Energy Choice Matters

April 27, 2010

REPs Oppose Mandate to Inquire Prompt Payment Act Status of All Customers

Requiring REPs to inquire of all applicants for service whether they are governmental entities as defined in the Texas Prompt Payment Act (PPA) will result in reduced service levels and increased frustration and costs for all customers, the REP Coalition said in opposing the requirement contained in a proposal for publication (37981). The REP Coalition included the Alliance for Retail Markets, Reliant Energy, Texas Energy Association for Marketers, and TXU Energy.

The Prompt Payment Act sets extended payment periods and other billing rules applicable to eligible government entities (Only in Matters, 3/5/10).

The REP Coalition noted that the Prompt Payment Act does not require REPs to ask each applicant for service their Prompt Payment Act status, stating that the costs of imposing the inquiry requirement would outweigh the benefit, as the REP Coalition believes that the overwhelming majority of governmental entity customers self-identify themselves as eligible for the rights afforded under the Prompt Payment Act.

"A requirement that REPs inquire with every applicant, even if it is obvious from the applicant's name that they are not a governmental entity under the PPA, will often not result in just a brief question and answer. In fact, the REP Coalition's view is that most of the time this inquiry will lead to follow-up questions by the applicant regarding what the PPA is, what protections are afforded to customers under it, and whether there is any opportunity for the applicant to meet the definition. This

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TEZ Says It Is Not Challenging Authority to Pass-through ERCOT Charges in Just Energy Contract

Taqueria El Zarape, Inc. (TEZ) has again re-characterized the nature of its complaint against Just Energy Texas, which was originally filed in district court prompting Just Energy to petition the PUCT to assert primary jurisdiction (37891).

The dispute relates to alleged over-charging of "Utility Charges," but aside from that, Taqueria El Zarape's pleadings have been confusing and fluid as to the exact nature of the complaint (Only in Matters, 4/16/10). Central to complaint, however, is language in the Just Energy contract that explicitly defines Utility Charges as including TDSP charges as well as the ERCOT Administration fee, Unaccounted for Energy (with the contract stating that UFE Charges will never be less than zero) and ERCOT RMR charges.

In a further brief requested by Commissioners after the April 15 open meeting, Taqueria El Zarape now says that, "this case centers on the non-TDSP components of Utility Charges to TEZ that Just Energy generates based on amounts billed to Just Energy, i.e., the ERCOT Administration fee, UFE, and ERCOT RMR Charge."

Specifically, TEZ said that it, "intends to prove in District Court that Just Energy is improperly calculating these charges."

"For example, given that it takes ERCOT months to finalize its own calculation of UFE, TEZ questions Just Energy's calculation of the UFE attributable to TEZ on a real-time basis, which Just

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Briefly:

Spark Energy Begins Residential Marketing at PPL

Spark Energy has begun offering residential electric service at PPL with a 12-month fixed price of 9.403¢/kWh, replicating the 10% off of PPL's price to compare rate which is being offered by several providers, though the other plans which are priced at 9.403¢/kWh are either fixed through December 2010, or month-to-month. Spark is the 11th supplier with a currently active residential offer that is broadly available.

BlueStar Receives Ohio Electric License

BlueStar Energy Services has received an Ohio electric supplier license to serve all customer classes, including residential customers, in all service territories (Only in Matters, 3/24/10).

Gateway Energy Services Expands to All N.J. Territories in Both Commodities

Gateway Energy Services has expanded its New Jersey marketing to include electricity and natural gas in all service areas, for both residential and commercial customers. Residential products, depending on commodity and service area, include 6-month, 12-month, 24-month or through-December-2010 fixed plans, plus a variable rate option. Gateway has been offering gas in New Jersey since 1999, and started marketing electricity, at PSE&G and Rockland Electric initially, late last year.

Unified Energy Services Seeks Maine Broker License

Unified Energy Services LLC applied for a Maine electric broker license to serve all customer classes in all service areas.

Power Management Company Receives Ohio Broker Licenses

Power Management Company, LLC has received Ohio electric and natural gas broker/aggregator licenses to serve non-residential customers at all distribution companies (Only in Matters, 3/24/10).

ERCOT Finds Valley NG Units Not Needed for Reliability

Reversing its preliminary finding, ERCOT said that after further studying other alternatives, it has determined that Valley NG Power Company's Units 1-3 (Luminant) are not required to support ERCOT System reliability, and the units may cease or suspend operations according to the schedule in their Notice of Suspension of Operations (Only in Matters, 3/19/10).

ERCOT Finds Valero Units Not Needed for Reliability

ERCOT said that it has determined that Valero Refining's Coastal Coast Units 1 and 2 are not required to support ERCOT System reliability, and the units may cease or suspend operations according to the schedule in their Notice of Suspension of Operations (Only in Matters, 4/5/10).

Champion Energy Services to Supply Sam Houston Race Park

Champion Energy Services said that it has won a 24-month contract to provide electricity to Sam Houston Race Park. Champion Energy Services will become a multi-year marquee sponsor of the 300-acre entertainment venue as part of the agreement, which includes an on-site marketing presence, naming rights, premier signage placement, and ongoing recognition at events.

Calif. PUC Denies Rehearing on CHP Cost Allocation

The California PUC denied rehearing of its decision allocating to direct access and community choice aggregation customers costs related to the local reliability and greenhouse gas reduction benefits from Combined Heat and Power installations with which the state's investor-owned utilities are required to sign contracts. The Alliance for Retail Energy Markets had argued that direct access customers should not be assigned any costs of the CHP contracts because direct access customers receive no tangible benefits: i.e. energy, capacity, RECs, or a locational resource adequacy adder, all of which accrue to the utilities. However, the PUC affirmed that

societal benefits from the CHP installations are appropriately charged to all distribution customers, including CHP costs which the PUC says relate to reduced greenhouse gas emissions and improved locational reliability.

ISO-NE Forecasts Adequate Summer Supplies

ISO New England said yesterday that it expects New England to have sufficient electricity supplies this summer, forecasting a peak under extreme summer weather of 29,310 MW, versus capacity resources totaling 32,670 MW.

Ontario Passes Bill Granting Ministry, OEB Additional Regulation Power Over Suppliers

The Ontario Legislature has passed legislation (Bill 235) granting the Ontario Energy Board authority to enact various new consumer protections and impose new requirements on electric and gas retailers, though in most cases the law leaves specific provisions to be developed through the Board's expanded regulation authority.

Among the specific provisions contained in the act is that customers are allowed to cancel a contract at any time from the point of signing the contract until 10 days after the customer receives, and acknowledges receipt, of a text-based copy of the contract, where applicable. Additionally, a customer could cancel a contract any time during the verification process, which consists of a 10-60 day window.

Otherwise, much of the specific directives sought by the Ministry of Energy and Infrastructure will be left to regulation (see Matters, 12/9/09 for complete review of provisions sought by the Ministry, such as elimination of auto-renewals, termination fee limits, direct rate comparisons to default service, etc.).

For example, the act permits the Ministry to direct the Board to issue regulations requiring or imposing standards that are required to be met by a gas or electric retailer, or its employees, agents, or third parties acting on behalf of the retailer, including standards related to:

- Education, training, certification and communications
- Business practices
- Performance standards
- Background verifications and assessments
- Record keeping
- Contracting, including standards related to contracting with certain specified classes of vulnerable consumers

Additional authority granted to the Board, if directed by the Ministry, would allow it to develop disclosures which must be made orally or in writing to customers, and to develop rules governing what information is required in the information and documents that must accompany contracts, the languages in which such information and documents may be provided, the form and manner of their presentation, and the circumstances under which they are to be provided.

The Board could also develop regulations governing acknowledgments and signatures, prescribing their form or manner and respecting information and matters to which they apply. Originally, the Ministry of Energy said that it desires a signature on all contracts.

Finally, the Board may develop rules governing early termination fees, as well as the renewal or amendment of contracts.

Pepco, Delmarva Counter OPC Petition to Review Entire SOS Administrative Charge

Pepco and Delmarva opposed the Office of People's Counsel's motion to expand the scope of the utilities' petition to increase the recovery of cash working capital costs in SOS rates to include a review of all components of the SOS administrative charge, as the utilities said that a wholesale review of all components is not required by the Case 8908 Settlements when updating a specific component.

As only reported by *Matters*, Pepco and Delmarva have applied to increase their recovery of cash working capital costs in SOS rates due to the move to weekly billing in PJM. OPC has opposed the request absent a review of other SOS components, such as the return, which may already be compensating the utilities for any increased cash working capital costs

(Only in Matters, 4//8/10). The Apartment and Office Building Association of Metropolitan Washington filed comments in support of OPC's motion, and said that cash working capital cost recovery should be addressed in Pepco's current rate case.

Pepco and Delmarva stressed that under the Case 8908 SOS Settlements, specific components may be adjusted individually without the need for resetting all components. While OPC characterized the utilities' request as single-issue ratemaking, the utilities noted that the recovery of prudently incurred costs under SOS is explicitly authorized by statute, and thus any component which is insufficient to recover such costs may appropriately be adjusted individually to ensure cost recovery. Pepco and Delmarva further noted that the SOS Settlement provides that, after the initial service period, all issues relating to SOS are open to change. Furthermore, while the Settlement service periods have expired, the utilities stressed that the Commission has ordered that the Settlement's terms shall continue absent Commission action. Thus, Pepco and Delmarva rejected OPC's arguments that the Settlement's terms have expired, and that all components must be re-examined. Pepco and Delmarva noted that the Commission has already adjusted individual components under the Settlement, without re-evaluating all components, citing the periodic update of the uncollectibles component.

Pepco and Delmarva said that OPC is free to seek a change to any portion of the settlement, but any such petition must be made separately and should not stall the companies' application to recover full working capital costs.

On this point, the Retail Energy Supply Association agreed, noting that resolution of the cash working capital issue is required due to the competitive disadvantage competitive suppliers currently face in competing against SOS which does not include all costs incurred to serve customers.

Due to PJM weekly billing, RESA said that Pepco and Delmarva are under-recovering their cash working capital costs, which, "means that retail suppliers are competing against an SOS rate that does not reflect the Companies' true cost of providing SOS."

"In other words, with respect to CWC costs, retail suppliers are not competing on a level playing field. They are at a competitive disadvantage because they are incurring costs that they must pass on to their customers in order to remain in business, whereas the Companies are able to offer SOS at a price that does not include their full CWC expense that they need to perform their day-to-day operations," RESA said.

RESA said that any review of the entire administrative charge would entail considerably more discovery, witnesses, testimony, potential settlement discussions, and overall resources from all stakeholders, compared with the limited update to cash working capital costs recovery. Thus, RESA urged the PSC not to delay updating cash working capital costs by linking any revisions to a complete review of the administrative charge.

Pepco and Delmarva also reiterated that they are losing nearly $1 million on residential SOS (Only in Matters, 4/16/10), calling OPC's calculated returns erroneous.

PPA ... from 1

single question has the potential to add 30 seconds or more to hundreds of thousands of nonresidential enrollments in the market. As stated previously, governmental entities are familiar with the PPA. Therefore, nearly all of the additional call-handling time will be expended on customers who do not qualify, resulting in reduced service levels and increased frustration and costs for all customers," the REP Coalition said.

At the very least, the inquiry requirement should not apply to residential customers since such customers are readily identifiable as not government entities, the REP Coalition said.

However, the Steering Committee of Cities Served by Oncor argued that the inquiry requirement would not be a significant burden on providers. "In cases where it is not obvious, it is fairly simple for a customer service representative to ask whether the customer is a governmental entity during enrollment, as would be required by the new rule," the Cities said.

The proposed rule would also require that REPs, within six months, inquire of their existing

customers whether the customer is an eligible government entity per the Prompt Payment Act, if the REP does not already know this information.

The REP Coalition said that if REPs were required to send a separate letter to non-residential customers inquiring of their status under the Prompt Payment Act, one REP in the market estimates that it would result in approximately $100,000 of additional costs to that REP alone.

The proposal would further require that REPs disclose to all governmental entities that they will be billed in accordance with the Prompt Payment Act. The REP Coalition asked that any disclosure requirement only apply going forward as new governmental entities under the Prompt Payment Act are acquired as customers. Additionally, the REP Coalition requested that REPs be expressly allowed to fulfill any disclosure obligation by one of the following methods: inclusion of language in the terms of service (TOS), your rights as a customer (YRAC) document, or by providing the disclosure orally at the time of enrollment.

The REPs recommended codifying in the PUCT's rules language that incorporates by reference the Prompt Payment Act's requirement for a governmental entity to timely dispute a payment pursuant to the Prompt Payment Act; specifically, within 21 days. The State of Texas agencies and institutions of higher learning, however, urged the Commission to clarify in the preamble that the rules are not intended to create any statute of limitations on the time for contesting overbilling to governmental entities.

TEZ ... from 1

Energy must do in order to charge UFE to TEZ at month's end. After discovery in the District Court case, TEZ will be able to explain exactly what Just Energy is doing wrong in making these calculations. However, because TEZ has not yet been provided with the details and documents that would permit it to determine how Just Energy is performing these calculations, TEZ is not yet in position to explain the improper calculation in precise detail."

Because Taqueria El Zarape now characterizes the crux of its complaint as relating to how the calculation of these non-TDSP utility charges is performed, which TEZ now admits can be passed through under the contracts, Taqueria El Zarape said that the dispute is purely factual and thus appropriately adjudicated by the court, and not the PUCT, since the case does not invoke either the Commission's expertise nor does it implicate any rule which requires a consistent interpretation in the market.

However, Taqueria El Zarape's latest description of its complaint is markedly different from its original petition in court, which prompted Just Energy to seek PUCT jurisdiction due to issues that Just Energy said require consistent interpretation from the Commission.

Specifically, Taqueria El Zarape originally stated that its complaint was filed because it, "recently obtained records from AEP indicating that Just Energy charged Plaintiff a higher 'Utility Charge' than it was charged by AEP. In other words, rather than simply passing through the Utility Charges, Just Energy charged Plaintiff more than the actual Utility Charge."

Taqueria El Zarape made no mention of the other charges it now accepts may be properly passed through (when calculated correctly) as the reason for the difference between the AEP TDSP charge, and the broader category of "utility charges" appearing on its bill.

"Just Energy's practice of charging more than the actual Utility Charge violated its contractual obligation to do no more than pass through the charge," Taqueria El Zarape alleged in its original complaint, again, with the overcharge defined as the difference between the AEP charges and the utility charges billed by Just Energy. Taqueria El Zarape cited as an example an October 20, 2008, bill in which, "Just Energy billed Plaintiff for Utility Charges of $1,028.51 (for electricity usage of 2,6720 KWh [sic]). However, AEP's records show the actual Utility Charge for that period to be only $980.41."

"Accordingly, Plaintiff was overcharged $48.10 during that period," Taqueria El Zarape said, still making no mention of the non-TDSP charges it now accepts may be imposed.

Taqueria El Zarape further alleged, "Just Energy routinely charged Plaintiff more in Utility Charges than it was permitted to charge under

the terms of its contract. Rather than simply passing through the Utility Charges assessed by AEP, Just Energy inflated the Utility Charges in its bills, and collected the excess amounts from Plaintiff."

"Upon information and belief, Just Energy did not reimburse AEP for the inflated amount it collected. Instead, it retained the excess amount as profit," Taqueria El Zarape further alleged.

Taqueria El Zarape eventually devotes a single sentence in its original complaint to "certain enumerated charges" which the contract permits Just Energy to add to TDSP charges, but Taqueria El Zarape does not dispute their amount or calculation per se (as it is now doing), and instead alleged that these additional charges were wholly inapplicable during the time period in dispute, rather than miscalculated by Just Energy.

"Just Energy has no justification for increasing the amount it charged its customers beyond the amount it was charged by AEP. Although Just Energy's contract does permit Just Energy to add certain enumerated charges to the TDSP charge, upon information and belief, none of the circumstances permitting these additional charges were applicable during the period when Just Energy was improperly inflating the pass-through Utility Charge," Taqueria El Zarape originally alleged.

Moreover, the injunctive relief originally sought by Taqueria El Zarape was for Just Energy, "to stop their practice of overcharging Plaintiff for electricity by charging a Utility Charge higher than the action [sic] amount assessed by the TDSP," as opposed to requiring Just Energy to stop charging an amount higher than the amount assessed by the TDSP and ERCOT.

As previously reported, Taqueria El Zarape follows this same tack in its appeal of a PUCT ALJ's order denying Taqueria El Zarape's motion to dismiss Just Energy's petition for primary jurisdiction. In its appeal, Taqueria El Zarape said, "TEZ's contract claim does not challenge Just Energy's passing through of regulated wires charges. Instead, it challenges Just Energy's imposition of ERCOT Administration fees, UFE, and ERCOT RMR charges through 'Utility Charges.'" Though not as explicit as in its original complaint, by using the terms "imposition" and "through" in describing its complaint, Taqueria El Zarape can reasonably be seen as opposing the ERCOT pass-throughs themselves, specifically through the utility charge, and not the calculation of the charges as it now claims is its true dispute.

Indeed, though counsel for Taqueria El Zarape attempted to clarify at the April 15 open meeting that Taqueria El Zarape was merely challenging the amount of the ERCOT-related pass-throughs, counsel also stated that it was unusual for Just Energy to assess the ERCOT charges as a utility charge and not as a component of the energy charge, raising the specter that Taqueria El Zarape is indeed challenging more than simply the amount charged, by questioning the appropriate method, or category, of recovery (energy rate versus utility charge).

Indeed, Just Energy takes the latter statement to mean that, "TEZ appears to primarily challenge Just Energy's authority to pass through categories of charges that are not assessed by the TDSP as 'Utility Charges.'"

"This is consistent with the statements made by Mr. Evans, attorney for TEZ, at the April 15th Open Meeting, where he stated that TEZ's experts indicate that ERCOT charges are typically passed through with energy charges, and not with the TDSP charges," Just Energy said.

For this reason, Just Energy argued that, "[t]his is not simply a breach of contract issue, but rather goes to the common understanding of what is meant by certain categories of charges, who bills those charges, and whether Just Energy's TSA [terms of service agreement] resulted in proper authorization for those charges by including them as Utility Charges." The questions before the PUCT are thus legal, and not merely factual, and an assertion of primary jurisdiction via declaratory judgment is appropriate, Just Energy said.

Additionally, Just Energy noted that its terms of service with Taqueria El Zarape was a standard form contract that Just Energy used for a large number of commercial customers. "To the extent that TEZ's allegations have merit, and Just Energy's commercial TSAs or its billing methodology were in violation of PURA and the Commission's rules, Just Energy needs

guidance from the Commission in order to appropriately conform its contracts and remedy any incorrect billing activities," Just Energy said, in further arguing that the Commission should exercise jurisdiction to provide such guidance.

Just Energy said that it is thus seeking a legal determination from the PUCT that, under its terms of service, Just Energy may properly bill for the ERCOT Administration Fee, UFE, and ERCOT RMR Charges under the category of Utility Charges per P.U.C. Subst. R. 25.480 and PURA § 17.15. While Just Energy is also seeking a determination that it properly billed Taqueria El Zarape for those Utility Charges, and believes that this question is ultimately legal, Just Energy recognized the hesitancy among Commissioners regarding the factual implications of determining whether specific amounts were properly billed, and said that it should be permitted to amend its petition to remove this requested relief if the Commission believes the relief cannot be granted, so Just Energy can still pursue its legal categorization question.

PUCT Staff, however, do not agree that the Commission's exercise of primary jurisdiction is warranted, at least under Staff's current understanding of the case. Staff agreed that, "TEZ's District Court petition, filings in this docket, and statements made by TEZ's counsel at the April 15th Open Meeting collectively convey a vague picture of what its allegations are with respect to the non-TDSP ERCOT-related charges." Ultimately, though, Staff believes that TEZ does not contest Just Energy's ability under the contract to charge TEZ the ERCOT charges as a category of charges, "but it is not clear what TEZ alleges was wrong with the way in which Just Energy charged TEZ the ERCOT charges." As noted above, TEZ now says that it intends to further develop its allegations after discovery in court.

Regardless, Staff agreed with Taqueria El Zarape that the TDSP tariff is not implicated by the case, which was the original grounds upon which the ALJ relied in concluding that the Commission appeared to have primary jurisdiction, since consistent interpretation of the TDSP tariff would benefit the market. Staff also believes that the dispute is factual and not legal in nature, and thus not appropriate for a declaratory order.

For these reasons, Staff would dismiss Just Energy's petition for a declaratory order without prejudice, noting that, as Just Energy conducts discovery in court and Taqueria El Zarape's complaint becomes more clear, Just Energy may later find it appropriate to again seek relief at the Commission if the Commission's expertise, or an issue that would benefit from consistent interpretation, arises.