

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF DELAWARE**

IN THE MATTER OF THE APPLICATION OF )  
OPEN MARKET ENERGY, LLC FOR A )  
CERTIFICATE TO PROVIDE ELECTRIC ) PSC DOCKET NO. 14-118  
SUPPLY SERVICES WITHIN THE STATE OF )  
DELAWARE (SUBMITTED MARCH 24, 2014; )  
FILED FEBRUARY 13, 2015) )

**ORDER NO. 8734**

**AND NOW**, this 5<sup>th</sup> day of May, 2015, the Delaware Public Service Commission (the "Commission") determines and orders the following:

**WHEREAS**, pursuant to 26 *Del. C.* §1012(a), prior to doing business in the State of Delaware, every Electric Supplier<sup>1</sup> seeking to provide Electric Supply Service<sup>2</sup> to customers shall obtain a certificate from the Commission. In addition, Section 1012(a) provides that the Commission shall promulgate rules and regulations governing the information that Electric Suppliers shall be required to provide and requirements to be satisfied in order to obtain such certificate; and

**WHEREAS**, the Commission has promulgated such rules and regulations governing the information that Electric Suppliers are required to provide and the requirements that must be satisfied to obtain such a certificate. Such rules and regulations are set forth in 26 *Del. Admin. C.* §3001 (the "Supplier Rules"); and

**WHEREAS**, pursuant to Section 3001-2.1 of the Supplier Rules, all Electric Suppliers (which includes brokers) must obtain an Electric

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<sup>1</sup> Under 26 *Del. C.* §1001(14)(c), an "electric supplier" means a person or entity certified by the Commission that sells electricity to retail electric customers utilizing the transmission and/or distribution facilities of a nonaffiliated electric utility, including: Any broker, marketer or other entity (including public utilities and their affiliates).

<sup>2</sup> Under 26 *Del. Admin. C.* §3001-1.0, "Electric Supply Service" means the provision of electricity or electric generation service.

Supplier Certificate<sup>3</sup> from the Commission to sell Electric Supply Service to, or arrange the purchase on behalf of, Retail Electric Customers<sup>4</sup> prior to offering contracts to Customers or commencing service; and

**WHEREAS**, Section 3001-2.1.1 of the Supplier Rules requires that all Electric Suppliers file with the Commission an Application<sup>5</sup> for an Electric Supplier Certificate which must contain all of the information and documents required to demonstrate to the Commission that it possesses the technical, financial, managerial and operational ability to adequately serve the public;" and

**WHEREAS**, Section 2.1.1.5 of the Supplier Rules requires that each Applicant<sup>6</sup> "present **substantial evidence** supporting their financial, operational, managerial and technical ability to render service within the State of Delaware." (emphasis added). This Section further provides, in part, that "[s]uch evidence shall include, but is not limited to" information such as a list of states in which the Applicant or any of its affiliated interests is presently selling electric supply service to Retail Electric Customers (Section 3001-2.1.1.5.3 of the Supplier Rules), a list of states in which the Applicant or any of its affiliated interests has been denied approval of a State Commission to sell electricity to Retail Electric Customers

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<sup>3</sup> Under Section 3001-1.0 of the Supplier Rules, an "Electric Supplier Certificate" or "ESC" means a certificate granted by the Commission to Electric Suppliers that have fulfilled the Commission's certification requirements.

<sup>4</sup> Under 26 Del. C. §1001(21), a "retail electric customer" or "customer" means a purchaser of electricity for ultimate consumption and not for resale in this State, including the owner/operator of any building or facility, but not the occupants thereof, that purchases and supplies electricity to the occupants of such building or facility.

<sup>5</sup> Although this term is capitalized in this section of the Supplier Rules, it not defined in either the Delaware Code or the Supplier Rules.

<sup>6</sup> Under Section 3001-1.0 of the Supplier Rules, an "Applicant" means an entity or person seeking to obtain an Electric Supplier Certificate.

or has had its authority revoked (Section 3001-2.1.1.5.4), a list of states in which Applicant or any of its affiliated interests is presently selling electric supply service to Retail Electric customers and a list of states in which Applicant or any of its affiliated interests has pending applications to sell electric supply service to Retail Electric customers (Section 3001-2.1.1.5.3); relevant operational experience of each principal officer responsible for Delaware operations (Section 3001-2.1.1.5.5), and a statement detailing any criminal activities of which the Applicant or any of its affiliated interests has been charged or convicted, or which the principal or corporate officers of the Applicant or any of its affiliated interests has been charged or convicted (Section 3001-2.1.1.8.6); and

**WHEREAS**, Section 3001-2.1.1.5.9.11 also provides the following: "The Commission or its Staff may consider any other information submitted by the Applicant if it can show the financial, operational, managerial, and technical abilities of an Applicant;" and

**WHEREAS**, pursuant to 26 *Del. C.* §1001 to §1020 and the Supplier Rules, on March 24, 2014, Open Market Energy, LLC (the "Company") submitted an incomplete application that requested certification as a Retail Electric Supplier in order to broker the sale or purchase of Electric Supply Service;<sup>7</sup> and

**WHEREAS**, on February 13, 2015, the Company filed a complete application (the "Application") with all of the necessary information as required by the Supplier Act; and

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<sup>7</sup> The Company's submission failed to meet the Commission's minimum filing requirements, but the Company later supplemented submitted all of the necessary documents to qualify as a complete application.

**WHEREAS**, in the Application, the Company stated that it seeks certification as a Broker<sup>8</sup> that will utilize appropriate energy procurement strategies to meet the needs of residential and commercial customers in Delaware; and

**WHEREAS**, as part of the Application, the Company stated that it "has over 60 customers leveraging our services today at over 300 different locations throughout Maryland, DC, Delaware and Virginia;" and

**WHEREAS**, at the time that the Company initially submitted the Application, the Company was not qualified to do business in the State of Delaware and did not become qualified to do business in the State of Delaware until October of 2014; and

**WHEREAS**, although the Company is not qualified to do business in Virginia, it provides consulting services (bill review, budgeting, market research), such as budgeting and quarterly analysis of bills, for a customer that has Virginia locations; and

**WHEREAS**, as part of the Application, the Company submitted a copy of a business license from the State of Delaware, Division of Revenue with issue date of March 3, 2014, and validity dates of April 1, 2014, to December 31, 2014; and

**WHEREAS**, as part of the Company's responses to questions from the Commission Staff ("Staff"), the Company admitted that since January of 2013, it has been managing a utility account for a customer located in Delaware. Hence, the Company has conducted business in the State of

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<sup>8</sup> Pursuant to Section 1001(3) of the Act, a "broker" means a person or entity that acts as an agent or intermediary in the sale or purchase of, but that does not take title to, electricity for sale to retail electric customers. Brokers are included in the definition of an Electric Supplier under Section 1001(14)(c) of the Act.

Delaware since January of 2013 (i) without authorization to conduct business in the State of Delaware,<sup>9</sup> (ii) without first obtaining certification to act as an Electric Supplier, and (iii) without a Delaware business license for all of the time period for which it has been engaging in such activities;<sup>10</sup> and

**WHEREAS**, Staff has confirmed that on October 2, 2009, the Company lost good standing in its home state of Maryland when the State of Maryland administratively forfeited the Company's corporate status for failure to file property returns for 2008;<sup>11</sup> and

**WHEREAS**, Delaware law prohibits any foreign corporation from doing business of any kind in this State without having first filed and obtain authorization with the State of Delaware, Division of Corporations. See 8 *Del. C.* § 371(b).<sup>12</sup> In addition, Delaware law provides for penalties for non-compliance with 8 *Del. C.* §371(b) and for fines and/or overdue franchise taxes<sup>13</sup> under 8 *Del. C.* §378; and

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<sup>9</sup> The Company was not authorized to conduct any business in the State of Delaware until October 24, 2014.

<sup>10</sup> Staff has confirmed that the Company did not have a Delaware business license for the year 2013 and did not renew its Delaware business license for 2015 until after February 16, 2015.

<sup>11</sup> Subsequently, the Company was able to file articles of reinstatement on June 14, 2010, and is currently in good standing in that state.

<sup>12</sup> 8 *Del. C.* 371(b) provides, in pertinent part, that no foreign corporation shall do any business in this State, through or by branch offices, agents or representatives located in this State, until it shall have paid to the Secretary of State of this State for the use of this State, \$80, and shall have filed in the office of the Secretary of State: (1) A certificate ... issued by an authorized officer of the jurisdiction of its incorporation evidencing its corporate existence.... The statement shall be acknowledged in accordance with 8 *Del. C.* §103.

<sup>13</sup> 8 *Del. C.* §378 provides, in pertinent part, that any foreign corporation doing business of any kind in this State without first having complied with any section of this subchapter applicable to it, shall be fined not less than \$200 nor more than \$500 for each such offense. Any agent of any foreign corporation that shall do any business in this State for any foreign corporation before the foreign corporation has complied with any section of this subchapter applicable to it, shall be fined not less than \$100 nor more than \$500 for each such offense.

**WHEREAS**, Delaware law also prohibits conducting any type of business in the State of Delaware without first obtaining a business license from the Delaware Division of Revenue;<sup>14</sup> and

**WHEREAS**, after interaction with Staff and counsel for Staff regarding the pending Application, on April 20, 2015, the Company filed a letter stating that it was withdrawing the Application without prejudice; and

**WHEREAS**, Staff has expressed concerns about the Company's unlicensed brokering activities in the State of Delaware and therefore has presented this matter to the Commission for its consideration;

**WHEREAS**, Staff has reported to the Commission that the Application fails to fulfill all of the requirements for an Electric Supplier Certificate to act as a Broker as set forth in the Supplier Rules and therefore has recommended that the Commission not issue an Electric Supplier Certificate authorizing the Company to broker sales and customer purchases of Electric Supply Services in the State of Delaware; and

**WHEREAS**, the Commission finds that it has the authority, based on the facts set forth above, to propose to deny the Company certification as an Electric Supplier in the State of Delaware; and

**WHEREAS**, pursuant to Delaware law, the Supplier Rules, and 29 Del. C. §10131(b), the Commission proposes to deny granting the Company certification as an Electric Supplier in the State of Delaware based on the following: Conducting business in the State of Delaware

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<sup>14</sup> 30 Del. C. §2101 provides, in pertinent part, that no person shall engage in or carry on any trade or business for which a license is required by this part without first having obtained a license therefor from the Department of Finance and paid therefor the fee or tax prescribed in this Part.

in violation of Delaware law, specifically, without complying with 8 Del. C. § 371(b), conducting business in the State of Delaware without a proper business license in violation of 30 Del. C. §2101, and engaging in activities without first obtaining certification from the Commission in violation of 26 Del. C. §1012(a) and Section 3001-2.1;

**NOW, THEREFORE, IT IS HEREBY ORDERED BY THE AFFIRMATIVE  
VOTE OF NOT FEWER THAN THREE COMMISSIONERS:**

1. By issuing the Notice attached as Exhibit "A", the Commission hereby proposes to deny granting the Application which the Company filed with the Commission.

2. The Commission reserves the jurisdiction and authority to enter such further Orders in this matter as may be deemed necessary or proper.

**BY ORDER OF THE COMMISSION:**

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Chair

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Commissioner

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Commissioner

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Commissioner

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Commissioner

ATTEST:

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Secretary

**EXHIBIT "A"**

May 5, 2015

**VIA CERTIFIED MAIL AND REGULAR MAIL**

John Gardiner, President  
Open Market Energy, LLC  
7625 Wisconsin Avenue, Suite 300  
Bethesda, MA 20814

**WITH COPIES TO:**

Marcia Eisinger as Delaware Registered Agent  
Open Market Energy, LLC  
1 Oak Avenue  
Rehoboth Beach, DE 19971

**WITH COPIES TO:**

Elio Battista, Esquire  
Parkowski, Guerke & Swayze, P.A.  
800 King Street, Suite 203  
Wilmington, DE 19801

RE: IN THE MATTER OF THE APPLICATION OF OPEN MARKET ENERGY, LLC FOR A CERTIFICATE TO PROVIDE ELECTRIC SUPPLY SERVICES WITHIN THE STATE OF DELAWARE (SUBMITTED MARCH 24, 2014; FILED FEBRUARY 13, 2015) - PSC DOCKET No. 14-118

Dear Mr. Gardiner:

On February 13, 2015, Open Market Energy, LLC (the "Company") filed an application ("Application") with the Commission and requested certification, under 26 *Del. C.* §1012 and 26 *Del. Admin. C.* §3001, for it to act as an Electric Supplier (broker) in the State of Delaware. Staff and the Commission investigated the Application and have discovered that the Company has been doing business in State of Delaware prior to obtaining authorization to conduct such activities and conducting business in the State of Delaware without a business license, both of which are violations of Delaware law. In addition, Staff and the Commission have discovered that the Company is engaging in the activities of a broker without first obtaining certification, which is also a violation of Delaware laws and regulations.

The Commission proposes to deny the Application based on these legal violations. Please see the attached Order No. 8734 which sets forth in further detail the Commission's reasons for this proposed denial of the Company's request to obtain certification as an Electric Supplier in the State of Delaware.

You have ten days to request a hearing before the Commission if you wish to argue that there is no basis to deny your Application. Submit any request for a hearing in writing by U.S. mail to the attention of the Commission Secretary. In the absence of a hearing, the Commission's proposed decision to deny the Application will become final. If you request a hearing, please be advised that you will have the following rights at that hearing:

- 1) You have the right to present evidence, to be represented by counsel and to appear personally or by other representative.
- 2) You or your counsel shall have the right to examine and cross-examine the witnesses.
- 3) You may subpoena witnesses. Requests for subpoenas should be directed to: Donna Nickerson, Secretary, Public Service Commission, 861 Silver Lake Blvd., Dover, Delaware.
- 4) All testimony before the Commission shall be under oath, and a stenographic record of the hearing shall be made.
- 5) The Commission must reach its decision in this matter based upon the evidence received at the hearing.

If you do not request a hearing, the denial of your Application will be finalized by the Commission at its next meeting. If you have any questions concerning this matter, please contact the Commission office at (302) 736-7500.

Sincerely,

Donna Nickerson, Secretary  
DELAWARE PUBLIC SERVICE COMMISSION

Enclosure: Order