp. (Solutions) - dominates much of the ATSI-connected generation that would participate in those integration auctions. Indeed, Solutions holds 10,760 MW of the 12,910 MW in generating resources connected to ATSI and is expected to bid 100% of that capacity into the integration auctions. Moreover, Solutions, which in addition to providing wholesale service also provides competitive retail electric service in the FirstEnergy Ohio Utilities' service territories, has begun making offers to sign up retail customers to long-term contracts for periods after June 1, 2011, extending as long as 2018. The competitive concerns arise from the fact that FirstEnergy will determine whether each LSE is eligible to 'opt out' of the integration auction, but FirstEnergy has the potential to dominate both sides of the integration auction through its affiliates - the FirstEnergy Ohio Utilities and Solutions," NOPEC said.

"Also, Solutions' dominant generation market position in the ATSI footprint allows it to currently make offers to retail customers in the FirstEnergy Ohio Utilities' service territories for as long as six years after June 1, 2011. Solutions' wholesale and retail generation activities create additional potential competitive concerns at the retail level, as other retail suppliers are not able to make such offers for periods beyond June 1, 2011, largely because of the uncertainty presented by FirstEnergy's proposed realignment," NOPEC added.

NOPEC said that FirstEnergy's proposed integration schedule provides inadequate time for LSEs to determine whether they should opt-out of the integration auction, as well as the Base Residual Auction, as LSEs must commit to PJM's May 2010 Base Residual Auction for Delivery Year 2013-2014 by February 2010, even though FirstEnergy itself may not finally commit to the realignment until 30 days after FERC's decision in the federal proceeding. During this same time period, LSEs affected by the realignment would also be required to determine whether to opt out of the proposed separate integration auctions. "Indeed, the integration auctions themselves would occur in April 2010, six months before FirstEnergy would be required to submit its completed integration plan to PJM," NOPEC noted.

In comments before PUCO, the Retail Energy Supply Association said FirstEnergy has presented a reasonable timeframe for the move, but said that if there is any delay, the move should not take place during the middle of an electric security plan. RESA also urged PUCO to evaluate the effects of the RTO move on all customers, both utility standard offer customers and customers served by competitive retail electric suppliers.

"While these suppliers may not be financially at risk as a result of the change, the regulatory uncertainty created by the move may discourage or delay potential market entrants," RESA noted. "For example, a supplier knowing that FirstEnergy proposes to move to PJM in less than two years may delay serving retail customers in FirstEnergy if it requires obtaining a MISO CP node for such a short period. Transition programs may be needed to prevent the upcoming change of RTO to being a barrier of entry or expansion," RESA said.