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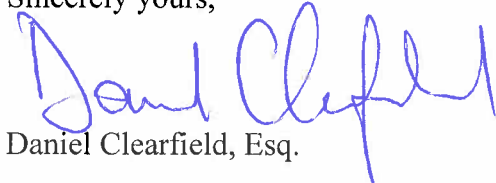
November 23, 2011

Via Electronic FilingRosemary Chiavetta, Secretary
PA Public Utility Commission
PO Box 3265
Harrisburg, PA 17105-3265Re: Investigation of Pennsylvania's Retail Electricity Market
Docket No. I-2011-2237952

Dear Secretary Chiavetta:

On behalf of Direct Energy Services, LLC (“Direct Energy”) enclosed please find the original of its Comments following the *En Banc* Hearing of November 10, 2011, along with the electronic filing confirmation page with regard to the above-referenced matter.

Sincerely yours,



Daniel Clearfield, Esq.

DC/jls
Enclosurecc: ra-OCMO@state.pa.us w/enc.

**BEFORE THE
PENNSYLVANIA UTILITY COMMISSION**

Investigation of Pennsylvania's Retail Electricity Market :
: Docket No. I-2011-2237952
:

**COMMENTS OF
DIRECT ENERGY SERVICES, LLC
FOLLOWING THE *EN BANC* HEARING
OF NOVEMBER 10, 2011**

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Date: November 23, 2011

I. INTRODUCTION

Pursuant to the Secretarial Letter (dated October 7, 2011), Direct Energy Services, LLC (“Direct Energy”)¹ respectfully submits these written comments following the *en banc* hearing of November 10, 2011 related to the Pennsylvania Public Utility Commission’s (“Commission” or “PUC”) Retail Markets Investigation (“RMI” or “Investigation”).

The purpose of these written comments is to highlight key issues or positions from Direct Energy’s prior comments, presentations and testimony related to opt-in auctions, and to respond to key issues or positions raised by others on opt-in auctions. Consistent with the Secretarial Letter, the issues and positions being addressed are those that, in Direct Energy’s view, should be reviewed by the Commission in connection with development of an intermediate work plan concerning opt-in auctions.

¹ Direct Energy is a licensed competitive energy and gas supplier (“EGS” and “NGS”) in Pennsylvania, eligible and actively providing electricity and/or natural gas to residential, commercial, and industrial customers in most utility territories, and is also providing an electricity aggregation service in Pike County.

In 2009, Direct Energy Business located its North American headquarters in Pittsburgh, Pennsylvania. In addition, Direct Energy has recently relocated Direct Energy Residential employees from Ohio, Texas, and Ontario, Canada to Pittsburgh, now totaling approximately 356 employees. Direct Energy’s acquisition on June 10, 2010 of the US operations of Clockwork Home Services (Clockwork) including its 29 small businesses in Pennsylvania resulted in an increase in our in-direct employee headcount, Clockwork’s franchises – One Hour Heating and Cooling, Benjamin Franklin Plumbing, and Mister Sparky – employ 215 and its affinity group members employ another 314 people throughout Pennsylvania. Lastly, Direct Energy’s recent acquisition of Gateway Energy resulted in 74 employees and an office in Kingston. All told, there are approximately 1,000 employees in Pennsylvania, with approximately 70,000 sq. ft. of office space, and an annual payroll of \$27.5 million for the Pittsburgh and Kingston based employees.

II. OPT-IN AUCTIONS

A. **Opt-In Auctions Are Important**

Retail opt-in auctions can spur a quantitative and qualitative change in the level of migration and the strength of retail competition in the Commonwealth.² These auctions will build momentum for choice. They will deliver immediate economic development benefits for residential customers, small commercial customers, and the Commonwealth, and can be conducted with minimum risk for ratepayers. With this important step, the Commission will also be creating market conditions that could support other changes and the final transition to default service as a backstop service.

B. **Core Elements Of Opt-In Auctions**

Opt-in auctions can be done while honoring contractual commitments and protecting remaining default service customers. The core elements of opt-in auctions should be based on these principles.³

- Participants. Residential and small commercial customers who are on Default Service at the beginning of the enrollment period.
- Incentive. After three months, the bonus payment is made to the customer by the EGS. The customer is free to choose an alternative supplier or return to default service without losing the bonus payment or the savings that have accrued. We are recommending a bonus payment in the range of \$100-\$150 for residential customers,⁴ and \$175-\$200 for small commercial customers based on the focus group research presented previously.

² En Banc hearing testimony and presentation of Paul Hibbard, Vice President with Analysis Group (Boston), on behalf of Direct Energy.

³ *En Banc* hearing testimony and presentation of Andrew Parece, Managing Principal with Analysis Group (Boston), on behalf of Direct Energy.

⁴ Based on the focus groups of residential and small business customers who have not switched suppliers conducted by the Tarrance Group, as articulated by *En Banc* witness Dave Sackett, residential customers stated that under the opt-in scenario, they would need the equivalent of \$10 per month, or \$120, to consider participating in this auction.

- Fixed Price. As discussed herein, the auction would be used to set the fixed price per kWh for all customers who opt-in to the program for a period of one year.
- Auction mechanism. We are recommending a descending clock auction approach for the price auction. This approach is relatively simple and it has been used successfully in (wholesale) default service procurements.
- Transition. The customers' options at the end of the one-year program period are also very important. Direct Energy recommends that Opt-in program customers be guaranteed a fixed price offering by the assigned EGS to whom they are assigned prior to the end of the one-year period. These customers can also choose another supplier or revert to default service at that time and there are no termination fees.⁵

C. **No Limitations On Customer Participation In Full-Scale Opt-In Auctions**

Direct Energy believes that as many customers as possible should be able to experience the benefits of retail choice. In contrast, the Office of Consumer Advocate (“OCA”) and others have proposed exclusionary rules to prevent wide participation in full-scale opt in auctions. Specifically, the OCA has proposed that participation in opt-in auctions be on a first-come, first-served basis until a specified participation cap – as low as 10% of default customers – is reached.⁶

For full-scale auctions,⁷ limits on customer participation appear to be patently inconsistent with the PUC’s goals to expand shopping and the benefits of the competitive market. Nothing in Act 129 requires that a certain number or percentage of customers remain on default service. To the contrary, the Choice Act gives every customer the right to choose an electric supplier. Opt-in auctions are merely a mechanism that encourages

⁵ Customers who take no action after receiving at least two notifications, will revert to a month to month variable rate at the end of their term.

⁶ OCA’s Comments on the Tentative Order, p. 18-19.

⁷ So that EDCs and EGSs can gain experience, Direct Energy has recommended that participation in pilot auctions be limited to 10%-20% of customers on default service at the beginning of the enrollment period.

customers to exercise that statutory right. In the sub-group process, participating utilities have stated that there are no significant administrative barriers other than a 10,000 customer per day processing/enrollment cap.

Participation limits for full scale auctions are aimed at keeping the number of shopping customers at or below a specified level. In doing so, the benefits of opt-in auctions are left to a special and restricted range of customers. Such participation limits would force customers to be turned away from full scale opt-in auctions. So, rather than encouraging competition, the limits on participation would be restricting the ability of customers to exercise their statutory right and would keep them from gaining experience in the competitive markets. Stated otherwise, the limits on participation would actually discourage customers attracted to opt-in auctions programs but (by a matter of timing or faster action by others) who fall just outside any arbitrary participation limitation from participating in the retail markets.

D. No Moving Price Ceilings

It has been suggested at the *En Banc* hearing, that pricing of electricity under the opt-in auctions must be subject to a price ceiling that should never exceed the applicable price-to-compare. However, this is not practical. The price-to-compare will vary over time. It makes it more complicated than necessary for bidders to ensure that the auction price is below such a moving target. As a result, risk and costs would be added to the opt-in auction results.

There are more practical solutions. One solution is to use a guaranteed price tied to the price-to-compare at the time of the bids. The opt-in auction would set a fixed price per kWh for all customers who opt-in to the program for a period of one year. Eligible

customers would be informed prior to the enrollment period that the fixed price would be lower than the known default service rate at the beginning of the program period (June 1, 2013 for the full-scale auction). The fixed price would not change over the program year, and it would be guaranteed to be lower than the default service rate for six months, assuming that the EDCs move to bi-annual Default Service rate adjustments as recommended by the PUC. After three months, the bonus payment is made to the customer by the EGS. Thus, if prices rise after the six month price guarantee, the customer is free to choose an alternative supplier or return to default service without losing the bonus payment or the savings that have accrued.

A different solution would use an estimated (or projected) default service price. The procedure for estimating this price will be defined prior to the enrollment period, so that the estimated price would be equally known to all bidders and customers. The auction price would then be guaranteed to be lower than this estimated average default service price over the 1-year period. And, after three months, the bonus payment is made to the customer by the EGS. Either approach will create a workable program and produce benefits to customers. Because customers will also receive a signing bonus, it is most likely that their total charges will be at or below what they would have paid if they were on default service. But, if the default rate falls below the opt-in auction price, the customer can always switch back to default and still be ahead.

E. Compliance With Act 129

The OCA and others have contended that opt-in auctions must not affect the affordability of default service. This contention is based on the premise that Act 129

requires that procurements of electricity for default service must be “affordable.” This premise is fatally flawed for the following reasons.

First, Act 129 made substantial changes to the statutory standards for acquisition of electric generation supply by default service providers (e.g., EDCs) for their default service customers.⁸ The opt-in auctions are not default service from a default service provider. Participation in an opt-in auction will remove the customer from default service. So, the requirements of Act 129 are not directly applicable to opt-in auctions. As discussed above, opt-in auctions merely encourage customers to exercise their statutory right to right to choose an electric supplier.

Second, Act 129 does not mandate that default service meet some regulatory view of what is “affordable.” The provisions of Act 129 require the use of a “competitive procurement process” to obtain a “prudent mix” of contracts designed to ensure “adequate and reliable service” that produces the “least cost [for electricity] to customers over time.”⁹ Nothing in these statutory provisions mandates that that results of such competitive procurements be the lowest possible at any particular time. A default rate that promotes a competitive market will produce the lowest price for electricity over time.

These statutory requirements are not sufficiently ambiguous to warrant reference to tools of statutory construction.¹⁰ Yet, that is exactly what OCA does in discussing opt-

⁸ Act 129 of 2008, P.L. 1592 (“Act 129”). Act 129 also amended the Pennsylvania Public Utility Code (Code), 66 Pa. C.S. §§ 101 et seq., to, *inter alia*, require the Commission to develop and adopt an Energy Efficiency and Conservation (EE&C) Programs.

⁹ See, e.g., 66 Pa. C.S. §§ 2807(e)(3.1), (3.2), (3.4).

¹⁰ 1 Pa. C.S. § 1921(b) (“When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.”).

in auctions. Despite the lack of ambiguity, OCA references the preamble to Act 129 and interprets the law as requiring that default service to be “stable, reliable, affordable, efficient and environmentally sustainable.”¹¹ In doing so, the OCA uses the preamble to control the statutory provisions. But, this violates the principles of statutory construction because (a) these principles should not be used without an ambiguity and (b) preamble language does not control over the statutory language.¹²

Third, opt-in auctions will not upset the competitive market. Default service is intended to be a “back-stop” to the competitive market. Procurement of electricity for default service results in a pass-through of costs to default service customers. If any customer leaves default service, the remaining default service customers will experience a modified price. The same is true when a customer returns to default service – for

¹¹ OCA’s Comments on the Tentative Order, p. 2.

¹² 1 Pa. C.S. § 1924 (“The title and preamble of a statute may be considered in the construction thereof. Provisos shall be construed to limit rather than to extend the operation of the clauses to which they refer...”). See, e.g., *Barasch v. Pa. Public Util. Com.*, 532 A.2d 325 (Pa. 1987) (“Although titles and preambles are accepted aids in resolving ambiguity in an enacting clause, they may not be used to create ambiguity where none exists in the clause”) (citations omitted); *UMCO Energy, Inc. v. Dep’t of Env’tl. Prot.*, 938 A.2d 530, 537 (Pa. Commw. 2007) (“Before we look to the preamble for aid in construing the regulation, we must first find that the regulation creates an ambiguity”); *English v. Commonwealth*, 816 A.2d 382, 387 (Pa. Commw. 2003) (“While it is true that language contained in a preamble may be considered in construing an ambiguous law, it is not controlling”); *Commonwealth v. Reefer*, 816 A.2d 1136, P17 (Pa. Super. 2003) (“[T]he title is always a part of a statute or ordinance and, as such, may be considered in construing the enactment, but it is in no sense conclusive, particularly when there is no ambiguity in the body of the statute or ordinance itself”) (quoting *Commonwealth v. Campbell*, 758 A.2d 1231, 1237 (Pa. Super. 2000); *Commonwealth v. Campbell*, 758 A.2d 1231, 1237-1238 (Pa. Super. 2000) (“[T]he title, preamble headings, and other divisions of a statute may be considered in the construction but shall not be considered to control”) (quoting *Boring v. Erie Ins. Group*, 641 A.2d 1189, 1192 (Pa. Super. 1994); *Commonwealth v. Phila. Suburban Water Co.*, 581 A.2d 984 (Pa. Commw. 1990) (“The Act’s preamble, while not controlling, see Section 1924 of the Statutory Construction Act of 1972, 1 Pa. C.S. § 1924, is helpful in construing the statute”).

