

Energy Choice Matters

January 15, 2010

Draft III. Order Would Fine Just Energy \$178,500 for Lack of Managerial Fitness, Other Violations

Just Energy would be fined \$178,500 and required to make changes to its contract verification procedures and marketing materials under a proposed order from an Illinois ALJ in complaint proceeding initiated by the Citizens' Utility Board and several other consumer groups (08-0175).

Under the proposed order, Just Energy, known as Illinois Energy Savings d/b/a U.S. Energy Savings at the time the complaint was filed, would be required to undergo an independent audit of its sales program, with a focus on hiring, training, solicitation procedures and performance, compensation, sales verification, complaint tracking and reporting, discipline, and other compliance practices. The objective is to substantially reduce customer complaints and violations of the Alternative Gas Supplier Law ("the Act"). If approved by the Commission, the audit results would be submitted to Staff and Just Energy by September 1, 2010. Unless Just Energy voluntarily agrees to implement the audit's recommendations, the draft order would require that a docket be established to review the audit's recommendations.

The draft order would require Just Energy to conduct verification calls of door-to-door sales without the salesperson being present. Specifically, the salesperson could not be visible to the customer or able to hear the customer's conversation with the verifier during the call. The salesperson could be present with the customer after the call is completed and the phone connection disengaged, the draft says. The proposed order would require Just Energy's verification script to include audible confirmation from the customer that the sales agent is not present before the verification portion of the call begins.

Furthermore, each verification question should request verification of a single fact, and there should be a sufficient pause for an answer to each question before another question is asked, the proposed order recommends.

In printed materials utilized during in-person sales contacts at or near a residence or business

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Pa. PUC to Bring Default Service Regulations into Compliance with Act 129

According to a PUC news release, the Pennsylvania PUC issued for comment a proposed policy statement regarding default electric service which brings the current policy statement in line with the requirements of Act 129 of 2008. A copy of the statement was not available yesterday, and the Commission did not address the matter during voting at its administrative meeting.

According to a news release, the Commission voted 5-0 to adopt the changes to the statement, which included amendments to definitions and terminology of default service provider, and updates showing that the default service provider should procure electric generation supply for default service customers in compliance with Act 129. Among other things, the Act requires a "prudent mix" of spot purchases, short-term contracts, and long-term contracts to serve default service customers. The policy statement revisions add certain definitions, and addresses electric generation supply procurement and alternative energy portfolio standards.

In a separate action, the Commission also said that it has begun the process to bring its default

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PUCT Commissioners Cite REP Change in Control Rulemaking As Priority

PUCT Commissioners agreed that the rulemaking regarding a change in control or ownership of a REP should be a Priority Category #1 project in the Commission's list of priorities (23100, Only in Matters, 12/18/09).

A strawman rule governing changes in control developed by Commissioner Kenneth Anderson has already been posted (Only in Matters, 11/6/09). Anderson reiterated that recent cases have heightened awareness of the need for clarity with respect to changes in control and the current opaqueness with respect to some transactions, though Anderson did not cite specific cases.

Although Anderson did not cite any examples, one recent acquisition which has not been reflected in any REP certificate amendment, to date, is the acquisition of dPi Energy by Amvensys Technologies, from dPi's former owner, Rent A Center, Inc. (Only in Matters, 12/11/09).

Zahed Lateef is listed as a director of Amvensys Technologies according to Texas Secretary of State records, and it is unclear if that is the same individual as Z. Ed Lateef who was formerly a principal at Riverway Power, which defaulted in 2008 (dPi Energy affiliate dPi Teleconnect lists Z. Ed Lateef as a director).

Addressing three separate dockets regarding Notice of Violations against several of the REPs which failed in 2008, Commissioner Donna Nelson directed Staff to ensure that the principals of the failed REPs are listed in the NOVs and revocation orders so there is a record of such individuals given that, per the Substantive Rules, "[a]n individual that was a principal of a REP that experienced a mass transition of the REP's customers to POLR shall not be considered for purposes of satisfying," the 15-year managerial retail energy experience requirement for REP certification. Additionally, such a principal of a failed REP shall not own more than 10% of a REP or "directly or indirectly" control a REP.

Of note is that there is no prohibition of a principal of a failed REP from being involved with another REP, so long as that individual

does not control the REP directly or indirectly, does not own more than 10% of the REP, and is not used to meet managerial competency requirements.

Commissioner Kenneth Anderson stressed that Staff, in REP applications and amendments, must scrub new principals against Commission records and Secretary of State records to determine if any principals were involved with a failed REP.

Returning to the Commission priorities for 2010, Commissioner Donna Nelson asked that innovative rate mechanisms -- meaning a potential Distribution Cost of Service factor and changes to the Transmission Cost Recovery Factor --- should be in Priority Category #2. Although some of the issues are being addressed in various rulemakings, Nelson stressed that there should be a discussion about coordinating the pass-through of such transmission and distribution costs to REPs in a meaningful way so REPs have some notice of any changes, and that the number of changes per year is limited.

PUCT Instructs Staff to Develop Harsher LaaR Violation Penalties at ERCOT

The PUCT instructed Staff to work through the ERCOT stakeholder process to adopt, in the ERCOT Protocols, stricter penalties for failure to meet Load Acting as a Resource obligations, after concluding that the Commission can currently, by statute, only penalize each instance of LaaRs violation a maximum of \$25,000, regardless of the megawatt total involved or the impact on reliability (37634).

The stakeholder process should consider other penalties for failure to deploy LaaRs that would not invoke the statutory penalty cap, such as withholding (or requiring a return of) other ancillary service payments for failure to deploy. Chairman Barry Smitherman suggested consideration of preventing frequent LaaR dispatch violators from being qualified to provide the service.

The PUCT's action was prompted by its conclusion that it could only penalize Luminant \$25,000 for a failure to deploy LaaRs, which Commissioners agreed is inadequate given the

serious risk that the lack of LaaRs deployment creates for reliability (Only in Matters, 1/14/10). However, Commissioners could not agree to Staff's proposed penalty of \$115,000 that would have charged Luminant for each megawatt of LaaRs shortage at \$5,000 per MW short (with a 50% mitigation due to the specific facts of the case), since the Commission found that the failure to meet ERCOT's instructed LaaRs deployment is a single violation, regardless of the megawatt shortfall.

PUCT Staff Says AllStar Amendment, Revocation Cases Inexorably Linked

PUCT Staff countered AllStar Energy's (TexRep5, LLC) contention that its REP certificate amendment request and Staff's petition for certificate revocation should be addressed in separate proceedings, as Staff noted that, "if the certificate is revoked there is no certificate to amend."

As only reported in *Matters*, Staff moved to revoke the REP certificate of AllStar Energy in alleging that AllStar 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 AllStar (37801, Only in Matters, 1/1/10). AllStar countered that any revocation proceeding should not impact the amendment to its REP certificate it is seeking to reflect its correct parent ownership of the George Company, rather than Horizon, which AllStar said was incorrectly listed in a prior amendment (Only in Matters, 1/12/10).

Staff reiterated that the amendment request and revocation petition involve common questions of law or fact. "Staff does not know who actually owns or owned TexRep5, and the correct owner is essential to both the Application and the Counter-Petition for revocation. Applicant claims that Horizon Power and Light was incorrectly listed as the parent company in the amendment approved in Docket No. 37199, and filed the instant amendment to show that the correct parent company is the George Company. Before granting approval of the Application, Staff needs an opportunity to inquire into who the

actual owners and principals are of TexRep5. Staff does not at this time know whether Applicant is entitled to an amendment or not. The revocation issue, therefore, directly relates to, and arose out of, the ownership question that is addressed in the amendment request. This information is also essential to a revocation proceeding involving the Applicant given that Horizon Power and Light and two of its principals, who are also listed as principals of the George Company in the Application, were parties to an enforcement action in Delaware. Given that owner information was incorrectly listed before, Staff has no reason to believe that such a mistake could not happen again," Staff said.

Briefly:

Energy Plus Receives Pa. Electric License

The Pennsylvania PUC granted Energy Plus Holdings an electric supplier license to serve residential and all sizes of commercial customers in all service territories.

IDT Energy Receives Pa. Electric License

The Pennsylvania PUC granted IDT Energy an electric supplier license to serve residential and commercial customers in all service areas. As only reported in *Matters*, IDT recently received a Pennsylvania gas supply license as well (Only in Matters, 12/4/09).

Gateway Energy Services Receives Pa. Gas License

The Pennsylvania PUC granted Gateway Energy Services a natural gas supply license to serve residential and all sizes of commercial customers at UGI Utilities and UGI Central Penn (Only in Matters, 11/3/09).

Rhoads Energy Receives Pa. Gas License

The Pennsylvania PUC granted Rhoads Energy a natural gas supply license to serve residential and all sizes of commercial customers at UGI Utilities. Rhoads Energy is a heating oil and HVAC service provider which previously held a supply license when gas choice first started, but decided to exit the business due to changing corporate priorities. Rhoads said that the maturing market has attracted it back to the

retail gas supply business. Rhoads will initially focus on customers in the UGI territory in Lancaster and Berks counties, where it currently focuses its oil/HVAC business. Rhoads said that its marketing will be geared towards offering a bundled gas supply and heating system service product (Only in Matters, 10/29/09).

Chautauqua Energy Management Receives Pa. Gas License

The Pennsylvania PUC granted Chautauqua Energy Management a natural gas supply license as a supplier, broker/marketer, and aggregator to serve all sizes of non-residential customers at National Fuel Gas Distribution (Only in Matters, 9/23/09).

Mass. DPU Confirms Switching Restriction is Only Applicable at Nstar

The Massachusetts DPU has ordered Fitchburg Gas & Electric and the Western Massachusetts Electric Company to file revised model terms and conditions applicable to electric suppliers removing a switching restriction included in their previously updated tariffs, stating that it "now recognizes" that the Nstar tariff used as a model contained a switching restriction that the DPU did not intend to apply to other territories when directing other companies to replicate Nstar's tariff (09-46). The switching restriction, which prevents customers returning to basic service from returning to their prior supplier for six months, is only intended to be in place at Nstar, the DPU confirmed. As only reported by *Matters*, Fitchburg Gas & Electric and WMECO added the switching restriction to their tariffs in following the new model tariff which has been mainly revised to implement the supplier referral program (Only in Matters, 12/16/09). National Grid did not include the switching restriction in its compliance filing, and thus does not need to remove it.

Mitchell Energy Management Services Receives Pa. Broker License

The Pennsylvania PUC granted Mitchell Energy Management Services an electric broker/marketer license to serve commercial customers over 25 kW, industrial customers, and governmental customers, in all service territories (Only in Matters, 10/23/09).

America Approved.com Receives Pa. Broker License

The Pennsylvania PUC granted America Approved.com LLC an electric broker/marketer license to serve all sizes of commercial customers, industrial customers, and governmental customers at PPL and Duquesne Light (Only in Matters, 10/29/09).

Customer Acquisition Specialists of America Receives Pa. Broker License

The Pennsylvania PUC granted Customer Acquisition Specialists of America an electric broker/marketer license to serve all sizes of nonresidential customers in all service areas (Only in Matters, 9/25/09).

Northeast Energy Partners Receives Pa. Broker License

The Pennsylvania PUC granted Northeast Energy Partners an electric broker/marketer and aggregator license to serve all sizes of commercial, industrial and governmental customers in all service areas (Only in Matters, 11/5/09).

Goldstar Energy Group Receives Pa. Broker License

The Pennsylvania PUC granted Goldstar Energy Group an electric broker license to serve all sizes of commercial, industrial and governmental customers in all service areas (Only in Matters, 11/25/09).

Paragon Advisors Receives Pa. Broker License

The Pennsylvania PUC granted Paragon Advisors an electric broker license to serve commercial customers over 25 kW, industrial customers, and governmental customers at PPL (Only in Matters, 10/22/09).

HRNEnergy Receives Pa. Broker License

The Pennsylvania PUC granted Health Resource Network, Inc. (d/b/a HRNEnergy) an electric supply license as a consultant, to serve commercial customers over 25 kW and industrial customers in all service areas. HRNEnergy has brokered energy for New York and New Jersey customers in the health care industry since 1997 (Only in Matters, 10/29/09).

Exelon Energy Adds Aggregation to Pa. License

The Pennsylvania PUC granted Exelon Energy's request to amend its retail electric supply license to include aggregation services in addition to acting as a load serving supplier (Only in Matters, 11/6/09).

PUCT Approves Amendment Recognizing Sale of TCS Energy to NationsGas Partners

The PUCT granted Telecom Consulting and Services, LLC (TCS Energy) an amended REP certificate to reflect its purchase by NationsGas Partners, LLC, which is an oil and gas company that holds significant mineral interests across the United States. As only reported in *Matters*, former Commerce Energy CEO Steven Boss has been named Manager of Development & Operations at TCS Energy (Only in Matters, 11/18/09).

PUCT Approves Penalties for National Power, Pre-Buy Electric

The PUCT approved a fine of \$1.824 million against National Power Company, Inc., of Houston, and a fine of \$1.866 million against Pre-Buy Electric, LLC, in connection with each REP's default in 2008 (Matters, 4/21/09). The Commission also approved a preliminary order setting a list of issues in its Notice of Violation against HWY 3 MHP, in which the Staff is seeking \$1.44 million in penalties (Matters, 12/21/09).

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premises, any price comparison between Just Energy and a gas utility shall be limited to the utility serving the area in which the residence or business is located, the proposed order would hold. Per the draft, all depictions of utility prices shall display at least three years of data in no greater than quarterly increments. Any graph-style depiction of prices should not depict any future price of any utility, and should not depict or suggest that a utility's future prices will be higher than the last month for which the price is known, the draft adds.

The proposed order would prohibit Just Energy from compensating any employee or agent with supervisory or disciplinary authority

over Illinois distributors, contractors or other sales personnel through commissions associated with the sale of Just Energy products.

Under the draft, customer requests for service cancellations must be forwarded to the utility for cancellation within two business days of Just Energy receiving the request from the customer, and without any barriers beyond normal legal retention efforts. The proposed order would incorporate and enforce various other remedial measures that were part of a 2008 settlement between the Illinois Attorney General and Just Energy, which specifies various required disclosures and allows a customer to cancel a contract with no termination fee up to 10 business days after the first bill.

Precedent for Other Suppliers

Several proposed findings of the ALJ go beyond the fact-specific complaints concerning Just Energy and implicate interpretations of Commission authority and enforcement powers over all gas suppliers.

First, the proposed order finds that the Commission can take actions against a supplier for violations of the Illinois Consumer Fraud and Deceptive Business Practices Act, the Illinois Deceptive Trade Practices Act, and Illinois common law. The ALJ notes that the Alternative Gas Supplier Law requires compliance with "all other applicable laws and rules," which grants the Commission to judge compliance with broader consumer fraud laws and the like. However, the only remedy the Commission can prescribe for violations of such broader laws are the remedies contained in the Alternative Gas Supplier Law for non-compliance (such as penalties or license revocation), rather than the ICC being able to enforce penalties or other provisions contained in the broader consumer fraud statutes.

Second, the ALJ found that a supplier's sales contractors are its agents, and the supplier shares their responsibility for any wrongs they commit while attempting to sell contracts on the supplier's behalf. "It makes no difference that the sales agents are independent contractors ... [a] person may be both an independent contractor and an agent for another," the ALJ concluded.

Third, the ALJ holds that customer complaints correlate with management sufficiency. "A complaining customer is an unsatisfied customer. It is a fundamental management principle to reduce or eliminate complaints, in order to obtain or retain customers. Rational gas supply management regards complaints as a reflection of its competence, because complaints constrain revenue, thereby jeopardizing the viability of the enterprise," the ALJ said, in stating that a high number of complaints can be taken as evidence of a lack of the required managerial competency.

Moreover, the validity of a high number of complaints not need to be proven for a showing of insufficient managerial competency, the ALJ added. "[T]he volume, nature and repetition of consumer complaints correlate with management sufficiency," the ALJ said, without the need for a showing of fraud.

Proposed Findings Against Just Energy

The proposed order, which addresses complaints in the timeframe of January 2007 through March 2008, would find that Just Energy:

(1) Had insufficient management for the period in question;

(2) Committed eight violations of subsection 19-115(c) of the Act [requiring valid customer authorization for a switch] by failing to obtain verifiable authorization before switching a customer's gas supplier;

(3) Committed a single violation of subsection 19-115(f) of the Act by disseminating marketing material that distorts the required disclosure of the price of its services;

(4) Committed eight violations of the Alternative Gas Supplier Law, in the form of Illinois Consumer Fraud and Deceptive Business Practices Act violations, through deceptive acts and misrepresentations; and

(5) Committed seven violations of the Illinois Deceptive Trade Practices Act, in the form of Consumer Fraud Act violations, through misrepresentations concerning identity, pricing, savings, or products that caused the likelihood of confusion or misunderstanding for customers.

Regarding managerial competency, the ALJ's proposed order would find that the high number of complaints against Just Energy,

relative to the LDCs and other suppliers, shows a failure to maintain the required competency. The ALJ's conclusion is not based on the absolute number of complaints, but on their relation to other suppliers and the LDCs. "Complaints regarding Respondent vastly exceed the claims concerning any other gas supplier and, indeed, exceed the combined complaints against all others. When a provider in a competitive market generates customer disapproval at a level far above industry norms, there is management deficiency," the ALJ said.

The ALJ cited evidence that Just Energy had approximately 100,000 customers from January 2007 through September 2008, and was the subject of 1,900 complaints, or 1.9% of its customer base, during the period. The company with the next closest level of complaints was Peoples Gas, which has 784,271 customers during the timeframe and was the subject of 2,060 complaints, or 0.26% of its customer base. The ALJ noted that Peoples only recorded 160 more complaints than Just Energy despite having more than 700,000, or 700%, more customers.

Although Just Energy argued that many of the complaints were unsubstantiated, the ALJ said that "a substantial number of complaints" were confirmed by Just Energy. Even assuming that the complaints could not be treated as valid, the ALJ noted that each company could be presumed to receive the same ratio of valid to invalid complaints, meaning Just Energy would still well exceed its peers in the number of valid complaints.

The ALJ said that misrepresentation regarding likely customer savings was the subject of over half of the complaints directed to CUB and the Commission's customer service unit. More than half of the complaints reported to the ICC customer service unit also involved Just Energy's contract termination fees. Both CUB and Staff recorded a "meaningful" percentage of complaints regarding false identification by sales agents, slamming, and language barriers, the ALJ said.

Aside from the relative volume of complaints, the ALJ reached his conclusion regarding a lack of managerial fitness due to the continuation of complaints over a prolonged period, especially in light of a settlement between Just Energy and

CUB in October 2006 regarding many of the same issues. "It is troublesome enough that a supplier would trigger an extraordinary degree of consumer disapproval in the first instance. It is worse when that market disturbance goes unchecked over many months. Even according company management time to recognize the nature and magnitude of the problem, the duration here is far too long," the ALJ said.

While Just Energy argued it had at all relevant times directives and procedures in place to prohibit, detect and correct violations of internal policies and applicable law, the ALJ stressed that, "the question is not whether [Just Energy] did anything at all, but whether what it did was effective to sufficiently manage its sales force."

Just Energy's "longstanding benchmark" of 2% for the ratio of complaints to sales, "was a likely contributing cause of its abnormal complaint volume during the relevant time frame," the ALJ said, adding that, "[the] ratio was, and remains, too high."

Although Just Energy argued that its use of door-to-door sales accounts for its higher complaint rates versus other suppliers who are less active in market, the ALJ found that, "[the] ratio is unacceptable to the Commission and again calls the efficacy of [the] door-to-door business model into question."

The ALJ also reported that 60% of all Just Energy contracts signed from February 2008 to November 2008 were cancelled or dropped by the customer, the company, or the utility that would have delivered gas. Approximately 20% of total sign-ups were cancelled at the customer's behest within 70 days of sign-up in both 2007 and 2008, the ALJ said. Of the 38,811 customers that entered into a four-year contract from February to December 2004 (Just Energy's first year as a certificated supplier) only 59 (.0015%) completed them, the ALJ said.

The ALJ proposed fining Just Energy \$100,000 for its lack of managerial competency over the relevant period, reflecting a maximum penalty of \$10,000 per each instance of violation, which the ALJ defined as each month of insufficient competency. "The Commission does not construe 15 months of management to constitute a single violation within the meaning of subsection 19-120(c)(2). That would create an incentive to perpetuate failure, since a

persistent management failure would receive no more penalty than a brief one, thereby rendering the remedial statute ineffective," the ALJ said.

The other violations found in the proposed order relate to specific interactions with customers. In one example, the ALJ found that a Just Energy sales agent violated the Consumer Fraud Act by obtaining the customers' account information under the false promise and misrepresentation of checking her eligibility for Just Energy service, then using the fraudulently obtained information to forge the customer's signature and impersonate the customer during the sales verification call.

The ALJ found that CUB did not meet its burden in showing that Just Energy's termination fees during the period in question were unlawful, under CUB's allegation that the liquidated damages unreasonably exceeded anticipated or actual loss. For part of the relevant timeframe, Just Energy calculated exit fees using a forecast rate of consumption for the remainder of the contract term multiplied by a fixed rate per therm. The Commission said that since lost profits can be considered in the calculation of reasonableness, the termination fee does not appear unreasonable, though the ALJ did not propose a formal finding affirming this view. Rather, the ALJ noted that the termination fee question has become moot due to legislation last year that caps termination fees at \$50, while also finding that CUB failed to meet its burden of proof.

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service regulations into compliance with Act 129. A copy of the filing was not available, and the Commission did not address the matter during voting at its administrative meeting.

According to a news release, the rulemaking addresses the following items:

- Default Service Procurement and Implementation Plans
- Default Service Rate Design and the Recovery of Reasonable Costs
- Commission Review of Default Service Program and Rates
- Default Service Customers

The matters were docketed as M-2009-2140580 and L-2009-2095604.