

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

**IN THE MATTER OF THE APPLICATION OF)
DELMARVA POWER AND LIGHT COMPANY)
FOR APPROVAL OF SOLAR RENEWABLE)
ENERGY CREDIT CONTRACTS AS SREC) PSC DOCKET NO. 10-198
SUPPLY SOURCES FOR STANDARD OFFER)
SERVICE CUSTOMERS (Filed June 1, 2010))**

**DELAWARE SUSTAINABLE ENERGY UTILITY, INC.'S
RESPONSE TO STAFF'S REPORT ON DELMARVA POWER'S REQUEST FOR
APPROVAL OF SOLAR RENEWABLE ENERGY CREDIT CONTRACTS**

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I. Statement of Facts

A. The Delaware Sustainable Energy Utility (“SEU”)

The SEU is a nonprofit Delaware corporation established by 29 *Delaware Code* § 8059. The SEU was created by the General Assembly to promote the public interest, as reflected in the enabling legislation § 8059(b):

(b) Intent of legislation. -- The General Assembly finds that there remain in Delaware significant, cost-effective opportunities to acquire end-user energy efficiency savings that can lower customers' bills and reduce the environmental impacts of energy production, delivery, and use. Delaware has an opportunity to create new markets for customer-sited renewable energy generation that will help build jobs in Delaware, improve our national security, keep value within the local economy, improve energy reliability, and protect Delawareans from the damaging effects of recurrent energy price spikes.

Under § 8059(g)(1)(d), the SEU, through its contract administrator, has the following responsibilities (among many others):

3. To promote program initiatives and market strategies that address the needs of persons or businesses facing the most significant barriers to participation;
4. To promote coordinated program delivery, including coordination with low income weatherization programs, other efficiency programs, and utility programs;
5. To coordinate with relevant regional and national energy efforts and markets, including markets for pollution emissions offsets and credits, and renewable energy credits;
6. To consider innovative approaches to delivering sustainable energy services, including strategies to encourage third party financing and leveraged customer contributions to the cost of program measures, as consistent with principles of sound program design;
7. To offer "one-stop shopping" and be the point-of-contact for sustainable energy services in Delaware.

The General Assembly intends that the SEU plays a key role in stabilizing the SREC market in Delaware. *See, e.g., 26 Delaware Code § 360(c); 29 Delaware Code § 8059(g).* Delmarva's contract with the SEU, therefore, is a contract with a not-for-profit, state-created entity, and from the SEU's perspective, the contract promotes stability in the SREC market. In addition, as will be explained more fully below, the SEU contends that the contract will create financial benefits for Delmarva's customers in the long run, will benefit the State's solar industry and the development of additional solar projects in Delaware, and will serve the public interest in other substantial ways.

B. The Delaware General Assembly's Intent to Promote Renewable Energy

The Delaware Code, including the provisions referred to above, 1) demonstrate the General Assembly's intent to promote the development of renewable energy in Delaware, and 2) establish that the General Assembly considers the development of renewable solar projects as vital to the public interest.

For example, Title 26 of the *Delaware Code* § 351 of the Renewable Portfolio Energy Standards Act ("RPS") provides, in part:

(b) The General Assembly finds and declares that the benefits of electricity from renewable energy resources accrue to the public at large, and that electric suppliers and consumers share an obligation to develop a minimum level of these resources in the electricity supply portfolio of the state. These benefits include improved regional and local air quality, improved public health, increased electric supply diversity, increased protection against price volatility and supply disruption, improved transmission and distribution performance, and new economic development opportunities.

(c) It is therefore the purpose and intent of the General Assembly in enacting the Renewable Energy Portfolio Standards Act to establish a market for electricity from these resources in Delaware, and to lower the cost to consumers of electricity from these resources.

Similarly, Section 1500(b) of The Energy Efficiency Resource Standards Act of 2009 reflects Delaware public policy as adopted by the General Assembly:

(b) The General Assembly finds and declares that:

(1) Cost effective energy efficiency shall be considered as an energy supply source before any increase or expansion of traditional energy supplies; and

- (2) Energy efficiency is among the least expensive ways to meet the growing energy demands of the State; and
- (3) Providing affordable, reliable, and clean energy for all consumers in Delaware is in the public interest and will yield social, economic, and welfare benefits for generations to come; and
- (4) The benefits of a strong focus on cost effective energy efficiency accrue to the public at large, and all electric and natural gas suppliers and consumers in Delaware share an obligation to develop a minimum level of these resources in the energy supply portfolio of the State.
- (5) The benefits of cost effective energy efficiency include lowered consumer spending on energy, improved regional and local air quality, improved public health, increased electric supply diversity, increased protection against price volatility and supply disruption, improved transmission and distribution performance, and new economic development opportunities; and
- (6) The Delaware Sustainable Energy Utility (SEU) combines public funding sources and consumer savings with private sector funds and management skills to provide all Delaware energy users with assistance for all their energy efficiency and renewable energy needs; and
- (7) The SEU is a critical mechanism for achieving energy conservation and energy efficiency in the State.

C. The Dover Sun Park and Related Contracts

The Dover Sun Park is a major renewable energy initiative launched by the City of Dover whose purpose is to construct one of the largest solar energy facilities on the east coast of the United States. The project's importance to Delaware and its citizens in terms of increased electric supply diversity, local air quality, protection against price volatility and supply disruption, the local economy, and the state's solar industry are self-evident. The contracts related to the new facility between Delmarva and White Oak, White Oak and the SEU, and Delmarva and the SEU related to the purchase and sale of SRECs took months to negotiate. The Delmarva/SEU contract reflects the best judgment of the parties in terms of the current and future SREC market and the needs of Delmarva to purchase SRECs under the Delaware Renewable Energy Portfolio Standards Act in *26 Delaware Code* § 351 et seq.

D. The Delmarva/SEU Contract and the Public Interest

The Delmarva/SEU contract for the purchase and sale of SRECs promotes the public interest. If Delmarva can satisfy all or a greater portion of its RPS requirements from the Dover Sun Park project, it will not be required to invest in other solar projects in Delaware. If the contract is rejected by the Commission, the SEU has calculated that the solar industry will lose approximately \$6,142,777 that Delmarva would otherwise be required to invest in SREC purchases for projects during the period from 2011 through 2014. See Exhibit A hereto. This would be a serious blow to the developing solar industry in Delaware.

Rejection of the Delmarva/SEU contract would also have the effect of driving SREC prices up substantially, which would have a negative effect on Delmarva and its customers in the long run. Assume, for example, that the current solar installation market in Delaware is dominated by projects smaller than 300 kW in size and require an SREC price closer to \$275 in order for these projects to supply electricity to customers (mainly medium to small Commercial & Industrial and residential) at prices competitive with existing retail electricity rates. Further assume that this market will transition to include larger projects over time but this will take years and requires market growth to attract investment. Thus, a key factor affecting future SREC prices is a healthy local solar industry.

If the SEU does not participate in the Dover Sun Park project, the demand for projects at or below 300 kW during the critical period of market development over the next five years will be slowed. Without SEU participation, DPL will satisfy its legal obligation entirely in 2011 from the Dover Sun Park and a significant part of its obligation in 2012 from this single project. In 2013 and 2014, the demand for SRECs expands because of the new RPS. But if the SEU does not participate, an important share of SREC sales that could go to projects of 300 kW or less will be lost (over 10,000 MWh, representing more than \$2.7 million in revenue). These effects would seriously hamper solar industry growth at precisely the time when utility requirements to purchase SRECs are increasing rapidly. With utility demand for SRECs growing and industry capacity hurt by a lack of revenue for the projects that make up the bulk of the market, SREC prices will climb higher than they otherwise would have. Supply slows while demand grows -- prices will increase -- ECON 101.

While Delmarva would potentially save \$0.71 million in the short run by not buying SRECs from the SEU, its ratepayers are put at greater risk of higher future SREC prices. Moreover, because the Delaware solar industry will not grow as it would have, ratepayer funds will be used in future years to fund out-of-state projects in order for DPL to comply with the Delaware RPS policy.

II. ARGUMENT

A. The Delmarva/SEU Contract Serves the Public Interest and Should Be Approved.

Under 26 *Delaware Code* § 1007(b), the issue before the Commission is whether the Delmarva/SEU contract “is in the public interest.” Based upon its submissions in this proceeding, Delmarva Power obviously considers the Delmarva/SEU contract to be in the best interests of the company and its ratepayers. In addition, based upon its submissions, Delmarva considers the contract to favor the interests of the general public and the State of Delaware as a whole. The SEU agrees.

In making its determination about the “public interest,” the Commission must consider the benefits to Delaware as a whole. *Constellation New Energy, Inc. v. Public Service Commission*, 825 A.2d 872, 883 (Del. Super. 2003) (noting that settlement was supported by evidence of “other benefits to Delaware”). The Delmarva/SEU contract will benefit Delaware as a whole.

First, the Delaware RPS law requires Delmarva to purchase SREC’s in order to promote solar renewable energy projects. At this juncture, the Commission may assume that the Dover Sun Park project is going to be built. Therefore, Delmarva does not have to purchase any additional SRECs from the project to promote its construction.

The Staff’s consultants note that the General Assembly amended the RPS law in Senate Substitute No. 1 for Senate Bill 119 (“SSSB 119”), which passed the Legislature on June 29, 2010. SSSB 119 increased the SREC purchase requirements imposed on Delmarva (and other utilities). The consultants conclude that Delmarva should purchase the additional SRECs from White Oak for the Dover Sun Park, and forego its contract with the SEU. However, that approach will have Delmarva dedicate SREC purchases to a solar project which is underway, meaning that Delmarva will not have to purchase SRECs which would support new solar projects in Delaware. According to the SEU’s calculations, the consultants’ approach would

remove about \$6,142,777 from the SREC market that Delmarva would otherwise direct to new solar photovoltaic projects. And the SEU estimates that SRECs account for approximately 25% to 40% of the revenue requirement for solar projects to attract investors and sell energy at or below current retail electricity rates. The shortfall and the disappearance of Delmarva from the market for a year or more will have serious negative consequences for the solar industry and the SREC market in Delaware. It will also mean that Delaware will not realize the benefits of the additional solar projects, among them, lower consumer spending on energy, new jobs and new economic development opportunities, improved local air quality, improved public health, increased electric supply diversity, and increased protection against price volatility and supply disruption. *See, e.g., 26 Delaware Code § 1500(b)*. As the Delaware General Assembly has declared: “Providing affordable, reliable, and clean energy for all consumers in Delaware is in the public interest.” *26 Delaware Code § 1500(b)(3)*.

The impact would be hardest on Delaware companies providing small- to medium-scale solar applications to households and businesses (i.e., installations which are less than 100 kW in size, whose SRECs currently sell for \$275 or more). Solar technology is one of the few ways that residents and small businesses can protect themselves against volatile energy prices, especially natural gas prices. With the SREC market crippled for a year or more, these consumers lose a critical tool for affordable energy management in times of high energy cost risk.

The Governor and the General Assembly have identified clean energy as a key growth sector for the State. The drying up of the SREC market for projects other than the Dover Sun Park would seriously hamper State efforts to promote clean energy. Based on national estimates of the job creation impacts of solar PV investment, the loss of more than \$6 million in revenues to the local market will likely result in 70-100 fewer permanent jobs in Delaware.¹ These impacts must be weighed against the ratepayer savings from the Dover Sun Park without SEU participation of \$0.71 million.² Even these savings may not materialize. By 2015, Delmarva Power will need to purchase 45,020 SRECs to meet its statutory obligation. By 2019, this

¹ American Solar Energy Society (2007). *Renewable Energy and Energy Efficiency: Economic Drivers for the 21st Century*.

² The difference between the SEU price of \$249 to Delmarva when it purchases 11,000 SRECs in 2015 and 11,000 in 2016, and the White Oak price of \$216.70: $\$249 \text{ minus } \$216.70 = \$32.30 \times 22,000 \text{ SRECs} = \$710,600$.

volume increases to 93,640. With the solar industry having suffered a crippling blow without SEU participation in the Dover Sun Park project, it is likely to be very difficult for this demand to be met by in-state projects. Job loss and a foregone opportunity to be a clean energy leader will surely result. In that context, near-term ratepayer savings of \$0.71 million may earn these same ratepayers several years of high SREC prices, as utility demand chases a dwindling capacity to build projects in Delaware and ratepayers are forced to fund projects in other states to support Delmarva Power's satisfaction of its statutory obligation. Ratepayer funded migration of utility solar investment out of state, possibly in the tens of millions of dollars from 2015 to 2019 and beyond, is hardly a winning proposition for ratepayers or the State's industry, its economy and its environment.

At a cost of \$0.71 million in the short term, it is likely that ratepayers and the State will experience several-fold economic gains as a result of a healthy, growing solar industry. The SEU's participation in the Dover Sun Park transaction is good for job creation, local economic development, consumer protection against volatile energy prices, and protection of the local environment. The Commission is asked to approve the proposed purchase of SRECs by Delmarva Power in 2015 and 2016 from the SEU in order to secure these benefits to ratepayers and to the State. It is clearly in the public interest to move forward with the agreement supported by Delmarva Power, the City of Dover, the Delaware Municipal Electric Corporation and the Governor of Delaware, all of whom signed a June 15, 2010 proclamation favoring the transaction which includes the SEU's participation.

B. The Consultants Seek to Substitute Their Business Judgment for Delmarva's and They Disregard the Authority that the General Assembly has Vested in the SEU.

The analysis of the Delmarva/SEU contract involves weighing the public interest, assessing the stability and risks associated with the SREC market in Delaware, projecting the price for SRECs in 2015 and 2016, and other relevant factors. Delmarva has exercised its business judgment and has determined that obtaining Commission approval of the Delmarva/SEU contract is in the interests of the company, its ratepayers, and Delaware. The Consultants have not established by any stretch that the contract is contrary to the public interest. Indeed their report lacks a true analysis of the public interest. Instead the Consultants ask the Commission to substitute their judgment about the many variables involved for that of Delmarva.

However, Delmarva's business judgment should be afforded deference by the Commission. *Compare Application of Diamond State Telephone Co.*, 103 A.2d. 304, 319 (Del. Super. 1954), *aff'd in part and rev'd in part*, 107 A.2d 786 (Del. 1954), *modified on reargument*, 113 A.2d 437 (Del. 1955)(Commission is not the financial manager of corporation and should not substitute its judgment for directors).

In addition, the Consultants fail to address the SEU's statutory role in preserving the stability of the SREC market in Delaware and promoting renewable energy projects. The SEU was created by Delaware law and is only seeking to perform the very functions that the General Assembly created for it. The Consultants seek to substitute their judgment for the judgment of the SEU as to what is in the public interest. The SEU is a nonprofit organization with a volunteer Oversight Board, and therefore cannot realize any economic gain from its contract with Delmarva, which was undeniably negotiated in an arms length transaction. The Commission should certainly afford some measure of deference to the SEU in the performance of its statutory duties.

C. The Consultants' Report Misapplies and Misinterprets the Intent of the 2010 Amendment to the RPS Law.

SSSB 119, which increased the SREC purchase requirements imposed upon Delmarva and other utilities, was passed by the General Assembly on June 29, 2010, and signed by the Governor on July 28, 2010. As the Consultants observe, the Delmarva/SEU contract was signed on April 22, 2010, more than two months earlier. The General Assembly was well aware of the Delmarva/SEU contract when it enacted SSSB 119. Indeed, the Dover Sun Park project and the Delmarva/SEU contract provided significant motivators for the introduction and passage of SSSB 119, because the Dover project signaled that there would be sufficient solar power coming on line in future years, so that an increase in the RPS requirements was feasible. In light of the Dover Sun Park Project, the Delmarva/SEU contract, and Delmarva's increased need for SRECs under the 2010 amendment, the legislation was intended to create the impetus for new solar projects, in addition to the Dover Sun Park. Ironically, the Consultants seek to frustrate the very purpose of the RPS amendment by forcing Delmarva, against its own business judgment, to purchase additional SRECs from the Dover Sun Park project, rather than dedicate its resources to

new solar projects in Delaware. The Consultants' conclusions are contrary to the intent and meaning of Delaware statutes governing the SEU, renewable energy initiatives, and the RPS statute, and contrary to the public interest.

III. CONCLUSION

Based upon the foregoing facts, arguments, and authorities, the SEU respectfully submits that the Commission should approve the Delmarva/SEU contract and reject the conclusions of the Staff's consultants.

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