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September 2, 2016

Via Delafile:

Donna Nickerson
Secretary, Delaware Public Service Commission
861 Silver Lake Boulevard
Cannon Building, Suite 100
Dover, DE 19904

Re: Petition of Direct Energy
Docket No. 16-0744

Dear Secretary Nickerson:

Enclosed please find Delmarva Power & Light Company's Emergency Motion concerning the above referenced docket. The emergency nature of the Motion requires that it be heard and considered by the Commission at its meeting scheduled for September 6, 2016. Accordingly I respectfully request that it be provided to the Commissioners via email.

I regret any convenience caused to Staff, the Commission, DPA or any other intervenor, but the timing and emergent nature of this motion was caused by actions outside the control of Delmarva, Staff or DPA. I have provided the Petitioner and all parties and intervenors with electronic copies of this filing.

Should you have any questions or need any information, please do not hesitate to contact me (302-353-7979), including any time over the weekend or in the evenings.

Sincerely,

Todd L. Goodman

cc: Robert Howatt
Connie MacDowell
Parties via email

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE

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 DIRECTING DELMARVA POWER & LIGHT COMPANY TO DISTRIBUTE AN EDUCATIONAL BILL INSERT REGARDING THE OPTIONS AVAILABLE UNDER THE CONTRACT AWARDED BY THE STATE OF DELAWARE (FILED JUNE 30, 2016)	))))))))))))	PSC DOCKET NO. 16-0744

Emergency Motion of Delmarva Power & Light Company 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 Testimony

Delmarva Power & Light Company ("Delmarva"), by and through its undersigned counsel, hereby respectfully requests the Delaware Public Service Commission to enter an order granting relief. In support of this motion, Delmarva submits the following:

Facts

1. On June 30, 2016, Direct Energy Services, LLC ("Direct Energy") filed a petition (the "Petition") with the Delaware Public Service Commission (the "Commission"). In the Petition, Direct Energy asks the Commission to issue and order that would require Delmarva Power to distribute a bill insert to all of Delmarva Power's Residential and Small Commercial customers to promote the competitive retail electric choice and rooftop solar programs offered by Direct Energy.

2. The Commission issued an Opening Order ("Order No. 8922") in this docket on

July 26, 2016.[1] The Order provided:

> "*Interested 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.***"[2]

Order No. 8922 further provided that "this matter will be heard directly before the Commission on September 20, 2016."[3]

3. On August 31, 2016, the day that written comments by interested persons or objections to the Petition were due, counsel for Delmarva and Direct Energy spoke over the telephone concerning procedural and various issues related to the Docket. During that conversation, counsel for Direct Energy mentioned that Direct Energy planned to file written comments to its own Petition and accompanying prefiled testimony by an expert consultant. Counsel for Delmarva informed Direct Energy's counsel that pursuant to Order No. 8922, Delaware law and established Commission procedure, it would not be appropriate for Direct Energy to: (a) file written comments in support of its own Petition or (b) file previously undisclosed pre-filed expert testimony.

4. On August 31, 2016, Direct Energy filed written comments to its own Petition, which incorporated, as an attachment, 17 pages of previously undisclosed prefiled testimony by Direct Energy's expert consultant.

Argument

5. Direct Energy's decision to file written comments to its own Petition, which incorporate previously undisclosed expert testimony, 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 violates: (a) Order No. 8922; (b) the Delaware Administrative Procedures Act;

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[1] Order No. 8922, PSC Docket No. 16-0744 (July, 26, 2016).
[2] *Id.* at page 2, ¶2 (*emphasis original*).
[3] *Id.* at page 3, ¶4.

(c) Delmarva's right to due process; and (d) concepts of fairness and civility to opposing parties.

Direct Energy's Written Comments and
Expert Testimony Violate Order No. 8822

6. Order No. 8922 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.***"[4] Order No. 8922 does not provide for Direct Energy to file written comments in support of its own Petition. Direct Energy's original Petition is a six (6) page document that consists of Direct Energy's arguments as to why Delmarva should be ordered to include a bill insert promoting Direct Energy's competitive energy and solar offerings in Delmarva's billing envelopes. Order No. 8922 clearly provided that the August 31 filing date was for "interested persons or entities" to file comments or objections to Direct Energy's "Petition." The Order did not provide the opportunity for Direct Energy to file additional written comments to its own Petition.

7. Even more problematic is the fact that Direct Energy's written comments incorporated 17 pages of previously undisclosed prefiled testimony by an expert consultant. Direct Energy's expert consultant opined that the Commission should grant Direct Energy's Petition and issue an order requiring Delmarva to include Direct Energy's promotional materials in its billing envelopes to approximately 300,000 Delmarva customers. The expert testimony contains assertions and purported expert opinions concerning, among other things:

a. The witness's expert credentials and experience,

b. The intent of the "legislation" that resulted in Direct Energy's contract with the Delaware Department of State,

c. The Commission's obligations pursuant to the "legislation" and a directive of the Secretary,

[4] *Id.* at page 2, ¶2 (*emphasis original*).

d. Customer reactions to, and alleged preferences for, bill inserts compared to direct mail,

e. An alleged failure of Delmarva to provide retail choice providers like Direct Energy with a "complete and accurate list of customers and account holder names and addresses….,"

f. Assertions that the Commission has previously directed Delmarva to include bill inserts concerning non-utility services, and

g. An assertion that granting Direct Energy's Petition could result in over $46 Million in savings to Delmarva's customers.

8. Direct Energy's submission of expert pre-filed testimony only 1 full business day before the Commission is scheduled to consider Direct Energy's Petition not only violates Order No. 8922, but its timing serves to deny Delmarva (and other parties, such as the Division of the Public Advocate ("DPA") and Staff) the right to perform discovery into the bases underlying the multiple expert assertions in the expert testimony. The result of Direct Energy's actions make it impossible for Delmarva, DPA, Staff or any other party to prepare to counter these multiple newly raised arguments from Direct Energy and its surprise expert witness.

9. If Direct Energy had wanted to appropriately and fairly submit prefiled testimony, it should have either: (a) filed the expert testimony with its Petition, or (b) asked the Commission to enter a scheduling order that contained dates for all parties to file prefiled testimony, which would also have included dates for discovery on assertions, opinions and arguments of the type made in the testimony submitted by Direct Energy on August 31st. By waiting until 1 full working day prior to the Commission's consideration of the Petition to disclose its expert testimony, Direct Energy has attempted to deny Delmarva (and other parties, including DPA and Staff) a fair opportunity to challenge the multiple assertions, opinions and arguments contained in the expert testimony.

10. Delmarva disagrees with each of the broad assertions made by Direct Energy's

expert in his prefiled testimony (as listed in ¶8, a-g above) and is entitled to the opportunity to perform reasonable discovery to understand the basis underlying each. Any party to this docket, including Staff and DPA, are also entitled to that same opportunity.

The Timing Of
Direct Energy's Written Comments
and Expert Testimony Violate the APA
and Deny Delmarva Due Process of Law

11. Holding a hearing to consider Direct Energy's Petition only 1 full business day after the expert testimony was first disclosed would violate Delmarva's right to due process under both the Administrative Procedures Act ("APA") and the Due Process Clauses of the United States and Delaware Constitutions. A potential Commission order requiring Delmarva to include Direct Energy's promotional materials in its billing envelopes would constitute a "case decision" under the APA.[5] Accordingly, the APA specifically requires a "formal, public evidentiary hearing,"[6] at which Delmarva and other parties can submit evidence and cross examine witnesses.[7] Denying Delmarva the ability: (a) to perform discovery regarding Direct Energy's surprise expert testimony and (b) to adequately prepare to cross examine Direct Energy's expert on his multiple assertions and purported expert opinions would deny Delmarva the due process required by the APA.

12. As Delmarva points out in its own Written Comments to Direct Energy's Petition, which Delmarva filed on August 31st, the United States Supreme Court has ruled that attempting to force a public utility to include promotional materials of a third party in the utility's billing envelopes directly implicates "the full protection of the First Amendment."[8] The Supreme Court

[5] 29 Del. C. §10102(3).
[6] 29 Del. C. §10124.
[7] 29 *Del. C.* §10125.
[8] *Pacific Gas & Electric Company v. Public Utilities Commission of California*, 106 S.Ct. 903 at 907 (1986). *See also, id.* at 909, 912 and 913.

has long made clear that the potential impairment of party's First Amendment rights implicates the most fundamental of liberties protected by the Due Process Clause.[9] As such, due process requires Delmarva to be granted time to adequately prepare to respond to the multiple assertions and purported expert opinions contained in Direct Energy's surprise prefiled testimony.

The Timing of Direct Energy's Written Comments and Expert Testimony is Unfair to Delmarva and Other Parties

13. Finally, Direct Energy's written comments and expert testimony, coming as they do when no party will have time to explore or rebut them, constitute an unfair surprise litigation technique. Permitting Direct Energy to submit expert testimony, without giving Delmarva and other opposing parties an opportunity for discovery and to file their own prefiled testimony (should they desire to do so), would reward Direct Energy and its counsel for ambush litigation techniques. This Commission has never countenanced such action.

WHEREFORE, for the reasons set forth above, Delmarva respectfully request the Commission to:

a. Postpone the Commission's consideration of the Petition currently scheduled for September 20, 2016;

b. Appoint a Hearing Examiner to establish a schedule that will include a reasonable opportunity for parties to: (1) conduct discovery upon Direct Energy, (2) file testimony and (3) establish a date for an evidentiary hearing;

Or in the alternative

c. Strike Direct Energy's written comments and the expert testimony incorporated therein and proceed with the September 20th Commission consideration based solely upon the Petition and written comments filed on August 31, 2016 by interested parties and entities, without admission and/or consideration of any

[9] "[F]reedom of speech and of the press -- which are protected by the First Amendment from abridgment by Congress -- are among the fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the States." *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

additional evidence or materials.

And

d. Provide any additional relief and take any other action that the Commission determines to be reasonable and just.

Respectfully Submitted,
Delmarva Power & Light Company

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Pamela J. Scott (DE Bar #2413)
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Dated: September 2, 2016

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE

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 DIRECTING DELMARVA POWER & LIGHT COMPANY TO DISTRIBUTE AN EDUCATIONAL BILL INSERT REGARDING THE OPTIONS AVAILABLE UNDER THE CONTRACT AWARDED BY THE STATE OF DELAWARE (FILED JUNE 30, 2016)	))))))))))))	PSC DOCKET NO. 16-0744

Certificate of Service

The undersigned certifies that the attached was filed in DelaFile and that copies were provided to parties of record via email.

Date: 9/2/16