

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION
AT RICHMOND, MARCH 15, 2017

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CASE NO. PUE-2016-00094

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PETITION OF
DIRECT ENERGY SERVICES, LLC

For a declaratory judgment

FINAL ORDER

On August 26, 2016, Direct Energy Services, LLC ("Direct Energy") filed with the State Corporation Commission ("Commission") a petition for a declaratory judgment ("Petition") pursuant to Rule 100 C, *Declaratory judgments*, of the Commission's Rules of Practice and Procedure.¹ In its Petition, Direct Energy requests that the Commission resolve certain issues related to the Virginia Electric Utility Regulation Act ("Regulation Act")² before Direct Energy expends considerable resources as a competitive service provider ("CSP") to develop and refine business plans, market to potential customers, enter into contractual relationships with suppliers and customers, and take other significant and costly steps necessary to provide 100% renewable energy to residential, and possibly commercial and industrial, customers located in the service territory of Virginia Electric and Power Company ("Dominion").³

On September 20, 2016, the Commission issued an Order for Comment in this proceeding that, among other things, docketed this proceeding; determined that Dominion and

¹ 5 VAC 5-20-10 *et seq.*

² Code § 56-576 *et seq.*

³ Petition at 3. Direct Energy is currently licensed as a CSP. *Application of Direct Energy Services, LLC, For a license to conduct business as an electricity competitive service provider*, Case No. PUE-2016-00088, Doc. Con. Cen. No. 161010102, Order Granting License (Oct. 6, 2016).

Appalachian Power Company ("APCo")⁴ are necessary parties to this proceeding; directed Dominion and APCo to respond to the Petition; and provided an opportunity for Direct Energy to reply to the responses filed by Dominion and APCo. On October 11, 2016, Dominion and APCo filed responses to the Petition. Also on October 11, 2016, the Chesapeake Climate Action Network and Appalachian Voices (collectively, "Environmental Respondents") filed a Motion to Participate as Respondents and Extend Deadline to File Responsive Pleading ("Environmental Respondents' Motion"). After Dominion and APCo were given an opportunity to respond to the Environmental Respondents' Motion, on December 1, 2016, the Commission issued an Order Granting Motion wherein it found that Environmental Respondents may file comments limited to the three issues raised by the Petition and established dates for the Environmental Respondents, Dominion, APCo, and Direct Energy to make additional filings in this matter.

On December 16, 2016, the Environmental Respondents filed a response to the Petition and on January 12, 2017, Dominion and APCo filed additional responsive pleadings. On January 26, 2017, Direct Energy filed a reply to the responses of Dominion, APCo, and the Environmental Respondents.

NOW THE COMMISSION, upon consideration of this matter, is of the opinion and finds as follows.

Direct Energy seeks a declaratory judgment that it is authorized by § 56-577 A 5 of the Code to: (i) continue to provide a 100% renewable energy product to existing and future incumbent electric utility customers once the utility has in place an approved tariff to provide 100% renewable energy in its service territory; (ii) provide a 100% renewable energy product to commercial and industrial customers whose demand for the previous calendar year exceeded five

⁴ Direct Energy is licensed to compete for customers in APCo's service territory as well as in Dominion's service territory.

megawatts ("MW"); and (iii) indicate to commercial and industrial customers that they are not subject to the five-year minimum stay provision because they are purchasing a 100% renewable energy product from Direct Energy.⁵

Whether a CSP may continue to provide a 100% renewable energy product to existing and future incumbent electric utility customers once the incumbent electric utility has in place an approved tariff to provide 100% renewable energy in its service territory.

Direct Energy requests the Commission interpret Code § 56-577 A 5 ("Section A 5"), which provides:

After the expiration or termination of capped rates, individual retail customers of electric energy, regardless of customer class shall be permitted:

- a. To purchase electric energy provided 100% from renewable energy from any supplier of electric energy licensed to sell retail electric energy within the Commonwealth, other than any incumbent electric utility that is not the incumbent electric utility serving the exclusive service territory in which such a customer is located, if the incumbent electric utility serving the exclusive service territory does not offer an approved tariff for electric energy provided 100% from renewable energy; and
- b. To continue purchasing renewable energy pursuant to the terms of a power purchase agreement in effect on the date there is filed with the Commission a tariff for the incumbent electric utility that serves the exclusive service territory in which the customer is located to offer electric energy provided 100% from renewable energy, for the duration of such agreement.

Direct Energy asserts that it "will not be providing service pursuant to specific and individual 'agreements' with [] customers beyond that which is required by 20 VAC 5-312-80 C ["Rule 80 C"]; it will instead be offering service generally to all customers in a particular class (residential, commercial, or industrial) pursuant to standardized rates and terms and conditions

⁵ Petition at 8. The Commission herein addresses the specific issues presented in the Petition, which do not invoke broader questions involving rights and responsibilities attendant to an "exclusive" service territory as referenced in the applicable statutes.

associated with providing this [100% renewable] product."⁶ Direct Energy argues that after approval of a 100% renewable tariff for the incumbent electric utility, the existing customers to which Direct Energy may continue to market its services "is most reasonably construed to mean [the utility's] overall customer base."⁷ Based on this interpretation, Direct Energy asserts it "should be able to serve new customers even after [the utility] offers an approved 100% renewable energy tariff."⁸

In construing a statute, the Supreme Court of Virginia has explained that:

our primary objective is to ascertain and give effect to legislative intent, as expressed by the language used in the statute. When the language of a statute is unambiguous, we are bound by the plain meaning of that language. And if the language of the statute is subject to more than one interpretation, we must apply the interpretation that will carry out the legislative intent behind the statute.

In evaluating a statute, moreover, we have said that consideration of the entire statute ... to place its terms in context to ascertain their plain meaning does not offend the rule because it is our duty to interpret the several parts of a statute as a consistent and harmonious whole so as to effectuate the legislative goal. Thus, a statute is not to be construed by singling out a particular phrase.⁹

"The plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow or strained construction."¹⁰ Under Code § 56-577 A 5 a ("Section A 5 a"), individual retail customers are permitted to purchase energy provided 100% from renewable energy from

⁶ *Id.* at 4.

⁷ *Id.*

⁸ *Id.*

⁹ *Cuccinelli v. Rector & Visitors of the Univ. of Va.*, 283 Va. 420, 425-26, 722 S.E.2d 626, 629-30 (2012) (internal quotation marks and citations omitted).

¹⁰ *Virginia-American Water Co. v. Prince William County Service Authority*, 246 Va. 509, 518, 436 S.E.2d 618, 623 (1993) (quoting *Vollin v. Arlington County Electoral Bd.*, 216 Va. 674, 678-79, 222 S.E.2d 793, 797 (1976)).

any licensed CSP if the incumbent utility does not offer a 100% renewable tariff. Thus, if the incumbent utility offers a 100% renewable tariff, retail customers are not permitted to purchase energy from a CSP under Section A 5 a.¹¹ Code § 56-577 A 5 b ("Section A 5 b") permits a customer to continue purchasing renewable energy from a CSP under limited circumstances once the incumbent utility begins offering a 100% renewable tariff. Specifically, "individual retail customers" are permitted to "continue purchasing renewable energy pursuant to the terms of a power purchase agreement in effect on the date" that the incumbent utility begins offering a 100% renewable tariff "for the duration of such agreement." Thus, a customer's ability to continue purchasing renewable energy from a CSP is conditioned on having a power purchase agreement in effect when the incumbent begins offering a 100% renewable tariff. In order for Direct Energy's argument to prevail, the term "power purchase agreement" found in Section A 5 b must include "offering service generally to all customers in a particular class . . . pursuant to standardized rates and terms and conditions associated with providing this product."¹² The Commission finds that it does not.

"Power purchase agreement" is not a defined term under the Regulation Act. When a term in a statute is not defined, the general rule of statutory construction is to infer legislative intent from the plain meaning of the language used.¹³ In the absence of a statutory definition, words in statutes are to be given their ordinary meaning within the statutory context.¹⁴ Based on

¹¹ As discussed further below, retail access may still be available under Code § 56-577 A 3 and A 4, subject to the conditions applicable thereunder.

¹² Petition at 4.

¹³ See, e.g., *Petition of Elizabeth River Crossings OpCo, LLC v. City of Portsmouth, Virginia*, Case No. PUE-2013-00071, 2013 S.C.C. Ann. Rept. 425, 427, Order Dismissing Petition (Sept. 10, 2013); *Hubbard v. Henrico Ltd. Partnership*, 255 Va. 335, 340, 497 S.E.2d 335, 338 (1998); *City of Virginia Beach v. Flippen*, 251 Va. 358, 362, 467 S.E.2d 471, 473-474 (1996); *Marsh v. City of Richmond*, 234 Va. 4, 11, 360 S.E.2d 163, 167 (1987).

¹⁴ See, e.g., *Grant v. Commonwealth*, 223 Va. 680, 292 S.E.2d 348 (1982).

the ordinary meaning of "agreement," the Commission finds that a CSP's general offering available to the utility's customers, without acceptance by an individual customer, would not constitute "a power purchase agreement" pursuant to which individual retail customers would be permitted to continue purchasing renewable energy under Code § 56-577 A 5 b.¹⁵ This is consistent with Section A 5, which specifically refers to the rights of "individual retail customers" "to continue *purchasing renewable energy*. . . ." An offer alone – without the agreement of the customer – would not result in the purchase of renewable power by an individual retail customer.

Direct Energy's interpretation of "agreement" would permit a CSP to serve – and to market to – all of the utility's customers, including new customers who are not currently taking service from the CSP.¹⁶ However, the plain language of Section A 5 b addresses only the *continuation* of service for "individual retail customers," which presumes an existing relationship between the retail customer and the CSP, something that would be absent for a new customer. Permitting new customers to purchase from a CSP when the incumbent utility has a 100% renewable tariff is also contrary to Section A 5 a, which allows customers to purchase from a CSP *if* the incumbent utility *does not* have a 100% renewable tariff. Had the General Assembly intended to allow a CSP to be able to continue to market and serve an incumbent utility's entire customer base after the utility begins offering a 100% renewable tariff, it could have done so, but it did not. "[W]hen the language of a statute is unambiguous, courts are bound by the plain

¹⁵ Merriam-Webster's On-line Dictionary defines "agreement" as a "contract duly executed and legally binding."

¹⁶ Petition at 4.

meaning of that language and may not assign a construction that amounts to holding that the General Assembly did not mean what it actually has stated."¹⁷

The Environmental Respondents also make the argument that the retail customer is not required to be a party to the "power purchase agreement" referenced in Section A 5 b in order to continue purchasing renewable energy from a CSP:

[n]othing in the Code prohibits Direct Energy from entering into a PPA with a third party where that PPA, by its terms, allows Direct Energy to then offer renewable power to Virginia retail customers. As such, as long as Direct Energy offers 100 percent renewable power to customers "pursuant to the terms" of a pre-existing PPA, Direct Energy may offer that 100 percent renewable power to all retail customers, new and old.¹⁸

In its Reply, Direct Energy similarly asserts that "the term power purchase agreement [in Section A 5 b] . . . encompass[es] a CSP's agreement with a generator that is used to serve the CSP's retail customers purchasing via a tariff arrangement."¹⁹ These arguments fail, however, because if the customer is not a party to the power purchase agreement, the retail customer would not be purchasing power *pursuant* to the power purchase agreement – as required by the statute to *continue* purchasing said power. Rather, under this scenario, *the CSP* would be purchasing renewable power *pursuant* to the power purchase agreement, presumably from a wholesale provider. These arguments result in a reading that is unnecessarily strained and contrary to a plain reading of the statute.²⁰

¹⁷ *Williams v. Commonwealth*, 265 Va. 268, 271, 576 S.E.2d 468, 470 (2003).

¹⁸ Environmental Respondents' Response at 7.

¹⁹ Direct Energy's Reply at 16.

²⁰ Code § 56-577 A specifically states that "[r]etail competition for the purchase and sale of electric energy shall be subject to the following provisions," and includes no manifest intent by the General Assembly to incorporate provisions into Section A 5 b related to a CSP's relationship with a wholesale supplier. In addition, "power purchase agreement" is described in Section A 5 b as "in effect on the date there is filed . . . a tariff for the incumbent electric utility that serves the exclusive service territory in which *the customer* is located" This is consistent with the

In its Reply, Direct Energy also notes the differing use of the term "power purchase agreement" in Section A 5 b and "customer service contract" in the Commission's Rules Governing Retail Access to Competitive Energy Services ("Retail Access Rules"),²¹ and asserts the terms should not be construed to have the same meaning.²² This argument, however, does not reach the result sought by Direct Energy. That is, we need not construe such terms to have the same meaning in order to conclude that, under the plain language of the statute, a "power purchase agreement" refers to an agreement between a CSP and an individual retail customer. Further, under the Retail Access Rules, the term "customer service contract" is broader in application and relates to more than just retail supply agreements under Section A 5 b.²³ Finally in this regard, the Commission notes that the requirements for a "customer service contract" under Rule 80 C include, among other things: price; the length of the contract; minimum and maximum usage requirements; any fixed charges; and confirmation of the customer's request for enrollment. Accordingly, a contract in compliance with Rule 80 C could in fact qualify as a "power purchase agreement" for purposes of Section A 5 b.

The Commission concludes that the plain meaning of "power purchase agreement" for purposes of Section A 5 b refers to an agreement between a CSP and an individual retail customer pursuant to which the customer purchases 100% renewable power. This is consistent with the plain meaning of "power purchase agreement" and with the overall context of the statute. The intent of the statute, gleaned from its plain language, is to allow a customer who has

referenced power purchase agreement being between a CSP and "the customer" rather than between the CSP and a wholesale supplier.

²¹ 20 VAC 5-312-10 *et seq.*

²² Direct Energy's Reply at 14.

²³ *See, e.g.,* 20 VAC 5-312-10 A,

a pre-existing power purchase agreement with a CSP for 100% renewable power to continue purchasing under that agreement for the duration of the agreement, in the event the incumbent utility begins offering a 100% renewable tariff while the agreement is effective. Given the plain and unambiguous language of the statute, the Commission does not reach Direct Energy's policy arguments.²⁴

Whether a CSP is permitted to provide a 100% renewable energy product to commercial and industrial customers whose demand for the previous calendar year exceeded five MW.

Direct Energy requests the Commission find that a CSP is authorized by Section A 5 to provide a 100% renewable product to commercial and industrial customers whose demand for the previous calendar year exceeded five MW.²⁵ Direct Energy asserts that it "must be assured that an approved [incumbent electric utility] 100% renewable energy tariff will not preclude Direct Energy from offering to serve its then-existing commercial and industrial customers whose demand exceeds five MW [], as well as future similarly situated customers who wish to take such service from Direct Energy."²⁶

Under Code § 56-577, there are three types of retail access available to retail customers, each subject to its own qualifications and limitations. Code § 56-577 A 3 ("Section A 3") allows certain large customers with demand exceeding five MW to purchase electric supply from CSPs,

²⁴ See, e.g., *Newberry Station Homeowners Ass'n v. Bd. of Supervisors*, 285 Va. 604, 614, 740 S.E.2d 548, 553 (2013) ("[W]hen the language of an enactment is free from ambiguity, resort to legislative history and extrinsic facts is not permitted because we take the words as written to determine their meaning.") (internal quotes and citation omitted); *Smith v. Commonwealth*, 282 Va. 449, 454, 718 S.E.2d 452, 455 (2011) ("When statutory terms are plain and unambiguous, we apply them according to their plain meaning without resorting to rules of statutory construction.") (citing *Halifax Corp. v. First Union Nat'l Bank*, 262 Va. 91, 99-100, 546 S.E.2d 696, 702 (2001)); *Kummer v. Donak*, 282 Va. 301, 306, 715 S.E.2d 7, 10 (2011) ("Because there is no ambiguity in the applicable statutes, the Kummer children's public policy argument must fail."); *Brown v. Lukhard*, 229 Va. 316, 321, 330 S.E.2d 84, 87 (1985) ("If language is clear and unambiguous, there is no need for construction by the court; the plain meaning and intent of the enactment will be given it.") (citation omitted).

²⁵ Petition at 8.

²⁶ *Id.* at 6.

subject to certain limitations; Code § 56-577 A 4 ("Section A 4") allows aggregation of load by certain non-residential customers to meet the five MW demand limitation in Section A 3, subject to Commission approval; and Section A 5, discussed above, permits individual retail customers, regardless of customer class, to "purchase electric energy provided 100% from renewable energy" from a CSP "if the incumbent electric utility serving the exclusive service territory does not offer an approved tariff for electric energy provided 100% from renewable energy."

In the previous section, the Commission addressed the requirements pursuant to Section A 5 for a CSP to continue to provide service once an incumbent electric utility has a 100% renewable tariff. Section A 5 contains no size limitations that allows any customer, including residential customers, to purchase 100% renewable energy from a CSP if the incumbent utility does not have an approved tariff for 100% renewable energy. Section A 3 permits retail access for certain large customers regardless of the type of electricity being sold, subject to certain limitations. Section A 4 permits aggregation of non-residential customer load for purposes of meeting the Section A 3 size limits, subject to Commission approval and, like Section A 3, permits retail access regardless of the type of electricity being sold. Should a CSP, such as Direct Energy, desire to provide retail supply to customers pursuant to Sections A 3 or A 4, those customers receiving service would have to qualify under Sections A 3 and A 4 and would be subject to the requirements of those sections.

Whether a CSP is authorized by Section A 5 to indicate to commercial and industrial customers that they are not subject to the five year minimum stay provision because they are purchasing a 100% renewable energy product from the CSP.

Direct Energy requests that the Commission determine that individual or aggregated customers with a demand of five MW or greater receiving 100% renewable energy from a CSP be exempt from the five-year minimum stay requirement. Such a determination depends on the

section of Code § 56-577 under which the retail access is permitted. Under Section A 5, customers are permitted to purchase 100% renewable energy from a CSP if the incumbent utility does not offer a tariff for 100% renewable energy. Section A 5 is available to "individual retail customers of electric energy within the Commonwealth, regardless of customer class" and contains no size or minimum stay requirements.²⁷ Accordingly, commercial and industrial customers are not subject to a minimum stay provision if they are purchasing a 100% renewable energy product from a CSP under Section A 5.

Sections A 3 and A 4 permit retail access for certain large customers regardless of the type of electricity being sold, subject to certain size and other limitations. In the event the incumbent electric utility offers a 100% renewable tariff, and Section A 5 no longer permits a customer to purchase 100% renewable energy from a CSP under Section A 5, this does not impact the availability of retail access under Sections A 3 and A 4. However, retail access under Sections A 3 and A 4 is subject to the requirements of those sections, including, among other things, size limitations and the requirement that "[i]f such customer does purchase electric energy from licensed suppliers after the expiration or termination of capped rates, it shall not thereafter be entitled to purchase electric energy from the incumbent electric utility without giving five years' advance written notice"

Accordingly, IT IS SO ORDERED and this matter is dismissed.

AN ATTESTED COPY hereof shall be sent by the Clerk of the Commission to:
Michael J. Quinan, Esquire, Christian & Barton LLP, 909 East Main Street, Suite 1200,
Richmond, Virginia 23219; Lisa S. Booth, Esquire, Dominion Resources Services, Inc.,

²⁷ While Section A 3 is "subject to the provisions of subdivisions 4 and 5," no comparable language makes the conditions of Section A 3 applicable to retail access under Section A 5. In addition, unlike Section A 4, which specifically states that retail access under that section is subject to "the conditions specified in [Section A 3]," Section A 5 contains no comparable language.

120 Tredegar Street, Richmond, Virginia 23219; Noelle J. Coates, Esquire, American Electric Power Service Corporation, 3 James Center, 1051 East Cary Street, Suite 1100, Richmond, Virginia 23219; William Cleveland, Southern Environmental Law Center, 201 West Main Street, Suite 14, Charlottesville, Virginia 22902-5065; and C. Meade Browder, Jr., Senior Assistant Attorney General, Office of the Attorney General, Division of Consumer Counsel, 202 N. 9th Street, 8th Floor, Richmond, Virginia 23219-3424. A copy also shall be delivered to the Commission's Office of General Counsel and Divisions of Public Utility Regulation and Utility Accounting and Finance.