

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

IN THE MATTER OF THE APPLICATION OF)
DELMARVA POWER & LIGHT COMPANY FOR)
AMENDMENT OF ITS POWER PURCHASE) PSC DOCKET NO. 06-241
AGREEMENT WITH BLUEWATER WIND)
DELAWARE, LLC (FILED AUGUST 2, 2010))

ORDER NO. 7835

AND NOW, this 7th day of September, 2010:

APPLICATION

1. On August 2, 2010, Delmarva Power & Light Company ("Delmarva") filed with the Delaware Public Service Commission (the "Commission" a Letter Application (the "Application") for approval of amendments to the June 23, 2008 offshore wind Power Purchase Agreement (the "2008 PPA") with Bluewater Wind Delaware, LLC ("Bluewater").

2. The Application stated that Bluewater first approached Delmarva about extending the 2008 PPA deadlines in or around January 2010. According to Exhibit 2 to the Application, a number of key milestones in the 2008 PPA were premised on Bluewater's expectation that the United States Minerals & Management Service ("MMS") would adopt permitting regulations by mid-2008; however, the MMS did not issue the expected regulations until April 2009, and they did not become effective until June 29, 2009. Implementing the permitting regulations required an entire year, and permitting did not begin until MMS issued its Request for Interest ("RFI") in April 2010. Because of this delay, which was beyond either Bluewater's or Delmarva's control, Bluewater would not be able to satisfy the 2008 PPA's deadlines for permitting. Furthermore, Bluewater characterized

the MMS permitting process as "ill-defined," and noted that the recent restructuring of MMS into three separate entities created additional uncertainty regarding when Bluewater would receive the necessary permits. (Application, Ex. 2).

3. At the time the parties executed the 2008 PPA, Bluewater planned to install a meteorological tower to collect the necessary data regarding wind, wave and current patterns in the area where the project would have been be constructed in early 2009, and to have collected a full year of data by early 2010. As a result of the delays, Bluewater has not yet installed the tower. The lack of meteorological tower data, which Bluewater terms "critical," has further delayed it in meeting the 2008 PPA's deadlines. Bluewater received a tower lease in November 2009, and claimed that it has "diligently pursu[ed]" the necessary environmental permits from the various federal agencies. (*Id.*).

4. Because of these delays, Bluewater requested, and Delmarva agreed to, a two-year extension of several dates in the 2008 PPA. (*Id.*).

5. The proposed substantive amendments are as follows:

- (a) The Amended PPA extends the Services Term¹ of the Amended PPA from the Initial Delivery Date until the earlier of (1) 25 years after the Initial Delivery Date or (2) December 31, 2041 (it was December 31, 2039 in the 2008 PPA. (Application, Ex. 4 - PPA Section ____).
- (b) The Amended PPA extends the Guaranteed Initial Delivery Date after which Delay Damages will begin to accrue from December 1, 2014 to December 1, 2016. However, there is no change to the definition or

¹ Capitalized terms used herein shall have the same meaning as defined in the 2008 PPA and/or the Amended PPA between Delmarva and Bluewater.

calculation of Delay Damages as set forth in the 2008 PPA. (*Id.* Section 5.4).

- (c) The Amended PPA extends the Date Certain (the date by which the Bluewater project must be completed) from May 31, 2016 to May 31, 2018. If Bluewater does not achieve the Initial Delivery Date by the Date Certain, Delmarva may terminate the Amended PPA on 30 days' notice. (*Id.* Section 5.4).
- (d) The Amended PPA extends the time period in which additional wind turbines may be installed after the Date Certain from May 31, 2017 to May 31, 2019. Under both the 2008 PPA and the Amended PPA, additional wind turbines can only be installed during this time period if they were part of the project's original planned capacity and could not be installed due to a *force majeure* event. (*Id.* Sections 5.4 and 5.5).
- (e) In the 2008 PPA, Bluewater had up to June 23, 2010 to terminate the 2008 PPA if it was unable to find satisfactory purchasers for the rest of the energy and other products from the project or if it determined that it was not otherwise prudent to continue to develop the project. The Amended PPA extends that deadline to June 23, 2012. Delmarva will return to Bluewater \$4 million of the Development Period Security if Bluewater exercises its termination option after June 23, 2010 but before June 23, 2011 (rather than returning the full amount of Development Period Security as in the 2008 PPA). If Bluewater exercises its termination option after June 23, 2011, however, the Amended PPA provides that Delmarva will retain the entire amount of Development Period Security. (*Id.* Section 2.4(a)).
- (f) In a side agreement that was filed as part of the Application, Delmarva and Bluewater agreed that Bluewater's right to give notice of termination pursuant to Section 2.4(a), and Delmarva's requirement to refund the entire amount of Development Period Security, would be the later of the two-year anniversary of the Execution Date (June 23, 2010) or the date of Commission approval of the Amended PPA, and that if the Commission did not approve the Amended PPA in its entirety, this extension date would terminate on the thirtieth day after the date of such Commission action. (The Amended PPA defines the final day of this extension under either circumstance as the "Outside Date"). (Application, Ex. 3). The side agreement further provided that neither Bluewater nor any of its Affiliates will attempt to alter any

pricing or other economic provisions of the 2008 PPA or the Amended PPA that will require Delmarva or its customers to bear additional costs. (*Id.*).

- (g) The Amended PPA extends Delmarva's right to terminate upon an adverse change in law from June 23, 2010 to the earlier of June 23, 2012 or the date when the Bluewater project is financed. (Application, Ex. 2 - Section 2.5).
- (h) The Amended PPA extends the date by which Bluewater must notify Delmarva of the final capacity size of the project from June 23, 2010 to June 23, 2012. (*Id.* Section 2.4(b)).
- (i) The Amended PPA contains a new provision requiring Bluewater to compensate Delmarva for any increased costs of purchasing renewable energy credits ("RECs") from the market over the costs in the 2008 PPA from May 31, 2016 to either May 31, 2018 or the project completion date on time (the "Interim Period") if the project is not completed (the "Interim Period Cost to Cover"). If Bluewater does not reach the Project Commercial Operation Date before May 31, 2016, Bluewater must pay Delmarva either: (1) the Interim Period Cost to Cover during the Interim Period or (2) provide replacement RECs to Delmarva to allow Delmarva to meet its requirements under the Renewable Energy Portfolio Standards Act ("REPSA"). Bluewater's delivery of replacement RECs to Delmarva reduces and can completely eliminate the Interim Period Cost to Cover. Delmarva will use commercially reasonable efforts to minimize the Interim Period Cost to Cover, but it is not required to incur the Alternative Compliance Penalty under the REPSA. (*Id.* Section 4.2(c)).
- (j) The Amended PPA makes clear that before it can withdraw from the Amended PPA, Bluewater is responsible for both the Interim Period Cost to Cover and the Termination Payment described in the 2008 PPA. (*Id.* Sections 5.4(b) and (d)).
- (k) The Amended PPA extends specified critical milestone dates in Schedules 1 and 3 of the 2008 PPA by two years (except for commencement of avian studies, which has already occurred, and installation of the meteorological tower by June 30, 2011). The extended milestone dates include:

- The financial closing date was extended from August 31, 2012 to August 31, 2014.
- The date for issuing the Notice to Proceed with construction was extended from September 2012 to September 2014.
- The Site Control Rights Obtained date was extended from August 31, 2012 to August 31, 2014.
- The deadline for Permitting was extended from August 31, 2012 to August 31, 2014.
- The deadlines for execution of the Turbine Supply Agreement and EPC Contract were extended from August 31, 2012 to August 31, 2014.
- The deadlines for receiving various project permits set forth in Schedule 3 of the 2008 PPA were all extended by two years.

6. Delmarva's Application emphasized that in exchange for its agreement to Bluewater's request to extend the 2008 PPA deadlines, it had negotiated new provisions designed to protect Delmarva's standard offer service ("SOS") customers from adverse consequences that might arise therefrom. (Application at 2). Specifically, Delmarva wanted to ensure that its customers were protected from any increased costs of purchasing RECs should REC prices during the Interim Period be higher than the REC price under the 2008 PPA. Therefore, Delmarva required Bluewater to agree to compensate Delmarva's customers for any increased costs of purchasing RECs from another source over the REC costs contained in the 2008 PPA. (*Id.*). Similarly, under the 2008 PPA, if Bluewater terminated the 2008 PPA on or before June 23, 2010 pursuant to the provisions allowing it to do so, it was entitled to the return of the full \$6 million of Development Period Security it had given Delmarva. Under the terms of the Amended PPA, however - and

subject to the side agreement (Ex. 3) - Bluewater is only entitled to the return of \$4 million of that Development Period Security at best; Delmarva gets to retain \$2 million of it if Bluewater terminates the Amended PPA pursuant to Section 2.4(a) after the Outside Date, and has the right to retain the entire amount if Bluewater exercises its right to terminate after the occurrence of a specific date. (*Id.* at 3 and Ex. 3)²

7. Delmarva stated that before agreeing to the requested extensions, it gave "careful consideration" to certain factors, including that:

- the 2008 PPA had already been approved by the Commission and State Agencies;
- the project was a significant component of the State's goal to develop and promote renewable energy and "green jobs" in Delaware;
- the 2008 PPA constituted a large percentage of Delmarva's overall renewable energy portfolio;
- the delay in MMS regulations was outside Bluewater's control;
- the delay in receiving RECs from the Bluewater project should not result in a shortage of RECs because Delmarva's SOS load has decreased significantly due largely to the recession; and
- the customer protections it negotiated should minimize certain risks to Delmarva's customers that could result from the additional project delay.

(*Id.* at 4).

8. In light of the foregoing, Delmarva concluded that agreeing to the proposed extensions was in the public interest. (*Id.*).

²Again, this particular date will be determined according to the side agreement.

9. Delmarva characterized these amendments to the 2008 PPA as "material," and stated that it filed the Application requesting Commission approval of them because it believed that "where material amendments have been made to a Commission-approved long term contract, those material amendments should also be subject to Commission review and approval before they can become effective." (*Id.* at 5).³

10. Staff and the Division of the Public Advocate have reviewed the Application and do not oppose the requested relief.

DISCUSSION

11. First, we believe that we can make a decision on the proposed Amended PPA on our own, without the other State Agencies that were involved in approving the 2008 PPA. Section 1007(d) of the Electric Utility Restructuring Customer Supply Act ("EURCSA") appears to require the involvement of all the State Agencies only for the initial IRP process. That section provides:

*As part of the initial IRP process, to immediately attempt to stabilize the long-term outlook for standard offer supply in the DP&L service territory, DP&L shall file on or before August 1, 2006, a proposal to obtain long-term contracts. * * **

Subsection (d)(1) set forth this Commission's and the Energy Office's authority to approve or modify the Request for Proposals ("RFP") prior to its issuance. Subsection (d)(2) required DP&L to publish the RFP and gave the State Agencies authority to retain an independent consultant to oversee the development of the RFP and to assist in

³ Delmarva observed that it had agreed to two previous requests by Bluewater to extend deadlines under the 2008 PPA that it believed were "reasonable, posed no material risk to customers, confirmed that pricing and other economic provisions would remain unchanged, and did not constitute a material change to the terms of" the 2008 PPA. (Application at 3 n.2).

their review of the proposals received. Finally, subsection (d)(3) directed the State Agencies to evaluate any proposals received prior to February 28, 2007. It further provided that "[o]nce 1 or more of the contracts have been finalized and approved by the [State Agencies], then DP&L shall enter into such contract or contracts." The statute is silent on whether the approval of all of the State Agencies is required for amendments to the contracts approved pursuant to this section.

12. Second, the 2008 PPA contained the following provision in Article XIV, Section 14.7:

This Agreement shall be considered for all purposes as prepared through the joint efforts of the Parties [who are defined as Bluewater and Delmarva] and shall not be construed against one Party or the other as a result of the preparation, substitution, submission or other event of negotiation, drafting or execution hereof. *The Parties shall be able to amend this Agreement from time to time by mutual consent provided that no amendment or modification to this Agreement shall be enforceable or effected unless reduced to a writing signed by the Parties. Furthermore, no amendment of this Agreement occurring after the Execution Date, for which a Party seeks cost recovery from Buyer's ratepayers, shall be enforceable absent specific Commission approval of such amendment. ...* (2008 PPA. *emphasis added*).

In other words, according to this provision in the 2008 PPA, the PPA can be amended by the parties' mutual consent without invoking the Commission's approval process, depending on what the amendment is, but if the amendment would (or could) result in either party seeking cost recovery from Delmarva's ratepayers, Commission approval *is* required. The State Agencies approved the 2008 PPA (with this provision regarding amendments) in Order No. 7440 dated September 2, 2008.

Thus, based on the foregoing, we conclude that we alone can make a decision regarding the proposed Amended PPA. The applicable EURCSA provision does not envision the involvement of the remaining State Agencies after the initial RFP process and their approval of contracts entered into as a result thereof (and indeed the State Agencies have not been involved in approving any of the other contracts into which Delmarva has entered for the provision of SOS service). Moreover, the 2008 PPA that the State Agencies approved does not envision the involvement of any entity other than the Commission for the approval of amendments thereto.

13. Having determined that we have the authority to approve or deny the proposed amendments to the 2008 PPA, we conclude that the Amended PPA is in the public interest. We, along with the other State Agencies, had previously concluded that the 2008 PPA was in the public interest for several reasons, and the reasons given for that conclusion then remain valid today. Furthermore, as Delmarva notes, the 2008 PPA constitutes a large percentage of its overall renewable energy portfolio, and although the Amended PPA will postpone its recognition of the benefits therefrom, Delmarva has negotiated important protections for its SOS customers so that they are not disadvantaged in the event that Bluewater does not fulfill its obligations under the Amended PPA, including protection from any increased costs of purchasing RECs should REC prices during the Interim Period be higher than the REC price under the 2008 PPA and an agreement that neither Bluewater nor any of its Affiliates will attempt to alter any pricing or other economic provisions of the 2008

PPA or the Amended PPA that will require Delmarva or its customers to bear additional costs.

**NOW, THEREFORE, IT IS HEREBY ORDERED BY THE AFFIRMATIVE VOTE OF
NO FEWER THAN THREE COMMISSIONERS:**

1. That, based on our review of the applicable legal authority and the proposed Amended PPA, and for the reasons set forth above, the proposed Amended PPA is in the public interest and is APPROVED.

2. That the Secretary of the Commission shall deliver the attached form of notice by Internet e-mail to each participant on the service list in PSC Docket No. 06-241.

3. That Delmarva Power and Light Company is hereby notified that it will be charged the costs of this proceeding under 26 *Del. C.* §114(b).

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/ Alisa Carrow Bentley
Secretary