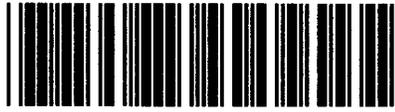




Control Number: 38645



Item Number: 24

Addendum StartPage: 0

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

August 1, 2011

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TO: Stephen Journey, Director
Commission Advising and Docket Management
William B. Travis State Office Building
1701 N. Congress, 7th Floor
Austin, Texas 78701

Courier Pick-up

RE: SOAH Docket Nos. 473-10-5991 and 473-11-0070
PUC Docket Nos. 38446 and 38645

Application of Clearview Electric Inc. for a Waiver of P.U.C. Subst. R. 25.107

Petition of Commission Staff to Revoke the Retail Electric Provider Certification of Clearview Electric Inc.

Enclosed is the Proposal for Decision (PFD) in the above-referenced case. By copy of this letter, the parties to this proceeding are being served with the PFD.

Please place this case on an open meeting agenda for the Commissioners' consideration. There is no jurisdictional deadline in this case. Please notify me and the parties of the open meeting date, as well as the deadlines for filing exceptions to the PFD, replies to the exceptions, and requests for oral argument.

Sincerely,

A handwritten signature in black ink, appearing to read "Craig R. Bennett".

Craig R. Bennett
Administrative Law Judge

Enclosure

xc: All Parties of Record

SOAH DOCKET NO. 473-10-5991
PUC DOCKET NO. 38446

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APPLICATION OF CLEARVIEW § BEFORE THE STATE OFFICE
ELECTRIC INC. FOR A WAIVER OF §
P.U.C. SUBST. R. 25.107 § OF
§ ADMINISTRATIVE HEARINGS

SOAH DOCKET NO. 473-11-0070
PUC DOCKET NO. 38645

PETITION OF COMMISSION STAFF § BEFORE THE STATE OFFICE
TO REVOKE THE RETAIL §
ELECTRIC PROVIDER §
CERTIFICATION OF CLEARVIEW § OF
ELECTRIC INC. § ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

This case involves two separate—but completely related—actions. On July 9, 2010, Clearview Electric Inc. (Clearview) filed with the Public Utility Commission of Texas (PUC or Commission) a request for a waiver from the requirements of P.U.C. SUBST. R. 25.107(f)(1). Specifically, that rule establishes the financial assurance requirements that each retail electric provider (REP), including Clearview, must satisfy. Relevant to this case, P.U.C. SUBST. R. 25.107(f)(1)(B) requires a REP to provide a \$500,000 irrevocable letter of credit to the Commission. Clearview has never provided this letter of credit. Not long after Clearview filed its request for a waiver of this REP requirement, the Staff (Staff) of the Commission filed a separate petition to revoke the REP certification of Clearview because it had not provided the required \$500,000 letter of credit. So, the issue in this case is whether Clearview should be granted a waiver and, if not, whether its REP certification should be revoked. After considering all of the evidence and arguments presented, the Administrative Law Judge (ALJ) recommends that Clearview's request for a waiver be denied. However, the ALJ does not recommend that its REP certification be revoked. Rather, the ALJ recommends that its REP certification be suspended until such time as it can show complete compliance with the requirements of P.U.C. SUBST. R. 25.107.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

No party contested issues of notice or jurisdiction in this proceeding, so those matters are more fully set out in the findings of fact and conclusions of law. However, the ALJ does note at the outset that the Commission has jurisdiction over this proceeding pursuant to Sections 39.352 and 39.356 of the Public Utility Regulatory Act (PURA), while the State Office of Administrative Hearings (SOAH) has jurisdiction over matters relating to the conduct of the hearing in this proceeding pursuant to TEX. GOV'T. CODE ANN. § 2003.049.

On August 24, 2010, the Commission referred Clearview's request for a waiver to SOAH for a hearing. Shortly thereafter, on September 10, 2010, the Commission referred Staff's enforcement action to SOAH as well. On October 25, 2010, a joint prehearing conference was held in the two dockets. At that time, the parties agreed the two dockets should be joined for purposes of a hearing and issuance of a single proposal for decision (PFD). The hearing convened on May 10, 2011, before ALJ Craig R. Bennett in the William P. Clements Building, 300 West 15th Street, Fourth Floor, Austin, Texas. Staff was represented by Jeff Stuart and Jennifer Littlefield, attorneys with the PUC's legal division. Clearview was represented by attorney Christopher Malish. The hearing concluded that day, and the record closed with the filing of reply briefs on July 14, 2011.

II. APPLICABLE LAW

A utility may not provide retail electric service in Texas unless the utility holds a certificate as a REP from the Commission.¹ In considering an application for REP certification, the Commission must consider whether an applicant has the financial, technical, and managerial resources necessary to provide adequate and continuous electric service and to meet applicable customer protection requirements under the law.² In addition, the Commission must determine if the applicant complies with all applicable customer protection provisions, disclosure requirements, and marketing guidelines.³

¹ PURA § 39.352(a).

² PURA § 39.352(b).

³ PURA § 39.352(c).

To carry out the provisions of PURA, the Commission adopted P.U.C. SUBST. R. 25.107. That rule sets out various requirements for REPs to meet in order to obtain and maintain their certification. REPs that were certificated at the time the rule was adopted were given a 12-month phase-in period to comply with the requirements of the rule. The phase-in period ended on May 21, 2010, and the rule has since been revised and the phase-in period has been removed. Now, all REPS are required to comply with the requirements of P.U.C. SUBST. R. 25.107. Among other financial requirements, a REP must provide an irrevocable stand-by letter of credit in the amount of \$500,000 payable to the Commission to cover the REP's outstanding customer deposits and residential advance payments, as well as provide assurance that the REP will be financially capable of participating in the ERCOT market long-term.⁴

Both PURA and the Commission's rules allow the Commission to suspend or revoke a REP's certificate for a significant violation of PURA or rules adopted under PURA, which would include the requirements of P.U.C. SUBST. R. 25.107(f)(1)(B).⁵ A "significant violation" includes the failure to maintain financial resources in accordance with P.U.C. SUBST. R. 25.107(f).⁶ However, the Commission may also make exceptions to the requirements of its rules for "good cause."⁷

So, if it finds good cause in this case, the Commission could choose to grant a waiver to Clearview from the requirement that it post a \$500,000 letter of credit. Alternately, the Commission could deny the waiver, find that Clearview's failure to post the letter of credit is a significant violation, and then suspend or revoke Clearview's REP certification. Each of these courses of action has a basis in the Commission's rules and other applicable law.

⁴ P.U.C. SUBST. R. 25.107(f)(1)(B). Certain REPs with a tangible net worth greater than \$100 million and meeting other requirements do not have to provide the letter of credit if they meet all of the requirements of P.U.C. SUBST. R. 25.107(f)(1)(A). Clearview does not qualify under this provision.

⁵ PURA § 39.356(a).

⁶ P.U.C. SUBST. R. 25.107(j)(1), (6), and (17).

⁷ P.U.C. SUBST. R. 25.3(b).

III. PRELIMINARY ORDER ISSUES

The Commission issued a preliminary order in each of these two dockets. In regard to Clearview's request for a waiver, the Commission's Preliminary Order directed the ALJ and the parties to address the following issues:

1. Given the size of its customer base and the manner in which it conducts its business operations, does Clearview have sufficient financial strength to participate in the ERCOT market?
2. Other than the \$500,000 irrevocable stand-by letter of credit requirement of P.U.C. SUBST. R. 25.107(f)(1)(B), does Clearview comply with all the requirements of current P.U.C. SUBST. R. 25.107 that are applicable to it?
3. Given all the facts and circumstances, including without limitation, the manner in which Clearview manages its business and the size of its customer base, should the waiver be granted?
4. If the answers to issues 1, 2, and 3 are yes, what is the appropriate amount for the irrevocable stand-by letter of credit required by P.U.C. SUBST. R. 25.107(f)(1)(B) necessary to protect the market and Clearview's customers?
5. If the answers to issues 1, 2, and 3 are yes, what other requirements, including a prohibition on adding customers or marketing, should be imposed on Clearview until such time as they are in full compliance with all of the provisions of P.U.C. SUBST. R. 25.107 that are applicable to it?
6. If the answers to issues 1, 2, and 3 are yes, what should be the term of the waiver?
7. In the interest of judicial economy, should this docket be consolidated with Petition of Commission Staff to Revoke the Retail Electric Provider Certification of Clearview Electric Inc., Docket No. 38645, SOAH Docket No. 473-11-0070?

In regard to Staff's enforcement action, the Commission's Preliminary Order identified the following issues to be addressed by the ALJ and the parties:

1. Is Clearview in compliance with the access to capital financial requirements set forth in P.U.C. SUBST. R. 25.107(f)(1)?
2. Has Clearview timely complied with the phase-in provisions set forth in P.U.C. SUBST. R. 25.107(k)?

3. If Clearview is not in compliance with one or more of the sections of P.U.C. SUBST. R. 25.107 listed above, is such a violation a significant violation for purposes of P.U.C. SUBST. R. 25.107(j)?
4. If the violation is a significant violation, should Clearview's REP certificate be amended, suspended, or revoked pursuant to P.U.C. SUBST. R. 25.107(j)?
5. In the interest of judicial economy, should this docket be consolidated with Application of Clearview Electric Inc. for a Waiver of P.U.C. SUBST. R. 25.107, Docket No. 38446, SOAH Docket No. 473-10-5991?

The ALJ addresses these issues in detail in the section below.

IV. DISCUSSION

Although the parties' briefing does not address many of the questions from the Commission's preliminary orders, the ALJ finds it helpful to structure this PFD to address and answer those questions. In answering them, the ALJ is able to present a clear view of the facts and circumstances so that the Commission can address the ultimate issues the parties have briefed, which are: Should Clearview be required to provide an irrevocable \$500,000 letter of credit to the Commission? If so, should the Commission suspend or revoke its REP certification if it is unable to comply with this requirement? With this in mind, the ALJ now turns to the Commission's referred issues. Subheadings A through G below address the Commission's inquiries regarding Clearview's request for a good cause waiver. Subheadings H through L address the Commission's referred issues in Staff's enforcement action against Clearview. As appropriate, the ALJ refers the Commission to the discussion in different sections, rather than simply restating the ALJ's analysis of the evidence and arguments.

- A. Given the size of its customer base and the manner in which it conducts its business operations, does Clearview have sufficient financial strength to participate in the ERCOT market?**

Clearview has been a certificated REP in Texas since October 27, 2006. As of the time of the hearing, it provided service to customers in seven states: Texas, Connecticut, New York,

New Jersey, Pennsylvania, Maryland, and Delaware.⁸ Clearview is unique in that it has only 28 customers in Texas, but has about 37,000 customers in the other six states in which it provides service.⁹ The average monthly total billing for its 28 customers in Texas is roughly \$4,500 (*i.e.*, approximately \$162 per customer, per month).¹⁰ So, for a full year, Clearview's total revenue from all of its Texas customers combined is approximately \$55,000.

Although Clearview's customer base and billings in Texas are very small, it has more significant operations in the other six states in which it operates. Basically, Clearview is a utility of some significant size, but with only limited operations in Texas. Clearview submitted its financial documents under seal,¹¹ so the ALJ does not discuss the details of those documents in this PFD. But, the Commission may review them as it considers the ALJ's conclusions. Among other things, those financial documents reflect that Clearview is a financially stable company that is adequately capitalized. Based on its prior growth and current financial situation, Clearview expects its customer count in those other states to grow to between 50,000 and 75,000 customers by the end of 2011.¹²

If requested, Clearview could deposit \$100,000 with the Commission as a financial security measure.¹³ But, in order to obtain an irrevocable letter of credit for \$500,000 to deposit with the Commission, Clearview has been informed by its investment institutions that it would need to be able to have and deposit that full amount of \$500,000 with the financial institution.¹⁴ Therefore, Clearview argues that it does not make financial sense for it to pledge that amount of assets for only 28 customers at this time. Rather, it would make more financial sense for it to simply pull out of the Texas market—which is something the REP rules are designed to avoid (namely, utilities dropping customers and ceasing operations). Therefore, it argues that it should be given a waiver.

⁸ Tr. at 43.

⁹ Tr. at 44.

¹⁰ Tr. at 33; Clearview Ex. 1, at 3.

¹¹ Clearview Ex. 2.

¹² Tr. at 47. There is no evidence of any significant growth expected in Texas in the near term.

¹³ Tr. at 50-51.

¹⁴ Tr. at 33; Clearview Ex. 1, at 3.

Staff appears to agree that Clearview is financially stable. When questioned at the hearing, Staff's financial expert, Neal Frederick, testified that he did not believe that Clearview was in a financially unstable position such that it presented a risk of default or potential financial harm to its customers, ERCOT, or other utilities.¹⁵ He further testified that it is unlikely that there would be any scenario where Clearview's liabilities for which the letter of credit is designed to protect would be more than \$75,000, and that a deposit of \$17,857 per customer (which is what a \$500,000 letter of credit would provide) is more than would be required from a financial standpoint for the protection of customers, ERCOT, and other utilities.¹⁶ Mr. Frederick agreed that, if the Commission's ultimate concern is to ensure financial accountability to customers, ERCOT, or potential creditors, then a lesser letter of credit (in the amount of \$50,000 or \$100,000) from Clearview would be sufficient.¹⁷

Because the evidence establishes that Clearview could provide either funds or a letter of credit up to \$100,000 to the Commission, and this amount is sufficient to protect Clearview's customers, ERCOT, and other utilities, the ALJ concludes that record clearly establishes that Clearview has ample financial strength to cover its potential exposure to the Texas market. However, the ALJ understands that the Commission's concern goes beyond this. In adopting the financial requirements that must be met by REPs to be certificated, the Commission noted that the objective of those requirements was to "reduce the probability of REP default" and that the requirements "should more simply reflect that the REP has access to a sufficient level of financial resources to enter and operate in the market, rather than attempt to match financial requirements with the REP's exposure to the market."¹⁸ Thus, it is clear that the Commission's concern is with the overall financial viability of the utility and its ability to continue as a going concern, and not just its ability to cover its potential financial exposure in Texas.

¹⁵ Tr. at 57.

¹⁶ Tr. at 75.

¹⁷ Tr. at 58.

¹⁸ *Order Adopting the Repeal of §25.107 and new §25.107 as Approved at the April 23, 2009 Open Meeting*, Project No. 35767, at 47 (May 1, 2009).

But, even considering this larger concern by the Commission, the ALJ finds that Clearview has sufficient financial strength to participate in the ERCOT market. Clearview has more than 37,000 customers in seven states and is projected to add between 13,000 and 38,000 more customers this year. It is only in Texas that it has a limited presence, and this limited presence is not an indicator that the company is financially weak or unstable. There is no dispute that it is a financially stable utility with no imminent threat of failure or default. Given that it is stable as a company, and is able to offer immediate security that is more than adequate to cover its potential financial exposure in the Texas market, there is no reason to believe Clearview is not financially strong enough to participate in the ERCOT market.

B. Other than the \$500,000 irrevocable stand-by letter of credit requirement of P.U.C. SUBST. R. 25.107(f)(1)(B), does Clearview comply with all the requirements of current P.U.C. SUBST. R. 25.107 that are applicable to it?

There is no dispute that Clearview has complied with all other applicable requirements of P.U.C. SUBST. R. 25.107. The only challenge raised by Staff relates to the letter of credit. Because this is undisputed, the ALJ does not discuss it further.

C. Given all the facts and circumstances, including without limitation, the manner in which Clearview manages its business and the size of its customer base, should the waiver be granted?

This issue essentially presents a policy question. In the Commission's preliminary order in regard to Clearview's request for a waiver, the Commission very clearly decided that a small customer base and load size are insufficient, in themselves, to justify a waiver. In particular, the Commission stated:

The Commission determines that a limited load or customer count does not *per se* constitute good cause for a waiver from any of the requirements set forth in P.U.C. SUBST. R. 25.107(f) or (k). Speaking more specifically to the waiver from P.U.C. SUBST. R. 25.107(f)(1)(B) sought by Clearview in this docket, a limited load or customer count does not, in and of itself, constitute good cause for a waiver from satisfaction of the access to capital requirements set forth in Rule 25.107(f)(1)(A) or (B).

In adopting the current REP certification rule, the Commission considered proposals to scale a REP's capital requirements in relation to the REP's load or customer counts. The Commission declined to adopt such an approach, determining that the rule should "more simply reflect that the REP has access to a sufficient level of financial resources to enter and operate in the market, rather than attempt to match the financial requirements to the REP's exposure to the market." In adopting the new Rule 25.107, the Commission decided that provision and maintenance of an irrevocable letter of standby credit with a face value of \$500,000 was a minimum means by which a REP that was serving load on or before January 1, 2009 could demonstrate a sufficient ability to access capital in order to operate in the market. Accordingly, the Commission concludes that a limited load or customer count does not, by itself, constitute good cause for a waiver.¹⁹

Yet, a small customer count and/or limited load are the only significant reasons offered by Clearview to support its request for a waiver. Although Clearview has established its financial stability, that is not really a justification for the waiver. Rather, the only rationale for why a waiver would be appropriate for Clearview is because it has a small customer base and load size in Texas. Based upon the Commission's preliminary orders, the ALJ does not believe that rationale could support a finding of adequate good cause for the waiver.

Moreover, it presents a dangerous precedent to grant a waiver solely based upon customer count and load size. At some point, the Commission would basically be undercutting its reason for the financial security rules—which were not to "attempt to match financial requirements with the REP's exposure to the market," but to ensure the market has more financially-stable utilities.²⁰ Given this purpose behind the rules, and the Commission's prior determination that customer count and load size will not justify a waiver by themselves, the ALJ does not think that good cause has been shown for the waiver. Therefore, the ALJ recommends that the waiver request be denied.

¹⁹ *Preliminary Order*, P.U.C. Docket No. 38446, at 3 (Oct. 21, 2010). (cites omitted)

²⁰ *Order Adopting the Repeal of §25.107 and new §25.107 as Approved at the April 23, 2009 Open Meeting*, Project No. 35767, at 47 (May 1, 2009).

D. If a waiver is granted, what is the appropriate amount for the irrevocable stand-by letter of credit required by P.U.C. SUBST. R. 25.107(f)(1)(B) necessary to protect the market and Clearview's customers?

The ALJ has not recommended that a waiver be granted. However, if the Commission disagrees and concludes that one should be granted, then the evidence indicates that a much lower letter of credit would be sufficient to protect the market and Clearview's customers. Staff's expert appeared to indicate that one year's worth of customer billings would more than cover Clearview's potential liabilities.²¹ If the Commission's concern is to ensure financial accountability to customers, ERCOT, or potential creditors, then a letter of credit between \$50,000 and \$100,000 from Clearview would be sufficient, according to Staff's expert.²² Given Clearview's total average monthly billing of \$4,562, then the total annual billing amount in Texas is \$54,744 (*i.e.*, \$4,562 x 12 months). Therefore, if the Commission granted a waiver to Clearview, a letter of credit of \$55,000 would be adequate to protect the market and Clearview's customers.²³

E. If a waiver is granted, what other requirements, including a prohibition on adding customers or marketing, should be imposed on Clearview until such time as they are in full compliance with all of the provisions of P.U.C. SUBST. R. 25.107 that are applicable to it?

The ALJ has not recommended that a waiver be granted. However, if the Commission disagrees and concludes that one should be granted, then it would be reasonable for the Commission to require that Clearview undertake no additional marketing efforts in Texas or sign up any new customers until such time as it can satisfy all requirements for REP certification under P.U.C. SUBST. R. 25.107. This will ensure that Clearview's potential financial exposure does not increase. Clearview has agreed to these conditions if a waiver is granted.

²¹ Tr. at 75.

²² Tr. at 58.

²³ After the hearing, Clearview submitted evidence showing it had provided a letter of credit to the Commission in the amount of \$30,000 on July 7, 2011. *See Opposed Motion to Admit Late-Filed Exhibit* (referencing Item 157 in Docket No. 37919). Although this is more than \$1,000 per customer, the evidence in the record does not establish that it would be a sufficient amount to satisfy any financial concerns Staff might have. Therefore, the ALJ maintains that a higher letter of credit, in the amount of \$55,000, should be required if a waiver is granted.

F. If a waiver is granted, what should be the term of the waiver?

The ALJ has not recommended that a waiver be granted. However, if the Commission disagrees and concludes that one should be granted, then it would be reasonable for the Commission to allow the waiver to stay in place until such time as Clearview meets all requirements for REP certification under P.U.C. SUBST. R. 25.107. Given the recommended terms of the waiver (namely, the prohibition on Clearview advertising in Texas or signing up new customers), it does not seem prudent to put a time limit on the waiver, because it would potentially necessitate additional administrative action that might not otherwise be necessary. Rather, the waiver could remain in place with the accompanying prohibitions indefinitely, until such time as Clearview is able to comply with all requirements of P.U.C. SUBST. R. 25.107.

G. In the interest of judicial economy, should this docket be consolidated with Petition of Commission Staff to Revoke the Retail Electric Provider Certification of Clearview Electric Inc., Docket No. 38645, SOAH Docket No. 473-11-0070?

The parties agreed that the dockets could be consolidated, and the ALJ has consolidated them for purposes of the hearing and issuance of this PFD. Therefore, this issue is moot and requires no additional consideration by the Commission at this point in time.

H. Is Clearview in compliance with the access to capital financial requirements set forth in P.U.C. SUBST. R. 25.107(f)(1)?

It is undisputed that Clearview is not in compliance with the access to capital requirements of P.U.C. SUBST. R. 25.107(f)(1), because it has not provided the required \$500,000 letter of credit to the Commission. Because this is undisputed, the ALJ does not address it any further detail here.

I. Has Clearview timely complied with the phase-in provisions set forth in P.U.C. SUBST. R. 25.107(k)?

As with the issue above, it is undisputed that Clearview did not timely comply with the phase-in provisions because it has never provided the irrevocable \$500,000 letter of credit to the Commission. Except for this requirement, Clearview has otherwise complied with all other requirements under the Commission's rules for REP certification.

- J. If Clearview is not in compliance with one or more of the sections of P.U.C. SUBST. R. 25.107 listed above, is such a violation a significant violation for purposes of P.U.C. SUBST. R. 25.107(j)?**

The Commission's rules allow revocation or suspension for "significant" violations of PURA or the Commission's rules.²⁴ Moreover, in its rules, the Commission has provided a non-exclusive list of what are considered significant violations. Included among the list of significant violations is the "failure to maintain financial resources in accordance with subsection (f)" of P.U.C. SUBST. R. 25.107.²⁵ This is the specific violation that Clearview has committed by failing to supply the \$500,000 letter of credit to the Commission. Therefore, it is undisputed that Clearview's violation is significant under the Commission's rules, and subjects Clearview to possible revocation or suspension of its REP certificate.

- K. If the violation is a significant violation, should Clearview's REP certificate be amended, suspended, or revoked pursuant to P.U.C. SUBST. R. 25.107(j)?**

Although Clearview's violation is significant under the Commission's rules, the ALJ does not find that Clearview's REP certificate should be revoked. Clearview is a financially stable company that is capable of providing continuous and adequate retail electric service in Texas. Clearview has met all other requirements for REP certification except for the \$500,000 letter of credit. Even Staff's own expert testified that \$500,000 would essentially "over-secure" the potential financial exposure that Clearview might have in regard to its 28 customers in Texas. From a financially prudent standpoint, it makes little sense to require Clearview to earmark and set aside \$500,000 for only 28 customers. Thus, it is rational for it to seek to avoid this requirement and its effort in seeking a waiver does not reflect on its ability to provide service and protect the financial concerns of ERCOT and customers. So, although the violation is significant, the ALJ does not find that revocation is the most appropriate sanction. Rather, revocation would mean that Clearview's 28 customers in Texas will be punished by having to switch service and deal with the administrative hassles associated with that.

²⁴ P.U.C. SUBST. R. 25.107(j). Amendment of the REP certificate is also allowed, but no parties ask for this and it does not appear relevant to this case. Therefore, the ALJ does not address it.

²⁵ P.U.C. SUBST. R. 25.107(j)(6).

Instead, the ALJ believes that Clearview's REP certificate should be suspended. Under the Commission's rules, a suspension will allow Clearview to continue to provide service to its existing customers, but will require it to cease all REP activities associated with obtaining new customers in Texas.²⁶ In particular, the Commission's rules provide:

Suspension and revocation. A certificate granted pursuant to this section is subject to amendment, suspension, or revocation by the commission for a significant violation of PURA, commission rules, or rules adopted by an independent organization. A suspension of a REP certificate requires the cessation of all REP activities associated with obtaining new customers in the state of Texas. A revocation of a REP certificate requires the cessation of all REP activities in the state of Texas, pursuant to commission order.²⁷

So, a suspension essentially keeps the status quo—allowing the REP to provide service to its existing customers, but prohibiting it from obtaining any additional customers—while a revocation requires the REP to cease *all* REP activities. In the event of a revocation, Clearview's existing customers would be required to obtain service from a new REP.

In this case, a suspension appears to strike the appropriate balance between protecting ERCOT and the customers from a financial standpoint and, on the other hand, ensuring continuous and adequate service with minimal burden to Clearview's existing customers. And, since Clearview has already provided a \$30,000 letter of credit to the Commission, the remaining unprotected risk to ERCOT, customers, or any other utility is minimal. Therefore, the ALJ recommends that Clearview's REP certificate be suspended indefinitely, until such time as Clearview can comply with all requirements of the Commission's rules for REP certification. During its suspension, Clearview would be prohibited from obtaining any new customers and undertaking any actions directed toward obtaining new customers.

²⁶ P.U.C. SUBST. R. 25.107(j).

²⁷ P.U.C. SUBST. R. 25.107(j).

- L. **In the interest of judicial economy, should this docket be consolidated with Application of Clearview Electric Inc. for a Waiver of P.U.C. SUBST. R. 25.107, Docket No. 38446, SOAH Docket No. 473-10-5991?**

This issue is addressed under Section G above and is moot, because the two dockets have been consolidated.

V. CONCLUSION

In conclusion, the ALJ finds that Clearview is a financially-stable utility with a very limited customer base and load in Texas. Its financial exposure to Texas is very limited, as its total customer billings average less than \$55,000 per year for all customers. It has provided a \$30,000 letter of credit to the Commission, which is sufficient to cover most of the potential financial risk it might pose. But, Clearview has committed a significant violation of the Commission's rules by failing to provide the \$500,000 letter of credit required under P.U.C. SUBST. R. 25.107. Clearview's small customer count and load size are not a sufficient basis for a waiver of this requirement. But, revocation of Clearview's REP certificate under these circumstances is not the most appropriate sanction. Instead, suspension of Clearview's certificate will accomplish the goal of protecting Clearview's customers, ERCOT, and other utilities at this time, while minimizing the disruption and hassle to Clearview's current customers. Therefore, the ALJ recommends that Clearview's REP certificate be suspended until such time as Clearview can demonstrate compliance with all applicable requirements of P.U.C. SUBST. R. 25.107. In support of this recommendation, the ALJ makes the following findings of fact and conclusions of law.

VI. FINDINGS OF FACT

1. Clearview Electric Inc. (Clearview) has been a certificated Retail Electric Provider (REP) in Texas since October 27, 2006.
2. In 2009, the Public Utility Commission (PUC or Commission) amended P.U.C. SUBST. R. 25.107, raising the requirements for REPs to meet to obtain and maintain their certification.

3. Clearview was in compliance with PUC SUBST. R. 25.107(f) before the Commission's 2009 amendments.
4. REPs that were certificated prior to the 2009 rule amendments were given a 12-month phase-in period to comply with the requirements of the amended rule.
5. The phase-in period expired on May 21, 2010, and the rule has since been revised and the phase-in period has been removed.
6. Currently, all REPs are required to comply with the requirements of P.U.C. SUBST. R. 25.107.
7. Among other requirements set forth in P.U.C. SUBST. R. 25.107, a REP must demonstrate that it has adequate access to capital by providing evidence of either: (1) an investment-grade credit rating; (2) tangible net worth greater than or equal to \$100 million, a minimum current ratio of 1.0, and a debt-to-total capitalization ratio of 0.60; or (3) shareholders' equity of not less than \$1 million and an irrevocable stand-by letter of credit with a face value of \$500,000 payable to the Commission, as required by P.U.C. SUBST. R. 25.107(f)(1).
8. As applied to this case, it is undisputed that Clearview must demonstrate its access to capital by providing an irrevocable stand-by letter of credit in the amount of \$500,000 payable to the Commission.
9. Clearview has never provided the required \$500,000 irrevocable stand-by letter of credit to the Commission.
10. Clearview has provided a \$30,000 irrevocable stand-by letter of credit to the Commission.
11. Clearview currently has only 28 customers in Texas.
12. Clearview currently has only \$4,562 in average monthly billings for all of its customers in Texas.
13. As of the time of the hearing, Clearview provided service to customers in seven states: Texas, Connecticut, New York, New Jersey, Pennsylvania, Maryland, and Delaware.
14. Although Clearview has only 28 customers in Texas, it has approximately 37,000 customers in the other six states in which it provides service.
15. Clearview is a financially-stable company that is not in imminent danger of default.

16. Clearview expects its total customer count in the United States to grow to between 50,000 and 75,000 customers by the end of 2011.
17. On July 13, 2010, Clearview filed with the Commission a request for a good cause waiver from the requirements of P.U.C. SUBST. R. 25.107(f) and (k).
18. On August 24, 2010, the Commission referred Clearview's request for a waiver in P.U.C. Docket No. 38446 to the State Office of Administrative Hearings (SOAH) for assignment of an Administrative Law Judge (ALJ) to conduct a hearing and issue a proposal for decision (PFD), if necessary.
19. On September 8, 2010, Staff (Staff) of the Commission filed a petition to revoke the REP certificate of Clearview. This action was assigned P.U.C. Docket No. 38645.
20. On September 10, 2010, the Commission referred Staff's enforcement action in P.U.C. Docket No. 38645 to SOAH.
21. On October 21, 2010, the Commission issued a Preliminary Order in P.U.C. Docket No. 38446, as well as a separate Preliminary Order in P.U.C. Docket No. 38645, identifying the issues to be addressed by the parties in the proceedings.
22. On October 25, 2010, a joint prehearing conference was held in the two dockets. At that time, the parties agreed the two dockets should be joined for purposes of a hearing and issuance of a single PFD. The parties further agreed upon a procedural schedule and hearing date and time for the dockets, which was adopted by order of the ALJ.
23. On May 10, 2011, an evidentiary hearing on the merits in the two dockets was conducted before ALJ Craig R. Bennett in the William P. Clements Building, 300 West 15th Street, Fourth Floor, Austin, Texas. Staff appeared and was represented by Jeff Stuart and Jennifer Littlefield, attorneys with the Commission's legal division. Clearview was represented by attorney Christopher Malish. The hearing concluded that same day, and the record closed on July 14, 2011, with the filing of reply briefs.

VII. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this proceeding, including the authority to grant a good cause waiver, or to revoke or suspend a REP certificate for a significant violation of the Public Utility Regulatory Act (PURA) or the Commission's rules. PURA §§ 14.051, 17.051, 39.352, and 39.356(a).
2. SOAH has jurisdiction over this proceeding, including the authority to issue a proposal for decision pursuant to PURA § 14.053 and TEX. GOV'T. CODE ANN. § 2001.058.

3. Staff provided proper notice of the petition to revoke to Clearview's REP certificate.
4. Proper notice of the hearing was provided in accordance with the Texas Administrative Procedure Act §§ 2001.051, 2001.052, and 2001.054.
5. A REP that obtained certification prior to the amendments adopted in P.U.C. SUBST. R. 25.107 (adopted on May 1, 2009, and effective on May 21, 2009), was allowed to continue to operate as a REP for not more than twelve months after May 21, 2009, without meeting the requirements of the amended rule. Former P.U.C. SUBST. R. 25.107 (adopted May 1, 2009 and effective on May 21, 2009).
6. Clearview was required to be in compliance with P.U.C. SUBST. R. 25.107 by May 21, 2010.
7. Clearview has failed to demonstrate that it had adequate access to capital by providing evidence of either: (1) an investment-grade credit rating; (2) tangible net worth greater than or equal to \$100 million, a minimum current ratio of 1.0, and a debt-to-total capitalization ratio of 0.60; or (3) shareholders' equity of not less than \$1 million and an irrevocable stand-by letter of credit with a face value of \$500,000 payable to the Commission, as required by P.U.C. SUBST. R. 25.107(f)(1).
8. Both PURA and the Commission's rules allow the Commission to suspend or revoke a REP's certificate for a significant violation of PURA or rules adopted under PURA, which would include the requirements of P.U.C. SUBST. R. 25.107(f)(1). PURA § 39.356(a) and P.U.C. SUBST. R. 25.107(j).
9. A violation of P.U.C. SUBST. R. 25.107(f)(1) is a significant violation. P.U.C. SUBST. R. 25.107(j)(6).
10. The Commission may make exceptions to the requirements of its rules for good cause. P.U.C. SUBST. R. 25.3.
11. A small customer base and load size are insufficient, in themselves, to establish good cause for waiving the requirements of P.U.C. SUBST. R. 25.107(f)(1).
12. Clearview has failed to establish good cause for the Commission to grant a waiver of the requirements of P.U.C. SUBST. R. 25.107(f)(1)(B).
13. Given the size of its customer base and the manner in which it conducts its business operations, Clearview has sufficient financial strength to participate in the ERCOT market.

14. Other than the \$500,000 irrevocable stand-by letter of credit requirement of P.U.C. SUBST. R. 25.107(f)(1)(B), Clearview has complied with all the requirements of current P.U.C. SUBST. R. 25.107 that are applicable to it.
15. Clearview's REP Certificate should be suspended until such time as Clearview can demonstrate compliance with all applicable requirements of P.U.C. SUBST. R. 25.107.

SIGNED August 1, 2011.



CRAIG R. BENNETT
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

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STYLE/CASE: CLEARVIEW ELECTRIC INC

SOAH DOCKET NUMBER: 473-11-0070

REFERRING AGENCY CASE: 38645

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