

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission's Promul-)
gation of Rules for Alternative Dispute) Case No. 99-1615-EL-ORD
Resolution Procedures Pursuant to Chapter)
4928, Revised Code.)

ENTRY ON REHEARING

The Commission finds:

- (1) On December 7, 1999, the Commission formally initiated this proceeding in order to establish procedures for alternative dispute resolution (ADR) for certain complaints, pursuant to the recently enacted Section 4928.16(A)(4), Revised Code. On December 21, 1999, the Commission issued for public comment its staff's proposal, which suggested proposed rules by which the Commission should establish ADR procedures.
- (2) On March 30, 2000, the Commission issued a decision in this matter and adopted ADR rules. Those rules included procedures for mediation and arbitration of pending formal complaints between nonmercantile, nonresidential customers, on the one hand, and electric utilities, electric service companies, electric cooperatives, or governmental aggregators, on the other hand.
- (3) Section 4903.10, Revised Code, states that any party to a Commission proceeding may apply for rehearing with respect to any matters determined in that proceeding, but such an application must be filed within 30 days after the entry of the order in the Commission's journal.
- (4) On May 1, 2000, Columbus Southern Power Company and Ohio Power Company (collectively referred to as "AEP") jointly filed an application for rehearing. AEP argues that the adopted ADR rules should be modified in three respects. We will address each point in turn.
- (5) AEP's first allegation is that the mediation rules should be modified because mediation cannot be a "voluntary" process and also allow one party to impose it upon another party to the dispute. AEP argues that, if one party is opposed to a mediation process (because, for example, it is not interested

in settling what it perceives to be a frivolous claim), it should not be forced to devote resources to a process in which it is not interested. AEP urges the Commission to make mediation available only if both parties voluntarily agree to participate. In the alternative, AEP asks the Commission to not impose mediation unless, at a minimum, the responding party has had an opportunity to file an answer and any responsive motion and the Commission has determined whether reasonable grounds for complaint exist.

AEP's first rehearing argument is the same as what it raised in its earlier comments. We rejected that argument on the ground that the enabling statute does not require all parties to select the ADR procedures before they are triggered. Moreover, we stated that one party should be able to engage in good faith settlement discussions with the aid of a mediator over a short period of time without first having the other party agree to the use of a mediator. We noted that nothing in this conclusion, however, would require the parties to actually reach a settlement. For that reason, we found that no harm will result from the short-term mediation framework proposed by the staff. We continue to agree with that conclusion. Moreover, we do not agree with AEP's alternative suggestion. We are not convinced that mediation must be automatically delayed until reasonable grounds for complaint have been found to exist.

- (6) In the second assignment of error, AEP contends that the rules should be clarified to make it clear that, during the mediation process, a party is not required to provide information that is not discoverable in the complaint process. Without this clarification, AEP states that a party could initiate the mediation process simply to obtain information that is not discoverable in the complaint proceeding.

Previously, AEP sought to preclude informal discovery during the mediation process altogether on the ground that it might discourage use of mediation (AEP Initial Comments at 4-5). We did not agree with that suggestion, finding that the staff's proposal was designed to allow good faith mediation discussions to take place. We continue to hold that view because, to do otherwise, could diminish the effectiveness of the mediation. Our adopted rule indicates

that the informal discovery shall be for information relevant to the mediated issue. While we recognize that not necessarily all relevant information is discoverable, we still believe that our rule is appropriate. As we noted before, specific discovery concerns can be addressed in the individual mediations. Additionally, we point out that our adopted mediation rules explicitly subject communications during the mediation to Ohio confidentiality rules (including Section 2317.023, Revised Code). For these reasons, AEP's second assignment of error is denied.

- (7) AEP's third assignment of error relates to the authority of the arbitrator as stated in Rule 4901:1-26-04(E). AEP states that the Commission's rule is not specific enough in identifying what provisions of Ohio law provide the arbitrators with authority or the nature of that authority.

This issue was also raised in the comments, although not raised by AEP. Cincinnati Gas & Electric ("CG&E") and the Coalition for Choice in Electricity ("CCE") had advocated that the rules indicate that the arbitrator has the same powers as listed in Section 2711.06, Revised Code (CG&E Initial Comments at 3; CCE Reply Comments at 5). Similarly, Dayton Power and Light Company ("DP&L") and CG&E stated that the arbitrator's authority should be limited to the lawful remedies available to the Commission, except the arbitrator should not have any authority to grant, deny, suspend, cancel, or review any license, permit, or certificate of the electric service company (DP&L Initial Comments at 3; CG&E Reply Comments at 1). We stated that the rules should refer to the arbitrator's authority because that was a very important point and it was something that was not part of the staff's proposal. We chose to broadly word the rule on this point, instead of trying to list specific statutory references or powers. We still think this is most appropriate, particularly since the arbitrations can proceed under various certified arbitration processes.

- (8) Finally, AEP also asks the Commission to provide a red-lined copy of the final rules, which depicts the changes from those adopted on March 30, 2000 and those adopted today. AEP states that this is particularly important in light of the time constraints facing interested parties engaged in implementing the electric restructuring legislation.

Because of our conclusion to not modify the ADR rules, there is no need to produce a redlined copy of the final ADR rules.

ORDER:

It is, therefore,

ORDERED, That AEP's application for rehearing is denied. It is, further,

ORDERED, That copies of the previously adopted proposed rules be filed with the Joint Committee on Agency Rule Review, the Legislative Service Commission, and the Secretary of State, in accordance with divisions (D) and (E) of Section 111.15, Revised Code. It is, further,

ORDERED, That the previously adopted proposed rules be effective as of the earliest date permitted by law. Unless otherwise ordered by the Commission, the review date for these rules shall be January 31, 2004. It is, further,

ORDERED, That a copy of this Entry on Rehearing be served upon all parties and interested persons of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Ronda Hartman Fergus

Craig A. Glazer

Judith A. Jones

Donald L. Mason

GLP;geb