Energy Choice Matters

March 4, 2010

PUCT Staff: "Commercial Standard" Under UCC Links Variable Rate to Contemporary Wholesale Prices

"[T]he generally accepted understanding of the terms 'variable rate' and 'variable plan' by market participants and the [Texas] Commission is such that Gexa promised that it would charge a variable rate that varies in a manner that is reasonably related to contemporaneous changes in the wholesale price for electricity such that when market prices go down, the commodity price would not go up," PUCT Staff said in a reply to a motion for summary decision from three complainants in docket 37569. Staff recommended that the ALJ grant summary decision in part and deny in part, including denying summary decision regarding claims concerning the retail-wholesale price link, despite Staff's view of the term variable rate enumerated above.

As only reported in *Matters*, the case involves three complainants who have alleged that Gexa's variable rate contracts require the retail rate to be set according to contemporaneous wholesale prices, such that the rate must fall as wholesale prices fall (Only in Matters, 11/18/09).

Gexa's Terms of Service used the terms "variable rate," "variable price," and "commodity price," which the complainants asserted carry the common industry understanding that the variable rate would be set in a manner that is reasonably related to contemporaneous changes in the wholesale price of electricity. None of these terms are defined in the contract, nor are any of these terms ambiguous, Staff said.

"In the absence of ambiguity, contractual terms are to be interpreted based on their plain, ordinary and generally accepted meaning. Based on the information provided by complainants in their motion, Staff believes that the complainants have met their initial burden of proof with respect to this claim because the statements made by Gexa, TEAM [Texas Energy Association for Marketers], and by

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N.Y. PSC Staff Opposes Use of Longer Average in Calculating ConEd LAUF Factor

New York PSC Staff yesterday opposed in pre-filed testimony Consolidated Edison's proposed changes to the method used to determine the gas Line Loss Factor (LLF), which is used to set the Lost And Unaccounted For (LAUF) gas factor applicable to sales and transportation customers, and which also establishes the level of required ESCO deliveries (09-G-0795).

In direct testimony in its rate case, ConEd proposed changing the method of determining the LLF to use a five-year average instead of a three-year average. ConEd said that the longer duration would minimize the impact that any single year included in the average has on the overall target, and reduce the effect that a given year may have when the line loss falls outside normal statistical parameters.

However, Staff noted in direct testimony that the current LAUF methodology has resulted in a reduction of gas losses which the customer pays for in gas costs. Staff recommended maintaining the current LAUF methodology established in Case 06-G-1332.

"The LAUF factor directly impacts the amount of gas costs incurred by customers as close to the actual system performance as possible. In a system making progress in reducing lost and

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Briefly:

MXenergy Seeks Maryland Electric License
MXenergy has applied for a Maryland retail electric supplier license to serve all customer classes, including residential customers, at each of the four investor-owned utilities.

Champion Energy Seeks Authority to Serve Illinois Residential Customers, Add Three Service Areas
Champion Energy sought to amend its Illinois alternative retail electric supplier license to market to all customer classes, add three service territories, and provide single billing services. Champion currently has authority to market to non-residential customers with annual electrical consumption greater than 15,000 kilowatt-hours. Champion is seeking to expand that authority to include all customers, including residential customers. Currently, Champion is licensed to market at Commonwealth Edison and AmerenIP. Champion is seeking authority to market at AmerenCILCO, AmerenCIPS, and MidAmerican Energy Company, in addition to its current service areas.

PPL EnergyPlus Joins Retail Energy Supply Association
PPL EnergyPlus has joined the Retail Energy Supply Association, bringing RESA's ranks to 13 members. "PPL EnergyPlus is joining forces with RESA to promote the advancement of competitive retail markets, which produce the best results for customers by providing more choices, more innovation and more ways to manage costs and improve efficiency," said Gene Alessandrini, senior vice president-Marketing for PPL EnergyPlus.

Vectren Names SCO Suppliers
Vectren Energy Delivery of Ohio reported that the following suppliers won customers in its recent Standard Choice Offer auction: SouthStar Energy Services, Vectren Retail, DTE Energy Trading, and Interstate Gas Supply.

Amigo Energy Offering Supply Through Shop Texas Electricity
Amigo Energy said that it has partnered with online broker Shop Texas Electricity to offer electricity through ShopTexasElectricity.com

National Fuel Gas Distribution Revises New York GTOP
National Fuel Gas Distribution Corporation has filed revisions to its New York Gas Transportation Operating Procedures Manual (97-G-1380). National Fuel Gas Distribution said that the primary purpose of the changes is to update the capacity mix released to ESCOs as part of its Mandatory Upstream Transmission Capacity program.

Amen Properties Provides Priority Power Principals With Warrant/Purchase Option
Amen Properties said yesterday that it has entered into new employment agreements with the senior executives (John Bick and Pat Ennis) managing Amen's energy broker/consultant, Priority Power Management, LLC. In connection with the new employment agreements, Amen Properties also issued a warrant to Bick and Ennis entitling them collectively to purchase 80% of the equity of Priority Power for a price of $10. The warrant has an expiration date of December 1, 2014 and vests only upon the delivery of $1.9 million in cash earnings by Priority Power to Amen. Additionally, the company issued an option to Bick and Ennis entitling them to purchase Amen's retained 20% ownership in Priority for the price of $480,000. This purchase option has an expiration date of December 1, 2012.

PUCO Reinstates FirstEnergy All-Electric Discounts
PUCO directed Ohio Edison, Cleveland Electric Illuminating, and Toledo Edison to file revised tariffs to provide temporary rate relief to all-electric customers whose discounted rates were previously terminated. Though PUCO did not direct a specific level of discount applicable to either generation or distribution, the FirstEnergy utilities were directed to file tariffs producing bill impacts, "commensurate with FirstEnergy's December 31, 2008, charges for those [all-electric] customers." PUCO noted that under the FirstEnergy companies' competitive procurement, all wholesale generation costs are to be recovered through retail rates, finding that further proceedings regarding the recovery of

the revenue shortfall from the rate relief are necessary. Staff is to investigate long-term solutions for all-electric rates and report to the Commission within 90 days. PUCO's order applies the temporary discount to service rendered beginning with the date that the revised tariffs are filed.

Smitherman Says Suspension of Smart Meter Deployment Would Be Inappropriate

Suspending the deployment of advanced meters in Texas and the collection of the advanced meter surcharge would not be appropriate at this time, PUCT Chairman Barry Smitherman said in a memo in advance of today's open meeting (20970).

Responding to complaints from customers, mostly in the Killeen-Temple area, who have attributed Oncor's smart meter installation to their recent higher bills, Sen. Troy Fraser asked for a suspension of advanced meter deployment and the associated surcharge until more testing of the meters is complete.

Smitherman agrees with proposals for additional independent testing, such as those proposed by Oncor and CenterPoint Energy, to increase customer confidence in the meters (Matters, 3/3/10). However, citing the numerous benefits from advanced meters, Smitherman said that suspending deployment would be inappropriate at this time, particularly as Oncor, through extensive testing, has not found any advanced meter to be outside the +/- 0.15% accuracy factor provided for in its contract with Landis+Gyr (which is more accurate that the +/- 0.20% standard in the PUCT rules).

Advanced meters help reduce the customer's electric use, ultimately reducing their electric bill, and help reduce peak demand, Smitherman said. "In May 2007, when much of this discussion about advanced meters was taking place, reserve margins were projected to be below 10%, falling to 5.9% in 2012. While reserve margins are projected to be more robust over the next several years, they are projected to fall below required 12.5% by 2014," Smitherman noted.

"Advanced meters will play a significant role in helping to reduce peak load and generation to meet that load," Smitherman added, citing results from a Baltimore Gas & Electric peak reduction pilot that saw peak use reductions of 22% to 37%.

Furthermore, advanced meters increase reliability and permit faster system restoration during outages. Smitherman cited a finding from consultant Dr. Richard Brown, engaged by the PUCT to examine system hardening measures to reduce the impact of hurricanes, who said that incorporating advanced metering systems into system hardening efforts could help reduce total system restoration time by as much as 25%.

Last October, CenterPoint received $200 million in federal stimulus funds to help speed the deployment of smart meters. "It is unknown how any suspension of the deployment in the CenterPoint area would impact the grant," Smitherman noted.

Smitherman also cited the recent introduction of new products by REPs to take advantage of smart meters and reduce customers' bills.

Smitherman noted the "broad-based support" that advanced metering received in the legislature, with legislation providing for the monthly surcharge passing without any opposition. Additionally, the legislature also overwhelmingly supported (only two negative votes) language codifying in PURA that, "it is intent of the legislature that net metering and advanced meter information networks be deployed as rapidly as possible to allow customers to better manage energy use and control costs, and to facilitate demand response initiatives."

CenterPoint proposed substantially similar measures to increase customer confidence in advanced meters to the measures proposed by Oncor (such as independent testing, side by side comparisons, etc.). Like Oncor, CenterPoint has proposed distributing, free of charge, in-home devices to customers to allow customers to monitor their usage and further educate them about their consumption, with CenterPoint recommending 300 such monitors be distributed (36699).

BHE Cites Concerns on Green Standard Offer

Bangor Hydro-Electric cautioned the Maine PUC against creating a green option under the Standard Offer, citing logistical and backoffice hurdles, as well as the potential to decrease the amount of competitive bids for wholesale supply (2010-46).

As only reported in *Matters*, the PUC has initiated an investigation into creating a renewable Standard Offer supply option, at the direction of the legislature (Matters, 2/10/10).

As previously reported, the PUC said that its tentative position is to require a green power pricing option from all Standard Offer bidders, but asked for comments and alternative approaches.

BHE argued that making a green Standard Offer bid a requirement for participating in the wholesale RFP, "may result in fewer, or even no, standard offer bidders."

BHE said that such a concern should outweigh any concerns about a lack of green Standard Offer bidders if the green component was made optional for bidders, "as the risk of having no bidders for standard offer would appear to be paramount."

"It is hard to see a difference between an optional green standard offer and a green supply product offered by a Competitive Energy Provider [CEP]," BHE said. "The problem appears to be lack of demand for a green power supply product at the current prices for green energy supply; if there were sufficient demand, that need could be satisfied by a CEP. Creating a new green standard offer product does not address this problem," BHE added.

BHE said that if the purpose of the green Standard Offer product is to give customers an option for renewable supply, such an option already exists through competitive providers. If there are no or few current competitive renewable offers available to customers, then the PUC should examine why this is so, BHE said. Alternatively, if the purpose of the green Standard Offer is to encourage additional renewable generation, other measures currently being pursued, including long-term supply contracts and the development of community renewable resources, are better suited to this goal, BHE added.

"The creation of a second aggregate provider has an enormous impact on Bangor Hydro's existing system," BHE said, reporting that it built its backoffice system in the wake of restructuring to support a single Standard Offer. BHE said that "major" changes to billing, payment processing, collections, accounting interfaces, EDI, Load Settlement, and ICAP reporting would be required.

The PUC asked whether the Standard Offer should be offered on a per kilowatt-hour basis, or in 100 kWh blocks. BHE reported that its billing system cannot currently handle 100 kWh blocks of green power.

The Commission also asked whether customers should be able to move between the Standard Offer and green Standard Offer on a monthly basis. BHE said that allowing customers to "bounce" back and forth monthly between the green offer and Standard Offer would create uncertainty for bidders about the projected load for both segments, resulting in either fewer bids or higher-priced bids. BHE noted that the PUC has imposed an opt-out fee for larger commercial customers to reduce this volatility with respect to competitive supply.

BHE reported that while not a "check off" form allowing for green Standard Offer enrollment, BHE could develop a tear-off on its bills that the customer could send directly to the supplier to sign up for green energy. Enrollment would follow the typical process for placing a customer on competitive supply.

TXU Expands iThermostat Product to Commercial Customers

TXU has expanded its iThermostat web-enabled programmable thermostat to business customers, stating that business customers can save 10 to 30 percent off of their electric bill using the iThermostat.

The iThermostat is a fully web-enabled programmable thermostat that lets businesses monitor and manage their building's temperature, and control devices such as the HVAC system, from any Internet device.

Previously, the iThermostat was primarily marketed to residential customers. TXU said that it is the only retail electric provider in Texas providing this sort of technology to commercial businesses.

The iThermostat comes with a broadband gateway device that communicates with all thermostats in the facility. TXU said that the two iThermostats included in its offer, plus the gateway and installation, are valued at $550, but are made available at no cost to qualified business customers signing a two-year commodity plan with TXU. Customers can retain the iThermostats upon switching to another REP, but would not have access to TXU's web portal (the iThermostats would still function as stand-alone programmable thermostats). Average size businesses using 76 MWh annually that use the iThermostat can save an estimated $12,000 dollars over the 15-year life of the product, TXU said.

Variable ... from 1

the Commission itself, as referred to in the complainants' motion, indicate that the generally accepted understanding of the terms 'variable rate' and 'variable plan' by market participants and the Commission is such that Gexa promised that it would charge a variable rate that varies in a manner that is reasonably related to contemporaneous changes in the wholesale price for electricity such that when market prices go down, the commodity price would not go up," Staff said.

The TEAM statements concerning variable plans cited by the complainants were made generally in a separate PUCT project, and TEAM has not offered any specific views on the complainants' claims.

"With respect to the term 'commodity price,' the evidence relied on by the complainants supports a similar conclusion. Gexa's use of the terms 'variable rate,' 'variable price,' and 'commodity price' in its contract with the complainants created an obligation on Gexa to set its variable rate in a manner that was reasonably related to contemporaneous changes in the wholesale price of electricity," Staff said.

Staff further said that statements made by Gexa, TEAM, and the Commission cited by the complainants indicate a "commercial standard" under which the variable rate of a retail customer is related to wholesale prices for electricity under the Uniform Commercial Code (which the Gexa contract explicitly incorporates), such that a change in the commodity price must be reasonably related to contemporaneous changes in the wholesale price for electricity.

Despite this belief, Staff said that summary decision on this argument should be denied, because, "Gexa's response to the complainants' motion creates an issue of fact with respect to the existence of a duty requiring Gexa to set the commodity price in a manner that is reasonably related to contemporaneous changes in the wholesale price for electricity."

Gexa argued that the PUCT's definition of a "variable price product" in the Substantive Rules provides that the retail price may vary according to a method determined by a REP, which could accord the REP broad discretion in how to price electricity (the time period of the complaint occurred before this definition was in place creating the legal controversy). "In the Staff's view, while the rule is not determinative of this issue, it sufficiently rebuts the complainants' factual assertions on a motion for summary decision," Staff said.

Furthermore, Staff said that the issue for purposes of summary decision is broader than whether Gexa had any contractual duty to set the variable rate in a certain manner; the issue before the ALJ is whether Gexa violated the contracts by varying prices in a manner that was not reasonably related to contemporaneous changes in the wholesale price for electricity such that when market prices go down, the commodity price would not go up.

In terms of this broad issue, Staff said that the complainants failed to provide evidence of what the contemporaneous wholesale electric prices were for the billing periods in dispute, and thus summary decision should be rejected. While the complainants cited Monthly U.S. Natural Gas Wellhead Price data from the U.S. Department of Energy, Staff said that, "[t]he price of gas is not synonymous with the wholesale price of electricity." Thus, the complainants "have not shown that Gexa breached a duty to set its variable rate in a manner that is reasonably related to wholesale prices," Staff concluded.

Staff would grant summary decision on several other issues, some of which are related solely to the contractual relationship and interaction between Gexa and the complainants which do not raise market-wide implications (and will not be summarized here).

However, another claim applicable outside of the Gexa-complainant contract concerns the proper notice on each bill (under the prior Substantive Rules) required for a change in a variable rate contract. In some of the bills Gexa provided to complainants, a rate change was not expressly denoted on the bill as Staff said was required; the bill merely provided that, "Your per kWh rate is X.XX cents." During the term of the customers' service with Gexa, Gexa updated its billing procedure such that bills now read, "Important Notice: Your per kWh rate has changed to X.XX cents," if a rate change occurred that month. While complainants argued that this new notice was also insufficient, Staff said that the notice is clear and easy to understand, as required under the Substantive Rules.

Staff also said that a series of statements Gexa made to the press during 2008 were, "misleading because they inconsistently describe what a variable rate plan is." By incorporating the Uniform Commercial Code into its contract, Staff said that the contract required Gexa to not make misleading representations to its customers. However, Staff said that since the complainants are not entitled to any relief on this count (as it does not relate to overcharging), summary decision should be denied.

Complainants cited a May 20, 2008 Gexa news release which stated: "Variable Rate: Variable electricity rates can go up or down, depending on changes in the wholesale electricity market. With variable rate plans, consumers will benefit when market prices fall."

Complainants next cited an August 2008 KHOU report in which a Gexa representative said, "The month-to-month customers that are opening their bills now, are looking at bills for power that they used in the past, that was procured at some time prior to that," referencing the market price spikes in the spring of 2008.

Complainants also cited a December 8, 2008 *Dallas Morning News* story in which a Gexa representative stated, "We price our product so that we will be a sustainable player in the marketplace in the long term," in response to a question of whether the month-to-month rate is indexed to energy prices.

Complainants also cited two January 2009 news stories in which Gexa describes the month-to-month plan as a "premium" product, since it provides customers with flexibility to leave at any time.

Complainants finally cited an April 2007 press release in which Gexa said that its variable rates were "some of the lowest" rates available.

Staff's pleading does not describe which of these statements it finds misleading, other than stating that the statements describe the variable rate plan inconsistently. Gexa has said that the statements are not misleading as the context of the statements was different, but Staff said that Gexa failed to explain why context makes a difference.

Given the lack of specificity in Staff's belief that that statements are misleading, REPs could be concerned about future application of an "inconsistency" standard (should Staff's arguments ultimately be affirmed).

Specifically, while Staff does not state which statements it finds inconsistent, among several statements that the complainants allege are misleading is the description of the variable rate plan in 2007 as a one of the market's lowest rates, versus the 2009 description of the variable rate plan as a premium product. This is the argument of most concern for REPs' future marketing practices, assuming it is affirmed (again, it is unclear what Staff's position on this specific claim is).

If these statements came a month apart, a strong case could be made. But a finding that statements more than two years apart describing a generic product-type (and not a specifically branded product) would essentially not allow a REP to change its pricing strategy with respect to that product-type if it ever publicly states that pricing strategy. Put another way, the course of market events from 2007 through 2009 (which included the congestion-induced price spikes) could have prompted Gexa, or any REP, to re-evaluate its variable rate pricing strategy in light of new market conditions (by changing it from a market-leading rate to pricing it at a premium to reduce risk). The question then becomes, what obligation does the REP have to "update" customers on this new strategy for customers who were enrolled onto the rate during a time in which the rate was being priced and marketed under a different strategy, especially considering the variable nature of the rate.

Alternatively, the question is, what "shelf life" does a REP's marketing statements have? Complainants argue that Gexa's departure (which complainants allege began around the summer of 2008 and was confirmed by the use of the term “premium” in the 2009 news stories) from its 2007 description of the variable rate as being one of the lowest in the market is misleading. For how long does Gexa's, or any REP's, 2007 press release create an expectation from customers that the REP’s variable rate will be among the lowest in the market? Is the expectation perpetual until a REP affirmatively issues other marketing material describing the plan differently (or informs each current variable rate customer of the same)?

ConEd ... *from 1*

unaccounted for gas, such as the Company's, a five year average is higher than a three year average and is less representative of the current system's LAUF gas," Staff said.

As an alternative to reduce the financial impact on ConEd from timing mismatches related to the LAUF (which distort the company’s finances without increasing its incentive to reduce losses since the underlying cause is solely due to the timing mismatch), Staff suggested fixing the LAUF factor, using the most recent three year average, for the duration of ConEd's multi-year rate plan, with a dead band of +/-.005. If the actual LAUF factor from actual line loses is greater than the fixed LAUF factor by more than .005, the benefit would go to the customer. If the actual LAUF factor from actual line loses is less than the fixed LAUF factor by more than .005, the benefit would go to ConEd.