

FEB 19 1998

Decision 98-02-100 February 19, 1998

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Application of Dwayne Lee Porter dba D.L. Porter Corp. for registration as a non-utility electric service provider under Public Utilities Code Section 394.

Application 97-12-027  
(Filed December 18, 1997)

**ORIGINAL**

Dwayne Lee Porter, for applicant.  
Carol Dumond, Attorney at Law, for Consumer Services  
Division, protestant.

**O P I N I O N**

**I. Introduction**

The Commission's Consumer Services Division (CSD) opposes, and recommends that the Commission deny, the Application of Dwayne Lee Porter, dba D.L. Porter Corp. (Porter), for registration as an electric service provider (ESP) under Senate Bill (SB) 477 (Stats.1997, Ch. 275) and specifically under §§ 391-396 of the Public Utilities (PU) Code. The CSD makes this opposition and recommendation based on its allegations regarding false statements in the application, applicant's failure to make a showing under § 394, and his lack of respect for laws and regulations, as demonstrated by his criminal record. In the opinion of CSD, all of these are predictors that there is very serious doubt that Porter will follow the letter and spirit of consumer protection laws and regulations enacted to protect the most vulnerable of users to be served by ESPs, i.e., unsophisticated residential and small commercial users.

This case presents the Commission squarely with the issue of the use of conviction records for ESP licensing purposes and with the subsidiary issue of technical ability. This is the first case of its kind under SB 477. Public hearing was held before Administrative Law Judge (ALJ) Barnett on January 9, 1998.

**II. Applications for Registration Under SB 477**

**A. Requirements of § 394.**

Section 394(a) of the PU Code requires that each entity offering electric service to residential and small business customers register with the Commission. More specifically, § 394(a) provides, inter alia, that:

As a precondition to registration, the entity shall provide, under oath, declaration, or affidavit, the following information to the commission:

- (1) Legal name and any other names under which entity is doing business in California.
- (2) Current telephone number.
- (3) Current address.
- (4) Agent for service of process.
- (5) State and date of incorporation, if any.
- (6) Number for a consumer contact representative, or other personnel for receiving customer inquiries.
- (7) Brief description of the nature of the service being provided.
- (8) Disclosure of any civil, criminal, or regulatory sanctions or penalties imposed within the 10 years immediately prior to registration, against the company or any officer or director of the company pursuant to any state or federal consumer protection law or regulation, and of any felony convictions of any kind against the company or any officer or director of the company.
- (9) Proof of financial viability.
- (10) Proof of technical and operational ability.

It is paragraphs (8), (9), and (10) with which this decision is most concerned. Paragraph (8) requires disclosures of two categories: (1) non-felony consumer protection-related punishments within 10 years of the application; and (2) felony convictions of any kind at any time against the company or any of its principals. Paragraphs (9) and (10) require proof of technical, financial, and operational ability.

**B. Standards for Denial of Registration.**

Section 394.1(c) provides that the Commission may deny an application on grounds that the applicant company or any officer or director has (1) been convicted of a crime as described in § 394(a)(8); (2) failed to make a sufficient showing with respect to paragraphs (1) through (10) of § 394(a); or (3) knowingly made a false statement of fact in the application for registration. Any one of those grounds is sufficient for the Commission to deny registration, with the limitation that past convictions may be grounds for denial only if the crime or act involved "is substantially related to the qualifications, functions, or duties required to provide retail electric service to end use customers of electricity or the false statement is material to the registration application." (§ 394.1(c).)

The qualifications of an ESP include, but are not limited to, factors such as those the applicant must swear to on the application under § 394; e.g., technical and operational ability, financial viability, identification of an agent for service of process and maintenance of a telephone number for customers to contact in case of questions or trouble. An ESP's qualifications also include evidence of ability to live up to fiduciary obligations and responsibilities, including the ability to satisfy any damages under § 396(a), integrity, trustworthiness, and honesty. (See PU Code §§ 394.4, 394.5, and 394.25.)

The functions of an ESP include marketing to prospective and current customers, customer service, dispute resolution, billing, and providing uninterrupted and good quality electric service in a competitive market.

SB 477 imposes special duties on ESPs who choose to serve small commercial and residential electric customers, including the duty to provide reliable electric service, at competitive rates, and in compliance with all relevant laws and regulations.

**C. Additional Consumer Protections Under § 394.4.**

Section 394.4(h) provides that "the commission or the governing body may adopt additional residential and small commercial consumer protection standards

which are in the public interest." In the context of § 394.4, it may be that the "protection" envisioned by the Legislature is more of the sort which prescribes recordkeeping, noticing, billing, and other business practices. However, this subparagraph is nevertheless consistent with the Commission's enacting standards for the physical, as well as financial, protection of these smaller, more vulnerable consumers.

### III. The Facts of This Case and Applicable Case Law

#### A. The Facts Presented.

SB 477 was enacted August 15, 1997. Porter applied for registration on October 15, 1997. In so doing, he used the application form sent him by the Energy Division. (Appendix A.) The application provided to Porter by the Energy Division was inadequate to meet the requirements of SB 477. It did not inform applicants of the kinds of information needed to comply with the statute. Porter testified that he did not consult SB 477 at any time while preparing his application, which therefore does not contain all information required by § 394 as a precondition of registration. He did, however, check the box on the last page of the Energy Division application to indicate that he had been convicted of a felony. His explanation (required on the form) consisted of a sentence reading: "I was convicted of a felony in 1985 for assault that is all."

Energy Division asked Porter for "a detailed description of this event *and of any other arrests and/or convictions* which might be on your record." (November 7, 1997 letter from John Boccio of the Energy Division, Tab D to the Declaration of Curtis Jung (Exhibit 1); emphasis added.)<sup>1</sup> In response, Porter provided a more detailed description of the conduct underlying the reported offenses.

---

<sup>1</sup> Under Business & Professions Code § 461, it is a misdemeanor for any public agency to ask or require an applicant to reveal, on an *initial* application, the records of any arrest not resulting in conviction or a *nolo contendere* plea. Here, the initial application did not ask for any such information; however, the November 7 letter, a follow-up inquiry into an only partially-explained felony history, could properly make the inquiry. The California Supreme Court, in

*Footnote continued on next page*

Porter did admit in his answer to the November 7 letter that there had been two felonies involved arising out of the same activity: second degree burglary and assault with intent to rape. He reported in his answer that "I was sentence[d] to five years probation and did 180 days in the county Jail (which I completed with no violation)." The assault occurred in 1982.

Further, in responding to the November 7 Energy Division letter, Porter did not mention any other arrests or convictions, as requested in that letter. Yet, as shown in Tab B attached to Exhibit 1, Porter was convicted on a misdemeanor charge of prostitution in November 1987. In addition, Porter has had multiple convictions for the offense of driving with a suspended license since 1991. At the time he applied for ESP registration, there was a bench warrant outstanding for his arrest from the Alhambra Judicial Court District due to his failure to perform community service to which he had been sentenced on September 18, 1996 on the latest of his convictions for driving with a suspended license. Porter testified that he now has a valid drivers license and he owes the Court 120 hours of community service, which he says he will complete by May 1998.

Porter testified that he has matured since 1982. He now works as an independent businessman selling credit card equipment. He has worked as a salesman for AT&T and Xerox. As a salesman, he meets the public continuously and has never had any problems.

---

*Loder v. Municipal Court* (1976) 17 Cal.3<sup>d</sup> 859, cert. denied 429 U.S. 1109, said: "... [A]n arrest record may under appropriate conditions be a valuable investigative tool for the discovery of further evidence. Often the prior arrest is not an isolated event but one of a series of arrests of the same individual on the same or related charges ... ." (17 Cal.3<sup>d</sup> at 865.) As the felony Porter did report was a felonious assault, and as Porter's application contains no description of his planned operations as required in § 394 (a)(7), it was proper for Energy Division to inquire into the record of the individual whose registration might result in constant face-to-face contact with his customers.

**B. Case law Regarding the Use of Arrest Records For Licensing Purposes.**

The cases discussed below concern the use of arrest records for licensing purposes, and the associated tension between individual privacy rights and the state's compelling interest in protecting its citizens through its licensing function. The most common basis for denial or revocation of licenses, certificates, and registrations is conviction of a crime involving "moral turpitude." (*Morrison v. State Board of Education* (1969) 1 Cal.3<sup>rd</sup> 214; see esp. 227-228, fn. 23.)

About 30 years ago, the Legislature evolved a trend to follow "more careful and precise drafting to minimize the danger of the imposition of disciplinary measures for acts unrelated to the profession involved." (*Morrison*, 1 Cal.3<sup>rd</sup> at 228, fn. 23; see also *Kopp v. Fair Political Practices Committee* (1995) 11 Cal.4<sup>th</sup> 607, 644.) As noted above, SB 477 limits the Commission's discretion to deny registration based on past convictions. To be used in denying an application, misdemeanor convictions must be for crimes within the 10 years prior to application and involve consumer protection issues, and felony convictions must be for crimes substantially related to the qualifications, functions, and duties required of an ESP. (PU Code § 394.1(c).)

Section 394.1(c) is closely worded, making it less broad than other less precise statutes, and does not mention "moral turpitude," although the issue of moral turpitude must and does arise in licensing matters involving criminal convictions. In exercising our § 394.1(c) discretion, the Commission may be guided by the courts' determinations in other licensing cases, especially those that denied registrations, licenses, or certificates under Business and Professions Code § 480 (a)(1),<sup>2</sup> to determine how best to protect the public from unfit licensees while balancing the state's interest in fair licensing procedures.

---

<sup>2</sup> Section 480 (a)(1) of the Business & Professions Code provides that a board may deny a license on grounds of criminal conviction, and defines a conviction as "a plea or verdict of guilty or a conviction following a plea of nolo contendere. ..."

In *Morrison*, a teacher without any criminal record, complaints, or criticisms of his performance had his life diplomas revoked by the Board of Education on grounds of immoral and unprofessional conduct and acts involving moral turpitude. The Board's basis was an allegation by another teacher, since retired, that Morrison had engaged in a limited, non-criminal physical homosexual relationship with him. On appeal, the California Supreme Court reversed, noting that, in general, terms authorizing revocation of a business license are often based on conduct described as "immoral conduct," "unprofessional conduct," and "acts involving moral turpitude." (1 Cal.3<sup>d</sup> at 220, 224-225.) The issue is the fitness of the applicant or licensee to engage in its business, i.e., to "fulfil the moral obligations incumbent upon members of the [applicant's or licensee's] profession." (Id. at 220-221; see, e.g., *Hallinan v. Committee of Bar Examiners* (1966) 65 Cal.2d 447, 459, 462.) The central question is whether the conduct at issue is substantially related to the business or profession. The "immoral conduct" may not be considered in the abstract but "must be considered in the context in which the Legislature considered it, as conduct which is hostile to the welfare of the general public ... ." (1 Cal.3<sup>d</sup> at 224, quoting from *Jarvella v. Willoughby-Eastlake City School District* (1967) 12 Ohio Misc. 200, 233 N.E. 2d 143.) The key is whether, reading the terms in a reasonable way, the private acts of a licensee or applicant are likely to place the public in jeopardy. (*Morrison*, 1 Cal.3<sup>d</sup> at 224, 225.) The Court reversed, holding that the appropriate inference between conduct and profession was lacking. (1 Cal. 3d at 238.)

In *Arneson v. Fox* (1980) 28 Cal.3d 440, a real estate broker, who had been convicted of conspiracy with respect to filing fraudulent reports with the United States Securities and Exchange Commission of earnings by a corporation engaged in real estate, had his real estate license revoked by the real estate commissioner. The Supreme Court held that suspension or revocation of a license is warranted on grounds of conviction of a crime, "so long as the underlying offense bears a substantial relationship to the qualifications, functions, or duties of the licensed business or profession." (28 Cal 3d at 443.)

### Discussion

Here we are considering licensing Porter to sell an essential utility service, electricity, to the least sophisticated and therefore potentially the most vulnerable of California consumers. Because of his felony criminal record, CSD recommends denial or at least a restriction prohibiting Porter from visiting customers' residences or businesses in the course of his operations.

CSD asserts that Porter's behavior with respect to his misdemeanor convictions is disturbing from a regulatory viewpoint because it demonstrates a pronounced and continuing pattern of disregard for the regulatory power of the state, first in Porter's choice to drive at times when he knew his driver's license had been suspended and second in his failure to take the sentences seriously enough to comply with them. If Porter does not take his duties as an ordinary citizen seriously, CSD believes it is unlikely that he will be serious in complying with consumer protection laws and regulations, and with his duties as a person privileged to provide essential services as a registered ESP.

Porter says he has been rehabilitated; he had paid his debt to society for the assault. The assault occurred 16 years ago when he was a young man. He is now mature and has worked as a salesman for AT&T and Xerox. He meets the public regularly and has had no recurrence of violent conduct since his conviction.

We must consider this case in light of the Supreme Court's admonition that "the right to practice one's profession is sufficiently precious to surround it with a panoply of legal protection" (*Yakov v. Bd. Of Med. Examiners* (1968) 68 Cal.2d 67,75; *Morrison v. State Bd. of Ed.*, (*supra*) and our statutory duty to find a substantial relationship between the crime and the qualifications, functions, or duties of an ESP providing retail electric service to end-use customers.

Given the time that has passed since the crime (16 years) and the evidence of rehabilitation, we cannot find that the crime "is substantially related" to the qualifications of a licensee.

However, this does not end our inquiry. Although it was a crime that brought Mr. Porter to our close scrutiny, we cannot overlook the other qualifications for



registration. Porter has not shown to our satisfaction that he is amenable to regulation. His failure to comply with Court orders makes us hesitate to register him. When he has complied he may reapply. Further, Porter has not produced evidence that he has the requisite financial, technical, or operational ability needed to comply with §§ 394(a)(9) and (10). However, we have not yet established ESP standards so we do not deny the application on that basis. We will be issuing ESP standards for public comment no later than March 31, 1998. Therefore, financial responsibility and technical competence must be detailed in the registration application. Failure to provide adequate information can result in denial of the application. (§ 384.1(c)(2).) Mr. Porter may reapply for registration after he completes his community service obligation, and provides under oath all of the information required by § 394(a). We are concerned that residential and small commercial customers have adequate recourse in the event of fraud or nonperformance.

#### **Judicial Review**

Judicial review of Commission decisions is governed by Division 1, Part 1, Chapter 9, Article 3 of the PU Code. The appropriate court for judicial review is dependent on the nature of the proceeding. This is an enforcement proceeding, so this decision is issued in an "adjudicatory proceeding" as defined in PU Code § 1757.1. Therefore, it will be subject to judicial review in the Court of Appeals. (See PU Code § 1756(b).)

#### **Findings of Fact**

1. Porter's errors in filling out his application were inadvertent.
2. Porter has been convicted of felonies in the past and other crimes within the last ten years, the nature of which are not substantially related to the qualifications, functions, and duties of an ESP.
3. Porter's failure to comply with court orders shows a lack of responsibility and reflects on his obligations to the community and his obligation to obey the regulations of this Commission should he be permitted to register.

4. Porter is not familiar with the qualifications of an ESP. He has not described the nature of his proposed service, proof of his technical and operational ability, or proof of his financial viability as required by § 394(a).

5. Porter does not understand the qualifications, duties, and functions of an ESP.

#### **Conclusions of Law**

1. Porter's application should be denied, but he should be permitted to refile his application in compliance with § 394(a) after he has completed his community service obligation to the satisfaction of the Court.

2. Porter has failed to make a sufficient showing that he meets the standards of § 394(a).

3. This is an enforcement proceeding, so this decision is issued in an "adjudicatory proceeding" as defined in PU Code § 1757.1. Therefore, the proper court for filing any petition for writ of review will be the Court of Appeals.

#### **O R D E R**

##### **IT IS ORDERED that:**

1. The application of Dwayne Lee Porter, dba D.L. Porter Corp., for registration as a nonutility electric service provider is denied.

A.97-12-027 ALJ/RAB/rmn \*

2. Porter may reapply for registration after he has completed his community service obligation to the satisfaction of the Court.

3. Application 97-12-027 is closed.

This order is effective today.

Dated February 19, 1998, at San Francisco, California.

RICHARD A. BILAS  
President  
P. GREGORY CONLON  
JESSIE J. KNIGHT, JR.  
HENRY M. DUQUE  
JOSIAH L. NEEPER  
Commissioners

# REGISTRATION APPLICATION FOR NON-UTILITY SERVICE PROVIDERS

\*\*\*PLEASE PRINT OR TYPE\*\*\*

ESP No. _____
Date Granted _____

1. Exact Legal Name of Registrant:

D.L. PORTER CORP

Doing Business As (DBA):

DLP

2. Current Address:

845 Coleridge Dr. #2  
Street Address

Inglewood CA 90302  
City State Zip Code

3. Current Telephone Number: 310 673-9353

4. Type of Ownership:

\_\_\_\_ Individual \_\_\_\_ Partnership  Corporation

\_\_\_\_ Limited Liability Company

5. a. If registrant is a corporation, the state in which the registrant is incorporated:

DELAWARE (State of Incorporation)

b. List names and titles of corporate officers. (Attach additional page if necessary):

DINAWE L. PORTER  
\_\_\_\_\_  
\_\_\_\_\_

6. a. If a sole proprietorship or partnership, the county in which the fictitious business name statement has been filed, if applicable.

\_\_\_\_\_  
\_\_\_\_\_

Complete and mail this application along with \$100.00 certified check (write 0462-800 on front of check) to:

State of California  
Public Utilities Commission  
Energy Division - ESP  
Registration  
505 Van Ness Avenue  
San Francisco, CA 94102-3298

INCOMPLETE APPLICATIONS CANNOT BE PROCESSED

<b>FOR CPUC USE ONLY</b>
Application Processed
By: _____
Date: _____

b. If a partnership list all general partners. (Attach additional page if necessary.)

N/A

7. If a limited liability company list all managers and/or officers and their titles. (Attach additional page if necessary.)

N/A

8. The address and telephone number of the registrant's principal place of business if DIFFERENT from current address telephone number listed in line numbers 2 and 3:

Street Address  
City State Zip Code  
Telephone Number

9. The name, title, address and telephone number of the person to whom correspondence or communication regarding customer complaints are to be addressed:

DWAYNE PORTER President  
845 CLEWLEY DR #7  
Inglewood CA 90302  
310 673-9353 (213) 734-7676  
Telephone Number FAX Number E-Mail Address (If Available)

10. Are you a certified renewable resource provider pursuant to Public Utilities Code Sec. 383? Yes Certification Number X No

11. Name and Address of Agent for Service of Process: (Must Be Located In California)

Name: A. J. [unclear]  
Street Address:  
City and State: Zip Code:

12. Criminal Record Clearance: Has the registrant or any of the general partners or corporate officers or limited company liability managers or officers ever been convicted of any felony?

No  Yes If yes, please explain on additional page.

### DECLARATION

I, (print name and title) DENNIS H. PETER, PRESIDENT declare under the penalty of perjury that the above statements are true and correct.

Dated this 14 day of Oct 1997 at INGLEWOOD CA 90302  
(day) (month) (year) (place of execution)

Signature: Dennis H. Peter

(END OF APPENDIX A)