

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission's Promulgation of Rules for Certification of Providers of Competitive Retail Electric Services, Pursuant to Chapter 4928, Revised Code. )  
)  
) Case No. 99-1609-EL-ORD  
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)

ENTRY ON REHEARING

The Commission finds:

- (1) On March 30, 2000, the Commission issued its finding and order in this matter establishing rules for the filing and processing of applications for certification of competitive retail electric service (CRES) providers, pursuant to Amended Substitute Senate Bill 3 (SB3). These rules are contained in Rules 4901:1-24-01 through 4901:1-24-13.
- (2) Section 4903.10, Revised Code, states that any party to a Commission proceeding may apply for rehearing with respect to any matter determined by the Commission, within 30 days of the entry of the order upon the Commission's journal.
- (3) Applications for rehearing were timely filed by FirstEnergy Corporation (FirstEnergy), Ohio Citizens Action (OCA), the cities of Toledo and Cleveland, Ohio, and jointly by the cities of Brook Park and Eastlake, Ohio.
- (4) In its application for rehearing, FirstEnergy raised three assignments of error. In its first assignment of error, FirstEnergy argues that Rule 4901:1-24-03(C) precludes a CRES provider from binding a customer to an agreement or contracting with a customer for CRES before the effective date of the rules. FirstEnergy contends that SB3 does not restrict the offering or contracting for such service to commence on or after January 1, 2001, subject to the supplier being certified by the Commission. Therefore, FirstEnergy argues that the Commission may not adopt a rule that precludes certain conduct prior to the effective date of the rule. FirstEnergy requests clarification that this rule should be interpreted to only apply on a prospective basis and not apply to contracts executed prior to the effective date of the rule. FirstEnergy notes that there may be a legitimate concern with protecting

the interests of residential customers. Thus, FirstEnergy argues that, if the Commission determines not to change the rule, the Commission should clarify that this rule should not be interpreted to apply to commercial and industrial customers.

Upon review, we will grant rehearing on FirstEnergy's first assignment of error. Under SB3, the starting date for providing CRES is January 1, 2001 and all CRES providers including governmental aggregators, must be certified prior to supplying electricity. In enacting this law, the legislature sought to ensure effective competition, reasonably available alternatives, and protection against unreasonable sales practices, market deficiencies, and market power. It is our intent in carrying out SB3 that, in order to ensure that prospective customers could make educated choices regarding CRES, they have adequate information regarding CRES in advance of engaging in contractual agreements. Thus, we provided for an education campaign to provide information on CRES. Nevertheless, we also find that commercial and industrial customers will generally be more sophisticated in this arena than will residential customers. Similarly, residential customers who are part of a governmental aggregation will have access to knowledgeable representation. Accordingly, we will revise rule 4901:1-24-03(C) to permit a CRES provider to contract with a commercial or industrial customer for CRES prior to January 1, 2001. However, we are retaining the rule that prohibits CRES providers from contracting with a residential customer who is not part of a governmental aggregation for the provision of a CRES prior to a supplier being certified. We believe that our restriction against contracting with this group of residential customers for the provision of a CRES falls squarely within the intent of SB3. However, we remind the governmental aggregators that CRES certification is required prior to the actual provision of electric service to residential customers. CRES providers that bind residential customers who are not part of a governmental aggregation to an agreement to purchase or contract for the provision of a CRES prior to a supplier being certified shall be found to be in violation of SB3.

- (5) FirstEnergy also contends that the certification rules use multiple terms to refer to a supplier, including: retail electric generation provider, CRES provider, provider, certified provider, certified retail electric generation provider, certified CRES provider, applicant, and certified retail electric service provider. FirstEnergy argues that, while multiple terms may be necessary to address the differing status of suppliers through time, each term used in the rules should be defined. Upon review of this assignment of error, we grant rehearing for the purpose of clarification. As pointed out by FirstEnergy, there are multiple terms used in Rules 4901:1-24-01 through 4901:1-24-13, that refer to supplier. In an effort to clarify the rules, the term “retail electric generation provider” which is defined, is now substituted for the terms “retail generation provider” and “retail electric generation provider”. Further, the term “CRES provider” has been defined and is substituted for the terms “certified CRES provider” and “certified provider”.
- (6) In its third assignment of error, FirstEnergy argues that Section 4928.08(B), Revised Code, provides that, before a supplier may be certified to provide CRES, the Commission must find that a supplier has provided a financial guarantee sufficient to protect customers and electric distribution utilities (EDU) from default. FirstEnergy argues that these rules should be modified to specifically require that a supplier must provide a financial guarantee sufficient to protect customers and EDUs from default before the supplier may be certified by the Commission.

We also grant rehearing of FirstEnergy’s third assignment of error for the purpose of clarification. Section 4928.08(B), Revised Code, requires that a supplier must provide default security and be certified by the Commission before providing a CRES. There is no restriction in Section 4928.08(B), Revised Code, as argued by FirstEnergy, that requires a supplier to provide default security before certification. Furthermore, we find that Rule 4901:1-24-04(B) provides protection to all EDUs from default by requiring the CRES provider to demonstrate, as part of the EDU’s financial review, that it has the financial capability to provide the CRES. Also included in the Commission’s certification review process is that the CRES provider must demonstrate that it has a financial guarantee sufficient to protect

customers and EDUs from default. Rule 4901:1-24-08 also provides that an EDU may require a CRES provider to issue and maintain a financial instrument with the EDU to protect the EDU from default and, under this rule, the EDU may require the retail electric generation provider to furnish financial and other information contained in its tariff to determine the type and/or amount of the financial instrument required for compliance. Thus, these rules provide adequate protections to the EDU from default, without unnecessarily impacting the CRES certification process. Nevertheless, we find that the interests of all parties will be served by a financial review process conducted by the EDU and the Commission that avoids duplicative processes and provides cooperation and communication between staff and the EDU in the determination of the financial capabilities of the applicant during the certification process.

- (7) OCA argues that three provisions of the certification rules are unreasonable. First, OCA contends that Rule 4901:1-24-04(B)(3) requires that a governmental aggregator file a detailed description of its experience and plan for providing aggregation services. OCA contends that this is unreasonable because no local government will have had any direct experience providing opt-out electric aggregation but will have experience in delivering services to their constituents. Thus, OCA contends that requiring such a description is time wasting and irrelevant. OCA also claims that local governments will submit their plans for operation, which will contain more relevant information. Finally, OCA claims that, since the voters of a municipality will have approved the ordinance or resolution for opt-out aggregation, local governments will have conducted public hearings on their plan and will have been more accountable to consumers than any other component of the CRES market.

With respect to OCA's first assignment of error, we grant rehearing for the purpose of clarification. Rule 4901:1-24-04(B)(3) provides that governmental aggregators must file information including copies of operational plans and descriptions of experience. We recognize that, prior to the effective date of SB3, local governments will have had no direct experience providing opt-out electric aggregation. We also note that on page 3 of the March 30, 2000 order we stated that governmental aggregators will be required to file

a detailed description of their experience. Our intent in this rule is to provide the Commission with information on the extent of any governmental aggregator's experience or the experience of the party supplying service to the governmental aggregator. Thus, in order to satisfy this portion of the certification rules, a governmental aggregator relying on the capability of another party for such service would simply file a statement to that effect and include a description of the operational experience of that party.

- (8) OCA also claims that Rule 4901:1-24-04(C)(3) requiring an applicant to file an affidavit if not all required information is included with the application is unreasonable. OCA argues that local governments should be permitted to move forward with the certification process prior to that point. OCA also argues that it is unreasonable for a municipal government engaged in opt-out aggregation to have to file an affidavit stating that the disclosures are not included with the initial application. It states that such affidavits would be of no value to the Commission.

We also grant rehearing of OCA's second assignment of error for purposes of clarification. The rule applies to all applicants and was not specifically targeted to municipal aggregators. Rule 4901:1-24-04(C)(3) provides that any applicant may file a notarized affidavit in lieu of the information and or document required by an applicant during the certification process. If an applicant is unable to provide certain information at the time of the filing of its application, that applicant can substitute an affidavit, pursuant to Rule 4901:1-24-03. Further, the filing of the affidavit allows an applicant to receive a certificate from the Commission, and merely puts a placeholder for the requisite information. The rule also provides that when an affidavit is substituted for information, the applicant must provide the information to the Commission at least ten days prior to the provision of CRES. We anticipate that, in many cases, information may not be available to applicants at the time they file the application. The value to the applicant of using an affidavit in lieu of information is that it allows any applicant to move ahead in its certification rather than be forced to halt the process in the event that some information is unavailable at the time it files its application. The value to the Commission is that, while allowing the

certification process to move forward, the rule ensures that the information that the affidavit was substituted for must be provided at least ten business days prior to offering or providing CRES.

- (9) OCA also contends that Rules 4901:1-24-05(B) and (C), are unreasonable for local governmental aggregators not engaged in providing electric generation service nor deriving gross receipts or gross earnings from its function as governmental aggregators. OCA argues that local governments will not generate revenue through their aggregation activities. As a result, OCA contends that it is unreasonable to require an opt-out governmental aggregator applicant not engaged in providing a CRES for which it generates revenues to file affidavits that it will either timely file an annual report of its interstate gross receipts and earnings and sales of kWh or timely pay any assessment made pursuant to Sections 4905.10, 4911.18, and 4928.06(F), Revised Code. OCA claims that it would be reasonable to interpret SB3 so as to mean that the legislature only intended the Commission to certify governmental aggregators engaged in actually delivering a CRES for which they contract and receive payments for the services provided. Another interpretation would be to say the local government aggregators without intrastate gross receipts, gross earnings, or sales of kWh could be assessed a nominal flat fee. According to OCA, this approach would clarify the Commission's intention.

OCA's final assignment of error also should be granted for purposes of clarification. It is noted that certification does not automatically equate to the requirement to pay an assessment. To the extent that any governmental aggregator does not earn revenues from its activities, it will not be required to pay an assessment and will only be required to file information on that fact with the Commission. The legislature intended that the Commission monitor the gross revenues of CRES providers. The fact that any CRES provider fails to generate gross receipts, gross earnings, or sales of kWh of electricity, does not eliminate the requirement to file an annual report providing that information. But, it would eliminate any requirement to provide any assessment. Thus, we find that this reporting

requirement is reasonable and does not present an unreasonable burden to governmental aggregators.

- (10) Cleveland contends that the Commission erred when it determined that governmental aggregators must necessarily be providers of CRES and must be certified by the Commission in order to be governmental aggregators. Cleveland argues that a municipality should not be subject to certification to the extent that it plans to merely contract with an electric services company in order for that company to provide CRES to consumers. It claims that, in that situation, the electric services company is the CRES provider and only the CRES provider should be subject to supervision and regulation by the Commission. Cleveland also argues that, if the Commission rules determine that all governmental aggregators are subject to certification as providers of CRES, the application of tariff provisions that subject such providers to extensive requirements would duplicate requirements between a governmental aggregator and the electric service provider with whom it contracts for service.

Upon review, we find that Cleveland's assignment of error should be denied. Section 4928.01(A)(27), Revised Code, defines retail electric service to mean any service involved in supplying or arranging for the supply of electricity to ultimate consumer in this state, from the point of generation to the point of consumption. Retail electric service includes aggregation service. Clearly, the legislature included aggregation service in what it defined as providing CRES. Furthermore, there are sound public policy reasons why the legislature included governmental aggregation within the definition of a retail electric service. The Commission believes that the legislation was intended to insure that the entities providing service were identifiable to the public and to other CRES providers. Excluding governmental aggregators from this process could create loopholes for CRES suppliers to governmental aggregators and gaps in tracing responsibility for any problems in service delivery. Furthermore, we recognize that, over time, the list of wholesale providers could change, including the list of governmental aggregators, and it was important to maintain this identification process as circumstances changed. We recognize that, in some cases, there may be duplicative information provided to the Commission by governmental aggregators and

the electric service providers with who they contract for service. In the event this becomes burdensome to either such party, we will review the information requested by our application forms.

- (11) In their application for rehearing, Toledo, Brook Park and Eastlake raise three assignments of error. Brook Park and Eastlake, argue that, under *Ottawa Cty. Bd. Of Commrs. V. Marblehead* (1999), 86 Ohio St. 3d 43, the Ohio Constitution, Article XVIII, Section 7 provides home rule municipality the right to adopt a charter providing for local self-governance including local police regulations that are not in conflict with general laws and the right to operate a public utility. Brook Park, Eastlake, and Toledo contend that the Commission did not address the issue whether the rules constitute a substantial infringement of the municipalities' constitutional authority or perform a balancing of the state's interest expressed in Section 4928.02, Revised Code, with those of the home-rule municipalities. Brook Park, Eastlake, and Toledo argue that the rules apply to all governmental aggregators and require them to be certified regarding the governmental aggregator's managerial, technical, and financial capability to provide a CRES. In addition, Rule 4(B)(3) requires governmental aggregators to file operational plans and descriptions of experience. Further, Brook Park, Eastlake, and Toledo contend that the rules provide for ongoing Commission supervision of the home-rule municipal aggregator if changes in provider status or transfer or abandonment of a certificate occurs. Finally, the rules require an assessment to be imposed, the proceeds of which will go to the Commission and the OCC. Clearly, according to Brook Park, Eastlake, and Toledo, the rules infringe on the constitutional rights of home-rule municipal aggregators and are not necessary to enforce the state's interest as defined in Section 4928.02, Revised Code.

We find that Brook Park, Eastlake, and Toledo's arguments are without merit. As we stated in our March 30, 2000 finding and order in this case, we believe that, through SB3, the legislature has directed the Commission to certify governmental aggregators providing CRES. We further believe that the legislature provided for this certification under the broad police powers of the state for the protection of the public. This is a legitimate exercise of the state's powers

under the constitution. As such, the Commission established rules for the certification of CRES providers. However, we recognized that municipalities are answerable to their constituents and, thus, the level of information the Commission requires from municipal aggregators to ensure the public protection is very limited. As such, the rules are specifically drafted to not cause a substantial infringement on the municipality's constitutional authority. Rule 4901:1-24-04(B)(3) indicates that the information governmental aggregators must file is less burdensome than that required of other aggregators and retail generation providers, power marketers, and power brokers. Specifically, we did not include the requirement that governmental aggregators must demonstrate managerial, technical, and financial capability to provide a CRES. Further, we note that the court has recognized that, when there is a compelling statewide public policy regarding police powers, the interest of that public policy will supersede the constitutional authority of a home-rule municipality. See, *Columbus v. Teater*, 53 Ohio St. 2d 253 (1928) and *State ex rel. Klapp v. Dayton Power & Light Co.*, 10 Ohio St. 2d 14 (1967).

Brook Park, Eastlake, and Toledo also argue that the rules fail to go far enough in relaxing the requirements for municipal aggregators that merely perform the functions of a purchasing agent. They contend that the Commission adopted such an approach in its decision to decline jurisdiction over switchless rebillers when it exercised jurisdiction over the underlying interexchange carrier. See, *In the Matter of the Application of the Hogan Company d.b.a. Interwats for Certification to Furnish Telecommunications Services within the State of Ohio*, Case No. 90-1802-TP-ACE (December 5, 1991). Brook Park, Eastlake, and Toledo urge the Commission to adopt a similar procedure for municipal aggregators that function only as purchasing agents considering that the Commission will retain jurisdiction over the competitive retail electric generation supplier. Thus, Brook Park, Eastlake, and Toledo contend that municipalities that only function as purchasing agents should only have to file a copy of the ordinance or resolution authorizing the formation of an aggregation program, a copy of its plan for operation and governance of its aggregation program and a copy of the disclosures required by Section 4928.20(D), Revised Code.

As we noted earlier, the information required to be filed by governmental aggregators will be limited to information such as that suggested by Brook Park, Eastlake, and Toledo. This information will include: a copy of the ordinance or resolution authorizing the formation of an aggregation program, a copy of its plan for operation and governance of its aggregation program, a copy of the disclosures required by Section 4928.20(D), Revised Code, and a description of the operational experience of the party providing service to the governmental aggregator.

- (11) In its third assignment of error, Brook Park, Eastlake, and Toledo also contend that the Commission has declined to promulgate rules listing all of the information that must be included in a government aggregator's certification application. Instead, Brook Park, Eastlake, and Toledo contend that the Commission will supplement the information required through its orders or through the staff's discretion. As a result, Brook Park, Eastlake, and Toledo argue the supplements, which affect applicant's ability to become certificated, will not be subject to review by the Joint Committee on Agency Rules Review (JCARR) as required by Section 111.15(D), Revised Code. Brook Park, Eastlake, and Toledo contend that the Commission must at a minimum attach the application forms as appendices to the rules to enable appropriate JCARR review.

We note that Brook Park, Eastlake, and Toledo are correct that the rules do not specifically set forth all documents that must be filed by governmental aggregators. Instead, the rules identify, for the type of applicant, the type of information the Commission will expect to be filed. We initially issued these draft rules with lists of information required to be filed with applications. Upon review, we decided to issue the rules without such lists and, instead, to provide a general description of the types of information that would be required in applications. We believe that this approach allows the Commission the flexibility to adapt our application forms to any changes that could occur in a changing CRES market. Our intention is to identify for each applicant the type of information that would be needed in order to process an application. We will be providing application forms in the near future.

It is, therefore,

ORDERED, That the applications for rehearing are granted, in part, and denied, in part, as set forth in this entry. It is, further,

ORDERED, That a copy of this entry on rehearing be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

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Alan R. Schriber, Chairman

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