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To

217 New Castle Street
Rehoboth Beach, DE 19971
March 26, 2012

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

Re: *Regulation Dckt. No. 56 – COMMENTS ON THE JANUARY 31, 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:

Pursuant to PSC Order No 8102 (Jan. 31, 2012) and the notice published at 15 DE Reg. 1386 (March 1, 2012), I am submitting my attached comments on the proposed revisions to the Commission's REPS rules.

While my comments are lengthy and sometimes technical, some of them are not groundbreaking. The changes proposed in parts 1 and 2 merely seek to clarify. According to an e-mail exchange with Staff on February 8, 2012, the procedures suggested in those parts of my comments are the same process that Staff understood would be followed going forward. My request then is simply to codify in the rules' text the common understanding of the matters set forth in parts 1 and 2..

My comments about proposed rule 3.2.4 are more substantial, and more difficult. In particular, the constitutional objections posed in part 3.B raise significant questions about the power of the executive branch to change statutory directives. I ask the Commission to give them careful consideration, and not unintentionally endorse an unconstitutional grant of legislative power.

If you have any questions please contact me. I have sent an electronic copy of this letter and comments to Ms. Knotts.

Respectfully submitted,

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Enclosures (11 copies of Comments)

COMMENTS ON THE JANUARY 31, 2012 PROPOSED REVISIONS TO THE PSC'S "RULES AND PROCEDURES TO IMPLEMENT THE RENEWABLE ENERGY PORTFOLIO STANDARD," 26 Del. Admin. Code § 3008

For purposes of these comments, the relevant statutory provisions in the "Renewable Energy Portfolio Standards Act" (26 Del. C. §§ 351-364) shall be referred to, and cited, simply as "section" or "§." Unless otherwise noted, such reference shall be to the appropriate section in Title 26, Chapter 1, Subchapter III-A. In contrast, the rules under consideration shall be referred to as the "rule" or "proposed rule," followed by the appropriate number. The term "rule" shall be used even though the relevant matter would be designated as a section within the RPS Rules.

1. Proposed New Rule 3.2.3.2 – Exempted Load and Actual Cost Recovery Only

The 2011 amendments to the Renewable Energy Portfolio Standards Act direct that DP&L (as the Commission-regulated electric company) "shall be responsible for procuring RECs, SRECs and any other attributes needed to comply" with the RPS standards"with respect to all energy delivered to such compan[y]'s end use customers." § 354(e).[1] In contrast to prior provisions applicable to retail suppliers (§ 358(f)(1)), the 2011 changes do not contain any explicit authorization to allow DP&L to recover the costs for procuring these RECs and SRECs. Proposed rule 3.2.3.2 seeks to remedy that omission by directing DP&L to recover its "RPS compliance costs" costs through "a non-bypassable charge" imposed on "all of its distribution system customers." According to the new rule , this new charge would be based "on the weighted average cost of RECs and SRECs supplied by" DP&L.

A. *Exempted Industrial Customers – Need for Addition of Exemption or Offsetting Credit*

The RPS compliance standard for any particular year is based upon a percentage applied to the "total retail sales" of electricity delivered to Delaware end user customers. § 354(a); Rule 3.2.1. However, excluded from such "total retail sales" are retail load amounts sold and delivered to "industrial customers with a peak demand in excess of 1,500 kilowatts." §§ 352(26), 353(b); Rules 2.2, 2.2.1. Presumably when retail suppliers bore the responsibility for REC and SREC compliance, such "exempted" load industrial customers did not pay for the costs of the supplier's REC and SREC procurement. Such "exempted" load was not subject to RPS requirements.

If DP&L is succeeding to the retail suppliers' RPS obligations, the same regime should apply. Industrial end user customers with exempted load should not be assessed the RPS

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1 As added by 78 Del. Laws ch. 99, § ?? (July 7, 2011). The 2011 amendments to the Renewable Energy Portfolio Standards Act shall be referred to as the "Bloom Energy Amendments."

charge based on their exempted load. The proposed rule however now speaks of DP&L imposing the RPS "non-bypassable charge" on "all of its distribution system customers." The only carve-out in the proposed rules is for "grandfathered contract" end users. Those with grandfathered contracts will be assessed the RPS charge but will then be given concurrently a offsetting credit in the full amount of the RPs charge. Proposed rule 3.2.3.2.1.

The proposed rule revisions should be changed to explicitly remove "exempted load" industrial customers from any liability for the charge imposed by proposed regulation 3.2.3.2. This exclusion should be written into the text of the rule and come either in the form of: (1) a textual exception to the "all its distribution system end user" phraseology or (2) the addition of a second, explicit, complete RPS credit offset mechanism to be applied to to all industrial end use customers with exempted load.

B. *Recovery of Only Actual RPS Costs for Particular Compliance Year*

Under § 358(f)(1), a retail supplier could (and can) recover from its customers only its "actual dollar for dollar costs incurred in complying with a state mandated renewable energy portfolio standard." *See also* Rule 4.1. Again, if DP&L is to follow the footsteps of the suppliers' duties, the rules should make clear that the charge now being allowed DP&L similarly extends only to the recovery of its *actual* costs of compliance for the given "compliance year." In particular, the statutory section does not allow for recovery of costs of RECs and SRECs to be "banked" for future use, but only those committed or retired for the particular compliance year.

While proposed rule 3.3.3.2 allows DP&L to recover its costs based on the "weighted average cost of the RECs and SRECs supplied by" DP&L, the rule should be expanded to make explicit that: (1) the total recovery of weighted average costs *cannot exceed* the actual costs incurred by DP&L and (2) that such "actual" costs are limited to those incurred in achieving compliance in the given compliance year.

2. Carry-Over of Retail Supplier Obligations and Entitlements to DP&L

Proposed Rule 3.2.3, much like § 354(e), simply says that beginning in 2012, DP&L "shall be responsible for procuring RECs, SRECs and other attributes needed to comply" with the applicable RPS standard "with respect to all energy delivered to such compan[y]'s end use customers." Yet both the statutory provisions, as well as the mirroring RPS rules, continue to speak in terms of the duties and entitlements of "retail suppliers." *See, e.g.*, §§ 354(g), (h); 356(a)-(e); 358(d)-(f); 360(a); 362(a). *See also e.g.*, proposed Rules 3.2.12 through 3.2.17.

The proposed rules should have an explicit provision announcing that with the changeover to DP&L procurement, DP&L also succeeds to the rights and obligations of "retail suppliers" as set forth in the statute and rules.

In particular, such a directive would make DP&L subject to the recovery and notice requirements set forth in § 358(f) and rule 4.0. DP&L would be obligated to notify its end use delivery customers, at least once a year, of the total costs incurred in complying with the RPS requirements for that particular compliance year. § 354(f)(3) & Rule 4.3.

3. Proposed Rule 3.2.4 - Output from Qualified Fuel Cell Provider Project

Newly proposed rule 3.2.4 announces that energy output produced by a Qualified Fuel Cell Provider Project (QFCPP") may be used by DP&L to fulfill its REC and SREC requirements "as determined by the Secretary of DNREC in consultation with the Commission." The language of the proposed rule is inconsistent with, if not contradicted by, the underlying statutory provision, § 353(d). There are two problems.

A. *Limitation on Output from Fossil-Fueled Project Entitled to Convert to REC Equivalents*

Statutory § 353(d), just as proposed rule 3.2.4, says that energy output from a QFCPP shall be available to "fulfill" DP&L's State-mandated REC and SREC requirements." However, the same subsection then goes on to provide that DP&L shall have the ability "to apply the REC and SREC equivalent fulfillment benefits . . . for 20 MW in addition to the 30 MW set forth in § 364 of this title for future *customer sited* applications of qualified fuel cell provider fuel cells." § 353(d)(2) (emphasis added). This provision creates two directives:

> (1) it allows DP&L to utilize the generation output from 20 MW of (fossil-fuel driven) fuel cell generation to gain REC equivalency *for generating fuel cells that are "customer-sited;"* and
>
> (2) it limits the REC equivalency available for generation output from a QFCPP to generation produced by 30 MW of "project-sited" fuel cells.

Consequently, even if a QFCPP has a overall capacity of greater than 30 MW (as permitted by § 364(d)(1)a.), only the output from 30 MW of generation from such a QFCPP can be accorded the output/REC equivalence granted by § 353(d).[2]

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2 It is unclear how the REC equivalency provisions of § 353(d) apply in the context of a fuel cell (either in a QFCPP or at a customer site) that is *powered by a renewable (non-fossil) fuel.* Output from such a renewable fuel powered cell would be entitled to earn "regular" REC credits, without any limitation. § 352(6)e., (18), & (20). This is so whether the fuel cell is located in a mass project or might be customer-sited in Delaware. Indeed, in the case of a fuel cell powered by a renewable fuel and installed before the end of 2014, the output from such a cell is entitled to a 3.5 multiplier in REC crediting. § 356(a)(2). However, in contrast to the REC equivalency formulas, these

Bloom Energy's operating subsidiary is currently asking the Secretary of DNREC for Coastal Zone Act approval for its QFCPP. Its application seeks permission to site a 50 MW fuel cell project (powered by natural gas) within the coastal zone. Given the possibility of approval, the proposed rules concerning REC equivalency for QCFPP output should explicitly note the statutory limit on REC equivalency: that output beyond that produced from 30 MW of fuel cell capacity at a QFCPP cannot gain REC equivalency.

B. *Delegation of Power to Determine REC Equivalency to Secretary of DNREC*

As noted above, proposed rule 3.2.4 announces that the criteria for converting output from a QCFPP to REC and SREC equivalencies shall be "determined by the Secretary of DNREC in consultation with the Commission." Such a rule is not an accurate statement of the corresponding statutory provision, § 353(d). The statutory text contains explicit directives for REC and SREC equivalency: 1 MWH of QFCPP output equals 1REC and 6 MWH of output (6 output RECs) equals 1 SREC. § 353(d)(1), (d)(1)a. Plus, the statutory text also imposes a cap on the use of output/SRECs: they cannot be used for more than 30% of SREC compliance in any one year unless other "regular" SRECs are unavailable or DP&L faces paying an alternative SREC compliance payment. § 353(d)(1)a. None of these formulas were "determined by the Secretary;" they were enacted as *statutory law* (by politically accountable actors) under the constitutional process set forth in Article III, section 18 of our State's constitution.

In the Bloom Energy tariff proceeding, the Secretary (joined by DP&L) asserted that he had been given the authority to amend, modify, and indeed repeal the formulas set forth in the statutory text of § 353(d)(1) . He found such power in § 3534(d)(1)b. It reads:

> The Secretary of DNREC may, after coordination with the Commission and a Commission-regulated electric company, adjust the requirements of this section including permitting a Commission-regulated electric company participating in a Commission approved project to exceed the percentages set forth in this section.

The Commission apparently endorsed that power in its final order. PSC Findings, Opinion and Order No. 8079 (Dec. 1, 2011) at ¶¶ 27, 55 & Ordering ¶ 2. The glitch is that such assertion by the Secretary comes with significant constitutional problems. The Commission did not

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"regular" RECs from a renewable powered fuel cell – even if multiplied - could not be converted into SREC equivalencies. Thus, the equivalency provisions of § 353(d) surely apply to output from fuel cells powered by non-renewable fuels, such as natural gas. Similarly, the provisions of § 353(d)(2) that allow *customer-sited* fuel cells (up to an aggregate capacity of 20MW) to earn REC equivalencies also apply to disbursed fuel cells that might be fueled by natural gas rather than a renewable fuel. It is an unresolved question whether fuel cells powered by a renewable fuel can earn the equivalencies and the SREC conversion benefit.

undertake to investigate those problems in its earlier Order.

Even assuming that the Secretary correctly reads the text of § 353(d)(1)b., the constitutional problem still remains: neither the General Assembly nor the Governor - alone or in unison - can confer upon an executive official the power to amend, repeal, or rewrite *statutory* text and *statutory* standards. *Cf. In the Matter of an Appeal of the Dept. of Natural Resources and Environmental Control*, 401 A.2d 93, 96 (Del. Super. 1978) (Walsh, J.) (agency cannot alter statutory permit scheme by imposing blanket prohibition rather than following statute's discretionary criteria for permit). *Compare Clinton v. City of New York*, 524 U,S. 417, 438 (1998) ("There is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes."); *Terran ex rel. Terran v. Sec'y of Health & Human Services*, 195 F.3d 1302, 1312 (Fed. Cir. 1999) (maj. opinion) ("The Constitution does not authorize members of the executive branch to enact, amend, or repeal statutes."); *id., 1*95 F.3d at 1317 (Plager, J., dissenting) ("Neither one House of Congress acting alone . . . nor the President or other Executive Branch official may constitutionally enact, amend, or repeal statutes"). Statutory text, and the dictates contained within such enacted language, can only be changed, or removed, by the procedure set forth in Article III, § 18.

Admittedly, over the years courts have upheld federal statutory directives that allow executive branch officers to suspend or supersede statutory directives, when executive officials find the occurrence of *statutory-specified* contingencies. *See Field v. Clark*, 143 U.S. 649, 690-94 (1892). *Cf. The Brig Aurora*, 7 Cranch (11 U.S.) 382, 388 (1813). And in such situations, courts have gone further and upheld a statutory grant of power to to executive officials to fill the resulting gap with new or additional "regulations" once the future contingency has occurred. *See J.W. Hampton, Jr., & Co. v. United States,* 276 U.S. 394, 401-11 (1928); *Terran*, 195 F.3d at 1312-13 (maj. op.) . *Cf. Touby v. United States*, 500 U.S. 160, 165-67 (1991). But in these contexts, the power granted to the executive officers comes with limited discretion: the statutory text defines the triggering event for executive action and then provides "intelligent principles" to govern the superseding executive regulations And, in most instances, the statutory text provides procedural protections to surround the executive's exercise of its his powers. *See Touby*, 500 U.S. at 166; *J.W. Hampton,* 276 U.S. 409-410; *Terran*, 195 F.3d at 1314-15.

The constitutional glitch with § 353(d)(1)b. (as the Secretary reads it) is that the provision contains a double dose of pure discretion to the Secretary. Nothing in the text of that statutory provision defines when, and upon what trigger, he may change the statutory formulas: there are no statutorily-defined contingencies. And nothing in the language of § 353(d)(1)b. sets forth "intelligent principles" (as determined by the legislature and Governor) to guide the Secretary in how he is to exercise any power to supersede the legislatively prescribed formulas. Indeed, during the Bloom Energy tariff proceeding, the Secretary proposed changes to the statutory formula, stretching out 15-20 years, even before any the statutory formula had became operative. And he made those changes premised on his view of the balance between ratepayer cost and support for other renewable generation; a balance not mentioned the text of § 353(d)

(1)b. Finally, in acting to change the equivalency criteria during the the Bloom Energy tariff process, the Secretary failed to comply with any rule-making process. While § 354(d)(1)b. does not mention such a proceeding, the state APA requires him to undertake such process as a condition of exercising delegated power. [3]

The Secretary's assertion of the power to change the statutory formulas in § 353(d)(1) raises significant constitutional questions. Unless the Commission is willing to wade in and provide answers to those questions, it should not endorse any reading of the statutory text which allows the Secretary to simply alter the statutory directives at his whim, without being able to look to any statutory standard and without any rule- making process. Yet proposed rule 3.2.4 seems to put the imprimatur of the Commission on just such a power.

Rather than endorse such an approach, the better response by the Commission would be to alter the text of proposed rule to read as follows:

> 3.2.4. 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).*

This changed rule would be consistent with the statutory text and at the same time avoid any endorsement of the Secretary's claim to be able to exercise unfettered power to change statutory directives. If the Secretary of DNREc believes he can exercise the power to make changes to the statutory formulas, he can then initiate his own proceeding to make such a determination. In that proceeding, after public notice, parties can present their constitutional objections.

Proposed rule 3.2.4 should be revised as above.

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3 *See* 29 Del. C. §§ 10102(7), 10113(a) (if agency is setting a statement of policy or promulgating criteria for decision of future agency matters, it is enacting a "regulation" and must follow formal statutory rule-making procedures including public notice, comment, and appealable reasoned decision).