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TO: Chairman Winslow
Commissioner Conaway
Commissioner Drexler
Commissioner Gray
Commissioner Karia

FROM: Brenda R. Mayrack, Esq., Deputy Attorney General

DATE: August 15, 2015

RE: Objection of Constellation NewEnergy, Inc. (the "Affected Party") to the Production of Certain Documents in Response to a Freedom of Information Act Request ("FOIA") request from Gary W. Lipkin of Eckert Seamans Cherin & Mellott, LLC, on behalf of client Direct Energy Services, LLC

On July 18, 2016, the Public Service Commission received a Freedom of Information Act Request ("FOIA") request from Gary W. Lipkin of Eckert Seamans Cherin & Mellott, LLC, on behalf of client Direct Energy Services, LLC for the following:

The full proposal, including all attachments and subparts, submitted to the Delaware Public Service Commission ("PSC") by Constellation NewEnergy Inc. ("Constellation NewEnergy") in response to (a) the Request for Proposals ("RFP") issued (on or about January 22, 2016) by PSC on behalf of the Electricity Affordability Committee ("EAC" or "Committee") and (b) the statutory requirement contained in Senate Substitute No. 1, House Bill 160, FY2016 Bond and Capital Improvements Act of the State of Delaware, Section 68 ("EAC Section"). This request includes the confidential and non-confidential components of the proposal by Constellation NewEnergy.

Commission staff provided an update regarding the status of the request to Mr. Lipkin within 15 business days of his request.

Commission Staff identified the document responsive to the request.

The responsive document was filed by Constellation NewEnergy, Inc. (the “Affected Party”) as Third Party Confidential Records per the Commission’s FOIA regulations, 8 *Del. Admin. C.* sec. 1202 and Section XX of the Commission’s Request for Proposal regarding the Confidentiality of Proposals and Materials.

Pursuant to the Commission’s FOIA regulations, the Affected Party was notified of the FOIA request and timely objected by letter dated August 1, 2016, to the disclosure of the document in its entirety. After discussion with Commission Counsel, the Affected Party has since withdrawn its objection with respect to all but a subset of the document, in an email dated August 5, 2016, which included proposed redactions of the confidential information for which the Affected Party maintains its objection to disclosure (attached). Commission Staff has provided a version of the document at issue indicating these proposed redactions for the Commission’s review (attached).

The question before the Commission at the August 23rd meeting will be whether the Affected Party has met its burden of proof, based upon a preponderance of the evidence (*i.e.*, “more likely than not”), with respect to its claim of confidentiality for the proposed redactions. The Affected Party “bears the burden of establishing confidentiality under FOIA.” 8 *Del. Admin. C.* § 1202-6.2.4. If the Commission determines that the Affected Party has met its burden of proof, then the Commission should determine that these pages should not be disclosed and that the request for these pages should be denied. If the Commission determines that the Affected Party has not met its burden of proof, then the Commission should determine that these pages should be disclosed.

With respect to the proposed redactions for which the Affected Party has maintained its objection, my review has determined that these pages contain “non-public” information under 29 *Del. C.* sec. 10002(L)(2) (“Trade secrets and commercial or financial information obtained from a person which is of a privileged or confidential nature”).

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