Energy Choice Matters

March 5, 2010

Dominion Retail Favors Additional Door-to-Door Marketing Requirements for Illinois Electric Suppliers

Electric supplier sales agents in Illinois should be required to affirmatively state, upon first soliciting a small volume customer on a door-to-door basis, that they do not work for the local utility, a governmental office, or a consumer organization, Dominion Retail said in comments in new consumer protection rules pending before the Illinois Commerce Commission (09-0592, Matters, 12/4/09).

As only reported in *Matters*, the ICC's wide-ranging proposed consumer protection rules (Part 412 of the Illinois Administrative Code) would, among other things, require sales agents to wear identification badges with their name, photo, and logo of the supplier or broker they are representing (for mass market sales).

"It is crucial that customers approached in their homes are not deceived into believing that a sales representative is from the local utility company, governmental office or a consumer organization," Dominion Retail said in recommending that the ICC adopt further measures in addition to the ID badge requirement.

Specifically, Dominion Retail proposed a requirement that, "The first item a door-to-door employee must communicate to a prospective customer is that they do not work for the local utility, a governmental office or a consumer organization and also provide them with a written statement stating the same."

Dominion Retail's proposed language would also require that, "the door-to-door employee shall not state or imply that they are working on behalf of the utility's Choice program (i.e. implying that they are acting for the utility) and they must clearly state the retail electric supplier or suppliers that

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PUCT May Examine Number of Trade Names REPs May Use

PUCT Commissioner Donna Nelson, during yesterday's open meeting, expressed concern with REPs' current ability to utilize five trade names on their certificates in addition to their certificated name. Nelson noted that some smaller REPs are simultaneously marketing under several names, which can frustrate efforts by customers, and the Commission, to know who the REP is, and track complaints and compliance.

Chairman Barry Smitherman agreed that he is frustrated with the use of multiple names as well as affiliate and holding company structures that require Staff to be "Sherlock Holmes" when a REP applies for a new or amended certificate to determine the REP's ownership and principals.

Commissioner Kenneth Anderson noted that the current rulemaking addressing changes in control of a REP could be modified to also include a review of the trade name regulations, since they include the same parts of the Substantive Rules. Smitherman, who in the past has expressed his belief that PURA does not allow the Commission to require REPs to apply for pre-approval for mergers and acquisitions, wryly noted that inclusion of the trade name provisions in Anderson's rulemaking may have won him over on the rule.

Logistical Concerns Impacting Deferred Payment Plan Switch Hold Proposal in Texas

PUCT Commissioner Donna Nelson reported that logistical concerns are one of the reasons that Staff's draft proposal for publication concerning deferred payment plans does not include mechanics or other authority with which to enforce a switch hold provision contained in the rule (36131, Only in Matters, 3/3/10).

As exclusively reported in *Matters*, the draft would require customers entering into a deferred payment plan to agree that they understand that "[b]y entering into this agreement, you are agreeing that you will not be allowed to change service to another provider until the terms of the deferred payment plan are met."

However, as noted by *Matters*, the rule otherwise did not address how such a switch-hold would work, nor did it include in the rule explicit authority for REPs to enforce this switch-hold agreement.

Nelson reported that, under the current meter tampering draft rule which includes a switch hold, the process would be manual. While that process may be workable for the relatively small number of accounts associated with tampering, Nelson said there are concerns that the manual process would be unworkable for the vastly larger number of customers who enter deferred payment plans.

Nelson said that the switch-hold issue will be part of March 8 stakeholder meeting, and her intent is to craft the rule such that, once an automated switch hold process is developed at ERCOT, the switch-hold for deferred payment plans can take affect without requiring a new or revised rule

Commissioner Kenneth Anderson said that he has greater concerns about the Commission's authority to impose a switch-hold on customers entering into deferred payment plans, rather than customers found to have tampered with meters and who have engaged in electricity theft. Nelson replied that customers on deferred payment plans are making a commitment to their REP, and switching before the deferred payment plan is paid off is analogous to theft. Chairman Barry Smitherman also expressed support for the switch-hold provision as it applies to customers on deferred payment plans.

PUCT Staff to Present Proposal to Allow ERCOT to Add Nodal Guardrails in Next Month

PUCT Staff reported that, after discussions with ERCOT Chief Technology Officer Mike Cleary and Independent Market Monitor Dan Jones, Staff will bring a proposal for publication before the Commission, likely by the April 1 open meeting, that would revise the Commission's rules to allow the introduction of certain temporary market "guardrails" coincident with the start-up of the nodal market.

Currently, some of guardrails under consideration (a reduced offer cap) are prohibited by PUCT rule, and the intent of the draft would be to allow such potential changes, if later developed through the stakeholder process and approved at the ERCOT Board, to be implemented.

ERCOT stakeholders have been debating NPRR 091, which as previously drafted would require the System-Wide Offer Cap (SWCAP) to be set at the higher of $180/MWh or 18 mmBtu per MWh times the Fuel Index Price (FIP) during the first 45 operating days of nodal. The NPRR would also establish an Energy Offer Curve floor adjusted to -$50 per MWh, and hold that all transmission constraints are to be treated as non-competitive constraints during an initial 30 Operating Day period (Only in Matters, 2/2/10).

PUCT Staff Posts Prompt Payment Act Proposed Rule

PUCT Staff posted in Project 37981 a proposal for publication that would establish new Subst. R. §25.482 to set provisions under which REPs and aggregators must comply with the Prompt Payment Act (PPA - Tex. Gov't Code, Chapter 2251).

The Prompt Payment Act sets extended payment periods and other billing rules applicable to eligible government entities, and §25.482 would incorporate by reference these payment rules.

However, Staff's proposal would also require aggregators and REPs to disclose to all governmental entities eligible under the Prompt Payment Act that they will be billed in accordance with the Prompt Payment Act.

Additionally, under Staff's draft, aggregators and REPs shall ask all applicants for service whether they are governmental entities as defined in the Prompt Payment Act.

For existing customers for whom an aggregator or REP does not know whether they are governmental entities as defined in the Prompt Payment Act, the aggregator or REP shall inquire within six months of the effective date of the proposed rule whether such customers are governmental entities, except that an aggregator is not required to make this inquiry for customers for which REPs bill for the aggregator's services.

Briefly:

Nelson Says PUCT Must Look at Other Smart Meter/High Bill Issues Other than Testing Fee Waiver

During a discussion of action the PUCT should take in response to higher bills being faced by customers in certain areas (such as Killeen), and whether new advanced meters are responsible, Commissioner Donna Nelson said that, at the next open meeting, she believes that the Commission will need to discuss "other issues" in addition to waiving the meter testing fee for affected customers. Nelson did not elaborate on what these other issues would be, though she said that the issue does rise to an emergency given that some customers are being disconnected due to their inability to pay the high bills. Again, although Nelson did not express with any specificity what issues she was referencing, measures taken by the PUCT in response to emergencies in the past have included disconnection prohibitions, extended deferred payment plans, prohibitions on requesting a deposit to initiate or continue service, and waiver of discretionary charges. The PUCT did not suspend smart meter deployment or the monthly surcharge at yesterday's meeting.

Cirro Allowing Small/Medium Business Customers to Pay by Credit Card Without Fee

Cirro Energy has expanded its payment options available to small and mid-size business customers to include payment by Visa or MasterCard free of charge. Cirro said that the upper limit on businesses able to use the new program are those businesses having charges not in excess of the $25,000 eligible maximum charge per month on qualifying cards. From data gathered through its commercial sales representatives, Cirro believes that the majority of REPs charge a fee for business customers to pay by credit card. The credit card payment may be made by phone or online. Other existing payment options for these commercial customers include one-time or recurring auto-pay using a bank account, as well as Western Union and Moneygram. Cirro supplies about 2.6 million megawatt-hours of electricity annually to over 80,000 residential and commercial customers in Texas.

Power Management Co. LLC Seeks Pa. Broker License

Power Management Co. LLC applied for a Pennsylvania electric supply license as a broker/marketer and consultant serving all sizes of commercial and industrial customers in all service areas. Power Management Co. is currently active in New York and New England.

NRG to Purchase South Trent Wind Farm in Texas

NRG Energy has signed a binding letter of intent to purchase the South Trent wind farm near Sweetwater, Texas. AEP Energy Partners, Inc. has a 20-year power purchase agreement for all of the generation from the 101 MW wind farm. The acquisition requires PUCT approval (38029). NRG said that after the transaction it and its affiliates will own and control 11,034 MW of installed generation capacity in ERCOT. Total installed generation capacity in ERCOT, based on publicly available information from ERCOT and using the approach described in the Commission's Substantive Rules, is 75,863 MW, NRG said. Even including generation NRG could theoretically import into ERCOT via DC ties (which NRG does not have a contractual claim upon), NRG said that its capacity market share will only be 16.0%, which NRG said was

well below the 20% limitation in PURA.

World Energy Solutions Narrows Q4 Loss

World Energy Solutions narrowed its net loss to $237,000 in the fourth quarter of 2009, versus $1.0 million a year ago, on higher revenue and continued cost reduction. Gross profit was $2.8 million versus $2.4 million a year ago. Total operating expenses for Q4 2009 were $3.0 million, compared with $3.4 million in the prior year, reflecting decreases in compliance, commissions, and marketing expenses.

Constellation NewEnergy Launches Blog Aimed at Commercial Customers

Constellation NewEnergy has launched a blog (http://blog.newenergy.com) aimed at keeping commercial customers informed of energy policy and restructured markets while providing customers with efficiency tips and information on renewables.

New York ESCOs File Briefs on Confidentiality

The Retail Energy Supply Association, National Energy Marketers Association, Small Customer Marketer Coalition, and Main-Care Energy have all filed letters with the New York PSC asking that the PSC maintain the confidentiality of ESCO revenue data and customer counts. A private citizen has submitted a Freedom of Information Law request for ESCOs' 2009 revenue and customer data, which the suppliers say is exempt from such disclosure under a number of New York laws and precedent. The PSC has received similar requests in the past, and has denied the requests, finding that the ESCO data qualifies for confidential status since disclosure would result in competitive harm to ESCOs. Several suppliers told *Matters* that the instant freedom of information request is not distinguishable from the past requests which the PSC has denied.

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they work for and purpose of the contact."

"Each door-to-door employee shall leave a business card that reflects their identity and the identity of the electric supplier or suppliers that they represent," under Dominion Retail's suggested language.

Finally, Dominion Retail recommended prohibiting the door-to-door "employee" from dressing in uniforms that contain any branding elements (including similar logo or colors) as the local utility.

The interaction of the ICC's proposed door-to-door solicitation requirements and applicability to agents, brokers, and consultants is ambiguous. In the ICC's draft, the term "sales agent" means, "any employee, agent, independent contractor, consultant, or other person that is engaged by the RES [retail electric supplier] to solicit customers to purchase, enroll in, or contract for power and energy service on behalf of a RES."

The specific door-to-door marketing rules apply to, "[s]ales agents who engage in door-to-door solicitation for the purpose of selling power and energy service offered by the [retail electric supplier]," and specifically state that the required ID badge shall include the logo of the retail supplier or the entity licensed as an agent, broker, or consultant under the ABC law who the salesperson is representing.

Dominion Retail said that, "because the most serious problems occur when salespersons have no affiliation with the [retail electric supplier], the Commission should require an affiliation." In its actual redlined language, Dominion Retail provided the following provision, "The [retail electric supplier] performing door-to-door marketing will only use employees, not independent contractors, when conducting door-to-door sales."

The Retail Energy Supply Association noted that incongruities may arise since entities required to be licensed under the ABC law are also governed by Part 454 of the Illinois Administrative Code. RESA noted that several sections of the draft rule (covering both door-to-door and other solicitation forms) state, "Upon a customer's request, the RES and its sales agents shall refrain from any further marketing to that customer."

RESA gave an example of an ABC representing multiple retail electric suppliers in which the ABC provides a customer with a sales pitch for a particular product for a particular supplier (e.g. XYZ Retail Supply). If the customer requests that the sales agent refrain from any further marketing, the implications of

this request remain unclear, and RESA said that it could be interpreted as (1) preventing the ABC from conducting further marketing to the customer of just XYZ Retail Supply, (2) preventing the ABC from conducting further marketing of any of the ABC's retail suppliers, (3) preventing XYZ Retail Supply from marketing to the customer, or (4) preventing *any* retail supplier doing business with the ABC from marketing to the customer.

RESA suggested eliminating this and other potential confusion by excluding from the definition of "sales agent" under Part 412 entities required to be licensed according to 83 Ill. Adm. Code 454, and addressing solicitation rules for such ABCs in Part 454.

RESA's intent is that all agents, whether a supplier employee, agent not covered under Part 454, or agent covered under Part 454, should follow the rules of Part 412. RESA thus suggested, after excluding a Part 454 broker from the definition of sales agent under Part 412, adding language to Part 454 stating that ABCs must, "[c]omply with the requirements of Section 412.110, Section 412.120, Section 412.130, Section 412.140, Section 412.150, Section 412.160, and Section 412.170," of the administrative code.

This may still be confusing as to applicability, however. While RESA's language would not subject Part 454 brokers to the "definitions" section of Part 412 which (under RESA's changes) defines a "sales agent" as not including a Part 454 broker, it's unclear whether a Part 454 broker could successfully argue that the requirements of Part 412 must be read in the entire context of that section of the administrative code irrespective of which specific sections it must follow. This is especially true as many of the "requirements" which RESA would subject Part 454 brokers to begin by stating, "The sales agent shall ..." and then continue by listing the requirement. The term "sales agent" is not defined in Part 454, and one legal argument would be, in the absence of a definition, to use the definition provided for in Part 412 itself (even though the definition section of Part 412 is not explicitly incorporated in part 454 under RESA's language). If, when complying with Sections 412.110 et. al. of Part 412, the Part 454 brokers applied the definitions of Part 412, they would be defined away from any of the requirements applicable to "sales agents" due to the definition excluding a Part 454 broker.

Turning to less ambiguous matters, Dominion Retail also suggested that suppliers performing door-to-door marketing should be required to notify the local municipality and the local utility of their locations and schedule of door-to-door selling activities, and be required to comply with all local ordinances regarding door-to-door solicitations. Door-to-door sales should be restricted to 10 am to 6 pm, Dominion Retail said.

Rescission Period

The rescission period, unsurprisingly, attracted the greatest amount of retail suppliers' comments. The proposed draft would make two major changes related to the rescission period. First, it would extend the rescission period to 10 calendar days, from the current three business days, and would also start the clock on the period from the date of the utility's acceptance of an enrollment (rather than the signing of the contract). Second, the draft rule would allow customers to cancel a contract without penalty for up to 10 days after receipt of their first bill.

Suppliers generally argued that the longer rescission period would increase prices due to risk premiums, and discourage suppliers from offering fixed contracts. Additionally, suppliers said that no problems with the existing rescission period have been cited by Staff as justifying the changes.

RESA noted that basing the start date of the rescission period on the date on which the utility processes (or accepts, the draft rule uses both terms) an enrollment could extend the rescission period to 17 days from the date of contract signing, for normal next-cycle switches. However, the period would be even longer for customers signing forward contracts, RESA observed. Illinois does not permit suppliers to enroll customers for a future meter read date beyond the next meter read (except for a Move-In). Thus, for customers who wish to have a forward flow date (perhaps contracting early to take advantage of low prices), suppliers may execute a contract but hold their enrollment request to the utility until that meter-read date window opens.

Under a rescission period based on when the utility accepts the enrollment, the rescission period could thus last months, RESA explained. Due to the risk of the customer rescinding the contract months into the future, this would severely discourage retail suppliers from offering customers a forward contract, and deprive customers of the ability to lock-in a low, future price available during the middle of their current contract, RESA said.

Additionally, without being afforded forward pricing, RESA noted that it may be difficult for a customer to properly enroll onto a new contract without potentially: (1) being subjected to an early termination fee, (2) initiating an automatic renewal clause (most likely at a higher rate than their original term agreement), or (3) defaulting to default service which may impose a minimum stay requirement.

As to the provisions allowing a customer to cancel a contract 10 calendar days after the receipt of their first bill, BlueStar Energy Services called such a rule, "simply bad public policy."

As most suppliers engage in prudent forward hedging and procure supplies upon or shortly after contract execution, BlueStar noted that allowing a customer to cancel after the rescission period without a termination fee would prevent suppliers from recovering costs incurred to procure forward supplies for the customers. Such a prohibition will add a premium to prices, or reduce fixed price product options available, BlueStar said.

BlueStar and RESA both said that a prolonged no-cancellation-fee period would invite gaming, with RESA noting that the period from contract signing to the end of the 10-day period after the first bill could be as long as 87 days.

"Not only would such a policy harm customers in the form of higher prices and limit the number of fixed-price offers in the market, but it would also create a structure that allows customers to easily game the market (potentially impacting a retailer's solvency), causing even further unnecessary harm to the competitive market," RESA said.

"RESA would point out that this extended rescission period provides an opportunity for third party agents, brokers, or consultants ('ABC') to improperly urge customers to engage in this type of 'gaming' behavior ... It is not difficult to imagine an ABC being quite successful in aggregating a large number of customers using the selling point, 'Sign up with me, and I promise you if market rates fall between the time you contract with a RES until the time you receive your first bill, I will get you a new lower rate without any penalties for canceling or switching,'" RESA said.

RESA and BlueStar both said that the rescission period should primarily be designed to protect customers against slamming or bad actors, which does not require an 87-day no-cancellation-fee window (and are being addressed by several other provisions such as the disclosure statement). However, RESA said that it would be amendable to a rule that would allow a customer to cancel without a termination fee after their first bill, if the price the customer contracted at differs from the price that appears on their first bill.

Other Solicitation Matters

RESA and the Illinois Competitive Energy Association both raised concerns about how suppliers are to convey information in the Uniform Disclosure Statement to customers solicited through telesales (inbound or outbound). RESA is concerned that as much of the information in the statement will already have been disclosed by the supplier when explaining its offer, requiring the statements to be recited again will unnecessarily lengthen the call and frustrate customers. ICEA said that, similar to the flexibility afforded to door-to-door sales, telephonic solicitations should be permitted to cover all of the required items in the statement in any order, so long as all the information is communicated to the customer.

RESA suggested that to ensure all customers who receive a written Uniform Disclosure Statement read the statement, the Commission should consider requiring the Uniform Disclosure Statement to be either a separate document or be the first page(s) of a written Letter of Agency (the current draft does not specify the location of the Uniform Disclosure Statement).

Commonwealth Edison recommended that the Uniform Disclosure Statement be required to

state that the supplier is licensed by the ICC, and that the supplier has informed the ICC that the supplier is "seeking to enroll customers." This statement should also include the ICC's phone number and internet address, and direct customers to both for more information, ComEd said. As is implicit in this requirement, ComEd recommended requiring suppliers to inform the ICC before commencing a marketing or solicitation program using each of the various methods covered by rule (e.g. door-to-door, telesales, etc.).

For direct mail and email marketing, RESA noted that the draft rules require a Uniform Disclosure Statement to be included. RESA said that the Uniform Disclosure Statement may not fit on such direct mailings, and suggested that suppliers be allowed to provide a website link directing customers to visit in order to obtain the statement, or be allowed to include a separate written statement accompanying, but not included on, the mail piece.

Furthermore, RESA sought clarification on the types of direct mail and email marketing that are required to include the Uniform Disclosure Statement. RESA noted that general offers inviting customers to contact the supplier for a fixed rate, but provide no specific rate or product information, cannot include a Uniform Disclosure Statement, because the Uniform Disclosure Statement is product specific. RESA suggested limiting the Uniform Disclosure Statement requirement to direct mail or emails for "a specified power and energy product or service."

RESA noted that the current Uniform Disclosure Statement requires that, if savings are guaranteed under certain circumstances, the supplier must provide a written statement, in plain language, describing the conditions that must be present in order for the savings to occur. RESA said, as written, guaranteed savings products would effectively be banned from being sold via telesales, noting that while other disclosures in the Uniform Disclosure Statement can be made orally for telesales, the guaranteed savings requirement must be made in writing. Presumably this is before the contract is executed, as is RESA's interpretation, although that is not entirely clear due to how the draft language is written (it could be argued the a supplier is only required to disclose pre-enrollment the existence of the written statement which must be provided at a later date).

In any event, RESA sought changes that would allow oral disclosure of the guaranteed savings statement.

Customer Size and Applicability

RESA suggested that the definition of "small commercial customer" be revised to mean a non-residential customer of an electric utility consuming 15,000 kilowatt-hours or less of electricity annually in the State of Illinois, rather than in a specific utility service area. RESA said that this broader geographic scope is required so that large customers with a small operation in one utility area, but who are defined as large commercial customers due to their usage in another area, are not considered small commercial customers in certain areas (such as retail franchises or similar entities).

While most of the draft rule applies only to residential and small commercial customers, rules for training sales agents would apply to all retail suppliers regardless of what customer sizes they serve. ICEA said that the application of these training rules to all suppliers has not been justified given the sophistication of large customers, the lack of any evidence of a problem, and the success of the large commercial market. Under ICEA's proposal, training as well as the following provision of Part 412, which is included in the sales agent training section, would no longer apply to sales to large commercial customers, "A RES and its sales agents shall not utilize false, misleading, materially inaccurate, or otherwise deceptive language or materials in soliciting or providing services." Such activities may still be prohibited by various other consumer protection laws.

Customer Complaint Reporting

Several suppliers expressed concerns with the draft's provision to post customer complaint data online. Suppliers were concerned with the inclusion of informal complaints, which Dominion Retail noted, "could include any questions a consumer has or even a complaint such as a customer who thinks the supplier's price is 'just too high' for any reason whatsoever."

Dominion Retail also noted that merely listing

the number of complaints could provide a false picture of a supplier's performance, as suppliers with more customers may have more complaints, but a lower complaint rate. Dominion Retail suggested a metric that examines the percentage of complaints per customer of the supplier, in addition to total complaints. RESA suggested a metric that takes into account the number of enrollments submitted by the supplier and the number of customers served by the supplier for the reporting period.