MORRIS, NICHOLS, ARSHT & TUNNELL LLP

1201 NORTH MARKET STREET
P.O. BOX 1347
WILMINGTON, DELAWARE 19899-1347

302 658 9200
302 658 3989 FAX

RECEIVED
07 FEB 16 PM 2:16
DELAWARE P.S.C.

MICHAEL HOUGHTON
302 351 9215
302 425 4675 FAX
mhoughton@mnat.com

February 16, 2007

BY HAND DELIVERY

Arnetta McRae, Chair
Delaware Public Service Commission
861 Silver Lake Boulevard
Cannon Building, Suite 100
Dover, Delaware 19904

Re: In the Matter of Integrated Resource Planning for the Provision of Standard Offer Supply Service by the Delmarva Power & Light Company Under 26 Del. C. Section 1007(c) & (d): Review and Approval of the Request for Proposals for the Construction of New Generation Resources Under 26 Del. C. Section 1007(d), PSC Docket No 06-241

Dear Chairperson McRae:

Pursuant to the Delaware Public Service Commission's (the "Commission") February 6, 2007 ruling on Professor Jeremy Firestone's **Motion to Commence Proceedings to Determine Validity of Assertions of Confidentiality,** enclosed please find NRG Energy, Inc's (hereinafter "NRG") re-redacted public bid proposal in Delaware Public Service Commission Docket No. 06-241. After the Commission's February 6, 2007 ruling, we have reviewed our redacted January 24, 2007 bid proposal in detail and re-assessed our previous claims of confidentiality.

Of all the proposals submitted, NRG's proposal was probably the most comprehensive at approximately 1,000 pages in total. From NRG's perspective, such a large submittal was not due to filler, but instead demonstrates that NRG has heavily invested in Integrated Gasification Combined Cycle (IGCC) technology for the past two years and the size, depth and breadth of our proposal reflects those efforts. As a result of the considerable investment in time, intellectual capital and money, NRG has built up an enormous amount of data on pricing, technology, feasibility, plans, know-how, etc. to make the Indian River IGCC plant a reality and radically reduce any perceived "execution risk" in the evaluation process. In turn, by compiling such extensive data on this innovative baseload technology and inserting it into its proposal under this Docket, there are broad categories of information that if disclosed to

competitors (either within Delaware or beyond it) would cause serious competitive disadvantage and/or greatly harm NRG in its core business. It would be impractical and inefficient to draft a point-by-point analysis of each redaction made, but the following addresses with reasonable particularity the categories of redactions contained in NRG's attached re-redacted public bid proposal and the basis for such redactions.

Pursuant to Delaware's Freedom of Information Act, 29 Del. C. Ch. 100, all information filed with the Commission is considered a public record unless it contains "trade secrets and commercial or financial information obtained from a person which is of a privileged or confidential nature." *See, e.g.*, PSC Order No. 6869 in regulation Docket No. 15 (March 14, 2006) at Section X; PSC Order No. 6793 in regulation Docket No. 65 (December 6, 2005) at §5.1; 29 Del. C. §10002(g)(2). To qualify as a non-public record under this exemption, materials received by the Commission must be clearly and conspicuously marked on the title page and on every page containing the sensitive information as "proprietary" or "confidential" or words of similar effect. The Commission shall preemptively deem all information so designated to be exempt from public record status. Id.; PSC Rules of Practice and Procedure, Rule 11(a).

Under Delaware law a trade secret is "confidential and proprietary information" which, if it "falls into a rival's hands", will cause "serious competitive disadvantage." ID Biomedical Corp. v. TM Technologies, Inc., 1994 WL 384605 (Del. Ch. 1994). Trade secrets include – but are not limited to – formulas, patterns, devices, compilations of information, even lists of customers that give a business the opportunity to obtain an advantage over competitors who do not know or use such information. Del. Op. Atty. Gen. 77-029 (September 27, 1977).

"Commercial or financial information obtained from a person which is of a privileged or confidential nature" has been broadly interpreted to mean information not known to the public which would give a competitor an edge. Del. Op. Atty. Gen. 77-037 (December 28, 1977). In the public bid process, such information specifically includes information that may have been required to be submitted in order for a state agency to evaluate the company but which, if released, would greatly harm the company and might be used by a competitor. Id. (emphasis added). Confidential or privileged commercial or financial information has been determined to include – but is not limited to – such information as assets, product pricing, profits and losses, stock holdings, loans, proposed or pledged collateral, and technical approaches to a public bid, including but not limited to details about processes, operations and style of work. Del. Op. Atty. Gen. 87-I031 (November 4, 1987); and Hecht v. Agency for International Development, C.A. No. 95-263-SLR (D. Del. 1996), available at 1996 WL 33502232.

Relying on the authorities cited above, specific details regarding NRG's pricing proposals with or without carbon capture sequestration, the commercial structures NRG proposes to use in the Power Purchase Agreement (PPA) tariff, and NRG's entire mark-up of the proposed PPA have all been redacted. All of this information goes directly to what type of deal NRG has proposed and more importantly what type of deal NRG would accept, which could cause serious competitive disadvantage to NRG in both this competitive solicitation process (which remains

ongoing), but will also competitively disadvantage NRG in bid processes in other states – currently or in the future.

All references to and details regarding counterparties who were involved in assembling the bid and who may be a part of the IGCC development process going forward subject to ongoing commercial negotiations have been redacted. The future success in the development of the IGCC plant at the Indian River site requires NRG to maintain as much leverage as possible with potential counterparties. Such leverage will benefit the overall structure and pricing for the PPA, which in turn directly inures to the benefit of Delmarva and ultimately the public. Conversely, and quite obviously, disclosure of such information will competitively disadvantage and greatly harm NRG's ability to negotiate the best and most commercially reasonable contract or other agreements with potential counterparties.

All references to and details of NRG's paid consultants and their work, findings and recommendations in connection with the development of the Indian River IGCC plant have been redacted, including the names of the retained consultants and description of their work in the Appendices Volume II Table of Contents. NRG has retained these third-party consultants and paid them considerable sums to provide their expertise to develop the cutting-edge technology know-how, etc. to make the Indian River IGCC plant a reality. As a whole, this data goes directly to NRG's competitive advantage in its business, and not just in the context of this RFP. As is the case with a vast majority of the information redacted, if such information were to be disclosed to the public, it is quite conceivable that our existing and potential competitors would be flooding the PSC website to download NRG's documents to either find a means to undercut NRG's bid, and/or to go to school on our hard work and capitalize on our hard-won experience for free.

Certain specific percentages and expected performance data have been redacted throughout NRG's public bid proposal. This information is not only confidential to our vendors, but also remains subject to being confirmed in our negotiations with contractors, so early disclosure would serve only to highlight to those counterparties our "hold up" point – again with the potential to jeopardize the entire project. Emissions or comparable data that comes from an existing, publicly available source like the United States Environmental Protection Agency, the Electric Power Research Institute, or other non-Indian River IGCC specific sources have not been redacted.

Other competitively sensitive data, such as cost per ton measures for Carbon Dioxide, as well as projected heat rates have been redacted. Similarly, the specific costs for interconnection and carbon capture sequestration were redacted. Should NRG be forced to disclose the major components of its costs, competitors will be able to back-calculate NRG's economics and hurdle rate which would be an enormous competitive disadvantage to its business going forward, both with this RFP and more generally.

Finally, peculiar aspects of NRG's business -- such as how NRG generally manages fuel -- and expected operating characteristics of the Indian River IGCC facility are

redacted because public disclosure of such information would seriously damage NRG's competitive advantage elsewhere.

For all of the reasons set forth above, the redacted information is crucial competitive data at the heart of NRG's core business operations and future development plans, and public disclosure of this information will cause serious and irreversible harm to NRG's competitive advantage in the marketplace. As a result, the redacted information contained in the attached bid proposal must not be disclosed by the PSC for at least three (3) years from the date of NRG's RFP submission to the PSC on December 17, 2006. Further, prior to <u>any</u> release of information NRG deems to be confidential, NRG requests that the Commission provide NRG with reasonable notice and an opportunity to show why the information should not be released.

In short, we believe that NRG has submitted -- even it its redacted form -- a very comprehensive and polished proposal that should reflect that NRG has given a lot of thought to how the proposed Indian River IGCC facility will cleanly, effectively and efficiently operate into the future. We also have given an enormous amount of thought, time and energy to our redactions so as to ensure that members of the public are able to review the great majority of NRG's bid in order to understand our proposal and provide meaningful comments.

Also enclosed on disk is an electronic copy of NRG's re-redacted bid proposal. If you have any questions or concerns, please do not hesitate to contact me.

Sincerely,

Michael Houghton

MH/fv

Enclosures

cc: Interested Parties in PSC Docket No. 06-241 (via E-mail w/o Enclosures)