

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE**

IN THE MATTER OF THE ADOPTION OF)
RULES TO IMPLEMENT THE RENEWABLE)
ENERGY PORTFOLIO STANDARDS ACT, 26) PSC REGULATION DOCKET
DEL. C. §§ 351-363, AS APPLIED TO) NO. 56
RETAIL ELECTRICITY SUPPLIERS)
(OPENED AUGUST 23, 2005)

ORDER NO. 6885

AND NOW, to-wit, this 11th day of April, 2006, the Commission having received and considered the Findings and Recommendations of the Hearing Examiner, previously designated in the above-captioned matter, which were submitted after a duly publicized evidentiary hearing, and having heard from all parties and the Commission Staff that there are no exceptions to said Findings and Recommendations;

AND WHEREAS, based upon the recommendations of the Hearing Examiner, the Commission has determined that the evidence of record supports approving the *Rules and Procedures to Implement the Renewable Energy Portfolio Standard*, as proposed by Commission Staff;

Now, therefore, **IT IS ORDERED:**

1. That the Commission hereby adopts and approves in its entirety the Findings and Recommendations of the Hearing Examiner, which is attached hereto as Exhibit "A."
2. That the Commission finds that the proposed rules may reflect substantive changes from the earlier published rules

(Jan. 2006), and may constitute a new proposal within the meaning of 29 Del. C. § 10118(c). Staff represents that these proposed rules are as set forth in Attachment "A" to the Report. A copy of the Report of the Hearing Examiner with Attachment "A" is attached hereto as Exhibit "A".

3. That the Secretary of the Commission shall transmit to the Registrar of Regulations for publication in the *Delaware Register* the notice attached hereto as Exhibit "B" and the proposed regulations attached to the Hearing Examiner's Report as Attachment "A" for publication on May 1, 2006.

4. That the Secretary of the Commission shall cause the notice attached hereto as Exhibit "B" to be published in *The News Journal* and the *Delaware State News* newspapers on or before May 1, 2006.

5. That the Secretary of the Commission shall cause the notice attached hereto as Exhibit "B" and the proposed regulations attached to the Hearing Examiner's Report as Attachment "A" to be sent by United States mail to all persons who have made timely written requests for advance notice of the Commission's regulation-making proceedings.

6. All written comments, suggestions, and compilations of data, briefs, or other written materials concerning the proposed regulations shall be submitted to the Commission on or before June 1, 2006.

7. That the Commission will hold a public hearing on June 6, 2006 at 1:00 PM to consider adoption of the proposed

regulations attached to the Hearing Examiner's Report as Attachment "A".

8. That the public utilities regulated by the Commission are notified that they may be charged for the cost of this proceeding under 26 Del. C. § 114.

9. That the Commission reserves the jurisdiction and authority to enter such further Orders in this matter as may be deemed necessary or proper.

BY ORDER OF THE COMMISSION:

/s/ Arnetta McRae
Chair

/s/ Joann T. Conaway
Commissioner

/s/ Jaymes B. Lester
Commissioner

/s/ Dallas Winslow
Commissioner

Commissioner

ATTEST:

/s/ Karen J. Nickerson
Secretary

E X H I B I T "A"

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FINDINGS AND RECOMMENDATIONS OF THE HEARING EXAMINER

DATED: MARCH 7, 2006

WILLIAM F. O'BRIEN
SENIOR HEARING EXAMINER

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FINDINGS AND RECOMMENDATIONS OF THE HEARING EXAMINER

William F. O'Brien, duly appointed Hearing Examiner in this Docket pursuant to 26 Del. C. § 502 and 29 Del. C. ch. 101, by Commission Order No. 6793, dated December 6, 2005, reports to the Commission as follows:

I. APPEARANCES

On behalf of Delaware Public Service Commission Staff:

JAMES McC. GEDDES, ESQUIRE
ASHBY & GEDDES

On behalf of the Delaware Energy Office:

BRIAN GALLAGHER, CONSULTANT

On behalf of the Division of the Public Advocate:

JOHN C. CITROLO, DEPUTY PUBLIC ADVOCATE

On behalf of Constellation NewEnergy, Inc.:

DIVESH GUPTA, ESQUIRE
McDERMOTT WILL & EMORY

On behalf of Delmarva Power & Light Company:

STEPHEN SUNDERHAUF, MANAGER OF PROGRAM EVALUATIONS DEPT.

On behalf of PEPCO Energy Services:

CARLA G. PETTUS, ESQUIRE

II. BACKGROUND

1. On July 12, 2005, the Delaware General Assembly enacted new legislation, entitled the Renewable Energy Portfolio Standards Act ("Act"),¹ which requires retail electricity suppliers in Delaware to derive a percentage of their electricity supply from eligible renewable energy resources. The General Assembly authorized the Delaware Public Service Commission (the "Commission") to administer the Act and, in so doing, directed the Commission to adopt rules governing the Act's implementation by July 31, 2006.

2. On August 23, 2005, by PSC Order No. 6697, the Commission opened Regulation Docket No. 56 to develop standards under the Act and directed Staff to conduct workshops to gain input from interested parties regarding proposed rules. After conducting two workshops and otherwise collaborating with Delaware stakeholders, Staff drafted a proposed regulation entitled *Rules and Procedures to Implement the Renewable Energy Portfolio Standard* ("Rules" or "regulation") and submitted it to the Commission.

3. On December 6, 2005, by PSC Order No. 6793, the Commission directed publication of notice of the proposed regulation, which included, among other things, publication in the *Delaware Register of Regulations* on January 1, 2006. The Commission set a deadline of February 2, 2006, for the filing of comments by interested parties, and scheduled a public hearing for February 14, 2006. Written

¹ The Act is codified, in main part, at 26 Del. C. §§ 351-363.

comments were filed by the Delaware Energy Office ("DEO")(Ex. 3),² Delmarva Power & Light Company ("Delmarva Power")(Ex. 4), and Constellation NewEnergy, Inc. ("Constellation")(Ex. 5).

4. In accordance with PSC Order No. 6793, a duly noticed³ public hearing was conducted at the Commission's offices in Dover on February 14, 2006. Representatives of Staff, the Division of the Public Advocate, the Delaware Energy Office, Delmarva Power, Constellation, and PEPCO Energy Services, Inc. participated in the hearing. Appearing at the hearing, but not participating, were Janine Schleiden from PJM Interconnection, LLC and Paul Sample from the Delaware General Assembly, Division of Research. One member of the public attended the hearing and offered comment, as summarized below.

5. At the hearing, Staff submitted written testimony, which described certain changes it had made to its proposed regulation based on the written comments received. (Ex 2.) In addition, the other participants placed their written comments into the record and cross-examined Staff's witness. At the conclusion of the hearing, the record was left open in order to allow Staff to submit a final proposed regulation based on further discussions with the participants during and after the hearing.

6. In accordance with the post-hearing schedule, Staff, on March 1, 2006, submitted its final proposed regulation (Ex. 6). Staff

² References to the Exhibits entered into the evidentiary record of this proceeding will be cited as "(Ex. ___)" or "(Ex. ___ at ___)." References to the transcript of the proceedings will be cited as "(Tr. ___)."

³ Ex. 1 consists of the affidavits of publication of notice from *The News Journal* and *Delaware State News* newspapers. Notice was also sent to those entities that had participated in the prior workshops.

also provided a redlined version of the final proposal (Ex. 7), as well as a three-page, post-hearing memorandum describing each post-hearing modification that it had made to its proposed regulation (Ex. 8). After receiving these documents into evidence, I closed the record, which now consists of eight exhibits and a 66-page *verbatim* transcript of the proceedings. I have considered all of the record evidence of this docket and, based thereon, I submit for the Commission's consideration these Findings and Recommendations.

III. THE PROPOSED REGULATION

7. Staff's proposed regulation consists of five sections establishing renewable energy portfolio standards and governing compliance requirements for retail electricity suppliers. (Ex. 6.) The first section of the *Rules* contains definitions of the terms used in the regulation. The second section addresses the purpose and scope of the regulation and identifies the entities that will be subject to the regulation. In general, the *Rules* apply to all retail electricity sales in Delaware except those from a Municipal Electric Company or from an exempt Rural Electric Cooperative, and excluding sales to an exempt Industrial Customer. The second section identifies the steps that must be taken for Rural Electric Cooperatives and Industrial Customers to be exempt from the regulations.

8. The third section governs the Commission's administration of the standards including: (1) certifying eligible energy resources; (2) ensuring compliance with the renewable energy standards (beginning with a cumulative minimum percentage of electricity generated by renewable energy resources of 1 percent in 2007 and reaching a 10

percent cumulative level in 2019); and (3) verifying compliance with the renewable energy standards. Suppliers comply with the minimum percentage requirements by accumulating Renewable Energy Credits ("RECs"), which are equivalent, on a one-to-one basis, to mega-watt hours of energy derived from eligible renewable energy resources. Suppliers may buy and sell RECs for compliance purposes. In lieu of using a REC, suppliers have the option of making an alternative compliance payment ("ACP"), escalating from \$25 per megawatt-hour in the first year a supplier uses an ACP to \$50 after four years of using ACPs to meet compliance requirements.

9. The fourth section of the regulation addresses an electricity supplier's recovery of costs incurred in complying with the renewable energy standards. The fifth and final section addresses Delaware's Freedom of Information Act, the persons who may file a complaint under the *Rules*, and the penalties for failure to comply with the *Rules*.

IV. SUMMARY OF PUBLIC COMMENT

10. Rick Holmes, a resident of Wilmington and Vice President (for Delaware) of the Mid-Atlantic Solar Energy Association, offered comments at the February 14th hearing in support of solar hot water systems. (Tr. 59-61.) Mr. Holmes first noted that the definition of "eligible energy resource" in the proposed *Rules*, and under the Act, includes "solar energy technology that includes solar radiation to produce electricity." Mr. Holmes recommended, however, that eligible solar energy technology include solar radiation that *displaces* electricity rather than just that which *produces* electricity.

Mr. Holmes asserted that a 2-kilowatt solar electric system (which produces electricity) is about 15 to 20 percent efficient whereas a 2-kilowatt solar hot water system (which displaces electricity use) is closer to 70 percent efficient. He also noted that solar hot water has been included in federal tax credit legislation. Mr. Holmes emphasized, however, that he does not wish to include solar heated swimming pools as an eligible solar resource.

V. SUMMARY OF EVIDENCE

11. **DEO.** Charlie T. Smisson, Jr., State Energy Coordinator, submitted written comments on behalf of the Delaware Energy Office, which were admitted into the record by stipulation of the participants. (Ex. 3; Tr. 56-57.) Mr. Smisson noted that the DEO has oversight duties under the Act as well as a long history of facilitating the installation of renewable and alternative energy technologies in Delaware.

12. Mr. Smisson recommended that the Commission adopt the proposed rules, with two exceptions. First, Mr. Smisson objected to Staff's proposed method for determining which Industrial Customers are exempt from the regulation. (Ex. 3 at 2-3) Under § 353(b) of the Act, electricity sales to industrial customers "with a peak demand in excess of 1,500 kilowatts" are exempted from the regulations. Proposed Section 2.2.2, however, allows exemption for customers with multiple accounts totaling in excess of 1,500 kilowatts, served by a single supplier, if "the aggregate of their accounts with an NAICS Manufacturing Sector Code...have a Peak Demand of at least 751 kilowatts...". According to Mr. Smisson, this section will allow

industrial customers to exempt non-manufacturing loads, such as off-site office buildings, from the Rules because only 751 kilowatts of peak demand needs to be attributable to manufacturing activities. Mr. Smisson asserted that Section 2.2.2 effectively lowers the 1,500 kilowatts peak demand threshold established in the Act for an industrial customer and is, therefore, inconsistent with the Act. (Id. at 2.)

13. Second, Mr. Smisson testified that proposed Section 3.2.6 improperly ties the determination of what type of metering is permissible for a small generator to the types of metering allowed under the applicable utility's tariff. (Id. at 3-4.) Under § 355(c) of the Act, "small eligible energy sources, 100 kilowatts of capacity or less" may aggregate generation to meet the Act's requirements as long as they document their level of generation with "appropriate metering." Proposed Section 3.2.6, however, adds that "appropriate metering" is defined in the applicable utility's tariff then in effect. According to Mr. Smisson, use of the utility's tariff to define "appropriate metering" undermines the Act's intent, which is to allow flexible or alternative metering arrangements. (Id. at 4.)

14. **Constellation.** Martha A. Duggan, Vice President, Regional Government and Regulatory Affairs, submitted written comments on behalf of Constellation, which were admitted into the record by stipulation of the participants. (Ex. 5; Tr. 58.) Ms. Duggan recommended that Staff:

(1) clarify the definition of "Retail Electricity Product" under Section 1.1 by specifying that multiple electrical energy offerings with the same "Generation Attributes" may be considered a

single Product, despite any differences in pricing methods;

(2) clarify Section 2.2 by specifying that industrial customers that seek exemption from the Rules must inform its retail supplier of its intention to claim such exemption;

(3) add a requirement, under Section 3.1.6.1, that Staff notify suppliers (two years in advance of any change) that it is considering implementation of a tracking system for Renewable Energy Credits other than the system used by PJM,;

(4) clarify Section 3.2.2 by specifying that reporting requirements apply to green and non-green products but do not require reporting on specific retail products within those categories;

(5) add language to Section 3.3.4.6 stating that increases in Alternative Credit Payments will occur only after a determination has been made that the Retail Electricity Supplier has not conducted adequate planning; and

(6) clarify and modify Section 4.3 so that suppliers' notice requirements to customers relating to cost recovery reflect the differences in billing functions performed by retail electricity suppliers and an Electric Distribution Company.

(Id. at 2-7.)

15. **Delmarva Power.** Randall V. Griffin, Associate General Counsel, submitted written comments on behalf of Delmarva Power, which were admitted into the record by stipulation of the participants. (Ex. 4; Tr. 57-58.) Mr. Griffin recommended that Staff add a Section 3.1.6.2 that permits the retroactive creation of Renewable Energy Credits for electricity produced after June 1, 2006, by a renewable generator that did not become certified until after such date. Mr. Griffin stated that allowing retroactive creation of RECs in this

manner is consistent with the Act and will ensure that additional RECs are available for use by suppliers for RPS compliance purposes.

16. In addition, Mr. Griffin recommended that the *Rules* permit renewable energy generating entities to be certified as Delaware Eligible Energy Resources based upon comparable generator RPS certifications granted by other states. (Id. at 2.) According to Mr. Griffin, permitting reciprocity will increase the number of RECs available for RPS compliance purposes in Delaware, where the electricity market is much smaller than most other PJM states and, therefore, less attractive for renewable generators interested in selling RECs. Mr. Griffin provided language that could be added under Section 3.1.2 that would permit reciprocity for generator certification requirements.

17. Finally, Mr. Griffin recommended that Section 3.3.1 allow suppliers to submit their RPS compliance report within 120 days of the end of each compliance year, rather than within 90 days. (Id.) Mr. Griffin asserted that 90 days places too much burden on suppliers, especially when PJM does not finalize its revenue data until the close of a 60-day settlement period. Mr. Griffin noted that Maryland allows five months for RPS compliance reporting and the District of Columbia allows 120 days.

18. **Staff.** At the hearing, Staff submitted written testimony from David Bloom, Public Utilities Analyst, in which Mr. Bloom responded to the comments provided by the participants. (Ex. 2.) Mr. Bloom described the changes that Staff made to its proposed Rules, based on the comments, and explained why certain recommendations were

not accepted. Mr. Bloom also answered participants' questions under cross-examination. (Tr. 41-48.)

19. Mr. Bloom testified that Staff accepted Constellation's recommendations regarding the definition of Retail Electricity Product under Section 1.1 and the notice requirements for Industrial Customers that seek exemption from the rules. (Ex. 2 at 2-3.) Mr. Bloom did not revise Section 3.1.6.1 to require two years notice from the Commission before changing renewable energy tracking systems, as recommended by Constellation, because a situation may arise where the Commission needs to cease using the PJM tracking system immediately and will not be able to wait two years to create another system. (Id. at 3-4.) Regarding Constellation's request that the Commission place certain restrictions on increases in Alternative Compliance Payments, Mr. Bloom asserted that any alteration of the ACP schedule would conflict with the Act and he declined therefore to make the proposed revision. In response to Constellation's concern regarding a supplier's obligation to notify its customers of RPS cost recovery through billing inserts, Mr. Bloom asked Retail Electric Suppliers to work with Delmarva and the Delaware Electric Cooperative to develop an appropriate billing arrangement that will allow for compliance with the notification requirements.

20. Mr. Bloom also responded to DEO's comments. Mr. Bloom testified that Staff decided to keep its definition of "Industrial Customer" in Section 2.2.2, notwithstanding DEO's concern that Staff's definition lowers the peak demand threshold for exemption under the Act from 1,500 kilowatts to 751 kilowatts. (Id. at 6-7.) Mr. Bloom

asserted that an Industrial Customer with multiple accounts should be eligible for exemption as long as its accounts total 1,500 kilowatts, as long as more than half of the load corresponds to NAICS Manufacturing Sector Codes. Mr. Bloom noted that Staff had to create a definition for "Industrial Customer" since the Act did not provide a definition and because neither Delmarva Power nor the Delaware Electric Cooperative has tariffs specifically designed for Industrial Customers.

21. Mr. Bloom testified that Staff accepted DEO's recommendation regarding permissible metering for a small generator under Section 3.2.6. Staff, therefore, removed the language that it had added to the statutory language providing that small Eligible Energy Resources "document the level of generation, as recorded by appropriate metering." Staff had added, but now has removed, the language "as defined in the applicable utility's tariff." DEO was concerned that the utility's tariff may not contemplate alternative metering arrangements. Mr. Bloom emphasized, however, that the applicable utility's tariff, as well as any interconnection agreements, still apply. (Id. at 7.)

22. Mr. Bloom testified that Staff did not accept any of Delmarva Power's three recommendations. (Id. at 8-10.) First, Staff declined adding a section to the *Rules* that specifically would permit retroactive creation of RECs because Staff intended for June 1, 2006 to be the starting date for when RECs may be created. In addition, Delmarva Power's proposal permitting retroactive REC creation is not consistent with PJM's GATS Operating Rules, according to Mr. Bloom.

23. Second, Staff rejected Delmarva Power's recommendation to revise Section 3.1.2 to permit REC reciprocity between states because of the possibility that other states' regulations would change over time. (Id. at 9.) Third, Staff decided not to extend its deadline for submitting compliance reports from 90 to 120 days. (Id. at 9-10.) As grounds, Mr. Bloom noted that Delaware's compliance year is June 1 through May 31, and because PJM finalizes its revenue data at the close of 60 days following the end of a calendar year, suppliers have close to seven months after the PJM settlement period to file their compliance report. In contrast, Maryland and the District of Columbia use the calendar year for compliance purposes.

24. In his post-hearing memorandum, dated March 1, 2006, Mr. Bloom made three additional modifications to the proposed Rules, in addition to various grammatical corrections. (Ex. 8.) First, Mr. Bloom added a new section, which reads:

Section 2.2.1.1.1 the Commission's Staff shall, within thirty (30) days of receipt of the notice, provide to the Industrial Customer an acknowledgment of the status, exempt or non-exempt, of the Industrial Customer and...;

Mr. Bloom made this recommendation in order to ensure that all parties (*i.e.*, the Industrial Customer, its Retail Electricity Supplier and Staff) are aware that the Industrial Customer has elected for exemption of its load. (Id. at 1-2.)

25. Second, Mr. Bloom added a new section, which reads:

Section 3.1.7.1 If a Generation Unit is deemed an Eligible Energy Resource under Section 3.1 and the Eligible Energy Resource's GATS account continues to be maintained in good standing, the Eligible Energy Resource may achieve a Delaware designation for RECs recorded with PJM-EIS's GATS

for the calendar year being traded in GATS at the time of the Commission Staff's approval of the Eligible Energy Resource, but no earlier than June 1, 2006.

Staff made this recommendation to ensure that RECs are available for use by Retail Electricity Suppliers for RPS compliance. (Id. at 2.)

26. Third, Mr. Bloom changed the filing date of the annual compliance report from within 90 days to within 120 days. As a result of this change, Staff also altered the date for Staff to notify the Retail Electricity Supplier of any compliance deficiencies from within 135 days to within 165 days. These changes affect Sections 3.2.2, 3.3.1, and 3.3.5. Staff made this revision to allow Retail Electricity Suppliers more time to submit a more accurate Report. (Id. at 2-3.)

VI. FINDINGS AND RECOMMENDATIONS

27. The Commission has the authority and jurisdiction to promulgate regulations under 26 *Del. C.* § 209(a) and 29 *Del. C.* § 10111 *et seq.* Pursuant to 26 *Del. C.* § 209(a), the Commission may fix "just and reasonable" regulations governing any public utility. In addition, Section 2 of the *Renewable Energy Portfolio Standards Act* directs the Commission to "adopt rules and regulations necessary to implement the provisions of this Act..." Under these statutes, the Commission has jurisdiction to promulgate Staff's proposed *Rules* in this docket.

28. The final proposed regulation, which is attached to the proposed Order in this case as Exhibit "B", closely follows the Act, which is codified primarily at 26 *Del. C.* §§ 351-363. In fact, the most significant provisions, such as: (a) the minimum levels of supply

from renewable resources required over the next twelve years, which range from 1 to 10 percent of sales; (b) the list of Eligible Energy Resources; and (c) the creation of tradable renewable energy credits ("RECs") which are used to meet compliance requirements; simply replicate provisions found in the Act. For the administrative details, however, Staff used its discretion (with ample input from the participants) to set more specific reporting requirements, to sharpen certain definitions, and generally to establish implementation procedures.

29. Based on the comments submitted and the statements made at the hearing, all of the participants generally support the proposed *Rules*. While Staff accepted just one of the two recommendations made by DEO, Mr. Gallagher stated that DEO found the final proposed *Rules* to be acceptable. (Tr. 55.) After initially declining Delmarva Power's recommendations regarding retroactive REC creation and the amount of time allotted for reporting, Staff made certain concessions in its final proposed *Rules* that moved towards Delmarva Power's positions. To wit, Staff allowed for an earlier recognition of RECs in Delaware and extended the deadline for annual reporting from 90 to 120 days from the end of the reporting period. (Ex. 8 at 2-3.) In addition, Staff's decision not to allow jurisdictional reciprocity for RECs is reasonable, given the administrative burden that of tracking changes in other state's requirements and the possibility that Staff would not agree that another state's requirements are appropriate.

30. Mr. Bloom addressed each of Constellation's concerns (Ex. 2 at 2-5; Tr. 29-34; Ex. 8 at 1-2). As summarized above, Staff adopted

several of Constellation's recommendations designed to clarify certain sections and rejected other suggestions as contrary to the Act. In addition, Staff declined to place a two-year notice requirement on the Commission for implementing a new renewable energy tracking system if the Commission finds that the PJM's system is no longer suitable. (Ex. 2 at 3.) As noted by Mr. Bloom, if the Commission must cease use of PJM's system on short notice, it will not be able to wait two years before implementing a replacement system.

31. Staff did not make any changes to its proposed *Rules* based on Mr. Holmes's recommendation, under public comment, that electricity use that is *displaced* by solar energy (e.g., with a solar hot water system) qualify as an eligible resource, rather than just electricity *produced* by solar energy. (Tr. 59-61.) This change would contradict the Act's requirement that qualifying solar energy "produce electricity that powers electricity generators," under § 354 (e)(1), as apparently recognized by Mr. Holmes. I agree, therefore, with Staff's decision not to add electricity displaced by solar energy to the list of eligible resources.

32. In summary, after considering comments from all of the interested parties, Staff has proposed rules that are consistent with the Act and which implement the Act in a reasonable manner. As such, and for all of the above reasons, I recommend that the Commission adopt, as just and reasonable, Staff's proposed regulation (Ex. 6). A proposed form of Order implementing the above recommendation is appended, as Attachment "A," for the Commission's convenience. I will also note that, based on the changes Staff made to the proposed

regulation published in the *Delaware Register* in January of 2006, it is likely that the Commission will need to republish the proposed *Rules*, and establish a new 30-day comment period. See 29 *Del. C.* § 10118(c).

Respectfully submitted,

/s/ William F. O'Brien
William F. O'Brien
Senior Hearing Examiner

Dated: March 7, 2006

A T T A C H M E N T “A”

DELAWARE PUBLIC SERVICE COMMISSION

RULES AND PROCEDURES

TO IMPLEMENT

THE RENEWABLE ENERGY PORTFOLIO STANDARD

EFFECTIVE: _____

1.1 The following words and terms, when used in this Regulation, should have the following meanings unless the context clearly indicates otherwise:

“Alternative Compliance Payment” (“ACP”) means a payment of a certain dollar amount per megawatt hour, which a Retail Electricity Supplier may submit in lieu of supplying the minimum percentage of RECs required under Section 3.3.4 of this Regulation.

“DNREC” means Delaware Department of Natural Resources and Environmental Control.

“Commission” means the Delaware Public Service Commission.

“Compliance Year” means the calendar year beginning with June 1 and ending with May 31 of the following year, for which a Retail Electricity Supplier must demonstrate that it has met the requirements of this Regulation.

“Customer-Sited Generation” means a Generation Unit that is interconnected on the End-Use Customer’s side of the retail electricity meter in such a manner that it displaces all or part of the metered consumption of the End-Use Customer.

“Eligible Energy Resources” means the following energy sources located within the PJM region or imported into the PJM region and tracked through the PJM Market Settlement System:

Solar energy technologies that employ solar radiation to produce electricity;

Electricity derived from wind energy;

Electricity derived from ocean energy including wave or tidal action, currents, or thermal differences;

Geothermal energy technologies that generate electricity with a steam turbine, driven by hot water or steam extracted from geothermal reservoirs in the earth’s crust;

Electricity generated by a fuel cell powered by Renewable Fuels;

Electricity generated by the combustion of gas from the anaerobic digestion of organic material;

Electricity generated by a hydroelectric facility that has a maximum design capacity of 30 megawatts or less from all generating units combined that meet appropriate environmental standards as determined by DNREC (see DNREC Regulation ____);

Electricity generated from the combustion of biomass that has been cultivated and harvested in a sustainable manner as determined by DNREC, and is not combusted to produce energy in a waste to energy facility or in an incinerator (see DNREC Regulation ____);

Electricity generated by the combustion of methane gas captured from a landfill gas recovery system; provided, however, that:

Increased production of landfill gas from production facilities in operation prior to January 1, 2004 demonstrates a net reduction in total air emissions compared to flaring and leakage;

Increased utilization of landfill gas at electric generating facilities in operation prior to January 1, 2004 (i) is used to offset the consumption of coal, oil, or natural gas at those facilities, (ii) does not result in a reduction in the percentage of landfill gas in the facility’s average annual fuel mix when calculated using fuel mix measurements for 12 out of any continuous 15 month period during which the electricity is generated, and (iii) causes no net increase in air emissions from the facility; and

Facilities installed on or after January 1, 2004 meet or exceed 2004 Federal and State air emission standards, or the Federal and State air emission standards in place on the day the facilities are first put into operation, whichever is higher.

“End-Use Customer” means a person or entity in Delaware that purchases electrical energy at retail prices from a Retail Electricity Supplier.

“Fund” means the Delaware Green Energy Fund.

“GATS” means the Generation Attribute Tracking System developed by PJM-Environmental Information Services, Inc. (PJM-EIS).

“Generation Attribute” means a non-price characteristic of the electrical energy output of a Generation Unit including, but not limited to, the Unit’s fuel type, geographic location, emissions, vintage, and RPS eligibility.

“Generation Unit” means a facility that converts a fuel or an energy resource into electrical energy.

“Industrial Customer” means an End-Use Customer with a North American Industry Classification System (NAICS) Manufacturing Sector Code.

“Municipal Electric Company” means a public corporation created by contract between 2 or more municipalities pursuant to provisions of Title 22, Chapter 13 of the Delaware Code and the electric utilities that are municipally owned within the State of Delaware.

“New Renewable Generation Resources” means Eligible Energy Resources first going into commercial operation after December 31, 1997.

“Peak Demand” shall have the same meaning as and be determined consistently with how such term or a similar term is defined and determined in the applicable utility's tariff then in effect and approved by the Commission. For customers with more than one account, the peak demands shall be aggregated for all accounts. The calculation will be applied in the current year based on the Peak Demand, as defined above, in the prior year.

“PJM” or “PJM Interconnection” means the regional transmission organization (RTO) that coordinates the movement of wholesale electricity in the PJM region, or its successors at law.

“PJM region” means the area within which the movement of wholesale electricity is coordinated by PJM Interconnection. The PJM region is as described in the Amended and Restated Operating Agreement of PJM.

“Renewable Energy Credit” (“REC”) means a tradable instrument comprised of all the Generation Attributes equal to 1 megawatt-hour of electricity derived from Eligible Energy Resources and that is used to track and verify compliance with the provisions of this Regulation. A REC does not include emission reduction credits and/or allowances encumbered or used by a Generation Unit for compliance with local, state, or federal operating and/or air quality permits associated with the 1 megawatt-hour of electricity.

“Renewable fuel” means a fuel that is derived from Eligible Energy Resources. This term does not include a fossil fuel or a waste product from a fossil fuel source.

“RPS” and “Renewable Energy Portfolio Standard” means the percentage of electricity sales at retail in the State that is to be derived from Eligible Energy Resources.

“Retail Electricity Product” means an electrical energy offering that is distinguished by its Generation Attributes only and that is offered for sale by a Retail Electricity Supplier to End-Use Customers. Multiple electrical energy offerings with the same Generation Attributes may be considered a single Retail Electricity Product.

“Retail Electricity Supplier” means a person or entity that sells electrical energy to End-Use Customers in Delaware, including, but not limited to, non-regulated power producers, electric utility distribution companies supplying standard offer, default service, or any successor service to End-Use Customers. A Retail Electricity Supplier does not include a Municipal Electric Company for the purposes of this Regulation.

“Rural Electric Cooperative” means a non-stock, non-profit, membership corporation organized pursuant to the Federal “Rural Electrification Act of 1936” and operated under the cooperative form of ownership.

“Total Retail Sales” means retail sales of electricity within the State of Delaware exclusive of sales to any Industrial Customer with a Peak Demand in excess of 1,500 kilowatts.

2.0 Purpose and Scope

2.1 The benefits of electricity from renewable energy resources accrue to the public at large, and electric suppliers and consumers share an obligation to develop a minimum level of these resources in the electric supply portfolio of the State. The purpose of this Regulation, in support of 26 Del. C., § 351 – 363, is to set forth the rules for governing the RPS.

2.2 This regulation shall apply to all retail electricity sales in the State of Delaware except for retail electricity sales of Municipal Electric Companies and retail electricity sales to any Industrial Customer with a Peak Demand in excess of 1,500 kilowatts.

2.2.1 An Industrial Customer with Peak Demand in excess of 1,500 kilowatts may elect to have their load exempt from this Regulation provided that they meet the definitions found in Section 1.1 and:

2.2.1.1 submit a notice to the Commission’s Staff including, but not limited to, Name and Address of Industrial Customer, and NAICS Code and load for each account ;

2.2.1.1.1 the Commission’s Staff shall, within thirty (30) days of receipt of the notice, provide to the Industrial Customer an acknowledgement of the status, exempt or non-exempt, of the Industrial Customer and;

2.2.1.2 submit the Commission’s Staff acknowledgement referenced in Section 2.2.1.1.1 of this Regulation to their Retail Electricity Supplier.

2.2.2 For an End-Use Customer with multiple accounts totaling in excess of 1,500 kilowatts within an applicable utility’s service territory and served by a single Retail Electricity Supplier, to have their load exempt, the aggregate of their accounts with an NAICS Manufacturing Sector Code must have a Peak Demand of at least 751 kilowatts and they must follow the procedure found in Section 2.2.1.

2.3 Any Rural Electric Cooperative that is opted-out of Commission regulation by its membership pursuant to 26 Del. C. § 223 of the Delaware Code shall, for all purposes of administering and applying this Regulation, be treated as a Municipal Electric Company during any period of time the Rural Electric Cooperative is exempt from Commission regulation.

2.4 A Rural Electric Cooperative may elect to be exempt from the requirements of this Regulation provided that, on or before June 1, 2006, they:

2.4.1 submit a written notice to the Delaware General Assembly;

2.4.2 submit a written notice to the Commission;

2.4.3 alert their End-Use Customers with notices inserted in two (2) consecutive electricity bills;

2.4.4 offer their End-Use Customers a voluntary program for purchasing renewable energy under competitive rates; and

2.4.5 either contribute to the Delaware Green Energy Fund at levels commensurate with other Retail Electricity Suppliers or create an independent fund separate from the Delaware Green Energy Fund to be used in support of energy efficiency technologies, renewable energy technologies, or demand side management programs, into which they make payments of \$0.178 for each megawatt-hour they sell, transmit, or distribute in the State.

3.0 Administration of RPS

3.1 Certifying Eligible Energy Resources:

3.1.1 The Commission through its Staff will certify Generation Units as Eligible Energy Resources based on the definition of Eligible Energy Resources found in Section 1.1 of this Regulation.

3.1.2 Any Generation Unit seeking certification as an Eligible Energy Resource must submit an Application for Certification as an Eligible Energy Resource Under the Delaware Renewable Energy Portfolio Standard (Application) to the Commission. This may include Customer-Sited Generation or a Generation Unit owned or operated by a Municipal Electric Company.

3.1.3 Commission Staff will review the Application and will notify the applicant of its approval as an Eligible Energy Resource or of any deficiencies in their Application within 30 days of receipt. The applicant will have the opportunity to revise their submission, if appropriate.

3.1.4 If Commission Staff finds the Generation Unit to be in compliance with Sections 1.0 and 3.0 of this Regulation, as well as any other applicable Delaware statute; Commission Staff will issue a State of Delaware Certification Number.

3.1.5 Upon receipt of the State of Delaware Certification Number, a Generation Unit will be deemed an Eligible Energy Resource.

3.1.6 Upon designation as an Eligible Energy Resource, the Generation Unit's owner shall be entitled to one (1) Renewable Energy Credit (REC) for each mega-watt hour of energy derived from Eligible Energy Resources. RECs will be created and supplied by the PJM-EIS GATS, or its successor at law. Eligible Energy Resources are subject to applicable PJM-EIS GATS rules and shall pay applicable PJM-EIS GATS fees.

3.1.6.1 However, if in the future, the Commission finds that PJM-EIS's GATS is not applicable or not suited to meet the needs or requirements of the RPS, the Commission may establish or participate in another renewable energy tracking system.

3.1.7 RECs created by Eligible Energy Resources on or after June 1, 2006 shall be valid to meet retail electricity supplier requirements, subject to Section 3.2.3 of this Regulation.

3.1.7.1 If a Generation Unit is deemed an Eligible Energy Resource under Section 3.1 and the Eligible Energy Resource's GATS account continues to be maintained in good standing, the Eligible Energy Resource may achieve a Delaware designation for RECs recorded with PJM-EIS's GATS for the calendar year being traded in GATS at the time of the Commission Staff's approval of the Eligible Energy Resource, but no earlier than June 1, 2006.

3.1.8 An Eligible Energy Resource will remain certified unless substantive changes are made to its operational characteristics. Substantive changes include, but are not limited to changes in fuel type, fuel mix and generator type. An Eligible Energy Resource making substantive changes to its operational characteristics shall notify the Commission of such changes at least 30 days prior to the effective date of such changes. At such time the Generation Unit shall submit a revised Application, which shall be subject to the process laid out in Section 3.1 of this Regulation.

3.1.9 RECs created by an Eligible Energy Resource shall remain valid for compliance, subject to Section 3.2.3 and Section 3.3.3 of this Regulation, even if that Eligible Energy Resource is subsequently decertified for eligibility.

3.2 Compliance with RPS

3.2.1 The Total Retail Sales of each Retail Electricity Product sold to End-Use Customers by a Retail Electricity Supplier during any given Compliance Year shall include a minimum percentage of electrical energy sales from Eligible Energy Resources as shown in Schedule 1.

SCHEDULE 1	
Compliance Year	Cumulative Minimum Percentage
2007	1%
2008	1.5%
2009	2%
2010	2.75%
2011	3.5%
2012	4.25%
2013	5%
2014	5.75%
2015	6.5%
2016	7.25%
2017	8%
2018	9%
2019	10%

3.2.2 A Retail Electricity Supplier's compliance with Schedule 1 shall be based on accumulating RECs equivalent to the current Compliance Year's Cumulative Minimum Percentage of Total Retail Sales of each Retail Electricity Product sold to End-Use Customers and subject to Section 3.2.3 and, where appropriate, Commission regulations⁴. Such RECs shall be filed annually with the Commission within 120 days following the completion of the Compliance Year.

3.2.3 Each Retail Electricity Supplier can provide no more than 1% of each Compliance Year's Total Retail Sales from Eligible Energy Resources operational before December 31, 1997. The remainder of each year's retail sales, up to the required amount as specified in Section 3.2.1 of this Regulation must come from New Renewable Generation resources. In Compliance Year 2020 and for each Compliance Year thereafter, all Eligible Energy Resources used to meet the cumulative minimum percentage requirements set by the Commission rules shall be New Renewable Generation Resources.

3.2.4 A Retail Electricity Supplier shall not use RECs used to satisfy another state's renewable energy portfolio requirements for compliance with Schedule 1. A Retail Electricity Supplier may sell or transfer any RECs not required to meet this regulation.

3.2.5 On or after June 1, 2006, Eligible Energy Resources may create and accumulate RECs for the purposes of calculating compliance with the RPS.

3.2.6 Aggregate generation from small Eligible Energy Resources, 100 kilowatts of capacity or less, may be used to meet the requirements of Schedule 1, provided that the generators or their agents, on an annual basis, document the level of generation, as recorded by appropriate metering.

⁴ The Commission understands the legislation to mean that the Total Retail Sales of *each* Retail Electricity Product sold to End-Use Customers during a given Compliance Year shall include a minimum percentage of RECs determined by the current Cumulative Minimum Percentage as defined in Schedule 1. The Commission shall, in another proceeding, further define how RECs from Green Power products, as that term is defined in Commission Docket Number 49, are to be tracked and utilized for compliance in the RPS.

3.2.7 A Retail Electricity Supplier shall receive 300% credit toward meeting the RPS for energy derived from the following sources installed on or before December 31, 2014:

3.2.7.1 Solar electric; or

3.2.7.2 Renewable fuel that is used in a fuel cell.

3.2.8 A Retail Electricity Supplier shall receive 150% credit toward meeting the RPS for wind energy installations sited in Delaware on or before December 31, 2012.

3.2.9 A Retail Electricity Supplier shall receive credit toward meeting the RPS for electricity derived from the fraction of eligible landfill gas, biomass or biogas combined with other fuels.

3.2.10 Cumulative minimum percentage requirements of Eligible Energy Resources shall be established by Commission rules for Compliance Year 2020 and each subsequent year. In no case shall the minimum percentages established by Commission rules be lower than those required for Compliance Year 2019 in Schedule 1. Each of the rules setting such minimum percentage shall be adopted at least two years prior to the minimum percentage being required.

3.2.11 Beginning in Compliance Year 2010, and in each Compliance Year thereafter, the Commission may review the status of Schedule 1 and report to the legislature on the status of the pace of the scheduled percentage increases toward the goal of 10%. If the Commission concludes at this time that the schedule either needs to be accelerated or decelerated, it may also make recommendations to the General Assembly for legislative changes to the RPS.

3.2.12 Beginning in Compliance Year 2014, and in each Compliance Year thereafter, the Commission may, in the event of circumstances specified in this subsection and after conducting hearings, accelerate or slow the scheduled percentage increases towards meeting the goal of 10%. The Commission may only slow the increases if the Commission finds that at least 30% of RPS compliance has been met through the ACP for three (3) consecutive years, despite adequate planning by the Retail Electricity Suppliers. The Commission may only accelerate the scheduled percentage increases after finding that the average price for RECs eligible for RPS compliance has, for two (2) consecutive years, been below a predetermined market-based price threshold to be established by the Commission. The Commission shall establish the predetermined market-based price threshold in consultation with the Delaware Energy Office. Rules that would alter the percentage targets shall be promulgated at least two years before the percentage change takes effect. In no event shall the Commission reduce the percentage target below any level reached to that point.

3.3 Verification of Compliance with the RPS

3.3.1 Within 120 days of the end of a compliance year, each Retail Electricity Supplier who has made sales to an End-use Customer in the State of Delaware must submit a completed Retail Electricity Supplier's Verification of Compliance with the Delaware Renewable Energy Portfolio Standard Report (Report) which includes, but is not limited to, evidence of the specified number of RECs required for that Compliance Year according to Schedule 1 and the Total Retail Sales of each Retail Electricity Product.

3.3.2 RECs must have been created by PJM-EIS's GATS, or its successor at law or pursuant to Section 3.1.6.1 of this Regulation.

3.3.3 RECs, submitted for compliance with this Regulation, may be dated no earlier than three (3) years prior to the beginning of the current Compliance Year.

3.3.4 In lieu of standard means of compliance with the RPS, any Retail Electricity Supplier may pay into the Fund an ACP of \$25 for each megawatt-hour deficiency between the RECs used by a Retail Electricity Supplier in a given compliance year and the RECs necessary for such Retail Electricity Supplier to meet the year's

Cumulative Minimum Percentage. In subsequent years, the ACP for any Retail Electricity Supplier shall increase as follows:

3.3.4.1 If a Retail Electricity Supplier has paid an ACP of \$25 for any megawatt-hour deficiency in any previous year, then the ACP shall be \$35 for each megawatt-hour.

3.3.4.2 If a Retail Electricity Supplier has paid an ACP of \$35 for any megawatt-hour deficiency in any previous year, then the ACP shall be \$45 for each megawatt-hour.

3.3.4.3 If a Retail Electricity Supplier has paid an ACP of \$45 for any megawatt-hour deficiency in any previous year, then the ACP shall be \$50 for each megawatt-hour.

3.3.4.4 If a Retail Electricity Supplier has paid an ACP of \$50 for any megawatt-hour deficiency in any previous year, then the ACP shall be \$50 for each megawatt-hour.

3.3.4.5 ACPs shall not be more than \$50 for each megawatt-hour.

3.3.5 The Commission Staff shall notify any Retail Electricity Supplier of any compliance deficiencies within 165 days of the close of the current Compliance Year. If the Retail Electricity Supplier is found to be deficient by the Commission Staff, the Retail Electricity Supplier shall be required to pay the appropriate ACP, according to Section 3.3.4 of this Regulation. All such payments shall be due within 30 days of notification by the Commission Staff. Upon receipt of payment, the Retail Electricity Supplier shall be found to be in compliance for that given year.

3.3.6. All compliance payments, made by the Retail Electricity Supplier, shall be payable to the Delaware Green Energy Fund and sent to the Commission.

4.0 Recovery of Costs

4.1 A Retail Electricity Supplier may recover, through a non-bypassable surcharge on its supply portion of the bill, actual dollar for dollar costs incurred in complying with the State of Delaware's RPS, except that any compliance fee assessed pursuant to Section 3.3.4 and its subsections of these Rules and Regulation shall be recoverable only to the extent authorized by Section 4.2 of this Regulation.

4.2 A Retail Electricity Supplier may recover any ACP if the payment of an ACP is the least cost measure to ratepayers as compared to the purchase of Renewable Energy Credits to comply with the RPS; or if there are insufficient Renewable Energy Credits available for the Retail Electricity Supplier to comply with the RPS.

4.3 Any cost recovered under this section shall be disclosed to customers at least annually on inserts accompanying customer bills.

5.0 Other General Rules

5.1 Under Delaware's Freedom of Information Act, 29 Del. C. ch. 100, all information filed with the Commission is considered of public record unless it contains "trade secrets and commercial or financial information obtained from a person which is of a privileged or confidential nature." 29 Del. C. §10002(d)(2). To qualify as a non-public record under this exemption, materials received by the Commission must be clearly and conspicuously marked on the title page and on every page containing the sensitive information as "proprietary" or "confidential" or words of similar effect. The Commission shall presumptively deem all information so designated to be exempt from public record status. However, upon receipt of a request for access to information designated proprietary or confidential, the Commission may review the appropriateness of such designation and may determine to release the

information requested. Prior to such release, the Commission shall provide the entity that submitted the information with reasonable notice and an opportunity to show why the information should not be released.

5.2 Any End-Use Customer, Retail Electricity Supplier, Eligible Energy Resource, potential Eligible Energy Resource or other interested party to which this Regulation may apply may file a complaint with the Commission pursuant to the Rules of Practice and Procedure of the Delaware Public Service Commission.

5.3 The failure to comply with this Regulation may result in penalties, including monetary assessments, suspension or revocation of eligibility as an Eligible Energy Resource, or other sanction as determined by the Commission consistent with 26 Del.C., § 205(a), § 217, and § 1019.

E X H I B I T "B"

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE

IN THE MATTER OF THE ADOPTION OF)
RULES TO IMPLEMENT THE RENEWABLE)
ENERGY PORTFOLIO STANDARDS ACT, 26) PSC REGULATION DOCKET
DEL. C. §§ 351-363, AS APPLIED TO) NO. 56
RETAIL ELECTRICITY SUPPLIERS)
(OPENED AUGUST 23, 2005))

NOTICE OF PROPOSED RULE-MAKING AND PUBLIC HEARING
CONCERNING RENEWABLE ENERGY PORTFOLIO STANDARDS

On July 12, 2005, the Delaware General Assembly enacted legislation finding that "the benefit of electricity from renewable energy resources accrue to the public at large, and that electric suppliers and consumers share an obligation to develop a minimum level of [renewable energy] resources in the electric supply portfolio of [Delaware]." The General Assembly further stated that its purpose in enacting this legislation is to establish a market in Delaware for electricity from renewable resources, and to lower the cost of such electricity to Delaware consumers. To this end, the General Assembly directed the Delaware Public Service Commission (the "Commission") to adopt rules and regulations governing the implementation of Renewable Energy Portfolio Standards, and further directed the Commission to promulgate such rules and regulations by July 31, 2006.

In PSC Order No. 6793 (Dec. 6, 2005), the Commission issued a set of regulations for public comment and designated a Hearing Examiner to

conduct further proceedings. On March 7, 2006, the Hearing Examiner issued a written report with revised regulations that were proposed for adoption by the Commission. On April 11, 2006, the Commission voted to adopt the Hearing Examiner's Report and publish the revised regulations for further public comment. In connection with the authority given to it, the Commission now proposes to adopt new rules and regulations to govern the Renewable Energy Portfolio Standards obligations of electric suppliers.

The text of the revised Rules proposed to be adopted is set forth as Attachment "A" to PSC Order No. 6885 (Apr. 11, 2006). Such proposed Rules will be published in the July 2006 volume of the Delaware Register of Regulations. In summary form:

The first section of the Rules contains definitions of the terms used in the regulations. The second section addresses the purpose and scope of the regulations, and identifies the entities which will be subject to the regulations. That section further identifies the steps that must be taken for certain entities to be exempt from the regulations.

The third section sets forth proposed regulations regarding the Commission's administration of the standards including, certifying eligible energy resources; ensuring compliance with the renewable energy standards (beginning with a cumulative minimum percentage of electricity generated by renewable energy resources of 1% in 2007 and reaching a 10% cumulative level in 2019); and verifying compliance with the renewable energy standards.

The fourth section of the regulations addresses an electricity supplier's recovery of costs incurred in complying with the renewable energy standards. The final section of the regulation addresses the Freedom of Information Act, the persons who may file a complaint, and the penalties for failure to comply with the rules and regulations.

The Commission has authority to promulgate such regulations pursuant to 26 Del. C. §§ 353 and 362.

The Commission hereby solicits written comments, suggestions, compilations of data, briefs or other written materials concerning the proposed rules and regulations. Anyone desiring to submit written comments, suggestions, data compilations, briefs or other written materials shall file ten (10) copies of such materials with the Commission at its office located at 861 Silver Lake Boulevard, Cannon Building, Suite 100, Dover, DE 19904 (Attn: PSC Reg. Dckt. No. 56). All such materials shall be filed with the Commission on or before June 1, 2006. Persons who wish to participate in the proceedings but who do not wish to submit written materials are asked to send a letter to the Commission informing the Commission of their intention to participate on or before June 1, 2006. The Commission will hold a public hearing to consider the proposed regulations on June 6, 2006 at 1:00 PM at its Dover office identified above.

The proposed rules and regulations and all materials submitted in connection with this docket will be available for public inspection and copying at the Commission's Dover office during normal business hours. The fee for copying is \$0.25 per page. The proposed rules and regulations may also be reviewed at the office of the Division of the

Public Advocate located at the Carvel State Office Building, 4th Floor, 820 N. French Street, Wilmington, DE 19801, during normal business hours by appointment. Finally, the proposed rules and regulations will be available for review on the Commission's website located at www.state.de.us/delpsc.

Any individual with disabilities who wishes to participate in these proceedings should contact the Commission to discuss any auxiliary aids or services needed to facilitate such review or participation. Such contact may be in person, in writing, by telephone or otherwise. The Commission's toll-free telephone number is (800) 282-8574. Any person with questions may also contact the Commission Staff at (302) 739-4247 or by Text Telephone at (302) 739-4333. Inquiries may also be sent via Internet e-mail to david.bloom@state.de.us.