

# Energy Choice Matters

May 4, 2010

## Md. OPC Alleges Viridian Pre-Licensing Advertising Violates COMAR

The Maryland Office of People's Counsel alleged that Viridian Energy PA LLC, "appears to be in violation of the statutory and regulatory requirements in PUC § 7-507(a) and COMAR §20.51.02.01(A) both of which provide that a party, 'may not engage in the business of an electricity supplier in the State' unless the person holds a license issued by the Commission."

Viridian's pending electric supplier application in Maryland was first reported by *Matters* (Only in *Matters*, 2/23/10).

OPC's allegations were based on its assertion that, "Viridian has apparently advertised its service as an electricity supplier, and actually solicited at least one electricity supply customer, prior to any approval of [its electric supplier] Application."

OPC further said that Viridian has apparently commenced advertising of its services as a "Maryland, New Gas & Electric Company," alleging that the advertising has occurred, "without an adequate disclaimer that Viridian has not yet been approved to provide such services." OPC cited an advertisement at [www.marylandenergyopportunity.net](http://www.marylandenergyopportunity.net), accessed on April 30, 2010, in which Viridian is described as a new Maryland Gas & Electric Company, and which prominently includes an offer for Maryland customers to "SAVE UP TO 30% OF THE GENERATION PORTION OF YOUR MONTHLY BGE ELECTRIC BILL." The advertisement includes a click-on button to "SWITCH NOW AND SAVE," OPC said.

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## Conn. Senate Takes No Action on Energy Bill in Monday Evening Session

The Connecticut Senate, anticipated to address a mammoth energy bill Monday night, adjourned in the early hours of Tuesday morning without beginning debate or taking a vote.

The Senate did not appear Monday evening to have the votes to overturn a potential veto, thus delaying the vote. A Democratic caucus on the bill is occurring this morning before today's session.

Pressure against the bill continues from the governor's office and DPUC. Robert L. Genuario, Secretary of the Office of Policy and Management, and DPUC Chairman Kevin DeGobbo issued another letter to Sen. John Fonfara and Rep. Vickie Nardello Monday afternoon stating that relatively small changes made to the bill are inadequate to meet their concerns.

While Genuario and DeGobbo said that they can support giving the utilities greater control over electric procurement, such control must be tempered with oversight, which the DPUC has done by limiting long-term contracts to 20% of Standard Service-eligible load. Provisions in the bill for complete portfolio management expose customers to "far too many adverse consequences," Genuario and DeGobbo said.

Provisions in the bill regarding retail choice will likely lead to lost jobs in Connecticut due to negative impacts on the market, Genuario and DeGobbo added.

Genuario and DeGobbo further said that the new renewable incentives in the bill would cost ratepayers over \$80 million.

## Calif. PUC Says PG&E Anti-CCA Efforts Violate Tariffs

Recent actions by Pacific Gas & Electric to discourage customers from taking community choice aggregation service "violated tariffs and rules," the California PUC said yesterday, in directing PG&E to immediately cease such actions

On April 9, the PUC confirmed Marin Energy Authority (MEA) as a community choice aggregator. "The CPUC has heard from members of the public and MEA that although PG&E has a statutory obligation to cooperate with community choice aggregators, instead the utility has been attempting to thwart MEA's efforts to launch the new CCA," the PUC said.

"After evaluating PG&E's actions, the CPUC's Executive Director today sent a letter to the company, outlining actions that PG&E must immediately cease, including telephoning customers to ask them to opt out and then transferring the call that PG&E initiated to a PG&E customer service representative ... [C]ustomers electing to opt-out of MEA service must do so only by the methods included in the customer notification provided by MEA - by the customer calling a phone number or visiting a website," the PUC said.

Furthermore, PG&E cannot obtain an opt-out by using an opt-out form PG&E includes in a newspaper advertisement or by visiting a customer's residence and asking the customer to provide an oral or written opt-out during the visit, the PUC directed.

In addition, PG&E may no longer send mailers that have the appearance of an official opt-out notice to its customers in Marin County for the purpose of encouraging these customers to opt out of the CCA program established by MEA. "These mailers are likely to create unnecessary customer confusion and therefore violate the statutory requirement that PG&E cooperate fully with any community choice aggregators," the PUC concluded.

PG&E was directed to meet with the PUC's Energy Division to identify the specific customers who have opted out of MEA service in the manners specified above and develop a way of informing these customers that their opt-outs are invalid.

The PUC also said that it expects to act at its May 20 meeting on the City and County of San Francisco's Petition to modify a previous PUC decision (D.05-12-041) regarding restrictions placed on marketing and other CCA-related activities undertaken by utilities. San Francisco's petition for tighter utility marketing restrictions was first reported by *Matters* (Only in Matters, 1/14/10).

## Calif. PUC Agenda Decision to Open Multi-Track LTPP Proceeding

A California PUC agenda decision would institute a new three-track long-term procurement plan (LTPP) proceeding as a successor to R.08-02-007. Upon initiation of the new docket, R.08-02-007 would be closed with its record incorporated into the new proceeding (which would be assigned a docket number at that time).

Based on the record in R.08-02-007, the agenda decision would establish separate tracks for different elements of the 2010 procurement planning cycle:

(1) Track I would identify PUC-jurisdictional needs for new resources to meet system or local resource adequacy (bundled and direct access load), and to consider authorization of investor-owned utility procurement to meet that need, including issues related to long-term renewables planning and the need for replacement generation infrastructure to eliminate reliance on power plants using once-through-cooling (OTC).

(2) Track II would address the development and approval of individual IOU "bundled" procurement plans

(3) Track III would consider rule and policy changes related to the procurement process which were not resolved in R.08-02-007, such as updates to the procurement rules to comply with SB 695 and refinements to the D.06-07-029 Cost Allocation Methodology. Other policy issues would include potential refinements to the bid evaluation process in competitive solicitations, particularly with respect to utility-owned bids.

## NOPEC Says Rider GCR May Hit Non-bypassability Threshold Prior to June 1, 2011

Rider GCR at the FirstEnergy Ohio utilities could reach the threshold for making the charge nonbypassable by the June 1, 2011 start of the next proposed electric security plan, the Northeast Ohio Public Energy Council and Northwest Ohio Aggregation Coalition reported in a post-hearing brief.

Rider GCR reconciles generation supply costs with actual revenues, and would have been nonbypassable under the originally proposed Market Rate Offer. As only reported by *Matters*, the non-unanimous stipulation for an electric security plan would make Rider GCR bypassable under certain conditions (Only in *Matters*, 3/24/10).

Per the stipulation, Rider GCR shall be avoidable by customers during the period that the customer purchases retail electric generation service from a competitive provider subject to the following conditions:

a) If the allowed balance of Rider GCR reaches 5% of the generation expense, then this balance would shift to recovery through a non-avoidable charge in Rider GCR

b) In the event of a winning SSO bidder default, the utilities may convert Rider GCR to a non-avoidable charge if they believe that the bidder default will cause the GCR balance to exceed the 5% threshold

However, NOPEC and NOAC reported that a witness for the FirstEnergy utilities testified that the initial balance of Rider GCR could reach 5% of the utilities' generation expenses by the time the electric security plan takes effect on June 1, 2011, "thereby rendering Rider GCR non-bypassable for all practical purposes."

"Such a result was clearly not intended by the ESP Stipulation, and runs directly contrary to the policy goals set forth in R.C. 4928.20 that require the promotion of governmental aggregation. For this reason, the Commission should revisit Rider GCR and make it entirely bypassable for shopping customers," NOPEC and NOAC said.

Direct Energy opposed the electric security plan stipulation because it would provide, "a guaranteed share of the market to a single

[competitive] provider, FirstEnergy Solutions, while also ensuring that unlike an MRO, the underlying market structure in Ohio may change every three years."

Specifically, Direct objected to the stipulation's provision which would procure supplies for Percentage of Income Payment Plan customers on a bilateral contract with FirstEnergy Solutions with such supplies priced at 6% off of the price to compare. Direct said awarding such load to FirstEnergy Solutions without a competitive procurement runs contrary to O.R.C. § 4928.54.

However, the FirstEnergy utilities and PUCO Staff both said that the Ohio Department of Development may still elect to hold a competitive procurement for PIPP load if it chooses, and is not required to accept the FirstEnergy Solution supplies.

Direct also noted that, "[t]here is nothing in this settlement that moves the retail electric market in Ohio forward. In fact the ESP as a whole continues to discourage long term investment and large scale sales in the FirstEnergy service territory by ensuring a revision of the standard service offer structure every three years continuing retail market barriers to entry such as lack of purchase of receivables and setting a precedent to guarantee a share of the market to a competitor with no recourse."

### EnerNOC Complaint

EnerNOC has protested the electric security plan, and has now filed a complaint at FERC over the same issue, due to the retention of interruptible riders under the electric security plan. EnerNOC essentially claims that it was misled into believing that that existing ELR and OLR interruptible rates would not be extended past the end of the current electric security plan based on their proposed elimination under the original Market Rate Offer. EnerNOC argues that it relied on this information in participating in the American Transmission Systems Inc. integration capacity auction, even though at the same time as the auction was conducted the FirstEnergy companies were negotiating an electric security plan to retain the interruptible tariffs, but did not inform the market of this relevant development.

About 400 MW is currently on the existing ELR rate.

PUCO Staff and the FirstEnergy companies first stressed that the ATSI integration auction rules provide that there is no warranty that the information provided is correct.

"EnerNOC assumed that, because FirstEnergy had not sought to extend the ELR rate in its MRO application, the ELR rate would expire and not be replaced. Assumptions are dangerous," PUCO Staff said.

"Essentially EnerNOC made a bet (or is concerned that other participants in the ATSI capacity auction made a bet). It wagered that there would be more capacity available (in the form of demand reduction) in the ATSI auction than there actually was. That EnerNOC gambled and lost (or is concerned that others did) is not this Commission's problem. [EnerNOC] asks this Commission to eliminate a program that is very popular with customers, that fills important economic development and state mandated demand reduction needs so that CSPs [curtailment service providers] would have a chance to sign up those customers to use their demand reductions to meet PJM capacity requirements. The position is nonsense," Staff added.

The FirstEnergy companies noted that settlement talks were confidential. Furthermore, if the potential extension of the interruptible riders had been disclosed to auction participants, the result would have been that potential bidders in the ATSI integration auctions would have been discouraged, resulting in higher clearing prices in the auction, the FirstEnergy companies noted.

This result would have exposed the utilities to a claim that they had intended to manipulate the market by attempting to keep bidders away if they had, as EnerNOC desired, revealed confidential information that only reflected a speculative outcome from ongoing negotiations, the FirstEnergy companies said.

The FirstEnergy utilities dispelled EnerNOC's claims regarding lack of notice of due process. The FirstEnergy utilities cited the testimony of EnerNOC's witness, Kenneth Schisler, who on cross-examination admitted that EnerNOC had been monitoring the MRO docket. Schisler further admitted, although he was not

specifically aware of the fact, that a review of the MRO filings would have revealed that the Staff did, in fact, announce its intention to circulate a settlement proposal in the proceeding. Schisler also admitted that he knew "through the trade" that settlement talks were taking place, though EnerNOC did not elect to intervene in the MRO case. "Thus, what emerges from the record is not that EnerNOC was unaware of settlement or that it was 'excluded' from anything. Instead, as Mr. Schisler admitted, EnerNOC knew that settlement talks were going on and affirmatively chose not to get involved," the FirstEnergy companies said.

"EnerNOC's complaints regarding the Stipulation process should be understood for what they really are: unhappiness that a handful of interruptible customers may elect to take service under Rider ELR because it is 'an incredibly better deal' than EnerNOC intends to offer those same customers," the FirstEnergy companies said.

EnerNOC has now filed a section 206 complaint at FERC against ATSI and the FirstEnergy utilities repeating the same claims: that information relevant to the integration auction was withheld from the public while granted to certain potential bidders (those involved in the settlement discussions); and alleging that since both were parties to the settlement negotiations, ATSI improperly shared non-public information with affiliate FirstEnergy Solutions.

## **Rep. Turner Says Switch Hold Issue Will End Up in Court if Included in PUCT Rules**

Texas State Rep. Sylvester Turner submitted comments to the PUCT in its deferred payment plan rulemaking again arguing that a switch hold, as proposed by the Commission, is beyond the Commission's jurisdiction (36131).

"If such a rule were adopted it would most likely lead to costly and timely litigation, straining agency resources for what would most likely be a rule struck down by the courts," Turner threatened.

As in previous comments (Only in Matters, 1/25/10), Turner argued that PURA

§17.004(a)(2) and PURA §39.101(b)(2), among other sections of the statute, prohibit a switch hold since they provide that customers are entitled to their choice of electric providers, which would be denied under a switch hold.

Turner also said that any actions to address REP bad debt are unjustified given the lack of data provided to the Commission regarding bad debt levels. Turner further suggested that the switch hold will lead to more disconnections by forcing customers to stay on a more expensive rate when they are unable to pay their current bill.

"This proceeding was about improving disconnection protections, and not bailing out retail electric providers," Turner said.

## ***Briefly:***

### **AEP Retail Energy Partners Seeks to Serve Residential Ohio Customers**

AEP Retail Energy Partners LLC has requested to amend its Ohio electric supplier certificate to add the authority to market to residential customers in all service areas. Additionally, AEP Retail Energy Partners provided 10-day notice to PUCO that it intends to begin providing service on or after May 10, 2010. AEP Retail Energy Partners updated its application to reflect that it has signed agreements with Energy Services Group, Inc. and Alliance for Cooperative Energy Services (ACES) Power Marketing LLC to provide various backoffice and technical services. Additionally, AEP Retail Energy Partners LLC has agreements in place with ACES Power Marketing LLC and AEP Energy Partners, Inc. to provide energy supply services.

### **dPi Energy Reports Zonal Distribution of Customers**

In response to a further PUCT interrogatory in its application for a REP certificate amendment recognizing new ownership, dPi Energy provided additional granularity regarding its customer base, reporting customers by ERCOT zone as follows:

North:	14,470
Houston:	15,971
South:	2,892
West:	1,226
Total:	34,559

The bulk of dPi's customers are situated in Dallas in the North Zone and Houston in the Houston Zone, dPi said.

### **Standard Power of America Registers as N.H. Aggregator**

Standard Power of America registered as a New Hampshire electric aggregator serving non-residential customers in all service areas.

### **Constellation NewEnergy Launches VirtuWatt Service Linking Market, Usage Data**

Constellation NewEnergy launched a new energy management product, called VirtuWatt, which Constellation called, "a unique combination of hardware and online applications that allows customers to manage and optimize electricity usage in real-time and lower their energy bills by reducing consumption during peak pricing periods." VirtuWatt, "delivers a single platform that allows commercial power users to take advantage of the full benefits of competitive electricity markets in real-time," Constellation added. Using the VirtuWatt online dashboard, customers can track current energy usage, usage trends and current market values.

### **Ameren Energy Resources Announces Further Staff Reductions**

Ameren Energy Resources Company, LLC announced further labor reductions yesterday citing weak market conditions, eliminating approximately 75 full-time positions at several power plants and support service facilities in Illinois and Missouri. Affected employees of the merchant subsidiary include both management and union-represented workers. The staffing reductions, coupled with other planned spending cuts, will reduce net expenses by approximately \$20 million in 2010. Ameren Energy Resources will also be evaluating temporarily ceasing operations at its least efficient plants and taking actions to reduce its benefits costs in the near future.

## **Viridian ... from 1**

In much smaller print, and less prominently displayed in the advertisement, there is a statement that Viridian is "launching" in Maryland in May 2010, OPC said. Though the website encourages Maryland customers to switch and save, OPC conceded that when entering a Maryland zip code on the site, a message appears stating, "That product or service is not available in your area at this time."

The website was still active Monday evening, but as of Tuesday morning the content has been removed and appears as under construction.

The website promotes Viridian's direct sales opportunity for potential sales associates as much as actual retail service to end users. The website is apparently run by USA Energy Network.

The website also states that direct sales opportunities for Viridian will also be launched for New Jersey in May 2010, and New York, Massachusetts, and Illinois in later 2010.

OPC further said that it received an inquiry from a consumer on April 9, 2010 who was solicited by Viridian for electricity supply service. The consumer sought to determine whether Viridian was a licensed supplier, OPC said.

"Even though the above seems to indicate that Viridian is not yet entering into customer contracts in Maryland, OPC believes that the advertisement and solicitation are potentially misleading to Maryland customers. As for the advertisement, the offer to provide service in Maryland is more prominent and accessible in the web advertisement than the disclaimers which indicate that such service is not yet available. As for the solicitation, it is evident that the licensing status of Viridian was not made clear at the time of the solicitation," OPC alleged.

These allegations quoted above, concerning the nature of any licensing status disclosure, depart from OPC's original allegation that Viridian's pre-licensing advertising, in and of itself, is contrary to COMAR's undefined restriction against engaging in the business of electricity supply prior to licensure.

This is most likely because advertising prior to licensure is expressly permitted by the PSC under Order No. 75949 in Case 8738.

Specifically, in setting the requirements for

"marketing" advertisements, the Commission ordered that the supplier shall include, "The offeror's Maryland license number, as granted by this Commission, or a statement that a license application has been filed with the Commission."

What is also noteworthy, as described by the Commission in summarizing parties' positions, is that OPC, during this period of Case 8738 (1999-2000), argued that, "ads [should] specifically state contract duration and price terms and conditions, and the supplier's license number. Advertisements by suppliers not yet licensed by the Commission should state that fact." In Case 8738, OPC only recommended that unlicensed suppliers not be permitted to execute contracts, with no restriction on advertising if the pending licensing status was disclosed. PSC Staff also endorsed allowing suppliers to advertise before they are licensed.