

January 24, 2001

MAINE PUBLIC UTILITIES COMMISSION
Amendments to Standard Offer Service Rule
(Chapter 301)

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 the opt-out fee provision of our standard offer rule (Chapter 301).¹ The rule adopted through this proceeding replaces the emergency rule adopted by Orders issued on November 3, 2000 and November 7, 2000 (Docket No. 2000-890).

II. BACKGROUND

On August 16, 2000, the Commission adopted several amendments to the standard offer rule (Chapter 301). The amendments were based on our experience in implementing the rule and conducting last year's standard offer bid process, and on the comments of participants in the New England electricity market. These amendments included a change to the opt-out fee provision of the rule (section 2(C)), the purpose of which is to deter the strategic movement of customers between standard offer service and the competitive market. Such activity is often referred to as "gaming" the standard offer.

The original opt-out fee provision in Chapter 301 required that a customer in the medium or large standard offer class (or a set of customers having a demand greater than 50 kW) who entered the standard offer service after taking service from a competitive provider either continue to take standard offer service for 12 months or pay an opt-out fee to the standard offer supplier equal to 1-month's generation bill. As part of the August amendments, we changed the opt-out provision so it applied only to a customer who takes standard offer service during the summer months; if so, the customer would have to remain on standard offer service through the following February or pay an opt-out fee. To provide a greater deterrence against gaming, we also increased the opt-out fee to equal the sum of the customer's two highest standard offer bills.

We amended the provision to target summer service because it was in these months that there appeared to be the greatest potential for strategic entry onto standard

¹ This rulemaking considered only amendments to the opt-out provision, section 2(C).

offer service. Electric power prices in the New England market are typically at their highest during these months. When standard offer prices are averaged, they are likely to be lower than summer market prices, thereby creating an incentive to take standard offer service during the summer and then return to the competitive market. Such activity creates a large financial risk for the standard offer suppliers.

The intent of the change was to strengthen the deterrent effect of the opt-out fee, while targeting its applicability to the perceived problem (i.e., dropping to the standard offer during the summer months). However, by limiting the applicability of the opt-out fee to summer months, we inadvertently created an opportunity for strategic movement by entering standard offer service during non-summer months. Under conditions where market prices become higher than the fixed standard offer rate, competitive providers, together with customers who have contracted to purchase electricity from competitive providers, will have the economic incentive to extract savings by returning the customers to standard offer service. Having entered the standard offer in a non-summer month, customers could return to the competitive market at any time, without incurring an opt-out fee. Before our August rule change, a customer entering the standard offer in a non-summer month would have had to remain for 12 months before returning to the competitive market or pay an opt-out fee, thus providing some deterrent against such activity.

In October 2000, we became aware that a significant number of customers of competitive providers were seriously considering entering the standard offer to extract below-market savings. It was our understanding that those customers would not have considered such action if the original opt-out provision had not been amended to target only summer standard offer service. This situation raised a substantial concern because the current suppliers of standard offer service were chosen early in the year to provide service for a 12-month period beginning March 1, 2000. At the time the suppliers were chosen, the original opt-out fee was in effect. The opt-out fee provision as amended in August 2000 would allow a significant amount of load to enter the standard offer at below current market prices, creating a potential for substantial financial harm to the suppliers. Any such harm would, in part, have been a direct result of our change of the rule in the middle of the standard offer period.

Accordingly, we considered an emergency rule that would reinstate the original opt-out provision. We concluded that allowing the potential for harm created by the August rule change to occur would be fundamentally unfair to the current standard offer suppliers. Additionally, such action might signal to suppliers generally that the Maine Commission might change the rules in the middle of the game to their substantial detriment. This could cause some suppliers to decide not do business in Maine and others to add significant premiums to their Maine prices. The end result would be higher rates for Maine consumers.

For these reasons, we adopted an emergency rule, pursuant to 5 M.R.S.A. § 8054, that reinstated the original opt-out provision. *Order Adopting Emergency Rule*, Docket No. 2000-890 (November 7, 2000). By statute, the emergency rule may only be

in effect for a maximum period of 90 days. We therefore initiated this rulemaking to consider the appropriate structure of the opt-out fee in light of the circumstances described above.

III. RULEMAKING PROCESS

On November 13, 2000, we issued a Notice of Rulemaking, proposing amendments to the opt-out fee provision of the Rule. Consistent with rulemaking procedures, the Commission provided an opportunity for written comments on the proposed rule and held a hearing on the matter on December 3, 2000. The Public Advocate, Central Maine Power Company (CMP), the Maine Electric Consumer Cooperative/Competitive Energy Services (MECC), and Duke Energy Trading and Marketing (Duke) commented on the proposed rule.

IV. DISCUSSION OF AMENDMENTS

We extend the opt-out fee requirement that was reinstated in the emergency rule so that it remains in effect until the end of the current standard offer period (February 28, 2001). This will extend the effectiveness of the provision that existed when the current standard offer suppliers were chosen to provide service through the end of their term of service. As discussed in *Order Adopting Emergency Rule – Part II*, Docket No. 2000-890 (Nov. 7, 2000), extending the original opt-out fee requirement to be concurrent with the initial standard offer period is necessary to maintain fundamental fairness in the administration of standard offer service. No commenter objected to extending the original opt-out fee requirement through the first standard offer period. We have, however, modified the language to remove the option of remaining on the standard offer for 12 months to avoid payment of the fee. This option could never be used because, as discussed below, standard offer terminations beginning March 1, 2001, are governed by a new opt-out fee provision.

For the period beginning March 1, 2001, the amended rule maintains the original structure of the opt-out fee provision (i.e., a customer who switches to standard offer from a competitive provider must remain on the standard offer for 12 months or pay an opt-out fee, regardless of when the customer entered standard offer).² However, the fee will be set at two times the customer's highest standard offer bill, rather than a 1-month bill fee contained in the original rule. This approach should more effectively

² We considered other structures to deter gaming, such as fees when re-entering standard offer service and charging current market prices for returning customers. However, based on the comments, we conclude the other approaches are more problematic and administratively burdensome than the opt-out-fee structure.

deter gaming, as was intended by the August amendment, without creating the potential for gaming the standard offer by entry in non-summer months.³

We received no objections to this portion of the proposed rule. However, several commenters expressed a concern regarding customers whose return to standard offer service might be beyond their control or otherwise not related to gaming. This could occur, for example, if a provider suddenly goes out of business or decides to terminate service, resulting in the customer's automatically defaulting to standard offer service for a period of time. Under our rule, such a customer would be required to take standard offer service for 12 months or pay the opt-out fee; a result that might be unfair under the particular circumstances. Because it is difficult to articulate specific exemptions to the opt-out requirements that would be appropriate in all cases, we will entertain, on a case-by-case basis, requests for waivers of the opt-out fee, pursuant to section 10 of the rule, that demonstrate that the circumstances do not warrant the payment of an opt-out fee. Potentially relevant to a waiver request are such factors as whether the return to standard offer service was related to efforts to strategically game standard offer pricing and whether the failure to impose the fee would work an injustice on the standard offer supplier.

The Notice of Rulemaking sought comment on how the opt-out fee should be apportioned between standard offer providers if a customer enters during one provider's term and exits during another's. CMP responded that the opt-out fee is primarily intended to deter gaming, not to reimburse actual costs; therefore, the fee should be given to the then-current provider rather than apportioning the amounts. Duke commented that the fee should be apportioned based on harm to the providers and one approach would be to apportion based on the number of months service was provided. Although we agree with CMP that the primary purpose of the opt-out fee is deterrence, it is appropriate to consider the relative harm to the successive providers. Depending on the specific circumstances, the original provider, the later provider, or both providers could be harmed. Thus, it is appropriate to apportion the fee in some manner. Because we cannot determine in advance the relative harm to providers, we conclude that the most appropriate approach is to simply apportion the fee based on the number of months served by each provider. The amended rule incorporates this approach.

The amended rule contains a provision clarifying that a customer subject to the opt-out fee is required to notify the utility prior to leaving the standard offer service. The amended rule also includes a provision that would allow the Commission to increase the opt-out fee by order, to an amount necessary to discourage gaming in the event of increasing market prices. The Public Advocate expressed concern that the language in the proposed rule did not contain any standard by which we would decide to increase

³ The amended rule includes an exemption from the opt-out fee requirements for customers in the northern Maine market, but specifies that the Commission can adopt an opt-out fee for the region if market conditions warrant. The proposed rule included the exemption because we have not observed the volatility in northern Maine that would raise the gaming concern. No one commented on the northern Maine exemption.

the fee. We agree and added language stating that the fee may be increased upon a finding that such action is necessary to provide the intended deterrence against gaming the standard offer or to obtain reasonably-priced standard offer service.

The proposed rule contained a provision that specified that customers in a group with a combined demand of 50 kW or greater are individually responsible for their portion of opt-out fee if the competitive provider or aggregator defaults on its responsibility to pay the opt-out fee. The Public Advocate and CMP opposed the addition of this provision. They stated that it is likely that the individual customers would have little control or knowledge regarding the circumstances leading to the imposition of the fee and that the provision could result in a collection burden for the utilities. The commenters stated the obligation to pay the fee should remain with the provider or aggregator, and the Commission should use its authority to revoke licenses and impose fines to enforce compliance. The Public Advocate added that a problem in this regard has not surfaced and therefore there is no need to address the problem now. We agree that the proposed provision raises valid concerns and we do not include it in the amended rule. We will monitor market activity and consider imposing such a requirement if future circumstances warrant.

We have altered the provision regarding groups of smaller customers to specify that the opt-out fee requirement applies when a competitive electricity provider or aggregator induces the group to return to standard offer service and then to move back to competitive service within 12 months.⁴ If we observe other efforts involving smaller customers that may be considered gaming of standard offer pricing, we would consider taking deterrent action pursuant to section 2(C)(3)(b) of the rule.

The MECC generally questioned the Commission's efforts to restrict strategic gaming of standard offer service, stating that any approach will be difficult to administer, will result in unintended consequences, and will be susceptible to entities finding ways to frustrate the intent. The MECC stated that standard offer service was intended as only a guarantee of physical delivery, not a least cost alternative to market sources. The MECC thus recommends that standard offer service be priced month-by-month or indexed to market rates. A second best option, according to the MECC, is to set the anti-gaming rules and leave them in place, rather than continually considering amendments in efforts for improvement or to deal with unforeseen problems.

⁴ For clarity, we moved this provision to a separate section of the rule.

We agree with the MECC that any anti-gaming provision presents administrative challenges and difficult questions of interpretation. We also agree that pure market pricing would alleviate the need to consider appropriate anti-gaming provisions.⁵ However, we disagree with the MECC's view of the purpose behind standard offer service. In our view, standard offer service is intended to provide a reasonably-priced safe harbor for customers who cannot obtain or lose service from competitive providers, and to allow for a gradual transition for customers who have no current desire to choose a competitive provider. We thus have a responsibility to try to secure standard offer service that is reasonably priced. The potential cost to suppliers of strategic gaming of standard offer service is of such magnitude that, if not deterred, unacceptable premiums in standard offer rates would occur. Thus, to achieve reasonably-priced standard offers, we must continue to act to deter strategic gaming. Although we agree that we should strive for stability in this area, there may be times when it is necessary to modify our rules if they are not operating as intended.

Accordingly, it is

ORDERED

1. That the attached amendments to Chapter 301, Standard Offer Service, are hereby adopted;
2. That the Administrative Director shall file the adopted rule and related materials with the Secretary of State; and
3. The Administrative Director shall send copies of this Order and the attached amended rule to:
 - 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 rulemakings;
 - c. All persons who commented in this proceeding;
 - d. All persons on the service list in the rulemaking, Public Utilities Commission, Bidding Processes and Terms and Conditions for Standard Offer Service (Chapter 301), Docket No. 97-739;

⁵ Such an approach may be appropriate for the large class upon an assumption that there currently exists reasonable competition for these customers. We have sought comment on this matter, See *Order*, Docket No. 2000-808 (Dec. 22, 2000). Such pricing, in our view, would not be appropriate for the smaller classes, because there is no assurance that a reasonably robust market exists for these customers.

e. All persons on the service list in the rulemaking, Public Utilities Commission, Amendments to standard offer rule (Chapter 301), Docket No. 2000-489;

f. All licensed competitive electricity providers in the State;

Dated at Augusta, Maine, this 24th day of January, 2001.

BY ORDER OF THE COMMISSION

Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Nugent
Diamond