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 QUALIFIED FUEL CELL PROVIDER PROJECT TARIFFS (Filed August 19, 2011)	))))	PSC DOCKET NO. 11-362

ORDER NO. 8055

FOR ADMISSION AS AN INTERVENER,
SUBJECT TO CONDITIONS

AND NOW, this 7th day of October, 2011, pursuant to the authority granted to this Hearing Examiner in PSC Order No. 8025 dated September 6, 2011, and having considered the Petition to Intervene Out of Time ("the Petition") filed by the Retail Energy Supply Association ("RESA"), this Hearing Examiner determines the following:

1. RESA filed a Petition to Intervene out of time in the above-captioned Docket on October 5, 2011.

2. In its Petition, RESA states that it is "a non-profit trade association of independent corporations that are involved in the competitive supply of electricity and natural gas [throughout the Mid-Atlantic U.S.]."[1] (Petition, ¶1)

3. In PSC Order No. 8025, the Commission ordered that the deadline for filing petitions for intervention was September 6, 2011. (See Order, ¶3.) The Public Notice of the Application and the Public Comment Sessions was published in *The News Journal* and *Delaware State*

[1] RESA's members include, for example, ConEdison Solutions, Constellation NewEnergy, Inc., Exelon Energy Company, Hess Corporation, NextEra Energy Services, and Reliant and TriEagle Energy, L.P. (Petition at ¶1, fn 1.)

News newspapers on August 23, 2011. The Notice of Evidentiary Hearing to be held on October 18, 2011 was published in those same newspapers on September 25, 2011. (*See* PSC Docket.)

4. Thus, RESA's Petition to Intervene was not timely filed. In fact, RESA's Petition was twenty nine (29) days late. In addition to the Division of Public Advocate (DPA), three (3) other interveners timely filed intervention petitions. (*See* PSC Docket.)

5. I emailed RESA's Petition to Intervene to the parties for comment. Applicant Delmarva Power & Light Company's and Intervener Bloom Energy Corporation's joint response correctly states that RESA's Petition fails to demonstrate "good cause" as required by Rule 21(b) of the *Commission's Rules of Practice and Procedure.* Rule 21(b) provides that "[l]ate intervention may be granted for good cause shown." RESA's Petition fails to state why it filed its Petition twenty nine (29) days late. RESA's Petition only states that "RESA agrees to accept and be subject to the current approved Procedural Schedule in this proceeding." (Petition, ¶7)

6. On October 6, 2011, I wrote RESA as to why it had not timely filed its intervention petition. RESA responded that the following factors caused the late filing: a) the fact that this is an expedited docket; b) RESA's resources monitoring cases in various states; c) RESA's Counsel's schedule; d) obtaining RESA's internal approvals for attempting to intervene in this docket; and e) arranging for local counsel. Based upon these factors, which have not been disputed by Delmarva Power or Bloom Energy, I find that RESA has established "good cause" for filing its intervention petition late,

thereby satisfy Rule 21(b) of the Commission's Rules. Thus, RESA must be allowed to intervene in this proceeding.

7. Applicant Delmarva Power & Light Company's and Intervener Bloom Energy Corporation's joint response also states that they do not object to RESA's intervention, provided that "RESA will not be permitted to introduce or offer any new evidence at the hearing scheduled for October 18. The parties and Staff have not had the opportunity to issue data requests to RESA, and it would be inappropriate to permit RESA to inject new evidence or written comments into this proceeding after the period for written comments and discovery has passed."[2] (Response,¶5.)

8. In response to my October 6th inquiry, RESA responded that "at this time, [RESA] does not intend to introduce any documents or testimony (pre-filed or live) into evidence in this proceeding." (RESA's 10/6 Letter to HE, p.1.) Delmarva Power and Bloom Energy responded that they did not question the professional integrity of RESA's Counsel. However, due to RESA's late appearance, the parties believed that RESA must be expressly prohibited from doing these things so that the parties can avoid being confronted with evidence which was not disclosed in discovery or even an "ambush" by RESA. (Joint 10/6 Letter to HE, p.2) Apparently, RESA's promise that "at this time, [RESA] does not intend to do these things," did not satisfy

[2] Similarly, Delaware's Department of Natural Resources (DNREC), an Intervener, did not object to RESA's intervention *provided that*: 1) RESA "would be bound by the current procedural schedule;" and 2) RESA's "participation does not hinder or delay the proceeding." (*See* PSC Docket.)

Delmarva Power or Bloom Energy which are confronted with a contested docket. (*Id.*) It does not satisfy me either.

9. In its Petition, RESA alleges that its particularized experience and expertise will be useful to the Commission in deciding the issues in this Docket. (Petition at ¶¶3,4.) RESA alleges that the collective experience of its member companies, who are in the retail or wholesale supply of electricity and natural gas business, "enable [RESA] to bring a unique perspective on the electric restructuring process and markets in general, the issue of rate design, the structure of standard offer service, energy delivery service, and renewable portfolio standards in particular." (*Id.* at ¶4.)

10. RESA's Petition further alleges that the new Tariff proposed by Delmarva Power involving Bloom Energy "could impact Delaware's evolving competitive retail electricity market, including RESA's members' ability to participate in the Delaware electricity market and their ability to comply with Delaware's regulations related to renewable energy." (*Id.* at ¶3.)

11. For purposes of considering the merits of RESA's Petition and its October 6th letter, I assume as true the representations made therein. Specifically, in good faith, RESA has adequately alleged that it has particularized expertise and experience which may be valuable to the Commission in deciding the issues in this docket. Also, RESA has sufficiently alleged that the proposed Tariff may affect one or more of its member companies. Thus, RESA has satisfied the intervention requirements of Rule 21(a) of the Commission's *Rules of Practice and Procedure*. ("Rules")

12. However, due to the late filing of RESA's Petition to Intervene, and the potential prejudice to the parties and interveners which have timely participated in this docket, pursuant to Rule 21(d) of the Commission's Rules, RESA's intervention shall be subject to the "reasonable terms and conditions" described hereinafter.

IT IS ORDERED:

1. The Petition for Intervention filed by the Retail Energy Supply Association ("RESA") is **GRANTED.**

2. The Amended Procedural Schedule established by this Hearing Examiner and agreed to by the parties, will not be modified, changed or varied in any respect due to this Order. I have added RESA to the official Service List for this Docket.

3. RESA may attend the evidentiary hearing and participate as an intervener. RESA is permitted to cross-examine the witnesses of the other parties and interveners. However, RESA is prohibited from introducing any documents or testimony (pre-filed or live) into evidence in this proceeding, including but not limited to, at the evidentiary hearing.

4. Since the Commission is currently accepting late public comments filed in this expedited docket, RESA is permitted to file an "Intervener's Comment" on or before 4:30 p.m. on October 13, 2011. I also find that all public comments in this docket must be submitted on before 4:30 p.m. on October 13, 2011. I am imposing this deadline so that all public comments and RESA's Intervener's Comment (if any) can be delivered to the Commissioners in advance of the October 18, 2011 evidentiary hearing.

5. RESA is hereby placed on notice that it is required to comply in all respects with the Commission's *Rules of Practice and Procedure* as well as all Delaware statutes, rules and regulations pertinent to this Docket.

6. Pursuant to Rule 28, the parties may file an interlocutory appeal of this Order to the Commission within three (3) days of today. In case of appeal, the Commission will hear oral argument at the October 18, 2011 evidentiary hearing. However, this proceeding is not stayed pending any such appeal.

BY ORDER OF THE COMMISSION

Mark Lawrence
Hearing Examiner