

BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF DELAWARE

IN THE MATTER OF THE PROVISION OF )  
STANDARD OFFER SUPPLY TO RETAIL )  
CONSUMERS IN THE SERVICE TERRITORY ) PSC DOCKET NO. 04-391  
OF DELMARVA POWER & LIGHT COMPANY )  
AFTER MAY 1, 2006 )  
(OPENED OCTOBER 19, 2004) )

ORDER NO. 7042

This 17<sup>th</sup> day of October, 2006, the Commission determines and Orders the following:

1. In this docket, the Commission sat in executive sessions on December 15, 2005, January 12, 2006, and January 24, 2006 to consider the bid process and successful bids for each "Tranche" in Delmarva Power & Light Company's<sup>1</sup> procurement of wholesale Standard Offer Service ("SOS") electric supply. That wholesale supply would be used to serve the utility's retail "fixed-price" SOS load beginning in May, 2006. The Commission conducted those reviews in executive sessions pursuant to the provisions of 29 Del. C. §§ 10002(g)(2) and 10004(b)(6).<sup>2</sup> In addition, on December 20, 2006, the Commission sat in

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<sup>1</sup>"DP&L"

<sup>2</sup>The Settlement approved by PSC Findings, Opinion, and Order No. 6746 (Oct. 11, 2005), contains several provisions dictating when, and to what extent, the results from such SOS procurement regime will be made available to the public and others. See Order No. 6746, Proposed Settlement, Part I at ¶¶ 2-6, 8. As the Commission saw it, the Settlement's "confidentiality" provisions find their legs in the notion that the bids submitted in the procurement process (both in terms of the bid amount and the identity of the submitting bidder) involve commercial information of a privileged or confidential nature. See 29 Del. C. § 10002(g)(2). The Commission conducted its bid reviews in executive sessions because it believed such discussions might include references to such "confidential" bid documents. See 29 Del. C. § 10004(b)(6). Moreover, the review in executive session of the results in each "Tranche" of procurement also ensured that the bidding for subsequent

another executive session to hear, and discuss with representatives of DP&L, the availability of mitigation measures that might be adopted to offset significant increases in SOS retail prices due to the Tranche bid results.<sup>3</sup>

2. Pursuant to 29 Del. C. § 10004(f), the Commission now releases to the public the minutes from these four executive sessions. The minutes no longer need to be kept confidential to serve the purposes that drove the votes for executive sessions. The Commission also now releases for public review the verbatim transcripts of such executive sessions, and the accompanying documents distributed during such sessions. However, the transcripts and documents have been redacted in several instances to preserve information that remains confidential under the confidentiality guidelines adopted in PSC Findings, Opinion, and Order No. 6746 (Oct. 11, 2005).<sup>4</sup> The

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Tranches would not be skewered because of "public" knowledge of the bid amounts submitted in earlier rounds.

<sup>3</sup>The Commission chose to sit in executive session to discuss the availability of mitigation measures because of the possibility that such discussion would allude to the bids and bid amounts from the initial Tranche of procurement. At the time of the discussion (and continuing to today), those bids were to remain confidential. See n. 2 above.

<sup>4</sup>For example, references in the transcripts to the identity of winning bidders in any Tranche, or the percentage of overall SOS supply "won" by particular bidders, have been redacted. So too, discussions of actual averaged successful bid amounts submitted in particular Tranches, or the anticipated percentage increases in retail rates based on the winning bid results in particular Tranches, have also been black-lined. The Commission did adopt - for public review - its consultant's final report which provides an overview of the bid process, the identities of winning bidders, and the overall averaged winning bid amounts. See PSC Order No. 6881 (Mar. 28, 2006). In addition, the retail SOS rates resulting from the initial procurement bid process have now been in place for almost six months.

transcripts and distributed exhibits (with the called-for redactions), shall now be available for public inspection.<sup>5</sup>

3. The Commission also sat in another executive session at its meeting on December 15, 2005 to hear legal advice or opinion from its counsel concerning a Freedom of Information Act request submitted by Representative Robert Valihura.<sup>6</sup> That request - subsequently withdrawn - sought access to the records about the bids, bidders, and results related to the initial Tranche in the SOS procurement process.<sup>7</sup>

4. The Commission, pursuant to 29 Del. C. § 10004(f), now releases the minutes and transcript of that "legal advice" executive session held on December 15, 2005. Although the released information contains counsel's advice that might otherwise be protected under the attorney-client privilege, the Commission deems it appropriate to now make such discussions available for public review.

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<sup>5</sup>The Commission is not releasing the summary and ranking of submitted bids, copies of the actual bids, and the actual successful bid and acceptance documents which were forwarded to the Commission prior to each Tranche review session. Those documents remain commercially-privileged "non-public" records under the confidentiality provisions accepted in Order No. 6746. See 29 Del. C. § 10002(g)(2). The Commission does release redacted copies of other documents distributed during the executive sessions.

<sup>6</sup>The Commission moved to executive session to hear such advice under the provisions of 29 Del. C. § 10004(b)(4). The advice related to "potential litigation" in the sense that disclosure of the bid information to Representative Valihura might have provoked either DP&L or a bidding wholesale supplier to institute judicial action premised on the Commission disregarding the confidentiality scheme previously accepted in Order No. 6746. Alternatively, the discussion involved the possibility of litigation instituted by another member of the public or a media entity potential litigation also seeking access to the same records premised on the records being previously disclosed to Representative Valihura.

<sup>7</sup>The Commission subsequently provided such information to the Energy Committee of the House of Representatives pursuant to a House legislative subpoena. Representative Valihura chaired the Energy Committee.

Now, therefore, **IT IS ORDERED:**

1. That, for the reasons expressed in the body of this Order, the minutes, transcripts, and distributed exhibits related to the executive sessions conducted on December 15, 2005, December 20, 2005, January 12, 2006, and January 24, 2006 in this docket, shall be made available for public inspection. The transcripts and exhibits from such sessions have been redacted in part to preserve commercial and financial information obtained from a person which is of a privileged or confidential nature. Such redactions are consistent with confidentiality provisions accepted in PSC Findings, Opinion, and Order No. 6746 (Oct. 11, 2005).

2. That the Secretary of the Commission shall maintain the documents described in Ordering paragraph 1 of this Order as publicly available documents as of the date of this Order. The bid ranking documents, copies of actual bids, and the successful bids and acceptances furnished to the Commission during the course of the initial procurement process conducted under this docket shall continue as non-public records and shall not be available for public inspection at this time.

3. That the Commission reserves the jurisdiction and authority to enter such further Orders in this matter as may be deemed necessary or proper.

BY ORDER OF THE COMMISSION:

/s/ Arnetta McRae  
Chair

PSC Docket No. 04-391, Order No. 7042 Cont'd.

/s/ Joann T. Conaway  
Commissioner

/s/ Jaymes B. Lester  
Commissioner

/s/ Dallas Winslow  
Commissioner

/s/ Jeffrey J. Clark  
Commissioner

ATTEST:

/s/ Karen J. Nickerson  
Secretary