

Daniel Clearfield  
717.237.7173  
dclearfield@eckertseamans.com

November 23, 2011

**Via Electronic Filing**

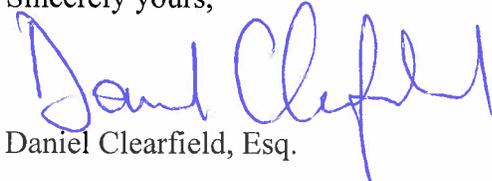
Rosemary Chiavetta, Secretary  
PA Public Utility Commission  
PO Box 3265  
Harrisburg, PA 17105-3265

Re: 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  
Enclosure

cc: 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**

---

Daniel Clearfield, Esquire  
(Pa. Attorney ID No. 26183)  
Carl R. Shultz, Esquire  
(Pa. Attorney ID No. 70328)  
Eckert Seamans Cherin & Mellott, LLC  
213 Market Street, 8th Floor  
Harrisburg, PA 17108-1248  
717.237.7173

Date: November 23, 2011

## **I. INTRODUCTION**

Pursuant to the Secretarial Letter (dated October 7, 2011), Direct Energy Services, LLC (“Direct Energy”)<sup>1</sup> 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.

---

<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup>

- 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,<sup>4</sup> and \$175-\$200 for small commercial customers based on the focus group research presented previously.

---

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

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

<sup>4</sup> 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.<sup>5</sup>

### 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.<sup>6</sup>

For full-scale auctions,<sup>7</sup> 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

---

<sup>5</sup> 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.

<sup>6</sup> OCA’s Comments on the Tentative Order, p. 18-19.

<sup>7</sup> 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 with 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.<sup>8</sup> 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.”<sup>9</sup> 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.<sup>10</sup> Yet, that is exactly what OCA does in discussing opt-

---

<sup>8</sup> 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.

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

<sup>10</sup> 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.”<sup>11</sup> 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.<sup>12</sup>

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

---

<sup>11</sup> OCA’s Comments on the Tentative Order, p. 2.

<sup>12</sup> 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”).

whatever reason. But, the modified price does not justify restrictions upon either (a) the customer's statutory right to choose a supplier or (b) the customer's ability to "fall back" to default service for a period of time.

**F. Wholesale Supply Contracts**

Some commentators in the RMI process have voiced concerns about implementing any competition enhancing measures and, particularly, opt-in auction pilots, prior to the end of the existing EDC default service plans for fear that the switching prompted by the measure could interfere with existing wholesale supply contracts. But, the competition enhancing measure can be implemented without any such legitimate concern. Existing contracts have two forms: (1) wholesale full requirements, load following contracts, and (2) wholesale supply block purchase contracts.

With respect to full requirements contracts, the wholesale suppliers are not guaranteed any particular level of load. In these contracts, the suppliers agreed to provide power to a portion of the default load, however large or small, and have always been on notice through Commission statements, EDC procurement documents and contract language that supply volumes are unknown and not guaranteed, the effect of switching on full requirements contracts should not be a legitimate concern.

With respect to block supply contracts (with the exception of Duquesne), none of the existing EDC default service supply plans have load served by block or other types of fixed contracts that exceed 51% of estimated residential load in October 2012 a potential date for when pilot opt-in auctions could take service with the winning EGS(s).<sup>13</sup> And with respect to the commercial and industrial classes, no EDC has entered into block

---

<sup>13</sup> See Appendix I Analysis Provided by Analysis Group, on behalf of Direct Energy, Exhibits I-1 and I-2.

contracts for default service supply. There is little chance that the competition enhancing steps, including opt-in pilots would cause switching that would result in more than 50% of the existing default service load to switch to competitive supply prior to June 1, 2013. Therefore clarifying that the PUC intends that the competition enhancing steps be implemented as soon as possible is both important for competition and technically feasible.

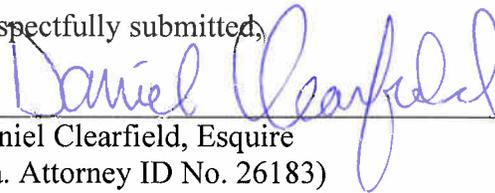
**G. Details for Pilot Opt-In Auctions**

Direct Energy has been working with the Commission's Staff and other stakeholders to develop the details for implementing pilot and full opt-in auctions. In Attachment A, Direct Energy (a) summarizes the working group high-level principles (slides 4 and 5) and (b) provides Direct Energy's positions on the issues that the sub-group has been tackling (slides 7 to 12). Direct Energy believes that the detail set forth in Attachment A provide a firm foundation for pilot and full scale opt-in auctions. The experience gained in the pilot auctions will inform and guide the implementation of full opt-in auctions.

**III. CONCLUSION**

Direct Energy appreciates the opportunity to present written comments following the *en banc* hearing. These comments have been provided with the objective of ensuring that a properly functioning and workable competitive retail electricity market exists in the Commonwealth. And, Direct Energy looks forward to working with the Commission and other stakeholders to produce a robust and sustainably competitive electric market.

Respectfully submitted,



---

Daniel Clearfield, Esquire  
(Pa. Attorney ID No. 26183)  
Carl R. Shultz, Esquire  
(Pa. Attorney ID No. 70328)  
Eckert Seamans Cherin & Mellott, LLC  
213 Market Street, 8th Fl.  
Harrisburg, PA 17108-1248  
717.237.7173

Date: November 23, 2011

# Attachment A

## PA Retail Markets Investigation Opt-In Auction Sub-group

Direct Energy Recommendations for Opt-in Auction

November 1, 2011



# Opt-In Auction for PA Retail Service

## Background

- Working group consensus principles

## Direct Energy Recommendations

- Definition of eligible participants and bids
- Auction timing – pilot and full-scale auction
- Auction mechanism
- Other key auction design parameters
- Customer assignment and post-auction follow-up

**Outline**

**Background**

**Direct Energy Recommendations**

## Working Group Consensus Principles

### Customer eligibility

- Auction will not target those customers who have already switched to competitive suppliers
- Auction will apply to residential and small commercial customers (defined by rate class for each EDC), and not to large commercial and industrial customers
- Auction will not be used in smaller utilities (Pike County, Citizens, Wellsboro, UGI)

### Existing default service supply contracts

- Ideally, auction date for switching customers would be June 1, 2013 to coincide with end of default service plans
- Pilot auctions could be held earlier to ensure success of the full-scale opt-in auctions
- Auction (and pilots) will minimize the effect on existing wholesale default service contracts

### Auction structure

- Auction product will result in a fixed price service for one year coupled with a pre-determined signing bonus that each EGS agrees to remit to each participating customer
- Auction winners will be determined by the lowest price sufficient to clear the market
- The auction will not result in one competitive supplier dominating the market



## Working Group Consensus Principles (continued)

**Auction will allow maximum flexibility to consumers and afford the same consumer protections they have today**

- Participating customer will be free to switch without cancelation or termination to another EGS or to default service during the term (but will not receive signing bonus if they switch in first 3 months)
- Customers will be informed prior to the end of the term that the aggregation (“opt-in”) program is over and the serving EGS may offer a non-aggregation product
- Winning EGS is obligated to accept all customers assigned to them and provide service for the entire 1-year service term
- CAP customers will be eligible to participate depending on EDC-specific policies

### **Supplier participation requirements**

- Bidders may be required to provide additional financial assurances to be eligible to bid

### **Logistics**

- Auction will be overseen and approved by the PAPUC who would hire consultants to provide expertise where needed
- Each EDC will conduct the auction, under PAPUC supervision, recovering costs from EGSs participating in the auction



## Outline

### Background

### Direct Energy Recommendations



Direct Energy.

## Definition of Eligible Participants and Bids

**Eligible participants for the opt-in auctions will be residential and small commercial customers who are on default service at the beginning of the enrollment period**

- Opt-in auctions will only be marketed to existing default service customers

**Opt-in auctions will be comprised of two key elements**

- Price: Fixed price per kWh for all customers within a EDC/rate class
- Bonus Payment: Fixed payment made by EGSs to assigned customers within a EDC/rate class

**Opt-In auction will be used to set the fixed price of service to opt-in customers**

- Eligible participants will be informed that the fixed price will be guaranteed to be lower than the estimated average default service price over the 1-year period; the procedure for estimating this price will be defined prior to the enrollment period
- The actual price will be announced to bidders prior to the auction

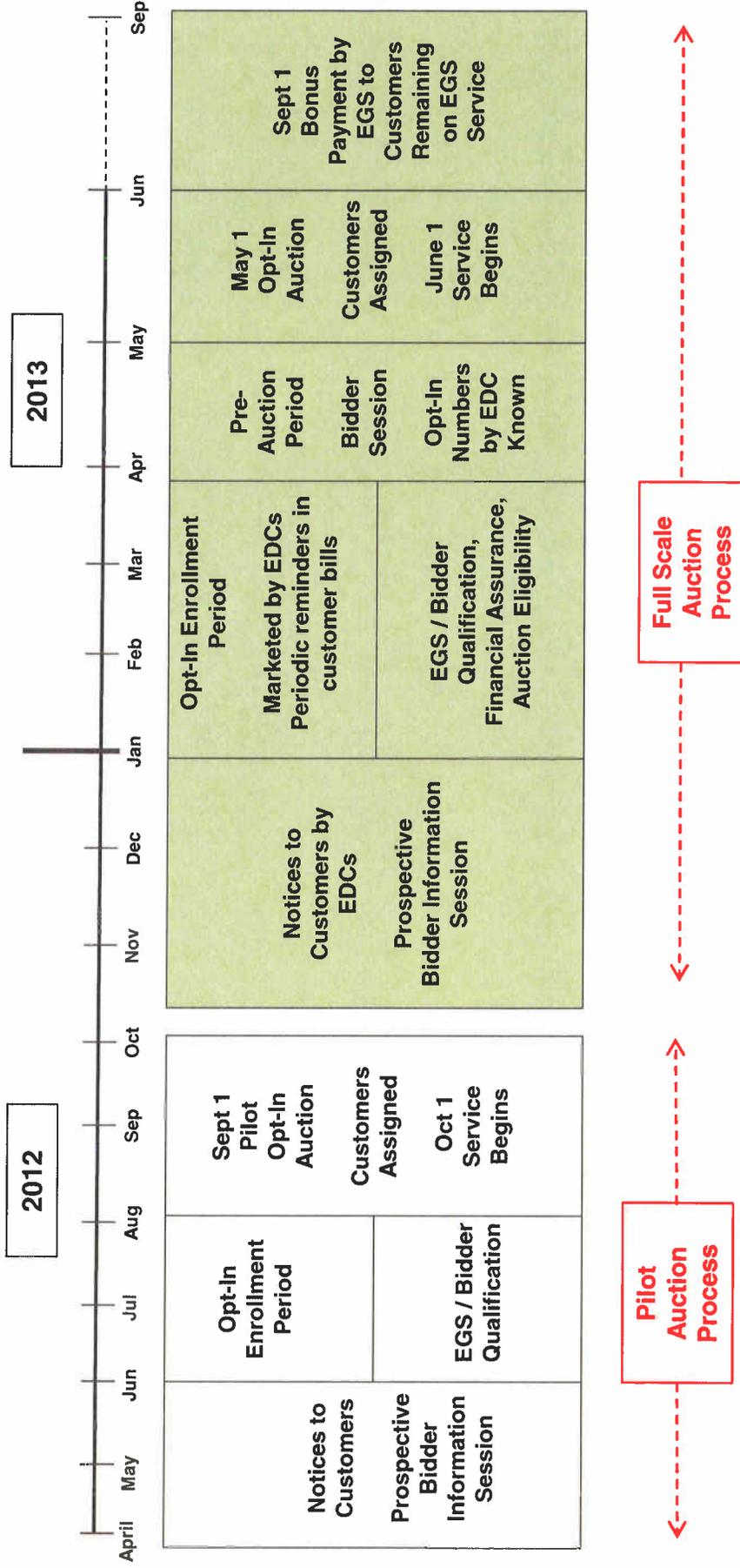
**Bonus payment will be set administratively, with the fixed price per kWh set at auction:**

- Set administratively and announced before the auction enrollment period begins
- Consistent statewide, separate levels for residential and commercial customers
- Preliminary recommended bonus payment: Residential \$150, Small Commercial \$200
- PUC should allow flexibility in specifying bonus payment prior to the opt-in auction enrollment period, based on market conditions, stakeholder feedback market research



## Auction Timing – Pilot and Full Scale Auctions

- Pilot opt-in auction precedes full-scale auction to test process and parameters
- PUC approval of the full-scale auction as part of EDCs default service plans, expected by 2Q 2012



## Auction Mechanism

**Bonus Payment: approved by PUC, announced to suppliers and participants in advance of opt-in auction enrollment period**

- Bonus payment = fixed dollar amount per opt-in customer assigned to EGS

**Bid amount: Fixed price per kWh determined by auction clearing price (EDC/rate-class specific)**

- Bid is fixed price per kWh for 1-year for specified percent of opt-in customers (since opt-in customer volume will be known in advance of auction, percent or number of customers are interchangeable )

**Descending clock auction mechanism recommended**

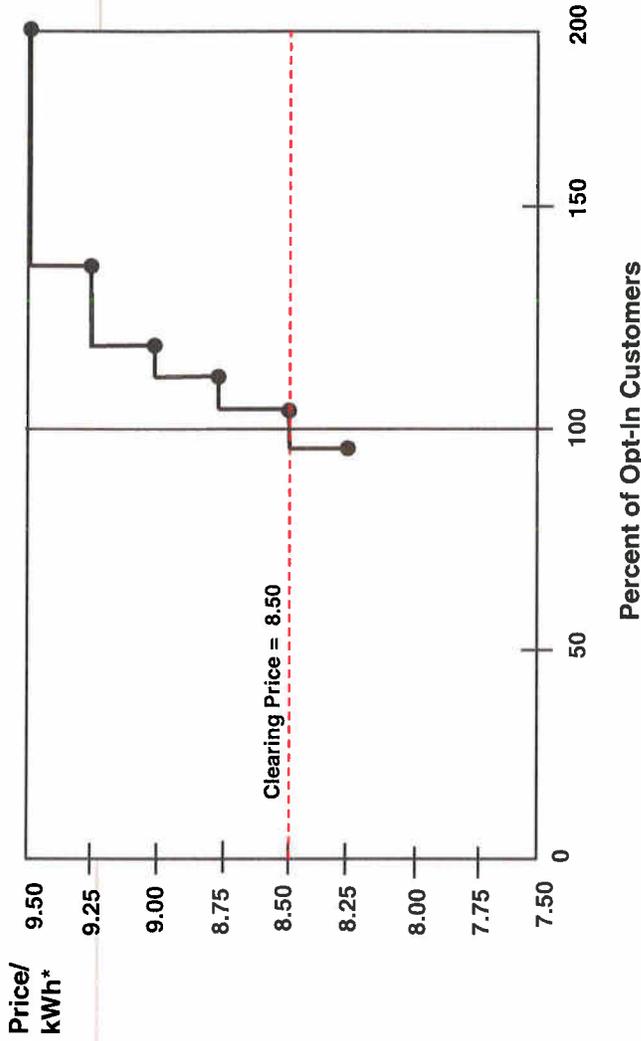
- Relatively simple and likely to achieve lowest price with robust competition
- EDCs announce the auction starting price, or “reserve price” (see p. 7)
- Price is reduced in increments by the auctioneer over multiple rounds, with each bidder specifying the percent of opt-in customers they agree to serve at current “round” price
- Price is reduced until the bids equal 100 percent of the opt-in customers, which determines the auction clearing price for the EDC/rate class
- Competition and transparency drive auction prices downward (vs. sealed bid auction of one-time bids)



# Auction Mechanism Example

Aggregate Bids By Round			
Round	Price	Total Shares	Status
1	9.50	200	Losing
2	9.25	140	Losing
3	9.00	120	Losing
4	8.75	110	Losing
5	8.50	104	4 Rationed
6	8.25	96	96 Winning

Winning Bidders		
Bidder	Price	Share of Opt-In Customers
1	8.50	34
2	8.50	14 + 1 rationed
3	8.50	30
4	8.50	18 + 3 rationed
Total		100



\* Bid increments are shown as uniform for illustration; in practice bid increment will decrease as volume approaches 100 percent of opt-in customers

Bidder 1		
Round	Price	Bid
1	9.50	60
2	9.25	40
3	9.00	40
4	8.75	35
5	8.50	34
6	8.25	34

Bidder 2		
Round	Price	Bid
1	9.50	40
2	9.25	30
3	9.00	20
4	8.75	20
5	8.50	20
6	8.25	14

Bidder 3		
Round	Price	Bid
1	9.50	40
2	9.25	40
3	9.00	35
4	8.75	35
5	8.50	30
6	8.25	30

Bidder 4		
Round	Price	Bid
1	9.50	60
2	9.25	30
3	9.00	25
4	8.75	20
5	8.50	20
6	8.25	18



Direct Energy

## Other Key Auction Design Elements

### Opt-in auction customer limits

- Pilot opt-in auction: Limit pilot auction to 10%-20% of customers on default service depending on level of retail shopping and absolute number of default service customers (pilot needs to be large enough in scope to test approach / systems)
- Pilot learnings will be integrated into Full-scale auction implementation
- Full-scale opt-in auction: No limit on number of participants in full-scale auction

### Load caps – limits on winnings of any one supplier

- Recommend 25%-50% cap on the proportion of opt-in customers that any one supplier can be assigned (by EDC and rate class) depending on existing migration levels and absolute number of default service customers

### Definition of small commercial customers for inclusion in the auction

- EDCs propose (subject to PUC approval) definition of eligible small commercial customers
- Definition to be based on the smallest commercial class by EDC, or target of 25 kW threshold (whichever is larger); recommend disaggregating to high load-factor and low load-factor sub-segments

### Opt-in auction customers' options at the end of 1-year program period

- EGS assigned customers in the opt-in auction will be guaranteed a fixed-price offer for extending service with the EGS

**PUC should allow flexibility in specifying customer limits prior to beginning of enrollment period and load caps prior to the auction, depending on market conditions and bidder interest**



## **Customer Assignment and Post-Auction Follow-up**

**At the conclusion of the Opt-In Auction customers are randomly assigned to bidders in proportion to auction winnings, subject to volume limits/caps (if any)**

- Limits on the proportion of customers in a EDC/rate class that can be served by one EGS, and/or the total number of customers who can opt-in can be imposed during the auction

**A bidder who wins 20% of the opt-in customers in a rate class is randomly assigned 20% of the customers from this rate class that have opted in**

- Random selection based on number of customers for residential
- For small commercial classes, sub-segments by high-low load and/or load factors may make random assignment more equitable

**EGSs inform assigned opt-in customers of their new generation supplier prior to service date, with service period of 1 year, and ability to change suppliers at any time**

- Service date is common to all EGS bidders who are assigned opt-in customers

**Assigned Opt-in customers can change supplier at any time, though winning EGSs pay bonus to customers 3 months after service is initiated, if customer remains on EGS service at that time**

