

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE

IN THE MATTER OF THE INVESTIGATION)
INTO THE ADOPTION OF PROPOSED)
RULES AND REGULATIONS TO ACCOMPLISH)
INTEGRATED RESOURCE PLANNING FOR THE) PSC REGULATION DOCKET NO. 60
PROVISION OF STANDARD OFFER SERVICE)
BY DELMARVA POWER & LIGHT COMPANY)
UNDER 26 DEL. C. § 1007(c) & (d))
(OPENED AUGUST 21, 2007))

ORDER NO. 7518

This 6th day of January, 2009, the Commission determines and Orders the following:

1. The "Electric Utility Retail Customer Supply Act of 2006" ("the Act") directs Delmarva Power & Light Company ("DP&L") to file an "Integrated Resource Plan" ("IRP") with the Commission, the State Energy Office, the Controller General, and the Director of the Office of Management and Budget (collectively "the State Agencies").¹ The Act requires DP&L to systematically evaluate all available supply options (including procurement, generation, transmission, conservation, and load management) over a ten-year planning period.² The Act further directs DP&L to craft an IRP comprised of the appropriate mix of such resources that will be utilized to meet the needs of its Standard Offer Service ("SOS") customers at the lowest reasonable cost, while

¹See 26 Del. C. § 1007(c) (as amended by 75 Del. Laws ch. 242 § 6 (2006)).

²Id.

supporting or improving the reliability of electric service to all customers in Delaware.³

2. The Act further provides for Delmarva to consider the economic and environmental value of resources that utilize new or innovative baseload technologies, resources that provide short- or long-term environmental benefits to the citizens of the State, facilities that have existing fuel and transmission infrastructure, facilities that utilize existing brownfield or industrial sites, resources that promote fuel diversity, resources that support or improve reliability, and resources that encourage price stability

3. The Act confers on the Commission the authority to "promulgate any rules and regulations it deems necessary to accomplish the development of IRPs by DP&L."⁴

4. As of this date, DP&L has filed its initial IRP and three updates. In Order No. 7122 (Jan. 23, 2007), the Commission opened PSC Docket No. 07-20 to perform its oversight and review of the IRP. By Order No. 7623 (Aug. 21, 2007), the Commission opened this proceeding to consider the development of rules and regulations to accomplish integrated resource planning for DP&L's SOS customers. The Commission directed Staff to prepare proposed rules, regulations, or other needed documents ("the Draft Regulations") for the Commission's review.

³See 26 Del. C. §§ 1001, 1007(c)(1)(as amended by 75 Del. Laws. Ch. 242 § 6 (2006)).

⁴See 26 Del. C. § 1007(c)(1)c. (as amended by 75 Del. Laws. Ch. 242 § 6 (2006)).

5. Staff circulated initial Draft Regulations to the parties in PSC Docket No. 07-20 ("the IRP parties") and the State Agencies on August 31, 2007. The IRP parties and the State Agencies filed comments on Staff's initial drafts on October 12, 2007. Following comment from the IRP Parties and State Agencies, Staff submitted revised Draft Regulations on November 14, 2007.

6. In Order No. 7318 (Dec. 4, 2007), the Commission approved the Draft Regulations, initiated the formal rulemaking procedure dictated by the Administrative Procedures Act, and directed written comments on the Draft Regulations to be filed by February 1, 2008.⁵ On March 3, 2008, Staff further revised the Draft Regulations ("Revised Draft Regulations") to incorporate its analysis of the comments submitted through February 1, 2008. On March 12, 2008, a duly-noticed evidentiary hearing was held to consider the Revised Draft Regulations.

7. On October 24, 2008, the Hearing Examiner submitted her proposed findings and recommendations regarding the Revised Draft Regulations (the "Hearing Examiner's Report") (hereafter "HER at ____"). The HER focused on the issues that remained in dispute following the lengthy evidentiary hearing: (1) the definition of "acknowledgment" in Sections 1.7, 2.0, and 9.3; (2) the definition of "environmental benefit" in Section 2.0; (3) the definition of

⁵The Sustainable Energy Utility Task Force, Jeremy Firestone ("Dr. Firestone"), Bluewater Wind LLC, Delmarva Power & Light Company ("DP&L"), the Delaware Energy Office, and the Clean Air Council all filed written comments regarding the Draft Regulations. In addition, Green Delaware participated in the proceedings.

"external costs" in Section 6.0;⁶ and (4) Delmarva's role in developing demand-side management programs in light of the establishment of the Sustainable Energy Utility ("SEU").⁷

8. The Hearing Examiner recommended that the Commission adopt Staff's proposed Revised Draft Regulations with two revisions. First, to avoid confusion between the terms "acknowledgement" and "approval," the Hearing Examiner recommended that the following language be inserted into Section 1.7:

Approval or disapproval of an IRP must be made by the Commission after, at a minimum, Staff's analysis of and public comment on the proposed IRP.

(HER at ¶ 26). The Hearing Examiner rejected the Clean Air Council's position that the term "acknowledgement" is consistent with Commission approval after evidentiary hearings because use of the term "approval" materially changes the meaning of the Revised Draft Regulations. (HER at ¶ 15). The Hearing Examiner reasoned that an extensive rewrite of the Revised Draft Regulations was not warranted simply to clarify the treatment of an initial filing vis-à-vis a filing that had been subject to evidentiary hearings. *Id.* Second, the Hearing Examiner recommended changing the definition of price stability from variation in the "real" price paid by SOS customers over the planning period to

⁶With regard to the definition of plan development in Sections 2.0 and 6.1.3, the Hearing Examiner accepted Staff's argument that the broad language of both sections encompassed health and environmental effects, and that DP&L or the public could provide analyses of health costs to the Commission for consideration in evaluating the IRP. (HER at ¶ 22). The Hearing Examiner observed that inclusion of a "laundry list" could discourage utilities from considering other unenumerated factors (Mar. 12, 2008 Tr. at 101:21).

⁷The Hearing Examiner adopted Staff's position that although the SEU has specific jurisdiction to develop energy efficiency programs, DP&L may propose energy efficiency programs in its IRP. (HER at ¶ 24).

"actual" price to make the definition more "concrete and identifiable." (HER at ¶¶ 19, 26).

9. The Clean Air Council and Professor Jeremy Firestone filed written exceptions to the Hearing Examiner's report, and Green Delaware "generally agreed" with those exceptions. (Dec. 2, 2008 Tr. at 187:5-6). In its exceptions, the Clean Air Council argued that substituting the term "approval" for "acknowledgement" would not require an extensive rewrite of the Revised Draft Regulations because the term was only used in three subsections. (Clean Air Council Brief on Exceptions at 5) (hereafter "CAC Br. at ___"). The Clean Air Council contended that the IRP should be subject to a full contested proceeding prior to Commission acknowledgment. *Id.* In response, Staff argued that use of the term "approval" would inappropriately impute ratemaking treatment to the components of the IRP filing prior to the time a rate case was filed. (Dec. 2, 2008 Tr. at 200:9-22).

10. Additionally, the Clean Air Council and Dr. Firestone argued that health costs should be specifically delineated as "environmental costs" under Section 6.1.3 because analysis thereof was integral to the evaluation of resource options pursuant to 26 Del. C. § 1007(c). (Firestone Brief on Exceptions at ¶ 7) (hereafter "Firestone Br. at ___"); CAC Br. at 7-9). Both Dr. Firestone and the Clean Air Council further asserted that it was not feasible for the public to evaluate and analyze the health effects of the IRP components. *Id.* Staff argued that the regulations governing the IRP should be flexible and that other state agencies, such as the Department of Natural Resources and Environmental Control ("DNREC"),

had more expertise in determining the potential health costs of an IRP program than the Commission. (Dec. 2, 2008 Tr. at 199-200).

11. Dr. Firestone further objected to the Hearing Examiner's recommended change of the definition of price stability from "real" to "actual" price. He argued that this change materially altered the definition because the term "real price" has an economic meaning - it is adjusted for the effects of inflation. (Firestone Br. at ¶ 11). Staff agreed with the Hearing Examiner that calculation of "real" price can be nebulous and, although recognizing that using an "actual" price might not include the effects of inflation, believed that it was a more certain starting place than the "real" price. (Dec. 2, 2008 Tr. at 198:12-18; 201:18-24 - 202:1-6).

12. Dr. Firestone next contended that the term "efficient" should be deleted from Section 1.1 because it was redundant of the term "cost effective." (Firestone Br. at ¶ 10). In response, Staff argued that the term "efficient" encompassed more than merely economic efficiency, and both terms were used in several places throughout the EURCSA. (Dec. 2, 2008 Tr. at 196-197).

13. Finally, Dr. Firestone challenged the effective date of the Revised Draft Regulations. He urged the Commission to apply the rules and regulations retroactively to both the 2006 and 2008 IRPs. (Firestone Br. at ¶ 9). Staff pointed out that a regulation may not be applied retroactively unless the legislature provides for such retroactive application in the regulation's governing statute, which was not the case here. (Dec. 2, 2008 Tr. at 195:17-196:8). Moreover, Staff observed that DP&L had indicated on the record that it would

comply with the regulations in its current filings. (*Id.* at 196:12-23).

14. The Commission convened on December 2, 2008 to hear oral argument and deliberate on the Hearing Examiner's findings and recommendations regarding the Revised Draft Regulations. After hearing such oral argument and conducting its deliberations in public, we hereby find as follows.

15. We adopt the Hearing Examiner's and Staff's positions that "health costs" should not be included as a specific externality for consideration in the proposed regulations. DNREC and the Delaware Energy Office have an interest in environmental and health costs, and interveners and the public can look to these agencies on these issues. Furthermore, we are not convinced that the public cannot calculate the potential impact of this externality on an IRP; Dr. Firestone's participation in this docket and the information he has submitted demonstrates that interested members of the public can indeed calculate (or submit information that calculates) the impact of including an externality such as health costs in an IRP. In this regard, we observe that while the externality of health costs may be important to some people, there are other externalities that are important to other people. If health costs are specifically included as an externality but others are not, it suggests that we do not intend for those other externalities to be considered and addressed. That is not the case: we intend for the regulations to cast as broad a net as possible with respect to externalities to be considered and addressed. (5-0).

16. Although we acknowledge and appreciate the efforts of Staff and the parties in preparing the Revised Draft Regulations, our deliberations at the December 2, 2008 meeting and our questioning of the parties demonstrate that we believe that several important issues have not been adequately addressed in the Revised Draft Regulations. Specifically, we reject the Hearing Examiner's recommendation with respect to the distinction between "acknowledgement" and "approval" as used in the Revised Draft Regulations. As a review of the transcript of our deliberations demonstrates, this issue caused us great concern. We were advised that the difference between "approval" and "acknowledgement" as set forth in these Revised Draft Regulations was designed to address a distinction this Commission first drew in IRP cases arising in the mid 1990s as a way to prevent a utility whose IRP had been "approved" from later contending, in a rate case filed subsequent to Commission approval of an IRP, that the generation assets included in that IRP had also been approved for ratemaking purposes. However, we believe that that concept is not clear in the Revised Draft Regulations, and direct Staff to revisit this particular issue to clarify the difference between "acknowledgement" and "approval," or indeed to determine whether the distinction is warranted. (5-0).

17. We also direct Staff to consider the following issues in redrafting the proposed regulations:

- Incorporation of the role of the SEU vis-à-vis this Commission in the regulations governing demand-side management;

- Whether the Hearing Examiner's modification of Section 2.0, "Price Stability," to provide for the "actual" price as opposed to the "real" price, is appropriate;
- How confidential information in the IRP should be treated;
- Whether other state agencies, such as DNREC and the Office of Management and Budget, should be included in the IRP review process and, if so, in what manner;
- The impact and effect of DP&L's hedging policy on its IRP;
- The potential impact of federal climate change legislation on the IRP;
- Whether Staff should consider the input of agencies other than DNREC, or the input of the public, in assessing the "environmental benefits" of the IRP as defined in Section 2.0; and
- Whether DP&L's assessment of any transmission enhancements should be included.

(5-0).

18. We hereby direct Staff to revise the Revised Draft Regulations to address the issues outlined in Paragraphs 16 and 17, and to circulate those revisions to the IRP Parties and the interveners in this docket. All revised regulations shall be subject to the provisions of the Administrative Procedures Act with respect to notice and publication. See 29 Del. C. §§ 10115, 10118.

19. We further designate a different Hearing Examiner to preside over this docket going forward.

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

1. That, pursuant to 26 Del. C. § 502 and 29 Del. C. ch. 101, Mark C. Lawrence is assigned as the Hearing Examiner for this docket.

Hearing Examiner Lawrence shall conduct such procedures and hearings as may be necessary to construct a record sufficient for the Commission to investigate the proposed rules and regulations. Hearing Examiner Lawrence shall conduct such procedures and hearings in accordance with the notice and other procedural requisites imposed by State law and those required under the Administrative Procedures Act.

2. That this docket is remanded to Hearing Examiner Lawrence to schedule and conduct such evidentiary hearings as may be necessary to resolve the issues delineated in Paragraphs 16 and 17 above, and to thereafter submit his recommendations with the Commission. Dates and times for serving comments regarding, and responding to Staff's proposed revisions addressing, the issues identified in Paragraph 17 above shall be included in said procedural schedule. Hearing Examiner Lawrence is specifically delegated the authority to determine the form and manner of any further public notice in this matter. James McC. Geddes, Esquire, shall continue as Rate Counsel in this matter.

3. That Staff is directed to revise the Revised Draft Regulations to address the issues identified in Paragraphs 16 and 17 above and circulate those revisions to the parties, and that Staff follow the procedures outlined in Section 10118 of the Administrative Procedures Act with respect to these newly-revised draft regulations.

4. 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