STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the complaint of **MPI ACQUISITION, LLC,** against **CLOVERLAND ELECTRIC COOPERATIVE.**	))))	Case No. U-17432

At the October 17, 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

On July 11, 2013, MPI Acquisition, LLC (MPI) filed a complaint against Cloverland Electric Cooperative (Cloverland) seeking an order approving MPI's purchase of a nine megawatt (MW) block of power from an alternative electric supplier (AES). On September 13, 2013, Cloverland filed an answer.

On September 11, 2013, a prehearing conference was held before Administrative Law Judge Peter L. Plummer. MPI and Cloverland appeared, and the Commission Staff (Staff) participated in the proceeding. At the prehearing, the parties agreed to the filing of stipulated facts and exhibits (which were filed the same day), and agreed to waive Section 81 of the Administrative Procedures Act, MCL 24.281, thus dispensing with the Proposal for Decision.

On September 25, 2013, initial briefs were filed by MPI and Cloverland (Cloverland's brief is in support of a motion for summary disposition). On October 8, 2013, the Staff filed a reply brief, and on October 9, 2013, MPI and Cloverland filed reply briefs.

MPI's Position

MPI owns and operates a paper mill, and is a customer of Cloverland pursuant to a special contract tariff (tariff) approved by the Commission in the March 15, 2013 order in Case No. U-17179. MPI proposes to purchase a 9 MW block of power from an AES, to be delivered to Cloverland 24 hours per day, 7 days per week, at a 100% load factor that would provide MPI, net of losses at the meter, with 78,840,000 kilowatt-hours (kWh) per year. MPI would pay Cloverland the monthly distribution charges set forth in the tariff for choice service, and would pay for its remaining electrical requirement as bundled service under the tariff.[1] MPI would be Cloverland's first customer to take choice service.

The parties agree that Cloverland's net jurisdictional sales for 2012 were 803,962,859 kWh, and that 10% of that amount is 80,396,286 kWh. The parties further agree that MPI's actual purchases from Cloverland in 2012 were 122,865,319 kWh. Thus, MPI proposes to take only a portion of its service from an AES in order to avoid violating the statutory mandate that no more than 10% of Cloverland's annual weather-adjusted retail sales may be taken as choice service. *See*, MCL 460.10a(1)(a). MPI requests the Commission to issue an order "confirming that the proposed transaction is authorized by the applicable statutes and rules." MPI's initial brief, p. 2.

MPI argues that the Commission has a legislative mandate to foster competition and encourage retail open access service. *See*, MCL 460.10, 460.10a(1). MPI contends that billing

[1] The Commission notes that the issue of payment for the remaining bundled service was not presented in the complaint.

will be simple because the AES-supplied electricity will be considered the first through the meter, and no new metering equipment will be required. MPI states that it can be billed for distribution service pursuant to Section 5.1 of the tariff. *See,* Stipulated Record, Exhibit A, pp. 7-8. MPI contends that the only statutory requirement that must be met is the requirement that AESs serve no more than 10% of Cloverland's jurisdictional retail sales. MPI asserts that it and Cloverland contemplated the possibility of MPI taking both bundled and choice service when negotiating the tariff, because it was known to both parties that MPI could not take 100% choice service without causing Cloverland to violate the 10% cap.

In reply, Cloverland contends that a more specific and more recent statutory provision takes precedence over a more general and older provision, and thus argues that the 10% cap provision enacted by 2008 PA 286 (Act 286) takes precedence over the general purpose mandates of 2000 PA 141 (Act 141) which require the fostering of competition. Cloverland also maintains that Act 141 did not envision that all customers would have the option to choose an AES, as illustrated by the fact that customers of an electric cooperative may participate in choice only if they have a minimum peak load of one MW. MCL 460.10x(1). Finally, Cloverland responds that the clear language of the tariff indicates that MPI may not take both types of service at once, and logic dictates that Cloverland would not have struck a deal for a special reduced rate if it knew that MPI would only be purchasing a small portion of its electricity from the utility.

Cloverland's Position

Cloverland submitted a motion for summary disposition pursuant to Rules 323 and 335 of the Commission's Rules of Practice and Procedure, 1999 AC, R 460.17323 and 460.17335. Cloverland argues that since MPI's 2012 electrical usage clearly exceeds 10% of Cloverland's 2012 net jurisdictional sales, MPI has not stated a claim upon which relief may be granted.

Moreover, Cloverland submits, the tariff does not permit MPI to take both choice and bundled service at the special contract rate. Cloverland contends that MPI is attempting to circumvent Act 286 and the procedures for choice enrollment adopted by the Commission in the September 29, 2009 order in Case No. U-15801, Appendix A (Procedures).

Cloverland notes that, under the Procedures, MPI is a Group Five customer, and its energy allotment "shall be based on the customer's previous year's 12-month annual usage." Procedures, p. 4. Energy allotments for Group Five customers are assigned "on a first-come, first-serve basis pursuant to the guidelines of the Securing an Annual Energy Allotment section of this document." *Id.* The referenced section again refers to the fact that allotments "shall" be based on the customer's previous year's 12-month annual usage, and provides that an allotment "shall be deferred if the level of Choice Participation is greater than the Cap or if the annual energy allotment would create a situation where the level of Choice Participation would be greater than the Cap if the allotment were to be awarded." *Id.*, p. 6. Since the allotment must be assigned based on the customer's actual purchases during the most recent calendar year, Cloverland argues, then MPI's assigned energy allotment must be 122,865 megawatt-hours; and since this amount exceeds the cap, MPI's proposal must be rejected.

Cloverland further argues that the enrollment queue procedures support its position. Those procedures provide that an "allotment shall be awarded to the first customer in the enrollment queue if its entire annual energy allotment falls below the Cap. . . If the annual energy allotment of the first customer in the enrollment queue exceeds the Cap then the utility shall not award additional allotments until such time that the first customer in the queue is provided the opportunity to accept its allotment." Procedures, p. 6. Thus, Cloverland contends, the Procedures do not contemplate that choice service may be taken in blocks, or as partial service. Cloverland

notes that if the energy usage of a choice customer exceeds its annual allotment, the customer is not forced to purchase from a utility. Cloverland argues that these provisions would allow MPI to circumvent the cap by taking choice service and then purchasing all of its energy requirements that way.

Finally, Cloverland argues that if the Commission allows MPI to purchase a block of choice service, MPI may not purchase the remainder of its service under the tariff. Cloverland notes that Section 5.1 of the tariff provides that MPI "will take service from the COOPERATIVE on either a bundled basis ("BUNDLED SERVICE") or an open access basis through an alternative energy supplier ("CHOICE SERVICE")." Exhibit A, p. 7. Thus, Cloverland asserts, the clear language of the tariff offers only an either/or choice and not a combination; and if MPI purchases electricity from an AES, then the special contract rate for bundled service no longer applies and MPI must purchase its remaining requirements at the applicable standard tariff rate listed in the rate book.

In reply, MPI points out that Cloverland's retail access service tariff (RAST) was modified to reflect the distribution costs in the tariff. MPI contends that the RAST must be made available to all customers, because that was the express intent of Act 141. With regard to the contract interpretation issue, MPI contends that a dictionary definition of "either" may include "each," and that Cloverland's interpretation of the tariff would mean that MPI could never be served by an AES.

The Staff's Position

The Staff agrees with MPI.[2] The Staff contends that the Procedures only seem to address the situation where a customer takes all of its energy requirements from an AES, and do not address the present situation where a customer whose annual usage exceeds the utility's cap elects to take choice service and the utility has no other customers on choice. The Staff notes that the Legislature, in MCL 460.10a(1)(b), explicitly granted the Commission discretion to decide "how customer facilities will be defined for the purpose of assigning the annual energy allotments," and argues that the statute's only requirement is that energy allotments be "awarded on a calendar year basis." The Staff contends that MPI's proposal is consistent with Act 141's mandate that all retail electric customers in the state have the option to choose an electric supplier. MCL 460.10(2)(a), and 460.10a(1). The Staff urges the Commission to "adopt a policy that allows a customer of a utility that does not have a queue to take a set block of power from an AES, and its remaining energy requirements from the utility." Staff's reply brief, p. 5. The Staff further argues that if the set amount of power exceeds a subsequent cap (which could be lowered as a result of decreased sales) the customer should not be removed from choice; and that the customer should not be allowed to increase the block of power unless there is space below the cap that can be used. *See*, MCL 460.10a(1)(b).

Discussion

The Commission agrees with the Staff and MPI. Clearly the parties contemplated that MPI might take choice service, because the tariff reflects provisions for choice service. Cloverland is correct in asserting that the Procedures do not contemplate choice service being taken in blocks –

[2] Cloverland asserts that the Staff's reply brief should be struck because it is "in essence a position taken by Staff that should have been asserted in an initial brief." Cloverland's reply brief, p. 4, n. 1. The Commission finds that the Staff's reply responds to the initial briefs.

the Procedures simply do not address the present situation where the first customer to request choice from a utility is a large customer whose annual usage exceeds 10% of the utility's total annual weather-adjusted retail sales. The Commission is persuaded that the Legislature did not intend to cut off such a customer from the option to use an AES simply because it is a large customer.[3] The Procedures provide that the energy allotment is "based on" the previous year's actual purchases; they do not require that the energy allotment be equal to the previous year's actual purchases. Choice service is awarded on a first-come first-served basis, and the Commission finds that common sense should prevail. The "energy allotment" assigned to a customer may be less than that customer's total allotment calculated on a calendar year basis, where the total would exceed the available room under the cap held by the utility. *See,* Procedures, pp. 1, 4. The Commission finds that MPI's proposal to take choice service for a block of power that does not exceed the cap is consistent with Acts 141 and 286. The Commission further adopts the Staff's recommendations with respect to future modifications: if the 9 MW block of power exceeds a future decreased Cloverland cap simply as a result of decreased utility sales, MPI may not be removed from choice; however, MPI may not increase the block of power served by an AES unless there is space below the cap to accommodate the increase.

THEREFORE, IT IS ORDERED that:

A. MPI Acquisition, LLC's, petition to purchase a nine megawatt block of power from an alternative electric supplier pursuant to the choice service provisions of the special contract tariff approved in the March 15, 2013 order in Case No. U-17179.

B. The motion for summary disposition filed by Cloverland Electric Cooperative is denied.

[3] Particularly here, where the Legislature went to the trouble of defining how large the customer had to be in order to elect choice.

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 October 17, 2013.

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Mary Jo Kunkle, Executive Secretary