

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265**

Public Meeting held May 18, 2023

Commissioners Present:

Gladys Brown Dutrieuille, Chairman
Stephen M. DeFrank, Vice Chairman
Ralph V. Yanora
Kathryn L. Zerfuss
John F. Coleman, Jr.

Petition of Verdigris Energy, LLC for Reconsideration of the Pennsylvania Public Utility Commission's Final Order entered February 17, 2023, and Reinstatement of the Company's License to Operate as a Broker/Marketer of Electric Generation Supplier Services

A-2012-2284040

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) is the Petition of Verdigris Energy, LLC (Verdigris Energy or the Company) for Reconsideration of the Commission's Final Order entered on February 17, 2023, cancelling the Company's electric generation supplier (EGS) license.¹ Through this Petition, Verdigris Energy seeks reinstatement of its license to operate as an EGS in the Commonwealth.

The Pennsylvania Public Utility Code and Commission regulations require an EGS to furnish and maintain a bond or other financial security approved in form and amount by the Commission. *See* 66 Pa.C.S. § 2809(c)(1)(i) and 52 Pa. Code § 54.40. Verdigris Energy's license was cancelled due to the Company's failure to maintain an

¹ *Electric Generation Supplier License Cancellations of Companies with an Expired Financial Security*, Docket No. M-2022-3030286 (Final Order entered February 17, 2023) (*Final Order*).

approved financial security instrument on file with the Commission. Through this Order, the Commission denies Verdigris Energy's Petition for Rescission, but advises the Company that it may file a new application with the Commission if it wishes to provide EGS services in Pennsylvania in the future.

BACKGROUND

On May 10, 2012, the Commission issued Verdigris Energy a license to provide electric generation supplier services in the Commonwealth as a broker/marketer. *See* Docket No. A-2012-2284040. The Company initially furnished a fixed-term bond through the Western Surety Company. In 2013, Verdigris Energy furnished a bond through the Philadelphia Indemnity Insurance Company (Philadelphia Indemnity). The Philadelphia Indemnity bond took effect on November 2, 2013, with an expiration date of November 2, 2014. Philadelphia Indemnity continued the bond annually through November 2, 2022. These continuation certificates were filed with and accepted by the Commission.

By letter dated August 2, 2022, the Commission's Bureau of Technical Utility Services (TUS) warned Verdigris Energy of the upcoming, November 2, 2022, expiration of its bond and advised the Company to update its bond 30 days prior to the bond's expiration date or risk cancellation of its EGS license (Bond Renewal Notice Letter). Because Verdigris Energy failed to update its bond, the Commission entered an Order on December 22, 2022, tentatively cancelling Verdigris Energy's EGS license due to the Company's failure to maintain a bond or other financial security approved by the Commission.² The *Tentative Order* made clear that failure to timely file a proper financial security instrument could result in the cancellation of Verdigris Energy's

² *Electric Generation Supplier License Cancellations of Companies with an Expired Financial Security, Insufficient Financial Security Amount or Language*, Docket No. M-2022-3030286 (Tentative Order entered December 22, 2022) (*Tentative Order*).

license. The Commission served the *Tentative Order* on Verdigris Energy,³ the Office of Consumer Advocate, the Office of Small Business Advocate, the Commission’s Bureau of Investigation & Enforcement, and all jurisdictional electric distribution companies.

The Commission also published the *Tentative Order* in the *Pennsylvania Bulletin*,⁴ providing for a 30-day comment period. The *Tentative Order* made clear that, absent the filing of adverse public comment or an approved financial security within those 30 days, the Commission would issue a final order formally cancelling Verdigris Energy’s EGS license. Verdigris Energy did not file an adverse comment, nor did the Company timely file an approved financial security instrument with the Commission. No other party filed comments regarding the tentative cancellation of Verdigris Energy’s license. Therefore, the Commission entered its *Final Order* on February 17, 2023, cancelling Verdigris Energy’s EGS license.

On March 14, 2023, the Commission received a continuation certificate continuing the Philadelphia Indemnity bond through November 2, 2023. This continuation certificate was signed and dated August 4, 2022. The next day, March 15, 2023, the Commission received Verdigris Energy’s Petition for Reconsideration of the *Final Order* and Reinstatement of its EGS License. And on March 22, 2023, the Commission received an updated *continuous* bond from Philadelphia Indemnity that was signed, dated, and effective November 2, 2022. However, neither the continuation certificate nor the continuous bond had any effect because they were both received *after* Verdigris Energy’s license had been cancelled.

³ The Commission served the *Tentative Order* on Verdigris Energy via email. The Company acknowledges receipt of the email including the *Tentative Order*; however, Verdigris Energy did not open the attached file—a pdf file of the *Tentative Order*—because it believed that the email was a “phishing” email. See Verdigris Energy Petition at 2, Exhibit 4.

⁴ 53 Pa.B. 117 (January 7, 2023).

The Commission notes that Verdigris Energy did not include a certificate of service with its Petition. As such, there is no evidence that the Company properly served its Petition in accordance with 52 Pa. Code § 5.41(b). However, because we are denying the Company's Petition, we will overlook this violation of our regulations as no other party was harmed by this defect in service.

Although Verdigris Energy described its Petition as a Petition for Reconsideration, it was not filed within 15 days of the Commission's *Final Order* (entered February 17, 2023) as required by the Commission's regulations at 52 Pa. Code § 5.572(c). As such, the Company's Petition will be treated as a Petition for Rescission or Amendment, which can be filed at any time. *See* 66 Pa.C.S. § 703(g) and 52 Pa. Code § 5.572(d).

DISCUSSION

A. Legal Standards

Both the Public Utility Code and Commission regulations require that an EGS furnish to and maintain with the Commission a bond or other approved financial security instrument to ensure the EGS's financial responsibility and the supply of electricity at retail in accordance with contracts, agreements, or arrangements. 66 Pa.C.S. § 2809(c)(1)(i) and 52 Pa. Code § 54.40. No license will be issued or remain in force unless the EGS maintains and provides the Commission a valid financial security. *Id.*

Pursuant to the Public Utility Code, an EGS has the right to seek relief from a Commission order cancelling its license. *See* 66 Pa.C.S. § 703(g) (relating to the rescission and amendment of orders). Such a request for relief must be consistent with Commission regulations. *See* 52 Pa. Code § 5.572 (relating to petitions for relief following the issuance of a final decision).

The standards for granting a petition for rescission or amendment were set forth in *Duick v. Pennsylvania Gas and Water Company*, 56 Pa. P.U.C. 553 (1982):

A petition for reconsideration, under the provisions of 66 Pa. C.S. § 703(g), may properly raise any matters designed to convince the Commission that it should exercise its discretion under this code section to rescind or amend a prior order in whole or in part. In this regard, we agree with the Court in the *Pennsylvania Railroad Company* case, wherein it was stated that “[p]arties . . . cannot be permitted by a second motion to review and reconsider, to raise the same questions which were specifically decided against them . . .” What we expect to see raised in such petitions are new and novel arguments, not previously heard, or considerations which appear to have been overlooked by the Commission.

Duick, 56 Pa. P.U.C. at 559 (quoting *Pennsylvania Railroad Co. v. Pennsylvania Public Service Commission*, 179 A. 850, 854 (Pa. Super. Ct. 1935)).

Under the standards of *Duick*, a petition for rescission or amendment may properly raise any matter designed to convince the Commission that it should exercise its discretion to rescind or amend a prior order, in whole or in part. However, such petitions are likely to succeed only when they raise “new and novel arguments” not previously heard or considerations which appear to have been overlooked by the Commission. *Duick*, 56 Pa. P.U.C. at 559.

The Commission has administrative discretion regarding whether to grant or deny a petition for rescission or amendment of an order filed under 66 Pa.C.S. § 703(g). *West Penn Power Co. v. Public Utility Commission*, 659 A.2d 1055, 1065 (Pa. Cmwlth. 1995). However, such a petition should only be granted judiciously and under appropriate circumstances because such an action results in the disturbance of a final order. *Id.* As such, the Commission has wide latitude to deny a petition for rescission or amendment, and its decision will not be overturned by an appellate court absent a showing that the Commission abused its discretion. *Id.*

B. Petition

In its Petition, Verdigris Energy states that the Company was properly bonded as it has “had a \$10,000 bond in place since [it was] granted an EGS license in 2012.”

Verdigris Energy asserts that the Company thought, based on communication from its insurance agent (Scarborough Medlin & Associates), it had a continuous bond on file with the Commission beginning in late 2021 or early 2022. However, the Company acknowledges that this was not the case.⁵

In addition, Verdigris Energy notes that a prior Commission Final Order, entered January 19, 2022, stated that the Company’s EGS license would not be cancelled because the Company “provided the required approved financial security and [is] in compliance with 52 Pa. Code § 54.42(a).” This, the Company claims, cemented its belief that it had a continuous bond on file with the Commission. Verdigris Energy acknowledges receiving the Commission’s August 2, 2022, Bond Renewal Notice Letter advising the Company to update its bond, which was set to expire on November 2, 2022. However, Verdigris Energy did not act on the letter because, the Company claims, it thought that (1) the letter was a form letter sent to all EGSs and (2) it had a continuous bond on file with the Commission.⁶

Verdigris Energy further acknowledges that on December 22, 2022, it received an email from the Commission’s Secretary’s Bureau that included a copy of the *Tentative Order*. However, the Company admits that it did not open the attached document because it believed the email was a “phishing” email. According to the Company, the same thing happened with the February 17, 2023, email it received from the Secretary’s Bureau. This email included a copy of the *Final Order*. However, again, Verdigris Energy claims it appeared to be another phishing email. Verdigris Energy did not state whether it attempted to contact the Secretary’s Bureau to confirm whether or not the

⁵ Verdigris Energy Petition at 1-2, Exhibits 1 and 2.

⁶ Verdigris Energy Petition at 2, Exhibit 3.

emails were in fact “phishing” emails. Nor did Verdigris Energy contact its insurance agent to confirm that an original bond had been sent to the Commission. The Company claims that it only became aware of the deficiency with its bond when it received a hardcopy of the *Final Order* in the mail.⁷

At that point, according to Verdigris Energy, the Company contacted its insurance agent and learned that the associates handling its bond had left the agency several months before without having forwarded the original continuous bond to the Commission, a copy of which had been rejected by the Commission and returned to the agency. Verdigris Energy asserts that it has acted in good faith to secure a proper bond for the past 10 years. Further, the Company states that it was bonded, but through miscommunication with its insurance agent, it was unaware that the Commission had not been provided with the bond. Verdigris Energy also claims that having to reapply for an EGS license would “be a tremendous hardship.” Under the circumstances, Verdigris Energy requests that the Commission rescind its *Final Order* cancelling the Company’s EGS license and reinstate the license.⁸

C. Disposition

Although Verdigris Energy asserts that its failure to furnish the Commission with an updated bond was unintentional, we will deny the Company’s request for relief because it failed in its duty to maintain continuous bond coverage with the Commission. The Commission does not take lightly an EGS’s failure to maintain financial security coverage.

Verdigris Energy’s bond on file with the Commission expired on November 2, 2022. Although the Company may have *obtained* bond coverage from Philadelphia Indemnity prior to November 2, 2022, neither Verdigris Energy’s insurance agency,

⁷ Verdigris Energy Petition at 2-3, Exhibits 4, 6 and 10.

⁸ Verdigris Energy Petition at 2, 3-4, Exhibit 2.

Philadelphia Indemnity, nor Verdigris Energy itself *submitted* the updated bond to the Commission for approval. As such, the Commission was not aware of the existence of the updated bond.

Accordingly, on December 22, 2022, the Commission entered a *Tentative Order* and published it in the *Pennsylvania Bulletin*, tentatively cancelling Verdigris Energy's license for failure to maintain a bond or other financial security. Through the *Tentative Order*, the Commission warned Verdigris Energy that its bond on file with the Commission had expired and gave the Company an opportunity to file an updated financial security instrument. Verdigris Energy did not submit an updated financial security instrument in response to the *Tentative Order*. The Company admits that it received service of the *Tentative Order* on December 22, 2022; however, they did not open the attached Order because they believed the email to be a "phishing" email. There is no evidence—and Verdigris Energy makes no averment—that the Company contacted the Commission to inquire about the email. Therefore, on February 17, 2023, almost two months after entry of the *Tentative Order*, and more than 40 days after the *Tentative Order* was published in the *Pennsylvania Bulletin*, the Commission entered its *Final Order* formally cancelling Verdigris Energy's license.

As noted above, in March 2023, after the Company's license had been cancelled, a bond continuation certificate and later a continuous bond were provided to the Commission on behalf of Verdigris Energy. However, these bonds had no effect because the Company's EGS license had already been cancelled.

Although Verdigris Energy's failure to update its bond may have been unintentional, that mistake does not excuse the Company's failure to respond to the Commission's warnings via the August 2022 letter from TUS and the *Tentative Order* or, more importantly, its failure to comply with the financial security requirements of the Public Utility Code and the Commission's regulations. 66 Pa.C.S. § 2809(c)(1)(i) and

52 Pa. Code § 54.40. These requirements include the EGS licensee's duty to maintain financial security coverage, furnish the financial security instrument to the Commission, and receive Commission approval of that instrument. Verdigris Energy failed to meet these obligations. Under the circumstances, the Commission finds that the Company's Petition does not satisfy the *Duick* standard governing petitions for rescission and/or amendment.

A petition for reconsideration is governed by *Duick*, which essentially requires the Commission to perform a two-step analysis. First, the Commission must determine whether the petitioner has offered any new arguments that were not addressed by the Commission in its previous order. The Commission will not reconsider its previous decision based on arguments that have already been made. Second, the Commission must evaluate any new arguments or evidence and decide whether modification of its previous order is warranted. However, the Commission will not necessarily modify a prior order just because a petitioner offers a new argument that was not addressed by the Commission in its previous order.

Here, Verdigris Energy argues in support of its Petition that the Company (1) always maintained bond coverage; (2) had reason to believe that its insurance agent had submitted a continuous bond to the Commission; and (3) thought that the email from the Secretary's Bureau serving the *Tentative Order* was a "phishing" email. To the extent that the Company's arguments can be considered "new and novel" because it did not explain these issues to the Commission until *after* the *Final Order* had been entered, the Commission sees no reason to reconsider its *Final Order*. The Company's errors are entirely self-inflicted.

Verdigris Energy acknowledged that it received both the Commission's Bond Renewal Notice Letter and email service of the *Tentative Order*. However, the Company admits that it ignored the Bond Renewal Notice Letter because it mistakenly believed that

the letter did not apply to Verdigris Energy. Verdigris Energy failed to take reasonable steps to confirm the status of its bond with the Commission. Further, the Company admits that it chose not to open the *Tentative Order* because it believed the email was a “phishing” email. The prudent and reasonable choice in response to these communications would have been for Verdigris Energy to reach out to Commission staff to check on the status of the Company’s bond and whether the email was legitimate. Verdigris Energy did neither.

With respect to its bond coverage, Verdigris Energy failed to ensure that the Company, its surety, or its insurance agent furnished the Commission with the updated bond through Philadelphia Indemnity. Verdigris Energy admits these failures. Because of these self-inflicted errors, the Commission had on file an expired bond for Verdigris Energy. The Company had sufficient warning and time to correct its mistakes but failed to do so. As such, Verdigris Energy’s Petition presents no compelling reason for the Commission to rescind or amend its *Final Order*.

It is incumbent upon every EGS licensee to take steps to ensure not only that its financial security is updated with its surety or bank, but also that the updated bond or letter of credit is submitted to and accepted by the Commission. Verdigris Energy’s failure to ensure that it met both obligations is the Company’s fault alone.

Ultimately, Verdigris Energy failed to meet the Commission’s requirements to maintain and furnish evidence that the Company followed its financial security obligations under Section 2809(c) of the Public Utility Code. 66 Pa.C.S. § 2809(c). The Company’s bond on file with the Commission expired on November 2, 2022. Verdigris Energy clearly did not follow applicable procedures to furnish the Commission with a valid financial security instrument. This despite the fact that the Commission—through a letter from TUS, the *Tentative Order*, and publication of that *Tentative Order* in the *Pennsylvania Bulletin*—put Verdigris Energy on notice that its bond would expire or had

expired and gave the Company more than two months to take corrective action, such as filing comments to the *Tentative Order* or contacting Commission staff, before its license was cancelled via the *Final Order*. The duty is expressly on the EGS to maintain and provide the Commission with a valid financial security instrument that is accepted by the Commission, regardless of whether Commission staff inform the EGS that its bond is expiring. 66 Pa.C.S. § 2809(c)(1)(i) and 52 Pa. Code § 54.40. Verdigris Energy failed provide updated financial security.

Furthermore, in applying for an EGS license, Verdigris Energy agreed to abide by all Commission regulations, procedures, and orders. To receive and maintain an EGS license, an EGS must demonstrate that it “is fit, willing and able to properly perform the service proposed in conformance with applicable provisions of the Code and the lawful Commission orders and regulations” to perform the functions of an EGS, as a broker/marketer. *See* 52 Pa. Code § 54.37(a)(1).

We find that Verdigris Energy’s failure to abide by the Commission’s financial security requirements demonstrates that the Company lacks the technical fitness to be a licensed EGS in this Commonwealth.⁹ Verdigris Energy should have had business controls in place to ensure not only that it updated its financial security on a timely basis, but that it transmitted the instrument to the Commission and the Commission accepted and approved that instrument. Accordingly, in addition to the Company’s failure to maintain an approved financial security with the Commission, we find that Verdigris

⁹ The Commission notes that prior to the 2022 *Tentative Order* and 2023 *Final Order* that resulted in the cancellation of the Company’s EGS license, Verdigris Energy was listed on tentative orders for cancellation of its EGS license due to an expired bond entered on (i) November 19, 2015 (Docket No. M-2015-2490383); (ii) December 21, 2017 (Docket No. M-2017-2584781); (iii) November 14, 2019 (Docket No. M-2019-3006865); (iv) November 19, 2020 (Docket No. M-2020-3015227); and (v) November 18, 2021 (Docket No. M-2021-3023559). However, in each of these instances, Verdigris Energy retained its license by updating its bond before the Commission issued the corresponding final orders.

Energy lacks the technical fitness to be a licensed EGS in this Commonwealth and deny the Petition for this reason as well.

It is incumbent upon every EGS to ensure that its financial security is updated *and* received and approved by the Commission. In addition, it is incumbent upon all licensed EGSs to demonstrate ongoing fitness to perform all the services of that license and comply with all applicable provisions of the Code and the lawful orders and regulations of the Commission, which Verdigris Energy failed to demonstrate. Accordingly, we will deny the Company's Petition for Reconsideration. However, we note that Verdigris Energy may file a new application with the Commission if it wishes to provide electric generation supplier services in Pennsylvania.

CONCLUSION

The Commission has broad discretion to deny Verdigris Energy's request to rescind or amend a *Final Order*. Given the importance of the EGS financial security requirements to the operation of Pennsylvania's competitive retail electric market, Verdigris Energy's failure to maintain *and* furnish an updated financial security instrument to the Commission cannot be excused. As such, the Commission denies the Company's Petition. However, in recognition of the fact that Verdigris Energy's failure to update its bond appears to be unintentional and of the Company's attempt to update its bond, the Commission notes that Verdigris Energy may file a new application to provide electric generation supplier services in the Commonwealth.

Be advised, however, that if Verdigris Energy, or any of its successors, does apply to provide electric generation supplier services in Pennsylvania, in any capacity, it must acknowledge this license cancellation and provide information on what business controls it has in place to ensure compliance with the Code and the Commission's orders and regulations; **THEREFORE,**

IT IS ORDERED:

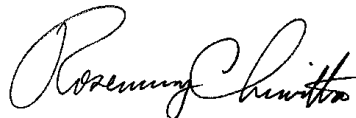
1. That Verdigris Energy, LLC's Petition for Reconsideration and request for reinstatement of its electric generation supplier license is denied consistent with this Opinion and Order.

2. That Verdigris Energy, LLC may file with the Commission a new application for an electric generation supplier license. If Verdigris Energy, LLC, or any of its successors, does apply to provide electric generation supplier services, in any capacity, the Company must acknowledge this license cancellation and provide information on what business controls it has in place to ensure compliance with the Public Utility Code and the lawful orders and regulations of the Commission.

3. That a copy of this Order be served on Verdigris Energy, LLC; the Office of Consumer Advocate; the Office of Small Business Advocate; the Commission's Bureau of Investigation and Enforcement; the Pennsylvania Department of Revenue – Bureau of Compliance, Business License Clearance Division; and all jurisdictional electric distribution companies.

4. That this proceeding at Docket No. A-2012-2284040 be marked as closed.

BY THE COMMISSION



Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: May 18, 2023

ORDER ENTERED: May 18, 2023