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RESOURCE AND RESERVE § PUBLIC UTILITY COMMISSION
ADEQUACY AND SHORTAGE § OF TEXAS
PRICING §

COMMENTS OF
IPR-GDF SUEZ ENERGY NORTH AMERICA, INC

May 29, 2012

IPR-GDF SUEZ Energy North America, Inc., (IPR-GDF SUEZ) submits these comments on a proposed new P.U.C. Subst. R. 25.508, that would increase the System-Wide-Offer-Cap ("SWOC" or "HCAP") to \$4,500/MWh beginning August 1, 2012.

IPR-GDF SUEZ is a member of Group of Competitive Texas Power Suppliers and incorporates by reference the Joint Comments filed by said group in this proceeding. In addition, it addresses the "Change in Law" question posed by the Commission separately, as follows:

QUESTION:

The Commission is seeking comment on the following question:

Will the new section implicate the provisions of Substantive Rule 25.475 that allow retail electric providers to change rates in fixed-rate products for retail customers due to "changes resulting from federal, state or local laws that impose new or modified fees or costs on a REP that are beyond the REP's control?"¹

¹ 16 TAC 25.475 (d) (2) (A) provides: "A REP may only change the price of a fixed rate product, an indexed product, or a variable product consistent with the definitions in this section and according to the product's EFL. ..."

By way of example, 16 TAC 25.475 (b) (5) defines a fixed rate product as:

Fixed rate product -- A retail electric product with a term of at least three months for which the price (including recurring charges) for each billing period of the contract term is the same throughout the contract term, except that the price may vary from the disclosed amount solely to reflect actual changes in the Transmission and Distribution Utility (TDU) charges, changes to the Electric Reliability Council of Texas (ERCOT) or Texas Regional Entity administrative fees charged to loads or changes resulting from federal, state or local laws that impose new or modified fees or costs on a REP that are beyond the REP's control. [Emphasis added.]

RESPONSE

1. Risk Management Considerations and Controllable Price Risks

Retail Electric Providers who sell fixed price contracts to retail customers should engage in prudent risk management practices including hedging against an increase in prices by buying fixed price energy and market-based ancillary services well in advance of delivery. Costs that are clearly within a REP's control should not be passed through to consumers. Such costs, as energy costs and the market-based ancillary services² -- should not qualify to be passed-through to consumers, because they can be hedged against. In other words, while the price of power on the spot market may be beyond an REP's control, its exposure to paying that price is within the REP's control.

Retail Electric Providers are exposed to some non-hedgeable risks for which they charge a risk premium to customers to compensate for the assumption of such risks. If, arguendo, the Commission believes, that the Change in Law provision may be invoked by REPs wishing to pass these costs onto their consumers, it is IPR GDF SUEZ' belief that a REP is strictly limited to a cost pass-through of only those material, non-market based Ancillary Service costs³ in the ERCOT market which it actually incurs. These costs would be considered to be not wholly within a REP's control. At this point, however, it is unclear whether the costs of non-market based ancillary services will increase materially as a result of any change in the System-Wide Offer Cap. Costs changes, if any, from an increase in SWOC for certain administrative charges such as the Base Point Deviation Payment, Emergency Interruptible Load Service Charge, the RUC De-Commitment Charge, and the Uplift Charge associated with Real-Time and Day-Ahead Partial Payments are expected to be minimal.

² Non-Spin Responsive Reserve Service (NSRS), Down Regulation Service (DRS), Up Regulation Service (URS), Responsive Reserve Service (RRS), and Renewable Portfolio Standards / RECs can be hedged. The RUC Capacity Shortfall Charge can be partially hedged through the purchase of Energy, Capacity and peaking products like energy call options. Unaccounted-For-Energy can be partially hedged by purchasing energy. The exposure of a REP to the RUC Make-Whole Uplift Charge is capped by Protocol.

³ Such costs include Congestion Revenue Rights (both ISO amounts and Zonal amounts), Cost Allocation for Ancillary Services Procurement, and the Real-Time Revenue Neutrality Adjustment Charge, which are not directly hedgeable in the market. Most REPs, however, charge a risk premium to cover these risks.

2. *Legal Effect of Change of SWOC*

Retail Electric Providers may change prices otherwise established by their contracts with customers if the "changes result ". . . from federal, state or local laws that impose new or modified fees or costs on a REP that are beyond the REP's control." See, e.g., 16 TAC 25.475 (b)(5).

Thus, in order to accomplish a change pursuant to these provisions, the change must result from:

1. A federal, state, or local law that:
2. imposes
 - a. new or
 - b. modified
3. fees or
4. costs
5. that are beyond the REP's control.

We will look at each of these requirements in turn to gauge the applicability of these change of law provisions to the current situation.

We begin by noting that this rule applies specifically only to changes in federal, state, or local law. Arguably, a change to an administrative agency rule is not a statute or local law. On the other hand, because they have the force and effect of statutes, administrative rules are generally construed in the same manner as statutes. *Rodriguez v. Service Lloyds Ins. Co.*, 997 S.W.2d 248, 254 (Tex.1999).

Next, the change does not impose a new fee, nor does it modify any existing fee, assessed by any governmental or quasi governmental body, nor by any TDSP.

It is also difficult to argue that the SWOC could be considered a cost, such that a modification to the SWOC could be considered a modification to a cost. The SWOC already exists as a design parameter in the ERCOT market construct. The SWOC itself is not a cost; it is a cap on the price at which power may be offered; the actual price may range anywhere below the cap. Admittedly, raising the SWOC permits (though does not require) generators to charge a higher amount for power than under the previous rule, but this does not necessarily *impose* a modified (higher) cost on REPs.⁴

The next question is whether a change in price allowed by raising the SWOC constitutes a change in costs that is "...*beyond the REP's control*".⁵ That issue has been addressed in the "Risk Management Considerations and Controllable Price Risks" Section above. Generally, IPR-GDF SUEZ believes that while the price of power on the spot market may be beyond an REP's control, its exposure to paying that price *is within* the REP's control, given the REP's ability to hedge.

CONCLUSION

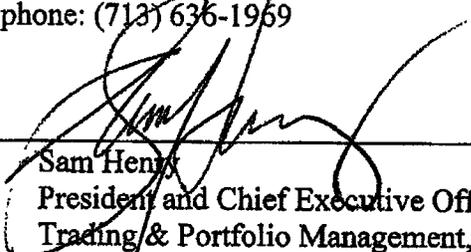
In the event that the Commission determines that the Change in Law provision may be invoked by REPs wishing to pass these costs onto their consumers, a REP should be limited to a cost pass-through of only those material, non-market based Ancillary Service costs which it actually incurs. Ultimately, each Retail Electric Provider should weigh the magnitude of the costs against the value of the long-term customer relationship before passing along any cost increase limited to non-hedgeable costs.

⁴ Increasing the level of the SWOC should not have significant impacts on customers with fixed price contracts if the increase, which has been publicly discussed at PUCT meetings since early 2012, has been properly managed by a prudent Retail Electric Provider (REP). Only REPs that have elected to not properly manage this potential risk may have exposure.

Respectfully Submitted,

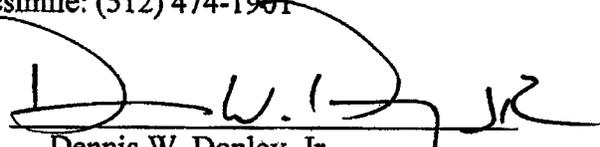
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