

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF DELAWARE**

IN THE MATTER OF THE CONSIDERATION            )  
OF THE "FOSSIL FUEL GENERATION                )  
EFFICIENCY" STANDARD 16 U.S.C.                )  
§ 2621(d)(13) RELATING TO A UTILITY'S        )       PSC DOCKET NO. 07-248  
EFFICIENCY PLAN FOR ITS FOSSIL FUEL         )  
GENERATION PLANTS                                )  
(OPENED SEPTEMBER 18, 2007)                    )

**ORDER NO. 7279**

This 18<sup>th</sup> day of September, 2007, the Commission determines and Orders the following:

1. By this Order, the Commission focuses on the last of the new standards that the Energy Policy Act of 2005<sup>1</sup> directed State commissions to "consider" for implementation by their rate regulated electric utilities under the regime initially created by PURPA.<sup>2</sup> This final standard has been labeled "Fossil Fuel Generation Efficiency" and, if adopted, would require:

Each electric utility [to] develop and implement a 10-year plan to increase the efficiency of its fossil fuel generation.<sup>3</sup>

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<sup>1</sup>Energy Policy Act of 2005, Pub. L. No. 109-58, §§ 1251-1252, 1254, 119 Stat. 594, 962-67, 970-71 (2005) ("EPAct 2005").

<sup>2</sup>Public Utility Regulatory Policies Act of 1978, 92 Stat. 3117 (1978), relevant provisions codified at 16 U.S.C. §§ 2611-12, 2621-27, 2631-34. The Commission has dealt with the other four new EPAct 2005/PURPA standards in several prior Orders. See PSC Orders Nos. 7252 (Aug. 21, 2007) (summarizing prior actions for "time-based" metering and "interconnection" standards and acting on "net-metering" standard) & 7267 (Aug. 21, 2007) (designating consideration of "fuel sources" standard as part of Integrated Resource Planning docket).

<sup>3</sup>See 16 U.S.C. § 2621(d)(13), as added by EPAct 2005, § 1251(a) (emphasis added).

2. The Commission opens this docket to consider implementation of this standard. However, as a threshold issue, the Commission has a significant question about whether, or how, such standard can, as a practical matter, be applied to the single "rate-regulated electric utility" still subject to the Commission's regulatory oversight. The Commission outlines the reasons for this skepticism below.

3. Under State law, Delmarva Power & Light Company ("DP&L") is the only entity that meets the PURPA definition of a "rate-regulated" "electric utility" for which the Commission must undertake the PURPA-compelled "considerations" of the various "standards."<sup>4</sup> Moreover, this Commission's rate regulation over DP&L - necessary for PURPA authority - extends only to DP&L's retail Standard Offer Service ("SOS") and Returning Customer Service ("RCS") sales and its retail distribution services.<sup>5</sup>

4. On that electric supply side, the Commission's regulatory authority, under state law, reaches (at least in theory) to the "generation, supply, and sale of electricity, *including all related facilities and assets used to serve*" the SOS and RCS services.<sup>6</sup> However, currently, DP&L, the regulated entity, does not own (or self-lease) any of the electric generation facilities. More particularly,

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<sup>4</sup>See 16 U.S.C. §§ 2602(4) ("electric utility"), (11) ("ratemaking authority"), (17) ("State regulatory authority"); 2621(a) ("State regulatory authority must consider implementation of PURPA standard "with respect to each electric utility for which it has ratemaking authority").

<sup>5</sup>See 26 Del. C. §§ 1006(b), 1007(a) (2006 Supp.). Other retail electric suppliers may sell retail electric supply in Delaware, but those sales are not "rate-regulated" by the Commission. Consequently, the Commission has no PURPA obligations related to those electric suppliers.

<sup>6</sup>See 26 Del. C. § 1003 (2006 Supp.) (emphasis added).

it does not hold any "fossil fuel generation" which could be the subject of a 10-year, increased efficiency plan called for by the PURPA standard.<sup>7</sup> Rather, under a regime endorsed by this Commission, DP&L procures electric supply needed to meet its SOS and RCS retail load from the short-term PJM wholesale markets (in the case of "hourly-priced" SOS and RCS services) or via "full requirements" contracts with multiple wholesale suppliers (in the case of "fixed-price" SOS services). See, PSC Findings, Opinions, and Orders Nos. 6746 (Oct. 11, 2005) & 7053 (Oct. 17, 2006).<sup>8</sup>

5. The question then becomes how would the federal "fossil fuel generation efficiency" standard be applied to this current procurement regime? PURPA's "consideration" mandates only extend to electric utilities that make a certain threshold of retail sales with wholesale operations (and sales) excluded from the scope of the PURPA's retail regulatory policies.<sup>9</sup> Thus, the PURPA fossil fuel generation efficiency standard could not be applied *directly* to the upstream wholesale suppliers that might utilize fossil-fueled

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<sup>7</sup>A corporate sibling of DP&L, Conectiv Energy Supply ("Conectiv") does own generation facilities in this State, some of which utilize fossil fuels. However, Conectiv, while it might be an "electric utility," makes wholesale rather than retail sales. Accordingly, it is not an electric utility over which the Commission has "ratemaking authority" under PURPA's definitional scheme. See 16 U.S.C. § 2602(4), (10), (11) & (17). Cf. 16 U.S.C. § 2612(b) (PURPA standard requirements do not apply to the operations of an electric utility to the extent that such operations relate to sales of electric energy for purposes of resale).

<sup>8</sup>See 26 Del. C. § 1007(c)(1)a. (2006 Supp.) (directing that such procurement process continue as the means for DP&L to procure at least 30 percent of the resource mix needed to meet SOS and RCS retail load).

<sup>9</sup>See 16 U.S.C. § 2612(a), (b).

generation facilities to generate the electric supply that eventually serves DP&L's rate-regulated retail load. Moreover, it is difficult to see how the PURPA standard could be applied *indirectly* to those upstream generation facilities. For DP&L's hourly-priced SOS and RCS load, the needed "supply" comes from PJM's short-term dispatch markets, where there is no ability to easily - or even clearly - identify any particular provider or generating asset (fossil or otherwise) that produced such supply. Similarly, for DP&L's fixed-price SOS load, supply is procured by full-requirements contracts that are not linked to particular generation assets. Consequently, in either of these situations, how would the retail utility (DP&L) construct a 10-year plan to improve the efficiency of unidentified fossil-fueled generation sources? Not only would the specific facilities not be identified but, in many circumstances, they would lie outside of Delaware's borders.

6. The Commission recognizes that in the pending DP&L procurement docket (Dckt. No. 04-491), the Commission has directed DP&L to negotiate concurrently with Conectiv and NRG to produce competing purchase power agreements linked to the construction of new gas-fired generating units in Delaware. Such facility would "backstop" any larger power purchase agreement that DP&L might complete with an off-shore wind generation facility. Such a power purchase agreement - linked to a particular fossil-fueled unit in Delaware - would not suffer from the "no-identity of assets problem" that exists under the present procurement regime. Perhaps, DP&L could then insist on a 10-year fuel-efficiency plan for this new fossil

(gas)-fueled plant - even though it would not be DP&L's facility. But of course, the Commission has not yet approved any such purchase power agreement between DP&L and either Conectiv or NRG. Moreover, even if such a contract is forthcoming, one would suspect that the prior competition between Conectiv and NRG to be awarded such a contract would have driven the competing suppliers to structure efficiencies into the construction and prospective operation of the new generation facility that would go beyond any that could be identified in any 10-year prescriptive "plan" called for under the PURPA standard. In sum, at this time, the Commission questions how the fossil fuel generation efficiency standard could be applied to DP&L now, or in the near-term future.

7. However, PURPA says that before the Commission can make any determination that a PURPA standard is not appropriate for implementation, it must provide public notice concerning its consideration of the standard and hold a hearing on the question (although the hearing might be a paper one).<sup>10</sup> Consequently, the Commission will now call for comments on whether it is possible, or appropriate, to adopt this federal "Fossil Fuel Generation Efficiency" standard for DP&L. Perhaps the input from the public and interested entities will show how such standard can be implemented and why its adoption would be appropriate. The Commission specifically asks for comments on the following questions: (a) Can the PURPA standard be implemented under the present regime used by DP&L to procure its

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<sup>10</sup>See 16 U.S.C. § 2621(b).

supply for its retail SOS and RCS loads? and (b) If so, what would be the structure of the 10-year efficiency plan? After the close of the comment period, the Commission can decide whether the above initial skepticism about the practical ability to implement the standard is justified or whether further consideration of the federal standard is needed.

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

1. That this docket is opened for the Commission to consider the "Fossil Fuel Generation Efficiency" standard set forth in 16 U.S.C. § 2621(d)(13), (as added by the Energy Policy Act of 2005), as that standard would be applied to Delmarva Power & Light Company, the sole "electric utility" still rate-regulated by this Commission.

2. That, the Secretary shall publish the public notice, attached as Exhibit "A," in The News Journal newspaper, in two-column format outlined in black, on September 26, 2007. The Secretary shall file evidence of such publication on or before October 26, 2007. The Secretary shall also post a copy of the notice on the Commission's Internet website. In addition, the Commission shall send a copy of this Order to Delmarva Power & Light Company and the Division of the Public Advocate.

3. That, the Commission solicits comments concerning whether it is possible or appropriate to adopt and implement the "Fossil Fuel Generation Efficiency" standard set forth in 16 U.S.C. § 2621(d)(13) for Delmarva Power & Light Company. The Commission specifically seeks comment in response to its initial, tentative position, as expressed in the body of this Order, that significant questions surround whether

it is practically possible to implement such an efficiency standard for generation by fossil fuels in the context of the present wholesale supply procurement regime utilized by Delmarva Power & Light Company. Any responsive comments should be filed on or before October 31, 2007.

4. That Hearing Examiner Ruth Ann Price is delegated the authority to grant petitions to intervene in this matter.

5. 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

/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

E X H I B I T "A"

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NOTICE OF PUBLIC SERVICE COMMISSION'S  
CONSIDERATION OF  
"FOSSIL FUEL GENERATION EFFICIENCY"  
STANDARD UNDER 16 U.S.C. § 2621(d)(13)

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The Public Service Commission ("PSC") has opened a proceeding to consider whether it is appropriate to implement the "Fossil Fuel Generation Efficiency" standard as set forth in 16 U.S.C. § 2621(d)(13), as amended by the Energy Policy Act of 2005. Delmarva Power & Light Company ("DP&L") would be the only "electric utility" that might be subject to the PSC's implementation of such federal standard.

In its PSC Order No. 7279 (Sept. 18, 2007), the PSC raised questions whether it would be practically impossible for the PSC to adopt the Fossil Fuel Generation Efficiency standard for DP&L in light of the current regime for how DP&L procures its wholesale supply to meet its retail "hourly" and "fixed price" Standard Offer Service

retail loads. DP&L does not currently own any fossil-fueled generation units and the PSC questions whether the efficiency standard could be applied directly to upstream wholesale suppliers or indirectly under "full requirements" contracts with such wholesale providers.

The PSC now solicits comments on whether it is appropriate to implement the federal "Fossil Fuel Generation Efficiency" standard for DP&L. As part of such comments, the PSC specifically seeks views on its preliminary assessment that, under the current procurement regime, it would not be practically possible to implement that standard for DP&L. In addition, the PSC seeks outlines of how that standard might be implemented in light of present, and any future, procurement practices.

If you wish to comment, you should first review Order No. 7279. It is available on the PSC's website that can be accessed at <http://dep.sc.delaware.gov>. Please file an original and ten copies of your comments at the following address:

Delaware Public Service Commission  
861 Silver Lake Boulevard  
Cannon Building, Suite 100  
Dover, Delaware 19904  
Attn: PSC Dckt. No. 07-248

The comments must be filed on or before October 31, 2007. If you are able, you should also submit an electronic copy of your document, either on an accompanying CD-Rom or as an attachment to an e-mail addressed to [karen.nickerson@state.de.us](mailto:karen.nickerson@state.de.us). If you do not wish to file comments, but wish to be a party to any further proceedings in this matter, then you should file a petition to intervene under Rule 21 of

the Commission's Rules of Practice and Procedure. That petition should be filed at the above address also on or before October 31, 2007. Only persons filing comments or such petitions will be afforded direct notice of further proceedings in this docket.

If you are disabled and need assistance to participate in these proceedings, please contact the PSC to discuss aides or assistance. If you desire more information or have further questions, contact the PSC at 1-800-282-8574 (in Delaware only) or (302) 736-7500. You can also send inquiries by Internet e-mail addressed to [janis.dillard@state.de.us](mailto:janis.dillard@state.de.us)