

**BEFORE THE
DELAWARE PUBLIC SERVICE COMMISSION**

IN THE MATTER OF THE PETITION :
OF DIRECT ENERGY SERVICES, LLC :
TO REQUEST THE PUBLIC SERVICE :
COMMISSION TO ISSUE, ON AN :
EXPEDITED BASIS, AN ORDER : PSC Docket No. 16-0744
DIRECTING DELMARVA POWER & :
LIGHT COMPANY TO DISTRIBUTE :
AN EDUCATIONAL BILL INSERT :
REGARDING THE OPTIONS :
AVAILABLE UNDER THE :
CONTRACT AWARDED BY THE :
STATE OF DELAWARE :

**RESPONSE OF DIRECT ENERGY SERVICES, LLC TO DELMARVA POWER &
LIGHT COMPANY'S EMERGENCY MOTION AND DELAWARE DIVISION OF THE
PUBLIC ADVOCATE'S SUPPORT OF DELMARVA'S MOTION**

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I. Introduction

Direct Energy Services, LLC (“Direct Energy”) hereby provides this response to the September 2, 2016 Emergency Motion of Delmarva Power & Light Company (“Delmarva”) to:

(a) Postpone the Scheduled September 20th Consideration of Direct Energy’s Petition, to Allow For Discovery or in the Alternative (b) Strike Direct Energy’s Written Comments and Incorporated Expert Witness (“Emergency Motion”) and the Delaware Division of the Public Advocate’s (“DPA”) Support of Delmarva’s Emergency Motion filed on September 3, 2016.

Pursuant to Order No. 8922 of the Delaware Public Service Commission (“Commission” or “PSC”), Direct Energy – clearly an “interested party” with respect to its own Petition – appropriately submitted comments on August 31, 2016 requesting that the Commission issue an order directing Delmarva to distribute an *educational* bill insert regarding the options available under the contract awarded by the State of Delaware to Direct Energy. Direct Energy supported its comments with *a sworn or verified statement, formatted in the form of direct testimony*, to provide the Commission with support for, and a comprehensive understanding of the facts contained in its Comments. The verified statement by Frank Lacey, an expert in public utility policy and competitive electric markets, was attached to provide background and support to validate the statements in the Comments providing: background on the genesis of the Contract entered into between Delaware Department of State and Direct Energy, pursuant to Senate Substitute No. 1 for Senate Bill 160. The Contract established Direct Energy as the “Electric Retail Supplier Exclusively Contracted by the State of Delaware” (“the State-authorized Contract”) and memorialized an offer wherein Direct Energy would save residential customers from 7 to 17% off their current generation rate *and* offer additional value added benefits to both residential and small commercial customers, such as a Nest thermostat (“a preferred electric

supply product offering”); 2) explain why a bill insert from Delmarva to inform customers about the State-authorized Contract was one of the best ways in which to inform customers about these impressive benefits, especially due to the paucity of residential shopping in Delaware at the present time; and 3) provided specific calculations to show how the Direct Energy State-authorized Contract represented as much as approximately \$41 million in customer value if all residential customers chose to take advantage of the offer. Direct Energy could have made each of these assertions in its Comments without providing expert support for these facts, but, in the interests of fully informing the Commission, it chose to include the verified statement so that their derivation and support would be transparent to all. It fully expected to make Mr. Lacey available at the hearing scheduled for the 20th so that parties could respond or question him. As the Commission’s Order in the case specifically notes that testimony may be taken at the September 20th hearing, Direct Energy believed – and continues to believe – that its filing was appropriate and fair to all parties.

Striking Direct Energy’s comments and direct testimony would be grossly inappropriate, deny Direct Energy its due process rights, and the right to adequately explain its petition to have an educational bill insert placed in the bills of Delmarva in order to educate customers about the tremendous opportunity that the State-authorized Contract represents. Such a result will only serve to provide the Commission with less information regarding the matter at hand and force it to consider Direct Energy’s request without being fully informed.

Importantly, Direct Energy does not object – and, in fact, would welcome – the filing by other parties of reply comments in reply to Direct Energy’s Comments and has no objection if other parties similarly wish to attach verified or sworn statements (in the form of direct testimony or otherwise) to their reply comments in order to fully explain any factual allegations

set forth in their responses. Direct Energy does not object to Delmarva and all other parties submitting reply comments, with or without their own verified statements, at least one week prior to the Commission's September 20, 2016 hearing in this matter, so long as all other parties (including Direct Energy) also have the opportunity to respond to the initial comments filed on August 31, 2016. Furthermore, Direct Energy is fully prepared to respond to any appropriate informal discovery and would make its witnesses available for that purpose.

However, Direct Energy urges the Commission not to delay its September 20, 2016 hearing in this matter. Such delay will mean a longer delay in Delaware consumers being well informed about the significant savings offered by Direct Energy, via the State-authorized Contract, or from other suppliers. As noted in Direct Energy's Comments, Direct Energy supports the Retail Energy Suppliers Association's ("RESA") position that the Delmarva bill should contain an additional insert to provide educational material about the benefits available from other suppliers in the market, in addition to a bill insert explaining the over \$41 million in savings and other benefits that consumers can obtain by switching to the offer made possible by Direct Energy's State-authorized Contract. The only entities that could possibly benefit from such a delay are those that are currently supplying residential SOS customers at rates that are higher than could be provided by competitive suppliers. Accordingly, the bill inserts requested by Direct Energy and RESA hold the potential of benefiting tens of thousands of Delmarva customers and they should be ordered without delay.

II. ARGUMENT

1. Delmarva claims that Direct Energy's filing of comments violated Commission Order No. 8922, which provides that "[i]nterested persons or entities may submit written comments or objections to the Petition by filing such comments with the Commission on or before August 31,

2016.”¹ The Motion also claims that Direct Energy somehow violated the Delaware Administrative Procedures Act, Delmarva’s right to due process, and concepts of fairness and civility to opposing counsel. However, Delmarva fails to cite any specific legal authority in support of its argument.

2. First, Direct Energy is clearly an “interested entity” in this matter. Certainly, if the Commission had wanted to prohibit Direct Energy from filing comments it would have done so in its Order. Furthermore, the Commission did not convey at its July 26, 2016 public meeting (at which it adopted Order No. 8922) that Direct Energy should not file comments. In fact, counsel for Direct Energy appeared at the Commission’s meeting and made a statement supporting Direct Energy’s request; no Commissioner, Commission staff member or any other party (including counsel for Delmarva) suggested that Direct Energy’s continued support of its motion was somehow inappropriate. Moreover, Delmarva does not cite a single Commission case to support its odd view of the term “interested entity.”

3. Next, Delmarva claims that Direct Energy improperly submitted direct testimony in the proceeding when the Commission’s Order in the proceeding did not permit such a submission. This mischaracterizes Direct Energy’s filing. Direct Energy properly filed a *sworn statement* with its Comments in support of factual assertions in its Comments. The Commission’s Rules of Practice and Procedure do not prohibit a petitioner from filing a supporting factual statement to support the factual assertions in its pleading.² In fact, the Commission’s rules arguably *require* that a verification be included to support facts alleged in comments. Rule 1.7.2 provides that

¹ Order No. 8922, Ordering Par. 2.

² In fact, the Rules of Practice and Procedure only outline when a party must file prepared statements of testimony. The rules provide that “parties shall file prepared statements of testimony and exhibits in rate proceedings or other proceedings where directed by the Commission or the designated Presiding Officer or Hearing Examiner.” 26 Del. Admin. Code 1001-2.0.

“[a]ll petitions and other filings [defined to include comments] that allege facts not otherwise in the record must be accompanied by a signed, sworn verification.”³ This is precisely what Direct Energy did. The only difference is that it structured the sworn statement as direct testimony, in order to make it more easily readable and more reflective of what the Commission typically reviews.

4. Next, Delmarva argues that Direct Energy’s submission violated the Delaware Administrative Procedures Act and its right to due process. Delmarva asserts that it is entitled to a “‘formal, public evidentiary hearing’ at which Delmarva and other parties can submit evidence and cross-examine witnesses.”⁴ The Commission clearly indicated that a public evidentiary hearing would be held in this proceeding, evidenced by the Public Notice on the Hearing which states: “[i]f you wish to formally participate as a party in this matter with the right to present evidence at the September 20, 2016 hearing, you must file with the Commission a written petition requesting leave to intervene....”⁵

5. As noted above, Direct Energy does not object to the Commission authorizing all interested parties to file reply comments and to specifically authorize Delmarva to file its own sworn statement (in the form of pre-filed testimony or otherwise), so long as the right to file reply comments is extended to all parties. Direct Energy, in particular, would like the opportunity to respond to Delmarva’s references to its “First Amendment rights.” In fact, it is well established that its Constitutional rights would not be implicated by a Commission directive to include the kinds of educational, informational bill inserts that Direct Energy and RESA have

³ 26 Del. Admin. Code 1001-1.0. Note that Direct Energy’s Comments specifically characterize Mr. Lacey’s testimony as a “sworn statement,” and it is accompanied by a verification attesting to the fact that he prepared it and that it is true and correct. Direct Energy Comments, pg. 2, Attach. A.

⁴ Emergency Motion at 5.

⁵ Public Notice at 2.

requested,⁶ and other states, such as Pennsylvania, have ordered such bill inserts to be mailed by electric distribution companies without any suggestion that such an order violated the EDC's First Amendment rights.⁷ Direct Energy would welcome the opportunity to fully assure the Commission that Delmarva's First Amendment rights would not be implicated by requiring this regulated utility to distribute educational, non-controversial bill inserts about competitive supply options generally and the offer made available by the State-authorized Contract in particular.

6. Delmarva repeatedly references the legal implications of holding a hearing to consider Direct Energy's Petition only one full business day after Direct Energy's comments and accompanying testimony were filed.⁸ Delmarva's claim is entirely inaccurate and misleading. While the Commission is scheduled to consider the Petitions to Intervene in this proceeding on September 6, 2016, it is not scheduled to consider Direct Energy's Petition on that date.⁹ The Commission is scheduled to hear this matter directly at its public meeting on September 20, 2016.¹⁰ The September 20 hearing date should give all parties ample opportunity to submit reply comments, with or without accompanying supporting verified statements.

⁶ The Commission can require commercial speech to include purely factual and uncontroversial information without violating the First Amendment rights of Delmarva. Any governmentally compelled disclosures to consumers must be "purely factual and uncontroversial." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1986). Nor is the compelled speech doctrine impacted by the requested bill insert. The compelled speech doctrine holds that private individuals cannot be mandated to engage in "public declarations of ideological positions." But, Delmarva is not being (a) required to use its own property to convey an antagonistic ideological message, (b) forced to respond to a hostile message when they "would prefer to remain silent," (c) required to be publicly identified or associated with another's ideological message with which they disagree. *See, e.g., Wooley v. Maynard*, 430 U.S. 705, 706 (1977); *Pacific Gas & Elec. Co. v. Public Utility Commission of California*, 475 U.S. 1 (1986) (plurality opinion).

⁷ Direct Energy Comments at 11.

⁸ Emergency Motion at 2, 4, 5. Delmarva asserts that it only has one full business day to adequately prepare to cross examine Direct Energy's expert, which is not the case as it has a full twenty days to prepare for cross examination (from August 31, 2016 when Direct Energy's comments and testimony were filed until the hearing on September 20, 2016).

⁹ DPA's Support of Delmarva's Emergency Motion makes a similar reference to a hearing being held on Direct Energy's petition on September 6, 2016. *See* DPA Support of Delmarva's Emergency Motion at par. 3.

¹⁰ Order No. 8922 at Ordering Par. 4.

7. Delmarva complains that it has been denied the ability to perform discovery regarding Direct Energy's expert witness.¹¹ The Commission's Rules of Practice and Procedure encourage parties in a proceeding to pursue informal discovery.¹² Direct Energy has not received any informal discovery requests to date (from Delmarva or any other party) and, if it had, it would respond to those appropriate requests. Moreover, Direct Energy would also be willing to make its expert witness available for appropriate informal discovery prior to the September 20th hearing, if any party had a need to do so.

8. Contrary to the insinuation in Delmarva's Emergency Motion, Direct Energy did not file its comments with a supporting sworn statement in order to sandbag Delmarva or restrict its right to discovery. In fact, Direct Energy's counsel contacted Delmarva's counsel to see whether it would be interested in proposing a joint procedural schedule to the Commission that would specifically provide for reply comments. Five days after the initial call, counsel for Delmarva finally returned the call, and indicated that, in his view, the procedural schedule was already set and that he was not interested in discussing a proposed procedural schedule with Direct Energy's counsel.¹³ If Delmarva had wanted to ensure that discovery was included in a procedural schedule, it should have either proposed its own procedural schedule to the Commission or worked with Direct Energy (and other interested parties) to develop a joint proposed procedural schedule for the Commission's review and approval. However, it did not

¹¹ Emergency Motion at 5.

¹² "The parties are encouraged to pursue discovery through informal written or oral data requests or conferences." 26 Del. Admin. Code 1001-2.0.

¹³ Unfortunately, Delmarva's description of the conversation that occurred between counsel for Direct Energy, Mr. Clearfield, and counsel for Delmarva, Mr. Goodman, is simply not true. See, Delmarva Petition at ¶ 3. Mr. Goodman never suggested that, in his view, Direct Energy could not file comments to its own petition, nor did he suggest that a verified statement in support of Direct Energy's comments was somehow not proper. If he had, counsel for Direct Energy would have taken note of such claims, because they are so unusual and totally unsupported by the Commission Order and procedural rules.

take either of those actions. Instead, Delmarva complained to the Commission about its inability to issue discovery on Direct Energy when it has failed to informally request the ability to do so.

9. Finally, Delmarva ironically claims that Direct Energy has violated concepts of fairness and civility by filing comments in this proceeding “only 1 full working day before the start of a holiday weekend and 1 full business day before the Commission is scheduled to consider Direct Energy's Petition.”¹⁴ As discussed above, the Commission is not scheduled to consider Direct Energy’s Petition or hold a hearing on the matter on September 6, 2016. Delmarva asserts that Direct Energy has used “ambush litigation techniques,”¹⁵ which carries little weight in light of Delmarva serving its Emergency Motion on Direct Energy at 4:29 p.m. on Friday, September 2, 2016, right before the holiday weekend commenced. In fact, if Delmarva had simply called counsel for Direct Energy it would have been willing to work out a schedule to present to the Commission that would give Delmarva the opportunity to respond to Direct Energy’s comments as it deemed appropriate, as well as provide any additional information about the factual assertions in Direct Energy’s comments, so long as the September 20th hearing continued. Delmarva did not choose to do so, and instead filed a motion filled with unsupported legal and factual allegations.

10. Direct Energy strongly rejects the assertion of the Delaware Division of the Public Advocate (“DPA”) requesting that the Commission “grant Delmarva’s request to strike Direct Energy’s comments and prefiled testimony.”¹⁶ In fact, Delmarva did not request that Direct Energy’s Comments be stricken in the first instance; it suggested this in the alternative if an adequate procedural schedule was not crafted. In any event, striking Direct Energy’s Comments

¹⁴ Emergency Motion at 2-3.

¹⁵ Emergency Motion at 6.

¹⁶ Delaware Division of the Public Advocate “Support” of Delmarva Petition at 4.

is completely without any legal basis.¹⁷ Moreover, the result of such an action would be for the Commission to decide this matter with less information rather than more. State regulatory agencies are best served when they are presented with comprehensive facts and legal basis that guide their decisions. This Petition is admittedly unique, but that is because it deals with the first contract ever entered into between an electric supplier and the State of Delaware in which Direct Energy has been authorized as “an Electric Retail Supplier Exclusively Contracted by the State of Delaware,” and authorized to identify its product offerings as “a preferred electric supply product offering for Residential and Small Commercial customers.”¹⁸ The Commission will benefit from a full record that fully explores all the relatively unique issues raised by Direct Energy’s Petition.

11. Finally, Direct Energy strongly objects to Delmarva’s request to delay the September 20, 2016 hearing on this matter. Such a delay will impede Delaware consumers from being well informed about the significant savings offered in the State-authorized program. Each month that passes without a customer switching to the offer made available by the State-authorized program results in approximately \$3.4 million in potential consumer surplus leaving the state of Delaware and going to wholesale electricity suppliers.¹⁹ Direct Energy submits that

¹⁷ Direct Energy respectfully takes issue with DPA’s allegation that Direct Energy has made “misstatements” about how Direct Energy came to be selected as the state’s exclusively contracted electric service provider. DPA “Support” at 2. In fact, the alleged misstatement was a reference to a statement on Direct Energy’s website to DPA that could have been characterized as suggesting that that agency had participated in the process of selecting Direct Energy as the exclusively contracted electric service provider. When DPA raised this issue with Direct Energy it immediately agreed to modify its website to comply with how DPA’s request that it not be mentioned. DPA, on Saturday Sept. 3, raised what it suggested might be another issue, concerning whether Direct Energy is intending to offer service to offer the State-authorized Contract to Delaware Electric Cooperative customers, as Direct Energy states on its website. DPA “Support” at 3. When informed of DPA’s concern prior to the filing of DPA’s comments it immediately agreed to look into the matter since there could be a variety of explanations including that it plans to provide service but hasn’t rolled the service out yet. In any event, Direct Energy does not believe that either of these relatively minor issues has any real bearing on the question of whether the Commission should consider Direct Energy’s Petition without delay, so that tens of thousands of Delaware citizens can be informed of the savings and benefits available to them.

¹⁸ Electric Supply Services Agreement, Section 3.7.

¹⁹ Direct Energy Comments at 13.

its comments and accompanying testimony will aid the Commission in ensuring that citizens of Delaware obtain the maximum benefit from the State-authorized program. Other parties will have ample opportunity to submit their own replies with or without supporting statements, if the Commission authorizes such filings.

III. Conclusion

Direct Energy appreciates the opportunity to respond to Delmarva's Emergency Motion and respectfully requests that the Commission: (a) reject the Motion of Delmarva and the "Support" of the DPA; (b) consider Direct Energy's comments and accompanying expert testimony in its deliberations on Direct Energy's above captioned Petition; (c) maintain the September 20, 2016 hearing date set for this matter; and (d) grant any other relief deemed appropriate under these circumstances.

Respectfully submitted,

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THE OPTIONS AVAILABLE UNDER THE)
CONTRACT AWARDED BY THE STATE OF)
DELAWARE (Filed June 30, 2016))

CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2016, I caused a copy of the **Response of Direct Energy Services, LLC to Delmarva's Emergency Motion** to be served on the following persons in the manner indicated below, and to be filed with the Delaware Public Service Commission using DelaFile:

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