

Energy Choice Matters

January 1, 2010

PUCT Staff Seeks Revocation of TexRep5 REP Certificate

The PUCT Staff moved to revoke the REP certificate of TexRep5, LLC (d/b/a AllStar Energy), alleging that TexRep5 violated several Commission rules governing retail electric providers by failing to disclose an investigation by the Delaware PSC into Horizon Power and Light, which shares principals with TexRep5 (37801).

TexRep5 is currently seeking an amendment to its REP certificate to clarify, among other things, its parent ownership, stating that Horizon Power and Light has never owned or controlled TexRep5 (Only in Matters, 12/21/09). Although there is no ownership connection, TexRep5's principals are also principals at Horizon, including Neil Leibman, TexRep5 CEO, and Tom O'Leary, TexRep5 COO.

Recently Staff has learned that Horizon has been investigated by the Delaware Public Service Commission for various allegations of unfair and deceptive business practices (Only in Matters, 8/19/09). "As a result of that investigation and an evidentiary hearing, a 'Settlement Agreement' was entered into by the parties, in which Horizon and two of its principals, Neil Leibman and Tom O'Leary, agreed to pay a total of \$500,000 in full and complete settlement of the issues raised in the complaint by the Staff of the Delaware Commission. Mr. Liebman [sic] and Mr. O'Leary are listed as officers of TexRep5. Horizon also agreed to relinquish its Electric Supplier Certificate issued by the Delaware Commission, and agreed not to reapply for an Electric Supplier Certificate in Delaware for a period of two years," Staff noted.

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Direct Partners with Whirlpool, Lennox, Best Buy, OpenPeak to Offer Home Energy Manager

Direct Energy is set to announce what it termed an "unprecedented" cross-industry initiative that has developed the Home Energy Manager, a new end-to-end home energy management solution that enables consumers to easily control home energy use and costs from the convenience of a single, hand-held touch screen device.

The Home Energy Manager was developed in conjunction with Whirlpool, Lennox International, Best Buy and OpenPeak, and is to be officially announced on January 7th at the 2010 International Consumer Electronics Show. Details are preliminary pending the formal launch.

Given that energy consumption is not a high-interest category for the average consumer, the Home Energy Manager will combine energy information with other information more readily desired by consumers to make the Manager a key information terminal that is part of everyday life for residential customers. Operating on the OpenPeak OpenFrame platform, the Home Energy Manager is to integrate energy management information with other useful information such as real-time traffic reports, weather, news and access to social networks.

In addition, there will be an online application store where consumers can download applications relevant to their lives at home, and also build on the platform.

Although details are still preliminary pending the formal announcement, plans are to conduct a 12-month pilot with a prototype of the Home Energy Manager in consumers' homes in Houston. The

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RESA Objects to Expansion of Mass. Switching Restriction Beyond Nstar

The Retail Energy Supply Association objected to the Massachusetts DPU's inclusion of the Nstar switching restriction in new Model Terms & Conditions applicable to electric suppliers, which has expanded the switching restriction, previously only in force at Nstar, to all four investor-owned electric distribution companies (Only in Matters, 12/16/09).

On August 28, the DPU issued a redline of new Model Terms & Conditions to implement provisions of the new electric supplier referral program. However, the DPU's new Model Terms & Conditions were based on Nstar's current Terms and Conditions, which contain the following switching restriction:

"[W]hen a Customer changes from a Competitive Supplier to Basic Service, unless the Customer or the Customer's applicable Competitive Supplier can demonstrate to the Company's reasonable satisfaction that the Customer has been placed on Basic Service upon the expiration of a contract with such Competitive Supplier, the Customer is not permitted to return to the same Competitive Supplier for a period of six (6) months from the effective date of the change. Customers are permitted to switch from Basic Service to a different Competitive Supplier who has not supplied the Customer with Generation Service in the same six (6) month period."

The Commission's order in the referral program proceeding was silent on whether it intended to expand the switching restriction to other distribution companies.

As only reported in *Matters*, Fitchburg Gas & Electric and Western Massachusetts Electric Company, in filing their compliance tariffs, strictly followed the DPU's Model Terms and Conditions and added the switching restriction to their tariffs, even though the new tariffs were principally meant to implement the referral program and make other ministerial changes (such as changing references to the former DTE to DPU). National Grid did not include the switching restriction in its compliance tariff, on the basis that the restriction was previously only in place at Nstar, and that the new Model Terms

and Conditions were only intended to implement terms of the referral program.

Calling changes to the switching rules outside the scope of Docket 09-46, RESA asked that the DPU direct WMECO and Fitchburg Gas & Electric to refile their tariffs without the switching restriction.

RESA noted that there was no notice that the proceeding would include a review or expansion of the switching restriction. The DPU's original June 2009 notice stated the purpose of the investigation was to develop model terms and conditions regarding the referral program, and made no mention of expanding the switching restriction. Nor was the switching restriction raised by any party in the proceeding.

Regarding the proceeding's scope, RESA noted that Nstar objected to Dominion Retail's recommendation to consider the bill recalculation requirement in the docket (under which customers on fixed price basic service have their rates recalculated as if they had been on monthly priced basic service when switching to competitive supply). Nstar said that the DPU's notice of the proceeding did not list basic service pricing as an issue to be reviewed, and thus Dominion Retail's request must be dismissed on procedural grounds. The DPU agreed, finding that the bill recalculation issue fell outside of the scope of the proceeding.

"If the bill recalculation requirement is beyond the scope of this proceeding despite the opportunity afforded to other participants to address Dominion's views in reply comments, then surely the customer [switching] restriction should be outside the scope since it was never raised at all," RESA argued.

Additionally, RESA noted that in the redline Model Terms and Conditions issued by the DPU to be implemented by the distribution companies, the switching restriction is not redlined as a change -- since the DPU used Nstar's tariff as a model which already contained the restriction. RESA said that it reasonably assumed that the Terms and Conditions filed by each distribution company based off the redline would incorporate only the redlined changes, and not specific provisions of Nstar's tariff that were not marked as redline changes.

Substantively, RESA said that there is no evidence that broader applicability of the

switching restriction outside of Nstar is warranted.

"[Restrictive] switching rules are harmful to the competitive market because they needlessly interfere with the relationships between competitive suppliers and their customers and undermine retail choice, which is the hallmark of restructured electric markets," RESA said.

RESA further noted that when originally adopted in 2006, the Nstar switching restriction was meant to be a "short term" solution to address the alleged potential for customers to leave and return to basic service to arbitrage seasonal price differences. Expanding this restriction, without evidence of its need at other distribution companies, is not consistent with the stated short-term nature of the rule, RESA said.

RESA noted that dynamic pricing, as originally contemplated as a long-term solution in 2006, could be used as an alternative to mitigate potential gaming and the need for the restriction.

Pennsylvania PUC Adds, Revises Conditions of Licensure Recommended by Just Energy

In a final order, the Pennsylvania PUC revised and added to the conditions Just Energy voluntarily agreed to follow in exchange for electric and natural gas supplier licenses. The Commission approved both licenses, with the conditions, in December, but written orders with precise conditions were only recently published.

As only reported in *Matters*, the PUC had originally denied both Just Energy licenses due to concerns about complaints and litigation in other states (Only in *Matters*, 11/12/09). In a rehearing request, Just Energy said that the Commission ignored various remedial measures it has already implemented, and further committed to additional measures, such as a \$50 cap on termination fees for door-to-door contracts, and a commitment to use only employees, and not independent contractors, for door-to-door sales (See exclusive coverage in *Matters*, 11/24/09, which outlines additional conditions).

Except as noted below, the PUC approved the licenses with the all conditions as

recommended by Just Energy. The PUC did order three revisions/additions to the conditions.

First, the PUC held that the conditions should be in place for a minimum of eighteen months from the date of the licensing orders, which shall constitute a probationary period. Just Energy had recommended that the conditions remain in place for 12 months, but with the start commencing from the date that Just Energy begins offering service.

Second, Just Energy proposed that it report on its compliance history in other jurisdictions prior to the expiration of the probationary period, and that the probationary period would expire with the concurrence of Commission Staff. The PUC noted that Just Energy's proposal is unclear as to what happens if Commission Staff does not concur with the release of the conditions.

Thus, the Commission's orders specify that not less than sixty days before the expiration of the probationary period, Just Energy will file a status report with the Commission describing its compliance history in Pennsylvania, as well as updated information regarding the compliance history of its affiliates in other states. Commission Staff will then make a recommendation as to whether license conditions remain necessary. If Staff believes that license conditions remain necessary, Staff shall recommend appropriate conditions, which may include some or all of the existing license conditions and/or different license conditions. The Commission will then issue an appropriate order at a subsequent public meeting.

Finally, the Commission said that one additional condition is necessary to protect Pennsylvania consumers. Due to the length of the contracts that Just Energy proposes to use in Pennsylvania, the PUC will require Just Energy to annually send a letter to its customers stating that the customer has selected Just Energy as his or her electric generation or natural gas supplier, and that Just Energy has no affiliation with the customer's public utility. This annual correspondence shall provide Just Energy's contact information, including the address, phone number and website. This annual correspondence shall also provide the Commission's contact information, including the website and the toll-free number for consumer

complaints.

The Commission said that, with such conditions, "it is unlikely that [Just Energy] would replicate the problematic history of its affiliates in other jurisdictions."

As previously reported, Vice Chairman Tyrone Christy dissented from both licensing orders, with the dissent also recently published.

Christy said that, "[w]e are not in such short supply of [suppliers] that we should be swayed to issue a license to a company with a questionable track record on the basis of temporary license conditions."

Christy further said that the Commission does not have resources to hold monthly meetings with a particular supplier, review its monthly compliance reports, marketing materials, background check criteria, and other conditions.

The dissent also contains Christy's opposition to door-to-door marketing by suppliers, which Christy partially shared at the December 17 Commission meeting (see exclusive story in Matters, 12/18/09).

Aside from the concerns previously raised by Christy, the written dissent argues that, "[t]he decision to sanction door-to-door sales of electricity by unlicensed individuals creates the opportunity for criminal activity by imposters who claim to be marketing electricity," citing a recent case of a criminal posing as a utility worker.

Christy noted that the Commission has told customers to verify utility workers by calling the utility, examining identification, and other measures. "In contrast to the ability of a homeowner to verify the identity of a utility worker through personal identification, company uniforms, company vehicles, and telephone calls to the utility, a homeowner will not be able to verify the identity of an unlicensed [marketing] individual," Christy said.

"Legitimate marketing activities should be confined to telemarketing, direct mailings, media advertisements, and the like," Christy said, in urging a ban on all door-to-door energy marketing, whether by licensed or unlicensed solicitors.

DPL Energy Resources Seeks Force Majeure Waiver of Ohio-Based Solar REC Requirement

DPL Energy Resources petitioned the Public Utilities Commission of Ohio for a force majeure determination regarding DPL Resources' 2009 Ohio solar energy resource benchmark, citing a lack of available in-state solar RECs.

DPL Resources is required to meet a solar benchmark of 0.004% in 2009, half of which must be met with resources located within Ohio.

"Despite [DPL Energy Resources'] substantial good faith efforts to comply with the 2009 Ohio [solar] benchmark as described herein, it has been unable to achieve compliance." DPL Resources said that it has achieved compliance with both the non-solar renewable energy benchmark, and the non-Ohio solar benchmark.

DPL Resources said that, as provided for in The Dayton Power and Light Company's alternative energy compliance plan approved by PUCO, Dayton Power & Light calculated its compliance obligations based upon the retail sales of Dayton Power & Light and DPL Energy Resources, combined, and planned to undertake activities geared toward meeting the solar requirements on behalf of both companies.

DPL Resources said that an RFP was issued on July 24 for RECs, but only one offer for a long-term contract was received to satisfy the Ohio-based solar REC portion of the RFP. The contract was for approximately 4 Ohio solar RECs per year over a five-year period.

In July and September, DPL Resources said that it submitted bids in reverse RFPs for 288 Ohio solar RECs from two Ohio-based sources, but was not successful in winning any of the RECs.

DPL Resources reported that it attempted to identify larger (20+ kW) Ohio solar systems installed by local contractors and recipients of grant awards, to make offers for such solar RECs. DPL Resources also issued a mass mailing to 128 Ohio residents who received grant awards for smaller solar projects (under 20 kW), with offers made to purchase those systems' RECs. DPL Resources said that the offers were met with mixed results, as some system owners refused to sell their solar RECs in anticipation of receiving a higher price through

other programs or bidders. DPL Resources contended that its offers were competitive, generally falling within the current market value for Ohio solar RECs.

DPL Resources said that, ultimately, it has only been able to satisfy 36% of the in-state solar REC requirement. Based on the results from its solicitations, DPL Resources, "concludes that there is currently an insufficient supply of Ohio solar resources from which it can purchase RECs to achieve full compliance with the Ohio [solar] benchmark for 2009."

DPL Resources noted that PUCO has the authority to make a force majeure determination based on this experience, and to modify DPL Resources' compliance obligations to accommodate a finding that Ohio solar resources are not reasonably available.

Briefly:

AEP Retail Energy Partners Seeks Ohio Supply License

AEP Retail Energy Partners LLC applied for an Ohio electric supplier license as a retail generation provider, power marketer, power broker, and aggregator. AEP Retail Energy Partners sought authority to market to commercial, mercantile and industrial customers in all service areas. AEP Retail Energy Partners is a newly formed entity. Previously, two other AEP competitive subsidiaries (AEP Ohio Commercial & Industrial Retail Company, LLC and AEP Ohio Retail Energy, LLC), held retail supply licenses in Ohio, but both were withdrawn in 2003.

TexRep5 ... from 1

TexRep5, however, failed to disclose the existence or the results of the Delaware Commission's investigation in its July amendment to its REP Certificate (Docket 37199), Staff alleged, in which Leibman and O'Leary were added as principals to TexRep5 (Only in Matters, 7/9/09 -- it was also in this docket that Horizon was originally listed as TexRep5's owner, which TexRep5 subsequently said was incorrect).

TexRep5 did provide "some information" regarding the proceeding at the Delaware

Commission in Attachment D-8 of the its instant amendment application, "but did not provide the significant details of the settlement agreement and order issued as a result of that proceeding," Staff alleged. "TexRep5's failure to disclose this information constitutes significant violations of the Commission's rules. Staff therefore recommends that TexRep5's application for an amendment of its REP certificate be denied and that TexRep5's certification be revoked," Staff urged.

Staff noted that Subst. R. §25.107(g)(2)(D) and (E) state that a REP application must include:

(D) A statement indicating whether the applicant or the applicant's principals are currently under investigation or have been penalized by an attorney general or any state or federal regulatory agency for violation of any deceptive trade or consumer protection laws or regulations;

(E) Disclosure of whether the applicant or applicant's principals have been convicted or found liable for fraud, theft, larceny, deceit, or violations of any securities laws, customer protection laws, or deceptive trade laws in any state.

"Delaware Order No. 7626 specifically cites Mr. Neil Leibman, Chief Executive Officer of Horizon Power & Light, LLC and Mr. Tom O'Leary, Chairman of the Board of Directors of Horizon's parent company Horizon Power Holdings, Ltd. as principals responsible for the \$500,000.00 settlement, to be deposited in a Special Purpose Account. Further, Delaware Order No. 7626 states that 'Messrs. Leibman and O'Leary, in their individual capacities, will be jointly and severally liable for tendering to the Commission the sum of \$250,000,'" Staff reported.

Staff noted that P.U.C. Subst. R. § 25.107(j) defines "significant violations" that may result in the revocation of a REP certificate as the following:

(1) Providing false or misleading information to the Commission;

(11) Suspension or revocation of a registration, certification, or license by any state or federal authority; and

(17) Other significant violations, including the failure or a pattern of failures to meet the

requirements of this section or other Commission rules or orders.

By failing to provide the information regarding the proceedings at the Delaware Commission, "TexRep5 has committed 'significant violations' as defined by P.U.C. Subst. R. § 25.107(j)," Staff alleged.

TexRep5 said in its December 18 amendment application that it is not currently serving customers.

system directly or remotely to turn on appliances and systems during peak usage times and put them in "sleep mode" at other times.

Direct ... from 1

objective of the pilot will be to learn how the Home Energy Manager impacts consumer behavior in the real world, how much money each household saves on its electric bills, and how the solution can be improved before it goes to market. According to preliminary data, the Home Energy Manager could save consumers up to 25 percent per month on their energy bill.

"The Home Energy Manager has the potential to do for home energy management what the iPhone did for communication," said David Dollihite, vice president of product development at Direct Energy. "We believe the Home Energy Manager will become the de facto platform that empowers consumers to look at energy use in a fresh, new way and modify their consumption behavior."

Direct said that the Home Energy Manager leverages the opportunity created by the deployment of smart meters to residential homes, allowing consumers to track and control their energy use and costs on an easy-to-use touch screen device with an intuitive graphic user interface. The solution works on an open platform and integrates easily and seamlessly with energy-connected smart appliances, such as dishwashers, washers and dryers, water heaters, thermostats and heating and air conditioning units.

The Home Energy Manager will allow customers to set pre-determined budget limits and ensure that smart appliances operate within specific parameters. Alerts will warn consumers when they are close to reaching their budget threshold for the month, and will offer personalized recommendations about how to reduce costs for the rest of the billing period. Consumers will also be able to program the