STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2002-152

August 8, 2002

PUBLIC UTILITIES COMMISSION
Amendment to Rule, Metering, Billing, Collections and Enrollments Interactions Among Transmission and Distribution Utilities and Competitive Electricity Providers (Chapter 322)

ORDER ADOPTING RULE AND STATEMENT OF FACTUAL AND POLICY BASIS

WELCH, Chairman; NUGENT and DIAMOND, Commissioners

I. SUMMARY

Through this Order, we adopt amendments to Chapter 322 (metering, billing, collections and enrollments) that would require utilities to negotiate in good faith to provide billing and collection services to aggregators and brokers. If the parties are unable to agree, the amended rule specifies that the Commission may direct the utility to provide billing and collection services upon specified terms. We also adopt several minor changes that result from a legislative change to the definition of small customers and from our prior experience in implementing this rule.

II. BACKGROUND

On December 5, 2001, Competitive Energy Services, LLC and the Maine Electric Consumer Cooperative (CES/MECC) requested that the Commission adopt an emergency rule that would require utilities to segregate that portion of the money collected from customers for competitive electricity service that represents a fee for aggregator or broker services and transfer that money to the aggregator or broker. The CES/MECC request resulted from the financial collapse of Enron, which jeopardized their ability to collect aggregation fees that were embedded in customer charges for generation service.

On January 8, 2002, the Commission denied the CES/MECC request for an emergency rulemaking, finding that the emergency rulemaking standard was not satisfied, that the requested action would impinge on the jurisdiction of the bankruptcy court, and that the CES/MECC proposed rule change would require alterations of existing contractual relationships. *Order Denying Request for Emergency Rulemaking,* Docket No. 2001-839 (Jan. 8, 2002). Although we expressed our reluctance to interfere with existing contracts, we stated that it would be appropriate to consider whether utilities should be required prospectively to bill for fees for aggregator and broker services, and that we would do so in a future rulemaking proceeding. *Id.* at 3.

III. RULEMAKING PROCESS

On March 27, 2002, we issued a Notice of Rulemaking to consider amendments to Chapter 322 that would require utilities to provide billing and collection services to aggregators and brokers. We also proposed several other minor revisions to the rule. Consistent with rulemaking procedures, the Commission provided an opportunity for written comments and held a hearing on May 1, 2002. Central Maine Power Company (CMP), Bangor Hydro-Electric Company (BHE), Maine Public Service Company (MPS), and CES/MECC provided comments on the amendments to the rule.

IV. DISCUSSION OF AMENDMENTS

A. Aggregator and Broker Billing

1. Proposed Rule

The proposed rule would require utilities to provide billing services for aggregators and brokers through the addition of a new sub-section H to section 3 of the rule. Section 3 contains detailed provisions governing consolidated utility billing for the provision of generation service by competitive suppliers. The proposed new sub-section H contained detailed provisions for aggregator and broker billing and collections that were similar to those for competitive suppliers in most respects. The proposed rule specified that utilities, upon the request of an aggregator or broker, would be required to calculate and issue bills for their services. As is currently the case for consolidated billing for generation service, the proposed rule stated that utilities would charge aggregators or brokers the incremental cost of providing billing services, and that the charge would be included in Commission-approved terms and conditions. The proposed rule also would require utilities to develop a standard contract for the provision of aggregator and broker billing, and disputes over contract terms would be submitted to the Commission for resolution. The proposed rule also contained an addition to section 6(C) to address partial payments in circumstances in which utilities are billing for aggregators or brokers.

2. Comments on the Proposed Rule

CMP expressed serious concerns about the proposed rule, stating that due to the magnitude of the impact on transmission and distribution (T&D) utilities, the Commission should not adopt the amendments absent a compelling need for the services. CMP pointed out that, to date, the only circumstance where such services have been requested is the unique situation in which CES/MECC chose to collect their fee through rates charged by Enron. According to CMP, the Commission should not adopt rules to accommodate the needs of a single entity when doing so could involve substantial costs and efforts to redesign its billing system.

CMP is unable to specify the precise amount of costs to modify its systems because the specific requirements of the proposed rule are unclear. However, CMP stated that the cost of system changes could be millions of dollars. CMP is concerned that, if the costs are substantial, aggregators and brokers would not likely choose to use the service, resulting in the costs of a system put into place for a few aggregators and brokers being recovered from the general body of ratepayers.

In supplemental comments, CMP discussed several lower cost options to address the CES/MECC needs. These options are: the aggregator is sent the entire amount paid by the customer for generation service and forwards the competitive provider its share; the competitive provider periodically informs the utility how much to pay the aggregator; the funds are placed into escrow and the escrow agent distributes the funds among the aggregator and the competitive provider pursuant to an agreement; and the utility acts similar to an escrow agent and distributes funds according to an agreement between the aggregator and the competitive provider.

BHE commented that T&D utilities should not be required to offer aggregator and broker billing and collection services in that it is difficult to create system changes to track the aggregator-customer relationship, calculate amounts owed, create receivables, and create data exchange system changes. BHE stated that creating these system changes would cost close to $1 million and there would be no certainty of recapturing the costs from participating aggregators and brokers. In this event, the costs would have to be recovered from ratepayers. BHE suggested a lower cost solution of sending funds to a third party trustee who would then distribute the funds according to a contractual arrangement.

MPS commented that a need for aggregator and broker billing services is undemonstrated. MPS argued that the request for such services resulted from the unusual event of a supplier bankruptcy, that risk of such bankruptcies is part of any market transaction, and a regulatory solution in thus not required. MPS also expressed a concern about the ability to recover its additional cost of providing the service from participating aggregator and brokers. MPS stated it would support the type of lower cost option suggested by CMP and BHE.

CES/MECC commented that, although its relationship with suppliers are governed by contractual terms, the nature of the contracts are constrained by Commission rules. According to CES/MECC, as long as the money flows first from the utility to the supplier, the aggregator is at risk, and thus Chapter 322 does not provide any reasonable mechanism through which CES/MECC could have avoided its problem with Enron. CES/MECC stated that the problem at the time of the Enron bankruptcy was that CMP believed it had no authority under Chapter 322 to segregate out aggregator fees. CES/MECC believes that the ability of utilities to segregate aggregator fees and remit such fees directly to the aggregator is both technically feasible and relatively inexpensive. CES/MECC asserted that it is economically infeasible for aggregators to bill customers separately for their services.

As a compromise, CES/MECC proposed that the modifications to Chapter 322 in the proposed rule be "permissive," in that they would apply only in those instances where the Commission finds circumstances warrant their application. In this way, CES/MECC could petition the Commission to invoke the provisions and direct the utility to separate funds if payments to the aggregator are threatened by actions of the supplier (including a filing for bankruptcy). CES/MECC stated that the modification to Chapter 322 would underlie all standard contracts between utilities and suppliers, providing utilities with the legal authority to separate payments to aggregators at the direction of the Commission.

3. Amended Rule

We adopt an amended rule that places an affirmative duty upon T&D utilities to negotiate in good faith to provide billing and collection services for aggregators and brokers. Consistent with the provisions for competitive supplier billing, the amended rule specifies that the aggregator or broker must pay the utility's incremental cost of providing the services. If the aggregator or broker and the utility are unable to agree on the terms of billing services after good faith discussions, the amended rule provides that either party may petition the Commission to determine the billing and collection services that must be provided. Under the amended rule, contracts for aggregator or broker billing services must be submitted to the Commission for approval; such approval is delegated to the Commission's Director of Technical Analysis. These provisions are included in new sub-section H to Section 3 of the rule.

The proposed rule contained detailed provisions for aggregator and broker billing and collection services that were substantially the same as those currently in effect for competitive suppliers. We have removed these specific provisions and adopted the more flexible approach in the amended rule for the following reasons. First, aggregator and broker services tend to be relatively diverse and may not be susceptible to any single approach. We are especially hesitant to adopt a single approach at this time in that CES/MECC was the only aggregator that provided comments in this rulemaking. Second, we are reluctant to modify the rule in any way that will cause utilities to incur substantial expense for system upgrades without knowing whether there is a significant demand for aggregator and broker billing services. If there is no significant demand for such services, ratepayers will bear all the costs of system upgrades for which they will receive no benefit. The lack of aggregator and broker participation in this rulemaking, at a minimum, raises questions as to the existence of any broad-based need for the utility provision of billing and collection services.

The flexible approach in the amended rule is similar in outcome to the compromise proposed by CES/MECC. The difference is that the aggregator or broker and utility must first attempt to agree on a service that is tailored to the specific needs of the aggregator or broker and can be provided by the utility at a reasonable cost. If the parties cannot come to an agreement, the matter can be presented to the Commission for resolution. This is similar to the CES/MECC approach in which the Commission must specifically authorize aggregator and broker billing and collection by

the utility in each instance. Moreover, our addition to Chapter 322 removes any question as to whether utilities are permitted under Commission rules to provide billing and collection services for aggregators and brokers and, in fact, places an affirmative duty on utilities to act in good faith to provide such services on reasonable terms.[1]

Finally, the amended rule requires that all contracts for aggregator or broker billing services be filed with the Commission for approval. This will allow the Commission to monitor the provision of aggregator and broker billing services and ensure that utilities are treating all market participants in a consistent and fair manner.

B. Miscellaneous Amendments

Maine's Restructuring Act, as initially enacted, applied certain consumer protections only to customers with a demand of 100 kW or less. Chapter 322 had several provisions that reference this 100 kW threshold (sections 3(G), 7(A)1, 8(A)). However, subsequent to the promulgation of Chapter 322, the Legislature amended the threshold for the consumer protections by requiring the protections to apply to "residential and small commercial consumers." P.L. 1999, ch. 657. The amending legislation included specific definitions of residential and small commercial customers. As a result, the proposed rule removed the references to the 100 kW threshold and replaced them with language consistent with the amended statute. The language in the proposed rule referred to "small non-residential customers" as opposed to "small commercial consumers" because this is the terminology used in our other rules; however, the definition of the term included in section 1 of the proposed rule is the same as in the statute.

The proposed rule also amended Section 10 to remove the requirement that contracts between the utility and a competitive electricity provider that conform to a Commission-approved standard form be filed with the Commission. Our experience to date reveals that this requirement is unnecessary.

All commenters either agreed with these proposed changes or did not oppose them. The amended rule includes the proposed changes without modification.

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[1] The CES/MECC comments assume that a provision in the rule that authorizes the Commission to direct utilities to separate payments would "underlie all standard contracts between utilities and suppliers, thereby giving the utilities the legal authority to separate payments to aggregators at the direction of the Commission." In our view, the impact of such a provision on a utility's authority to deviate from a contract is unclear. We note, however, that as a general matter it is our policy to refrain from interference with contractual relationships. Thus, the protection from business risk as it relates to the flow of dollars should be a matter that is addressed through contractual provisions at the beginning of a business transaction. Parties should not rely on the Commission's legal authority or willingness to interfere with existing contractual relationships to protect themselves from business risks.

Accordingly, we

O R D E R

1. That the attached amended Chapter 322, Metering, Billing, Collections and Enrollment Interactions among Transmission and Distribution Utilities and Competitive Electricity Providers is hereby adopted.

2. That the Administrative Director shall file the adopted rule and related material with the Secretary of State.

3. That the Administrative Director shall notify the following that the Commission has adopted the attached rule:

a. All electric utilities in the State;

b. All persons who have filed with the Commission within the past year a written request for Notice of Rulemaking;

c. All licensed competitive electricity providers.

d. All persons listed on the service list or filed comments in this Rulemaking, Docket No. 2002-152

4. That the Administrative Director shall send copies of this order and the attached rule to: Executive Director of the Legislative Council, 115 State House Station, Augusta, Maine 04333-0115 (20 copies).

Dated at Augusta, Maine, this 8th day of August, 2002.

BY ORDER OF THE COMMISSION

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Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Nugent
Diamond