Energy Choice Matters
August 30, 2010

FirstEnergy Solutions Pitching Ability to Form Opt-Out Aggregations Under Pa. Home Rule

FirstEnergy Solutions is pitching home-rule Pennsylvania municipalities on the formation of municipal opt-out aggregations, which FirstEnergy Solutions says home-rule municipalities may enact without enabling state legislation addressing opt-out aggregation.

Statute (66 Pa. C.S. § 2807(e)(3.1)) provides that, "if a customer does not choose an alternative electric generation supplier, the default service provider shall provide electric generation supply service to that customer."

The question of home rule municipalities' ability to create municipal opt-out aggregations, which change the customer's supplier absent an affirmative action, has never been addressed, and legal authority for such aggregations is open to interpretation.

Generally, home rule municipalities in Pennsylvania may act anywhere except where they are specifically limited by state law. Home rule municipalities' authority is set forth in their charter, which they can amend to add new authorities, such as conducting opt-out aggregations.

However, also generally, regulation of public utilities is preempted by the state under the Public Utility Code (Duquesne Light Co. v. Monroeville Borough, 1972).

This general preemption has never been tested directly with respect to the Electricity Generation Customer Choice and Competition Act, though it has been cited in various other utility cases concerning placement of distribution lines, and regulated rates.

In Pennsylvania Power Co. v. Township of Pine (2007), the Commonwealth Court held, as

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Md. PSC Staff Says Allegheny SOS Price Comparison Should Include Transmission Rate

Allegheny Power should include transmission rates in providing customers with the new SOS Supply Price Comparison Information to be included on bills, Maryland PSC Staff said in comments on an Allegheny compliance filing.

As only reported in *Matters*, Allegheny is only providing the base generation rate in its comparison information. Allegheny is the only utility to not include transmission rates in the SOS Supply Price Comparison Information (Only in Matters, 8/3/10).

"[T]he transmission rate is a component of the SOS price to be calculated," Staff said. "The SOS price has a transmission rate component, and listing the 'Transmission price' separately is potentially confusing to customers and redundant," Staff added.

Staff also recommended rejecting Allegheny's proposal to continue using the terminology Price to Compare, a view echoed by the Office of People's Counsel.

OPC also favored including transmission costs in the price provided under the SOS Supply Price Comparison Information as easier to understand.

The Retail Energy Supply Association made similar comments with regard to Allegheny, but also stressed that the utilities should include all bypassable charges in the SOS Supply Price Comparison

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Briefly:

NetGain Energy Advisors Seeks D.C. Broker Licenses

NetGain Energy Advisors (organized as NRGing, LLC) applied for electric and natural gas broker licenses in the District of Columbia to serve commercial and industrial customers. As only noted in *Matters*, NetGain Energy Advisors, whose principals have extensive telecom experience, recently applied for Maryland broker licenses as well (see Matters, 8/13/10).

Utility Choice International Seeks Pa. Gas Broker License

Multi-level marketer Utility Choice International, LLC applied for a Pennsylvania natural gas broker and aggregator license to serve all customer classes in all service areas. Utility Choice International has been operating as a natural gas Marketing Services Consultant which does not require licensure. As only noted in *Matters*, Utility Choice International is also seeking an electric broker license in Pennsylvania and broker licenses in Maryland (8/24/10, 8/10/10).

Reliant Energy Launches Collegiate Affinity Plan

Reliant Energy has launched a Collegiate Plan under which it will donate $25 to customers' chosen colleges or universities when they sign up for the plan. When customers re-enroll in a Collegiate Plan at the end of their initial 12-month term, another $25 will go to the customer's institution of choice. Reliant will make the donations - up to a total of $10 million - in the customers' names. The Collegiate Plan is a 12-month fixed product with either 20% or 100% wind. The 20% wind product is priced at 10.4¢/kWh at Oncor and 11.7¢/kWh at CenterPoint. The 100% wind product is priced at 10.5¢/kWh at Oncor and 11.8¢/kWh at CenterPoint. All Collegiate products include a $150 early termination fee.

RetailOPCO of Texas Confirms Principals

RetailOPCO of Texas, Inc. filed an unredacted version of its Texas REP application yesterday confirming that three of its principals have or had senior roles Australian Power & Gas (see Matters, 8/26/10). The unredacted application also confirmed that Kevin Howell, most recently Regional President, Texas at NRG Energy, is a director of RetailOPCO of Texas. RetailOPCO also reported that Energy Services Group would perform various EDI functions, and said that it has retained ERCOT market veterans David Morrison and Amy Gasca in various consulting roles.

Md. OPC Seeks Delay to Review Clearview History

The Maryland Office of People's Counsel asked the Maryland PSC to delay consideration of the electric supplier application of Clearview Electric, Inc. to further review a Connecticut civil penalty issued against Clearview Electric, Inc. for several alleged violations, including unauthorized switches, which Clearview Electric, Inc. paid without contesting (see Matters, 4/29/10). While OPC noted that the matters which gave rise to the Connecticut fine appear to be resolved, and related to a contractor no longer used by Clearview, OPC said that it would be appropriate for the Commission to examine Clearview's customer solicitation practices to ensure any issues are not repeated in Maryland.

ISO-NE FCA Hits Price Floor

ISO New England's Forward Capacity Auction for the 2013-14 delivery period hit the price floor of $2.951/kW-month with 5,374 MW of excess capacity, resulting in a prorated price of $2.516/kW-month for the rest of the ISO, and a prorated price of $2.336/kW-month for Maine. The auction procured 37,501 MW to meet the needed 32,127 MW of capacity for 2013-2014. ISO-NE said that the cleared results include 144 MW of new generation and 515 MW of new demand-side resources. Delist bids from Entergy's 600-MW Vermont Yankee station and Dominion's Salem Harbor Unit 3 and Unit 4 (580 MW) were rejected due to reliability concerns.

Trump SoHo Selects Green Mountain Energy for Supply

Trump SoHo New York has entered into a two-year agreement to buy 100% wind power from Green Mountain Energy Company. The contract is expected to cover more than 5.5

million kilowatt-hours annually.

FERC Issues Station Power Order

FERC ruled yesterday that the Commission and the states can use different methodologies when the Commission determines the amount of station power that is transmitted on the Commission-jurisdictional transmission grid and the states determine the amount of station power that is sold in state-jurisdictional retail sales (EL04-130). FERC's order was made in light of a D.C. Circuit Court decision, and the Court's determination that FERC and the states can employ different netting periods (and thus, potentially, no transmission of station power might take place in a month in which retail sales of station power may occur). FERC ordered that the California ISO tariff should address only Commission-jurisdictional transmission of station power and employ a Commission-approved monthly netting period to calculate transmission load. State-jurisdictional retail sales of station power are properly the subject of state-jurisdictional tariffs, which need not be and would not be filed with the Commission, FERC said.

FERC Rejects Several Proposed Exemptions from MISO RSG Charges

FERC rejected several exemptions from Revenue Sufficiency Guarantee (RSG) Charges sought by the Midwest ISO, but, in two separate proceedings, denied refunds relating to the removal of these exemptions.

In Docket ER09-411, in which MISO sought tariff revisions to include the exemptions which it had been granting previously despite no tariff language governing the exemptions, FERC denied refunds dating back to the refund effective date of January 6, 2009.

"We will apply our rejection of the proposed exemptions on a prospective basis only ... We will exercise our discretion and will not require the Midwest ISO to apply our rejection of the proposed exemptions retroactively or to provide refunds to customers," FERC said.

"We find that ordering refunds would create substantial uncertainty and undermine faith in the Midwest ISO's markets. As market participants cannot revisit commercial decisions made based on the expected rate, resettling real-time Revenue Sufficiency Guarantee charges to require refunds since January 6, 2009, would potentially render previous transactions uneconomic and would be an unfair and inequitable remedy. While we take seriously concerns that some market participants may have paid more than a fair share of Revenue Sufficiency Guarantee charges, we find that it is nevertheless appropriate to decline refunds," the Commission said.

Furthermore, FERC directed MISO to file tariff revisions to conform to its order on the proposed exemptions in ER09-411, and said that such a compliance filing shall have an effective date of the day following the date of the FERC order. "We are not making our rulings effective the date of the order to avoid market uncertainty regarding the hour of effectiveness on the day the order issues," FERC explained.

In Docket ER04-691, which dealt with treatment of the exemptions for the period prior to MISO's tariff filing in Docket ER09-411, FERC also declined to issue refunds despite the exemptions from Revenue Sufficiency Guarantee Charges being contrary to the tariff.

Addressing the proposed exemptions in Docket ER09-411, FERC found that several proposed exemptions were inappropriate as the exempted actions contributed to Revenue Sufficiency Guarantee Charges.

Notably, FERC concluded that intermittent resources are causing the incurrence of real-time Revenue Sufficiency Guarantee costs. More than four percent of total real-time Revenue Sufficiency Guarantee costs were caused by intermittent resources during a period studied by the market monitor, FERC noted.

"Based on this analysis, we will reject the proposed exemption for intermittent resources because exempting intermittent resources from real-time Revenue Sufficiency Guarantee charges would shift the associated costs to other market participants that did not cause those costs to be incurred. Such a result would be inconsistent with our application of cost causation principles in this proceeding," FERC said, directing MISO to remove from the tariff the proposed exemption for intermittent resources.

While the existing tariff properly exempts certain resources from Excessive/Deficient Energy Deployment Charges, the position that such resources should similarly be exempt from an allocation of real-time Revenue Sufficiency Guarantee costs is not justified, FERC concluded.

Additionally, FERC said that the proposed exemptions for resources in test mode, start-up, or shut-down mode and for resources that trip and go off-line are inconsistent with cost causation principles, and rejected the proposed exemptions.

However, notwithstanding the evidence of cost causation, FERC conditionally accepted the proposed exemptions for resources that are responding to Midwest ISO directives during emergencies or contingency reserve deployments.

"Exempting resources from real-time Revenue Sufficiency Guarantee charges during such circumstances acknowledges that any deviations that occur result from instructions by the Midwest ISO rather than the behavior or discretion of the resources involved," FERC said.

"Furthermore, in the case of contingency reserve deployments, the sharing of ramp capability between energy and operating reserves may cause resources to receive setpoint instructions that are not achievable. Such resources should not be held financially responsible for deviations caused by dispatch errors due to the limitations of the Midwest ISO's systems and software. Contingency reserves also provide capacity to serve generation resource de-rate deviations during contingencies, in the same way that resources committed during the Reliability Assessment Commitment process provide real-time energy for supply shortfalls caused by deviations. Since resources committed during the Reliability Assessment Commitment process are not subject to real-time Revenue Sufficiency Guarantee costs, per the Midwest ISO tariff, contingency reserves should likewise not be subject to real-time Revenue Sufficiency Guarantee costs," FERC said.

FERC conditionally accepted the proposed exemption for resources "affected by other events or conditions beyond their control," but ordered MISO to submit tariff language limiting this proposed exemption to include only those deviations that result directly from the failures or malfunctions of the Midwest ISO's software and hardware systems.

Other Dockets

Aside from the previously mentioned determination regarding RSG exemptions in Docket ER04-691, FERC also addressed refunds related to the so-called RSG "rate mismatch." FERC had previously declined to order refunds related to its rate mismatch order for the period April 25, 2006 to November 4, 2007, and yesterday further said that it will not require refunds associated with the rate mismatch for the period prior to April 25, 2006.

Also yesterday, FERC issued an order on the RSG Redesign Proposal in Docket EL07-86, finding several proposals made by MISO went beyond the scope of a compliance filing.

Among other things, the Redesign Proposal revised the indicative RSG cost allocation previously accepted by the Commission by combining the second and third cost allocation buckets (the headroom charge and the day-ahead schedule deviation charge) into a single allocation bucket, changing both the sequence of cost allocation and the calculations in the rate formulas from the indicative cost allocation.

"These proposed changes, which significantly impact the portion of Revenue Sufficiency Guarantee charges paid by market participants, have not been previously litigated and therefore represent new rate changes that are beyond the scope of this compliance proceeding. We will therefore reject this portion of the Midwest ISO's filing, without prejudice," FERC said.

FERC directed the Midwest ISO to file tariff sheets that replace the proposed combined headroom and deviations charge with the indicative cost allocation's proposal for separate intra-hour demand change and deviations charges.

Additionally, FERC said that the Midwest ISO's proposal to revise the definition of headroom to base it on Midwest ISO instructions, rather than retaining the indicative cost allocation definition based on actual injections of resources, represents a substantive change that is beyond the scope of the compliance proceeding.

Furthermore, the Midwest ISO Redesign Proposal revised the indicative cost allocation's calculation of the constraint management charge by adding self-schedule quantities to the charge calculation. "As a new proposal that revises the indicative cost allocation accepted by the Commission in the Order on Paper Hearing, this revision is outside the scope of this compliance proceeding. Accordingly, we reject this provision and direct the Midwest ISO to delete in a compliance filing to be submitted within 30 days of the date of this order the references to self-schedules in the constraint management charge," FERC ordered.

FERC did, however, accept the netting provisions of the Redesign Proposal as proposed by MISO. FERC dismissed protests over the formulation of the netting provisions and the merits of various other netting methods as beyond the scope of the compliance filing.

FERC also directed MISO to correct its formulation of virtual offers and bids in the calculation of the constraint management charge to treat virtual offers as a positive factor and virtual bids as a negative factor. MISO's filing had incorrectly treated virtual bids as positive factors and virtual offers as negative factors.

Home Rule ... from 1

described by the PUC in summarizing the decision, that the PUC is the ultimate authority in determining the particulars of implementing its regulations.

Additionally, in City of Philadelphia v. Pennsylvania Public Utility Commission (2003), the Commonwealth Court addressed the intersection of home rule and the Natural Gas Choice and Competition Act, as it related to rates at Philadelphia Gas Works, and found that the operation of a gas system, or any other proprietary or private business, is not one of the preserved rights of self-government under home rule, as the Home Rule Act provides that no city shall engage in any proprietary or private business except as authorized by the General Assembly.

In several instances, petitions brought by Philadelphia Gas Works challenging the constitutionality of the Gas Choice Act under the home rule law were dismissed on procedural grounds, and did not address the jurisdictional issue (City Council of Philadelphia, et al. v. Commonwealth of PA and Pa. PUC, 2002 and City Council of Philadelphia v. Commonwealth and Pa. PUC, 2005).

Complicating matters is the authority of individual municipalities under various forms of organization eligible for home rule (township, borough, etc.), as well as explicit statutory grants in some cases that allow municipal operation of a public utility.

These citations are not meant to indicate that they are controlling, but rather that home rule is not absolute, and that the issue of municipal opt-out aggregation appears to be novel and an issue of first impression.

FirstEnergy Solutions told *Matters* that home rule municipalities may conduct opt-out aggregation by amending their charters to provide for such aggregation, but when asked about any potential preemption issue FirstEnergy Solutions did not elaborate.

The PUC told *Matters* that it has not taken a position on the authority of home rule municipalities to implement municipal opt-out aggregation.

FirstEnergy Solutions has approached several municipalities about opt-out aggregation, including DuBois, Edinboro, Erie, and Sharon.

FirstEnergy Solutions declined to discuss specifics with *Matters*, stating that the proposals are still in development. However, FirstEnergy Solutions confirmed it has proposed to DuBois, in the Penelec territory, an 18-month opt-out aggregation plan that would start January 1, 2011 and provide a 6% discount off the default service price for residential customers and a 4% discount for general secondary customers.

FirstEnergy Solutions has been comparing the program to municipal aggregation in Ohio, which includes a fee for leaving the aggregation after the opt-out period. FirstEnergy Solutions has proposed a 30-day opt out period in Dubois.

Legislation backed by FirstEnergy Solutions to provide all municipalities with the ability to conduct opt-out aggregation is currently before lawmakers.

Maryland ... from 1

Information. RESA said that it is not clear whether Pepco, Delmarva and Allegheny have included the bypassable SOS reconciliation charge in their price comparison information. As previously reported, BGE explicitly included its Energy Cost Adjustment reconciliation rider in its price comparison information, for the months in which the amount of the charge is known.

Staff has not raised any issues regarding the apparent exclusion of charges other than generation and transmission at the utilities other than BGE.

While RESA agrees with Staff's approach to further review the utilities' redesigned webpages concerning SOS supply price information, with a report due October 29, RESA said that the websites should provide more information and a greater explanation of the weighted average supply price which will be provided to customers. In particular, RESA said that the websites should stress that the weighted average supply price is an average, and that a customer's individual charges may vary based on their usage and the months in which it occurs.