

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. )

FINDING AND ORDER

The Commission finds:

BACKGROUND:

On July 7, 1999, the governor of the state of Ohio signed Amended Substitute Senate Bill 3 (SB3). That legislation, among many things, established a starting date for competitive retail electric service in the state of Ohio. During the period of time leading up to the start of competitive retail electric service, the Commission is required to establish rules for a variety of issues related to a competitive retail electric environment. The Commission is specifically required in Section 4928.16(A)(4), Revised Code, to establish alternative dispute resolution (ADR) procedures for complaints by non-mercantile<sup>1</sup>, nonresidential customers, including arbitration through a certified commercial arbitration process and at the Commission.

Section 4928.16(A)(4), Revised Code, specifically states:

The commission, by rule adopted pursuant to division (A) of Section 4928.06 of the Revised Code, shall adopt alternative dispute resolution procedures for complaints by nonmercantile, nonresidential customers, including arbitration through a certified commercial arbitration process and at the commission. The commission also by rule may adopt alternative dispute resolution procedures for complaints by residential customers.

On December 7, 1999, the Commission formally initiated this proceeding in order to establish procedures for ADR. 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. The Commission also asked whether, as part of these rules, the Commission should consider "binding" arbitration appropriate in the newly developing competitive electric market. The following entities filed initial comments on January 31, 2000, and/or reply comments on February 14, 2000:

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<sup>1</sup> SB3 does not define "nonmercantile," but does define a "mercantile commercial customer" as a commercial or industrial customer if the electricity consumed is for nonresidential use and the customer consumes more than 700,000 kilowatt hours per year or is part of a national account involving multiple facilities in one or more states. Section 4928.01(A)(19), Revised Code.

Ashtabula County Community Action Agency	Industrial Energy Users-Ohio
The Buckeye Association of School Administrators	New Energy Midwest, L.L.C.
The Cincinnati Gas & Electric Company	Ohio Association of School Business Officials
City of Cleveland	Ohio Council of Retail Merchants
The Cleveland Electric Illuminating Company	Ohio Edison Company
Columbus Southern Power Company	Ohio Grocers Association
Consolidated Natural Gas Company	Ohio Manufacturers' Association
Corporation for Ohio Appalachian Development	Ohio Partners for Affordable Energy
The Dayton Power and Light Company	Ohio Power Company
Enron Energy Services	Ohio School Boards Association
Greater Cleveland Growth Association	Shell Energy Services Co., L.L.C.
	Supporting Council of Preventative Effort
	The Toledo Edison Company
	WPS-Energy Services, Inc.

### DISCUSSION:

After reviewing the staff's proposal, the initial comments, and reply comments, the Commission is adopting appropriate rules for ADR procedures. We will directly address only the more salient comments. In some respects, we agree with certain comments and have incorporated them into our rules without specifically addressing such changes in this Finding and Order. To the extent that a comment was raised and is not addressed in this Finding and Order or incorporated into our adopted rules, it has been rejected.

#### I. Purpose, Scope, and Definitions

The staff proposed ADR procedures (mediation and arbitration) for disputes between nonmercantile, nonresidential customers and electric service providers. Several comments addressed the scope of the proposal. The Coalition for Choice in Electric (CCE)<sup>2</sup> and The Cincinnati Gas and Electric Company (CG&E) contend that the ADR procedures should not be limited to complaints against electric service providers only (CCE Initial Comments at 1; CCE Reply Comments at 1-2). Rather, CCE and CG&E state the ADR procedures should be available for nonmercantile nonresidential

<sup>2</sup> The members of CCE involved in submitting joint comments in this case are: Consolidated Natural Gas Company, Enron Energy Services, Greater Cleveland Growth Association, Industrial Energy Users-Ohio, New Energy Midwest, L.L.C., Ohio Council of Retail Merchants, Ohio Grocers Association, Ohio Manufacturers' Association, Ohio Partners for Affordable Energy, Shell Energy Services Co., L.L.C., WPS-Energy Services, Inc., Ashtabula County Community Action Agency, Corporation for Ohio Appalachian Development, and Supporting Council of Preventative Effort.

customer complaints that arise out of the provision of retail electric services (*Id.*). Thus, in CCE's and CG&E's view, the complaints could be against competitive retail electric service providers, electric cooperatives, electric distribution utilities, electric light companies, electric service companies, electric suppliers, electric utilities, and governmental aggregators. The Dayton Power and Light Company (DP&L), however, argues that the ADR procedures should specify that they are only available for disputes between nonmercantile nonresidential customers and electric service companies (DP&L Initial Comments at 1). We agree with CCE and CG&E. The enabling statute does not limit the applicability of the ADR procedures to complaints against only certain types of electric service providers. Additionally, we find it wise, as suggested by two of the commenters (CCE Initial Comments at 69 and Reply Comments at 4; DP&L Initial Comments at 3) to specify that the ADR procedures will be available for pending complaints only. We think the word change is advisable to match the wording in the enabling statute. Moreover, the mediation and arbitration rules of the Commission should be alternative approaches to the Commission's complaint process, not for non-Commission disputes, as CG&E suggested.

Next, Shell Energy Services Co., L.L.C. (Shell Energy), suggests that the ADR rules include a definition of "dispute" so that the nature of the disputes possibly handled by ADR would be specified in the rules (Shell Energy Initial Comments at 8). In the alternative, Shell Energy suggested that the types of disputes that are not intended to be covered by ADR could be specified. We cannot agree to this suggestion. To define "dispute" (or the types of complaints, given our conclusion above) would require us to predict all of the types of electric complaints that will be filed with this Commission for which the ADR procedures could be available, or alternatively, the types of filed electric complaints for which the ADR procedures would not apply. Inevitably, we would omit something. We do not believe there is a need to adopt this approach.

A number of the commenters stated that the definition of arbitration should specify that arbitration is a voluntary process and that the parties should be able to all elect to have it be binding or reviewed by the Commission (AEP<sup>3</sup> Initial Comments at 2-3; FirstEnergy<sup>4</sup> Initial Comments at 3; DP&L Initial Comments at 4; CG&E Initial Comments at 4; Shell Energy Initial Comments at 4; CCE Reply Comments at 2). CCE further adds that we should also clarify that, if arbitration is elected and nonbinding, the complaint process would not simply resume if the arbitration result would be unacceptable (CCE Reply Comments at 6). We agree that the definition of arbitration should specify that the process is a voluntary one (that is to say that it is electable). Additionally, we believe that, when our personnel will be the arbitrator, the arbitration should result in a decision that is binding upon the parties (to the extent set forth in our rules). In our opinion, a binding arbitration process in that situation will assist in

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<sup>3</sup> Columbus Southern Power Company and Ohio Power Company jointly filed comments, which are designated herein as "AEP" comments.

<sup>4</sup> The Cleveland Electric Illuminating Company, The Toledo Edison Company, and Ohio Edison Company jointly filed comments through FirstEnergy Corp., which are designated herein as "FirstEnergy" comments.

reaching an expeditious conclusion for those parties, through that alternative means.<sup>5</sup> Moreover, we have also determined it appropriate to recognize that the electric utilities, electric service companies, electric cooperatives, and governmental aggregators may like to have certain classes of formal complaints or all potential formal complaints resolved through a particular commercial arbitration process. We have adopted a rule by which those entities can seek certification of a proposed commercial arbitration process in advance of the filing of formal complaints. In those applications, the applicants should indicate whether the arbitration process proposed would be binding.

## II. Mediation

AEP argues that the staff's mediation proposal should be modified because mediation is a voluntary process and one party should not be permitted to impose it upon another party to the dispute (AEP Initial Comments at 3). Instead, AEP states that all parties should request mediation before it is available. CCE opposes this suggestion (CCE Reply Comments at 2). We also do not agree with AEP's suggestion. The enabling statute does not require that all parties select the ADR procedures before they are triggered. Moreover, we feel that one party should be able seek 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. Nothing in this conclusion, however, will require the parties to actually reach a settlement. For that reason, we find no harm will result from the short-term mediation framework proposed by the staff.

CCE argues that, if a party requests mediation, there should be no stay of the pending complaint while the mediation process is going forward (CCE Initial Comments at 70). Otherwise, CCE believes that one party can unilaterally delay the complaint process (*Id.*). We do not believe that there is harm in the short delay that could be caused by the mediation process, particularly since we have included a 45-day maximum time frame under which the mediation will take place, unless extended by the mediator. Furthermore, we are not convinced that, in the end, a delay will necessarily occur by our proposed short-term mediation process.

Several entities took issue with the staff's proposed five-day period of time to respond to a request for mediation as being too short (AEP Initial Comments at 4; DP&L Initial Comments at 1-2; CG&E Initial Comments at 2; FirstEnergy Initial Comments at 1). Those parties suggest alternative timeframes ranging from five business days to 21 days (*Id.*). CCE states that the staff's time frame is appropriate (CCE Reply Comments at 2-3). We think that a valid point has been raised with regard to this aspect of the staff's proposal. We believe that seven business days for responding to a request for mediation is reasonable.

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<sup>5</sup> We wish to emphasize that the conclusion through the arbitration is binding upon the parties when Commission personnel acts as the arbitrator. It is not, therefore, precedent which binds the Commission.

Several entities state that the rules should explicitly note that the mediator will be independent of the parties and include the minimum requirements for a person to serve as a mediator (CG&E Initial Comments at 2; FirstEnergy Initial Comments at 1). Shell Energy advocates that the mediator be a member of the Commission staff (Shell Energy Initial Comments at 2). CCE opposes the establishment of minimum requirements for serving as a mediator (CCE Reply Comments at 3). We agree in part and disagree in part with these comments. We think it is wise to explicitly state that the mediator will be independent of the parties, even though that was implied under the staff's definition of mediation by a neutral third party. This language change emphasizes that we wish to avoid any appearance of bias. We do not agree that the rules must limit the mediator to Commission staff because, for instance, there could be a concern with the availability of staff (due to other pressing matters). The rules we adopt today allow the Commission the flexibility to appoint an in-house or out-of-house mediator. Also, we do not believe that the rules must list the minimum requirements of a mediator. To adopt minimum requirements in a rule is not practical and may vary from case to case, as CCE noted.

AEP and CCE argue that the parties should not be required to respond to informal discovery during the mediation process because it might discourage its use (AEP Initial Comments at 4-5; CCE Reply Comments at 3). We cannot agree. The staff's proposed rule is very fair and is designed to allow good faith mediation discussions to take place. Also, if we were to preclude informal discovery during the mediation process, it could diminish the effectiveness of the mediation. Any discovery concerns can be addressed in the individual cases.

Shell Energy suggests that the rules allow the parties the option to elect a shorter period of time than 30 days for conducting the mediation (Shell Energy Initial Comments at 2-3). We disagree. The 30-day period is not an unnecessarily long period of time. Additionally, we see no need for the parties (to the exclusion of the mediator) to control the period of the mediation.

CCE states that, if the Commission chooses to allow mediation to stay or delay the complaint process, then a maximum of 45 days should be used for the mediation process, unless both parties agree to extend the time beyond the 45 days (CCE Initial Comments at 70). Otherwise, in CCE's view, there is no finality in the mediation process and one party can unilaterally delay the complaint process (*Id.*). We agree for the most part. As we have noted above, we think a 30-day minimum and a 45-day maximum mediation period is very workable. However, we think that the mediator (not both parties) should agree to extend the time beyond the 45 days.

DP&L suggests that there should be a deadline as to when the parties will submit to the mediator the mediated resolution (DP&L Initial Comments at 2). We do not think that our adopted rules must include a definitive deadline for submitting the resolution to the mediator, particularly because the parties can discuss and develop a

time frame appropriate in each instance. In fact we believe that, as a general matter, a time frame will be discussed and developed during the mediation. We strongly encourage mediating parties to discuss this topic, so that matters get finalized expeditiously.

DP&L states that the rules should allow the parties to agree to a mediator's participation in the formal case (DP&L Initial Comments at 2). We do not think that the mediator should preside over or otherwise participate in the case if mediation does not result in an agreement. This suggestion could undermine the effectiveness of mediation and/or taint the adjudicatory process.

### III. Arbitration

CCE suggests that, if one party declines arbitration after a complaint has been filed, the Commission should employ expedited procedures for processing the complaint (CCE Initial Comments at 70-71). This proposed expedited process would include a 10-day answer period (if not already filed), 10-day response period for discovery, a hearing within 45 days, testimony staggered by seven days, and a Commission decision within 75 days (*Id.*). FirstEnergy opposes this suggestion (FirstEnergy Reply Comments at 1). We do not think it is necessary to force an expedited complaint process upon a party that does not elect a voluntary ADR process. For that reason, we cannot accept CCE's suggestion.

CG&E suggests that the rules specify that the arbitrator will issue the award in writing and serve it upon the parties (CG&E Initial Comments at 3). We agree and have modified the staff's proposal to be very clear on that point.

CG&E and CCE contend that the rules need to 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, DP&L and CG&E state 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 think that further detail in the rules regarding the arbitrator's authority will be very important. We also think that the rules should be broadly worded to acknowledge that arbitrators shall have all authority allowed by law.

DP&L suggests that the rules specify who bears the costs of the arbitrator and, if the Commission will not bear the costs, the costs should be evenly split between the parties (DP&L Initial Comments at 3). CCE opposes this suggestion (CCE Reply Comments at 4). We also disagree with this suggestion. As we noted earlier, there are two options available for the parties if they would like to use arbitration. On the one hand, the parties can seek to have the Commission assign its personnel to act as arbitrator. In that instance, there will be no costs assigned to the parties. On the other hand, the

parties can seek to have the issue(s) arbitrated through a Commission-approved, certified arbitration process. In that instance, we have decided that the parties should indicate, in that request, how they propose to bear the costs of the arbitration. Therefore, we shall not adopt DP&L's suggestion.

CCE advocates that a decision deadline be included in the rules for when a non-Commission personnel acts as the arbitrator (CCE Initial Comments at 71). CCE suggests that the deadline be 75 calendar days, with a one-time extension of 30 days (*Id.*). FirstEnergy opposes this suggestion (FirstEnergy Reply Comments at 1). We do not agree with CCE suggestion. If the parties select a Commission-approved, commercial arbitration process, then that framework is likely to address the decision deadline issue. Therefore, we shall not include a rule on this topic.

Next, CCE states that, when Commission personnel act as the arbitrator, the arbitration decision deadline should be 75 calendar days with one-time 30-day extension, rather than staff's recommended 120 days with a one-time 60-day extension (CCE Initial Comments at 71). FirstEnergy opposes this suggestion (FirstEnergy Reply Comments at 1). We find the staff's proposed initial time frame to be acceptable, but do not agree to a fixed extension time frame. Also, we have further clarified that provision to allow the arbitrator to also apply for the extension.

FirstEnergy argues that the details of the arbitration award (even in an executive summary) should not be filed with the Commission; only the joint motion to dismiss should be filed (FirstEnergy Initial Comments at 2). CCE opposes this suggestion (CCE Reply Comments at 6). We also do not agree with FirstEnergy's suggestion. As CCE noted, the staff's proposal would not require that a detailed summary be filed. We understand the interest in confidentiality associated with arbitration process, but we also believe that the summary needs to be provided so that the Commission can carry out its responsibilities in monitoring the competitive market. Thus, we find the staff's proposed executive summary to strike a workable balance between those two competing interests. We feel this compromise is a reasonable one.

CCE and Shell Energy recommend that the arbitrator be required to certify the record to the Commission and the Commission must limit its review to the arbitration record and briefs/memorandum filed in support (CCE Initial Comments at 71; Shell Energy Initial Comments at 3-4). Further, they state that the Commission must make findings from the arbitration record, not based upon an executive summary of the arbitration award (*Id.*). CCE also states that the party seeking the review should file the full arbitration record with the Commission (CCE Initial Comments at 71). We agree and disagree with these suggestions. In the rules we adopt today, we specifically allow a limited review for those arbitrations in which our personnel acts as the arbitrator. As part of a review request (to the extent set forth in our rules), the parties should provide the record as needed. We agree that the Commission must make findings based upon the record before it. We think that the review could be based upon the executive summary, depending upon the issue raised on review. In those situations in

which the arbitration would be conducted through a Commission-approved, certified arbitration process, we will consider these issues in our approval of company-specific arbitration processes.

AEP advocates that the time frame to seek Commission review of an arbitration award be different (45 days, instead of 30 days) from the time for filing a joint dismissal after acceptance of an arbitration award (AEP Initial Comments at 5). In AEP's view, this will allow the parties to use the first 30 days to determine if they are willing to accept the award and prepare that filing (*Id.*). In AEP's view, if that process fails, then the parties still have additional time to prepare a review request (*Id.*). CCE opposes this suggestion (CCE Reply Comments at 5). Since we have concluded that binding arbitration (to the extent set forth in our rules) is appropriate when Commission personnel acts as the arbitrator, we do not think staggered time frames are needed. The parties should determine their next step in that 30-day period and make the necessary filing in the requisite time. In those situations in which the arbitration would be conducted through a Commission-approved, certified arbitration process, we will consider these issues in our approval of company-specific arbitration processes.

Lastly, CG&E suggests that the Commission's scope of review of arbitration awards should be limited to the same grounds specified in Section 2711.10, Revised Code, in order to encourage use of the arbitration process (CG&E Initial Comments at 3-4). CCE opposes this suggestion (CCE Reply Comments at 5). As explained above, we think it is wise to have binding arbitration (to the extent set forth in our adopted rules) when Commission personnel acts as the arbitrator and a limited scope of review in those instances by the Commission. That scope of review should correspond with Section 2711.10, Revised Code. To avoid any arguments, we have included a reference to the statute in the our adopted rules.

#### CONCLUSION:

In light of the enactment of SB3, dramatic changes are occurring in the electric industry that have required a reevaluation of this Commission's traditional regulatory practices concerning the provision of electric services. The regulatory principles outlined above and in Attachment I represent, in this Commission's view, the appropriate rules by which to adopt ADR procedures. The conclusions addressed herein will help initiate the beginning of the state of Ohio's restructuring of the electric industry, but also mark another in the many steps that this Commission will take to foster a competitive electric environment.

#### ORDER:

It is, therefore,

ORDERED, That, in accordance with the above findings, it is in the public interest to adopt, and as a result we hereby adopt, ADR procedures for nonmercantile, non-

residential complaints, as set forth in Attachment I of this Finding and Order. It is, further,

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

ORDERED, That the 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 Finding and Order be served upon all parties and interested persons of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

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Alan R. Schriber, Chairman

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Ronda Hartman Fergus

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