

Energy Choice Matters

April 26, 2010

PUCT Staff Posts REP Change of Control Proposal, Would Limit REPs to One Trade Name

PUCT Staff posted a draft proposal for publication that would require REPs undergoing a change in control to seek prior Commission approval, and would limit REPs to using only one assumed name starting January 1, 2011 (37685).

Under the Staff draft, a REP or the person seeking to effect a change in control of a REP would be required to obtain prior approval from the PUCT before any change in control of occurs. A change in control of a REP would include but would not be not limited to:

- A REP sells, assigns, or otherwise transfers its REP certificate to another person;
- A REP or a principal of a REP sells 70% or more of the REP's assets, including, (without limitation) its REP certificate to another person. The sale of 70%, or more of the REP's assets would be defined as the sale, lease, exchange, or other disposition of 70% or more of the monetary value of the assets, including, without limitation, the customer agreements, of the REP that is not made in the ordinary course of business and without regard to whether the disposition is made with the goodwill of the business;
- A transaction or series of transactions, whether or not the transaction involves the acquisition of the voting securities of a REP, that results in the acquirer obtaining control of the REP, or
- A REP is a party to a merger or consolidation.

The Commission, absent good cause, would be required to issue an order on the change of

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Sunset Advisory Commission Recommends Granting Greater Enforcement Authority to PUCT

A Staff report from the Texas Sunset Advisory Commission recommends giving the PUCT greater enforcement and penalty authority, while increasing oversight of ERCOT and making the ERCOT board completely independent.

The Sunset Commission Staff said that granting the PUCT greater powers, such as restitution and cease and desist authority, would allow the PUCT to better oversee Texas' restructured markets and improve the PUCT's ability to resolve issues in these markets as they continue to evolve.

Sunset Commission Staff recommended authorizing the PUCT to order restitution to market participants harmed by market power abuse. "Restitution makes sense for situations in which a company has engaged in market power abuse in the wholesale electric market," Sunset Staff said, noting that without such restitution authority, profits from any manipulation could exceed the PUCT's administrative penalty authority, thus not discouraging such behavior. Though not by name, Sunset Staff cited a settlement under which Luminant paid \$15 million to resolve alleged manipulation claims which PUCT Staff alleged cost market participants \$57 million. Legislation which would have granted the PUCT restitution authority failed in the last legislative session.

Additionally, Sunset Staff recommended increasing the PUCT's administrative penalty authority from \$25,000 to \$100,000 per day for violations of ERCOT's reliability protocols or the PUCT's wholesale reliability rules.

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Conn. Settlement Filed Regarding Supplier Termination of Defaulting Gas Customers

Connecticut LDCs, gas marketers and the Office of Consumer Counsel have filed a settlement regarding the ability of marketers to cease supplying commodity to customers in default during the customer's initial 12-month stay on Firm Transportation service, which will cap a supplier's liability for such a customer's supply at a maximum of 90 days (09-11-15).

Currently, the LDCs have interpreted the 12-month minimum stay on Firm Transportation service as preventing a marketer from ceasing supply to a customer in default (Only in Matters, 11/26/09).

Under the settlement, marketers may include a provision in their contracts permitting them to drop a delinquent customer during the customer's initial Firm Transportation term, and default the customer to Billing Option #3 (utility consolidated billing) on the next available billing cycle, but no sooner than 10 calendar days, unless the delinquency is cured by the customer for the delinquent amount before such cycle.

When invoking such a drop, the marketer shall notify the customer in writing of the default, and that at the next available billing cycle, the customer will be billed by the LDC for both commodity and delivery services subject to LDC tariffs, rules, and regulations. The marketer will further notify the customer that they will be obligated to pay the LDC for the commodity as well as delivery service, and will now be billed by the LDC for a security deposit equal to three months highest usage (commodity and delivery).

During the time in which the customer is served under Billing Option #3 and is billed by the LDC, the marketer will retain the liability for the customer's commodity until either the customer pays the LDC security deposit, is switched to sales service, or is terminated by the LDC; however, in no event for more than 90 days from the marketer's customer drop notice to the LDC. During this period, the LDC will only be obligated to pay the marketer for the customer's commodity to the extent the customer pays the LDC. Payments made by the customer during this period will first be applied to delivery service and then to commodity service.

Upon notification by a marketer to the LDC that the marketer is dropping the customer for non-payment reasons during the initial Firm Transportation term, the customer will default to sales service once the security deposit and any LDC delinquent balance has been paid by the customer. The marketer may at any time prior to the customer's return to LDC sales service reinstate the customer's contract with the marketer by notifying the LDC that it is rescinding the customer drop.

The settlement was signed by Connecticut Natural Gas, Southern Connecticut Gas, Yankee Gas Services, Direct Energy Services, Hess Corporation, Santa Buckley Energy, and the Office of Consumer Counsel.

FERC Sets Hearing on FCA Revisions, Complaints

FERC set the majority of disputed issues regarding changes to the ISO New England Forward Capacity Market for hearing, though it will allow ISO-NE's proposed changes to be used in the upcoming fourth Forward Capacity Auction in August (ER10-787).

Regarding both the ISO-NE filing to revise the FCA, as well as complaints from generators, FERC set the following issues for paper hearing, in consolidated cases:

Issues Relating to Alternative Price Rule (APR)

- 1) Triggering conditions, if any, for the APR
- 2) Treatment of Out of Market (OOM) resources that create capacity surpluses for multiple years
- 3) Appropriate price adjustment under APR

Modeling of Capacity Zones

- 1) Whether zones should always be modeled
- 2) Whether all de-list bids should be considered in the modeling of zones
- 3) Whether a pivotal supplier test is necessary
- 4) Whether revisions to the current mitigation rules would be necessary in order to model all zones

Proper Value of Cost of New Entry (CONE)

- 1) Whether the value of CONE should be reset

Any potential changes stemming from an order resolving these issues will be applied after the August 2010 Forward Capacity Auction.

Regarding extension of the price floor, FERC

said that it, "generally does not approve of price floors, but recognizes that as a transitional mechanism to offset the flaws in the existing APR, an extension of the price floor in this case may be appropriate." While the price floor may be used in the August FCA, FERC expects that in its final order accepting an appropriate APR mechanism, it will terminate the price floor coincident with implementation of the new APR.

FERC accepted, and did not set for hearing, the following provisions as set forth in ISO-NE's original filing: the proposal to develop both local resource adequacy (LRA) and transmission security analysis (TSA) based requirements for import-constrained Capacity Zones and to set the local sourcing requirement (LSR) at the higher of the two values; the general provision to decouple the FCA Starting Price from CONE; the proposed revisions to the rules governing the review of offers below 0.75 times CONE; the compensation of resources that cannot prorate for reliability reasons; and the clarifications concerning the obligations of resources without a capacity supply obligation.

In particular, FERC accepted a starting price of \$15/kW-month for the first FCA held without a price floor.

FERC rejected GDF Suez's arguments concerning self-supply by load serving entities. GDF Suez had noted that LSEs are currently permitted to designate their own or contracted capacity resources to self supply their capacity needs as an alternative to purchasing capacity in the FCA. However, if the nomination is less than the LSEs' actual peak load three years later, the LSE is precluded from self-supplying the additional load and must purchase the difference at a premium.

GDF Suez argued that LSEs should be allowed to self-supply their full capacity needs with no premium attached since doing so will have no impact on the administration of the FCA. GDF Suez observed that an LSE with generating capacity may designate that capacity for self supply in a FCA up to the level of its peak load responsibility at the time of the self-supply designation, but this designation may be significantly below its estimated future peak load responsibility, and it is therefore required to sell generating capacity. GDF Suez argued that such a market rule is imbalanced since LSEs

selling generating capacity which they can not use as self-supply into the FCM receive less than the capacity clearing price. Thus, GDF Suez contended, an LSE that is not allowed to adjust its supply to meet incremental load ends up being charged more for its purchase to meet that load than its own resources are paid. GDF Suez had requested that the Commission direct ISO-NE to amend the market rules to allow LSEs that have incremental load and also have resources that cleared the relevant FCA to update their self-supply designations up to the start of the relevant Capacity Commitment Period.

However, FERC said that GDF Suez's request is outside the scope of the proceeding and said that the issue is properly raised in the stakeholder process.

Exelon Reports Lower Adjusted Earnings on Weak Prices, Refueling Outages

Exelon Generation posted lower adjusted earnings of \$434 million for the first quarter of 2010, versus \$605 million a year ago, on weak power prices and an increase in refueling outage days for its nuclear fleet. On a GAAP basis, net income was \$561 million for the first quarter of 2010, versus \$528 million a year ago, mostly due to a \$30 million increase in mark-to-market gains of from economic hedging activities.

The Generation segment includes merchant generating assets, wholesale energy marketing operations, and competitive retail sales. Generation's "market and retail" sales for the quarter were 28,214 GWh, versus 28,464 GWh a year ago. Generation's average realized margin on all electric sales, including sales to affiliates and excluding trading activity, was \$37.26 per MWh in the first quarter of 2010, compared with \$39.25 per MWh in the first quarter of 2009.

Exelon said that it expects capacity prices in the upcoming May Reliability Pricing Model auction to increase given several factors, including rule changes allowing demand response to bid in above \$0; a 1.7% increase in PJM's forecast for demand; the inclusion of the American Transmission Systems Inc. load; delay

in the Susquehanna-Roseland Transmission line which reduces available import capability into EMAAC; and an increase in net CONE of 15% and 23% for RTO and EMAAC, respectively.

Briefly:

Geary Energy Receives Delaware Electric License

The Delaware PSC granted Geary Energy, LLC a retail electric supplier license serving commercial and industrial customers.

WindStreet Energy Receives Delaware Broker License

The Delaware PSC granted WindStreet Energy, Inc. an electric broker license serving commercial and industrial customers.

Group Purchasing Organization Seeks Conn. Aggregation Certificate

The Group Purchasing Organization, Ltd. has applied for a Connecticut electric aggregator certificate to serve all customer classes in all service areas. The Group Purchasing Organization is affiliated with Expense Consulting, Ltd., which offers business consulting services on reducing overhead costs.

SCE, SDG&E Confirm Direct Access Cap Hit

Southern California Edison and San Diego Gas & Electric updated their direct access websites late last week to confirm that they are no longer accepting Notices of Intent during the open enrollment window as the load cap for the Year One allotment of new direct access has been hit, as previously reported (Matters, 4/19/10). Pacific Gas & Electric has offered no confirmation on its website of its cap status, though as previously reported, it was certainly hit on the first day similar to SCE and SDG&E.

Young Energy Seeks to Add Trade Name

Young Energy applied for an amendment to its Texas REP certificate to add the assumed name Payless Power and relinquish the assumed name Connect! Energy. Young Energy currently has authority to market under the similar name Payless Energy, as well as UNO Energy and Green Fields Electricity.

Maine PUC Opens Docket on CMP AMI Pricing Options

The Maine PUC has opened Docket 2010-132 to consider pricing options and other programs Central Maine Power should implement to take advantage of its approved advanced metering infrastructure (AMI).

Change in Control ... from 1

control application within 75 days.

Regarding trade names, the draft would provide that, beginning January 1, 2011, a REP may register and use no more than one assumed name at one time. This limitation would ensure less confusion among customers regarding the names under which a REP operates, Staff said.

The draft would also create a new type of REP to allow large commercial customers to purchase the output of distributed generation. The new category of Option 3 REPs would allow the certification of a REP for the sole purpose of selling electricity exclusively to a retail customer other than a small commercial and residential customer from a distributed generation facility located on a site controlled by that customer. Among other things, the applying Option 3 REP would have to show that the distributed generation from which it would sell power is owned by a power generation company registered with the PUCT.

Staff's proposal for publication would also make more explicit that REP applicants are required to disclose all relevant complaint and compliance history, listing several types of findings and actions which some recent applicants have said are not required by the current rules (e.g. settlements where not fault is admitted, cases in which non-compliance was alleged even if no finding was made). Furthermore, applicants would have to report such information for themselves and affiliated companies, and for companies which share the same principals as the applicant even if the companies are not considered affiliates. Staff's draft would also authorize the Commission to require that an applicant for REP certification or certification amendment must provide the Commission with the results of an independent

background investigation from a firm chosen by the Commission.

Staff's draft includes language strengthening the ability of the Commission to draw upon a REP's letter of credit.

Under Staff's proposal, switch holds erroneously imposed by REPs under the deferred payment plan rules would be considered serious violations, for which the Commission could suspend or revoke a certificate, or take other action permitted by rule.

Sunset ... from 1

The PUCT, Sunset Staff said, must be able to stop unlicensed or harmful activity immediately, but the PUCT lacks such authority. To stop an action, the PUCT first must issue a notice to the alleged violator and provide an opportunity for a hearing before issuing a cease-and-desist order. By then, the harm may have been done, Sunset Staff said. "Immediate action may be crucial if the harmful behavior affects electric reliability or causes an immediate harm to consumers, such as disconnecting consumers during a summer disconnect moratorium," Sunset Staff said, in recommending that the PUCT be granted the authority to issue emergency cease-and-desist orders for, "actions [that] would harm the reliability of the electric grid; are fraudulent, hazardous, or create an immediate danger to public safety; or could reasonably be expected to cause immediate harm to consumers in situations in which monetary compensation would be inadequate."

Sunset Commission Staff also recommended greater public reporting of complaints to the PUCT on its website, as well as enforcement actions taken by the PUCT. Per the Sunset Staff's recommendation, informal complaints received by PUCT would be aggregated to display information such as the total number of complaints by type and a breakdown of how they were resolved. Enforcement-related information displayed on the PUCT's website would include all investigation and enforcement activity, whether initiated from an informal complaint or elsewhere. Data shown, for example, could include the origin of the action, disposition of investigations,

and the amount of final enforcement penalties by company, Sunset Commission Staff said.

Furthermore, the PUCT should have clear authority to require the renewal of the various licenses it grants, the Sunset Commission Staff added. "The renewal process enables an agency to keep track of those it regulates, offers an opportunity to review their compliance history, and helps ensure compliance with regulatory requirements such as occurrence of disqualifying criminal offenses." Lack of a renewal feature in its licensing-related functions has made it difficult for the PUCT to know when a licensed entity goes out of business or has changed contact information, Sunset Staff noted. Sunset Staff also recommended that the PUCT be granted statutory authority to set reasonable fees for licensing-related functions, such as original applications and renewals.

With the PUCT, Railroad Commission, and Texas Commission on Environmental Quality all up for Sunset review in the same year, Sunset Staff noted a unique opportunity to examine each's authority and potential for shifting responsibilities to another agency or a merger or other reorganization. In particular, while the PUCT regulates electric and telephone utilities, gas utilities are the domain of the Railroad Commission, while water utilities are regulated by TCEQ. Any decision on the structure of such utility regulation should be postponed until the Sunset reviews of the other agencies are complete, Sunset Staff said.

ERCOT

ERCOT requires better oversight to address the "high risk" in its operations, Sunset Staff said, citing the nodal project, and its cost overrun, as an example.

"Oversight of an entity like ERCOT needs to be scaled to the risk and public importance of its functions. However, PUC's oversight of ERCOT is inconsistent as PUC only reviews requests for increases in ERCOT's fee authority and does not review spending in years in which ERCOT does not request an increase. In fact, PUC has not reviewed ERCOT's budget since 2006, over which time its operating expenses have increased 62 percent. PUC also does not review ERCOT's use of debt financing, an important point given ERCOT's accumulated

debt of \$365 million," Sunset Staff noted.

Sunset Staff recommended authorizing the PUCT to exercise additional oversight authority of ERCOT by annually reviewing and approving its entire budget and reviewing and approving all uses of debt financing. The annual budget review, including explicit authority to approve, disapprove, or modify each item in ERCOT's budget, would be exempt from requirements to conduct proceedings as a contested case. Sunset reviews of ERCOT, which is currently a one-time review, should be periodic, Sunset Staff added.

Furthermore, Sunset Staff recommended changing ERCOT's funding approach from setting a fixed level for the system administration fee, to setting a total budget for the year, approved by the PUCT, with the system administration fee then set to recover such expenditures, but subject to modification if usage varies and alters projected cost recovery. The ERCOT Board would adjust the fee on a quarterly basis as more accurate information is known about the revenues that the fee is actually producing.

Sunset Staff concluded that the presence of electric market stakeholders on the ERCOT Board, "impairs the impartiality," of the Board. Sunset Staff noted that industry stakeholders with financial interests in ERCOT's decisions hold a majority of votes on the Board, and said that ERCOT is unique as being the only transmission system operator in North America to not have a fully independent board. Residential consumers are generally underrepresented in the ERCOT decision-making hierarchy, Sunset Staff added.

"Authorizing PUC to directly make appointments to the Board would ensure public discussion of appointments and bring differing viewpoints to the selection process rather than the homogenous approach a self-appointing entity tends to take," Sunset Staff said.

Sunset Staff recommended restructuring the ERCOT Board to consist of nine directors appointed by the PUCT, including seven directors unaffiliated with the electric market, and two non-voting, ex officio directors - the Chair of the PUCT or a designee, and the Public Utility Counsel. The ERCOT CEO would no longer serve as a director of the Board.

Attempts to restructure the ERCOT board failed in the last legislative session.

Sunset Staff recommended maintaining the Office of Public Utility Counsel, as Texas has a continuing need for a residential and small commercial customer advocate.

Sunset Staff also reported that, "[r]ecent legislative decisions have set a clear market-oriented policy for overseeing electric and telecommunications utilities, which Sunset staff did not attempt to re-evaluate. For this reason, the report does not contain new regulatory requirements to force desired behavior by retail electric providers such as through standard offers, forms, or contracts; or through mandates for purchasing excess renewable generation from customers. In addition, Sunset staff could not devise the future direction and scope of state policy on promoting energy efficiency and renewable resources, especially in light of PUC's current efforts in these areas."