217 New Castle Street
Rehoboth Beach, DE 19971
December 13, 2012

Secretary
Public Service Commission
Cannon Building, Suite 100
861 Silver Lake Boulevard
Dover, DE 19904

Re: *Regulation Dckt. No. 56 – Supplemental Comments on the September 18, 2012 Proposed Revisions to the PSC's "Rules and Procedures to Implement the Renewable Energy Portfolio Standard," 26 Del. Admin. Code § 3008*

Dear Madam Secretary:

Please include these supplemental comments (and two attachments) in the "record" of the rule-making proceedings under PSC Order No 8219 (Sept. 18, 2012).

Counsel's Inquiry

In an e-mail to me dated December 3, 2012, counsel for the Commission suggested that some of the matters set forth in my earlier comments (dated October 27, 2012) went beyond the scope of rule amendments described in the public notice called for by Order 8219 In particular, he pointed to the revisions proposed by my points 2, 4, and 5 as going beyond the "noticed" proposed changes. As counsel sees it, my rewrites and supplements must either be passed off to a completely new rule-making proceeding or be incorporated into a supplemental, republished "notice" in this matter (assuming the PSC would accept my revisions). This is my response to counsel's correspondence.

"Substantive" Changes to Originally Proposed Rules

I realize that under the provisions of 29 Del. C. § 10118(c), an agency must undertake a "do-over" in promulgating regulations "[i]n the event an agency makes substantive changes in the proposal as a result of the public comments, evidence and information." The catch in this context is to determine what criteria the agency is to use when it makes its decision whether alterations from the originally proposed rules are "substantive" or "non-substantive."[1] There is

1 It is the agency's call on this question. 29 Del. C. § 10118(c).

no statutory direction on this question.[2] Accordingly, I would apply "plain" dictionary meanings to the "substantive" adjective: is the change either "considerable in amount or quality," so as to be "substantial," or is it "independent in existence or function," and "not subordinate" to the initial proposal?[3] This grammatical test is consistent with, if not a tad broader, than the oft-repeated "logical outgrowth" test applied by the D.C Circuit:

> To satisfy the APA's notice requirement, the NPRM and the final rule need not be identical: "[a]n agency's final rule need only be a `logical outgrowth' of its notice." Covad Commincations Co. v. FCC, 450 F.3d 528, 548 (D.C. Cir. 2006). A final rule qualifies as a logical outgrowth "if interested parties `should have anticipated' that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period." NE. Md. Waste Disposal Auth. v. EPA, 358 F.3d 936, 952 (D.C. Cir. 2004) (citations omitted). By contrast, a final rule fails the logical outgrowth test and thus violates the APA's notice requirement where "interested parties would have had to `divine [the agency's] unspoken thoughts,' because the final rule was surprisingly distant from the proposed rule." Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin., 407 F.3d 1250, 1259-60 (D.C. Cir. 2005) (internal citations omitted).

CSX Transportation, Inc., v. Surface Trans. Bd, 584 F.3d 1076, 1080-81 (D.C. Cir. 2009).

The key question is whether my proposed changes to the "noticed" rule amendments offer additional matters that are so totally independent of the original proposal that other potential commenters would end up being blindsided by the PSC's consideration (and adoption) of my additional text. I do not think any of my proposed alterations fit that criteria.[4]

Comment 2 (Proposed additional Rule 3.2.3.1.6)

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2 The State APA's definition of "substantive" is of little help here. Speaking to a different context, it defines "substantive" as any command that regulates conduct or that sets forth non-procedural requirements for obtaining government licenses or benefits. 29 Del. C. § 10102((9).

3 American Heritage Dictionary of the English Language "substantive" (<http://americanheritage.yourdictionary.com/substantive>); Webster's New World College Dictionary "substantive" (<http://websters.yourdictionary.com/substantive>).

4 I would point out that all the issues I raised in my comments were also raised in my earlier comments during the immediately proceeding rule-making process for the RESPA rules. The Commission deferred consideration of those comments to a new round of rule-making. PSC Final Findings, Opinion & Order No. 8150 at ¶¶ 12-15, 42 (May 15, 2012). Thus, the "players" on the issue surely came forewarned about my position on needed rules.

In its proposed rule, the PSC directs that DP&L (the "CREC") shall succeed to the entitlements and responsibilities of the retail electricity suppliers as it assumes REC and SREC compliance responsibility as required by 26 Del. C. § 354(e). *See* Proposed rule 3.2.3. My proposed additional paragraph (3.2.3.1.6) simply clarifies what happens in the one case where such "exclusive DP&L compliance" rule is not at work – the transitional contract scenario. My added paragraph recognizes that in that limited context (both in terms of volume and time), the retail suppliers remain responsible (and entitled) to all the statutory duties for compliance. They can use the REC multipliers. But they most also still comply with the customer charge and customer notification requirements for their transitional contract load. Rather than open up a new can of worms about the rights of transitional contract suppliers, my additional paragraph merely suggests – as a subset of the proposed transfer of compliance responsibility rule – that where such procurement responsibility has not been moved, the retail suppliers still must comply with, and enjoy the benefits of, the various statutory directives. Such a rule is a "logical outgrowth" of the PSC's proposed rule, and indeed the entire statutory scheme. It does not make any substantial change; nor does it introduce any independent issue. Rather is is subordinate to the PSC's proposed rule 3.2.3.

Comment 4 (QFCPP Size and REC equivalencies)

The PSC's proposed rule 3.2.4. says that "CRECs may use energy output produced by a Qualified Fuel Cell Provider Project to fulfill their REC and SREC requirements as set forth in 26 Del. C. § 353(d)." On its face, that provision suggests that "all" output from a QFCPP can gain REC equivalents. Yet, that does not seem to be true under the statutory scheme. The legislation does allow for a QFCPP to encompass up to 50 mw of generation cells (powered by natural gas). 26 Del. C. § 364(d)(1)a. But 26 Del. C. § 353(d)(2) seemingly allows only 30 mw of such capacity to earn REC and SREC equivalencies. Another 20 mw of Delaware manufactured QFCP fuel cells (fueled by natural gas) may also earn such equivalencies, but they must be "customer-sited" - at locations apparently outside of a QFCPP.[5]

This 30 mw limitation may in implicit in the language of proposed rule 3.2.4: it keys the ability to have REC equivalencies to the provisions of 26 Del. C. § 353(d). But to ensure clarity I ask the Commission to make that limitation explicit, either by additional regulatory text or commentary in the adopting order.

Again, such additional clarification does not present an issue beyond the scope of the proposed rule. My comment 4 was a response that perhaps the Commission had overstated the

5 In fact, for every mw of customer-sited QFCP fuel cells (entitled to REC equivalencies), there must be a one mw reduction in the allowable capacity for a 31-50 mw QFCPP. 26 Del. C. § 364(d)(1)a. This suggests that the QFCPP is a separate category than customer-sited, natural gas powered, Delaware-manufactured fuel cells.

reach of the law when it said the CRECs could use QFCPP output – without any expressed limitation –to fulfill REC compliance goals. My comment is thus a "logical outgrowth" of the agency's proposed rule. Commenters can, and indeed should, be expected to point out instances where the agency in its proposals might have misstated or erroneously expanded the scope of the statutory command. And a final change in the proposed rule to reflect such a "correct" understanding would not work a "substantial" change or raise an "independent" issue to the initially proposed rule. If the PSC would agree with my position on the limitations imposed by § 353(d)(2), then a change to the final rule to capture the statutory constraint would not work a "substantive" change to the initial proposal.

Nor do I think other persons are shut out from challenging my interpretation. The comment period here extends to January 2, 2013. Others, including the Public Advocate, DP&L, and Bloom Energy, have ample time to offer countering views of the 30 mw limitation on equivalences for output from a QFCPP.[6]

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Comment 5 (Scope of Credit and Exemption for Transitional Contract Customers and Exempted Industrial Customers)

In my comment 5, I highlighted the issue of exactly what charges would be included in the credit to be accorded transitional contract customers under Rule 3.2.3.2.3 and what would be the scope of exempted charges for industrial customers under proposed rule 3.2.3.2.1. My comments focused on whether such credit amount and exemption would include the QFCPP tariff charges. It was driven by the fact that DP&L has rolled those QFCPP charges into other REC and SREC compliance costs for purposes of customer billing.

In an e-mail exchange, counsel for DP&L has now set forth the utility's view: that both transitional contract customers and exempted industrial customers will still be obligated to pay the QFCPP charges, even as they are credited for, or exempted from other RESPSA compliance costs. I attach a copy of the company's e-mail.

I happen to think that DP&L's reading of the provisions of 26 Del. C. § 364(b) is the better one and that all DP&L's distribution customers have to pay the QFCPP charges. In light of that, I think that – for me – further clarification is not needed at this time.

My suggestion would be for the Commission to note, in its order, the interpretation offered by DP&L: that all its customers must pay the QFCPP charges regardless of transitional contracts or exempted load. The Commission should then say that no one has challenged that view, so there is no need for the Commission to speak to it.

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6 Again, I had raised the 30 mw limitation issue in my comments submitted in the previous round of rule-making for the PSC's REPSA rules. *See* PSC Final Findings & Order No. 8150 at ¶ 15.

Conclusion

I would simply add that the criteria for do-over "substantive" changes should not be so strict as to require a new round of rule-making process every time a comment challenges assumptions or text in the initially proposed rules. If that was the regime, only rules which are uncontroversial could ever be adopted. As the DC Circuit once outlined:

> As petitioners recognize, however, [the agency] is not required to adopt a final rule that is identical to the proposed rule. Indeed, "[i]f that were the case, [the agency] could learn from the comments on its proposals only at the peril of subjecting itself to rulemaking without end." *First Am. Discount Corp. v. Commodity Futures Trading Comm'n,* 222 F.3d 1008, 1015 (D.C. Cir. 2000) (internal quotation marks omitted); *see American Water Works Ass'n v. EPA,* 40 F.3d 1266, 1274 (D.C. Cir. 1994). Agencies, are free — indeed, they are encouraged — to modify proposed rules as a result of the comments they receive. *See Arizona Pub. Serv. Co. v. EPA,* 211 F.3d 1280, 1300 (D.C. Cir. 2000) (noting that "the Agency's change of heart . . . only demonstrates the value of the comments it received"); *Kooritzky v. Reich,* 17 F.3d 1509, 1513 (D.C. Cir. 1994) ("It is an elementary principle of rulemaking that a final rule need not match the rule proposed, indeed must not if the record demands a change.").

Northeast Maryland Waste Disposal Auth. v. EPA, 358 F.3d 936, 951 (D.C. Cir. 2004) (*per curiam*) (bracketed materials inserted).

If you have any questions please contact me. I have sent electronic copies of these supplemental comments by e-mails addressed to Ms. Pamela Knotts, Lawrence Lewis, Esq., and Todd Goodman, Esq.

Respectfully submitted,

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Attachments

Copy of L. Lewis, Esq., e-mail dated Dec. 3, 2012
Copy of T. Goodman, Esq. e-mail dated Dec. 4, 2012

cc:

Pamela Knotts, PSC (electronic copy with attachments)
Lawrence Lewis, Esq., PSC (electronic copy with attachments)
Todd Goodman, Esq., DP&L (electronic copy with attachments)