

BACKGROUND

A. Appellant

1. Delmarva Power is an electric distribution company that serves customers in the State of Delaware. Prior to the deregulation of the electric supply industry in Delaware, Delmarva Power also had the sole responsibility to supply electricity, as well as distribute electricity, to customers located in its Delaware service territory. Delmarva Power's rates for service provided to customers in Delaware are regulated by the Commission.

2. As part of deregulation of the supply of electricity, Delaware adopted retail customer choice for Delmarva Power's customers. Thus, Delmarva Power's customers have the option, which many have exercised (particularly large industrial customers), of selecting an alternate energy supplier, i.e., someone other than Delmarva Power, for their power needs. Customers who do not choose, or cannot choose, an alternative supplier are supplied electricity by Delmarva Power pursuant to a service offering designated Standard Offer Service ("SOS").

3. In response to the deregulation of electric supply, Delmarva Power, with the Commission's approval, sold its generation to third parties or transferred its generation to an unregulated affiliate. Thus, Delmarva Power does not generate electricity, rather it is required to procure supply from independent generators to serve its SOS customers. The cost of that supply is determined by the market, not by Delmarva Power. Delmarva Power does not profit from the power it procures for its customers.² Rather, the cost that Delmarva power pays for the power is passed through directly to its customers.

² However, it does receive a fixed annual margin of approximately \$2.5 million.

B. The Electric Utility Retail Customer Supply Act of 2006

4. In the late 1990s, Delaware, like many other states, began implementing policies to deregulate, and thereby introduce competition into, its electric utility industry. In 1999, Delaware enacted the Electric Utility Restructuring Act, which, among other things, deregulated electricity sales, implemented retail customer choice, and capped the rates for Delmarva Power's customers to allow for the transition to deregulated pricing. Those rate caps were extended in 2001 as part of the merger of Delmarva Power's parent with Pepco Holdings, Inc.

5. In 2006, the rate caps were set to expire and, as a result of the high prices of wholesale electricity at the time, Delaware customers faced significant rate increases. "In response to the resulting consumer outrage," the Delaware General Assembly enacted the "Electric Utility Retail Customer Supply Act of 2006" ("EURCSA"). Order, ¶ 1. The intent of EURCSA, as evidenced in many of its provisions, was to free Delaware of high market prices, to provide for electric generation in-state, and to provide customers with cost-effective, reasonably priced, stable and reliable power with minimal environmental impact. See, e.g., 26 Del. C. §§ 1007(c)(1), (d); Del. Law c 242, House Bill No. 6, Synopsis; Order, ¶¶ 50, 52, 53, 55.

6. Among other things, EURCSA requires Delmarva Power to conduct integrated resource planning and to file an integrated resource plan ("IRP") with the Commission, the Controller General, the Director of the Office of Management and Budget, and the Energy Office on a biannual basis beginning on December 1, 2006. 26 Del. C. § 1007(c)(1); Order, ¶ 3. In the IRP, Delmarva Power must "systematically evaluate all available supply options during a 10-year planning period in order to acquire

sufficient, efficient and reliable resources over time to meet its customers' needs at a minimal cost." 26 Del. C. § 1007(c)(1); Order, ¶ 3. In developing its IRP, Delmarva Power must also "investigate all potential opportunities for a more diverse supply at the lowest reasonable cost." 26 Del. C. § 1007(c)(1)(b); Order, ¶ 4.

7. As "part of the initial IRP process," EURCSA further requires Delmarva Power to file, on or before August 1, 2006, a request for proposals ("RFP") to obtain long-term contracts (no less than 10 years and no more than 25 years) for the construction of new generation resources within Delaware to serve Delmarva Power's customers taking standard offer service. 26 Del. C. § 1007(d); Order, ¶ 5. Delmarva Power is also directed to "set forth proposed selection criteria based on the cost-effectiveness of the project in producing energy price stability, reductions in environmental impact, benefits of adopting new and emerging technology, siting feasibility and terms and conditions concerning the sale of energy output from such facilities." 26 Del. C. § 1007(d); Order, ¶ 5.

8. The Commission, the Director of the Office of Management and Budget, the Controller General and the Energy Office (the "Agencies") are required to "retain the services of an independent third-party entity with expertise in the area of energy procurement at the expense of [Delmarva Power] to oversee the development of the request for proposals and to assist them in their review of proposals" 26 Del. C. § 1007(d)(2).

9. Pursuant to 26 Del. C. § 1007(d)(1), the Commission and the Energy Office may approve or modify the elements of Delmarva Power's RFP prior to its issuance and must ensure that the RFP elicits and recognizes the value of certain types of

proposals, including those that support or improve reliability. 26 Del. C. § 1007(d)(1); Order, ¶ 6.

10. After proposals are received in response to Delmarva Power's RFP, EURCSA provides that the Agencies must evaluate such proposals and "may determine to approve 1 or more of such proposals that result in the greatest long-term system benefits . . . in the most cost-effective manner." 26 Del. C. § 1007(d)(3); Order, ¶ 7. Once 1 or more of the contracts have been finalized and approved by the Agencies, EURCSA provides that Delmarva Power shall enter into such contract(s). Id.

C. Procedures Before the Commission

11. On August 1, 2006, pursuant to EURCSA, Delmarva Power filed its proposed RFP with the Commission. Commission Dkt. No. 06-241; Order, ¶ 8. The Commission and the Energy Office then modified Delmarva Power's RFP to include certain criteria concerning, among other things, the methodology to be used for evaluating the price and non-price components of the bids received. Order, ¶ 9 (citing Commission Order No. 7066, dated Oct. 31, 2006, and Commission Order No. 7081, dated Nov. 21, 2006).

12. On November 1, 2006, Delmarva Power issued a revised RFP incorporating all of the criteria required by the Commission and Energy Office. Order, ¶ 10. Three entities – Bluewater Wind LLC ("Bluewater"), Conectiv Energy Supply, Inc. ("Conectiv"), and NRG Energy Inc. ("NRG") – submitted bids in response. Order, ¶ 12. Bluewater submitted multiple variations of a bid proposal that included both a 600 megawatt ("MW") and 400 MW offshore wind farm. Conectiv submitted a primary and alternate bid for an 180 MW combined cycle gas turbine at its Hay Road facility in

Edgemoor, Delaware. NRG proposed to sell energy and unforced capacity credits from 400 MW of a 600 MW coal-fired integrated gasification combined cycle ("IGCC") facility to be built at its Indian River power station in Millsboro, Delaware.

13. The bids received were reviewed and evaluated by Delmarva Power and the independent consultant (the "IC") retained by the Agencies. On February 21, 2007, Delmarva Power and the IC filed reports with the Commission evaluating the three bids (Order, ¶ 13), which reports were prepared pursuant to the methodology established by the Commission and the Energy Office.

14. Both Delmarva Power and the IC ranked the bids in the following order: (i) Conectiv, (ii) Bluewater, and (iii) NRG. Order, ¶ 13. Conectiv was ranked the highest because, simply put, Conectiv's bid was determined to provide the best combination of clean, cheap, and reliable power. Delmarva Power and the IC further concluded, however, that none of the bids were acceptable because, among other things, all of the bids proposed prices that were projected to be above market when the new generation facilities went on line some years from now. Id. Thus, none of the bids achieved the overarching goal of EURCSA: minimal, cost-effective prices.

15. In its report to the Commission, Delmarva Power recommended that the Commission reject all of the bids because each one created unacceptable risks for Delaware customers. See Delmarva Power Request for Proposals Bid Evaluation Report, filed Feb. 21, 2007 (Commission Dkt. Nos. 06-241, 07-20). Similarly, the IC stated that it could not recommend that Delmarva Power be ordered into negotiations with any of the bidders absent further investigation. See New Energy Opportunities, Inc., La Capra Associates, Inc., Merrimack Energy Group, Inc., Edward L. Selgrade, Esq., Report on

Evaluation of Bids Submitted in Response to Delmarva Power & Light Company's RFP, filed Feb. 21, 2007 (Commission Dkt. No. 06-241).

16. Despite the bids submitted by Bluewater, Conectiv and NRG and the recommendations of Delmarva Power and the IC, on May 3, 2007, the Commission Staff recommended that Delmarva Power be directed to negotiate with Bluewater and Conectiv for a hybrid energy supply that would combine a 200-300 MW offshore wind farm with a 150-200 MW combined cycle gas turbine in Sussex County (the "Staff Recommendation"). Order, ¶¶ 17, 20. This hybrid approach was created by the Commission Staff, is not supported by any of the bids, and is inconsistent with the bids. Among other things, Bluewater's bid was for a 600 MW, rather than 200-300 MW, offshore wind farm, and Conectiv's bid was for an 180 MW combined cycle gas turbine located in New Castle County (Edgemoor, Delaware), not in Sussex County, where there is no gas pipeline. Order, ¶ 12.

17. On May 8, 2007, the Commission, without the other Agencies voting, voted to adopt the Staff Recommendation, with minimal alterations. On May 22, 2007, all of the Agencies voted to adopt the Staff Recommendation, with minimal alterations, and the Commission entered the Order. Specifically, the Commission directed Delmarva Power to negotiate with Bluewater for a long-term power purchase agreement for the provision of wind power. Order, ¶ 55. The Commission supported Staff's guidance on the 200-300 MW size of that contract but stated that it would "allow some, albeit not unlimited, flexibility in the size." *Id.* The Commission further directed Delmarva Power to negotiate with both Conectiv and NRG, concurrently with its negotiations with Bluewater, to provide firm back-up power that may be necessary when wind power is

unavailable. Order, ¶ 56. The Commission further noted that "NRG's bid proposal may compare favorably due to NRG's pre-existing location in Sussex County." Id. All such negotiations must be completed within 30 to 60 days. Id.

18. In essence, the Commission ignored EURCSA's mandate for cost-effective power by requiring negotiation for not just one but two over-priced contracts. The Commission further ignored its own established criteria for evaluating the bids, which included a consideration of price, and the IRP process, which is intended to lead to the acquisition of "sufficient, efficient and reliable resources over time to meet [Delmarva Powers] customers' needs at a minimal cost." 26 Del. C. § 1007(c)(1); Order, ¶¶ 3, 13. The Commission also disregarded the requirements of EURCSA and its own established RFP process by requiring Delmarva Power to negotiate for a hybrid approach that is not consistent with or provided in the bids that have been submitted.

19. In addition, the Commission assigned Delmarva Power the "responsibility of managing supply resources." Order, ¶ 58. The Commission permitted Delmarva Power to decline to accept such responsibility within 30 days of its Order. Id. Should Delmarva Power so decline, however, the Commission ordered that the Agencies shall retain an independent third party to serve as "supply resource manager" and that Delmarva Power shall be responsible for the cost of that third party. Id.

GROUND FOR APPEAL

The Commission has committed errors of law in the Order and substantial evidence does not exist to support the Order. Delmarva Power's grounds for appeal include, but are not limited to, the following:

20. In the Order, the Commission violates the plain language and legislative intent of EURCSA, specifically 26 Del. C. § 1007, by, *inter alia*:

(a) adopting the Staff Recommendation, which was not a proposal submitted in response to Delmarva Power's RFP;

(b) requiring Delmarva Power to negotiate for power contracts with unsuccessful bidders;

(c) requiring Delmarva Power to negotiate for power contracts with Bluewater, Conectiv, and NRG that may not result in the provision of stable, reliable and cost-effective power to Delmarva Power's customers, as required by EURCSA;

(d) requiring Delmarva Power to negotiate for power contracts with Bluewater, Conectiv, and NRG on terms that were not submitted in response to Delmarva Power's RFP; and

(e) disregarding and usurping the IRP process (Commission Docket No. 07-20), which may ultimately conclude that the power contracts contemplated by the Order do not provide sufficient, efficient, and reliable resources at a minimal cost to Delmarva Power's customers.

21. In the Order, the Commission violates the procedures that it established in Order Nos. 7066, 7081, and 7106 for evaluating bids received in response to Delmarva Power's RFP by, *inter alia*:

(a) adopting the Staff Recommendation, which was not evaluated pursuant to the Commission's existing Orders;

(b) requiring Delmarva Power to negotiate for power contracts with unsuccessful bidders;

(c) requiring Delmarva Power to negotiate for power contracts with Bluewater, Conectiv, and NRG that may not result in the provision of stable, reliable and cost-effective power to Delmarva Power's customers; and

(d) requiring Delmarva Power to negotiate for power contracts with Bluewater, Conectiv, and NRG that may be larger than those permitted by the Commissions Orders.

22. In the Order, the Commission assigned Delmarva Power the responsibility of "managing supply resources." Depending on its meaning, which is impermissibly vague, such assignment may violate the standard offer service provisions set forth in 26 Del. C. § 1001 *et seq.*, which concern the "provision of electric supply service." Further, should Delmarva Power decline to manage such resources, the Order may improperly require Delmarva Power (a) to fund the costs of the management of supply resources in violation of the standard offer service provisions set forth in 26 Del. C. § 1001 *et seq.*; and (b) to enter into power contracts and bear the risks of such power contracts, along with its customers, that Delmarva Power did not negotiate, did not determine to be in the best interests of its customers, and does not manage for the benefit of its customers.

23. The Order was not based on substantial or competent evidence and the Commission failed to conduct an evidentiary hearing or to permit any kind of evidentiary process in connection with the Staff Recommendation and entry of the Order. Thus, the Order, which adopts the Staff Recommendation, lacks an evidentiary basis and is erroneous as a matter of law.

24. The Commission failed to permit all interested parties adequate time to comment on, respond to, and present evidence concerning the Staff Recommendation,

which was adopted in the Order. Thus, the Order violates the due process rights of all interested parties.

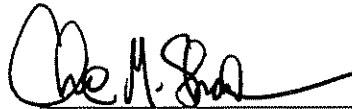
25. The Commission failed to adopt and/or follow appropriate procedures and acted without a reasonable basis in the record, in a substantially unlawful manner, and otherwise not in accordance with law when it entered the Order.

WHEREFORE, Delmarva Power respectfully requests that the Court:

- (a) reverse the Order; and
- (b) grant Delmarva Power such other and further relief as the Court deems

just and proper.

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