

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE

IN THE MATTER OF THE REQUEST OF)
SELECT ENERGY, INC., FOR WAIVERS OF)
CERTAIN POST-CERTIFICATION REQUIRE-)
MENTS IN THE COMMISSION'S RULES FOR) PSC DOCKET NO. 02-412
CERTIFICATION AND REGULATION OF)
ELECTRIC SUPPLIERS)
(FILED NOVEMBER 12, 2002))

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. 6098

This 7th day of January, 2003, the Commission determines and Orders the following:

1. Almost four years ago, the General Assembly and the Governor enacted the "Electric Restructuring Act of 1999," codified in major part at 26 Del. C. ch. 10 ("the Act"). As its name implies, the Act's goal was to transform the regime for delivering electric supply to retail consumers. Supply would no longer be simply a component of bundled "electric service" provided by a regulated public utility; rather, retail consumers would have the opportunity to choose to purchase electric supply (as an unbundled commodity) from competing (largely unregulated) "electric suppliers."

2. Pursuant to the directives in 26 Del. C. § 1012, in 1999 the Commission adopted "Rules for Certification and Regulation of Electric Suppliers" ("ES Rules"). PSC Order No. 5207 (Aug. 31, 1999). Those rules were intended not only to facilitate the transition to the

new competitive regime, but to also ensure, after the onset of such competition, that retail consumers would have adequate information to make informed choices. But as the Commission candidly acknowledged then, the Commission constructed - and adopted - those ES Rules in a fair - but very expeditious - process.¹

3. Now, the Act's "transition" period has come and gone for non-residential consumers located within Delmarva Power & Light Company's ("DP&L") service territory. In addition, nine months from now, residential consumers in that territory will also pass out of the "transition" phase. 26 Del. C. § 1004(a). At the same time, the Act's ultimate vision of a robust retail supply market served by numerous competing suppliers has not yet become a complete reality. As of the date of this Order, seventeen suppliers are certificated to provide electric supply in this State. Not all of those suppliers currently serve any customers and none, presently, offer to provide supply to residential consumers.

4. On November 12, 2002, one of those certificated suppliers, Select Energy, Inc. ("Select Energy"),² filed a letter application requesting that the Commission invoke its reserved "waiver" authority³

¹The short interval between the date of the Act's enactment and its initial implementation milestone necessitated the expedited process. The Act accepted such a process by explicitly allowing the Commission to waive the "normal" administrative procedure for adopting regulations in order to meet the Act's deadlines. See 26 Del. C. § 1015(a). In its 1999 adopting Order, the Commission - again due to time constraints - chose not to expound on its rationale for any of its adopted rules.

²PSC Order No. 5319 (Jan. 11, 2000).

³ES Rules, Section II, ¶ 5.

and "waive" portions of three of the Commission's ES Rules. As proposed by Select Energy, these waivers - two involving substantive provisions and the third excusing a procedural waiting period - would apply only to Select Energy's supply contracts offered to "commercial and industrial" consumers. First, Select Energy asks the Commission to "waive" the requirement that a consumer be afforded a period of 10 days, after receipt of a confirmation letter, to rescind the consumer's earlier selection of a particular electric supplier. ES Rules, Section III, ¶ 4. Second, Select Energy also seeks a "waiver" of the provisions in Section II, ¶ 1(i)(7), which allow a consumer to "terminate" (upon thirty-day prior notice) an existing electric supply contract if the consumer relocates outside of their current electric distribution company's ("EDC") service area.⁴ Select Energy apparently seeks a "waiver" from such rule - not to adjust the period for prior notification - but instead to extinguish the right given to the consumer to terminate the supply contract without any further liability in such relocation context. Presumably, without such provision, if a consumer relocates from an EDC's service area, the consumer's liability to the electric supplier would be governed by terms in the particular supply contract, or by otherwise background principles of remedies for contractual breach. Again, Select Energy seeks both these waivers only for commercial and industrial supply consumers. Finally, in order to allow it to promptly utilize the

⁴This provision, included in the section outlining mandatory terms for a supply contract, requires the supplier to notify the consumer of such right in the supply contract. Under this provision, the consumer is identified as "he/she."

above two waivers, Select Energy asks the Commission to forego the twenty-one day waiting period required before changes in standard form contractual terms may be implemented. ES Rules, Section II, ¶ 1(i).

5. In its letter application, Select Energy does not suggest any peculiar circumstances to support the waiver of the two substantive provisions. Rather, Select Energy asserts that since the time of its original certification, it has undertaken a process (throughout states in its northeastern market area) to revise its standard form supply contract in order to meet the "needs" of its industrial and commercial customers. The two "waivers" sought reflect such needed changes. Moreover, according to Select Energy, the "waiver" of the twenty-one day waiting period is appropriate because several of such consumers in Delaware have expressed a strong desire to contract with Select Energy for their electric supply.

6. Generally, a request for a "waiver" from a regulatory requirement is premised on unique, or exceptional, circumstances surrounding a particular applicant's ability to comply with the letter of the general rule. Here, as noted, Select Energy's application does not assert any such type of hardship. Rather, its requests for "waivers" are premised on the notion that in the two highlighted provisions in the ES Rules, the Commission, in 1999, spoke too broadly. According to Select Energy, the provisions in Section III, ¶ 4 (rescission period) and Section II, ¶ 1(i)(7) (relocation termination) were not meant to apply to supply contracts tendered to industrial and large commercial consumers. Those consumers, Select Energy says, have both negotiating sophistication and bargaining power

and, hence, really do not need the protections accorded by the two provisions. Rather, in Select Energy's view, those provisions were crafted - and intended to apply - as protections solely for residential and small commercial consumers.⁵

7. Of course, when viewed in this light, Select Energy's request is really not one for "waivers" to respond to unique circumstances but a request for Commission "intent" to trump the textual language of the ES Rules. In addition, the "waivers" Select Energy now seek are not unique to its operations; other electric suppliers soliciting business from industrial and large commercial consumers would also presumably desire not to be bound by the same two provisions. In fact, if the Commission were to grant "waivers" to Select Energy, it would have to grant "waivers" to all suppliers. Such a turn would, in effect, "rewrite" the particular provisions to make them applicable only to residential and small commercial consumers.⁶

8. At the same time, Select Energy's application does raise a valid policy argument - that large industrial and commercial customers, with the ability to bring experienced contract negotiation personnel to bear and with some level of bargaining leverage, may not need the same type of "consumer" protections as residential and small commercial customers. Those latter consumers may lack information and will often lack significant leverage in "negotiating" particular

⁵This argument finds support in the use of "he/she" to refer to consumers in Section II, ¶ 1(i)(7).

⁶See Tribune Company v. FCC, 133 F.3d 61, 68-70 (D.C. Cir. 1998).

terms. For example, we understand that other utility commissions have structured their electric supplier rules to focus billing and other consumer protections on residential and small business customers.

9. Select Energy's application convinces the Commission that it might be time to take a second look at the 1999 ES Rules, not only to reexamine the provisions highlighted by Select Energy, but to review the need for, or improvements to, any particular Rule. Circumstances have changed since 1999. For example, it may be that certain regulations should be lifted, as suggested by Select Energy, for certain types of consumers, particularly if the present regulations impede the further expansion of competition. By this Order, we direct Staff to begin an examination of our ES Rules after soliciting informal pre-formulation comments from suppliers and other interested persons. Staff should submit to us proposals for any amendments to our ES Rules. The Commission can then decide whether we should propose such amendments for adoption.

10. As to the "waiver" requests, under our present ES Rules, the provisions of Section III, ¶ 4 and Section II, ¶ 1(i)(7) apply to all electric supply consumers.⁷ This Commission lacks the power to now summarily modify those rules to have them only apply to residential and small commercial consumers. Such a change in text can only be accomplished by following the formal amendment process contemplated by

⁷The ES Rules define "customer" or "retail electric customer" as simply a purchaser of supply for ultimate consumption. ES Rules, Section I, "Customer." That definition makes no distinction as to classes of customers.

the state Administrative Procedures Act ("APA").⁸ Moreover, the Commission is not inclined to grant a "waiver" from these requirements to one particular supplier.

11. As noted above, the Commission will begin a review of the ES Rules. That procedure will take some time. In the interim, while that process moves forward, the Commission will allow Select Energy - and other electric suppliers - some flexibility in their contractual negotiations with sophisticated large and industrial consumers. Specifically, we will recognize the ability of large commercial and industrial customers to knowingly and intelligently "waive" the "rescission" and "termination" protections accorded by Section III, ¶ 4 and Section II, ¶ 1(i)(7). This is not a "waiver" of the application of those requirements - under our ES Rules they remain available to all consumers. Rather, by this Order, we acknowledge that large commercial and industrial consumers may make a conscious choice to forego those protections in the context of choosing a particular supplier and negotiating the terms of a particular supply contract. Such "waiver" must be an affirmative decision by the consumer and be reflected in an appropriate written, or other recorded, format.

12. In allowing large industrial and commercial consumers to "waive" the protections afforded by the two highlighted provisions, the Commission notes that the Maryland Public Service Commission has

⁸The Commission tentatively determines that it could not invoke the provisions of 26 Del. C. § 1012(a) to "waive" compliance with the APA for these modifications. There is no longer any looming statutory deadline - related to these modifications - which could trigger that APA-waiver provision.

adopted such a waiver regime for large commercial and industrial customers in its 2000 Consumer Protection regulations. Moreover, this right to waive appears consistent with the standard form contract offered by Select Energy with its application. That contract recites a consumer's waiver of these protections.

13. At the same time, the Commission acts very narrowly here. Until the Commission has spoken otherwise, electric suppliers may not solicit waivers of any of the ES Rules from residential and small business customers. Second, the ability to waive recognized by this Order speaks only to the two provisions in Section III, ¶ 4 and Section II, ¶ 1(i)(7) discussed above. Until the Commission says differently, other ES Rules may not be waived even by large industrial or commercial consumers. Moreover, this recognition of a right to waive two provisions is meant to extend only during the period while the Commission is examining its ES Rules.

14. The Commission does not now craft a specific definition of large commercial and industrial consumers who can exercise this limited "waiver" right. The industry has a common understanding of who falls within the "core" of that description. At the fringes, the Commission expects the supplier (seeking a "waiver") to ensure itself that the consumer not only has a "load" generally consistent with a large industrial and commercial customer but also exhibits the characteristics of a consumer able to bargain with an electric supplier on an equal basis.

15. Similarly, the Commission does not, in this Order, "approve" specific "waiver" language, either generally or as proposed

by Select Energy in its revised standard form contract. "Waiver" language may differ depending on what the consumer chooses to forego. What is important is that eligible consumers know (and understand) the protections accorded by these provisions of our present ES Rules and affirmatively agree to forego their protections. The ultimate supply contract (or some other document executed by the consumer) must reflect both such understanding and an explicit "waiver." Such "waivers," for eligible consumers, need not be pre-approved by the Commission. Instead, they will be subject to review if a consumer later contends it did not knowingly and voluntarily forego the protections accorded by these provisions in our ES Rules.⁹

16. Finally, in granting the above limited "waiver" right, the Commission anticipates that it might cause some glitches with the procedures adopted (with Commission endorsement) by electric distribution companies to formalize a consumer's selection of supplier. For example, under DP&L's "template" Electric Supplier Agreement, after a supplier electronically notifies DP&L of a consumer's choice, DP&L sends a confirmation letter to that consumer, reciting the ten-day period to rescind the choice of supplier.¹⁰ If, after the expiration of ten days, the consumer has not disputed the

⁹Of course, in granting this general - but limited - "waiver" right, the Commission cannot, and does not, override any other law (state or federal) which, in certain circumstances, might preclude this type of "waiver." If another law forbids "waiver," that law supersedes the right of "waiver" extended here.

¹⁰Conectiv Power Delivery, revised "template" Electric Supplier Agreement, Article 8.3 ("Procedure to Formalize Selection of Supplier") (submitted in compliance with PSC Order No. 5454 (June 20, 2002)) ("template" submitted June 28, 2002).

supplier selection, DP&L will process the change to begin at the next meter reading date, at least fifteen days distant. Thus, at least fifteen days must exist between the supplier's electronic request and the implementation of the change in supplier. The "waiver" opportunity granted to large industrial and commercial customers by this Order might require some minor modification to the notification sent by the electric distribution company. The wording of such consumer notice might now need to be changed to read: "unless you have made an authorized waiver of the right to rescind, you have ten days" But the limited opportunity for "waiver" granted here is not meant to alter the minimum fifteen day period between the electronic validation of the supplier's notice and the meter reading date at which the change in supplier will be implemented. Thus, even if a large industrial customer might "waive" the ten day right to rescind period, the change in supplier need not be implemented by the electric distribution company unless at least fifteen days have elapsed between the electronic validation of the supplier notification and the implementing meter-read date. The "waiver" only affects the consumer's right to rescind; it does not affect the electric distribution company's timetable for implementing the change in supplier. The Commission will send a copy of this Order to the two electric distribution utilities so that they can determine if the limited right to "waiver" may require some other minor modifications to their internal processes for confirming supplier change requests. If this Order creates difficulties in the efficiency of those

processes, the electric distribution utilities should promptly notify the Commission of those problems.

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

1. That the application of Select Energy, Inc., as it seeks a waiver of the application of certain provisions in Section III, ¶ 4 and Section II, ¶ 1(i)(7) of the Commission's "Rules for Certification and Regulation of Electric Suppliers" to large commercial and industrial consumers, is denied for the reasons set forth in the body of this Order.

2. That, as explained in the body of this Order, and subject to the restrictions expressed in the body of this Order, the Commission recognizes the ability of large commercial and industrial consumers to knowingly and voluntarily waive the particular protections (as identified in this Order) accorded consumers by Section III, ¶ 4 and Section II, ¶ 1(i)(7) of the Commission's "Rules for Certification and Regulation of Electric Suppliers." Electric Suppliers shall retain a written document, or other form of record, of any such waivers. This recognition of a limited ability to waive these protections shall remain in effect pending the Commission's review of its "Rules for Certification and Regulation of Electric Suppliers," as initiated by paragraph 3 below.

3. That the Commission Staff shall undertake a review of the Commission's "Rules for Certification and Regulation of Electric Suppliers" and promptly report to the Commission proposed amendments to those Rules. After review of Staff's report, the Commission shall decide whether to propose formal amendments to those Rules.

4. That to assist the Commission Staff in preparing its report, electric suppliers, electric distribution companies, and other interested persons may submit to the Commission their proposals for changes to the "Rules for Certification and Regulation of Electric Suppliers." Staff shall review these informal pre-proposal comments in its preparation of its Report. Such comments shall be submitted in writing to the Commission on or before February 14, 2003.

5. That the Secretary shall send, by United States mail, a copy of this Order to Select Energy, Inc., the Public Advocate, all certificated Electric Suppliers, Delmarva Power & Light Company, Delaware Electric Cooperative, Inc., and a representative for the Delaware Energy Users Group. The Secretary shall also post a copy of this Order on the Commission's website under s specific heading.

6. That James McC. Geddes, Esquire, is designated Rate Counsel to assist Staff in the preparation of its Report.

7. 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

/s/ Joshua M. Twilley
Vice Chair

/s/ Joann T. Conaway
Commissioner

PSC Docket No. 02-412 and PSC Regulation
Docket No. 49, Order No. 6098 Cont'd.

/s/ Donald J. Puglisi
Commissioner

/s/ Jaymes B. Lester
Commissioner

ATTEST:

/s/ Karen J. Nickerson
Secretary