

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter, on the Commission's own)
motion, to consider implementation of a) Case No. U-11915
voluntary electric supplier licensing program.)
_____)

**INITIAL BRIEF OF
NATIONAL ENERGY MARKETERS ASSOCIATION**

The National Electric Marketers Association ("NEMA") submits this brief in support of implementing a voluntary electric supplier licensing program in the State of Michigan.

NEMA is a national, non-profit trade association representing a regionally diverse cross-section of both wholesale and retail marketers of natural gas and electricity. NEMA also represents producers, generators, transporters and marketers of energy related information, services and technology throughout the United States.

NEMA intervened in this proceeding to support the Michigan Public Service Commission's (the "Commission's") consideration of restructuring the regulatory requirements of market entry to make them more suitable to the needs of a competitive generation market. The record in this proceeding shows that:

- Michigan's Act 69 and franchise requirements, which were designed to apply solely to public utilities during the past era of monopoly electric service, pose serious and unnecessary barriers to entry for third party, non-utility suppliers of electric generation in Michigan;
- Adoption of the Commission Staff's recommended licensing approach will ensure that necessary consumer protection and regulatory information requirements are satisfied, while removing time consuming and expensive proceedings and requirements designed for the passing era of monopoly electric service;
- Certain aspects of the Staff's proposal, including proposed new provisions requiring filing of customer and alternative supplier business information, should be modified to allow for confidential treatment of suppliers' and customers' proprietary business information;

- The Staff's proposed application of existing regulatory rules with respect to third-party suppliers and their customers should be reviewed and clarified.

Implementation by the Commission of a voluntary electric supplier licensing program will place Michigan within the sensible mainstream of other states which have considered the same question of developing reasonable regulatory requirements for new market participants. Other states proceeding with electric industry restructuring, such as California, Illinois and Pennsylvania, have all considered and decided that licensing programs consistent with the general outlines proposed by the Commission's Staff strike the proper balance between consumer protection and reasonable regulatory information, on the one hand, and avoidance of unnecessary barriers to entry, on the other.

I. Application Of Michigan's Act 69 Requirements and Franchise Processes To Alternative Electric Suppliers Will Deter Entry Of New Suppliers And Obstruct Market Development.

The record in this proceeding demonstrates that applying the provisions of Michigan's Act 69, coupled with highly varied municipal franchise processes and requirements, will severely impede development of the competitive generation market envisioned by the Commission. The voluntary supplier licensing program proposed by the Commission's Staff is necessary to encourage greater supplier participation in the competitive generation market.

A. The Act 69 Process Deters Entry Of New Electric Suppliers

In March, 1999 the Commission entered orders granting Act 69 certificates of public convenience and necessity to Destec Power Services, Inc. and Nordic Electric, L.L.C. Destec Power Services, Inc., Case. No. U-11308 (Order Approving Settlement Agreement, March 22, 1999); Nordic Electric, L.L.C., Case No. U-11692 (Order Approving Settlement Agreement, March 22, 1999). These cases graphically demonstrate some of the delays and uncertainties which will discourage prospective

market entrants in deciding whether to provide service in Michigan, absent access to a voluntary licensing program.

John Stauffacher testified in this proceeding on behalf of Dynegy Marketing & Trade ("Dynegy"). Mr. Stauffacher explained in detail from the perspective of a competitive supplier of electric generation the barriers to entry posed by the Act 69 process. Pointing to Destec's Act 69 certificate experience, Mr. Stauffacher testified that Destec filed its application for a certificate of public convenience and necessity on January 23, 1997. The proceeding was not resolved for over two years, finally ending with an order approving settlement on March 22, 1999. (Stauffacher test., p. 4 line 22 to p. 5 line 4). The Destec certificate case was a heavily litigated proceeding in which Destec's competitors intervened vigorously. (Stauffacher test., p. 5, lines 6-8). At the end of this more than two-year process, which ended in a settlement, Destec finally was granted a certificate of public convenience and necessity to provide unbundled electric generation services to Rate DA customers in two townships and one city. Destec Power Services, Case No. U-11308 (Order, March 22, 1999, p. 2).

Nordic Electric experienced a ten month Commission process in obtaining its certificate of public convenience and necessity. After filing its application for a certificate on May 11, 1998, proceedings ensued pursuant to which a certificate was finally issued allowing it to provide unbundled electric generation services in Ann Arbor, Michigan. March 22, 1999. Nordic Electric, L.L.P., Case No. U-11692 (Order, March 22, 1999).

The length and contested nature of these proceedings to obtain limited rights to do business is highly discouraging to potential Michigan generation market entrants. NEMA agrees with Staff's witness, Dr. Michel L. Hiser, who expressed his concern that Michigan's Act 69 certification procedures could stifle supplier participation in the

customer choice program if it is the only means available to qualify to do business. (Hiser test., p. 3, lines 17-19). Dr. Hiser stated that the Act 69 procedure is burdensome, time consuming and costly, and its application to the Michigan customer Choice Program for the electric market presents a potentially serious entry barrier. (Hiser test., p.4, lines 3-5.).

NEMA agrees with Dr. Hiser and Mr. Stauffacher that the certificate of public convenience and necessity requirements of Act 69 are simply inadequate to accommodate the evolving competitive generation market. As Dr. Hiser explained, the provisions of Act 69 were established when the paradigm governing the electric industry was a monopoly, with a clear mission to restrict participation in all components of the industry. Act 69 was appropriate for the monopoly structure in place when it was implemented, but it is not suitable for today's circumstances where generation competition is a desired policy. (Hiser test., p. 8, line 19 to p. 9, line 4).

The record shows that the Act 69 certificate process is a significant barrier to entry facing potential new suppliers and thus is harmful to the creation of competition in Michigan. (Stauffacher test., p. 6, lines 1-2). The practical consequences of the Act 69 certificate process in the development of competition are even farther-reaching than discouraging market entry. The Act 69 certificate process threatens to severely limit what competition does occur. As Mr. Stauffacher testified, due to the substantial burden involved in obtaining an Act 69 certificate, suppliers are likely to limit the areas in which they seek to obtain certificates to municipalities that have the largest customers. (Stauffacher test., p. 6, lines 4-7). The significance of this supplier response to the burdens of Act 69 is that suppliers would be much less likely to seek Act 69 certificates for other municipalities. (Stauffacher test., p. 6, lines 7-8). As a result, the Act 69 certificate process would likely result in customers in many

municipalities left with no choice whatsoever, further impeding development of competitive electric choice for the vast majority of Michigan customers. (Stauffacher test., p. 6, lines 7-18).

B. Franchise Requirements Deter Entry Of New Electric Suppliers

Potential new electric suppliers will also be deterred by the requirement that, prior to receiving an Act 69 certificate, an applicant must have obtained franchise authorization from all municipalities it is seeking certification to serve. Dr. Hiser testified that this requirement can substantially add to the cost and lengthen the time involved to complete the application process. Dr. Hiser stated that there are some 1850 local units of government, consisting of townships, cities and villages, in Michigan. (Hiser test., p. 4, lines 12-20).

Coupling the requirement of an Act 69 certificate with the requirement of obtaining a separate franchise for each political subdivision of the state to be served suggests that it would be nearly impossible, absent a voluntary licensing process like that proposed by Staff, for a new market entrant to establish a statewide presence, or even a broad presence within the service territory of any existing jurisdictional utility supplier.

The practical realities of the franchise requirement are demonstrated by the testimony of Richard A. Polich, vice president of Nordic Electric, on behalf of Energy Michigan. Mr. Polich's company, having procured 51 franchises since 1995, has had substantial experience based upon which to comment upon the franchise process. (Polich rebuttal, p. 4, lines 5-6). Mr. Polich testified that the period of time to obtain a franchise has ranged in his company's experience from successful completion in 60 days in some municipalities, to four years and counting for other municipalities. Mr. Polich described his company's costs in obtaining individual franchises as ranging

from \$1100 to over \$135,000. (Polich rebuttal, p. 4, lines 12-17). Using his company's experience in the City of Ann Arbor as a recent example, Mr. Polich also described the efforts of local governments to impose additional requirements – mandating low income assistance funds, renewable power requirements, and other mandates, many of which are not imposed upon incumbent electric utilities serving the areas for which Nordic has sought franchises. (Polich rebuttal, p. 5, lines 2-21). The clear message of Mr. Polich's testimony is that "unless local government program requirements such as those imposed by the City of Ann Arbor are preempted by the Michigan Public Service Commission requirements, Dr. Hiser's goal of achieving a minimally burdensome approach may not be realized." (Polich rebuttal, p. 6, lines 5-8).

The fact that there are a large number of political subdivisions, each claiming the right to regulate new electric market entrants, creates multiple barriers and threatens new market entrants with the prospect of large numbers of inconsistent local governmental requirements. Balkanization of retail electric sales requirements discourages new market entrants from providing service in Michigan, and can result only in higher regulatory compliance costs for suppliers and more limited choices for customers.

For example, Dr. Hiser stated that suppliers seeking economies of scale will likely need to serve customers spread out among many communities. Yet franchise procedures and fees vary markedly among municipalities. At the present time, more and more Michigan communities are requiring substantial application fees and charges from franchise applicants. This threatens to add significantly to the costs of market entry. (Hiser test., p. 5, lines 1-10).

Dr. Hiser's and Mr. Polich's testimony, if anything, understates the significance of the Act 69 and franchise issues to new market entrants. Very few potential new market entrants will be able and willing to obtain necessary financing, develop business plans, provide for staffs, and begin developing proposed electric service arrangements, until the uncertainties posed by application of the Act 69 and franchise requirements are resolved.

II. The Commission Should Implement A Voluntary Electric Supplier Licensing Program And To Establish Rules For Provision Of Service.

Staff's proposal to implement a voluntary licensing program will reduce barriers to entry and encourage new suppliers to participate in the Michigan electric supply market place. A voluntary licensing program will help resolve the Act 69 and franchise uncertainties which presently exist, and provide new market entrants reasonable assurance that they can do business in Michigan. In this way, the Commission will enable new market entrants to invest the resources needed to provide the amount and quality of generation competition which the Commission and Michigan customers desire.

Adoption of a voluntary electric supplier licensing program would also bring Michigan's efforts to develop a competitive generation market in line with the Commission's policy with respect to natural gas marketing. Dr. Hiser testified that Act 69 certification has not been required for any of the participating suppliers of natural gas, and customers are currently being served by non-utility suppliers without possession of a municipal franchise. (Hiser test., p. 10, lines 11-20). The electric supplier license approach, if conducted in the manner proposed by Staff, would constitute an expeditious, low cost, minimally burdensome approach for supplier participation in the Michigan electric retail choice program. NEMA agrees strongly with Dr. Hiser, who stated that compared to the process for acquiring Act 60 approval,

the voluntary licensing alternative will be a quantum improvement. (Hiser test., p. 14, lines 16-20).

NEMA also concurs with Dr. Hiser's suggested next steps for development of a licensing program. For example, Dr. Hiser envisions developing of a form of "not more than a couple of pages." (Hiser test., p. 17, lines 17-20). Use of a form will permit the gathering together in one place of the information which the Commission needs to consider granting a license in the 30 day ex parte manner proposed by Dr. Hiser. A form can also serve the additional purpose of focusing new market entrants' attention on the specific Commission requirements which they are subject to in doing business in Michigan. Use of a standard form should also increase ease of administration for the Commission and its Staff, as well as facilitate communication with license applicants.

NEMA also requests that the Commission consider several minor changes to some of the specific requirements proposed by the Commission's Staff:

- Energy suppliers and their customers should be able to rely upon their sensitive business information being kept confidential by the Commission. (Stauffacher test., p. 13, lines 8-22). While NEMA understands the Commission's need for reasonable information concerning quantities, terms and pricing of energy transactions, customer-specific information should not be made available for public release through Freedom of Information requests or otherwise.
- Reporting of energy transactions in the aggregate, rather than on a customer-specific basis, should provide the Commission with the information it needs for regulatory purposes while minimizing the regulatory

burdens upon electric suppliers and protecting confidential business information.

- Reporting of fuel type and source should be left as a matter of private contract between energy suppliers and their customers. This type of reporting is particularly problematic for energy marketers which may purchase their supplies from many different sources and fuel types. NEMA concurs with the Staff, however, that if a supplier represents that it is selling power from renewable or "green" fuel sources, that the supplier should have the burden of being able to reasonably demonstrate that its representations are true and correct.
- NEMA concurs with Consumers' witness, Mr. Bearman, that in the paragraph entitled "FERC Authorization" in the Staff's proposal, that the words "if required by law" should be added after "Power Marketer." (Bearman test., p. 6, lines 15-16).

NEMA also supports Consumers witness Mr. Bearman's recommendation that in connection with establishing a voluntary licensing program, that the Commission proceed with clarification of how existing Commission rules and procedures will apply to new suppliers. (Bearman test., p 8, lines 11-13). For example, review of the administrative code sections listed in the Staff's proposal shows that the sections' terminology is directed towards provision of service by electric utilities to customers, and does not address the additional interactions and interfaces which need to be considered with the introduction of third party electric suppliers into the equation. Consumers suggests that incumbent utilities, potential new entrants and others could work together with the Commission's Staff to comment and propose changes to the

rules for purposes of provision of energy to customers by third party suppliers. NEMA believes that this is a sound suggestion which should be adopted by the Commission.

III. Adopting Voluntary Licensing Requirements Is Consistent With The Sensible Mainstream Of Regulation.

Michigan is the only state, to NEMA's knowledge, which has applied traditional certificate of public convenience and necessity requirements to the participation of new electric suppliers in the emerging competitive market. Based upon the record in this proceeding, it is apparent that the Act 69 certificate, and franchise requirements, have proved themselves in practice to be inconsistent with development of a competitive electric generation market.

In moving towards development of a voluntary electric supplier licensing program, the Commission's policy direction is consistent with the sensible mainstream of current regulatory practice. For example, the State of California has developed an electric service provider registration process focusing upon obtaining basic management, financial and technical information required to ensure that electric service providers are capable of providing service consistent with the open access framework established in that state. California's present form is available on the California Public Commission's website and in its most recent March, 1998 revision consists of seven pages, two pages of which provide potential suppliers with notice of specific regulatory provisions which govern their market participation and transactions with customers.

Similarly, the Pennsylvania Public Utility Commission in its PA PUC Document Number 131964 has established a uniform Electric Generation Supplier License Application Package which addresses financial qualification, technical capability, management and taxation issues among others. On April 26, 1999, the Illinois Commerce Commission, for its part, adopted rules with respect to Certification of

Alternative Retail Electric Suppliers in its Docket 98-0544. As in California and Pennsylvania, the new Illinois rules provide for provision of financial qualification, technical capability and management information needed for the Illinois Commission to grant or deny an application, which decision in Illinois is required to be made by the Illinois Commerce Commission within 45 days of filing by the applicant. 83 Ill. Adm. Code Section 451, "Certification of Alternative Retail Electric Suppliers.

Accordingly, the Commission's policy direction towards implementing a voluntary licensing program is consistent with the approach taken by other utility Commissions working to implement electric generation competition. Use of certificate of public convenience and necessity processes, and requiring individual franchises for each governmental unit in which service is to be provided, on the other hand, is not consistent with the approach taken by other states' commissions in implementing electric generation competition.

CONCLUSION

For the foregoing reasons, the National Electric Marketers Association requests that the Michigan Public Service Commission implement a voluntary electric supplier licensing program. NEMA believes that the record supports adoption of such a program in the manner and form set forth by the Staff's witness, Dr. Michel Hiser, as modified consistent with the recommendations of the National Electric Marketers Association in this brief.

Dated: May 7, 1999

Respectfully submitted,

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