

THE BRAZILIAN FREE MARKET OF ELECTRIC ENERGY PROBLEMS RELATED TO THE TRANSITION FROM THE CAPTIVE MARKET

Moacyr Trindade de Oliveira Andrade
CSPE

Edna Lopes Ramalho
UNICAMP / CSPE

Fernando Amaral de Almeida Prado Jr
POLITÉCNICA - USP / SINERCONSULT

ABSTRACT

This article tries to evaluate, according to the regulatory agency's point of view, the main problems and conflicts between consumers and electric energy utility companies, resulting from the strategy of the consumers who become eligible to the free market, and search this alternative as a way of reducing the costs as well as a higher competitiveness within the commercial areas which they act. Additionally, suggest alternatives to the regulation suitability, aiming a better operation of the electric energy market, and a way to make it possible that the customers have a calm transition from the captive market to the free one.

INTRODUCTION

The electric energy market of the distribution utilities has been marked by the characteristics of a natural monopoly. The service was not optional to the consumer and its own profits were defined by the legislation.

The commercial connection with the generating units was noted by centralization characteristics, in such way that the potential existence of energy surplus to the market was defined in the meetings of the GCOI (Operation Interconnected Coordination Group), and where, it was not unusual the companies belonging to the Eletrobrás Group made the political strength and representative ness within the market prevail. Only in 1993, with the law 8631, it was determined the necessity of establishing supply contracts between the generating and distribution agents.

Later on, with the beginning of opportunity due to the law concerning the migration of large consumers to the free market, as well as the privatization of around 80% of the electric energy distribution companies, a focus of attention to the consumer eligibility to apply and search for competitive conditions within the market, acquiring its own needs concerning the usage of electric energy.

If we take into account that the termination of the contract is one of the conditions that allow this eligibility (an instrument which was not given its real value, since there were not other options of purchasing electric energy unless from the utility that connected the consumers physically to the grid), this instrument has become of vital importance in the commercial relations.

The greatest part of commercial relations was established in dubious contracts, lacking details and, many times, very old ones, containing automatic renewing clauses that were mere formalism between both parts. Later on, after the Resolution ANEEL 456/2000, established the general conditions for the supplying, this very law was consolidated as the main reference of the regulated commercial practices on electric sector.

Although it is unquestionable that this regulation has shown some important advances, many other points demand a better posture from ANEEL. Among those, we can highlight: The complaints closing dates for the automatic extension of the contract terms; The modification of the voltage class; the application of penalties for the unilateral cancellation; and others.

A real concern seems to be the alternatives utilized by the distribution utilities, which appear to be vague most of the times, and which scrape through the laws appointed in the de Consumer Defense Code, aiming to make it difficult for their clients to change their position of captive consumers towards the free market.

The preservation of a consumer's portfolio by the utilities using these methods, while they claim to have more satisfying alternatives for their commercial relations, makes it clear that it is just a meaningless speech used for seminar, or even worse a not so real converse, which clearly shows an attitude contrary to the fidelity concept speech in their commercial relations.

THE SUPPLY CONTRACTS

From 07th July 1995 on, with the law 9074, came up a new alternative for the electric energy trade: the Free Market. To be entitled to this way of commercialization, one must observe the parameters of the cited legal certificate:

Paragraph III Chapter 15: Complying with the current supply contracts, the renewal of the present and new concessions will be done without the exclusiveness of supplying electric energy to consumers with a load equivalent or superior to 10.000 kW, being provided with a voltage equal or superior to 69 kV, who might prefer to contract the supplying, as a whole or in part, from the independent power producer.

The aforementioned clause was restricted to the consumers already connected, so gradually they tried to reduce the demands in such a way that nowadays, the contracted demand should be superior or equivalent to 3.000 kW, maintaining the restriction of the voltage level to those consumers connected before the issuing of this very law (1995), exempting from that restriction the consumers who were connected after this date.

Concomitantly, as a manner to encourage the implementation of alternative energy sources (Small Hydro Power Plants - PCH, Biomass, among others, in 1995) it becomes viable that consumers with demand above 500 kW who acquire energy from these sources are entitled to become members of the Free Market, without any restrictions to their voltage level.

At first, due to the consumer's lack of information, and also due to the regulation's vagueness, there was not a expressive number of consumers trying to become eligible to the free market, however, in recent years this number is increasing, and we account presently that 25% of the country's market is served this way, totalizing, in September 2006, 576 Free Consumers.

The modifications resulting from the government's new plan, ruled by Law 10.848 of March 2004, provided a better regulatory safety, facing a previous perspective of returning the State to the infrastructure sector, disseminated by the plans presented by the winning political party (before the 2002 elections), as well as the growing competitiveness within the sector due to the better economic stability at that moment persuaded consumers to search for better conditions for all their supplies, which included electric energy, causing an increase in the number of consumption units trying to move into the Free Market.

Due to the need of closing the supply contracts in force at the time, and so that the consumers might become entitled to the free market, there has been an examination into situations that might be better balanced by the regulatory agencies aiming a reduction of the conflicts and also to allow a full understanding of all the commercial alternatives as well as the accessibility to the inspector agencies, which are responsible for the balance of the market.

With the ordainment of Resolution ANEEL 456 (November 2000), it has been determined that all the captive consumers must consolidate a supply contract along with distribution utility.

The clause 23 in this Resolution determines, among others clauses, for the Consumer with a voltage level superior to 2,3 kV:

I – Identification of the Delivery Point;

VI – date for the beginning of the supply and its length;

IX – rules for suspension; and

§2 the supply contract's length shall be determined, taking into account the needs and requirements from both parts, considering the following aspects:

a) The contract will be valid for 12 (twelve) months, except when there is an different agreement between the parts;

b) whenever, to fulfill the installed load, there is the need for investment from the utility, this very company might determine (for the first contract) a time length of up to 24 (twenty-four) months; and

c) the contract might be automatically extended for an equivalent period of time, as long as the consumer want it that way, and with a minimum of 180 (one hundred and eighty) days in advance, corresponding to the ending of each term.

The regulation understanding by the utility is substantially distinct from that realized by the consumer. The utility tries to keep their clients as captive, since the economical outcome of such condition are, actually, better when comparing with the free market.

This condition has been determined for the no effective conclusion of the major premise in RESEB, which established a full dissociation from the supply chain, which means, if there would be Generation, Transmission, Distribution, and Trade agents, and the latter two have been kept integrated until very recently; and nowadays the distribution utilities are not entitled to participate in trading energy for the free market. This condition has been adjusted by these companies with the creation of Holdings, by association with one of the trade companies, and then providing a higher easiness to enter the free market, when their captive consumers accept to do it through the Holding's trade company.

In fact, according to RESEB the transmission unit as much as the distribution unit would be characterized as companies strongly regulated, guaranteeing the access to the national electric grid.

Once the dissociation of activities in distribution/trade has not been completely put into effect, the economic result from each utility company is based on the moving of consumption units in the captive market to the free market. And these companies try to come up with several obstacles to prevent the feasibility of this transition.

Following next, we will try to cover the more relevant aspects that could and should be balanced, concerning difficulties, conflicts, and uncertainty displayed in this period on the free market electric energy.

Validity Period

The contracts period of validity, determined by Resolution 456/00, is one year (twelve months) except when there is a different settlement between the parts.

It seems clear that the periods of validities, should contain this characteristic, since if there is not a interruption in the supply or an alteration in the participation, migration to the free market, it would be enough that the consumer did not denounce it and the contract would be automatically extended for a equivalent period of time, that is another 12 (twelve) months.

However, due to the lack of options the supply contracts signed before the Resolution 456/00, and the Free Market availability, they did not have any commitment related to the validity times. In such cases, it is common to have contract validity periods up to 5 or 10 years.

With the implementation of Resolution 456/00, it was understood that the contract period of validity would be restricted to 12 months, and only if there would be the necessity of repairs for the services to the load would the first contract of 24 months be settled, and after that it would return to the previous yearly obligations.

The utility companies, however, interpret this in a distinct manner, and the contracts with longer terms, settled before the aforementioned resolution, when are finished would be automatically extended for an equivalent period of time, that is for 5 or 10 years more.

Such condition is not compatible with the perspectives created by RESEB as well as Resolution 456/00, since the Sector aspires for a consolidation of the Energy Market. However, on the utility side, refunding the energy purchased in advance to supply its market is not free of revenue loss when the consumption units leave their condition of captives to free ones, which exculpates, in a way, the utility actions concerning the loss theory that the captive consumers should endure this very losses, since the concession contracts have their economical balance warranted.

So, the regulator agency must provide the necessary conditions for the transition with no losses when granting the consumers passage from the free market to the captive one, caused by the devolution of energy purchased in advance for attending the unit in transition, as well as to guarantee that the contract validity period be 12 months indeed, which means that distinct validity periods must require the proper current documentation "*agreement between two parts*".

Another relevant aspect is associated to the denouncing of these contracts. Any judicial evaluation would define the contract validity having as reference its signature date. So, a 3 years contract, which was put into force in 08/10/2003 would be terminated by 08/10/2006, and taking into account that it's denouncing demands a 180

days (6 months) period time, it should happen by 02/10/2006. However, it is common the utility companies link the termination of the contract to the reading routes (metering) of the units and, in many cases, they would restrict it to the last reading stated day which does not correspond to the reference characterized by the contract settlement date. It becomes common, due to this, the answer from the utility to the contract denouncing in a period around 02/10/2006, in the example given, as being a extemporaneous one because the reading date is previous to the date 08/10/2006, and because of this the 180 days (according to their understanding) must have as a reference this reading date, usually around 20 to 30 days before the reference of the contract settlement, being necessary the intervention of the regulatory agencies for every similar case, and this does not always happen due to the lack of knowledge from the consumers about the alternative to appeal with the regulatory agency.

Another aspect of the supply contracts, with the same impediment characteristic capable of shaping the transition to the free market, are the contract rescission clauses. Some of these contracts have the same clause, although their consolidation appear to be impracticable, unless in cases of failure or interruption of the operation.

The utilities claim that if a client wishes to be entitled to the migration rights, it must respect integrally the contract in force, even those with 10 years validity time. Legally, it is comprehended that, when a rescission clause is settled, this very clause might be used, however, the utilities do not share the same point of view. They claim that the migration deals with additional losses related to the reference value of the energy when it was realized in CCEE (Electric Energy Trade Chamber), and that the client must endure all the losses inherent to that operation, which seems correct at first glance, however, when there is an evaluation of the possible losses, these do not appear to be consistent with the values in force within the Electric System.

Another way of impeding, used by the utilities is characterized by the procrastination of the needed documentation by the client to migrate to the Free Market, and by doing this, they maintain the consumer as captive for a significant additional time.

Clients who manage to get eligible to the free market through the acquisition of energy from incentive alternatives, and that are eligible to discounts in the transportation rate, the utilities demand that they corroborate the announced contracts. Although it is necessary to corroborate the origin of the purchased energy to obtain the transportation rate discount, it is only the ANEEL or CCEE may homologate these contracts.

On the utilities side, is important to highlight that the rules to annul the energy from the supply contracts, the function of reduction of market generated by the migration of clients to the free market, they are not clear. These distortions are characterized by the volume to be considered and for the repayment mechanisms. As an example, we address that the utilities must purchase 100% of the market to be attended, and in these provisions, it must be included the amount of the captive market as much as the amount of the free market within their concession area. Additionally, it is necessary to declare the free market in potential, which is the energy associated to those clients who already have the demanded conditions to migrate, and however have not put this right into practice, or are still yet to fulfill the contracts validities within the said time, until the horizon year of energy purchasing,

For appreciation of the potentially free market, according to the rules in force, the consumers with a demand superior to 500 kW are not included, the same ones who might become free, through contracts with renewable sources, are considered only those clients with contracts previous to 1995 and with a demand superior to 3.000 kW and with a nominal voltage equivalent or superior to 69 kV, and the clients who ingresses after 1995 with a demand superior to 3.000 kW and with no voltage restrictions. However, nowadays it is expressive the number of ingresses costumers who become effective through contracts with alternative sources, which provokes a distortion in the market planning and in the reimbursement mechanism.

As a way to minimize these amounts, designated as energy surplus, the utilities promote the trading of energy to those clients who possess their own generation fueled by diesel, which proportionate a reduction of energy and demand purchased from the utility for the peak hour, aiming an optimization of costs with this input, and then offering the "surplus" named EST (Energy of Electric Displacement) at a price lower than the amount spent by the client to operate its own generation during peak hours.

INFERENCES

The utilities role, as well as any other private company, is to preserve its market, to maintain its profit margin, and to develop the trading activities which allow its shareholders to obtain the fair results from their investment,

When it comes to the private company exercise the functions of the State, public service, the rates are regulated and must provide the conditions demanded by the entrepreneur and shareholders, at the same time they shall reflect moderateness conditions, allowing that the service have characteristics of universality compatible with the income of the users.

This duality can not be obtained through contract impositions or tricks with the electric energy users.

We reckon the need of a serious acting from the regulator agency, which happens to be ANEEL, as well as from the State, so to provide conditions for the services to be rendered and the results reflect quality, continuity, and moderated rates, as well as the revaluation on the utilities expertise related to mechanisms for preserving the clients, aiming at the future, instead of actions thinking about immediate and dubious results as for the longevity of the results.

On the utilities side it is necessary the utilization of tools that propitiate effective and coherent results when it comes to their clients, for example:

From the State, the real long term objective must be addressed, searching to provide evolutions of the free market, if that is the case, through the competition between agents, a positive result to the users of the services of electric energy, in terms of quality, technological evolution, and preservation of moderate rates.

On the part of the Regulatory Agency, even at such a condition of transition or non-execution of a effective plan to evolve and consolidate the Free Market, it can promote the adjusts already detected by the market's ability to operate so far.

The commercial relation between the energy distribution companies and its consumers will not be the same in the upcoming years, as it can be observed in the global trends of adaptation, or already at use in developed countries and in those still under development. Many alterations will be the result from the economy modernization, the technological improvements or the consumer's needs, as the Public Audience occurred on December, introducing the alternative to reach the limit necessary, 500 kw, by units connection by interest or integrated production union.

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