STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2000-890

November 7, 2000

MAINE PUBLIC UTILITIES COMMISSION
Rulemaking Amendment to Chapter 301, 62(C)(2) (Termination of Service by Medium and Large Non-Residential Customers and Aggregators; Applicability of Opt-Out Fee)

ORDER ADOPTING EMERGENCY RULE - Part II

WELCH, Chairman; NUGENT and DIAMOND, Commissioners

I. SUMMARY

In our Order – Part I, we amended the opt-out fee provision of our standard offer rule (Chapter 301) pursuant to emergency rulemaking procedures. Specifically, we reinstated the previously existing opt-out fee provision on a temporary basis. By our amendment of the opt-out fee provision last summer, we inadvertently weakened the effect of the opt-out fee. We acted expeditiously to undo the effect of our inadvertent change in order to ensure the continued availability of reasonably-priced standard offer electric service. Without the availability of reasonably-priced standard offer service, the general welfare of the State will be significantly and adversely affected. In this Order Part II, we explain our reasons for adopting the emergency rule in greater detail and respond to the comments we received on the proposed emergency rule.

II. BACKGROUND AND DISCUSSION

On August 16, 2000, the Commission adopted several amendments to the standard offer rule (Chapter 301). The amendments were based on our experience in implementing the rule and conducting last year's standard offer bid process, and the comments of participants in the New England power market. These amendments included a change to the opt-out fee provision of the rule (section 2(C)(2)(c)), the purpose of which is to deter the strategic movement of customers between standard offer service and the competitive market. Such activity is often referred to as "gaming" the standard offer.

The original opt-out fee provision of Chapter 301 required that a medium or large customer who entered the standard offer service after taking service from a competitive provider must either continue to take standard offer service for 12 months or, upon taking service from a competitive provider sooner than 12 months from the date of return to standard offer service, pay an opt-out fee equal to 1-month's generation bill to the standard offer supplier. In the amended rule, the opt-out provision applies only if a customer has taken standard offer service during the summer months; if so, the customer must remain on standard offer service through the following February or pay an opt-out fee equal to the sum of its two highest standard offer bills. We amended the provision to target summer service because it was in these months that there appeared to be the greatest potential for strategic entry to standard offer service. Electric power prices in the New England market are typically at their highest during these months. Because standard offer prices are averaged, they are likely to be lower than summer market prices, thereby creating an incentive to take standard offer service during the summer and then return to the competitive market, thus creating a large financial risk for the standard offer supplier.

In the Order adopting the August amendments, we concluded that our changes would be "more effective in deterring gaming, while limiting barriers to customers to reenter the competitive market." Thus, we increased deterrence by increasing the opt-out fee from one to two months of standard offer bills. Believing that strategic movement to standard offer service would be restricted to summer months, we restricted opt-fees to summertime return to the standard offer. We intended to strengthen the deterrent effect of the opt-out fees, and relaxed the applicability of the fees only because we believed this would not, as a practical matter, enhance the opportunity for gaming.

However, by limiting the applicability of the opt-out fee to summer months, we inadvertently created an opportunity for strategic movement that might be considered gaming the standard offer by entering the service during non-summer months. Under conditions where market prices become higher than the standard offer rate, as is currently the case, competitive providers, or customers who have purchased electricity from competitive providers, will have the economic incentive to extract savings by returning customers to standard offer service. Having returned to standard offer in the post-summer period, customers may return to the competitive market at the beginning of the new standard offer period starting March 1, 2001, without incurring an opt-out fee. Before our rule change in August, a customer returning to the standard offer would have had to wait 12 months before returning to the competitive market without an opt-out fee.

On Friday, October 27, 2000, we were informed by representatives of Maine Electric Consumer Cooperative (MECC), an aggregation of many medium and large electricity customers that are served by a competitive provider (Enron), that their members were seriously considering returning to the standard offer in the near future in order to extract the below-market savings of their Enron power supply contract, to be shared between the customers and Enron. The representatives also stated that these customers would not return to the standard offer if they could not return to the market for the new standard offer period on March 1, 2001 without an opt-out fee.

After meeting with the MECC, we became concerned that our August rule amendments encourage rather than discourage the strategic return to standard offer service. The current suppliers of standard offer service were chosen early in the year to provide service for a 12-month period beginning March 1, 2000.[1] At the time the suppliers were chosen, the original opt-out fee was in effect. The opt-out fee provision in the current rule, as amended in August, 2000, would allow a significant amount of load to enter the standard offer at below current market prices and may create substantial financial harm to the suppliers. Any harm would be a direct result of our change of the rule in the middle of the current standard offer period. Creating the potential for such harm was obviously inadvertent since it was our intent to strengthen the deterrent effect of opt-out fees. By allowing harm rather than protection to occur, our action might be viewed as fundamentally unfair to the current standard offer suppliers. Additionally, our August rule-change may signal to suppliers generally that the Maine Commission may change rules in the middle of the game to their substantial detriment. This could cause some suppliers to decide not to do business in Maine at all and others to add significant premiums to their Maine prices. The end result would be higher rates for Maine consumers.

Thus, we proposed an emergency rule amendment to correct the situation by temporarily reinstating the original opt-out provision so that current suppliers will not be harmed by the rule change. At our deliberations on the proposed emergency rule on October 31, 2000, representatives of the MECC assured us that it would not return customers to the standard offer until the Commission held a hearing on the emergency rulemaking. Our Order Proposing the Emergency Rule and the proposed emergency rule were sent to all licensed electricity providers and to all active participants in the electric restructuring process. We scheduled and held a hearing on Thursday, November 2, 2000. Written comments were accepted up to the time for the hearing.

At the hearing, representatives of Duke Energy Trading and Marketing (Duke), (Ken Salamone, Managing Director for Power Marketing at Duke and George Johnson of the law firm Dickstein, Shapiro, Moring & Oshinsky), NewEnergy East, LLC (Alison Watson, Business Development Manager and Kathryn Loebs, General Counsel) MECC (Anthony Buxton and Richard Silkman), Central Maine Power Company (CMP) (Raymond Hepper, General Counsel and Eric Stinneford, Manager of Power Contracts Administration) and Stephen Ward, the Public Advocate, appeared. Representatives of Duke identified Duke as the full-requirements, wholesale supplier for CMP's medium and large standard offer customer classes. As Duke is contractually committed to serving any MECC load that returns to the standard offer, Duke was greatly concerned by the opportunity created by the August rule change. In Duke's opinion, that opportunity should be viewed as gaming.

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[1] For medium and large commercial customers, the customers to whom an opt-fee would be applicable, Central Maine Power Company and Bangor Hydro-Electric Company were designated the standard offer service providers by the Commission because satisfactory bids were not received. CMP's standard offer service requirements are being met primarily through an all-requirements fixed price contract with a wholesale supplier. BHE's standard offer supply strategy involved purchasing a fixed amount of electricity by contract and purchasing the remaining standard offer supply on the spot market.

Duke assessed the gaming risks as those that existed in January, 2000 when it chose to respond to the invitation by CMP to bid on the wholesale supply for the medium and large customer classes. In Duke's view, it would be unfair now to impose the August amendment on Duke. Making the opt-out applicable fee only to customers that return to the standard offer in the summer was not suggested by the Commission when it proposed rule amendments in June 2000. The change was offered for the first time when the Commission adopted amendments in August. And even then, the change was described as strengthening the deterrent effect of the opt-out fees. Duke stated that the Commission should not lightly make standard offer rule changes that take effect during standard offer service periods already in effect. Certainly, the Commission should undo inadvertent changes that would otherwise change the reasonably expected benefits of their wholesale supply contract with CMP. If a fundamental rule change in the middle of a standard offer supply contract is made by the Commission inadvertently rather than through an adequately noticed and considered process, in Duke's view, it and other potential standard offer suppliers will be less inclined to offer standard offer service in Maine or will add a premium to their prices to account for such regulatory uncertainties.

Duke also asserts that there is no reason to believe that, if the Commission permitted the August rule to continue to effect customers or suppliers other than Enron might not follow the same course as the MECC customers, potentially causing even greater financial harm to Duke (or other standard offer suppliers) than the action contemplated by MECC.

Duke representatives also pointed out a clause in the CMP-Duke contract that permits Duke to seek relief from FERC under section 205 of the Federal Power Act if the Maine Commission modifies the standard offer rules in a way that materially adversely affects Duke (Section 4.4 of the contract). Because of section 4.4, Duke asserted that it is possible that Duke will recover the benefits received by the MECC members (and Enron, MECC's supplier). Duke warned that CMP's ratepayers, or some subset of ratepayers, might ultimately pay for MECC's and Enron's benefits.

Representatives of NewEnergy East, LLC, a licensed competitive energy provider (CEP), stated that the Commission should not adopt the emergency rule. The Commission had properly and fairly adopted the August amendments, and suppliers should be able to rely on those changes. Moreover, the standard offer supplier knows that rules are subject to change, and that risk was reflected in its bid. When asked, the representatives stated that NewEnergy served some medium and large customers in CMP's service territory who could benefit in same manner as MECC members. The representatives added that NewEnergy had entered into contracts with its Maine customers before the August amendments were adopted.

Representatives of the MECC also spoke at the hearing. They asserted that rule changes are a risk of entering the standard offer supply business and that Duke, or any standard offer supplier, factored that risk into its price, or at least should have done so. Thus, Duke should not be permitted to complain that a rule change occurred.

Moreover, MECC representatives asserted that the Commission need not be concerned about how future standard offer suppliers will view the Commission. Bidders do not delve deeply into the Commission’s regulatory policy decisions. Future bidders will simply assess the risks of the August-version of the rule. As for Duke, the MECC asserted, the Commission should not adopt the emergency rule unless Duke demonstrates actual damage as a consequence of the August amendment. The representatives estimated tangible, measurable benefits to the MECC customers of $3 1/2 to 4 million. These Maine businesses are facing severe competitive forces including the higher oil and gas prices that have caused electric generation prices to rise. The MECC customers deserve the benefits of the August rule change, because, the representatives argues, only with the up to $4 million in benefits will the MECC customers achieve the approximate 10% decrease in bundled electricity prices that CMP’s small non-residential and residential customers achieved on March 1.

The MECC representatives also argued that the Commission should not rely on contract section 4.4 as justification to adopt the emergency rule until the Commission further investigates the legal effect of the clause and the factual claim that the August amendment has a material impact on Duke.

CMP representatives reminded the Commission that CMP is actually the standard offer provider for the medium and large customer classes. Duke is simply the wholesale supplier that CMP contracted with to supply the full-requirement electricity needs of CMP. Eric Stinneford, the person in charge of negotiating contracts like the Duke contract, stated that if the emergency rule is not adopted, standard offer suppliers will view Maine as a riskier place to supply standard offer service, and will reflect that perception by making higher-priced standard offer bids.

We also received written comments from NewEnergy East and Forster, Inc. NewEnergy’s written comments were similar to its comments offered at the hearing. Forster urged the Commission to reject the proposed emergency rule. Forster is an important employer in the Franklin County area, but it faces intense competition. Unless it can cut costs, Forster faces an uncertain future. With rising energy costs, the MECC/Enron plan to extract value from the Enron-Forster power supply contract, presents a beneficial opportunity that will assist Forster to survive the coming year.

III. DECISION

We find that the opt-out fee amendment adopted last August has inadvertently created a potential to cause financial harm to CMP’s current wholesale standard offer supplier, and thereby will increase the risk that standard offer prices for Maine’s consumers in the future will be higher. This creates an immediate threat to the general welfare of the State that compels us to use our authority to adopt an emergency rule pursuant to the Administrative Procedures Act, 5 M.R.S.A. § 8054.[2]

As a general principle, the standard offer market in Maine will work best if the Commission sets the rules and then allows the suppliers to function under those rules. In particular, we seek to avoid changes that are effective in the middle of a standard offer service period, after suppliers have already bid and contracted to provide service. We realize that, legally, the possibility exists that rules can change, even in the middle of contract periods, and that suppliers will account for that risk in bids. If we do change a rule in the middle of standard offer contract period, however, we intend any such rule amendment to be well considered and promulgated because our perception of the public interest requires it.

In the present instance, we changed the standard offer rule in a manner that has a substantial impact on CMP's current wholesale supplier and did so thinking we had strengthened the protection that suppliers would receive from the rule. We were mistaken in our belief that we strengthened the deterrent effect of the out-out fee. In such a circumstance, we believe that proper regulatory policy requires us to correct regulatory mistakes if we can do so without unfairly harming others.

In the present circumstances, we have the good fortune to have been informed of our mistake before any party has justifiably relied on the August amendment to the opt-out fee. We note that we owe our good fortune to the MECC and its members. We believe that the MECC has acted honorably in this matter, both in seeking to extract cost energy savings by returning to the standard offer and by coming to the Commission before executing that plan.

We disagree, however, with MECC representatives that our decision whether to adopt the emergency rule should hinge on deciding whether and how much Duke will lose. First, it seems clear in an economic sense, that one side's harm will be equal to the other side's benefits. MECC must share its benefits with Enron, its competitive supplier. The definition of each "side" may have expanded from just Enron or just Duke. But regardless of whether Enron or Duke have transferred their opportunity cost risk to other entities, the total cost to each side is the same at the present time. In other words, the strategic return to standard offer service is essentially a zero sum game.

Nevertheless, we do not believe that we must decide the issue by examining whether a particular supplier loses more or less than Maine customers. The MECC argument that we must assess costs and benefits does not address the issue of

[2] Under that provision, we must modify the rulemaking procedure to the minimum extent necessary to meet the emergency. At the public deliberations in which we proposed the emergency rule, we decided that we could permit a 2-day comment period and conduct a rulemaking hearing in 2 days. All other requirements of the rulemaking process had to yield to address the immediate threat. Even under those limitations, we received considerable and excellent responses from interested parties.

governmental fairness, and we believe that governmental fairness is of paramount concern here. The economic opportunity results from our regulatory error and not the efforts of any market participant that created the opportunity in the first instance.

The Commission, using its regulatory rulemaking authority, should not cause such a substantial redistribution of value as a result of unintended consequences. Rather, the Commission should be governed by a principle that, where we adopted a rule change intended to increase the protection to standard offer suppliers against gaming the standard offer, and instead we increased the gaming exposure, we should undo our rule change regardless of whether the Duke-CMP contract assigns those risks to Duke or CMP and regardless of whether Duke's loss will mostly flow to Maine customers or Enron.

In the long run, all customers will benefit if suppliers perceive Maine's regulatory environment as fair. Suppliers will participate more vigorously in Maine markets and all customers will achieve better prices in the long term. If we fail to reinstate the pre-August opt-out fee provision on an emergency basis, we believe that the suppliers' perception of Maine's regulatory process will be damaged. As a result, Maine customers may well be harmed by a much greater amount than the amount by which MECC customers would benefit.

In light of our finding that fundamental fairness persuades us to adopt the emergency rule, we do not consider whether section 4.4 of the Duke/CMP contract requires CMP and its ratepayers (or a subset of those ratepayers) to reimburse Duke for losses it suffers because of the August rule change. We note, however, that before accepting MECC's (and NewEnergy's) arguments, we would have had to carefully consider the impact of section 4.4.[3]

Accordingly, we adopted the amendment to section 2(C)(2)(c) of Chapter 301 as attached to our Part I Order. This emergency rule will be in effect for up to 90 days, while we conduct a "regular" rulemaking in the matter of opt-out fees.

The Administrative Director shall send copies of these Part I and Part II Orders and the attached proposed rule to :

a. All persons who have filed with the Commission within the past year a written request for notice of rulemakings;

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[3] Indeed, contract section 4.4 shows that the level of unintended consequences was even broader than the Commission realized when the emergency rule was first proposed. Duke did not raise the section 4.4 issue until the hearing on the proposed emergency rule.

b. All persons on the service list in the rulemaking, Public Utilities Commission, Bidding Processes and Terms and Conditions for Standard Offer Service (Chapter 301), Docket No. 97-739;

c. All persons who filed comments in Docket No. 2000-489; and

d. All licensed competitive electricity providers in the State.

Dated at Augusta, Maine, this 7th day of November, 2000.

BY ORDER OF THE COMMISSION

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Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Nugent
Diamond

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.

2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within 30 days of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Civil Procedure, Rule 73, et seq.

3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.