STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the complaint of **INTEGRYS ENERGY SERVICES, INC.,** against **WISCONSIN ELECTRIC POWER COMPANY** concerning delays in allowing customer migration to retail access service.	)))))	Case No. U-17422

At the September 24, 2013 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. John D. Quackenbush, Chairman
Hon. Greg R. White, Commissioner
Hon. Sally A. Talberg, Commissioner

ORDER

Procedural History

On June 26, 2013, Integrys Energy Services, Inc. (Integrys) filed a complaint against Wisconsin Electric Power Company (WEPCo) alleging violation of WEPCo's retail access service (RAS) tariff with respect to the timing for switching to RAS service by WEPCo Customers A and B. The complaint seeks an order for emergency relief during the pendency of the proceeding and resolution of the complaint on an expedited basis through a contested case, or, in the alternative, a declaratory ruling. On August 5, 2013, Integrys also filed a motion for emergency relief.

On August 5, 2013, Dickinson County Memorial Hospital (DCH) filed a petition to intervene, revealing that it is Customer B, and on August 6, 2013, Northern Star Industries, Inc. (Northern

Star) filed a petition to intervene, revealing that it is Customer A. On August 9, 2013, WEPCo filed an answer to the complaint and a response to the motion for emergency relief.

On August 14, 2013, a prehearing conference was held before Administrative Law Judge Mark E. Cummins (ALJ). The Commission Staff (Staff) appeared. The petitions to intervene were granted and Integrys withdrew the motion for emergency relief. In accordance with the parties' stipulation, the ALJ set a schedule for the filing of a stipulated record and cross motions for summary judgment.

On August 23, 2013, the parties filed a stipulated record. On August 30, 2013, Integrys and WEPCo filed motions for summary disposition. On September 13, 2013, Integrys filed a response (and an amended response) to WEPCo's motion, and WEPCo filed a response to Integrys' motion. Additionally, on that date, Integrys, DCH, and Northern Star filed waivers of Section 81 of the Administrative Procedures Act, MCL 24.281. On September 16, 2013, WEPCo[1] filed a waiver of Section 81, and on September 17, 2013, the Staff filed a waiver; thus the parties have bypassed the need for a proposal for decision and have sent the motions directly to the Commission.

Background

Integrys is an alternative electric supplier (AES). According to the stipulated facts, Northern Star and DCH have been bundled service customers of WEPCo, being served under Tariff Cp1 (Cp1) (Exhibit A in the record) and a separate Electric Service Agreement (agreement). Northern Star entered into the agreement on December 7, 2009 (Exhibit C), and DCH entered into the agreement on May 1, 1996 (Exhibit D). Both agreements are for the supply and delivery of electric power, and both indicate that they shall continue in force "until terminated upon six (6)

[1] The parties discussed the possibility of stipulating to the waiver of Section 81 at the prehearing conference, but counsel for WEPCo indicated that he did not have authority to so stipulate at that time, necessitating the later filings by all parties. 1 Tr 8-9.

months' notice in writing." Exhibit C, p. 3, Section 10; and Exhibit D, Section 6. Cp1 specifies that "Customers taking retail access services are also subject to the Terms and Conditions contained in the Retail Access Service tariff rate schedule RAS-1." Exhibit A, p. 2.

On May 15, 2013, WEPCo received requests from Integrys for Northern Star and DCH to switch to RAS (Exhibits E and H), which service would be provided under Tariff RAS-1 (RAS-1). Section 2.4.4 of RAS-1 provides that "the Switch Date shall be effective on the next scheduled meter read date that is not less than eight (8) business days after a Switch Request has been validated by the Company," and Section 3.2 provides that "All Switch Requests will be handled in accordance with Section 2.4." Exhibit B. Section 2.2 of RAS-1 provides that "A Customer's eligibility to take Retail Access Service is subject to the full satisfaction of any terms or conditions imposed by pre-existing contracts with or tariffs of the Company." Exhibit B. WEPCo processed the switch requests as written notices of termination of the agreements, thus invoking the six-month notice period requirement. WEPCo indicates that December 10, 2013, is the scheduled switch date for Northern Star, and January 7, 2014, is the scheduled switch date for DCH.

On June 26, 2013, Integrys filed its complaint alleging that WEPCo is violating the RAS-1 tariff by not scheduling the switch dates eight business days after validation of the switch request.

Integrys' Motion

Integrys brings its motion pursuant to Rule 323 of the Commission's Rules of Practice and Procedure, 1999 AC, R 460.17323, and MCR 2.116(C)(9) (failure to state a valid defense) and (C)(10) (in the absence of a factual issue the moving party is entitled to judgment as a matter of law). Integrys argues that DCH and Northern Star should be switched to RAS immediately.

Integrys argues that the switch request does not have the legal effect of terminating the agreements, and that the stipulated record shows that many other utilities across Michigan have

similar termination provisions but do not interpret those provisions to impose a delay on switch requests.[2] Integrys contends that it is not necessary for a full service customer to terminate the standard service agreement when switching to RAS, because the customer will continue to receive delivery from the utility. Integrys argues that both agreements specify that they are subject to the General Primary Rate Schedule, and that rate schedule allows for the RAS option for customers on Cp1; thus, the agreements are subject to the provisions of RAS-1. Alternatively, Integrys maintains that even if the agreements were effectively terminated by the switch requests, the time frame for establishing a switch date set forth in RAS-1 takes precedence over any inconsistent contractual provisions, because tariffs have the legal force and effect of law.

Integrys contends that WEPCo can cite no legal authority for its position that a switch request has the legal force of a notice of termination, and points out that the two customers only want to switch from full service to choice service, not to terminate all service. Integrys argues that WEPCo's position is anticompetitive and threatens the ability of customers to receive choice service by allowing for delaying tactics. Cp1 explicitly applies to both full requirements and retail access service. Integrys contends that the agreement signed by DCH accommodates changes in the law and tariffs, where it states "This Agreement shall be subject to the company's Rules and Regulations on file with the Public Service Commission of Michigan, and to such filed changes in the Rules and Regulations and the General Primary Rate Schedule as may become effective," and Northern Star's agreement contains almost identical language. Exhibit D, Section 4, and Exhibit

[2] Exhibit N includes several examples of primary tariffs from other utilities that contain minimum term provisions such as one or five years, including two examples of 12-month notice-of-termination provisions. Exhibit O includes several examples of RAS tariffs from other utilities that all contain eligibility criteria essentially identical to the language in RAS-1. The stipulated record does not include any examples of standard electric service agreements from other utilities. It also does not include any information showing how the minimum term and notice provisions reflected in Exhibit N are interpreted by the respective utilities in a situation where the customer requests to switch to RAS before the term has expired.

C, p. 3, Section 8. Thus, Integrys argues, the changes to Cp1 that resulted from the introduction of RAS "were made fully a part of the Service Agreement," because both agreements are automatically modified by changes in the law and tariffs. Integrys' brief in support, p. 6. Integrys contends that even if a separate agreement for RAS (Exhibit L) must be signed, that does not necessitate termination of the existing agreements. Integrys indicates that only its interpretation of the tariffs and contracts offers harmonization of the potentially conflicting provisions with state law. *See, Cruz v State Farm Mut Auto Ins Co,* 466 Mich 588, 599; 648 NW2d 591 (2002).

In response, WEPCo contends that Integrys ignores the eligibility requirements of RAS-1, and that all of the provisions of RAS-1 must be construed as a whole. WEPCo further argues that even if the Commission determines that the switch requests do not constitute notices of termination, the issue remains as to whether the customers have satisfied the provisions of the agreements in order to be eligible for RAS. WEPCo maintains that nothing in RAS-1 or Cp1 conflicts with the agreements.

WEPCo's Motion

WEPCo's motion is brought pursuant to Rule 323 and MCR 2.116(C)(10), and seeks dismissal with prejudice. WEPCo contends that the stipulated record shows that the relief requested by Integrys cannot lawfully be granted because it would violate the termination provisions of the agreements (by ignoring them), and the eligibility requirements of RAS-1 (by ignoring the terms and conditions of a pre-existing contract). WEPCo argues that it is standard for electric utilities to have notice requirements for termination, and that RAS-1 is substantially identical to the choice tariffs for every other electric utility in Michigan.

WEPCo contends that the customer service agreement required for RAS service (Exhibit L) is distinctly different from the agreements signed by the parties pursuant to Cp1 (Exhibits C and D).

WEPCo notes that the parties have stipulated that "Except to the extent revisions to Tariff Cp1 impact the provisions, terms and conditions of such Electric Service Agreement, the provisions, terms and conditions of such Electric Service Agreement have not been amended or revised." Stipulated Record, ¶¶ 4 and 5. WEPCo contends that interpretation of a tariff is a question of law, and that the general principles of contract construction apply to tariffs.

WEPCo maintains that the switching provisions of RAS-1 are subject to the eligibility provisions of RAS-1. WEPCo asserts that the agreements are for full service including supply and the switch request eliminates a material provision of the agreements, thereby constituting termination. WEPCo argues that no subsequent rules, regulations, or tariffs provide for a switch to RAS prior to termination of the agreement. WEPCo maintains that when other utilities allow for switching on less notice than the notice required for termination of a service agreement, they expressly so state in their tariff, citing the example of Exhibit M. Conversely, WEPCo notes, Cp1 states that customers taking RAS must fulfill the eligibility requirements. WEPCo argues that termination provisions are commonplace, as are choice tariff provisions requiring conformance with existing agreements. WEPCo contends that there has been no adverse impact on competitive markets as a result of such provisions, which, the utility argues, is illustrated by the fact that over 85% of WEPCo's retail service load has switched or is in the process of switching to RAS. *See*, Exhibit P.

In response, Integrys argues that the agreements' notice of termination provisions are not applicable in the context of a switch request because service is not being terminated; and that, even if the notice provisions do apply, the mandatory timeline included in RAS-1 controls over the conflicting timeline included in the agreements. Integrys contends that WEPCo's interpretation sets two sections of RAS-1 at odds with each other; and that the language of the RAS-1 eligibility

requirements cannot be used to make the tariff subject to conflicting terms embodied in separate agreements.

Discussion

The Commission has previously found that the language of the eligibility requirements in a RAS tariff cannot be used to unreasonably delay enrollment in choice. April 28, 2005 order in Case No. U-14025 *et al.*, p. 14. The Commission finds that Integrys' motion should be granted pursuant to Rule 323 and MCR 2.116(C)(10) for the following reasons.

The Legislature has spoken through 2000 PA 141 (Act 141), which states that the option to switch to an AES shall be provided to all retail electric power customers in Michigan. MCL 460.10(2)(a), (b); MCL 460.10a(1).[3] Tariffs Cp1 and RAS-1 reflect this legal mandate. Both agreements are explicitly "subject to the company's Rules and Regulations on file with the Public Service Commission of Michigan, and to such filed changes in the Rules and Regulations and the General Primary Rate Schedule as may become effective." Exhibit D, Section 4, and Exhibit C, p. 3, Section 8. Cp1 is part of the General Primary Rate Schedule, and this tariff underwent changes as a result of Act 141. These changes took place after DCH entered into the agreement, and before Northern Star entered into the agreement, but the timing is not relevant. In either case, the customer taking service under the agreement is subject to the current terms of Cp1 at all times. *See,* Exhibit C, p. 2, Section 4, and Exhibit D, Section 3. Cp1 specifies that the choice customer is also subject to the terms and conditions of RAS-1.

Filed tariffs have the force and effect of law. *Crancer v Lowden*, 315 US 631, 635; 62 SCt 763; 86 LEd 1077 (1942); *Lowden v Simonds-Shields-Lonsdale Grain Co,* 306 US 516, 520; 59

[3] This assumes that the switching load fits under the utility's 10% choice cap or is exempt from the cap. *See,* MCL 460.10a(1)(a).

SCt 612; 83 LEd 953 (1939). "Once filed, a tariff binds the filing party 'with the force of law.'" *Verizon North, Inc v Strand,* 140 FSupp2d 803, 807 (WD Mich 2000), *aff'd in part and vacated in part,* 309 F3d 935 (CA 6 2002), quoting *Burlington N RR Co v Surface Transp Bd,* 75 F3d 685, 690 (DC Cir 1996). Contractual provisions that conflict with the requirements of the law are void and unenforceable. *See, American Trust Co v Michigan Trust Co,* 263 Mich 337, 339-340; 248 NW 829 (1933); and *Mino v Clio School District,* 255 Mich App 60, 71; 661 NW2d 586 (2003). WEPCo's relationship with its customers is defined by its tariffs, and separate contracts may not be used to modify those tariffs. *See, Falmouth Co-op Marketing Ass'n v Pennsylvania RR Co,* 232 Mich 538, 545; 205 NW 477 (1925); and *CenturyTel of Mich* v *Public Service Comm,* 245 Mich App 351, 365; 627 NW2d 632 (2001). To the extent that the language of the agreements conflicts with the RAS-1 and Cp1 tariffs, the tariffs control.

Additionally, both agreements are for the delivery of electric power. Thus, it is not apparent that the switch to choice is perforce a termination of the agreements, because delivery service will continue to be taken. There is no language in either agreement that states that delivery must be discontinued if supply service is terminated. While WEPCo may decide to require the choice customer to enter into another contract, the Commission does not find that the decision to switch constitutes termination of the agreements. Were there ambiguity in the language of the agreements, that ambiguity would be construed against WEPCo as the drafter. *State Farm Mut Auto Ins Co v Enterprise Leasing Co,* 452 Mich 25, 38-39; 549 NW2d 345 (1996). However, both agreements are unambiguously for delivery of electric power, and there is no dispute that delivery may continue in the absence of supply.

DCH and Northern Star have retained their original place in the RAS queue. In accordance with Section 2.4.4 of RAS-1, the switch dates for DCH and Northern Star should have been on the

next scheduled meter read date that was not less than eight business days after the switch request was validated, as shown by the dates reflected in Exhibits F, G, and I. Thus, the Commission finds that WEPCo shall arrange for these customers to switch to choice service immediately.

THEREFORE IT IS ORDERED that the motion for summary disposition filed by Integrys Energy Services, Inc., is granted, and the motion for summary disposition filed by Wisconsin Electric Power Company is denied, and the case is dismissed.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, under MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION

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John D. Quackenbush, Chairman

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Greg R. White, Commissioner

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Sally A. Talberg, Commissioner

By its action of September 24, 2013.

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Mary Jo Kunkle, Executive Secretary