

STATE OF CONNECTICUT

DEPARTMENT OF PUBLIC UTILITY CONTROL

DPUC Administration of Disclosure Label : Docket No. 07-05-33
Requirements and Examination of Direct :
Billing by Electric Customers : December 4, 2007

BRIEF OF RETAIL ENERGY SUPPLY ASSOCIATION

Introduction

The Retail Energy Supply Association (“RESA”)¹ submits this Brief in the above-referenced proceeding, which was initiated by the Department of Public Utility Control (“Department”) to administer disclosure label requirements and to examine whether the information presented in electric supplier bills enables customers to compare pricing policies and charges among suppliers. On September 21, 2007, RESA submitted comments in response to the Department’s Notice of Request for Comments that was issued in this docket on August 21, 2007 (“Notice”). RESA will not replicate in this Brief all of the views expressed in its September 21, 2007 comments, but, rather, incorporates them herein by reference. RESA limits its discussion in this Brief to the following major points:

- The Department should not require competitive electricity providers (“CEPs”) to include price information on the disclosure label because it would be misleading to customers and burdensome for CEPs. Instead, price information should be in the contracting

¹ RESA’s members include Commerce Energy, Inc.; Consolidated Edison Solutions, Inc.; Direct Energy Services, LLC; Gexa Energy; Hess Corporation; Integrys Energy Services, Inc.; Liberty Power Corp.; Reliant Energy Retail Services, LLC; Sempra Energy Solutions; Strategic Energy, LLC; SUEZ Energy Resources, N.A.; and U.S. Energy Savings Corp. The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of RESA.

documents provided by the CEP to the customer consistent with current practice.

- The Department should not monitor individual CEP offers as recommended by the Office of Consumer Counsel (“OCC”).
- Any customer confusion regarding pass-through costs that form the basis of certain retail electricity pricing options is best resolved through customer education programs.
- The Department should not require CEPs to provide a specific disclosure of the potential range of pass-through costs to customers who choose this pricing feature. In the event that the Department disagrees, it should require a separate notice (apart from the label) in the format recommended by RESA in Part II.C of this Brief.

Argument

I. PRICE INFORMATION SHOULD NOT BE INCLUDED ON THE DISCLOSURE LABEL.

At the inception of this proceeding, the Department assumed that the disclosure label would be the principal tool for customers to compare competitive supply offerings. For that reason, the Department contemplated that price information would form an important part of the label.² At the hearing conducted on October 23, 2007 in this proceeding (“Hearing”), representatives from RESA, Dominion Retail, Inc. (“Dominion”), Constellation NewEnergy, Inc. (“Constellation”) and Direct Energy Services, LLC (“Direct”) described the disadvantages of that approach as stated in their written comments.³ RESA appreciates the Department’s willingness to consider alternative ways to allow customers to compare competitive retail offerings when shopping for electricity supplies.

² See Notice, pp. 2-3.

³ See Comments of RESA, Sept. 21, 2007, pp. 1-4, 6-8; Comments of Constellation, Constellation Energy Commodities Group, Inc., Dominion and Direct, Sept. 21, 2007, pp. 2-7.

RESA remains convinced that price information should not be included on the disclosure label because that approach would be overly burdensome to CEPs and would, as an unintended consequence, mislead customers. It also could expose CEPs to legal risk as the disclosure label would lack sufficient explanation of the specific terms of the contract price. Furthermore, if customers are directed to focus only on the price of competitive offerings, rather than on the scope of services included therein, they may miss out on value-added services that can substantially lower their electricity bills. The Department should rely on CEPs to fully and accurately disclose pricing and product information in their electricity supply contracts and schedules appended thereto.

A. Including Price Information On The Label Would Be Extremely Burdensome To CEPs.

To meet the demands of customers, CEPs offer a wide array of products, each with a different pricing structure, and frequently negotiate special deals with commercial and industrial (“C&I”) customers that vary from a product’s standard pricing scheme. Thus, if the price information were included on the label, CEPs would be required to prepare a separate label for each product and for each customer that negotiates special pricing terms. This approach would be overly burdensome and is unnecessary because Section 16-245o of the General Statutes already requires CEPs to provide written notice of pricing to their customers before service is commenced.⁴ A requirement that price be included on the label would also cause CEPs to refrain from making their labels available to the general public because pricing information is generally deemed to be proprietary and competitively-sensitive data of the supplier

⁴ Conn. Gen. Stat. § 16-245o provides in relevant part: “Each supplier shall, prior to the initiation of electric service, provide the potential customer with a written notice describing the rates”

company. Thus, the proposed requirement would work to hinder, rather than advance, the fundamental purpose of the label.

B. Including Price Information On The Label Could Mislead Customers And Expose CEPs To The Risk of Legal Claims.

Many of the products offered by CEPs are based in whole or in part on time-of-use rates or indexed prices and may further provide that certain costs incurred by CEPs be charged to customers on a pass-through basis. The only practical way to establish a snapshot of the price of these products for disclosure label purposes would be to report an historical average price or estimated future price. Either measure would inevitably differ from the actual price that the customer will pay during the term of the contract. Consequently, its inclusion on the label would mislead customers and expose CEPs to the risk of claims of unfair trade practices, misrepresentation and other violations. Customers should rely on the pricing information and schedules that will be included in the executed supply contracts when they shop for electricity products and services.

C. Price Should Not Be Included On Labels Provided To Residential Customers.

During the Hearing, the Department inquired whether price information should be confined to labels disseminated to residential customers because most of the competitive offerings available to them are based on a fixed price. RESA respectfully requests that the Department reject this approach as well.

Residential customers will soon have a wide choice of products available to them, including variable-priced offerings, as a result of the customer referral program

that was recently implemented by the Department in Docket No. 05-08-05RE02.⁵ The new program, which is the product of Section 92 of Public Act 07-242, *An Act Concerning Electricity and Energy Efficiency* (“Act”), allows any residential or small commercial customer to learn about competitive supply offerings when they contact their utility company to make a service change or inquire about their bill.⁶ Section 92 of the Act also requires the utilities to purchase the receivables of CEPs.⁷ As a result of these pro-competitive policies, the residential market in Connecticut will be much more attractive to CEPs. Although Section 92 of the Act requires CEPs participating in the referral program to offer customers a fixed-price option (which will be communicated to customers by the utility companies), it also requires them to offer time-of-use rates. As CEPs develop a residential customer base in the state, they will soon begin to market a wide array of offerings to these customers beyond the traditional fixed-price product. Indeed, this dynamic has already begun to occur. Thus, the problems described in Parts A and B, which presently are most pronounced for C&I customers, will apply with equal force to residential customers.

D. Price Does Not Tell The Whole Story.

CEPs often include energy efficiency, equipment maintenance and other value-added services in their electricity offerings to both C&I and residential customers. For example, Direct, a RESA member company, presently offers residential customers in Texas a “Protection Plus” product that is a combined energy efficiency and commodity

⁵ See Decision, Oct. 10, 2007, pp. 2-15, Docket No. 05-08-05RE02, *DPUC Investigation Into The Process By Which Customers Can Choose An Electric Supplier When Initiating Electric Service – Amended Referral Program*.

⁶ Public Act 07-242, § 92.

⁷ *Id.*

product at a single unit price per kilowatt-hour. The product includes HVAC equipment tune-ups and duct cleaning, along with priority maintenance service in the event of equipment malfunction. It may not have the lowest unit price compared to other products, but the value-added services that come with it have been shown to shave nearly 20 percent off the electricity bill of a typical customer during the cooling season.

There is every reason to believe that CEPs will offer similar bundled energy efficiency and commodity products to residential customers in Connecticut. These Customers, however, would not be able to appreciate the potential savings of such products if they focus solely on a label price. In order to make meaningful shopping comparisons, customers must focus on the product and price information contained in the contracting documents.

E. The Department's Present Review Of Electricity Supply Contracts Is Sufficient.

When CEPs offer to provide services to a potential customer they typically provide that customer with a product description, pricing schedule and the standard terms of service, which will collectively form the electricity supply contract if the deal is signed. At the Hearing, a representative from the OCC urged the Department to monitor CEP offers to ensure that the price information and other terms contained therein are not misleading. The Department responded that it may wish to review the standard contracts of CEPs to ascertain whether they contain provisions that are adhesive or void as a matter of public policy.

As counsel for Constellation, Dominion and Direct properly noted at the Hearing, the Department already reviews the standard contracts of CEPs when they

apply for an electricity supplier's license⁸ and upon the CEP's five-year license review if its contracts have changed during the intervening period.⁹ It would be impractical for the Department to expand its review to encompass CEP price offers due to the sheer number of them and the individualized pricing of customer contracts that characterizes the competitive electricity supply business, nor is it necessary for the Department to do so.

As Connecticut's retail electricity market continues to evolve, customers will naturally seek out suppliers who provide accurate descriptions of the price and other features of their unregulated electricity products and shun any supplier attempting to mislead consumers. In that sense, the market is self policing. The Department's authority to impose sanctions, including license revocation and hefty fines, on any supplier who markets its services inappropriately will continue to provide a strong deterrent to those tempted to employ misleading or unfair practices. So, too, will the remedies available under the law to consumers who are the victims of fraud, misrepresentation or unfair trade practices. No more is needed.

II. CUSTOMER CONFUSION REGARDING PASS-THROUGH COSTS IS BEST RESOLVED THROUGH CUSTOMER EDUCATION AND OUTREACH.

A. The Department Should Develop An Electricity Shopping Guide For Residential And Small Commercial Customers.

During the Hearing, Department Staff indicated that most of the inquiries it receives about electricity supply contracts come from small commercial customers and

⁸ See Section 16-245-1(b)(13) of the Regulations of Connecticut State Agencies.

⁹ See Section 16-245-1(f) of the Regulations of Connecticut State Agencies.

involve pass-through pricing arrangements. Such arrangements were also at the core of the study of the purchasing practices of cities and towns that was filed by Representative Vickie Nardello in this docket on May 25, 2007.¹⁰ There was general consensus at the Hearing that customer education is the best way to eliminate confusion regarding pass-through pricing arrangements and to educate residential and small commercial customers to become smart shoppers. To that end, Department Staff suggested that it would be desirable to develop a shopping guide for these customers. RESA agrees.

As the first step toward that goal, the Department requested that the suppliers at the Hearing submit a description, in simple language, of the types of costs that they typically charge to some of their customers on a pass-through basis. RESA submitted its description as Late-Filed Exhibit 1 and stands ready to work with the Department and other stakeholders to continue to develop the shopping guide and other materials that would be helpful to residential and small commercial customers in the state. Once the shopping guide is developed, RESA recommends that CEPs include in their contracting documents a notice describing the availability of the guide and the address of the Department's website where it is posted. In the event that a customer does not have access to the internet, CEPs could provide a paper copy of the guide to such customer upon request.

¹⁰ See Letter of Vickie Nardello to Chairman Donald Downes, May 25, 2007, and attachments thereto.

B. The Description Of Pass-Through Costs Developed For Educational Purposes Should Not Replace The Legal Description Of The Terms In CEP Contracts.

At the Hearing there was discussion as to whether the Department would require the description of pass-through costs set forth in the shopping guide to be included in CEP electricity supply contracts. As RESA and other suppliers noted at the Hearing, the definitions included in such contracts are generally developed by attorneys based on the precise technical or legal meaning of such terms. As contract disputes often turn on the definition of these terms, it would be unwise to substitute them with a simple description developed for the purpose of educating small customers about the general types of costs that CEPs incur in the marketplace.

C. The Department Should Not Mandate A Disclosure Of The Potential Magnitude of Pass-Through Costs.

The Department stated at the Hearing that, although the shopping guide would be helpful to customers, it is not sufficient for small commercial customers to understand the degree of risk they are assuming when they opt for a pass-through pricing arrangement. The Department suggested that CEPs should disclose the potential magnitude of such costs to current or prospective customers. RESA does not believe that such a disclosure is necessary for the reasons stated below. However, if the Department disagrees and decides to mandate a disclosure, it should adopt the simple format recommended by RESA.

It is RESA's experience that customers become more comfortable with pass-through cost arrangements as they gain experience with the competitive markets. That is one of the reasons why public utility commissions in other states with well-developed retail markets do not require CEPs to provide their customers with an historical or

future estimate of pass-through costs. Instead, they rely on the CEPs to deliver the information requested by customers to make an informed choice of an electricity product that best fits their needs. Moreover, capacity costs (which are often passed through to customers) have become far less volatile over the last year due to the implementation of the Forward Capacity Market. For all of these reasons, RESA does not believe that a mandatory disclosure requirement should be instituted for pass-through charges.

If the Department concludes that such a disclosure is necessary, RESA recommends that it be limited to small commercial customers and include the following information in a separate notice: (1) the average percentage of generation costs that was comprised of pass-through costs for similar products during the preceding year or another historical period as appropriate at different consumption levels; (2) the percentage fluctuation of such pass-through costs during each month of the historical period; and (3) a clear statement that the historical pass-through cost information disclosed in (1) and (2) will differ from, and does not constitute a guarantee of, the costs that the customer will pay under the contract, and it does not alter the pricing provisions set forth in the contract.

Conclusion

RESA appreciates the opportunity to participate in this important proceeding. For the reasons set forth in this Brief and in written comments filed on September 21, 2007, RESA urges the Department to exclude price information on the disclosure label for all customer classes. RESA member companies stand ready to work with the Department and all stakeholders to continue to develop a shopping guide that would

educate residential and small commercial customers about the competitive electricity marketplace. Finally, RESA urges the Department to refrain from mandating a specific disclosure requirement for pass-through costs, but if it determines that such a disclosure is necessary, it should adopt the approach recommended by RESA.

Respectfully submitted,

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