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February 16, 2007

VIA E-MAIL

Ms. Karen Nickerson
Secretary
Delaware Public Service Commission
861 Silver Lake Boulevard
Dover, DE 19904

Re: Public Access to Docket 06-241 Bid Information

Dear Ms. Nickerson:

I write on behalf of Conectiv Energy Supply, Inc. (the "Company" or "Conectiv Energy") to explain the reasons for the redactions made in the public version of its Proposal to the Delmarva Power RFP and in its response to Delmarva Power's follow-up questions dated December 29, 2007 (referred to collectively as the "Proposal") submitted in response to the Delmarva Power RFP. The Company also responds herewith to Professor Firestone's request, in the nature of a FOIA request, for privileged access to the Proposal.

1. The Company's Business

The reasons for the redactions lie primarily in the competitive environment in which the Company does business, although public safety considerations also are involved. The Company is engaged in the business of the generation and marketing of electric power. It operates pursuant to a Market Based Rate Tariff issued by the Federal Energy Regulatory Commission which permits it to sell electric power at negotiated rates in the wholesale electric power markets. The Company's customers include publicly owned electric utilities, other wholesale market participants, PJM Interconnection, LLC, and investor owned utilities that obtain power supply to meet their standard offer service ("SOS") supply obligations. The Company's competitors include both numerous other owners of generation in the Mid-Atlantic region and numerous non-generation owning market participants. The methods used by the Company to generate electric power and the strategy used to develop its prices for electric power sales are highly confidential. If competitors were to gain access to such information they would be in a position to unfairly compete for customers so as to competitively harm the Company.

2. The Applicable Legal Standards

We submit that the threshold question before the Commission is whether Professor Firestone's request for disclosure should be considered under Rule 10 or Rule 11 of the *Commission's Rules of Practice and Procedure*. Rule 10 governs the public's right to inspect public records located in the Commission's files. Rule 11 governs parties' access to information submitted by other parties in a contested proceeding. We submit that Professor Firestone's request is properly considered under Rule 10 rather than Rule 11. Therefore, this response is submitted in the form of a response to a FOIA request for disclosure of a party's confidential and proprietary information rather than in the form of a response to a pleading in a litigated case.

The Commission, by Order No. 7003, opened Docket No. 06-241 to facilitate compliance with the "Electric Utility Retail Customer Supply Act of 2006" (the "Act"). The Act required Delmarva Power & Light Company ("Delmarva") to file a proposal to obtain long-term supply contracts, including a proposed form of Request for Proposals ("RFP") for the construction of new generation resources in Delaware. The Act also charged the Commission, the State Energy Office (an office of DNREC), the Office of Management and Budget, and the Controller General (the "State Agencies") to retain the services of an independent consultants to oversee the development of the RFP solicitation and to assist in the review of proposals submitted in response to the RFP. Therefore, Docket No. 06-241 is not a contested proceeding where the Commission is adjudicating an issue within its jurisdiction raised by a regulated entity, by a complainant, or by the Commission on its own motion. Instead, the State Agencies are using Docket No. 06-241 solely to facilitate the mandate of the Act. Specifically, they are using Docket No. 06-241 to review and approve Delmarva's RFP and to manage the activities of their consultants.

The Commission has properly acknowledged that Docket No. 06-241 is not a contested proceeding where due process requires the participation of all parties showing an unique interest. Specifically, it has not made any entity a formal party to this proceeding. *See* Mr. O'Brien's January 24, 2007 e-mail: "Please be advised that, *unlike the RFP case*, the IRP case will have formal parties ..." (emphasis added). Conectiv Energy submits that its Proposal should be viewed within this context. To that end, it is critical to recognize that Conectiv Energy has not intervened as a party in Docket No. 06-241. Conectiv Energy did not file its Proposal as a pleading or any other manner in Docket No. 06-241. And Conectiv Energy does not anticipate advocating a position in Docket No. 06-241 that is based upon its Proposal. Conectiv Energy simply submitted its Proposal to Delmarva in response to a commercial RFP seeking competitive bids for power supply.

Rule 11 is for the purpose of giving parties to a contested proceeding access to confidential information that parties in the proceeding may rely upon in their arguments to the Commission. However, because Docket No. 06-241 is a non-contested case in which Conectiv Energy is not a party, it is impossible to conclude that Rule 11 requires disclosure of Conectiv

Energy's Proposal in any form to anyone whether or not they are a "party" to Docket No. 06-241.[1]

While Rule 11 does not govern disclosure of the Proposal, Conectiv Energy does understand that its Proposal is now probably in the files of one or more of the State Agencies staff members that are involved in management of the consultants' activities. Such information is subject to public inspection only to the extent permitted by Rule 10. That rule limits the right of inspection to "the 'public records' of the Commission, as defined in 29 *Del. C.* § 10002(d)." That statute (part of the Freedom of Information Act) has been renumbered 29 *Del. C.* § 10002(g) and provides, in pertinent part, as follows (emphasis added):

> (g) "Public record" is information of any kind, owned, made, used, retained, received, produced, composed, drafted or otherwise compiled or collected, by any public body, relating in any way to public business, or in any way of public interest, or in any way related to public purposes, regardless of the physical form or characteristic by which such information is stored, recorded or reproduced. *For purposes of this chapter, the following records shall not be deemed public*:
>
> * * *
>
> (2) Trade secrets and commercial or financial information obtained from a person which is of a privileged or confidential nature;
>
> * * *
>
> (16)a. The following records, which, if copied or inspected, could jeopardize the security of any structure owned by the State or any of its political subdivisions, or could facilitate the planning of a terrorist attack, or could endanger the life or physical safety of an individual:

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[1] In a document titled "Response to Request for Access to Confidential Information and Motion for Entry of a Protective Order" (distributed by January 18, 2007 e-mail), Professor Firestone argues that he is a "party to 06-241" and, therefore, entitled to the information upon execution of an appropriate agreement or protective order under Rule 11(e). However, because the Commission is properly not granting party status in Docket No. 06-241, Professor Firestone is not a "party" entitled to access to confidential information under Rule 11(e). Even if the Commission were to commence granting formal party status in Docket No. 06-241, Conectiv Energy submits that Professor Firestone, who has no "direct interest," financial or otherwise, which is distinct from any other member of the public, should not receive party status under Rule 2.

* * *

> 2. Building plans, blueprints, schematic drawings, diagrams, operational manuals or other records of mass transit facilities, bridges, tunnels, emergency response facilities or structures, buildings where hazardous materials are used or stored, arenas, stadiums, waste and water systems, electric transmission lines and substations, high-pressure natural gas pipelines and compressor stations, and telecommunications networks facilities and switching equipment, the disclosure of which would reveal the building's or structure's internal layout, specific location, life, safety and support systems, structural elements, surveillance techniques, alarm or security systems or technologies, operational and transportation plans or protocols, or personnel deployments. Records that disclose the substances being used or stored on a given piece of property are public records; however, records which disclose the specific location on that property of the substances being used or stored may be disclosed only if the chief administrative officer of the agency from which the record is requested determines that disclosure will not jeopardize the security of any structure owned by the State or any of its political subdivisions, or will not facilitate the planning of a terrorist attack, or will not endanger the life or physical safety of an individual.

As explained more fully below and in Attachment No. 1, attached hereto, which lists each of the redacted items according to justification for said redaction and in an annotated version of the redacted Proposal, sent under separate cover to Commission staff member Robert Howatt, the materials redacted by Delmarva are trade secrets or sensitive safety-related information. They are not "public records" within the meaning of 29 *Del. C.* § 10002(g), and they are not subject to public inspection under Commission Rule 10. The information that is protected from disclosure by 29 *Del. C.* § 10002(g) reflects a business strategy that the Company intends to continue to employ as it participates in the competitive wholesale electric market. Therefore, the Company cannot agree that there is any time in the future when such information should no longer be exempt from disclosure to the public.

3. <u>Price-Related Information</u>

Many of the redactions are related to the bid price contained in Conectiv Energy's Proposal. Such information qualifies as "commercial or financial information" protected by 29 *Del. C.* § 10002(g)(2). However, it is not only the ultimate offered price or the formula and indices used by the Company to develop such price that qualifies as "commercial or financial information." Just as critical, or perhaps more so, is the internal proprietary information used by Conectiv Energy to derive its price. Such information falls into the following categories: (1) corporate financial information (*e.g.*, internal cost of capital and required rate of return); (2)

operating costs and characteristics that are based upon the Company's experience at other similar generating facilities (*e.g.*, operating and maintenance costs, dispatch expectations, capacity factor, heat rate, and other output data); (3) projected fuel costs and fuel acquisition strategies; and (4) the strategy used in selecting equipment, permitting and scheduling construction of the power plant. This is proprietary information that the Company used to develop its bid price for this Proposal. But even more importantly, it is proprietary information that the Company might use in developing its price for other market activities.

Conectiv Energy does not question the fact that the State Agencies or their consultants might need the information listed above in order to fulfill their mandate under the Act. However, the protection from public disclosure provided by 29 *Del. C.* § 10002(g)(2) is designed to enable the government to obtain information that it needs without exposing the providers of such information to competitive harm. Cases decided under the Federal Freedom of Information Act recognize the need to protect a company from the release of information that competitors might use to underbid it. *See, e.g.*, *McDonnell Douglas v. U.S. Dept. of the Air Force*, 375 F.3d 1182, 1189 (D.C. Cir. 2004), *citing Gulf & W. Indus. V. United States*, 615 F.2d 527, 530 (D.C. Cir. 1979) (substantial competitive harm likely where disclosure "would allow competitors to estimate and undercut its bids"). Delaware cases recognize the same principle in commercial disputes. *See American Totalisator Co., Inc. v. Autotote Limited,* 1983 WL 21374 (Del. Ch.) at *3 (recognizing the need to protect information on prices and costs because "[t]he bidding process involves the utilization of one's intimate knowledge of costs incident to the field of endeavor and the necessary price to guarantee a favorable profit margin. Naturally, within a particular industry the basic information is generally known"); *Delmarva Drilling Co, Inc. v. American Water Well Systems, Inc.*, 1988 WL 7396 (Del. Ch.) at *6 ("Data on price bids and bidding procedures requires protection from competitors"). If the commercial and financial information listed above were not protected by 29 *Del. C.* § 10002(g)(2), such information would be available to Conectiv Energy's competitors who would then be able to adjust their own pricing strategies to unfairly compete with the Company.

The Company submits that the information protected by 29 *Del. C.* § 10002(g)(2) need not be made public in order for the Commission to fulfill its mandate under the Act. The Commission's consultants, who are currently reviewing the unredacted proposals of the three bidders, are in a position to disclose to the Commission what the relative impact of each proposal would be on Delmarva customer rates. It is this information that is of genuine public interest, not the underlying raw prices and financial details, disclosure of which could harm the Company in the competitive markets in which it does business.

4. <u>Other Trade Secret Information</u>

Other redactions relate to other commercial information that is protected under 29 *Del. C.* § 10002(g)(2). The Company has redacted information relating to (1) strategic construction scheduling and planning, proprietary operating strategies, and unique design features of the proposed facility; (2) identification of vendors and equipment that may be used in the proposed facility and equipment specification information and other information that has

been provided to the Company only subject to the terms of confidentiality agreements; (3) names of critical company employees; and (4) confidential Company information such as its Federal Tax ID Number and its Bank Account numbers.

This type of information has been redacted to prevent competitors from gaining strategic knowledge about how the Company plans for and builds facilities like the one being proposed in the Proposal, to prevent vendors from knowing that the Company has committed to their equipment before supply negotiations even start, and to prevent competitors and their headhunters from getting access to a "shopping list" of the Company's most qualified people.

5. Information Related to Security

Finally, the Company has redacted site plans and/or maps to avoid orienting terrorists toward potentially destructive activity. Such redactions are clearly consistent with 29 *Del. C.* § 10002(g)(16)a, quoted above.

6. Professor Firestone Is Not Entitled to the Company's Confidential Information

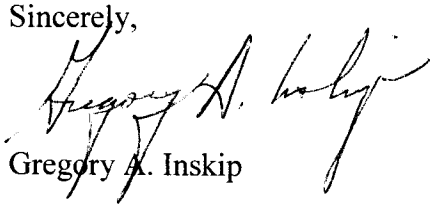
It is Rule 10 and 29 *Del. C.* § 10002(g) that govern public access to Commission records, not Rule 11. As demonstrated above, it is clear that the redacted information is not a public record under Rule 10 and must not be disclosed in response to a FOIA request.

Professor Firestone seems make the argument that, even if the information should not be made generally available, there is no harm in making it available to him since he is not in a position to use the information to harm Conectiv Energy competitively. However, Rule 10 does not provide for selectively defining public records based upon who is seeking the information. Rule 10 only has one definition for public records. If the information falls under one of the exceptions described above, the information is not a public record and is not subject to disclosure no matter who is seeking disclosure. Thus, Professor Firestone's contention that he has a special right to review the information because he would not use it to harm Conectiv Energy is without merit. Professor Firestone's request for the information should, therefore, be denied.

As a final thought Conectiv Energy wants to bring to the attention of the Commission that, if the past two years are any indication, the Commission can expect to be called on again to oversee bids for the right to supply electricity to Delmarva in the discharge of its Standard Offer Service obligation or otherwise. The Company respectfully submits that the State should encourage interest in the bidding process. An important step to that end is to let it

be known that the Commission will protect the trade secrets and other sensitive commercial information of bidders.

Sincerely,



Gregory A. Inskip

GAI:ksk778088

cc: I. David Rosenstein, Esq.
Dkt. 06-241 E-Mail Distribution

Attachment 1

List of pages in Proposal and Response to December 29 Questions on which redactions appear:

Paragraph 3 – Price Related Information:

Information directly revealing proposed bid price (e.g. indices and formulae used to derive price and explanations of pricing proposal):
Proposal pages: 15, 37, 68, 69, 109, 110, 111, 112, 113, 114, 115, 116, 117.
Response to December 29 Questions pages: 13, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 66, 107, 109.

Corporate financial information utilized in pricing proposal:
Proposal pages: 75, 76, 80, 82, 84, 88, 90
Response to December 29 Questions pages: 2, 27, 39, 102, 103, 105.

Operating costs and characteristics of similar equipment operated by Company used as a basis for developing price for proposed facility:
Proposal pages: 17, 40, 47, 49, 100, 101, 103, 104, 105
Response to December 29 Questions pages: 2, 14, 15, 16, 17, 20, 21, 22, 26

Projected fuel costs and strategy for obtaining fuel for the proposed facility:
Proposal pages: 35, 36, 39, 40
Response to December 29 Questions pages: 18, 19, 51, 53, 55.

Paragraph 4 – Trade Secret Information:

Strategic construction scheduling and planning; proprietary operating strategies; and unique design features of the proposed facility:
Proposal pages: 49, 51, 63
Response to December 29 Questions pages: 22, 23, 32, 49, 68.

Identification of specific vendors and equipment that may be used in the proposed facility and equipment specification information obtained from vendors under terms of confidentiality agreements:
Proposal pages: 17, 21, 22, 23, 24, 25, 26, 27, 28, 40, 79, 80, 82, 84.
Response to December 29 Questions pages: 14

Names of critical employees:
Proposal pages: 94, 95, 97
Response to December 29 Questions pages: 70.

Company financial security information (e.g. Tax ID number and bank account numbers):

Proposal pages: 73

Paragraph 5 – Security:

Proposal pages: 44, 62

Response to December 29 Questions pages: 98, 99.