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DELAWARE STATE SENATE
144th GENERAL ASSEMBLY

SENATE SUBSTITUTE NO. 1
FOR
SENATE BILL NO. 18

AN ACT TO AMEND TITLE 29 OF THE DELAWARE CODE TO CREATE A SUSTAINABLE ENERGY UTILITY IN THE STATE OF DELAWARE.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE (Three-fourths of all members elected to each house thereof concurring therein):

Section 1. Amend Title 29 of the Delaware Code by inserting a new § 8059 as follows:

"§ 8059. Sustainable Energy Utility.

(a) Definitions

As used in this section:

(1) "Sustainable Energy Utility" ("SEU") is the program under which the Contract Administrator must operate according to the provisions of this section to develop and coordinate programs for energy end-users in Delaware for the purpose of promoting the sustainable use of energy in Delaware.

(2) "Fiscal Agent" means an entity or person contracted by the Delaware Energy Office to assist in the financial management of the SEU.

(3) "Contract Administrator" means a nonprofit corporation contracted through competitive bid by the Delaware Energy Office that manages the functions and responsibilities of the SEU.

(4) "SEU Oversight Board" ("the Board") means a board comprised of public, academic and private sector representatives that acts to establish and revise SEU performance targets and to oversee SEU program planning, implementation, and evaluation to ensure compliance with performance targets.

(5) "Implementation Contractor" means any entity competitively contracted by the SEU to implement specific programs and services.

(b) Intent of Legislation

The Delaware General Assembly finds that there remain in Delaware significant, cost-effective opportunities to acquire end-user energy efficiency savings that can lower customers' bills and reduce the environmental impacts of energy production, delivery, and use. Delaware has an opportunity to create new markets for customer-sited renewable energy

generation that will help build jobs in the State of Delaware, improve our national security, keep value within the local economy, improve energy reliability, and protect Delawareans from the damaging effects of recurrent energy price spikes.

(c) Sustainable Energy Utility Administrative Organization

(1) This Act creates the "Sustainable Energy Utility" ("SEU"). The SEU program through the Contractor Administrator shall design and deliver comprehensive end-user energy efficiency and customer-sited renewable energy services to Delaware's households and businesses. The SEU shall be unaffiliated with any of the State's electric or gas utilities, public or private, and it will operate through the Contract Administrators under contract to the Delaware Energy Office ("Energy Office" or "DEO") under the direction of the State Energy Coordinator. The SEU shall be known by a trade name to be determined by the Delaware Energy Office.

(2) Routine administration of the SEU shall be managed by a Contract Administrator. The funds to support the SEU's activities shall be managed by a Fiscal Agent. This institutional structure, with ultimate responsibility for oversight residing with the Delaware Energy Office under the direction of the State Energy Coordinator and the Oversight Board, as detailed in subsections (d) and (e), is intended to protect not only the SEU's independence, but also to assure that its performance is continually and closely monitored and that it always has the strongest incentives to operate as efficiently as possible. The SEU Contract Administrator ("CA") and Fiscal Agent ("FA") will be selected by the Delaware Energy Office through an open, competitive bidding process.

(d) Responsibilities of the Delaware Energy Office

The Delaware Energy Office shall assume the following responsibilities relating to the development, implementation, and monitoring of the SEU:

(1) The Energy Office shall prepare Requests for Proposals (RFPs) to solicit bid proposals to engage each of the two administrator contractors: the SEU Contract Administrator and the Fiscal Agent. The RFPs shall be open to public comment, amended if necessary, and then submitted to the Oversight Board for approval prior to release. To maintain independence between each of the administrative functions, any bidder for an administrator contract, and any bidder's affiliate, shall not concurrently hold or be awarded the other administrator contract. Neither shall any bidder for the Contract Administrator be affiliated with a utility, public or private, that operates in Delaware, or any agency of the State of Delaware, or any entity providing power or fuel to Delaware's distribution utilities or residents.

a. The Energy Office shall determine and describe in detail in the RFPs the following: the roles of each contracted position; the relevant performance targets set by legislation, the Energy Office or the

Oversight Board; the bidding and contract procedures; the criteria for evaluation of bid proposals; and the annual reporting requirements. In addition, the Energy Office shall define performance incentives such that if the SEU exceeds program targets by 120% it shall receive a bonus, and if the SEU achieves less than 80% of program targets it shall be charged a penalty. By written agreement between the DEO and the SEU, performance incentives may be passed through to Implementation Contractors when the DEO and SEU decide this is in the best interest of the State's development of sustainable energy resources.

b. The Energy Office must require bidders for the SEU Contract Administrator to present, in their proposals, plans including, but not limited to: evaluation, monitoring and verification of program performance; data collection and management; and financial management.

c. The Energy Office shall ask bidders for the SEU Contract Administrator to describe how they will obtain information from, and be responsive to, the public, and how bidders intend to resolve disputes with stakeholders and customers.

d. The Energy Office shall evaluate the proposals based on criteria outlined in the RFP and then select and hire the contractors for the two positions.

e. The Energy Office shall determine the contract period for each administrator position, but such periods shall be no less than three years and no more than five years. The Energy Office may offer a renewal contract to a current contractor for one additional contract term, provided the contractor has met or exceeded expectations and the Oversight Board approves of the renewal. The contract must be open to the public through the RFP process after two consecutive terms by one contractor.

(2) The Energy Office shall report biannually to the Oversight Board on the progress of the SEU and the management of the Contract Administrator and Fiscal Agent contracts.

(3) The Energy Office shall ensure continuity of program implementation and sufficient carry-over funding during the transition period between the end of one SEU contract term and the beginning of another SEU contract term, so that Delawareans may still have regular access to sustainable energy services during transitional periods.

(4) The Energy Office must use the appropriate responsibilities outlined in the subsections (f) and (g) to develop additional RFP guidelines for each contractor.

(5) The Energy Office shall develop appropriate means to issue Renewable Energy Certificates and Solar Renewable Energy Certificates, as defined in Title 26 § 352 of the Delaware Code, for renewable energy technologies sited in Delaware.

(e) SEU Oversight Board

(1) There is hereby created the SEU Oversight Board which shall, from passage of this Act until January 31, 2008, consist of all members of the Sustainable Energy Utility Task Force ("Task Force") appointed pursuant to Senate Concurrent Resolution 45 from the 143rd General Assembly and Senate Concurrent Resolution 6 from the 144th General Assembly. By December 31, 2007 the Task Force shall recommend to the General Assembly the composition of the Board to serve after January 31, 2008.

(2) The Chair of the Sustainable Energy Utility Task Force shall preside as Chairperson of the Board or shall appoint a presiding officer for the Board from among the members.

(3) Board Members shall serve without compensation except for travel allowed in paragraph (8) of this subsection.

(4) No Board Member shall receive financial gain from service on the Board.

(5) Board Members shall not be employed by any organization directly or indirectly affiliated with the SEU or its contractors for a period of not less than two (2) years after the end of their service on the Board.

(6) The Board shall adopt by-laws, within three months from the enactment of this section, to govern itself.

(7) The Board shall have the following responsibilities:

a. Review and approve Requests for Proposals developed by the Energy Office for the contracts of the SEU Contract Administrator and Fiscal Agent.

b. Review and approve the annual and contract-term SEU performance targets recommended by the Contract Administrator.

c. Review and approve any proposed modifications to SEU performance targets or program designs during the contract term of the Contract Administrator.

d. Contract an independent professional agency to monitor and verify results reported by the Contract Administrator in annual and contract-term reports.

e. Receive biannual reports from the Energy Office, as described in subsection (d)(2), and offer recommendations to the Energy Office regarding the management of the SEU.

(8) In order for the Board to meet its obligations, the SEU shall annually set aside a budget at the beginning of the State fiscal year not to exceed seventy-five thousand real 2007 dollars, and not to be less than fifty thousand real 2007 dollars. Use of these funds shall be limited to the following:

a. Payment of consultant fees for independent analyses of policy and program options to improve SEU performance voted by two-thirds of Board members.

b. Supported travel by Oversight Board members to conferences and workshops of direct relevance to sustainable energy market development and performance. Supported travel is capped for individual

members at three thousand real 2007 dollars and only one supported travel can be requested by a member in a fiscal year.

c. Sponsorship of annual statewide competitions by elementary, middle and/or high school students in the State of Delaware to recommend SEU service logos, mottos or new sustainable energy measures.

d. Other uses as voted by two-thirds of the members of the Oversight Board that can be shown to directly improve the performance of the SEU and/or the State's development of sustainable energy resources.

(f) Responsibilities of the Fiscal Agent

The Fiscal Agent shall assist the Energy Office with the financial management of the SEU program. The Fiscal Agent is the SEU's "Treasury." The FA may be contracted by fee only or by a fee-plus-incentive structure as determined by the Energy Office. The primary responsibilities of the Fiscal Agent are to:

(1) Receive funds for the SEU from the funding sources outlined in subsection (j), disburse these funds to the SEU Contract Administrator under the direction of the Energy Office, and keep accurate records of such transactions;

(2) Interface with bonding and revenue authorities;

(3) Oversee financial transactions involving renewable energy certificates (RECs) and possible Solar Lifeline activities; and

(4) Pay SEU invoices.

(g) SEU Contract Administrator Responsibilities

The SEU Contract Administrator will manage the day-to-day functions and responsibilities of the SEU. The Contract Administrator's chief responsibilities are program research and design, administration of the Implementation Contracts, and oversight to ensure the Implementation Contractors meet appropriate performance and budgetary targets. The Contract Administrator may be contracted by fee only or by a fee-plus-incentive structure as determined by the Energy Office.

(1) Program Research and Design

a. The Contract Administrator shall undertake a comprehensive resource analysis ("Analysis") to support initial program planning for the SEU. The Analysis must include demographic energy use assessments, population and economic growth estimates, energy consumption forecasts, regional energy efficiency trend analyses, technical and economic potential estimates, and market potential assessments. The comprehensive resource analysis must:

1. assess energy end-user markets, including electricity end-uses, natural gas end-uses, clean vehicles, green buildings, weatherization, and affordable energy services;

2. assess energy end-user demographic sectors, including low-income, residential, commercial, industrial, agricultural, and transportation sectors; and

3. assess energy end-use equipment, including appliances, lighting, heating, cooling, industrial processes, and vehicles.

b. Using the results from the Analysis from subparagraph (1)(a) of this subsection, the Contract Administrator shall select markets, end-users, and end-use equipment for the SEU to target through its programs.

c. The Contract Administrator shall develop a comprehensive suite of program designs based on the Analysis and selected markets, end-users, and end-use equipment, as described in subparagraphs (1)(a) and (1)(b) of this subsection. Each program design must specify, at minimum, program goals, performance targets, an estimated budget, an implementation strategy, and an evaluation strategy. The Contract Administrator is not required to design or initiate all programs at once, but it must demonstrate how each program fits within the Contract Administrator's overall strategy to meet its own performance targets as well as the SEU's long-term performance targets established in subsection (i) of this Act.

d. The Contract Administrator is expected to fulfill the following responsibilities through program designs, RFPs for Implementation Contractors, and program implementation:

1. to be responsive to customers and market forces in implementing and redesigning the programs it delivers;

2. to design a portfolio of programs to allow all energy end-users, regardless of electricity or gas retail providers, and regardless of market segment or end-use fuel, to participate in the SEU programs;

3. to promote program initiatives and market strategies that address the needs of persons or businesses facing the most significant barriers to participation;

4. to promote coordinated program delivery, including coordination with low income weatherization programs, other efficiency programs, and utility programs;

5. to coordinate with relevant regional and national energy efforts and markets, including markets for pollution emissions offsets and credits, and renewable energy credits;

6. to consider innovative approaches to delivering sustainable energy services, including strategies to encourage third party financing and leveraged customer contributions to the cost of program measures, as consistent with principles of sound program design;

7. to offer "one-stop shopping" and be the point-of-contact for sustainable energy services in Delaware;

8. to create a comprehensive website that provides easy access to SEU programs and information for all Delawareans, allowing them to participate in SEU programs electronically;

9. to emphasize “lost opportunity” markets, which are sustainable energy measures that can only be cost-effectively captured at particular times, such as during new construction or extensive remodeling; and

10. to emphasize market strategies to deliver services.

e. The Contract Administrator shall continue to research and assess the resources and market needs for sustainable energy services in Delaware, as described in subparagraph (1)(a) of this section, while program implementation is ongoing. The Contract Administrator and other stakeholders will use this research to assess the impacts and effectiveness of SEU programs; to make adjustments to SEU program performance targets; to reassess targeted markets, end users, and end uses; and to recommend further policy initiatives for consideration by the Delaware Legislature.

(2) Administration of Implementation Contracts

a. With the exception of education and public outreach programs, which the Contract Administrator may implement itself with approval of the Energy Office and Oversight Board, all other SEU programs must be delivered by competitively selected Implementation Contractors.

b. The SEU shall propose rules to guide the bidding process and criteria to guide bid selection. The RFPs shall specify a contract term of no less than two years, and, in order to ensure program continuity during transition periods, no longer than six (6) months beyond the Contract Administrator’s contract term with the Energy Office.

c. The Contract Administrator shall be responsible for selecting winning Implementation Contractor bids.

d. Any entity, including electricity or gas utilities in the State of Delaware, may bid for an Implementation Contract. If an affiliate of the Contract Administrator bids, or intends to bid, for an Implementation Contract, both the Contract Administrator and its affiliate must ensure that the affiliate does not benefit from any unfair advantage resulting from insider information.

e. RFPs for competitively bid Implementation Contracts should include provisions for performance-based incentives as appropriate to ensure that program targets are achieved or exceeded.

f. If an Implementation Contractor is not successfully selected through the RFP bidding process, the Contract Administrator may implement its own program delivery process subject to approval by the Energy Office and Oversight Board.

(3) Oversight, Monitoring, and Verification

a. The Oversight Board must review the Contract Administrator’s proposed program designs, performance targets, and RFPs before the Contract Administrator submits RFPs for bid. When reviewing and approving the SEU’s programs and RFPs, the Oversight Board must ensure that program coordination

between the Contract Administrator, Implementation Contractors, and customers is as streamlined and simple as possible from the customer's perspective. The Oversight Board shall ensure that the SEU's programs will provide packaged-services. Rather than simply providing the most cost-effective or easiest-to-provide services, packaged-services must be designed to provide customers with as many relevant end-use services at once, each time the Contract Administrator or the Implementation Contractors have contact with a customer.

b. The Contract Administrator must develop and maintain information services to collect all performance, market, and financial data necessary to monitor and evaluate SEU performance as specified in its contract with the Energy Office. The Contract Administrator must make such data available to the Energy Office and Oversight Board upon request.

c. Consistent with the specific terms of its contract and generally accepted accounting principles, the Contract Administrator must prepare and submit detailed documentation and invoices for administrative, management, and program costs to the Fiscal Agent for review in order to receive payment.

d. The Contract Administrator must develop appropriate mechanisms to accurately evaluate, monitor, and verify program performance and Implementation Contractor performance.

e. The Contract Administrator shall have 30 days to respond to complaints from, or disputes among, affected persons or entities. After 30 days any unresolved complaints shall be presented to the Energy Office and Oversight Board.

f. The Contract Administrator shall submit to the Oversight Board for approval any reports produced by the Contract Administrator that codify current practices or detail new practices or substantive changes in the SEU's implementation of programs and services.

g. The Contract Administrator shall conduct site visits and review the files of the Implementation Contractors as necessary to ensure contract compliance.

(h) Evaluation, Monitoring, and Verification

(1) The Energy Office must ensure that adequate evaluation, monitoring, and verification mechanisms are in place so that:

(a) The Energy Office and Oversight Board can verify that both SEU and Implementation Contractor expenditures result in verifiable energy savings over the expected lifetime of each energy-saving measure.

(b) The SEU and Implementation Contractors are held responsible for the energy savings reportedly achieved through program activities and expenditures.

(i) SEU Initial Program Targets

(1) Energy Efficiency

By December 31, 2015, the SEU shall have achieved an average 30% reduction in annual energy usage for SEU participants, with a target of one-third (1/3) of the participant savings occurring for residential clients, based on January 1, 2006 baseline levels. The Energy Office and Oversight Board may increase or accelerate this target if a comprehensive resource analysis indicates a greater cost-effective end-user energy efficiency potential exists or if the SEU achieves performance targets ahead of schedule.

(2) Delaware Solar Lifeline

For the purposes of this subsection, a low-income household shall be defined as a household that qualifies for Low-Income Home Energy Assistance Program (LIHEAP) assistance in the State of Delaware. The SEU shall have the authority to administer the Delaware Solar Lifeline program, which shall provide, by December 31, 2015 each low-income household with a life-sustaining supply of at least 200 kilowatt-hours per month of low-cost electricity not to exceed 5 cents per kWh in real 2007 dollars from in-state solar electric resources, the electricity generated thereof dedicated entirely for use by low-income households in the Solar Lifeline program. The Energy Office shall devise annual Solar Lifeline program goals that specify a targeted amount of installed photovoltaic capacity and a targeted number of households to be served. Such targets shall increase at a reasonable rate each year until sufficient in-state photovoltaic capacity has been installed to provide, by December 31, 2015, each low-income household with at least 200 kilowatt-hours per month of low-cost solar electricity. Implementation of the Solar Lifeline program and the obligation to meet the December 31, 2015 target shall depend upon the DEO and SEU obtaining the approval of the Oversight Board, as voted by a majority of Board members. The chief criterion for Board approval shall be that the DEO and SEU have identified self-sustaining funds for the program or that the Delaware Legislature has approved designated funds for the purpose of maintaining the Solar Lifeline program.

(3) Affordable Energy

The SEU shall assess strategies and funding mechanisms to weatherize at least eight hundred (800) low-income households per year, not counting those households served with Weatherization Assistance Program funding. The SEU shall target services to households living in single-family owner-occupied units and mobile homes, single-family rental units, rental buildings with five (5) units or less, and large multifamily buildings with greater than five (5) units. The SEU shall target three low-income levels: 200% of the federal poverty level, 60% of the state median income, and 80% of the state median income.

(4) Green Buildings and Clean Vehicles

a. The Delaware Energy Office shall define "Green Buildings" and "Clean Vehicles" as appropriate to meet statewide energy efficiency targets established in paragraph (1) of this subsection, and with consideration for current best-practice definitions.

b. To establish initial SEU performance targets for Clean Vehicles and Green Buildings programs, the Delaware Energy Office, under the leadership of the State Energy Coordinator, and the Oversight Board shall either:

1. Determine appropriate initial SEU performance targets for Clean Vehicles and Green Buildings market programs to be included in the SEU Contract Administrator request for proposal,

2. Or the Energy Office and the Oversight Board may require that bidders for the SEU Contract Administrator propose such performance targets.

(5) Customer-sited Renewable Energy

Targets and rebate levels for Customer-sited Renewable Energy Technologies ("Customer-sited Renewables") shall be established by the DEO, under the direct supervision of the State Energy Coordinator. Customer-sited Renewables shall include solar electric, solar thermal, geothermal and wind energy systems not to exceed in capacity the levels specified in net-metering regulations of Title 26 § 1014 of the Delaware Code. Under the direct supervision of the State Energy Coordinator, the DEO shall develop incentive tiers for different Customer-sited Renewables and customer classes based on identified state best practices. Rebates shall not exceed fifty percent (50%) of the incremental cost of Customer-sited Renewables compared to the retail cost of electricity. Rebates shall decline over time unless the DEO and SEU agree that doing so will prevent SEU clients from maximizing installed capacity of Customer-sited Renewable Energy in a least-cost manner. Under the direct supervision of the State Energy Coordinator, the DEO shall specify a certain fraction of SEU-supported Customer-sited Renewables to be located at residential locations. The SEU shall furnish three services to participants who purchase Customer-sited Renewables. First, it shall provide incentives sufficient to cover the incremental cost of investing in Customer-sited Renewables, in accord with DEO incentive tiers and current retail energy prices. Second, the SEU shall obtain, on behalf of participants, Renewable Energy Certificates ("RECs") and Solar Renewable Energy Certificates ("SRECs"), as defined in Title 26 § 352 of the Delaware Code. Third, the SEU shall negotiate the wholesale price for RECs and SRECs for SEU participants, using its ability to aggregate Customer-sited Renewables to the best advantage of SEU participants. For these services, the SEU shall charge a fee sufficient to pay its costs and to maintain incremental cost investments in Customer-sited Renewables. This fee can be assessed as a one-time charge or an annual payment subject to the mutual agreement of the SEU and the participant. The Energy Office, under direct supervision of the State Energy Coordinator, shall determine a fair and reasonable rate that the SEU

may charge for aggregating RECs and SRECs. The SEU fee shall not exceed 35% of the retail value of RECs or SRECs.

(j) Funding for the SEU

(1) The Delaware Energy Office shall contract with the SEU Contractor Administrator to assist in the administration of some or all of the Green Energy Fund in accordance with Title 29 §8057.

(2) The SEU through the Contract Administrator may independently raise a series of special purpose bonds, tax-exempt if eligible, with a cumulative initial value between 2007 and 2015 capped at thirty million real 2007 dollars ($30 million 2007). In any event, the initial SEU Contract Administrator must provide financial warranty to pay its first year of administrative costs. Any such bond monies shall only be used to fund the SEU Contract Administrator and its Implementation Contractors to meet responsibilities outlined in this section, including administrative costs and overhead, implementation costs including the cost of contracting Implementation Contractors, operating expenses, and incentive costs. Bond monies shall not fund the Fiscal Agent, nor internal Energy Office responsibilities or staff, nor duties required of the Oversight Board, including independent SEU evaluation, monitoring, and verification. All bond monies shall be held and disbursed by the Fiscal Agent as defined in subsections (a) and (f). The State of Delaware's general funds shall not be liable for the repayment of any special purpose bonds, tax-exempt if eligible, by the Delaware Energy Office on behalf of the SEU.

(3) Revenue sources contributing to the SEU for the purpose of paying bond debt may include but not be limited to funds from shared savings agreements with SEU participants and partial proceeds from the sale of Renewable Energy Credits in local and regional markets. The Green Energy Fund shall provide equity leverage for the SEU.

(4) Staffing necessary for the DEO to fulfill its responsibilities in this Act shall be funded from the Delaware Energy Answers program and by existing program funding within the Department of Natural Resources and Environmental Control.

SYNOPSIS

This Act represents the work of the Sustainable Energy Utility Task Force. It creates the Delaware Sustainable Energy Utility (SEU) program to coordinate and promote the sustainable use of energy in Delaware. The SEU will use competitive markets and leveraged private-financing to deliver cost-effective end-use energy services that allow Delawareans to save 30% of their annual energy usage. The SEU will coordinate services that target residential, commercial, industrial, and transportation energy end-users in all energy markets, including electricity, heating fuels, green buildings, clean vehicles, customer-sited renewable energy, and affordable energy. The SEU will use competitively selected Implementation Contractors to deliver services utilizing performance based contracts.

This Act creates a Fiscal Agent to serve, under contract to the Energy Office, as the SEU's "treasury." The Act also creates an Oversight Board to ensure that the SEU meets responsibilities and performance targets enumerated in its contract with the Energy Office.

This Act creates initial performance targets for the SEU as well as evaluation and monitoring mechanisms to ensure that SEU energy savings are verifiable. The SEU Contract Administrator may receive performance incentives such that if it exceeds program targets by 120% it will receive a bonus, and if it achieves less than 80% of program targets it will be penalized.

The substitute bill adds a ¾ voting requirement which is required by the constitution. This Substitute Act allows the SEU through the Contract Administrators to independently raise a series of special purpose bonds with a total value capped of $30 million between 2007 and 2015. Any such bonds may only be used to fund SEU contractors and programs. The state of Delaware will not be liable for repayment of any such bonds. Bond repayment sources may include, but not be limited to, funds from shared savings agreement with SEU participants and partial proceeds from the sale of Renewable Energy Credits in local and regional markets. The Green Energy Fund managed by the DEO with assistance from the SEU, shall provide equity leverage for the SEU.

Author: Senator McDowell