

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE
AND THE DELAWARE ENERGY OFFICE
THE OFFICE OF MANAGEMENT AND BUDGET
AND THE CONTROLLER GENERAL

IN THE MATTER OF INTEGRATED RESOURCE)
PLANNING FOR THE PROVISION OF STANDARD)
OFFER SUPPLY SERVICE BY DELMARVA POWER &)
LIGHT COMPANY UNDER 26 DEL. C. § 1007(c))
& (d): REVIEW AND APPROVAL OF THE REQUEST) PSC DOCKET NO. 06-241
FOR PROPOSALS FOR THE CONSTRUCTION OF)
NEW GENERATION RESOURCES UNDER)
26 DEL. C. § 1007(d))
(OPENED JULY 25, 2006))

ORDER NO. 7246

This 7th day of August, 2007, the Delaware Public Service Commission (the "Commission"), Delaware Energy Office, the Office of Management and Budget, and the Controller General determine and Order the following:

1. By Order No. 7199 (May 22, 2007) ("the Order"), the Commission, the Delaware Energy Office, the Office of Management and Budget, and the Controller General (collectively "the State Agencies") accepted Staff's proposed energy supply portfolio and directed Delmarva Power & Light Company ("Delmarva") to negotiate in good faith with Bluewater Wind LLC ("Bluewater") for a long-term power purchase agreement ("PPA") for the provision of wind power. (See Order No. 7199 (May 22, 2007) at ¶¶ 51, 55). The Order instructed Delmarva to negotiate independently with both Conectiv Energy Supply, Inc. ("CESI") and NRG Energy, Inc. ("NRG") to provide any necessary backup firm power when wind power is not available and directed that the

negotiations for the backup power be conducted at the same time as the Delmarva-Bluewater negotiations. (Id. at ¶ 56.)

2. In accepting Staff's recommendations, the State Agencies explained at the outset that the "Electric Utility Retail Customer Supply Act of 2006" ("the EURCSA") does not constrain the State Agencies to consider solely the original generation proposals submitted by the bidders. (Id. at ¶ 50.) The State Agencies reasoned that the EURCSA did not contain such limiting language and that the RFP approved by the Commission and the Energy Office contemplated that negotiations between Delmarva and each bidder might modify the original submissions. (Id.) Moreover, the State Agencies reasoned that Staff's recommendation was the most appropriate method of diversifying risk, taking control of Delaware's energy future, and providing Delmarva's Standard Offer Service ("SOS") customers with price-stable reliable energy. (Id. at ¶¶ 50-52.) Accordingly, the State Agencies found that Staff's proposal was not prohibited by the EURCSA.

3. The State Agencies recognized that their decision to direct Delmarva to negotiate with Bluewater for a wind PPA was not the "least cost" alternative, but reasoned that the EURCSA criteria did not focus solely on price. (Id. at ¶ 53.) Moreover, the State Agencies observed that price was not even specifically identified in the EURCSA as a Delaware generation evaluation factor. (Id. at ¶ 55.) In light of the growing uncertainties with respect to price in the current energy market, the State Agencies based their decision on factors in addition to price such as environmental considerations and price

stability. (Id. at ¶¶ 53-55.) Despite the fact that CESI had submitted the lowest-priced bid, the State Agencies specifically declined to direct Delmarva to negotiate solely with CESI because "it does not utilize a new or innovative technology and it is not nearly as environmentally friendly as other proposed projects." (Id. at ¶ 54).

4. Although the State Agencies rejected CESI's proposed combined cycle gas turbine ("CCGT") at its existing Hay Road site, they ordered Delmarva to negotiate with CESI and NRG for backup generation. (Id. at ¶ 56.) The State Agencies noted that NRG's bid might have an advantage due to its pre-existing location in Sussex County, but did not expressly preclude CESI from building a facility in southern Delaware or discussing the reliability of its existing Hay Road site with Delmarva. (Id.) The State Agencies further observed that competition and flexibility were crucial components of the bidding process. (Id. at ¶¶ 55-56.)

5. On June 11, 2007, CESI filed a Petition for Rehearing and Reconsideration of the Order ("the Petition"). CESI urged the State Agencies to reconsider its CCGT proposal, terminate the current negotiations, and direct Delmarva to negotiate exclusively with CESI for its proposed CCGT at its Hay Road site. Alternatively, CESI requested that the State Agencies direct Delmarva to consider CESI's Hay Road site as an option for the backup component of the PPA and allow CESI and NRG to modify their proposals to include a wind component competitive with Bluewater. First, CESI contended that the State Agencies erred in directing Delmarva to negotiate with Bluewater

for a long-term wind PPA because the State Agencies arbitrarily departed from the bid selection criteria established by the EURCSA. CESI further alleged that this departure was not supported by substantial evidence in the record. CESI took the position that prior Commission Orders held that price was a controlling factor in the evaluation process. CESI also took the position that the approved RFP scoring criteria constituted a well-reasoned balancing of the six evaluation factors set out in EURSCA. Furthermore, CESI asserted, the State Agencies erred in declining to follow the bid rankings provided by the Independent Consultant ("the IC").

6. Second, CESI alleged that the State Agencies' refusal to direct Delmarva to negotiate exclusively with CESI for backup generation at its Hay Road site was not supported by substantial evidence. Specifically, CESI contended that Staff's discussions with PJM and the PowerWorld Report regarding system reliability ("the PowerWorld Report") were not subject to participant scrutiny, and thus, could not provide the basis for the State Agencies' alleged rejection of CESI's proposal.

7. Finally, CESI asserted that the principles of flexibility and competition mandated by both the Order and the EURCSA require the State Agencies to delay the bidding process to allow NRG and CESI to include a wind generation component in their bid proposals. CESI asserted that in preparation for submission of a wind project, it joined forces with a wind developer, Wind Energy System Technology, and a generation company, Tenaska, Incorporated, that has developed over 9,000 Megawatts of capacity in its 20-year history.

8. On June 18, 2007, the Public Service Commission Staff ("Staff") filed a response to the Petition ("Staff's Response").¹ Staff first argued that the State Agencies' decision to direct Delmarva to negotiate with Bluewater for a long-term PPA was supported by substantial evidence for two reasons. First, Staff argued that price was not the decisive factor in the bid evaluation process because none of the 26 Del. C. § 1007(c)(1) factors that the State Agencies were required to recognize in the RFP process and nothing in the plain language of the EURCSA mandates the price be the conclusive factor in the bidding process. For further support, Staff asserted that none of the prior Orders in this docket hold that price is the controlling factor in the bidding process. Second, Staff asserted that the State Agencies had the authority to deviate from the IC's rankings, after considering the volumes of material filed in this docket, because the EURCSA conferred exclusive responsibility for making the ultimate RFP decision on the State Agencies - not the IC. Staff stressed that the Commission and Energy Office observed that the State Agencies were not bound by the results of a "straight addition

¹That same day, Bluewater also filed a response in opposition to the Petition that was substantially similar to Staff's response. Bluewater argued that CESI's petition should be denied because: (1) CESI had not presented new evidence or legal precedent overlooked by the State Agencies; (2) prior Orders in this docket rejected the State Agencies' strict adherence to the evaluation scores in making their decision regarding the bid generation proposals; (3) the State Agencies' decision was supported by hundreds of hours and pages of evidence gathered throughout the exhaustive nine-month process leading up to the generation proposal decision; and (4) Conectiv should not be permitted to now submit a wind proposal when it elected not to do so in December 2006. See Bluewater Wind Delaware LLC's Submission in Opposition to Conectiv Energy Supply, Inc.'s Petition for Rehearing and Reconsideration (June 18, 2007) at 8-13.

of the numbers" in the IC's point allocation and had the flexibility to "go outside the bare numbers" if they deemed it appropriate.²

9. Staff further argued that the State Agencies' decision to direct Delmarva to negotiate with both CESI and NRG for backup generation did not violate due process and was supported by ample evidence. As an initial matter, Staff noted that the Order did not preclude CESI from establishing a generation facility in southern Delaware or demonstrating that its Hay Road site meets reliability requirements.³ With respect to CESI's due process argument, Staff asserted that CESI cannot demonstrate a colorable deprivation of a property or liberty interest that triggers due process protection because it has no right being affected by the RFP bidding process. With respect to CESI's evidentiary argument, Staff asserted that the PowerWorld Report constituted competent evidence in this unique process that was not a contested proceeding contemplated by the Commission's Rules of Practice and Procedure and Delaware jurisprudence governing evidentiary Standards. Staff emphasized that there were no formal parties, no sworn witnesses, and no authenticated documents in this docket.

²See Staff Response at ¶ 17 (quoting Order No. 7066 (Oct. 31, 2006) at ¶ 115).

³In its responsive papers, NRG disputed Staff's position on the location of backup generation and urged the State Agencies to hold that the Order requires any proposal for backup generation to be located in Sussex County, Delaware. NRG argued that Staff's hybrid proposal called for reactive support of backup generation in Sussex County and that the Order did not specifically address this recommendation to the contrary. See NRG Energy Inc.'s Response to Delaware Public Service Commission Staff Response in Opposition to Conectiv Energy Supply, Inc.'s Petition for Rehearing and Reconsideration (June 25, 2007) at ¶¶ 7-14. Other than this one exception, NRG concurred with the reasoning and conclusion in Staff's Response.

10. Finally, Staff argued that CESI should not be permitted to submit a wind project. In support of this argument, Staff asserted that both NRG and CESI had the opportunity to submit a wind proposal in December 2006 pursuant to the terms of the RFP but did not do so. Staff characterized CESI's recent interest in submitting a wind proposal as a desperate last-minute attempt to stall the current negotiations. Staff warned that delaying the negotiations could hinder Delaware's attempt to diversify its energy supply, prevent an informed decision on the generation bids, and waste millions of dollars already spent in the process.

11. On July 3, 2007, the State Agencies met to consider the Petition, to hear oral argument from the commenting parties and any other parties that wished to be heard, and deliberate in open session. The State Agencies determined that from the outset of the RFP bidding process, the State Agencies resolved not to be confined to the scoring criteria. The State Agencies determined that the Order was the result of a thoughtful and deliberate analysis of hundreds of volumes of material.

12. The State Agencies further determined that CESI's request to submit a wind generation proposal was untimely in light of its election to file a CCGT proposal instead of a wind proposal pursuant to the RFP in December 2006. The State Agencies observed the importance of moving forward in the process of providing for Delaware's energy future.

13. The State Agencies recognized that reliability is a major concern in Sussex County, Delaware. However, the State Agencies did

not make a determination on whether the Order mandates that the backup generation proposals be exclusively located in Sussex County, Delaware.

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

1. That, for the reasons stated above, Conectiv Energy Supply Inc.'s Motion for Reconsideration and Rehearing is denied.

2. That the Commission and other State Agencies reserve the jurisdiction and authority to enter such further Orders in this matter as may be deemed necessary or proper.

BY ORDER OF THE DELAWARE PUBLIC SERVICE COMMISSION,
THE DELAWARE ENERGY OFFICE,
THE COMPTROLLER GENERAL,
DIRECTOR OF THE OFFICE OF MANAGEMENT & BUDGET

DELAWARE ENERGY OFFICE

PUBLIC SERVICE COMMISSION

/s/ Philip J. Cherry
Philip J. Cherry,
Director of Policy & Planning
Department of Natural Resources &
Environmental Control

/s/ Arnetta McRae
Chair

/s/ Joann T. Conaway
Commissioner

THE CONTROLLER GENERAL

/s/ Jennifer Cohan

/s/ Jaymes B. Lester
Commissioner

**DIRECTOR OF THE OFFICE OF
BUDGET & MANAGEMENT**

/s/ Robert Scoglietti

/s/ Dallas Winslow
Commissioner

/s/ Jeffrey J. Clark
Commissioner

ATTEST:

/s/ Karen J. Nickerson
Secretary