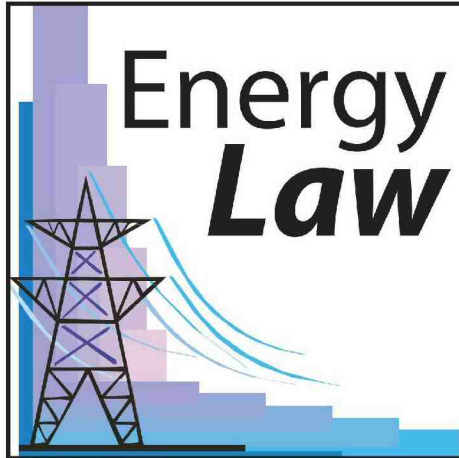


Special Report



The Best of Terms

Negotiating Retail Electricity Contracts

by RON MOSS

Retail customers in Texas enjoy a strong, competitive electric market, and that competition gives them the bargaining power to insist on fair and reasonable terms in retail electric contracts. Attorneys can help ensure their clients obtain those terms.

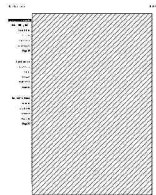
The Public Utility Commission of Texas has adopted detailed customer protection rules applicable to residential and small commercial customers participating in the retail market, but the PUC allows sophisticated consumers such as large commercial and industrial customers to agree to terms of service that differ from those specified in the PUC's rules. Attorneys advising large commercial and industrial customers should therefore be familiar with the typical provisions of such contracts and the issues they present.

- *Energy consultants.* The first question the attorney should ask is whether the customer has engaged an energy consultant to solicit offers from retail electric providers and to provide an apples-to-apples comparison of those offers. The retail electric provider generally pays

the consultant's fee from the proceeds of the contract. The consultant can provide valuable insight into current market conditions and can gather information that is useful in negotiations with retail electric providers, such as the customer's historical usage and load patterns. An energy consultant may also be asked to review the business terms in the retail electric provider's proposed contract, but it is incumbent on the attorney to evaluate the legal terms in the contract.

- *Terms and conditions.* A typical retail electric contract contains many of the same terms and conditions that appear in other commercial contracts, such as limitation-of-liability and dispute-resolution provisions, but there also are some important differences. For example, it is common for many of the terms and conditions in an electric sales contract to appear in a master agreement, but the agreed-upon prices and quantities often are set forth in a separate sales confirmation document. The attorney should compare the two documents to ensure they are consistent.

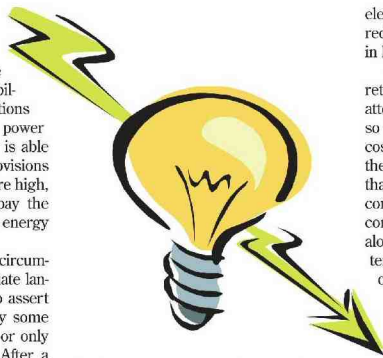
- *Provisions.* Unless the customer is seeking to acquire only part of its power needs through the proposed contract,



the attorney should review the contract's *force majeure* provision carefully to ensure that the retail electric provider cannot use price spikes or generator unavailability as an excuse to avoid its obligations to satisfy all of the customer's power needs. If a retail electric provider is able to invoke lenient *force majeure* provisions to avoid performing when prices are high, the customer will be forced to pay the prices established by the real-time energy imbalance market.

Depending on the customer's circumstances, it may be useful to negotiate language that allows the customer to assert *force majeure* with respect to only some of the customer's delivery points or only a portion of the expected load. After a hurricane or fire, for example, a customer may be able to take delivery of power at some meters but not others. Standard retail electric provider contracts often treat *force majeure* as an all-or-nothing proposition. The attorney should also ensure that the *force majeure* provision does not contain an arbitrary ending date, such as 30 days after the date on which a *force majeure* event is declared.

Another important provision to analyze is the description of costs that the retail electric provider is allowed to pass through to the customer. It is common for retail electric providers to pass through taxes and the "nonbypassable" charges imposed by the transmission and distribution utility, such as delivery charges and competition transition charges. The customer's attorney should make sure the contract provides a detailed description of



the charges to prevent the retail electric provider from imposing other costs that are not true pass-through charges. The attorney should also insert language to prevent the retail electric provider from marking up the charges that are passed through to the customer.

The "change of law" provision is another term that often warrants special scrutiny. Typically, retail electric providers draft those provisions to state that if a change in law, regulation, tariff, or any other fee or cost causes the retail electric provider to incur additional costs, those additional costs can be passed through to the customer.

The problem with such a provision is twofold. First, it creates uncertainty for the customer, who has no way of knowing how much a change in law will increase costs. Second, it is one-sided, because the retail

electric provider has not obligated itself to reduce its rates if a change in law results in lower costs.

If the retail electric provider insists on retaining the provision, the customer's attorney should insist that it be reciprocal, so that a change in law resulting in lower costs also is reflected in rates. In addition, the attorney may want to propose language that allows the customer to terminate the contract if the change in law increases the contract price above a certain percentage, along with language confirming that such termination will not be deemed an event of default.

- **Remedies.** The attorney should take special note of the remedies for an event of default. Retail electric provider contracts typically provide that, in the event of a customer default that leads to termination of the contract, the retail electric provider will have the right to calculate damages based on the expected volume of energy sales remaining under the contract multiplied by the market value of the energy. It is imperative that the customer's attorney insist on an objective standard to determine the market value of the energy in the event of a default, rather than leaving the quantification of market value to the discretion of the retail electric provider.

In addition, some customers may be subject to protections that the standard retail electric provider contract does not recognize. For example, the Prompt Payment Act in Texas Government Code Chapter 2251 governs the timing of payments by certain governmental entities, and any contrary payment provisions in the

standard contract are unenforceable by the retail electric provider. Other customers for whom an interruption or suspension of service would create a dangerous or life-threatening condition, such as hospitals, may be entitled to special protections as "critical care" customers. An attorney should be cognizant of those types of protections and make sure they are included in the contract.

Finally, lawyers should be aware of the dynamic nature of the Texas retail market. Retail electric providers periodically change their contracts to reflect new products or new developments in the market. Even if an attorney fully vetted a particular provider's contract in an earlier contract negotiation, an attorney or consultant should review it again to make sure that it has not been revised and that it remains appropriate for the current market conditions.



Ron Moss is a shareholder in [Winstead](#) in Austin. He focuses his practice on litigation in the courts and before administrative agencies.

His primary practice is utility law, with an emphasis on representing utilities before regulatory commissions and in appeals courts. In addition to utility matters, Moss has represented clients in environmental litigation and business litigation. His email address is rhmos@winstead.com.