

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE

IN THE MATTER OF THE REQUEST OF)
CONSTELLATION NEWENERGY, INC., FOR)
WAIVERS OF SEVERAL PROVISIONS IN THE)
COMMISSION'S *RULES FOR CERTIFICATION*) PSC DOCKET NO. 05-390
AND REGULATION OF ELECTRIC SUPPLIERS)
RELATED TO THE SUBMISSION OF STANDARD)
FORM CONTRACTS)
(FILED NOVEMBER 2, 2005))

IN THE MATTER OF THE ADOPTION OF)
RULES AND REGULATIONS TO IMPLEMENT)
THE PROVISIONS OF 26 DEL. C. CH. 10) PSC REGULATION DOCKET NO. 49
RELATING TO THE CREATION OF A COM-)
PETITIVE MARKET FOR RETAIL ELECTRIC)
SUPPLY SERVICE (OPENED APRIL 27, 1999))

ORDER NO. 6769

This 8th day of November, 2005, the Commission finds, determines, and Orders the following:

1. Constellation NewEnergy, Inc. ("CNE") is an electric supplier holding a certificate under the regime instituted by the "Electric Restructuring Act of 1999," 26 Del. C. §§ 1001-1019 (2004 Supp.). See PSC Order No. 5427 (May 9, 2000).¹

2. On November 2, 2005, CNE filed an application asking the Commission for a "waiver" of several provisions in the "Rules for Certification and Regulation of Electric Suppliers"² as they may apply to a particular electric supply contract that CNE intends to

¹CNE originally obtained an electric supplier certificate under the name (and business structure) of New Energy East, L.L.C. Through several transformations, New Energy East, L.L.C. became CNE. See PSC Dckts. Nos. 01-175, 02-348.

²Adopted by PSC Order No. 5207 (Aug. 31, 1999) ("ES Rules").

consummate with a large industrial or commercial concern operating within this State. In particular, CNE seeks relief from two of the ES Rules' requirements. First, CNE asks to be excused from the obligation to submit to the Commission - twenty-one days in advance - any revised standard form contract that it might intend to use for providing electric supply.³ Second, CNE requests permission to offer service to this particular customer under a contract that includes several modifications to this new revised standard form contract.⁴ According to CNE, the modifications to its new contract template arose from negotiations between the particular customer and CNE.

3. To support its "waiver" request,⁵ CNE reports that, due to market conditions, the putative customer is very anxious to promptly

³See ES Rules Section III ¶ 4. That provision reads in part:

If the Electric Supplier makes changes to its standard contract form, the Electric Supplier must submit these changes to the Commission Staff for review and comment. Such revised contract shall be filed twenty-one (21) calendar days prior to use by the Electric Supplier.

In its waiver request, CNE suggests that it has never filed with the Commission any form of standard contract. Thus, it asks for a waiver of ES Rules, Section II ¶ 1(i) (electric supplier must provide Commission with a copy of its standard form contract at least 21 days prior to use). Cf. PSC Order No. 5427 at Ordering ¶ 4 (New Energy East, L.L.C. must file standard form of contract for each class of customer it intends to serve at least 21 days prior to providing service to such class). However, Staff reports that a standard form of contract is already on file with the Commission. Consequently, the Commission will treat CNE's request as one related to the submission of a revised standard form of contract. However, the waivers granted here do not turn on whether a prior standard form contract was, or was not, submitted.

⁴See ES Rules, Section III ¶ 4 ("An Electric Supplier shall supply Electric Supply Service only by a contract substantially similar to the standard contract filed by the Electric Supplier under Section II, paragraph 1(i) of these Rules").

⁵See ES Rules Section I ¶ 5 (Commission may, for good cause, "waive" a particular provision in the ES Rules not based on statute so long as the

consummate a contract for CNE to supply it with electric supply.⁶ Moreover, CNE asserts that the customer (a large commercial concern) has negotiated the particulars of its supply contract utilizing sophisticated, senior personnel with a great deal of knowledge and experience in energy procurement and contracting. Moreover, CNE posits that the provisions in the ES Rules calling for a standard form of contract to be submitted to the Commission for pre-use review were primarily intended to help the Commission protect the interests of smaller, less sophisticated, consumers. In contrast, CNE argues, the particular customer here is extremely capable of protecting its own interest in procuring electric supply from CNE. By a letter signed by an employee described as "Executive Buyer, Energy," the putative customer has told the Commission that it supports CNE's request for waivers. In that correspondence, the customer explains why it thinks a waiver - allowing it to sign its negotiated supply contract promptly - will be in its best interest.

4. In PSC Order No. 6098 (Jan. 7, 2003), this Commission reviewed the history surrounding the promulgation of the ES Rules. In doing so, the Commission recognized that the original ES Rules generally draw no distinctions between differing types of consuming customers. However, the Commission acknowledged that large industrial and commercial entities, and particularly those with bargaining sophistication and leverage, may not need in their purchases of

waiver is consistent with the purpose of the Electric Utility Restructuring Act).

⁶CNE reports that the customer wanted a contract by November 3, 2005. However, CNE did not file for its waivers until November 2, 2005.

electric supply the same "consumer protections" that may be necessary or helpful, in the case of residential or small commercial customers. The Commission thus directed Staff to undertake an overall examination of the ES Rules including whether "certain regulations should be lifted . . . for certain types of consumers, particularly if the present regulations impede the further expansion of competition." PSC Order No. 6098 at ¶ 9. The Commission now understands that Staff, within a very short time, will present its Report proposing various changes to the ES Rules. In addition, in Order No. 6098, the Commission decided to give electric suppliers some "flexibility" in consummating a supply sale with a large industrial and commercial concern. That flexibility came from allowing an entity falling within such class of consumer the ability - in a particular contract - to make an informed waiver of particular contractual terms otherwise mandated by the ES Rules. See PSC Order No. 6098 at ¶¶ 11-15.

5. The Commission believes that what it said in Order No. 6098 allows it to grant the waivers now sought by CNE related to its particular contract with the particular large commercial customer. That customer represents that a prompt contract for it to purchase electric supply with CNE will benefit its interest. Moreover, it appears (from an admittedly sparse record) that the customer brought both negotiating experience and bargaining leverage to this particular transaction. Finally, by Order No. 6098, the Commission previously allowed this type of consumer, by individual contract, to waive particular Commission-imposed contractual terms. If the Commission believes such type of customer is sufficiently capable of protecting

its own interests as to particular contractual terms, it seems it should also be able to "waive" the Commission's "assistance" in reviewing the supplier's contract before the customer signs it.

6. Consequently, the Commission will grant CNE a waiver of the requirements of ES Rules Section III ¶ 4 in order to allow it and its customer to execute the contract of supply in the form attached as the second exhibit to CNE's letter application filed November 2, 2005. In the context of that particular contract, the Commission waives the requirements of Section III ¶ 4 related to both the submission of a revised standard form of contract and the use of such standard form for all supply sales. Again, these waivers apply only to the contract with the particular customer identified here. CNE has now filed a revised standard form of contract. Staff can now review it, presumably before such template is utilized in a supply sale by CNE to another consumer. At the same time, any pre-use review of the particular contract with this particular customer is not required. Finally, following what the Commission said in paragraph 16 of PSC Order No. 6098, none of the waivers granted here shall effect those provisions in the ES Rules that might relate to the requirements necessary for the electric distribution company to fulfill its obligations related to the delivery of contractual supply. Similarly, by allowing the use of the particular agreement, the Commission does not intend that either CNE or the customer can, based on language in such contract, forego any requirements in the ES Rules necessary to allow the electric distribution utility to perform its delivery function.

Now, therefore, **IT IS ORDERED:**

1. That, for the reasons set forth in the body of this Order, the Commission finds "good cause" and therefore waives (under Section II ¶ 5 of the Commission's "Rules for Certification and Regulation of Electric Suppliers") the requirements of Section III ¶ 4 of the Commission's "Rules for Certification and Regulation of Electric Suppliers" in the context of the negotiated sale of electric supply between Constellation NewEnergy, Inc. and the consumer identified by the filings in this docket. Consistent with such waivers, Constellation NewEnergy, Inc. is authorized to utilize the form of contract attached as a second exhibit to its letter application filed November 2, 2005 to consummate an electric supply agreement with that consumer. Such contract form may be utilized for this customer immediately without awaiting the close of the twenty-one day period called for by Section III ¶ 4 of the Commission's "Rules for Certification and Regulation of Electric Suppliers."

2. That, to the extent described in the body of this Order and paragraph 1 immediately above, the application of Constellation NewEnergy, Inc., filed November 2, 2005, is granted. This grant of waiver shall extend no further than the contract identified in that application.

3. That 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:

/s/ Arnetta McRae
Chair

Vice Chair

/s/ Joann T. Conaway
Commissioner

/s/ Jaymes B. Lester
Commissioner

/s/ Dallas Winslow
Commissioner

ATTEST:

/s/ Karen J. Nickerson
Secretary