

MEMORANDUM

TO: The Chair and Members of the Commission

FROM: Janis Dillard, Regulatory Policy Administrator
William F. O'Brien, Senior Hearing Examiner

SUBJECT: IN THE MATTER OF INTEGRATED RESOURCE PLANNING FOR THE
PROVISION OF STANDARD OFFER SUPPLY SERVICE BY DELMARVA
POWER & LIGHT COMPANY UNDER 26 DEL. C. § 1007(c) &
(d); REVIEW AND APPROVAL OF THE REQUEST FOR PROPOSALS
FOR THE CONSTRUCTION OF NEW GNEREATION RESOURCES UNDER
26 Del. C. § 1007(d);
PSC DOCKET NO. 06-241

DATE: FEBRUARY 23, 2007

Bruce Burcat, PSC Executive Director, asked us to review the re-redacted bids (submitted on February 16, 2007) in the RFP proceeding and to advise the Commissioners as to which, if any, of the redacted materials should be released to the public. He also asked us to provide a recommendation concerning Professor Jeremy Firestone's Motion for Entry of a Protective Order. This memo summarizes our analysis and, in the end, recommends that the Commission release emissions data (and a limited amount of other information) prior to the public comment hearings scheduled for the week of March 5, 2007, with a more extensive FOIA analysis taking place thereafter. In addition, we recommend denial of Dr. Firestone's Motion for Entry of a Protective Order.

To guide us in our effort regarding the redacted bid materials, Gary Myers, Deputy Attorney General, provided a memo, dated February 12, 2007, concerning the standard this agency should apply when evaluating the bidders' claims of confidentiality in this case.

Mr. Myers' memo is attached hereto as Attachment "A." In short, the standard used here is taken from Delaware's Freedom of Information Act ("FOIA"), which allows for protection of "trade secrets and commercial or financial information...which is of a privileged or confidential nature."¹ 29 Del. C. § 10002(g)(2).

At its February 6, 2007 meeting, the Commission directed the bidders to re-submit their bids with (1) another attempt at releasing as much information as possible and (2) written justification for non-disclosure of each item deemed confidential. The bidders submitted their re-redacted bids under cover letters dated February 16, 2007, with varying degrees of compliance. On February 20, 2007, Staff asked NRG Energy to provide its justification for its redactions on a more detailed basis, with a deadline of February 26, 2007. Rather than repeat the bidders' positions on confidentiality here, the Commissioners are referred to the cover letters submitted by the bidders.

After reviewing the redacted materials, we concluded that, in order to perform an appropriate FOIA analysis on each of the redacted items, we would need more time and possibly the enlistment of someone with direct experience in the electric markets. However, because the

¹We chose not to consider two other "tests" that apply to protection of confidential information in certain contexts. We did not consider the second prong of the FOIA analysis, which asks whether disclosure of the information likely will impair the government's ability to obtain necessary information in the future. Attachment "A," (Myers memo) at 4. This test could apply here under the notion that bidders will not participate in future RFPs if the Commission denies their requests for non-disclosure in this proceeding. However, the instant RFP proceeding (for new generation assets) likely will not be repeated and the PSC's only other bid-type processes are the Standard Offer Service ("SOS") RFPs, which call for much less information from the bidders. Release of the bid information in this case, therefore, likely will not substantially affect participation in future PSC RFP proceedings.

The other "test" not considered here is whether disclosure of bid contents would compromise the integrity of the instant bid process; i.e., whether bidders' knowledge of each others' bids would adversely effect negotiations with the bidders prior to final award. First, it is not clear that the PSC process will include any negotiations prior to award and, second, it is doubtful that FOIA even recognizes this concern. See Attachment "A," (Myers memo) at 2.

public comment hearings are scheduled in early March, and because certain Commissioners have expressed a desire to provide the public with critical data on which to comment, we decided to expedite the FOIA analysis on two areas of wide public interest: environmental impact and pricing.

Form H from the bids specifies the levels of air emissions expected under each proposed generation facility. Both Conectiv Energy and Bluewater Wind chose not to redact Form H. NRG Energy, however, continues to claim confidentiality of the emissions data. In its February 16th cover letter (which may be modified by its submission on February 26), NRG did not provide justification for the redaction, other than noting that it did not redact data that could be found in existing, publicly available sources. Therefore, because the other two bidders found no commercial sensitivity or trade secret protection in their emissions data, and NRG provided no justification for its own redactions, we recommend release of the emissions data from Form H. (Conectiv redacted certain notes on its Form H, which should maintain their confidentiality status at least until the more detailed FOIA review is completed.)

Regarding the pricing information, the agencies' independent consultant in this case made an initial review and could not advise us that any of the information fell outside the exemption for commercial information of a confidential nature. According to the bidders, pricing information is confidential commercial information because they use the same information to bid projects in other states and competitors could use the information in attempts to undercut their bids in those jurisdictions. In addition, we note that the Evaluation Reports, which have been released to the public in full, provide aggregate, comparative pricing information that will allow the public to make meaningful comment regarding price. For these reasons, while we believe that the pricing information should be further reviewed in the more detailed FOIA analysis to follow, we recommend that the redacted pricing information in the bids not be released at this time.

In addition, our initial review yielded three minor items that, on their face, fail any claim of confidentiality and should be released. First, NRG redacted a Chesapeake Utilities press release, at Volume 1,

pages 60-61 of its bid. This press release was previously released to the public by Chesapeake Utilities in 2006 and there is no reason now to keep it confidential. Second, Conectiv's Form O, Question 12, Attachment I, contains investor reports from Moody's and Standard and Poor's that Conectiv considers confidential. NRG has released similar investor reports in their Form O. This information is available for purchase by the general public from the ratings agencies and (barring any copyright infringement issues) this information should be released. Third, Conectiv has redacted the names of its employees from the organizational chart included in Form P/Item 1. Conectiv is concerned that its competitors would target these critical employees for recruitment. This information should be released because (as found by Delaware's federal District Court) the possibility of another company recruiting away one's employees is always present, regardless of whether the public is furnished with a list of the company's employees. *Hecht v. United States Agency for International Development*; 1996 WL 33502232 (D.Del).

Another option for the Commission would be to release all pricing and environmental information, irrespective of whether it falls within one of the FOIA exemptions. Our understanding is that while FOIA requires disclosure of non-confidential information, it does not bar agencies from releasing information that falls within an exemption. In other words, if, because of the enormous impact of its decision on Delaware residents, the Commission finds that the public interest in seeing confidential information (as the process unfolds) outweighs the competitive harm that would result from releasing the information, then the Commission could simply release the information. If the Commission chose this route, however, we would recommend that it place a limited grace period into effect, prior to release of the documents, to enable a bidder to withdraw its bid or to seek a judicial stay of the release of information. We recognize that a bidder's withdrawal of its bid does not necessarily end the question of whether FOIA requires release of its bid documents. If a bidder withdraws from the process, however, the public interest in seeing the bid documents diminishes substantially and, in that case, we would recommend protection of any bid information found to fall within a FOIA exemption.

As mentioned above, we recommend denial of Dr. Firestone's Motion for Entry of a Protective Order, which (if granted) would enable him to gain access to all bid materials. Dr. Firestone cites Rule 11(e) of the Commission's Rules of Practice and Procedure, which calls for either a confidentiality agreement or entry of a protective order so that "parties" will have access to confidential documents. First, the Commission should deny the motion because any protective order that applies to Dr. Firestone would necessarily apply to any member of the public and, therefore, would be the same as simply releasing the information to the public. Contrary to Dr. Firestone's assertions, the Commission has not afforded him any level of status beyond that afforded to anyone on the e-mail service list used for this docket. And since no member of the public at large has ever been denied inclusion on the e-mail service list, a protective order that covers Dr. Firestone would cover all members of the public.

Dr. Firestone argues that the Commission has bestowed upon him an elevated status by virtue of its consideration of his motions and its denial of other public comment during its deliberations on his motions. Rather than impart special status, however, the Commission's consideration of his motions simply reflects a courtesy the Commission extended to a member of the public who has shown great interest in the proceeding and, frankly, (from our perspective) has proven that he has much to offer in way of informing the proceedings. The fact that the Commission Chair did not allow other members of the public to comment when his motions were considered simply means that she was limiting oral public comment on the motions to the movant himself.

Second, it is doubtful that Rule 11(e) even applies to this proceeding. The Commission's Rules of Practice and Procedure were drafted and approved long before the Commission ever got into the business of administering RFPs. While entry of a protective order is necessary in traditional contested proceedings so that the parties to the case can formulate their positions with the benefit of access to confidential materials (while affording some protection against disclosure for the

utility), protective orders have no place in this proceeding, which involves the evaluation of bids. After all, members of the public who are on the e-mail service list are not parties to this case and due process therefore does not require that they see the confidential information. Indeed, there was no intervention period in this case, no hearing examiner assigned, no formal service list, no discovery, no sworn testimony, and no cross-examination. As such, this is not the type of contested case contemplated by Rule 11(e), which applies to "parties" to a case. Moreover, even if Rule 11(e) applies to this proceeding, the Commission may simply invoke Rule 1(b), which provides that "[n]othing in these rules shall preclude the Commission, in the exercise of its statutory duties and where circumstances reasonable require, from prescribing different procedures to apply to specific proceedings." The Commission has a statutory duty to administer (along with the other state agencies) this bid review process, the circumstances of which (for the reasons stated above) reasonably require procedures that do not include Rule 11(e) protective orders.

In addition, Dr. Firestone argues that the Commission cannot deny him party-status (and deny his motion for a protective order under Rule 11(e)) because he relied to his detriment on an e-mail from the case manager that indicated that he was already a "party" to the case and that he need not file for intervention. First, if this were a contested case and Rule 11(e) applied to Commission procedures, then Rule 21(d) would also apply, which limits authority to grant intervenor status to the Commission or to an appointed hearing examiner. Dr. Firestone, therefore, was on notice that an e-mail from a case manager cannot grant formal intervenor or "party" status. Furthermore, while Dr. Firestone may have relied on the e-mail in making his decision not to petition for leave to intervene, such reliance was not to his detriment. Had he petitioned, the Commission would have denied the petition then, just as it would deny it now (under this analysis). After all, the Commission has already set up the case (in PSC Order No. 7003) without an intervention period, which is consistent with the Commission's intent to not treat this RPF as a contested case. As mentioned above, a contested case, with intervening parties, would include discovery, submission of testimony, and cross-examination,

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which have never been contemplated as procedures in this case.

As a final note, we emphasize that any decision made by the PSC regarding the redacted materials (and any advice provided herein or by Mr. Myers) applies only to the PSC and not to the other three agencies involved in the evaluation of the bids. The other three agencies have the same access to the records as the PSC and each agency may have its own rules or procedures regarding public disclosure of such records.