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September 13, 2010

Via Electronic Filing
Rosemary Chiavetta, Secretary
PA Public Utility Commission
PO Box 3265
Harrisburg, PA 17105-3265

Re: Interim Guidelines Regarding Advance Notification by an Electric Generation Supplier of Impending Changes Affecting Customer Service; Amendment re: Supplier Contract Renewal/Change Notices; Docket Nos. M-2010-2195286 & M-0001437

Dear Secretary Chiavetta:

On behalf of Direct Energy Services, LLC, enclosed for filing is an original copy of its Comments along with the electronic filing confirmation with regard to the above-referenced matter.

Very truly yours,

Kevin J. Moody

Kevin J. Moody

KJM/jls
Enclosure

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Interim Guidelines Regarding Advance	:	
Notification by an Electric Generation	:	Docket No. M-2010-2195286
Supplier of Impending Changes Affecting	:	
Customer Service; Amendment re: Supplier	:	Docket No. M-0001437
Contract Renewal/Change Notices	:	

COMMENTS OF DIRECT ENERGY SERVICES, LLC

Direct Energy Services, LLC is a licensed electric generation supplier (EGS).[1] Direct Energy participated in the Office of Competitive Market Oversight (OCMO) and the Committee for Handling Activities for Retail Growth in Electricity (CHARGE) discussions that led to the OCMO recommendations addressed in the Tentative Order entered September 3, 2010 in this proceeding. Direct Energy appreciates the opportunity to provide its views on the urgent EGS contract renewal issues presented in the Tentative Order: (1) the use of an estimated Price To Compare (PTC) on customer contract renewal notices when an actual PTC is not yet available from the electric distribution company (EDC); and (2) the effect on a customer's existing EGS contract when the customer does not respond to a contract renewal notice.

Direct Energy commends the Commission, OCMO and the CHARGE group for their efforts to revise the March 2001 Interim Guidelines concerning EGS contract renewals to bring them up to date to reflect the current levels of residential electric shopping, default service

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1 Direct Energy Services, LLC (Direct Energy), is the US North (New England, Mid-Atlantic and Mid-West states) residential customer focused North American subsidiary of Centrica, plc. Centrica, plc is a leading provider of energy and other energy-related services to over 20 million households, with annual revenues of approximately $34 billion, $26 billion in market capitalization, and over 35,000 employees world-wide. Centrica, plc has an A- credit rating from Standard & Poors. Direct Energy, combined with the other North American subsidiaries of Centrica, had revenues of $10.5 billion in 2009 with over 6 million gas, electricity and related services customer relationships in North America. In addition, Direct Energy Business, LLC and Direct Energy are EGSs licensed to provide electricity and gas to residential and non-residential customers throughout Pennsylvania. Direct Energy and Direct Energy Business have extensive experience serving residential, commercial, and industrial customers in Pennsylvania.

pricing under the Commission's September 2007 default service regulations and policy statement, and to provide consistency with the natural gas supplier (NGS) contract renewal regulations. The proposed revisions, as far as they go, will help to ensure that customers are provided with competitive options at the expiration of their EGS contracts and, just as important, the information necessary to make informed choices. However, the revisions can go further to enhance customers' choices.

Direct Energy supports the Commission's adoption of OCMO's recommendation on the first issue and, accordingly, supports the Commission's adoption of revised Guideline II(b)(iii). However, during the OCMO discussions Direct Energy had sided with the supplier group that no estimated price to compare be provided given it offers little value to the customer in comparing offers. There were also strong concerns that a utility could use an estimated price to compare to discourage shopping by manipulating a higher or lower estimate depending on shopping levels. Direct Energy urges the Commission and Staff to be watchful of any such manipulation.

On the second issue, Direct Energy supported the Commission's adoption of the contract renewal provisions of the natural gas customer information regulations in the Interim Guidelines for EGS contract renewals. However, these contract renewal provisions became effective in April 2001, the month after the Interim Guidelines, when there was little or no actual market experience with the various products suppliers could offer.[2] Accordingly, these provisions are limited in scope and do not address the full range of contracts or contract renewal options that may now be provided to customers.

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2 Indeed, there has been little or no experience with application of the Interim Guidelines, as the Commission has acknowledged: "Because shopping activity was relatively low prior to the expiration of generation rate caps, the *Interim Guidelines* governing contract expiration or change in service terms were seldom put into practice." Tentative Order at 3.

EGS concerns that these provisions limit the types of contracts and choices an EGS might wish to offer are unquestionably valid. The provisions must allow for flexibility in market changes which affect price but not other terms and conditions. Customers should be free to agree to terms and conditions in their initial contracts that would govern the renewal products their existing EGSs could offer for renewal contracts and how those renewal contacts could become effective while allowing the EGS the ability to respond to market conditions in the renewal price offering. Direct Energy respectfully suggests that the Commission's response to these EGS concerns – there is "nothing in the OCMO proposal that prohibits a supplier from offering and entering into multi-year contracts with customers"– while true, does not acknowledge the full range of the limitations.

One obvious limitation (and mischaracterization) is that "a fixed term agreement may be converted to another fixed term agreement as long as the new agreement includes a customer-initiated cancellation provision that allows the customer to cancel at any time for any reason and contains no cancellation penalties, in the event the customer does not respond to the notice."[3] As a practical, financial and legal matter, such a contract is not a "fixed term" contract. It is a month-to-month contract that differs from the first example in 62 Pa. Code § 62.75(g)(2) only in that it can be cancelled at any time during any month rather than only at the end of a month.

The Commission's order promulgating the NGS customer information regulations acknowledges that both these renewals are month-to-month contracts, despite the language in the regulation:

> IRRC questions what occurs if an NGS wants to convert a long-term agreement to a month-to-month contract. IRRC also asks if the customer has to positively reselect this option or will the conversion occur if there is no action on

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3 Proposed Guideline II(d) (emphasis added); 62 Pa. Code § 62.75(g)(2).

> the part of the customer. IRRC recommends that we address this type of conversion in the regulations.
>
> . . . .
>
> We agree with IRRC that we have not adequately addressed the continuation of a fixed term agreement to a month-to-month agreement when the customer does not respond to the notice. We will add the following language to § 62.75(g)(2).[4]

The two provisions from the natural gas regulations alone do not preserve "choice" for customers[5] – whether or not they respond to EGS renewal offers – to the full extent of the Commission's power. The Commission clearly has the power to expand the scope of the negative option renewal contract provisions.

Section 2807(d)(1) of the Public Utility Code is relied upon by opponents of this position. This section provides that "[t]he commission shall establish regulations to ensure that an electric distribution company does not change a customer's electricity supplier without direct oral confirmation from the customer of record or written evidence of the customer's consent to a change of supplier."[6] By its terms, this provision does not prohibit EGS contract renewals on an negative option basis because customers are already EGS customers. Indeed, in its order promulgating the EGS customer information regulations, the Commission expressly acknowledged that there is no legal prohibition against negative option renewals of EGS contracts:

> A number of commentators question the rationale behind allowing automatic renewals for fixed term agreements to result in another fixed term agreement. We emphasize that we have not proposed that a customer's failure to act can result in the automatic renewal of another fixed term agreement. However, our regulations

4 31 Pa.B. 2005 (April 14, 2001).(emphasis added).

5 "In addition, a new guideline is proposed that will preserve "choice" for customers who fail to respond to a renewal notice from their current supplier by providing them with the opportunity to cancel, without penalty, any resulting agreement with that supplier." Tentative Order at 16.

6 66 Pa. C.S. § 2807(d)(1) (emphasis added).

do allow for a renewal clause in a fixed term agreement, provided that the renewal occurs with proper customer notice and the new agreement is open-ended.[7]

Thus, a customer may demonstrate choice of or consent to an EGS contract renewal by responding to the options notice or by not responding, but the proposed revisions do not fully accommodate these customer options.

Direct Energy agrees with the Commission's concerns with and the ramifications of "unwillingly" locking customers into renewal contracts with higher prices and new terms and conditions.[8] A customer should not be unwillingly locked into any contract, as there is no dispute that the ultimate choice of the EGS rests with the customer.[9] On the other hand, a customer may demonstrate choice in various ways, including accepting a renewal contract by choosing not to respond to a renewal offer.[10] While the two provisions in the NGS customer information regulations and the Commission's order promulgating the EGS customer information regulations acknowledge this, the NGS regulation proposed revisions to the Interim Guidelines unduly limit application of the opt-out method of choice or consent.

As the Commission states in the Tentative Order (p. 15): "Competition is strengthened anytime a customer has a choice." Providing customers with more choices is clearly in customers' best interests and better for the development of retail competition. Moreover, it is not

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7 28 Pa.B. 3780 (August 8, 1998) (emphasis added).

8 "If customers are unwillingly trapped in a contract which contains penalties for leaving, customers may prefer to stay with their default service suppliers. Competition is strengthened anytime a customer has a choice. Additionally, being unwillingly locked into a contract means that customers will not have a choice of suppliers." Tentative Order at 15.

9 66 Pa. C.S. § 2806(a).

10 The operative words in the statute are "choice" [§ 2806(a)] and "consent" [§ 2807(d)(1)(a)], which are not defined in the statute. As required by the rules of statutory construction [1 Pa. C.S. §§ 1903, 1921(a), 1932], these words must be construed according to their common and approved usage, or plain and ordinary meaning. The plain and ordinary meaning of "choice" is "the act of choosing: SELECTION; power of choosing: OPTION" [Webster's Ninth New Collegiate Dictionary (1983), 235], while the plain and ordinary meaning of "consent" is "compliance in or approval of what is done or proposed by another: ACQUIESCENCE; agreement as to action or opinion." [Webster's Ninth New Collegiate Dictionary (1983), 279].

in Direct Energy's (or any other EGS's or the competitive retail market's) best interests – as the Commission has stated – to create dissatisfied customers by locking them into contracts they don't want; in addition, it is in customers' best interests to eliminate unnecessary barriers to the renewal process while maintaining customers' ability to choose to the greatest extent possible and to avoid unwanted charges.

Accordingly, Direct Energy proposes additional provisions to provide for contract renewal situations not addressed in the proposed revisions and to give effect to the "beneficial change" concept in the Interim Guidelines. Direct Energy's proposals are shown as "tracked changes" to the Commission's proposed Appendix A, attached hereto. Specifically, Direct Energy proposes that a customer be permitted alternative methods of choosing to accept EGS contract renewals. When the renewal contract is beneficial to the customer because of a lower commodity price or removal of a cancellation fee, the renewal contract may become effective if the customer does not respond to the options notice. When the proposed change is a higher price than the existing contract or the renewal contract retains a cancellation fee, the renewal contract may become effective if the customer responds or does not respond to the options notice – but if the customer does not respond, the customer can avoid being unwillingly locked into the renewal contract or avoid a cancellation fee by cancelling the renewal contract within 3 business days after receiving the first bill.

This is a reasonable period of time for a customer to confirm the choice to accept or reject a renewal contract while not imposing unreasonable supply costs or risks on the EGS. This time period is consistent with both the right of rescission for the initial contract under the Commission's regulations[11] and the "Consumers Bill of Rights" recently enacted in New York.[12]

[11] 52 Pa. Code § 54.5(d).

This time period also permits cancellation before the customer experiences one or more months of service from the EGS in view of the 15 day deadline for billing information notifications; this permits the customer to move off the new price sooner and without penalty than if the cancellation period were longer, such as 30 days. Direct Energy's proposed revisions allow an EGS to respond to then current market conditions which may require higher hedging costs for a fixed price contract and therefore an early cancellation fee while retaining the ability of the customer for another opportunity to see the price change on their bill prior to committing to the full renewal contract term, if applicable.

Direct Energy made a similar proposal to OCMO. The Commission's order described Direct Energy's proposal as "somewhat complex and extremely difficult to implement because of its subjective nature, *i.e.,* what changes would be beneficial from a customer's prospective that would not require a customer's response?"[13] As shown in the attached Appendix A, Direct Energy's modified OCMO proposal is neither complex nor difficult to implement. Limiting the "beneficial changes" to two specific changes when only the price changes eliminates the subjective nature of the permitted changes and tying the contract renewal process to a perceived benefit.[14]

1. Is there an early termination penalty?
2. Is the new rate higher than the current rate?

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[12] On August 13, 2010, New York State Governor Patterson signed into law an act which amends New York's General Business Law by adding new Section 349-d establishing a competitive supplier ("ESCO", or Electric Supplier Company) Consumers Bill of Rights ("BOR"), applicable to residential customers and door-to-door solicitations. The BOR expressly authorizes the use of early cancellation fees within stated limits [§ 349-d(5)] and permits renewal of a contract with express customer consent provided the customer is notified not less than 30 days or more than 60 days prior to the renewal date; . The customer has 3 business days after receiving the first bill to cancel to avoid incurring the cancellation fee [§ 349-d(6)]. New York Consolidated Law Service, General Business Law, § 349-d.

[13] Tentative Order at 14.

[14] "[T]ying the entire renewal notice procedure and customer response requirement to the perceived benefit to the customer of the terms offered for contract (*15) renewal is another matter." Tentative Order at 14-15.

If the renewal, including a fixed to variable rate situation where the customer benefit may be subjective, does not fit under the two criteria then a three calendar day post-bill exit period must be offered.

CONCLUSION

Direct Energy requests that the Commission revise the Interim Guidelines as shown in attached Appendix A.

Respectfully submitted,

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Date: September 13, 2010

APPENDIX A

Interim Guidelines Regarding Advance Notification by an Electric Generation Supplier of Impending Contractual Changes Affecting Customer Service

I. The purpose of these interim guidelines is to set forth advance customer notification schedules for the following:

(a) Approaching expiration of a fixed term agreement, or;

(c) Proposed changes in terms of service, including, but not limited to, an increase in generation charges or contract termination for reasons other than failure to pay for services rendered and/or EGS service abandonment.

II. An electricity generation supplier, shall provide advance notification to its residential and small business customers of an approaching expiration of a fixed term agreement or any proposed changes in terms of service in accordance with the following guidelines:

(a) An Initial Notice shall be provided to each affected customer fifty-two to ninety days prior to the expiration date of the fixed term agreement or the effective date of the proposed change in terms. The Initial Notice shall include the following:

(i) A general description of the proposed change in terms of service;

(ii) The date when such change is to be effective or when the fixed term agreement is to expire;

(iii) An explanation of why such a change is necessary;

(iv) A statement indicating when a follow-up Options Notice will be issued with details regarding the proposed change, and;

(v) A statement explaining that the Options Notice will discuss the customer's options with respect to such proposed change in terms of service or expiring fixed term agreement.

(b) The Options Notice shall be provided to each affected customer at least forty-five days prior to the expiration date of the fixed term agreement or the effective date of the proposed change in terms. This notice shall include the following:

(i) A statement advising the consumer of the specific changes being proposed by the EGS and informing the customer of its options, including the customer's ability to select another EGS within a certain time period, accept the proposed changes, or return to the EDC for provider of last resort service;

(ii) Information regarding any new pricing or renewal pricing;

(iii) The EDC's or provider of last resort supplier's price to compare. If the price to compare is subject to change quarterly or otherwise as set forth in the EDC's default service plan, the notice should inform the customer of the frequency of the change and that the current price to compare can be obtained by contacting the EDC or accessing www.pa.powerswitch.com. If the EDC's price to compare for the proposed contract term is not yet established, an estimated price to compare should be provided and should be clearly labeled as an "estimated" price to compare. The notice should also include an approximate date that the actual price to compare will be established, and a statement that the customer can contact the EDC or access www.papowerswitch.com to obtain this information when it is available. The EDC shall be the source of the estimated price to compare;

(iv) Any rules that might apply to a customer's return to provider of last resort service, including, for example, but not limited to, a mandatory twelve-month stay rule;

(v) Instructions on exercising its options, including selecting an alternative supplier;

(vi) A date certain for any action required by customers to exercise their available options, including what will occur if customers fails to respond to the notice as set forth in paragraph (d), and;

(vii) Appropriate telephone numbers and internet addresses for the Office of Consumer Advocate and Commission's websites regarding choice (http://www.papowerswitch.com).

(c) In the instance where the proposed change in terms of service is beneficial to the consumer~~, such as in the case of~~ – a decrease in generation charges or the removal of a contract penalty or cancellation fee provision–~~,~~ the EGS may, at its option, provide the customer with one advance notification forty-five to ninety days prior to the effective date of the proposed change. Notwithstanding subsection (d) below, the proposed change may become effective if the customer does not respond to the notice. For example:

(i) A fixed rate agreement may be converted to another fixed rate agreement when the renewal rate is the same or lower and all other terms and conditions remain the same if the customer does not respond to the notice.

(ii) A renewal contract that does not contain a cancellation fee in the existing contract but otherwise contains the same terms and conditions as the existing contract may become effective if the customer does not respond to the notice.

(d) In the event that the customer does not respond to the renewal notice, a fixed term agreement may be converted to a month-to-month agreement, either at the same terms and conditions or at revised terms and conditions, as long as the agreement converts from a fixed term to a month-to-month agreement and contains no cancellation penalties. Alternatively, a fixed term agreement may be converted to ~~another fixed term~~ an open-ended agreement as long as the new agreement includes a customer-initiated cancellation provision that allows the customer to cancel at any time for any reason and contains no cancellation penalties, in the event that the customer does not respond to the notice.

(e) The following contract renewals with no other changes to the terms and conditions may become effective whether or not the customer responds to the notice, but a customer who does not respond shall have 3 business days after first bill under the renewal agreement to cancel the renewal agreement without incurring an early cancellation fee:

(i) A fixed rate agreement to a variable rate agreement with a cancellation fee.

(ii) A variable rate agreement to a fixed rate agreement with a cancellation fee.

(iii) A fixed rate agreement to a higher fixed rate agreement with a cancellation fee.