

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

FINDING AND ORDER

The Commission finds:

BACKGROUND:

On July 6, 1999, the governor of the state of Ohio signed Amended Substitute Senate Bill 3 (SB3). That legislation requires Ohio's electric industry to change from a monopoly environment to a competitive electric environment for generation services. The legislation established a starting date for competitive retail electric service in the state of Ohio and required this Commission to establish rules and make a number of key decisions before the start of competitive retail electric service. 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 required by Section 4928.08, Revised Code, to establish rules for the certification of competitive retail electric service providers.

On December 7, 1999, the Commission formally initiated this proceeding in order to establish rules for the certification of competitive retail electric service providers. On December 21, 1999, we issued for public comment our staff's proposal, which suggested proposed rules by which the Commission should establish the form and process under which certification should be granted. The Commission received numerous initial and reply comments to the staff's proposal from various stakeholders on January 31 and February 14, 2000. The following entities submitted initial and/or reply comments in this proceeding: Allegheny Energy Supply Company (Allegheny Energy), The American Association of Retired Persons (AARP), The Ameren Corporation (Ameren), the cities of Brook Park and Eastlake, The Coalition for Choice in Electricity (CCE), Ohio Citizens Action, The Dayton Power and Light Company (DP&L), Ohio Environmental Council, The Electric Power Supply Company, The FirstEnergy Corporation (FirstEnergy), Greater Cleveland Growth Association, Columbia Energy Services, Columbia Energy Power Marketing, Exelon Energy, Mid-Atlantic Power Supply Association, Strategic Energy L.L.C., Unicom Energy (collectively referred to as "Midwest Marketers"), Ohio Consumers' Counsel (OCC), The Association for Hospitals and Health Systems, Palmer Energy Company (Palmer), the city of Parma, The Buckeye Association of School Administrators, The Ohio Association of School Business Officials, and The Ohio Association of School Boards Association (collectively referred

to as “The Schoolpool”), The Shell Energy Services Company (Shell), the city of Toledo, and Unicom Energy, Inc. (Unicom).

After reviewing the staff’s proposal, the initial comments, and reply comments submitted in this matter, the Commission is adopting appropriate rules for filing and processing the certification applications. Because of the scope and number of comments we have received, we will only directly address 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 it is not addressed in this finding and order or incorporated into our adopted rules, it has been rejected.

DISCUSSION:

Before addressing certain of the comments that involve specific parts of staff’s proposed rules, we wish to address the issue of the applicability of the proposed rules to municipalities and governmental aggregators. The cities of Brook Park and Eastlake argued in their comments that the certification rules are unconstitutional as applied to charter municipal corporations and governmental aggregators. They argue that municipal corporations have certain home rule authority under Article XVIII of the Ohio Constitution. Brook Park and Eastlake also argued that the Commission cannot certify governmental aggregators because they will not provide competitive services to customers. Upon review of SB3, we believe it is clear that the General Assembly intended the Commission to certify and regulate governmental aggregators relative to competitive retail electric service (CRES) they provide to customers that are not also served by a municipal utility. The Legislative Service Commission in its final bill analysis of SB3 best summarizes the legislative intent on this issue: “With the exception of subjecting municipal corporations and electric cooperatives to supplier certification and the minimum service requirements that must be met by a certified supplier of competitive retail electric service, the act generally makes no change in the current exemption of electric cooperatives and municipal electric utilities from PUCO regulation.” Furthermore, throughout SB3 municipal corporations are included within the lists of those entities subject to regulation by the Commission. In the definition section of SB3, Section 4928.01(A)(13), Revised Code, governmental aggregator is defined as a government entity acting as an aggregator for the provision of a CRES. Also, there are several provisions in which governmental aggregators are specifically delineated. Section 4928.08, Revised Code, states that no electric utility, electric services company, electric cooperative, or governmental aggregator shall provide a CRES without first being certified by the Commission. Section 4928.10, Revised Code, states that the Commission shall adopt rules specifying the necessary minimum service requirements of an electric utility, electric services company, electric cooperative, or governmental aggregator subject to certification regarding the provision of competitive retail electric services. Section 4928.06(F), Revised Code, also provides for assessments on governmental aggregators to fund the Commission and

OCC. The Commission believes that through SB3 the legislature has directed the Commission to certify governmental aggregators providing competitive electric services to customers that are not also served by the governmental aggregator's municipal electric system. We can only assume that the legislature provided for this certification under the broad police powers of the state for the protection of the public. Consequently, we cannot agree with the municipalities that the Commission has no authority to adopt rules that cover governmental aggregators under certain conditions mentioned above.

We note that, while we firmly believe that governmental aggregators are subject to the certification requirements, the city of Toledo raised concerns that the functions of energy marketers and governmental aggregators are distinct and not capable of a one-size-fits-all rule when it comes to certification. Upon consideration of these comments, we have effectively reduced the amount of information that governmental aggregators must provide to the Commission. Under this rule, a municipal corporation, township, or county seeking to be certified as a governmental aggregator is only required to file a limited amount of information with the Commission. This information includes: a statement that it will provide retail electric generation, power marketing, or power brokerage services; a copy of the ordinance or resolution authorizing the formation of a governmental aggregation program; a copy of its plan for operation; a copy of the disclosures required by Section 4928.20, Revised Code; and a detailed description of its experience and plan for providing aggregation services. By minimizing these requirements we have acknowledged and responded to the concerns expressed by the cities.

OCC expressed concerns over certain aspects of the rules regarding liability. It stated that, under these rules, billing and collection agents that are fully independent but contracting with an electric utility, electric services company, electric cooperative, or governmental aggregator are exempted from the certification rules. OCC cited to Section 4905.55, Revised Code, that requires that utilities be held liable for the acts of their agents. It indicated that this is appropriate if the contracting entity will be held liable for the acts of the billing and collection agents with whom it is in contract. We agree with these comments and have added a new provision under the purpose and scope of the rules to address these concerns. This rule now provides that nothing in this rule exempts an electric utility, electric services company, electric cooperative, or government aggregator from liability for the acts of its billing and collection agents. We note that Palmer Energy recommended that consultants be excluded from the certification rules. We note that these rules do not contemplate certifying consultants, but these rules are not intended to list the entities that are not covered by the rules. It should be noted that, under these rules, if an applicant will rely on consultants or contractors to meet various requirements in the rules, the applicant may be required to provide evidence that the consultant or contractor can meet the requirements. Further, if a consultant or contractor performs any competitive service, then it must be certified.

Under the rules dealing with definitions, many parties suggested certain entities should be excluded or simply not defined. For the most part, we have left intact the definitions as previously written. We disagreed with CCE's suggestion that the term "retail electric generation" should be modified not to exclude service performed by an electric distribution utility (EDU). The exclusions in the term are for an EDU providing standard and default service. The standard and default services are statutory requirements placed on the EDU as part of the distribution function. We also agreed that the definition of CRES should have the same definition as found in Section 4928.01(A)(4), Revised Code, as suggested by DP&L. We find this change will make the definition comport exactly with SB3.

There were many comments on the general prohibition rules. Various parties, including AEP, Ameren, and FirstEnergy argued that SB3 only prohibited providing a CRES after January 1, 2001, but not prior to that date. As a result, they recommended striking the words "market" and "offer" in the rules relating to the provision of a CRES before the Commission certifies a provider or after the Commission denies a provider's application for certification renewal. Based on the comments we do not believe that CRES providers should be allowed to provide services that they are not legally permitted to provide as would be the case if a provider was not certified or had its certification revoked. The rules for CRES are designed to prevent CRES providers from contracting with customers or running advertisements designed to elicit a customer's agreement to purchase a CRES prior to the effective date of this chapter. However, we find that marketers should be allowed to engage in name recognition and awareness type marketing prior to certification.

Concerning the rules for the certification application process, there were many comments received on the type of information required to be filed and the applicability of such information to particular applicants. Upon consideration of these comments we have revised the rules to streamline the application process and to provide appropriate guidance to enable CRES applicants to complete the applications. We received comments on the extent to which public notice should be required and the necessity to renew protective orders for confidential information. We considered and rejected the suggestion to post notices of an application in newspapers in EDU territories for two reasons. First, we believe that it could be very costly to post such notices, especially for smaller statewide providers. Second, SB3 only gives the Commission 30 days to rule on an application, otherwise the application is deemed approved. This time frame effectively limits the extent to which newspaper notice is feasible as well as allowing sufficient time for comments. We believe a more reasonable approach is to provide notice of these applications on the Commission's website as suggested by Midwest Marketers. Upon review of the comments related to confidential or proprietary portions of an application, we believe after review that the Commission's current process set forth in the rules is appropriate. Therefore, we are not revising this portion of the rule.

Other comments were received on the rules that address the unavailability of information at the time of filing the application. OCC commented that the rules do not require an applicant to explain why information was not available at the time the application was filed. We note that the paragraph (C) of Rule 4901:1-24-04, O.A.C., was designed to recognize that applicants would likely need Commission certification before EDU and transmission entities are willing to enter into agreements with the applicant. However, staff was uncomfortable recommending certification approval without knowing that the applicant has or can obtain such agreements with EDU and transmission entities. Thus, the Commission has modified this provision to solve this problem and now will require that the affidavit required by this rule shall be accompanied by an explanation as to why such interconnection and/or agreements are not available for inclusion with the application.

Comments were also filed regarding the rights of parties to appeal their denial of applications. Shell Energy requested that the 90-day time frame to act to approve or deny a suspended application should be shortened to 30 days. A review of SB3, Section 4928.08(B), Revised Code, provides that the Commission has 90 days to rule on any suspended application. No commentor has provided justification to impose a more restrictive deadline. Shell also suggested that suspended applicants be allowed to request an informal meeting with Commission staff to try to quickly resolve the application suspension. We agree with Shell's suggestion on informal meetings with staff. We also suggest such meetings occur earlier rather than later in the 90-day window in order to expeditiously resolve problems with applications. There were also comments received on an applicant's rights to a hearing when an application had been denied. Upon review of these comments, we believe that the statutory process in place for appeals of Commission orders through rehearing provides sufficient protection to all parties.

With respect to the rule governing regulatory assessments for each certified provider, there was a request for clarification on how underreporting of gross revenues will be determined and what options are available to challenge such a finding under this rule. The rule provides that underreporting of gross revenues will be determined through a Commission audit or other procedures based on records and documents to be retained by the service provider.

There were many comments on the rule that provides for the default of retail electric generation providers. AEP recommended that new language be added to this rule that would require a CRES provider to register with each EDU in whose territory it will offer a CRES. Midwest suggested that the Commission should require the EDU to permit a surety bond as an acceptable financial instrument in addition to a letter of credit, cash deposit, or parental-affiliate guarantee. We will consider both of these issues when we address the contents of an EDU's tariff. Thus, we find that our rules need not establish an EDU's requirements. The Schoolpool indicated that this rule

requires both the aggregator and the certified provider to issue and maintain a financial instrument with the EDU. The Schoolpool recommended that only one of these providers be so required, not both. As written, the rule does not require two security instruments including one for an aggregator and one by its generation provider. The rules merely state that an EDU may require a certified supplier that will provide retail electric generation to post a security. This requirement insures that the entity responsible for providing the power will post the security. If an aggregator merely aggregates customers and then contracts with another entity that procures the power, then the procurer of the power would post the security. If the aggregator of customers will also be responsible for providing generation either directly or by contracting for back office support, then it would post the security. In response to this proposed rule, DP&L commented that it believes that the Commission lacks the statutory authority to determine the amount a provider in default owes the EDU when the provider's default security instrument is insufficient to cover the EDU's actual costs. It contended that this amount should be determined by court. In response to comments by DP&L, we are deleting that rule. Upon review, we agree that, if a provider's default security is insufficient to cover an EDU's actual costs to provide generation in a default situation, then the EDU should seek damages in court.

AEP commented that the rule for certification renewal should be modified to indicate that, when considering a certification renewal application, the Commission will consider the applicant's complaint and operational history in other states as well as its performance in Ohio. We find this modification is unnecessary. Midwest Marketers and Ameren both commented that the suppliers should not have to follow the same process for certification renewal as for initial certification. They argued that actual experience provided by CRES providers should create the presumption that a provider is financially, managerially, and technically fit to provide CRES in Ohio. In reviewing these comments, we believe that there is some merit to the suggestion that the renewal application should not have to be processed same as the initial certification application. However, we find that there is certain information that will be required to be filed so that the Commission is aware of any material changes that have occurred to the CRES provider. There are many things that can change regarding an entity's fitness and ability to provide the service it offers. Accordingly, we have revised this rule to permit the CRES provider, at the time of renewal, to file information indicating those material changes to the information contained in or supplied with a initial certification application. Comments were also received on the time frame for renewal of a certificate. We understand that providers will be under pressure since the Commission's certification renewal process could take as long as 120 days; however, the Commission could always allow a provider to continue to operate under its old certificate. Upon review, the Commission believes it is appropriate to extend the time period from 90 days to 120 days for filing certification renewal applications.

Comments were also received regarding the rules that address changes in provider status. Allegheny Energy suggested that only significant changes in ownership should be reported. It suggested a ten-percent threshold as significant. We believe that a change in the ownership interest of five percent is sufficient to warrant coverage under this rule. We believe that this change will still reduce administrative burdens for both the providers and the Commission. DP&L expressed concern that the rule be modified to include that any judgement against the certified supplier constitutes a material change that must be reported. We agree with this recommendation. We have thus modified this rule to provide that a provider should notify the Commission of any judgment or ruling that could affect a supplier's fitness or ability to provide contracted services.

With respect to rules for the transfer or abandonment of a certificate, Allegheny Energy suggested that the rule should be modified to reduce the abandonment notice requirement from 90 days to 60 days. We believe our notice requirement is reasonable. EDUs should have as much notice as possible so that they can arrange to supply the abandoning providers' customers under the standard offer. Similarly, customers should have as much notice as possible so that they can arrange to switch to a new competitive supplier in order to avoid returning to the EDU. With respect to the term "abandonment," we also agree with CCE's suggestion that the term as used in the rule requires clarification. We agree that this term could be construed to mean that the Commission is seeking notice each time a provider stops serving each customer. We have thus added a definition in this rule stating specifically that abandonment means the total cessation of competitive retail electric services in this state prior to the expiration of customer contracts.

With regard to the rules governing the procedures for certification suspension, rescission, or conditional rescission, OCC suggested that a new provision should be added that provides that an EDU will send notice to customers of a supplier whose certification has been rescinded by the Commission. We agree that a notice should be sent to customers; however, we believe that the notice should come from the supplier not the EDU. We believe that it would be difficult for an EDU to recover its costs for sending out the notice from a provider who is no longer allowed to provide CRES in this state. On the other hand, the Commission has the authority to levy forfeitures against a CRES provider whose certificate has been revoked or rescinded. This should serve as ample incentive for a provider whose certificate has been rescinded to comply with the notice requirement. CG&E commented that the rules should clarify that the EDU has the right to suspend or terminate a supplier as provided in an approved tariff filed at the Commission. We agree that an EDU should be able to suspend or terminate a supplier for failure to maintain sufficient default security or to follow operational requirements; however, such a requirement should be clearly spelled out in a tariff filed with the Commission. We believe that the certification rules are not the appropriate place to specify the contents of an EDU's tariff.

FirstEnergy also suggested that the failure of a provider to report material changes in its status under these rules should be added to the list of items for which a provider's certificate could be suspended or rescinded. The rules require CRES providers to inform the Commission of material changes to previously supplied information. The rules also provide that a certificate may be suspended or rescinded for violating a rule. OCC suggests that a new item should be added to these rules stating that the Commission could suspend, rescind, or conditionally rescind a provider's certificate upon a finding that a provider has failed to comply with state laws or ordinances designed to protect consumers. We note that SB3 has authorized the Commission to suspend, rescind, or conditionally rescind a provider's certificate for engaging in unfair, deceptive or unconscionable acts in this state. However, we believe that the Commission should reach an independent conclusion prior to suspending or rescinding a provider's Commission-issued certificate. We have thus added a provision that provides that as part of those deliberations, we could consider the findings of a court or another regulatory agency that a provider has failed to comply with state laws designed to protect consumers in this state. There were several comments that the enforcement provisions of SB3 should be linked with the Commission's enforcement provisions. We agree with these comments and have added a rule under which the Commission can seek forfeitures for violations of the certification rules or orders adopted by the Commission.

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 require the filing and processing of applications for certification to operate as a provider of competitive retail electric services. The conclusions addressed herein mark another of the many steps that this Commission will take to foster a competitive electric environment.

ORDER:

It is, therefore,

ORDERED, That the filing and processing rules for applications for certification to operate as a provider of competitive retail electric services, as set forth in the attachment of this finding and order, are hereby adopted. It is, further,

ORDERED, That copies of Rules 4901:1-24-01 to 4901:1-24-13, O.A.C., 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 all of the adopted rules be effective as of the earliest date permitted by law. Unless otherwise ordered by the Commission, the review date for rules 4901:1-24-01 to 4901:1-20-13, O.A.C., shall be September 30, 2002. 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

Alan R. Schriber, Chairman

Ronda Hartman Fergus

Craig A. Glazer

Judith A. Jones

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