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IN THE MATTER OF THE ADOPTION OF RULES AND PROCEDURES TO IMPLEMENT THE RENEWABLE ENERGY PORTFOLIO STANDARDS ACT, 26 DEL. C. §§ 351-363 AS APPLIED TO RETAIL ELECTRICITY SUPPLIERS (OPENED AUGUST 23, 2005; REOPENED SEPTEMBER 4, 2007; AUGUST 5, 2008; SEPTEMBER 22, 2009; AUGUST 17, 2010; SEPTEMBER 6, 2011; SEPTEMBER 18, 2012; FEBRUARY 2, 2017) - PSC REGULATION DOCKET NO. 56

Staff Review and Recommendation

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The Delaware Public Service Commission ("PSC" or "Commission") Staff ("Staff") submits this memorandum in response to public comments received during the public comment period ending April 24, 2017 regarding revisions to 26 Del. Admin. C. § 3008 approved for publication by PSC Order No. 9024 (February 2, 2017) ("February 2 Proposed Regulations" attached as Exhibit A). This memorandum supports the substantively-revised proposed regulations posted contemporaneously with this document ("Instant Regulations" attached as Exhibit B).

I. Background

The mandate for electric utilities to purchase a portion of their electricity from renewable sources began in 2005, when Delaware's legislature passed the Renewable Energy Portfolio Standards Act ("REPSA").[1] This was accomplished by requiring an annually-increasing percentage of electricity sold in Delaware[2] to come from Eligible Energy Resources ("EER").[3] Such a requirement is termed a Renewable Portfolio Standard ("RPS"). The RPS standard is met through procuring and retiring Renewable Energy Credits ("REC") which are produced by EERs; 1 Megawatt Hour ("MWh") of electricity produced from these EERs produces 1 REC. The RPS also has a specific requirement for solar photovoltaic ("PV") electricity production, referred to as a "solar carveout." Solar PV resources also generate credits called Solar Renewable Energy Credits ("SREC"), in the same fashion as EERs. REPSA was amended in 2007,[4] 2010,[5] and 2011.[6] Relevant to this proceeding, the 2010 Cost-Cap Amendments added Sections 354(i)&(j), which state:[7]

> (i) The State Energy Coordinator in consultation with the Commission, may freeze the minimum cumulative solar photovoltaics requirement for regulated utilities if the Delaware Energy Office determines that the total cost of complying with this requirement during a compliance year exceeds 1% of the total retail cost of electricity for retail electricity suppliers during the same compliance year. In the event of a freeze, the minimum cumulative percentage from solar photovoltaics shall remain at the percentage for the year in which the freeze is instituted. The freeze shall be lifted upon a finding by the Coordinator, in consultation with the

[1] 75 *Del. Laws,* c. 205 (2005).
[2] 26 *Del. C.* § 354(a).
[3] 26 *Del. C.* § 352(6).
[4] 76 *Del. Laws,* c. 165 (2007).
[5] 77 *Del. Laws,* c. 451 (2010). (The "Cost-Cap Amendments").
[6] 78 *Del. Laws,* c. 99 (2011). (The "Bloom Amendments").
[7] 26 *Del. C.* § 354(i), (j). ("Sections 354(i)&(j)").

> Commission, that the total cost of compliance can reasonably be expected to be under the 1% threshold. The total cost of compliance shall include the costs associated with any ratepayer funded state solar rebate program, SREC purchases, and solar alternative compliance payments.
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> (j) The State Energy Coordinator in consultation with the Commission, may freeze the minimum cumulative eligible energy resources requirement for regulated utilities if the Delaware Energy Office determines that the total cost of complying with this requirement during a compliance year exceeds 3% of the total retail cost of electricity for retail electricity suppliers during the same compliance year. In the event of a freeze, the minimum cumulative percentage from eligible energy resources shall remain at the percentage for the year in which the freeze is instituted. The freeze shall be lifted upon a finding by the Coordinator, in consultation with the Commission, that the total cost of compliance can reasonably be expected to be under the 3% threshold. The total cost of compliance shall include the costs associated with any ratepayer funded state renewable energy rebate program, REC purchases, and alternative compliance payments.

In September 2010, the PSC adopted changes to 26 Del. Admin. C. § 3008 to conform with the Cost-Cap Amendments.[8] These regulations generally mirrored the text of the Cost-Cap Amendments; as such, in April 2012,[9] the Delaware Department of Natural Resources and Environmental Control ("DNREC") began promulgating procedural regulations to further clarify the process for "freezing"[10] the RPS. The first procedural movement on DNREC's regulation appeared in the December 2013 Register of Regulations.[11] Further revised regulations were issued a year later.[12] A third set of revised regulations was published in November 2015.[13] DNREC Secretary's Order No. 2015-EC-0047,[14] dated December 15, 2015, finalized the regulations, which were memorialized in 7 Del. Admin. C. § 104, and became effective January 11, 2016.

[8] PSC Order No. 7834 (September 7, 2010), Exhibit A at 3.2.16, 3.2.16.1, 3.2.16.2.
[9] DNREC Start Action Notice 2012-03 "[T]o develop rules for administering the determination of the cost of the Renewable Portfolio Standard and whether or when to implement a freeze of the RPS." April 10, 2012. Available at http://bit.ly/2rjoHdn
[10] "Freezing" the RPS, as noted in the February 2 Proposed Regulations, "means suspension of the implementation of the annual increase in RPS as provided for under 26 *Del. C.* § 354(a), (b), (i), and (j)."
[11] 17 DE Reg. 600 (12/01/13).
[12] 18 DE Reg. 432 (12/01/14).
[13] 19 DE Reg. 397 (11/01/15).
[14] *Available at* http://bit.ly/2pP04eC

One month before the November 2015 DNREC revisions, the Delaware Division of the Public Advocate ("DPA") petitioned the PSC to reopen the instant docket to promulgate further regulations on the Cost-Cap Amendments, which the PSC denied in Order No. 8807 (December 3, 2015). The DPA filed an appeal with the Superior Court. On December 30, 2016, Judge LeGrow issued a Memorandum Opinion[15] overturning PSC Order No. 8807, and remanding the issue for further proceedings before the PSC consistent with the Opinion. DNREC has subsequently proposed to repeal its regulations in this matter in accordance with the Opinion.[16]

The Opinion imparted pertinent directives to the PSC in drafting the newly-mandated regulations. Specifically, the PSC must rely upon the "plain and ordinary meaning" in the statutory language.[17] Judge LeGrow opined that "if the General Assembly intended to draw a distinction… it is reasonable and logical to conclude such distinction would be explicit in the statute"[18] and instructed the PSC to be vigilant not to "collapse… plain, and presumably intentional, statutory distinction[s]"[19] where they may exist. Staff followed the Court's directive in drafting the February 2 Proposed Regulations and utilized the Court's rationale throughout these revisions.

II. Discussion

In the public comments received addressing the February 2 Proposed Regulations, seven issues arose and each is addressed below. The first four issues were controversial; the last three were not. In addressing each controversial issue, Staff presents background, justification for the wording of the February 2 Proposed Regulations, public comments received and Staff's response, any changes or newly-proposed language necessitated by the public comments, and substantiated Staff recommendations.

A. Controversial Issues

1. Defining "Total Retail Cost of Electricity for Retail Electricity Suppliers"

a. Background

[15] *DPA v. PSC,* C.A. N15A-12-002 AML. ("Opinion" or "Order")
[16] 20 DE Reg. 698 (3/1/17).
[17] Opinion at 11.
[18] *Id*. at 12.
[19] *Id*. at 11.

To determine whether "the total cost of complying with" the RPS requirement exceeds the threshold percentages indicated in Sections 354 (i)&(j), the statute instructs comparison against "the total retail cost of electricity for retail electricity suppliers" during a compliance year ("CY").[20] "Retail electricity supplier[s]" are defined in Title 26 as "a person or entity that sells electrical energy to end-use customers in Delaware, including but not limited to nonregulated power producers, electric utility distribution companies supplying standard offer, default service, or any successor service to end-use customers."[21] This definition is unambiguous in confining "retail" sales as those to "end-use customers." Further support is offered by the definition of "end-use customer" which "means a person or entity in Delaware that purchases electrical energy at **retail** prices from a **retail** electricity supplier or municipal electric company."[22] The definition of "wholesale" electric sales is similarly fundamental; the Federal Power Act instructs that the "sale of electric energy at wholesale" means "a sale of electric energy to any person for **resale**."[23]

b. Proposed Regulations

To properly effectuate Section 354(i)&(j)'s required calculation, the February 2 Proposed Regulations included a definition for total retail cost of electricity:[24]

> "the total costs paid by Non-Exempt Customers of the Commission-regulated electric company for the supply, transmission, distribution, and delivery of retail electricity, including costs paid to third party suppliers, during a respective Compliance Year."

The definition comports with the Court's directive that the Commission rely on the statute's "plain and ordinary meaning" and not "collapse… plain, and presumably intentional, statutory distinction[s]" where they may exist.[25] To properly effectuate the required calculation, this definition must provide meaning for every word in the statutory phrase "the total retail cost of electricity for retail electricity suppliers," as read to avoid surplusage.[26]

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[20] 26 *Del. C.* § 354(i), (j).
[21] 26 *Del. C.* § 352(22).
[22] 26 *Del. C.* § 352(7). (emphasis added).
[23] 16 U.S.C. § 824(d). (emphasis added).
[24] Exhibit A at 1.1.
[25] Opinion at 11.
[26] *See, e.g., Zhurbin v. State,* 104 A.3d 108, 111 (Del. 2014). ("We presume that the General Assembly purposefully chose particular language and therefore construe statutes to avoid

What are the "total retail costs of electricity?" And what does it mean for those costs to be "for" "retail electricity suppliers?" "Retail" inextricably defines the "total costs of electricity." The plain and ordinary meaning therefore denotes all bottom-line costs of all electricity sold for end-use. This begs another question: what is included in these "total" costs of electricity? It is axiomatic that no commodity of electricity exists without its being delivered to a point of sale. Electricity stores, where customers can purchase electricity without paying associated transmission or distribution charges, do not exist. This is the result of the network for electricity delivery and the properties of its use.[27] As such, the qualifier "total" requires that *all* charges mandated by receiving electricity service, including distribution and transmission charges, be included in the definition.

The second inquiry necessitates identification of "retail electricity suppliers." Per Title 26, they are "entit[ies] that sell[] electrical energy to end-use customers in Delaware," which include, but are not limited to, "nonregulated power producers, electric utility distribution companies supplying standard offer, default service, or any successor service to end-use customers."[28] Delmarva Power & Light Company ("Delmarva" or "DP&L") is the only standard offer service ("SOS") provider to end-use customers in Delaware.[29] Delmarva is the exclusive electric distribution utility in its footprint. As the owner and provider of the distribution network, Delmarva includes every end-user of electricity in its footprint among its distribution service customers. Any other entity selling electricity to end-use customers likewise falls within the expansive definition.

The last inquiry is the meaning of "for" in the statute. Staff's analysis bares two potential meanings: 1) the total cost "for" electricity services <u>incurred</u> by the retail electricity supplier to provide service; or 2) the total cost "for" <u>selling</u> retail electricity to end-use customers. These interpretations distinguish the "total costs for" **buying or providing** electricity versus the "total costs for" **selling** electricity. The statute's use of "retail" must be included in interpreting other language and, therefore, precludes the former meaning. This possibility of only including the costs incurred by the utility to provide electricity would implicate certain "wholesale" costs in the definition. Namely, Delmarva purchases supply at wholesale, for resale to its end-use customers at retail. The

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surplusage if reasonably possible.").

[27] A key property of electricity from retail electricity suppliers is that it cannot be used without some sort of connection to the electric grid. Electricity usage from a retail electricity supplier occurs at some location of end-use connected to the transmission and distribution system.

[28] 26 *Del. C.* § 352(22).

[29] 26 *Del. C.* § 1007(a).

Federal Power Act corroborates that this is a wholesale cost.[30] Retail and wholesale transactions are distinct and mutually exclusive; in electricity, there can be many wholesale sales (for resale), but there is only one retail sale (for end-use). If the cost of the power Delmarva purchases at wholesale is included in the definition, that definition must be incorrect. As a result, the plain and ordinary meaning of the statute dictates that due to the inclusion of the word "retail," only the total cost "for" selling retail electricity to end-use customers can provide the correct definition.

Following the Court's directive not to collapse statutory distinctions provides further support for Staff's analysis. Twenty-six *Del. C.* § 363 provides "Special Provisions for Municipal Electric Companies and… Cooperatives" for complying with the RPS requirement. Contrast Sections 363(f)&(g) with the requirements for Delmarva illustrated in Sections 354(i)&(j). Section 363(f) provides that "The total cost of complying with eligible energy resources shall not exceed 3% **of the total cost of the purchased power of the utility** for any calendar year,"[31] and is mirrored by subsection (g). In defining the relevant term of Sections 354(i)&(j), Staff noted the presumably intentional distinction between "purchased power" and "total retail cost of electricity." The costs referred to in 363(f)&(g) point explicitly to the "purchased power" which is the wholesale cost. Additionally, the adjective "total" defines not the total cost of retail *electricity* (as in Sections 354(i)&(j)) but the total cost only of *purchased power* (presumably for resale). Sections 363(f)&(g) therefore would preclude the cost of delivering electricity to retail customers, and the distinction between the two statutory provisions mandate that such delivery and transmission charges must be included under the instruction of the Order and the language of Sections 354(i)&(j).

c. Comments and Response

Public comments were received regarding this issue from the DPA, Mr. Gary Myers, Caesar Rodney Institute ("CRI"), and DNREC.

The DPA offered four unique arguments, and several other supporting arguments, seeking to rebut Staff's proposed definition. Their position is that the definition should include only the costs of electricity supply, to the exclusion of charges for distribution

[30] 16 U.S.C. § 824(d).
[31] (emphasis added).

and transmission service. They propose the following language for the definition of the total retail cost of electricity:[32]

> "[T]he price of electricity supply that Retail Electricity Suppliers charge Non-Exempt End-Use Customers for the Retail Electric Product that they provide to End-Use Customers."

The DPA's first argument is that Staff's definition of "total retail cost of electricity" conflates "retail electricity suppliers" with "end-use customers." The DPA asserts that "retail electricity suppliers **do not sell transmission, distribution and delivery service** to end-use customers. They sell electrical energy to end-use customers which is **then transmitted by transmission companies to CRECs, which then distribute and deliver** the… energy to end-use customers."[33] The DPA goes on to note that "Of course, **retail electricity suppliers don't offer delivery service to end-use customers; Delmarva does that**."[34] The DPA's position is untenable because the statutory definition of retail electricity suppliers specifically states that they "*include… electric distribution companies* providing standard offer… service."[35] Contrary to the DPA's characterization, when Delmarva sells supply to an end-use customer, Delmarva is simultaneously the retail electricity supplier, the transmission company, and the CREC providing, transmitting, and distributing energy. When other retail electricity suppliers provide the supply and transmission service, Delmarva remains the transmission owner and the CREC distributing and delivering the energy. Delmarva, as a retail electricity supplier, therefore supplies both transmission and distribution service to end-use customers. The DPA's contrary theory belies the facts.

In this section, the DPA also asks the Commission to examine the statutory definition of "retail electricity product," which the DPA feels "is instructive in this regard."[36] The DPA goes on to note that the definition of retail electricity product points explicitly to the product of electricity supply, a contention with which Staff agrees. However, embracing the Court's directive, Staff views the definition of retail electricity product as instructive in a different regard. While the DPA claims this definition should

[32] Comments of the Delaware DPA on Proposed Rules to Implement 26 *Del. C.* §§ 354(i) and (j) Promulgated by the Delaware PSC and Published on March 1, 2017, March 23, 2017, at 8. ("DPA Comments").
[33] DPA Comments at 9. ("CREC" means Commission-Regulated Electric Company, or Delmarva). (emphasis added).
[34] *Id.*at 10.
[35] 26 *Del. C.* § 352(22). (emphasis added).
[36] DPA Comments at 10.

be read into Sections 354(i)&(j) to corroborate its argument of only including supply charges, Staff underscores this phrase's absence as a plain, and presumably intentional, statutory distinction, which the Court directed should be given meaning in the regulation. The legislature could have required the calculation as a percent of the "total costs of retail electricity products." It did not. Courts consistently have upheld the "presum[ption] that the General Assembly purposefully chose particular language."[37] The General Assembly did not choose the phrase "retail electricity product" but rather "total retail cost of electricity for retail electricity suppliers." Accordingly, there is no merit to the DPA's contention that the cost-cap percentage ought to be determined as a percent of retail electricity products.

The DPA's second argument is that the February 2 Proposed Regulation charges end-use customers twice for the same costs. The DPA explains: "…including the transmission, distribution and delivery costs that end-use customers pay results in those customers essentially paying those costs twice: once on their actual bills, and again in the calculation that determines whether the minimum renewable requirements should be frozen."[38] If this premise were true, the DPA's proposed definition would similarly charge end-use customers twice for supply costs. But the argument is based on a flawed premise. The calculations regarding the freeze of the RPS requirements do not implicate any new charges on end-use customers. Rather, the purpose is to calculate whether a statutorily-provided-for-threshold has been breached in complying with the RPS requirement. Because the calculations do not provide for any new charges, this argument is devoid of factual basis.

The DPA's third argument is that not *all* retail electricity suppliers provide transmission, delivery, and distribution services to customers.[39] The DPA suggests that Staff's definition would "include a higher total amount attributable to Delmarva's standard offer service customers than to the customers of third-party suppliers such as Direct Energy."[40] That is not true. To wit, Staff's proposed definition includes all retail charges for electricity of retail electricity suppliers. An end-use customer of Direct Energy, for instance, receives supply and transmission service[41] from Direct Energy, but

[37] *Zhurbin v. State,* 104 A.3d 108, 111 (Del. 2014).
[38] DPA Comments at 10.
[39] *Id.* at 11.
[40] *Id.* at 11.
[41] As used here, "transmission service" means the financial obligation to provide transmission. In this scenario, Direct Energy would pay for transmission service and Delmarva, the transmission owner, would receive revenues to provide transmission to the end-use customer to whom Direct Energy is providing supply service.

distribution and delivery service from Delmarva. Both Direct Energy and Delmarva are retail electricity suppliers. As a result, 100% of the retail costs for Direct Energy (for supply and transmission) and Delmarva (for distribution and delivery) would be included in the calculation. An end-use customer receiving supply service from Delmarva also receives transmission, distribution, and delivery from Delmarva. For each of these customers, 100% of the total costs would also be included in the definition. The argument misinterprets the meaning of retail electricity suppliers and the implications of the February 2 Proposed Regulations.

The DPA's fourth argument is that, assuming the statute is ambiguous, tenets of statutory construction support its interpretation.[42] But this provision is not ambiguous. The DPA's argument attempts to meld several component parts. First is the contention that REPSA is "all about electricity supply, not transmitting, distributing and delivering that electricity supply."[43] The DPA points to precedent illustrating that a provision in isolation is often clarified by the remainder of the statutory scheme.[44] Staff has offered its views on clarification of this provision by the remainder of the statute – in noting above that 26 *Del. C.* § 363(f)&(g) requires evaluation against the "total cost of purchased power" and therefore offers a "presumably intentional distinction" from Sections 354(i)&(j) which offers support for Staff's definition. In the second part of the argument DPA then focuses on the policy statements of REPSA pointing to the benefits of electricity supply from renewable resources.[45] After, it notes "the policy statement refers to electricity from renewable energy resources – not electricity transmitted and distributed to Delaware electricity customers."[46] Staff emphasizes that *there is no electricity from renewable energy resources without that electricity being transmitted and distributed to customers.* The DPA's line of reasoning leaves out this crucial component of electricity supply: that it necessarily must be delivered to an end-use customer. The last part of the DPA's argument asserts that there "is a good reason that the General Assembly used different terms for municipal utilities and retail electric cooperatives."[47] Specifically, the DPA points to the fact that municipals serve only their own customers, and that revenues can be used to fund other community services.[48] Staff would point to the guidance of the Court,[49] and agree with the DPA that there is in fact "good reason" that

[42] DPA Comments at 11.
[43] DPA Comments at 12.
[44] *Id.* at 12. Citing *Terex Corp. v. Southern Track & Pump, Inc.,* 117 A.3d 537, 543-44 (Del. 2015).
[45] *Id.* at 12. Citing 26 *Del. C.* § 351(b), (c).
[46] *Id.* at 12.
[47] *Id.* at 14.
[48] *Id.* at 14.
[49] *Zhurbin v. State,* 104 A.3d 108, 111 (Del. 2014) ("We presume that the General

different terms were used – because the General Assembly intended different meanings, as illustrated by Staff's proposed definition. Regardless, the DPA's argument is a non-sequitur, as what the municipals do with the money they collect from their end use customers has nothing to do with the definition of total retail cost of electricity. The similarities between Sections 363(f)&(g) and 354(i)&(j) are far more pervasive than the DPA's strained connection between alternate language and the use of electric funds by municipalities.

Mr. Gary Myers does not offer text for an alternative definition from the February 2 Proposed Regulations, but his position mirrors the DPA's. Mr. Myers similarly believes that the definition should only include supply costs, to the exclusion of transmission and delivery charges.[50] He makes three arguments akin to the DPA's.

Mr. Myer's first charge is similar to the DPA's first – namely, that Staff conflates "retail electricity suppliers" with "end-use customers." Mr. Myers notes "[t]he statutory text says nothing about 'costs paid by customers,' or 'all customer costs,' or even all revenues or costs *received by* retail electricity suppliers. Rather, it directs that the appropriate reference is to be the '*cost of* electricity *for* retail electricity suppliers:' that is, the outlay… *incurred… by retail electricity suppliers to produce or procure electricity.*"[51] This statutory interpretation boldly ignores the word "retail." By definition, costs incurred *by* suppliers to procure electricity is "a sale of electric energy to any person for resale" which, as the Federal Power Act codifies, is a "sale of electric energy at wholesale."[52] That such sales are at wholesale necessarily preclude them from fulfilling the statutory requirement of a "retail" cost. In fact, Mr. Myer notes this elsewhere in his comments: "A retail electricity supplier thus bears the costs of procuring (*at wholesale*)… the 'electrical energy' *that it will then sell to end-use customers.*"[53] He thereby clearly delineates the distinction between the cost of procuring energy, at wholesale, and the subsequent sales to end-use customers, at retail. As Staff substantiated above, only one of these transactions is at retail, and only that transaction may provide the statutorily-required "retail costs." The final sale from retail electricity suppliers to end-use customers is the only retail sale, and therefore the sole basis for the definition of total retail cost of electricity.

Assembly purposefully chose particular language…").
[50] G. Myers' 2017 comments in response to March 1, 2017 PSC NOPR: PSC's proposed REPSA cost cap rules (20 DE Reg. 713 (March 1, 2017)), March 31, 2017, at 30. ("Myers Comments").
[51] Myers Comments at 30. (internal citation omitted). (emphasis in original).
[52] 16 U.S.C. § 824(d).
[53] Myers Comments at 31. (emphasis added).

Mr. Myers next suggests that "retail electricity suppliers do not incur distribution or delivery charges."[54] Staff has rebutted this claim. To wit, Delmarva is the exclusive provider of distribution service in its service territory and alone provides delivery service to end-use customers while simultaneously providing transmission service in support of their role as the standard offer service supplier.[55] As such, Delmarva, as a retail electricity supplier, supplies both transmission and distribution service to end-use customers. Mr. Myers further tries to draw a distinction between Delmarva in its role as a supplier and its role as a distribution utility. The statutory definition of retail electricity suppliers includes electric utilities, thus rending Mr. Myers' contention meritless. .[56]

Mr. Myers then posits "what costs do retail electricity suppliers bear for the retail cost of electricity?"[57] This argument presumes that "retail" implies simply that there must be some costs *aside* from the wholesale costs Mr. Myers previously acknowledged.[58] This frame of reference overlooks the fact that wholesale and retail transactions are distinct. A wholesale transaction is not merely turned into a retail sale when "suppliers' additional costs" are "incurred by them in order to retail the" energy, as Mr. Myers asserts.[59] Wholesale transactions and retail transactions occur in distinct regulatory constructs, and the associated jurisdictional boundaries are crucial and often contested in court. Indeed, Mr. Myers concedes this in his comments.[60] Additionally, Mr. Myers claims that the costs that should be added to the "wholesale" costs to determine the "total retail costs" would "include wholesale purchase or production costs *plus* the "back-office" and other additional costs incurred by suppliers to retail their electrical energy product."[61] To the extent this argument seeks to exclude transmission and distribution charges from the calculation of the total retail cost of electricity, it fails in circumventing the fact that "other additional costs incurred… to retail… electrical energy product[s]" would **necessarily** include costs for transmitting and distributing that electricity. Yet there is no method available "to retail" electrical energy products without associated transmission and delivery service.

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[54] *Id.* at 31.
[55] *Supra* at 6, 8.
[56] 26 *Del. C.* § 352(22).
[57] Myers Comments at 32.
[58] *Id.* ("The adjective retail suggests that the described amount includes more than the suppliers' "wholesale" costs of power.")
[59] *Id.*
[60] *Id.* at 18. ("FERC [Federal Energy Regulatory Commission] holds the *exclusive* power to determine and oversee the reasonableness of rates and compensation charged or received for the wholesale sale of energy and capacity." Citing 16 U.S.C. §§ 824(b), 824d(a), 824e(a). *See also Hughes v. Talen Energy Marketing,* 136 S.Ct. 1288 (2016).)
[61] *Id.* at 32.

Mr. Myers then requests of the Commission "a surrogate for the suppliers' retail cost of electricity" for use in the calculation.[62] He suggests that the Commission require determination of a "wholesale cost" and "additional retailing costs."[63] This argument is flawed because wholesale costs and retail costs are exclusive, and not interchangeable under the statutory text of Sections 354(i)&(j). Mr. Myers then asserts "the amount a retail electricity supplier charges end-users for "electric supply" represents its costs for procuring and selling the electrical energy product."[64] This analysis overlooks transmission costs, which are associated and billed by every retail electricity supplier for any sales of electricity to the supply customers of that retail electricity supplier. This argument relies upon the disproven assertion that there is some method of "procuring and selling" electrical energy without it being delivered to end-use customers. It therefore must be rejected.

Mr. Myers also echoes the DPA's argument that the provisions for municipal electric suppliers and cooperatives in Section 363 support his reading of the term as to only include supply costs. Staff above rebutted this argument as meritless.[65]

CRI provides a short assertion that mirrors the arguments Staff addressed above. These arguments add no discernable substance to the dispositive issues.

DNREC's comments on this issue support Staff. It endorses Staff's analysis regarding the difference between the statutory language used in Sections 363(f)&(g) and 354(i)&(j) denoting a plain and presumably intentional statutory distinction which must not be collapsed in defining the term. In further bolstering Staff's positions, DNREC states that "[e]lectricity is not a retail product unless and until it is delivered to customers… It is not physically possible to buy electricity from Delmarva Power without using the company's transmission and distribution assets."[66]

d. Revised Language and Staff Recommendation

[62] *Id.* at 33.
[63] *Id.*
[64] *Id.*
[65] *Supra.* at 7-9.
[66] Comments of the DNREC Division of Energy & Climate, April 24, 2017, at 3. ("DNREC Comments").

Staff's proposed definition for Total Retail Cost of Electricity in the Instant Regulations is as follows:[67]

> "the total costs paid by Non-Exempt Customers of the Commission-regulated electric company for the supply, transmission, distribution, and delivery of retail electricity, including costs paid to third party suppliers, during a respective Compliance Year."

Staff carefully considered the comments on this issue and has found no basis to change this definition. Staff recommends that the Commission approve for publication the Instant Regulations as set forth in Exhibit B.

2. Bloom Fuel Cell

a. Background

By way of the 2011 Bloom Amendments the General Assembly amended REPSA to add provisions related to Qualified Fuel Cell Providers and Qualified Fuel Cell Provider Projects ("QFCPP," "Bloom"), which provided procedures for fuel cells that were: manufactured in Delaware, capable of being powered by renewable fuels, and designated as an economic development opportunity for the state.[68] Importantly, the Bloom Amendments did not alter REPSA's definition of EERs to include QFCPPs, and therefore the QFCPP does not produce RECs or SRECs. However, the Bloom Amendments did provide for REC equivalencies, a method for "reducing" REC and SREC requirements of the CREC in proportion to the output of the QFCPP[69] in exchange for the monthly disbursement of CREC customers to the QFCPP.[70]

At issue is whether the costs of the monthly disbursements to the QFCPP should be included in the calculation of cost of compliance under Sections 354(i)&(j). Specifically, the relevant portion of Section 354(i) reads "the total cost of compliance shall include the costs associated with any ratepayer funded state solar rebate program, SREC purchases, and solar alternative compliance payments," which Section 354(j) mirrors as to all renewable energy.

[67] Exhibit B at 1.0. Updates from the February 2nd Proposed Regulations are in strikethrough(deletions) and underline(insertions), and result in the Instant Regulations in Exhibit B.
[68] 26 *Del. C.* § 352(16).
[69] 26 *Del. C.* § 353(d). *See also* 26 *Del. C.* § 364(d): "entitle the [CREC] to **reduce** its REC and SREC requirements as provided for in § 353(d) of this title…" (emphasis added).
[70] 26 *Del. C.* § 364(b).

PSC Staff has taken various positions on this issue in previous regulatory proceedings. However, in light of the remand of the Opinion, PSC Staff now views its previous positions as irrelevant to this proceeding. As previously discussed, the Opinion provides specific guidance as to how the Commission and Staff should interpret Sections 354(i)&(j) on remand, holding that the plain and ordinary meaning in the statutory language should be observed with instruction not to collapse plain, and presumably intentional, statutory distinctions where they exist.

b. Proposed Regulations

Accordingly, the February 2 Proposed Regulations excluded the QFCPP disbursements from the calculation of total cost of compliance.[71] The plain and ordinary meaning of the statute, which must be given meaning in the regulation, omits the QFCPP project or any of its associated costs. Including a cost that is not mentioned in the enumerated components of the cost of compliance would be outside the plain and ordinary meaning of the General Assembly's deliberate language and would contravene the Court's remand directive.

Section 363(e) of REPSA further substantiates Staff's position. Section 363 memorializes parallel cost-cap provisions for municipalities and co-ops, providing a similar statutory construction against which to contrast Sections 354(i)&(j). Section 363(e) states: "[t]he total cost of compliance with this section shall include the costs associated with any ratepayer funded renewable energy rebate programs, REC and SREC purchases, *or other costs incurred in meeting renewable energy programs.*"[72] Sections 354(i)&(j) have no instruction to include "other costs incurred" in meeting REPSA's requirement. The Court instructed the Commission to give meaning to distinctions where they exist in the statute. Courts "presume that the General Assembly purposefully chose particular language."[73] As a result of this holding and the Court's directive, the absence of the phrase "other costs incurred in meeting renewable energy programs" in Sections 354(i)&(j) compels that other costs incurred to meet REPSA's requirement, aside from those specifically enumerated in Sections 354(i)&(j), must not be included in the calculation of total cost of compliance.

c. Comments and Response

[71] Exhibit B at 3.2.21.3 and 3.2.21.4.
[72] 26 *Del. C.* § 363(e). (emphasis added).
[73] *Zhurbin v. State,* 104 A.3d 108, 111 (Del. 2014).

Public comments were received regarding this issue from the DPA, Mr. Gary Myers, CRI, DNREC, the Delaware Solar Energy Coalition ("DSEC") and 104 additional members of the public.

The DPA and Mr. Myers both illustrate at length previous positions that Staff has taken in this matter in previous regulatory proceedings.[74] This matter is on remand from the Superior Court, and previous positions are not relevant to determine whether Staff – here – has abided the Court's mandate.

The DPA then misconstrues Staff's position, which demands clarification. DPA's argument on this subject begins as follows:[75]

> In Staff's view, the [Bloom amendments are] irrelevant because Bloom did not exist at the time the General Assembly enacted Sections 354(i) and (j), and therefore the General Assembly's subsequent amendment specifically providing that QFCPP output can be used to satisfy a CREC's REPSA obligations cannot be considered.

This is not Staff's view. Still, the DPA bases several of its arguments on this mistaken premise, which are addressed in turn below.

The DPA argues "first, following Staff's argument to its natural conclusion, no amendment to a statute can ever be considered."[76] The DPA must be asserting that Staff has overseen language in the Bloom Amendments declaring that Bloom should be considered in the calculation of total cost of compliance. DPA cites *Simmons v. Delaware State Hospital* which held that "when the General Assembly amends a prior enactment by a material change in the language, the courts will presume that the legislature intended the changed meaning."[77] There is no such language in the Bloom Amendments or the REPSA. DPA points to no plain statutory language in the Bloom Amendments or elsewhere that requires inclusion of the costs of the Bloom project in the calculation of total cost of compliance. *Simmons* is instructive in a different regard. Consistent with *Simmons'* holding that amendments to legislation equate to changed meaning, it follows that *if the legislature chose* ***not*** *to change the language than there is an intention* ***not*** *to change the meaning.* The Bloom Amendments in no way altered Sections 354(i)&(j). Just

[74] Myers Comments at 15, DPA Comments at 20-22.
[75] DPA Comments at 20.
[76] *Id.*
[77] *Simmons v. Delaware State Hospital*, 660 A.2d 384, 389 (Del. 1995).

as the General Assembly added an entire complex regulatory construct[78] and significant associated cost to REPSA through the Bloom Amendments, it similarly could have added Bloom costs in the calculation of the total cost of compliance, which specifically speaks to customer cost protections. It did not. The General Assembly could have added the phrase (as in Section 363(e)) "other costs incurred in meeting renewable energy programs" to include these new costs. It did not. As a result of misstating Staff's position and misinterpreting Delaware precedent, the DPA's claim is without merit.

The DPA's third and fourth claims persist with its mistaken assertion of Staff's position is that the February 2 Proposed Regulations consider neither that statutory construction must effectuate the General Assembly's intent,[79] nor that statutes must be read as a whole.[80] These claims rely, ostensibly, upon the idea that Staff excluded Section 353(d) [81] in interpreting of the total cost of compliance. These claims miss the mark. In fact, the General Assembly specifically dictates the manner in which the output of Bloom generation may "fulfill" the RPS requirement elsewhere in the statute, which must be considered if, as the DPA asks and precedent requires, the statute is to be read as a whole. Section 364(d) explicitly speaks to how the output of the Bloom fuel cells should be viewed in relation to Section 353(d): Bloom "entitle[s] the [CREC] to **reduce** its REC and SREC requirements **as provided for in § 353(d)** of this title…"[82] The DPA overlooked the characterization of the Bloom output in Section 364(d), and therefore failed to read the statute as a whole, in contravention of the precedent it offered as support. Costs associated with reductions in the RPS requirement of the CREC is not a category enumerated in Sections 354(i)&(j) and therefore are not allowed to be included in the calculation for total cost of compliance. As the DPA has failed to show how the Bloom costs fit within one of the enumerated costs of compliance as provided for in Sections 354(i)&(j), this argument is without merit.

The DPA's last argument regarding this issue centers around the fashion in which the Bloom costs are represented on Delmarva customer bills. It provides several examples that illustrate Delmarva's communications regarding REPSA compliance often include output from the Bloom fuel cells. Staff has no issue with the examples, nor the characterization that Bloom fulfills a significant portion of Delmarva's REPSA compliance

[78] The Bloom Amendments added voluminously to REPSA, including amending to or adding §§ 352(16), 352(17), 353(c), 353(d), 354(a), 354(d), 354(e), 354(f), and 364(b)-(i).
[79] DPA Comments at 21.
[80] *Id.*
[81] Section 353(d) generally speaks to the fact that QFCPP output "shall fulfill the [CREC]'s state-mandated REC and SREC requirements…"
[82] 26 *Del. C.* § 364(d). (emphasis added).

requirement. However, this is not the salient consideration. As discussed further below in reply to Mr. Myers' comments on this issue, the chief consideration must be whether the costs associated with the QFCPP fall within one of the enumerated categories provided in Sections 354(i)&(j). This enumeration makes no mention of Bloom output, costs associated with reducing the RPS requirement, or other cost considerations. Regarding categories in which the Bloom costs could conceivably reside, the statute only speaks to the inclusion of "costs associated with… REC purchases."[83] The DPA actually concedes that Bloom does not produce RECs by way of proposed revisions elsewhere in its submitted comments. On page 16, the DPA provides proposed revisions to sections of the February 2 Proposed Regulations, specifically the sections that require as an element of the calculation of the total cost of compliance "the total cost of RECs retired to comply with the RPS."[84] The DPA proposes to add to each of these sections the following: "…including the amount the CREC paid for QFCPP output that it used to satisfy its REC requirement."[85] If the DPA's assertion that "the QFCPP output walks like a REC/SREC and quacks like a REC/SREC. It is a REC/SREC"[86] is in fact true, then the DPA should feel no reason to amend the February 2 Proposed Regulations in the manner it proposed, since the total costs of RECs are already included in the proposed calculation. If instead, as the DPA concedes through its proposed additions and as demonstrated by the language in Section 364(d), the QFCPP output **reduces** the CREC's REPSA requirement, then the attendant costs are not associated with the purchase of RECs and are therefore rightly excluded from the calculation of total cost of compliance. The DPA's argument is thus without merit.

Mr. Myers' comments support Staff's assertion that the output of the QFCPP does not produce RECs or SRECs.[87] He instead bases his assertion that the cost of the QFCPP should be included in the calculation on "whether the surcharge payments paid for the Bloom generation… constitute a part of the "cost of complying" with the renewable portfolio requirements."[88] Mr. Myers then goes on to cite instances throughout REPSA where it notes that the output of the QFCPP "fulfils" Delmarva's RPS requirement.[89] He posits "comply with" and "fulfil" are synonyms. This argument is compelling. However, Staff notes that, while Sections 354(i)&(j) instruct calculation against "the total cost of complying with this requirement" generally, the statute then specifically enumerates

[83] 26 *Del. C.* § 354(j).
[84] *See* DPA Comments at 16.
[85] *Id.*
[86] *Id.* at 17.
[87] Myers Comments at 12.
[88] *Id.*
[89] *Id.* at 12, 13.

which costs may be included in this "total cost of compliance." In Staff's view, the enumerated components of the total cost of compliance have plain and ordinary meaning which, in accordance with the Order, the resulting regulations must illustrate. In the alternative, the Commission would be forced to decide what is and isn't included in the "cost of complying" with the RPS requirement. This is not a decision that the statute leaves to the Commission. Why, then, does Staff recommend that only the enumerated costs of compliance should be included in the calculation? This justification stems from the guidance of the Order not to "collapse… plain, and presumably intentional, statutory distinction[s]"[90] where they may exist. As noted before, the parallel provisions for municipalities and rural electric cooperatives found in Section 363 include in the calculation for total cost of compliance "other costs incurred in meeting renewable energy programs," a clear statutory distinction which must be given meaning in these regulations. Sections 354(i)&(j) lack this direction to include "other costs," leading Staff to limit those elements included in the calculation of total cost of compliance to specifically those components listed therein. Essentially, as a result of the clear statutory distinction between Sections 354(i)&(j) and 364(d), Staff's view is in contrast with Mr. Myers' over-arching assertion that the essential question is "whether the Bloom generation constitutes a cost of complying." Staff instead views the salient consideration as "does the Bloom generation fall within one of the enumerated categories provided for in the statutory language," since "other costs" are not provided for in Sections 354(i)&(j). Mr. Myers has previously conceded that the output of the QFCPP is not a REC or SREC, and therefore does not fall within one of the statutorily enumerated categories of Sections 354(i)&(j). As a result, any costs associated with the output of the QFCPP must not be included in the calculation of total cost of compliance.

Mr. Myers offers additional excerpts from the legislative history surrounding the Bloom Amendments and resulting Commission proceedings, showing that many have characterized the output of the QFCPP as "fulfilling" the RPS requirements.[91] Staff concedes that there are instances, both in the statute and in the legislative history, that point to the output of the QFCPP as fulfilling the CREC's RPS requirements. These instances have no bearing, as the salient question is not whether the QFCPP "fulfills" a part of the RPS requirement, but rather whether the QFCPP falls into one of the enumerated categories that the statute instructs constitutes the "total cost of compliance."

[90] Opinion at 11.
[91] Myers Comments at 13, 14.

Mr. Myers' next argument relies upon the word "includes" in the statute, observing that "the listing in each 'definitional' sentence is prefaced by the term 'includes.'"[92] He then notes persuasive precedent showing that the word "includes" illustrates that the following list is not exhaustive, but representative of the types of things that should be included in the calculation. This argument ignores Delaware precedential case law requiring statutes be read to avoid surplusage.[93] If Mr. Myers' reading of Sections 354(i)&(j) is correct, then such interpretation of the word "includes" should be able to be placed in the context of the parallel section of the statute, Section 363(e), without surplusage. However, Section 363(e) caries both the term "includes" and the phrase "other costs incurred in meeting renewable energy programs." Mr. Myers claims that the word "include" "reflects a legislative decision not to limit 'the total cost of compliance' to the specifically listed costs but rather to also [*sic*] encompass similar charges and expenses."[94] However, if this logic is applied likewise to Section 363(e), the word "include" would carry exactly the same meaning as the term "other costs incurred in meeting renewable energy programs." The second phrase would then be duplicative in effectuating the statute, and therefore meaningless. Mr. Myers' argument fails to the extent his preferred interpretation would violate precedent when applied to an analogous section of the statute.

Mr. Myers' last argument stems from the "constitutional avoidance cannon" which states that agencies "should avoid interpretations that would render a statute unconstitutional, if that can be done without impairing the legislature's purpose."[95] Mr. Myers then aptly illustrates the quandary of the FPA's federal preemption of state actions, noting that "[t]he Bloom Energy scheme bears a striking, if not mirror, resemblance to Maryland's 'contract for differences,'" which he explains was struck down by the Supreme Court as unconstitutional.[96] Mr. Myers submits that the Supreme Court has held that "States may not seek to achieve ends, however legitimate… that intrude on FERC's authority over interstate wholesale rates."[97] The QFCPP does not do this. FERC has approved market mitigation rules that guard their authority over interstate wholesale

[92] *Id.* at 16. (By this he means that Sections 354(i)&(j) note that the total cost of complying with the RPS requirement shall **include…**)
[93] *See, e.g., Zhurbin v. State,* 104 A.3d 108, 111 (Del. 2014). ("We presume that the General Assembly purposefully chose particular language and therefore construe statutes to avoid surplusage if reasonably possible.").
[94] Myers Comments at 16.
[95] *Id.* at 17, citing *Hazout v. Tsang Mun Ting*, 134 A.3d 274, 286 (Del. 2016).
[96] *Id.* at 20.
[97] *Id.* at 19.

rates in the form of a Minimum Offer Price Rule ("MOPR").[98] The MOPR specifically determines which resources are unjustly infringing on FERC's control over interstate price formation, and which resources are not (resources subject to the MOPR may be unjustly influencing wholesale price formation, resources exempt from the MOPR are, by definition, not unjustly influencing such price formation[99]). The resource engaged in the state-sponsored "contract for differences" espoused in Mr. Myers' comments was subject to the MOPR.[100] In contrast, the QFCPP specifically applied to the FERC for a sanctioned waiver of the MOPR,[101] which FERC granted.[102] Accordingly, FERC deemed the QFCPP as not unjustly impacting wholesale price formation. Concomitantly, the QFCPP is in no constitutional jeopardy, thus rendering Mr. Myers' argument meritless.

CRI makes several arguments on this issue with the aim of including the QFCPP costs in the calculation of the total cost of compliance. The first argument discusses the Commission's approval of the Bloom sections of Delmarva's Tariff[103] in 2011.[104] Nothing regarding the Commission's approval of the QFCPP is at issue here, so this comment is beyond the scope of this proceeding. CRI's second argument claims that "[t]he QFCP RECs are equivalent to any REC from any [EER]."[105] This assertion has no factual basis. All other RECs are created by way of EERs producing generation. The QFCPP is not an EER and therefore cannot produce RECs. CRI's next argument relates to the annual report of RPS cost by Delmarva,[106] which are not at issue in this proceeding; this comment is thus out of scope. Their next argument stems from the recommendation of the working group in PSC Docket No. 13-250 that the QFCPP cost be included on Delmarva customer bills.[107] This argument is beyond the parameters of the Court's remand and obfuscates the dispositive issues. CRI's next contends that "[i]f the QFCP wasn't supplying RECs,

[98] *See* Tariff of PJM Interconnection, LLC at Section 5.14(h). Available at http://bit.ly/2sv8GRd
[99] *See* 153 FERC ¶ 61,066 (2015) at P2. ("PJM's MOPR is designed to protect against buyer-side market power by setting a price floor, i.e., a minimum bid, and by requiring that all new, non-exempted resources bid at that floor, or higher, absent a demonstration, through a unit-specific review process, that a lower bid is justified based on the resource's operational economics. PJM uses this process to assess costs and revenues of the resource and to ensure that any alleged cost advantages are not the result of uncompetitive, discriminatory subsidies or out-of-market payments.")
[100] *See Hughes v. Talen Energy Marketing,* 136 S.Ct. 1295 (2016), citing 137 FERC ¶ 61,145 (2011).
[101] *See* FERC Docket No. ER12-1420-000.
[102] 139 FERC ¶ 61,087 (2012).
[103] *See* Delmarva Tariff, Third Leaf No. 74 *et seq.*
[104] RE: 3008 Rules and Procedures to Implement the Renewable Energy Portfolio Standard (Opened August 23, 2005), PSC Docket 56, published March 1, 2017. May 9, 2017. ("Comments of CRI") at #1.
[105] Comments of CRI, at #2.
[106] *Id.* at #3.
[107] *Id.* at #4.

Delmarva would have had to purchase them under contract or on the spot market."[108] This contention is also without basis in fact. As noted above, the QFCPP does in fact fulfill a substantial portion of Delmarva's RPS requirement by reducing the compliance obligation through REC equivalencies. As a result, the QFCPP does not supply RECs, but Delmarva is not required to purchase additional RECs, as these equivalencies do fulfill a large portion of the REPSA requirement. CRI provided an addendum to its original comments on April 6, 2017, where it makes one additional argument. This new argument provides Staff's positions from prior regulatory proceedings, which Staff has previously contended are no longer relevant, as this proceeding is solely to respond to the remand of the Opinion.

DNREC offers several separate arguments in support of Staff's position to exclude the QFCPP costs from the calculation of cost of compliance. The first assertion offered is that Bloom is not enumerated among the definitional components of the cost of compliance in Section 354(i)&(j).[109] That is fact. DNREC's second and third arguments note that Bloom is not an EER as defined by REPSA, and therefore does not produce RECs.[110] In this section DNREC also responds to the comments of Drew Slater, the Delaware Public Advocate, which were made at the April 6, 2017 PSC meeting. Mr. Slater provided a comment regarding his communications with Mr. Colin O'Mara, a prior Secretary of DNREC. Mr. O'Mara was the Secretary of DNREC at the time of the Cost-Cap Amendments. Mr. Slater commented that the intent of Mr. O'Mara was "always to include Bloom" in the calculation of cost of compliance.[111] DNREC claims that they have recently conferred with Mr. O'Mara and provided a reply to Mr. Slater's public comment by stating "Mr. O'Mara confirmed that he agrees with DNREC's views on the RPS cost cap, and that REPSA does not define QFCP output as renewable energy in REPSA or include QFCP output as a component of the cost of compliance."[112] In Staff's view, the comments on this matter of Mr. Slater and DNREC refute each other, and are therefore not persuasive to change the recommendation of Staff.

DNREC's last argument is that neither DNREC nor the PSC has the authority to freeze the QFCPP costs, and therefore they should be excluded from the calculation of total cost of compliance. This argument is unsustainable. When the RPS is frozen, it

[108] *Id.* at #5.
[109] DNREC Comments at 4.
[110] *Id.* at 4-5.
[111] *Id.* at 5.
[112] *Id.*

"remain[s] at the percentage for the year in which the freeze is instituted."[113] As a result, a freeze of the RPS would not require the freezing of Bloom costs by either the PSC or DNREC. As a result of this misplaced reasoning, Staff does not find this argument persuasive.

The DESC makes one assertion regarding the inclusion of the QFCPP in the calculation of total cost of compliance. DESC reminds that, while certain fuel cells are included in the definition of EERs, they may only qualify as EERs when they are "powered by renewable fuels."[114] At this time, the QFCPP is not powered by renewable fuels, but by natural gas. This assertion supports Staff in that the QFCPP is not an EER, does not produce RECs, and is therefore not one of the enumerated elements of the calculation of the cost of compliance under Sections 354(i)&(j).

Certain members of the public also provided written comment. These comments were generally brief and expressing support for the inclusion of the QFCPP in the calculation of total cost of compliance. None of these commenters provided reasoning or support beyond that provided by the DPA, CRI, or Mr. Myers.

d. Revised Language and Staff Recommendation

Comments seeking to include the QFCPP in the calculation for the cost of compliance are unpersuasive, with each having been addressed and refuted. None of the arguments overcome the statute's presumably intentional distinction between Sections 354(i)&(j) and 363(e) that precludes "other costs incurred in meeting renewable energy programs" from being included in the calculation. Because the General Assembly in 2011 deliberately amended various sections of the REPSA but chose not to amend Sections 354(i)&(j) Staff continues to employ the plain, intentional statutory distinction per the Court's mandate.

The Instant Regulations mirror the February 2 Proposed Regulations in excluding the QFCPP costs from the calculation. The exclusion of these costs is in conformance with REPSA and the Opinion. As such, Staff recommends the Commission approve for publication the Instant Regulations attached as Exhibit B.

[113] 26 *Del. C.* § 354(i), (j).
[114] 26 *Del. C.* §352(6).

3. Consultation

a. Background

Sections 354(i)&(j) state: "The State Energy Coordinator in consultation with the Commission, may freeze…" the RPS requirement.[115] At issue is the exact meaning of this phrase, and how it should be implemented in the Commission's regulations under the guidance of the Order. Specifically, the question is how much, if any, discretion exists for the E&C Director to decide whether or not to implement a freeze.

b. Proposed Regulations

The February 2 Proposed Regulations required consultation with the Commission (a prerequisite for freezing the RPS requirement) only upon a finding by the E&C Director that "[a] Freeze… **should** be instituted," which would have been a unilateral decision of the E&C Director.[116]

Supporting the reasoning of the February 2 Proposed Regulations was the same guidance of the Court that has undergirded Staff's other reasoning. Specifically, as elsewhere, Staff was sure to not collapse statutory distinctions where they may exist. Staff emphasizes the presumably intentional statutory distinction contained within Sections 354(i)&(j) between "freezing" and "unfreezing" the RPS. Namely, Sections 354(i)&(j) note that "[t]he State Energy Coordinator in consultation with the Commission, may freeze," but when a freeze is to be lifted, "[t]he freeze shall be lifted upon a finding by the Coordinator, in consultation with the Commission…" If the assembly did not intend to provide any level of discretion, is it logical that the word "shall" would have likewise been employed when the statute contemplated initiating a freeze.

The February 2 Proposed Regulations contemplated the proper format for such "consultation" between the E&C Director and the Commission, and proposed that written notification from the E&C Director to the Commission would be sufficient for such consultation.

c. Comments and Response

[115] "The State Energy Coordinator" is defined in the February 2 Proposed Regulations and the Instant Regulations as the "E&C Director." The E&C Director is the Director of the DNREC's Division of Energy & Climate. *See* Exhibit B at 1.1.
[116] Exhibit A at 3.2.21.6.2, 3.2.21.7.2.

Public comments were received regarding this issue from the DPA, Gary Myers, CRI, DNREC, DESC, the Sierra Club, and the Mid Atlantic Renewable Energy Coalition ("MAREC").

The DPA provides proposed revisions to the February 2 Proposed Regulations in addition to substantive arguments on the subject. Staff does not endorse the DPA's proposed revisions, but several of their further assertions have persuaded Staff and are the basis for edits in the Instant Regulations.

In the DPA's proposed revisions, it requests that the Commission's regulations compel DNREC to file notification that they have calculated the cost of compliance for the subject CY.[117] The DPA then requests that the Commission open a docket to consider the E&C Director's notice and provide for a written comment period.[118] Staff does not support these proposed revisions. Sections 354(i)&(j) only require a consultation, which the DPA points out means "to ask the advice or opinion of; to consult an individual; to consult together."[119] Staff appreciates and supports this definition offered by the DPA, and as a result posits that a docket is likely an incorrect forum for the purposes of a consultation. The purpose of Commission dockets is not to "consult" with other parties; rather, it is for the Commission to make an administrative determination on an issue under their jurisdiction. Staff notes, as will be discussed further below, the plain language of Section 354(i)&(j) which notes that it is the E&C Director, not the Commission, with ultimate authority as to whether to freeze the RPS requirement. The Commission does not have the ultimate authority to determine whether to institute a freeze, and therefore a Commission docket is not the proper forum for such a consultation. The DPA then requests, by way of their proposed revisions, a period for interested parties to submit written comments to the Commission. Staff similarly does not support this proposed revision, as the DPA has pointed to no statutory language that supports the requirement for a public comment period. Rather, the DPA merely "propose[d]" this comment period, without citing any persuasive precedent or statutory language providing a basis for such a requirement.[120] Staff interprets Sections 354(i)&(j) as providing for a freeze contingent upon the consultation of only two parties: the E&C Director and the Commission. The Commission's Rules of Practice and Procedure states "[n]othing in these rules shall preclude the Commission, in the exercise of its statutory duties and where circumstances

[117] DPA Comments at 25, 3.2.21.6.1, 3.2.21.7.1.
[118] *Id.* at 25, 3.2.21.6.2-3.2.21.6.3, 3.2.21.7.2-3.2.21.7.3.
[119] *Id.* at 29.
[120] *Id.* at 30.

reasonably require, from prescribing different procedures to apply to specific proceedings."[121] The statute in Sections 354(i)&(j) is silent on public comments, and therefore the Commission has no requirement to allow for written comments in the process of this consultation.

The DPA then makes several substantive arguments against the text of the February 2 Proposed Regulations. The first argument the DPA offers is that "filing a written notice with the Commission is not 'consultation.'"[122] Staff is persuaded by this argument. It is a reasonable contention that the General Assembly assumed more than a written notification would be required to constitute "consultation." As discussed in section 3.d. *infra*, the Instant Regulations include revisions to address this comment.

The DPA's final argument is that the consultation between the Commission and the E&C Director must occur at a public meeting. This contention is generally in support of the assertion that written notification does not constitute "consultation." In support of this argument, the DPA cites the Delaware Freedom of Information Act ("FOIA"), noting that "every meeting of all public bodies shall be open to the public,"[123] that the Commission is clearly a "public body"[124] under FOIA, and that a consultation will occur at a "meeting."[125] Staff agrees with this assertion. As discussed further below, the Instant Regulations have been altered to address these concerns.

Mr. Myers comments extensively on the issue of consultation. His arguments break down into two general sections: analysis of the statutory text and the legislative history. All of Mr. Myers' component arguments set out to prove his assertion that Sections 354(i)&(j) were "meant to act as **automatic** 'circuit breakers' which would freeze further compliance with the renewable energy portfolio requirements if the incremental costs of renewable compliance turn out to exceed the statutorily-described percentage limits."[126]

Mr. Myers claims that the February 2 Proposed Regulations are ambiguous on the exact procedural method of instituting a freeze. Staff agrees with Mr. Myers that the provisions of the February 2 Proposed Regulations do not contain the level of clarity that should be provided, and the Instant Regulations seek to further clarify such procedures.

[121] 26 Del. Admin. C. §1001-1.1.2.
[122] DPA Comments at 29.
[123] 29 *Del. C.* §10004(a).
[124] 29 *Del. C.* §10002(h).
[125] 29 *Del. C.* §10002(g).
[126] Myers Comments at 5. (emphasis added).

Mr. Myers continues on to provide a textual analysis by providing a substantial outline of prior case decisions in Delaware which show that the term "may" often provides for a mandatory requirement and not a grant of permission. However, after this through review of case law, Mr. Myers concedes that "context often provides the crucial ingredient to determine whether the term 'may' expresses permissive discretion or preemptory obligation."[127] Staff appreciates Mr. Myers' apt presentation of Delaware case law, but also feels bound to the specific context of this proceeding and the guidance of the Court. In this context, the Opinion provides explicit direction to not collapse presumably intentional statutory distinctions where they may occur in the text; Staff views this as direction to give separate meanings to the terms "may" and "shall" in Sections 354(i)&(j). At the end of his discussion, Mr. Myers concedes that, as a result of the unclear and often contradictory precedent, the legislative "history ultimately controls here."[128]

Beginning on page 7, Mr. Myers provides a comprehensive overview of the legislative history of the Cost-Cap Amendments. In this section, he focuses on the comments of then-secretary of DNREC Colin O'Mara, and Senator McDowell, who Mr. Myers notes was the prime sponsor of the bill.[129] Staff understands the importance of observing the legislative debate when evaluating the meaning of a bill, particularly when precedent is unclear – as Staff and Mr. Myers both agree; administrative bodies may not promulgate regulations inconsistent with clear legislative intent.[130]

Mr. Myers provides the following excerpts of the legislative history from Sen. McDowell and Mr. O'Mara in support of his assertion that "the consumer protection provisions [are] easily administered and decisive."[131]

> [a]ny time the cost impact of the photovoltaic goes up by 1 percent, the utility involved **can push** what we like to call a circuit breaker. In other words, they **can suspend** the program for that year and simply extend the portfolio forward a year for their utility.[132]

[127] *Id.* at 26.
[128] *Id.* at 29.
[129] *Id.* at 7.
[130] *Wilmington Country Club v. Delaware Liquor Comm'n,* 91 A.2d 250, 255 (Del. Super. 1952).
[131] Myers Comments at 8.
[132] *Id.* at 8, citing SS 1 SD at 4-5 (McDowell). (emphasis added).

> [w]e've also built safety valves into this bill. I told you about the circuit breaker that we have put in where any utility who can show that its rates are going up or would go up by 1 percent in case of – of solar, the retail electric would go up by 1 percent in a year in the cases of solar, or 3 percent in the overall, they **could push** the circuit breaker and suspend their participation in the program for one year. And so that is a very, very serious rate production – ratepayer protection.[133]
>
> So under the legislation, if the – **as soon as there's a 1 percent impact** from the solar portion of the bill, the, the **target level freezes in place** for that entire calendar year and then starts up again after it.[134]

Mr. Myers asserts that the legislative history cited above supports the conclusion that the cost-caps are automatic – that is, without any level of discretion being provided. In support of this argument, he begins "DNREC's construct" (adopted by the February 2 Proposed regulations – i.e. providing DNREC discretion in determining whether or not to freeze) "makes both Senator McDowell and former Secretary O'Mara into liars."[135] However, to rebut, Staff points to the inconsistencies between the statements of the Senator and the former Secretary. Each of these two commenters to the General Assembly paint different pictures of the operation of the cost-caps. Specifically, when the Senator refers to these caps, he notes that "they **could push**" such "circuit-breakers," observing that "they **can suspend**" the program "[a]ny time the cost impact of the photovoltaic goes up by 1 percent." The word "can" according to Merriam-Webster means "be physically or mentally able to," or "have permission to – used interchangeably with may."[136] In contrast with the Senator, former Secretary O'Mara provides testimony suggesting a more compulsory operation of the cap: "**as soon as there's a 1 percent impact** from the solar portion of the bill, the, the **target level freezes in place.**" As a result of this testimony, Staff sees two distinct possibilities, one each laid out by the Senator and the former Secretary. By way of analogy, Staff observes these two comments from the legislative history as describing two different types of circuit breakers, the first with a manual switch required for operation, and the second operating automatically based on the surrounding system conditions. Senator McDowell describes the first, noting that DNREC can (defined as "having permission to") operate the circuit breaker with manual operation once certain conditions are met. Former Secretary O'Mara describes the second, noting that "as soon as" certain conditions apply, the circuit breaker

[133] *Id.* at 8, citing SS 1 SD at 9 (McDowell). (emphasis added).
[134] *Id.* at 9, citing SS 1 HD at 13 (O'Mara). (emphasis in original).
[135] *Id.* at 23-24.
[136] http://bit.ly/2dpaPf8

automatically operates. Due to this lack of clarity in the legislative history, Staff remains confident in its interpretation giving meaning to the presumably intentional statutory distinction between the choice of the word "may," when instituting a freeze, and "shall," when a freeze is to be lifted, resulting in the retention of DNREC's discretion to determine whether a freeze is to be instituted.

Mr. Myers continues on to observe that the legislative history does not mention any grant of discretion to DNREC. He then observes that the February 2 Proposed Regulations would allow DNREC to "silently" ignore the cost caps, based only on the E&C Director's determination of whether the cost caps "should" be frozen.[137] Staff agrees that the E&C Director should not be able to silently ignore the cost caps or the results of the calculation of the total cost of compliance. The Instant Regulations, in further clarifying the procedures for freezing the RPS, seek to improve upon the February 2 Proposed Regulations by requiring the E&C Director to provide final agency action, which will be subject to appeal, in their determination as to whether to freeze the RPS. This change is responsive to Mr. Myers' persuasive contention that the E&C Director should not be able to "silently" ignore the cost caps or the results of the calculation of total cost of compliance.

On this issue, CRI merely requests further clarity from the Commission's proposed rules, while supporting the proposed amended text submitted by the DPA. Staff has addressed these concerns above.

DNREC agrees with the February 2 Proposed Regulation's interpretation of the meaning of "may" and "shall" as providing discretion to the E&C Director.[138] They further support Staff's view of the lack of clarity provided in the legislative history. DNREC further questions the requirement to open a docket in this matter, noting that if the Commission required the E&C Director to submit a petition, it may raise "a genuine question as to whether REPSA gives the Commission the power to compel the [E&C] Director – an employee of another state agency – to file a petition to open a docket."[139] Staff recognizes the validity of this concern, and the Instant Regulations do not compel the E&C Director to file a petition. Instead, they have been distinguished from the February 2 Proposed Regulations by merely requiring the submission of the calculations by the E&C Director, and the resulting final determination of the E&C Director.

[137] Myers Comments at 24.
[138] DNREC Comments at 6.
[139] *Id.*

Specifically, Staff is appreciative of DNREC's inclination to "defer to the Commission to determine its procedures in considering a possible freeze."[140]

DESC merely asserts that DNREC retains discretion as to whether or not to freeze the RPS. As discussed above, Staff agrees with this assertion, and that position is reflected in both the February 2 Proposed Regulations and the Instant Regulations.

The Sierra Club also offers brief comments supporting the E&C Director's discretion in this matter. They note that the E&C Director's "discretion in making this decision is firmly rooted in the statute and is not dependent upon any regulations promulgated by either DNREC or the PSC."[141] As noted, Staff agrees that the E&C Director retains discretion in determining whether or not to declare a freeze of the RPS.

MAREC also contends that the E&C Director should retain discretion in determining whether or not to institute a freeze.[142] However, MAREC also opines that the Order should not foreclose DNREC's ability to consider all costs and benefits associated with the RPS in determining whether or not to institute a freeze.[143] Staff does not support this position. Sections 354(i)&(j) do not provide for the inclusion of any DNREC-calculated benefits to be included in the calculation for total cost of compliance. In fact, as noted earlier, it is Staff's position that under the guidance of the Order only the explicitly enumerated components in the calculation must be included. It would follow that, unless the legislature specifically provided for the consideration of benefits to the calculation, to retain consistency in Staff's position, such considerations would not be included the calculation. Staff's position is that DNREC retains the ultimate authority as to whether to declare a freeze. The Order only provided for the procedure for calculating the thresholds and the procedure for freezing. As a result, Staff thought it prudent that, although the E&C Director must perform the calculation in accordance with the specifics of Sections 354(i)&(j), the E&C Director then must provide a written determination, including the basis for that determination, as to whether to institute a freeze. Since the Instant Regulations mandate that such a determination is final agency action, it will then be up to the courts to decide whether such a determination is based on a reasonable basis on the record.

[140] *Id.*
[141] Comments of the Sierra Club. April 11, 2017.
[142] RE: Comments of MAREC on the revision of 26 Del. Admin. C. § 3008-3.2.21. April 24, 2017, at 2. ("MAREC Comments").
[143] MAREC Comments at 2.

d. Revised Language and Staff Recommendation

The Instant Regulations include substantive changes to the process for freezing the RPS requirement. As noted by several commenters, the February 2 Proposed Regulations were less than explicitly clear regarding the specific process for freezing the RPS. Additionally, as Mr. Myers characterized in his comments, the February 2 Proposed Regulations would have allowed DNREC to "silently" avoid the process for freezing the RPS, to the extent that even if the calculations exceeded the statutorily-provided-for threshold, consultation with the Commission would only have occurred if the E&C Director determined that the RPS "should" be frozen.[144] While, as discussed above, Staff views the distinction between the terms "may" and "shall" in Sections 354(i)&(j) as significant and therefore providing some discretion to the E&C Director, Staff does not view the discretion as absolute in that any resulting decision should be shielded from judicial review. In the Instant Regulations, Staff proposes to address this issue in the following manner. First, in lieu of the February 2 Proposed Regulation's requirement only to submit the calculations to the Commission for "consultation" after the E&C Director's determination, the Instant Regulations require DNREC to submit their calculations to the Commission for each CY.[145] This submission of the calculation automatically provides for a consultation if the "*E&C Director's <u>calculation</u> determines that*" the statutorily-provided-for thresholds have been breached.[146] Second, as soon as such calculations determine that the threshold has been breached, a consultation with the Commission will occur at a public, regularly-scheduled meeting, as the DPA's persuasive argument on this issue requested. Next, in response to Mr. Myers' request that DNREC not be able to "silently" prevent the freeze regardless of the results of the calculations, the Instant Regulations mandate a written determination, which shall be submitted to the Commission and therefore available for public review, as to whether the E&C Director determines to declare or not declare a freeze.[147] Lastly, since this determination may be the subject of intense disagreement among varying parties and is, in essence, the final agency action on this issue for the subject CY, Staff recommends that the written determination of the E&C Director should constitute final agency action under 29 *Del. C.* §10141(b). The result of this requirement would be to subject the E&C Director's determination to judicial review, allowing any parties to request the review of the court based on whether the E&C

[144] *See* Exhibit A at 3.2.21.6.2, 3.2.21.7.2.
[145] Exhibit B at 3.2.21.5.
[146] *Id.* at 3.2.21.6.
[147] *Id.* at 3.2.21.6.1.

Director's written determination was without a reasonable basis on the record or otherwise unlawful.[148]

Due to the extremely unclear nature of precedent and legislative history on this matter, Staff feels these revisions appropriately give meaning to what little guidance does exist. In the procedure outlined above and in the Instant Regulations, Staff sought to preserve the words of both Senator McDowell and former Secretary O'Mara. Mr. O'Mara opined that "as soon as" the thresholds are breached the cost cap is binding, while Senator McDowell noted that such cost caps are available such that they "can" be "pushed." To effectuate this guidance, Staff feels that there must be a forum in which the cost caps may be activated (making the cap available so it "can" be "pushed") "as soon as" the threshold is breached. The Instant Regulations provide for a consultation any time the calculations determine (with no discretion here on the part of the E&C Director) that one of the thresholds has been breached. Such a consultation is a statutory prerequisite of a freeze, as Sections 354(i)&(j) instruct that the RPS can only be frozen "in consultation with the Commission." If there were no consultation after the threshold had been breached, the guidance of Senator McDowell would be false – there would be no freeze available to the E&C Director after the threshold had been breached. This would have been the outcome of the February 2 Proposed Regulations, which Mr. Myers characterizes in his comments as "silently" averting a freeze. Such an outcome is untenable based on the legislative history. As outlined above, the Instant Regulations avoid this outcome. As a result, Staff recommends that the Commission approve for publishing the Instant Regulations as submitted.

4. <u>"Total" freeze</u>

a. Background

To Staff's knowledge, the assertion that a freeze of the RPS would result in the removal of any RPS requirement for the CREC is a novel argument presented in these public comments. Mr. Myers has asserted that once a freeze is declared, such a freeze would relieve the CREC of the totality of its RPS obligations, instead of freezing the annual increase in the RPS.[149]

b. Proposed Regulations

[148] *See* 29 *Del. C.* § 10141(e).
[149] Myers Comments at 42.

The February 2 Proposed Regulations follow the explicit and clear meaning of the statutory language. Sections 354(i)&(j) provide: "[i]n the event of a freeze, the minimum cumulative percentage from eligible energy resources shall remain at the percentage for the year in which the freeze is instituted." The February 2 Proposed Regulations, under this guidance, simply speak to suspending the annual increase of the RPS.[150]

c. Comments and Response

Mr. Myers claims that Sections 354(i)&(j) contain two separate stand-still directives: one for freezing the eligible energy resource requirement, and a separate directive to remain at the minimum cumulative percentage required. He notes the differing language between the first and second sentences in Sections 354(i)&(j) and presumes that this illustrates two separate stand-still directives.[151]

Mr. Myers' interpretation produces an absurd result. If the first sentence of Section 354(i)&(j) dictates a total freeze (i.e. eliminating the requirement to procure **any** RECs or SRECs for their RPS requirement), there would be no way for the RPS requirement to simultaneously "remain at the percentage for the year in which the freeze is instituted," as the second sentence requires. For instance, the RPS requirement for CY 2017 is 16%. If Mr. Myers' reading is correct, in the event of a freeze, the requirement for the frozen year (presumably CY 2018) under the first stand-still directive would be zero.[152] However, in effectuating this guidance, Sections 354(i)&(j) also instruct that in the event of a freeze "the minimum cumulative percentage from eligible energy resources shall remain at the percentage for the year in which the freeze is instituted." This provision clearly illustrates that the requirement for a frozen CY 2018 would remain at the percentage required for CY 2017: 16%. The paradigm envisioned by Mr. Myer's comments produces an absurd result. Precedent has dictated that courts do not adopt statutory constructions that produce absurd results.[153]

d. Revised Language and Staff Recommendation

[150] *Supra* n. 8.
[151] Myers Comments at 40.
[152] *Id.* at 40. ("Once such 'freeze' is in place, the responsible entity – now DP&L – need not acquire further RECs or SRECs for REPSA compliance purposes.")
[153] *Chase Alexa, LLC v. Kent County Levy Court*, 991 A.2d 1148, 1152.

Staff is not persuaded by Mr. Myers' argument in this regard. As a result, there have been no changes to the February 2 Proposed Regulations to conform to Mr. Myers' assertion.

B. Non-Controversial Issues

1. "Any ratepayer funded state renewable energy program"

The February 2 Proposed Regulations, in their enumeration of the elements that may be included in the calculation of total cost of compliance, included "the total contributions to that portion of the Green Energy Fund used to support the development" of the subject type of renewable resources.[154] This provision was intended to embody the phrase of Sections 354(i)&(j) "the costs associated with any ratepayer funded state renewable energy rebate program," as the Green Energy Fund is currently the only such state funded rebate program. The DPA points out that the wording used in the February 2 Proposed Regulations misstate the requirement of Sections 354(i)&(j).[155] Staff agrees with this assertion. As a result, the Instant Regulations change that component of the calculation to mirror the statutory text.[156]

2. February 2 Proposed Regulations, Section 3.2.21.11

Several commenters, including CRI, the DPA, and Mr. Myers contend that section 3.2.21.11 of the February 2 Proposed Regulations are without basis in statute. Staff agrees with this assertion. This provision has been stricken from the Instant Regulations.

3. Clean-up Revisions

The DPA offered several revisions that they characterize as "clean-up" at the conclusion of their comments. [157] Staff views the majority of these proposed revisions as substantive, and recommends that they be addressed at a later date. However, the DPA makes some suggestions regarding conforming the existing regulations to the guidelines of the Register of Regulations. Staff appreciates this suggestion. In accordance with the DPA's suggestion, Staff contacted the Registrar seeking any such conforming changes.

[154] Exhibit A at 3.2.21.2.1, 3.2.21.2.2, 3.2.21.3.1, 3.2.21.4.1.
[155] DPA Comments at 24.
[156] See Exhibit B at 3.2.21.3.1, 3.2.21.3.2, 3.2.21.4.1.
[157] DPA Comments at 33.

The edits suggested by the office of the Registrar have been included in the Instant Regulations. These changes include several instances of capitalizing "section," changing "Section" to "subsection," and removing redundant internal references to the Regulation.

EXHIBIT A

Proposed Rules, February 2, 2017 ("February 2 Proposed Regulations")

Approved by the Commission for Publication in Order No. 9024.

3008 Rules and Procedures to Implement the Renewable Energy Portfolio Standard (Opened August 23, 2005)

1.0 Definitions

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**" or "**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 3.3.5 of this Regulation.

"**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 displays all or part of the metered consumption of the End-Use Customer.

"CREC" means a Commission-regulated electric distribution company.

"**DNREC**" means Delaware Department of Natural Resources and Environmental Control.

"E&C Director" means the Director of the Division of Energy & Climate who is the successor to the State Energy Coordinator.

"**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 Photovoltaic Energy Resources means solar photovoltaic or solar thermal energy technologies that employ solar radiation to produce electricity or to displace electricity use;

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's Secretary's Order No. 2006-A-0035);

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's Secretary's Order No. 2006-A-0035);

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.

"Freeze" means suspension of the implementation of the annual increase in RPS as provided for under 26 **Del.C.** §§354(a), (b), (i) and (j).

"**Green Energy Fund**" means the Delaware Green Energy Fund as authorized under 26 **Del.C.** §1014(a).

"**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.

"Non-Exempt Customers" means all customers of the Commission-regulated electricity company that have not been certified by the Commission as exempt from the RPS under Section 2.2 of this regulation.

"**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.

"**Qualified Fuel Cell Provider**" means an entity that:

a. By no later than the commencement date of commercial operation of the full nameplate capacity of a fuel cell project, manufactures fuel cells in Delaware that are capable of being powered by renewable fuels, and

b. prior to approval of required tariff provisions, is designated by the Director of the Delaware Economic Development Office and the Secretary of DNREC as an economic development opportunity."

"**Qualified Fuel Cell Provider Project**" (or "**QFCPP**") means a fuel cell power generation project located in Delaware owned and/or operated by a Qualified Fuel Cell Provider under a tariff approved by the Commission pursuant to 26 **Del.C.** §364(d).

"**Renewable Energy Credit**" or ("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**" or "**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.

"**Solar Alternative Compliance Payment**" or "**SACP**" means a payment of a certain dollar amount per megawatt-hour, which a Retail Electricity Supplier or Municipal Electric Supplier may submit in lieu of supplying the Minimum Percentage from Solar Photovoltaic required under Section 3.3.4 of this Regulation.

"**Sustainable Energy Utility**" or ("**SEU**") is the nonprofit entity according to the provisions of 29 **Del.C.** §8059 that develops and coordinates programs for energy end-users in Delaware for the purpose of promoting the sustainable use of energy in Delaware.

"**Solar Renewable Energy Credit**" or "**SREC**" means a tradable instrument that is equal to 1 megawatt-hour of retail electricity sales in the State that is derived from Solar Photovoltaic Energy Resources and that is used to track and verify compliance with the provisions of this Regulation.

“Total Retail Cost of Electricity” means the total costs paid by Non-Exempt Customers of the Commission-regulated electric company for the supply,

transmission, distribution, and delivery of retail electricity, including costs paid to third party suppliers, during a respective Compliance Year.

"**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.

11 DE Reg. 1670 (06/01/08)

13 DE Reg. 952 (01/01/10)

14 DE Reg. 1241 (05/01/11)

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.,** Subchapter III-A, 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 its load exempt from this Regulation provided that it meets the definitions found in Section 1.1 and:

2.2.1.1 submits 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 submits the Commission's Staff acknowledgement referenced in Section 2.2.1.1.1 of this Regulation to its 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 its load exempt, the aggregate of its accounts with an NAICS Manufacturing Sector Code must have a Peak Demand of at least 751 kilowatts and it must follow the procedure found in Section 2.2.1.

2.3 Any Rural Electric Cooperative that has 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 if it develops and implements a program for its ratepayers that is comparable to the RPS beginning in 2013. A Rural Electric Cooperative electing to be exempt from this Regulation must notify the Commission of such election and shall be subject to the requirements set forth in 26 **Del.C.** §363. A Rural Electric Cooperative not electing to be exempt from this Regulation shall be subject to this Regulation and the applicable provisions of 26 **Del.C.** §363.

11 DE Reg. 1670 (06/01/08)

14 DE Reg. 1241 (05/01/11)

3.0 Administration of RPS

3.1 Certifying and Decertifying 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 Customer-sited generation is eligible to be considered an Eligible Energy Resource provided the facility is physically located in Delaware.

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

3.1.5 If an Eligible Energy Resource, once notified by Commission Staff, fails to provide the required documentation or missing information within 60 days of the date of such notification, the Application will be dismissed and must be resubmitted.

3.1.6 If Commission Staff finds the Generation Unit to be in compliance with this Regulation and other applicable law, Staff will issue a State of Delaware Certification Number.

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

3.1.8 Upon designation as an Eligible Energy Resource, the Generation Unit's owner shall be entitled to one (1) REC for each mega-watt hour of energy derived from Eligible Energy Resources other than Solar Photovoltaic Energy Resources. Upon designation as an Eligible Energy Resource, the owner of a Generation Unit employing Solar Photovoltaic Energy Resources shall be entitled to one (1) SREC for each mega-watt hour of energy derived from Solar Photovoltaic Energy Resource. SRECs and 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.

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

3.1.9 If a Generation Unit is deemed an Eligible Energy Resource 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 or SRECs 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.

3.1.10 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 review and re-certification.

3.1.11 An Eligible Energy Resource must provide updates to any changes to information submitted in the Application within 30 days of those changes becoming effective. These changes include but are not limited to changes in ownership of the generating unit, changes in ownership of the RECs or SRECs, changes in system size, or the deactivation of the unit.

3.1.12 RECs or SRECs created by an Eligible Energy Resource shall remain valid for compliance, subject to Section 3.2.7, Section 3.3.3 and Section 3.3.4 of this Regulation, even if that Eligible Energy Resource is subsequently decertified for eligibility.

3.1.13 An Eligible Energy Resource may be decertified for any of the following:

3.1.13.1 Failure to comply with Sections 3.1.1 through 3.1.11;

3.1.13.2 A material change in circumstances that causes it to become ineligible for certification under Section 3.1;

3.1.13.3 Fraud or misrepresentation in the Application or to PJM-EIS GATS;

3.1.13.4 Failure to properly update the Commission on changes to information submitted in the Application; or

3.1.13.5 Good cause as determined by the Commission.

3.2 Compliance with RPS

3.2.1 The Total Retail Sales of each Retail Electricity Product delivered 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 and Solar Photovoltaics as shown in Schedule 1.

SCHEDULE 1		
Compliance Year (beginning June 1st)	**Cumulative Minimum Percentage from Solar Photovoltaics ~~Energy Resources~~**	**Minimum Cumulative Percentage from Eligible Energy Resources**

2007		2.0%
2008	0.011%	3.0%
2009	0.014%	4.0%
2010	0.018%	5.0%
2011	0.20%	7.0%
2012	0.40%	8.5%
2013	0.60%	10.0%
2014	0.80%	11.5%
2015	1.0%	13.0%
2016	1.25%	14.5%
2017	1.50%	16.0%
2018	1.75%	17.5%
2019	2.00%	19.0%
2020	2.25%	20.00%
2021	2.50%	21.00%
2022	2.75%	22.00%
2023	3.00%	23.00%
2024	3.25%	24.00%
2025	3.50%	25.00%

Minimum Cumulative Percentage from Eligible Energy Resources includes the Minimum Cumulative Percentage from Solar Photovoltaics

3.2.2 A Retail Electricity Supplier's compliance with Schedule 1 shall be based on accumulating RECs and SRECs equivalent to the current Compliance Year's Cumulative Minimum Percentage of Total Retail Sales of each Retail Electricity Product sold to End-Use Customers subject to Section 3.2.7 of these Regulations and, where appropriate, other Commission regulations. Each Retail Electricity Suppliers shall file a report detailing its compliance with its RPS obligations within 120 days following the end of Compliance Year 2011.

3.2.3 Beginning June 1, 2012, ~~Commission-regulated electric companies (~~"every CREC"~~)~~ shall be responsible for procuring RECs, SRECs, and any other attributes needed to comply with the minimum percentage requirements set forth in

26 **Del.C.** §354 and Section 3.2.1 with respect to all energy delivered to the CREC's End-Use Customers. Such RECs and SRECs shall be filed annually with the Commission within 120 days following the completion of the Compliance Year. In fulfilling the duty imposed upon it by 26 **Del.C.** §354(e), a CREC shall succeed to, and assume, the obligations, entitlements, and responsibilities imposed or allowed to a "retail electricity supplier" under the provisions of 26 **Del.C.** §§354-362 and Sections 3.2, 3.3, 4.0 and 5.0 of these regulations.

3.2.3.1 The transitional process set forth in these Regulations shall apply to all Retail Electricity Suppliers that entered into retail electric supply contracts prior to March 1, 2012 that include RPS compliance costs for Compliance Year 2012 and thereafter and that extend beyond June 1, 2012 (such retail electric supply contracts shall be referred to as "Transitional Retail Contracts". The transitional process will end when the particular contract expires, or is otherwise terminated, or is modified to transfer the RPS compliance costs to the CREC, whichever occurs first.

3.2.3.1.1 On or before March 1, 2012, each Retail Electricity Supplier shall provide the CREC, the Commission Staff and the DPA with identification of all End-Use Customers supplied through a Transitional Retail Contract and shall further provide such supporting data as may be requested. Such identification shall include, but shall not be limited to, the name of the End-Use Customer and the expiration date of the Transitional Retail Contract. All such information required to be submitted hereunder may be submitted confidentially by the Retail Electric Supplier.

3.2.3.1.2 End-Use Customers who dispute their designation may file a complaint with the Commission according to 26 **DE Admin. Code** §1000.

3.2.3.1.3 Retail Electricity Suppliers shall transfer the RECs and SRECs necessary to meet their RPS compliance obligations for each Transitional Retail Contract for the respective Compliance Year beginning with Compliance Year 2012, to the CREC's GATS account for retirement at no cost to the CREC. The CREC will provide to the respective Retail Electricity Supplier the sales number based on metered data pertaining to the identified Transitional Retail Contracts for determining its RPS obligation with preliminary data on or before June 15th, and final data on or before August 15th. Ninety percent of the Retail Electricity Supplier's expected total RECs/SRECs necessary for compliance with its RPS obligations for each Transitional Retail Contract shall be transferred to the CREC's GATS account on or before August 1st following the end of the Compliance Year, and the remaining RECs and SRECs necessary for compliance with the Retail Electricity Supplier's RPS compliance obligations for each Transitional Retail Contract shall be transferred to the CREC's GATS account on or before September 1st following the end of the Compliance Year.

Should either of these deadlines fall on a weekend or legal holiday, the deadline will be the next business day following August 1st and September 1st.

3.2.3.1.4 If a Retail Electricity Supplier fails to transfer to the CREC's GATS account sufficient RECs or SRECs to comply with its RPS obligations for each Transitional Retail Contract, it shall reimburse the CREC for the CREC's weighted average purchase cost of procuring such RECs and /or SRECs necessary to comply with the Retail Electricity Supplier's obligations and/or any associated ACPs or SACPs by the CREC. The CREC shall accept the retail supplier's designation of Transitional Retail Contracts in determining the RPS obligation for such supplier.

3.2.3.1.4.1 The CREC shall notify the Retail Electricity Supplier of its deficiency and the amount owed to the CREC by October 1st of each year. The CREC shall provide the Retail Electricity Supplier with all supporting documentation of the costs incurred, if requested by the Retail Electricity Supplier. The Retail Electricity Supplier shall have fifteen (15) business days to reimburse the CREC or to advise the Commission in writing of any dispute relating to the deficiency. Interest shall accrue for any late payment (after the 15 business days) and shall be payable to the CREC. The interest rate shall be based on Delmarva's short term debt rate in effect on the date when the payment was due from the Retail Electricity Supplier.

3.2.3.1.5 To protect a CREC and its customers from incurring an ACP or SACP due to a Retail Electricity Supplier's failure to transfer the appropriate number of RECs and/or SRECs necessary for compliance with its RPS obligations during the transitional process, a CREC may request the Commission to approve a temporary reduction in its RPS obligation or a reduction in the ACP or SACP price for that Compliance Year.

3.2.3.2 Beginning with sales as of June 1, 2012, the CREC will charge all of its distribution system End-Use Customers for RPS compliance costs through a non-bypassable charge based on the weighted average cost of the RECs and SRECs supplied by the CREC.

3.2.3.2.1 Industrial Customers whose peak demand is in excess of 1500 kilowatts and have been acknowledged by the Commission as having their load exempted from the RPS compliance obligations pursuant to 26 **Del.C.** §353(b) and Sections 1,0, 2.2.1, and 2.2.2 shall not be charged the RPS compliance cost permitted by Section 3.2.3.2.

3.2.3.2.2 For a particular compliance year, the total recovery of the RPS compliance costs by the CREC, shall not be an amount greater than the CREC's actual

dollar for dollar costs incurred for that compliance year in complying with the State of Delaware's RPS, except that any compliance fee assessed pursuant to 26 **Del.C.** §358(d) and Section 3.3.5 of this Regulations shall be recoverable only to the extent authorized by 26 **Del.C.** §358(f)(2) and Section 4.2 of this Regulation.

3.2.3.2.3 The CREC will credit the distribution portion of the bill of the End-User Customers identified in Section 3.2.3.1.1 of these Regulations by the amount equal to the non-bypassable charge for the duration of the Transitional Retail Contract.

3.2.3.3 The CREC and Retail Electricity Suppliers shall place on their websites customer education pertaining to the RPS non-bypassable charge and credit required in Section 3.2.3.2 and 3.2.3.2.1. The CREC shall also include information on the RPS non-bypassable charge and credit on its bill message or bill insert.

3.2.3.4 Retail Electricity Suppliers that prior to March 1, 2012, have entered into contracts to purchase or produce RECs and/or SRECs specifically for Delaware RPS compliance may offer to the CREC those RECs and/or SRECs. The price would be determined by separate agreement between the Retail Electricity Supplier and the CREC. In no case shall the CREC be obligated to purchase any RECs/SRECs from the Retail Electricity Supplier.

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).

3.2.5 Energy output must be tracked using PJM-EIS GATS or its successor at law or pursuant to Section 3.1.8.1 of this Regulation.

3.2.6 The right of Commission-regulated electric companies to use energy output produced by a Qualified Fuel Cell Provider Project to fulfill their REC and SREC requirements shall not expire until actually applied to fulfill such requirements.

3.2.7 No CREC, or Retail Electricity Supplier with existing contractual electric supply obligations can provide 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 2026 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.

3.2.8 A Retail Electricity Supplier shall not use RECs or SRECs used to satisfy another state's renewable energy portfolio requirements for compliance with Section 3.2.1 and Schedule 1. A Retail Electricity Supplier may sell or transfer any RECs or SRECs not required to meet this Regulation.

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

3.2.10 Eligible Energy Resources that do not settle though the PJM Market settlement system must document their actual output of generation, as recorded by appropriate metering, as frequently as PJM-EIS-GATS shall prescribe.

3.2.11 Aggregate generation from small Eligible Energy Resources totaling 100 kilowatts or less of capacity, may be used to meet the requirements of Section 3.2.1 and Schedule 1 provided that the generators or their agents shall document the level of generation, as recorded by appropriate metering, as frequently as PJM-EIS-GATS shall prescribe.

3.2.12 A Retail Electricity Supplier or Rural Electric Cooperative shall receive 300% credit toward meeting the Minimum Cumulative Percentage from Eligible Energy Resources of Sections 3.2.1 and Schedule 1 of the RPS for energy derived from the following sources installed on or before December 31, 2014:

3.2.12.1 Customer-Sited solar photovoltaic physically located in Delaware; or

3.2.12.2 A fuel cell powered by Renewable Fuels for Retail Electricity Suppliers, and such a fuel cell sited in Delaware for Rural Electric Cooperatives.

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

3.2.14 A CREC shall receive 350% credit toward meeting the RPS for energy derived from off-shore wind energy installations sited off the Delaware coast on or before May 31, 2017.

3.2.14.1 To be entitled to 350% credit, contracts for energy and renewable energy credits from such off-shore wind energy installations must be executed by CREC prior to commencement of construction of such installations.

3.2.14.2 CREC shall be entitled to such multiple credits for the life of contracts for renewable energy credits from off-shore wind installations executed pursuant to section 3.2.14.

3.2.15 A Retail Electricity Supplier or a Rural Electric Cooperative shall receive an additional 10% credit toward meeting the RPS for solar or wind energy installations sited in Delaware, provided that a minimum of 50% of the cost of the renewable energy equipment, inclusive of mounting components, relates to Delaware manufactured equipment.

3.2.16 A Retail Electricity Supplier or a Rural Electric Cooperative shall receive an additional 10% credit toward meeting the RPS for solar or wind energy installations sited in Delaware provided that the facility is constructed and/or installed with a workforce that consists of at least 75% Delaware residents and/or the installing company employs in total a minimum of 75% workers who are Delaware residents.

3.2.17 A Retail Electricity Supplier or a Rural Electric Cooperative shall receive credit toward meeting the RPS for electricity derived from the fraction of eligible landfill gas, biomass or biogas combined with other fuels (for a Rural Electric Cooperative the Eligible Energy Resource must be sited in Delaware).

3.2.18 Cumulative minimum percentage requirements of Eligible Energy Resources and Solar Photovoltaic Resources shall be established by Commission rules for Compliance Year 2026 and each subsequent year. In no case shall the minimum percentages established by Commission rules be lower than those required for Compliance Year 2025 in Sections 3.2.1 and Schedule 1. Each of the rules setting such minimum percentage shall be adopted at least two years prior to the minimum percentage being required.

3.2.19 Beginning in Compliance Year 2010, and in each Compliance Year thereafter, the Commission may review the status of Section 3.2.1 and Schedule 1 and report to the legislature on the status of the pace of the scheduled percentage increases toward the goal of 25%. 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.

3.2.20 Beginning in Compliance Year 2014, and in each Compliance Year thereafter, the Commission may, in the event of circumstances specified in this section and after conducting hearings, accelerate or slow the scheduled percentage increases towards meeting the goal of 25%. The Commission may only slow the increases if the Commission finds that at least 30% of RPS compliance has been met through the ACP

or SACP for three (3) consecutive years, despite adequate planning by the CREC and, where applicable, Retail Electricity Suppliers with existing contractual electric supply obligations. The Commission may only accelerate the scheduled percentage increases after finding that the average price for RECs and SRECs 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.

~~3.2.21 The minimum percentages from Eligible Energy Resources and Solar Photovoltaic Energy Resources as shown in Section 3.2.1 and Schedule 1 may be frozen for CRECs as authorized by, and pursuant to, 26 **Del.C.** § 354(i)-(j). For a freeze to occur, the Delaware Energy Office must determines that the cost of complying with the requirements of this Regulation exceeds 1% for Solar Photovoltaic Energy Resources and 3% for Eligible Energy Resources of the total retail cost of electricity for Retail Electricity Suppliers during the same Compliance Year. The total cost of compliance shall include the costs associated with any ratepayer funded state renewable energy rebate program, REC and SREC purchases, and ACPs and SACPs alternative compliance payments.~~

~~3.2.21.1 Once frozen, the minimum cumulative requirements shall remain at the percentage for the Compliance Year in which the freeze was instituted.~~

~~3.2.21.2 The freeze may be lifted only upon a finding by the State Energy Coordinator, in consultation with the Commission, that the total cost of compliance can reasonably be expected to be under the 1% or 3% threshold, as applicable.~~

3.2.21 Implementation of Renewable Energy Portfolio Standards Cost Cap Provisions.

3.2.21.1 Within 90 days after the end of any Compliance Year, the CREC shall submit to the E&C Director the following information for the applicable Compliance Year:

3.2.21.1.1 The total cost of RECs retired to comply with the RPS;

3.2.21.1.2 The cost of all Alternative Compliance Payments as allowed under Section 4.2 of this Regulation;

3.2.21.1.3 The total cost of SRECs retired to comply with the RPS;

3.2.21.1.4 The cost of all Solar Alternative Compliance Payments as allowed under Section 4.2 of this Regulation; and

3.2.21.1.5 The Total Retail Cost of Electricity.

3.2.21.2 Within 90 days after the end of any Compliance Year, the Division of Energy & Climate shall determine the following information for the applicable Compliance Year:

3.2.21.2.1 The total contributions to that portion of the Green Energy Fund used to support the development of renewable resources; and

3.2.21.2.2 The total contributions to that portion of the Green Energy Fund used to support the development of solar photovoltaic renewable resources.

3.2.21.3 The Total Cost of Compliance for Renewable Energy shall be calculated as:

3.2.21.3.1 The total contributions to that portion of the Green Energy Fund used to support the development of renewable resources, plus

3.2.21.3.2 The total cost of RECs retired to comply with the RPS, plus

3.2.21.3.3 The total cost of SRECs retired to comply with the RPS, plus

3.2.21.3.4 The cost of all Alternative Compliance Payments as allowed under Section 4.2 of this Regulation, plus

3.2.21.3.5 The cost of all Solar Alternative Compliance Payments as allowed under Section 4.2 of this Regulation.

3.2.21.4 The Total Cost of Compliance for Solar Renewable Energy shall be calculated as:

3.2.21.4.1 The total contributions to that portion of the Green Energy Fund used to support the development of solar photovoltaic renewable resources, plus

3.2.21.4.2 The total cost of SRECs retired to comply with the RPS, plus

3.2.21.4.3 The cost of all Solar Alternative Compliance Payments as allowed under Section 4.2 of this Regulation.

3.2.21.5 Within 120 days after the end of any Compliance Year, the E&C Director or its assigned delegate shall calculate the Total Cost of Compliance for Renewable Energy and the Total Cost of Compliance for Solar Renewable Energy as described in Sections 3.2.21.3 and 3.2.21.4 of this Regulation as a percent of the Total Retail Cost of Electricity for the applicable Compliance Year.

3.2.21.6 The E&C Director shall consult with the Commission by providing written notification to the Commission upon a determination that:

3.2.21.6.1 The Total Cost of Compliance for Renewable Energy during a Compliance Year exceeds 3% of the Total Retail Cost of Electricity during the same Compliance Year; and

3.2.21.6.2 A Freeze of the yearly increase in the Minimum Cumulative Percentage from Eligible Energy Resources for CRECs as set forth in 26 **Del.C.** §§354(a), (b), and (j) should be instituted.

3.2.21.7 The E&C Director shall consult with the Commission by providing written notification to the Commission upon a determination that:

3.2.21.7.1 The Total Cost of Compliance for Solar Renewable Energy during a Compliance Year exceeds 1% of the Total Retail Cost of Electricity during the same Compliance Year; and

3.2.21.7.2 A Freeze of the yearly increase in the Minimum Cumulative Percentage from Solar Photovoltaics for CRECs as set forth in 26 **Del.C.** §§354(a), (b), and (i) should be instituted.

3.2.21.8 In the event of a Freeze of the yearly increase in the Minimum Cumulative Percentage from Eligible Energy Resources for CRECs, if the E&C Director makes a finding, consistent with the calculation set forth in Section 3.2.21.3 of this Regulation, that the Total Cost of Compliance for Renewable Energy can reasonably be expected to be less than 3% of the Total Retail Cost of Electricity during a Compliance Year, the E&C Director shall consult with the

Commission by providing written notification to the Commission of such finding and that the Freeze shall be lifted.

3.2.21.9 In the event of a Freeze of the yearly increase in the Minimum Cumulative Percentage from Solar Photovoltaics for CRECs, if the E&C Director makes a finding, consistent with the calculation set forth in Section 3.2.21.4 of this Regulation, that the Total Cost of Compliance for Solar Renewable Energy can reasonably be expected to be less than 1% of the Total Retail Cost of Electricity during a Compliance Year, the E&C Director shall consult with the Commission by providing written notification to the Commission of such finding and that the Freeze shall be lifted.

3.2.21.10 The Commission, upon receiving written notification from the E&C Director pursuant to Sections 3.2.21.6, 3.2.21.7, 3.2.21.8, and 3.2.21.9, shall treat such written notification as a Petition under 26 Del. Admin. C. §1001-1.2 and proceed according to 26 Del. Admin. C. §1001 to impose or lift a Freeze.

3.2.21.11 In implementing a Freeze under these Regulations, existing contracts for the production or delivery of RECs, SRECs, renewable energy supply, or other environmental attributes shall not be abrogated.

3.2.22 The Renewable Energy Taskforce shall be formed for the purpose of making recommendations about the establishment of trading mechanisms and other structures to support the growth of renewable energy markets in Delaware according to 26 **Del.C.** §360(d).

3.3 Verification of Compliance with the RPS

3.3.1 Within 120 days of the end of the Compliance Year 2011, 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 SRECs and RECs required for that Compliance Year according to Schedule 1 and the Total Retail Sales of each Retail Electricity Product. Beginning with the Compliance Year 2012, the CREC 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 SRECs and RECs required for the Compliance Year according to Schedule 1 and the Total Retail Sales of each Retail Electricity Product according to Section 3.2.3.

3.3.2 SRECs or RECs must have been created by PJM-EIS's GATS or its successor at law, or pursuant to Section 3.1.8.1 of this Regulation.

3.3.3 SRECs or 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 The three (3) year period referred to in Section 3.3.3 shall be tolled during any period that a renewable energy credit or solar renewable energy credit is held by the SEU as defined in 29 **Del.C.** §8059.

3.3.5 In lieu of standard means of compliance with the RPS, any Retail Electricity Supplier may pay into the Green Energy Fund an SACP or ACP pursuant to, and in such amounts as stated in, 26 **Del.C.** §358, or in such other amounts as may be determined by the E&C Director~~State Energy Coordinator of the Delaware Energy Office~~ consistent with 26 **Del.C.** §358(d)(4)~~354(i)-(j)~~.

3.3.6 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 or SACP, according to Section 3.3.5 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.

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

11 DE Reg. 1670 (06/01/08)

12 DE Reg. 1110 (02/01/09)

13 DE Reg. 952 (01/01/10)

14 DE Reg. 1241 (05/01/11)

16 DE Reg. 790 (01/01/13)

4.0 Recovery of Costs

4.1 A Retail Electricity Supplier may recover, through a non-bypassable surcharge actual dollar for dollar costs incurred in complying with the State of Delaware's RPS, except that any compliance fee assessed pursuant to Section 3.3.5 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 or SACP if the payment of an ACP or SACP is the least cost measure to ratepayers as compared to the purchase of RECs and SRECs to comply with the RPS; or if there are insufficient RECs and SRECs 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.

4.4 Special provisions for customers of CRECs. All costs arising out of contracts entered into by a CREC pursuant to 26 **Del.C.** §1007 (d) shall be distributed among the entire Delaware customer base of such companies through an adjustable non-bypassable charge which shall be established by the Commission. Such costs shall be recovered if incurred as a result of such contracts unless, after Commission review, any such costs are determined by the Commission to have been incurred in bad faith, are the product of waste or out of an abuse of discretion, or in violation of law.

11 DE Reg. 1670 (06/01/08)

12 DE Reg. 1110 (02/01/09)

14 DE Reg. 1241 (05/01/11)

5.0 Miscellaneous

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, Qualified Fuel Cell Provider Project 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.

10 DE Reg. 151 (07/01/06)

11 DE Reg. 1670 (06/01/08)

14 DE Reg. 1241 (05/01/11)

15 DE Reg. 1625 (05/01/12)

EXHIBIT B

Proposed Rules, July 25, 2017 ("Instant Regulations")

3008 Rules and Procedures to Implement the Renewable Energy Portfolio Standard (Opened August 23, 2005)

1.0 Definitions

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**" or "**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 ~~S~~subsection 3.3.5~~. of this Regulation.~~

"**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.

"CREC" means a Commission-regulated electric distribution company

"**DNREC**" means Delaware Department of Natural Resources and Environmental Control.

"E&C Director" means the Director of the Division of Energy & Climate, as the immediate successor to the State Energy Coordinator, to include any subsequent successor.

"**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 Photovoltaic Energy Resources means solar photovoltaic or solar thermal energy technologies that employ solar radiation to produce electricity or to displace electricity use;

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's Secretary's Order No. 2006-A-0035);

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's Secretary's Order No. 2006-A-0035);

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.

"Freeze" means suspension of the implementation of the annual increase in RPS under 26 **Del.C.** §§354(a), (b), (i) and (j).

"**Green Energy Fund**" means the Delaware Green Energy Fund as authorized under 26 **Del.C.** §1014(a).

"**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.

"Non-Exempt Customers" means all customers of the Commission-regulated electricity company that have not been certified by the Commission as exempt from the RPS under subsection 2.2.

"**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.

"**Qualified Fuel Cell Provider**" means an entity that:

a. By no later than the commencement date of commercial operation of the full nameplate capacity of a fuel cell project, manufactures fuel cells in Delaware that are capable of being powered by renewable fuels, and

b. prior to approval of required tariff provisions, is designated by the Director of the Delaware Economic Development Office and the Secretary of DNREC as an economic development opportunity."

"**Qualified Fuel Cell Provider Project**" (or "**QFCPP**") means a fuel cell power generation project located in Delaware owned and/or operated by a Qualified Fuel Cell Provider under a tariff approved by the Commission pursuant to 26 **Del.C.** §364(d).

"**Renewable Energy Credit**" or ("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**" or "**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.

"**Solar Alternative Compliance Payment**" or "**SACP**" means a payment of a certain dollar amount per megawatt-hour, which a Retail Electricity Supplier or Municipal Electric Supplier may submit in lieu of supplying the Minimum Percentage from Solar Photovoltaic required under ~~S~~subsection 3.3.4. ~~of this Regulation.~~

"**Sustainable Energy Utility**" or ("**SEU**") is the nonprofit entity according to the provisions of 29 **Del.C.** §8059 that develops and coordinates programs for energy end-users in Delaware for the purpose of promoting the sustainable use of energy in Delaware.

"**Solar Renewable Energy Credit**" or "**SREC**" means a tradable instrument that is equal to 1 megawatt-hour of retail electricity sales in the State that is derived from Solar Photovoltaic Energy Resources and that is used to track and verify compliance with the provisions of this Regulation.

"Total Retail Cost of Electricity" means the total costs paid by Non-Exempt Customers of the Commission-regulated electric company for the supply, transmission, distribution, and delivery of retail electricity, including costs paid to third party suppliers, during a respective Compliance Year.

"**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.

11 DE Reg. 1670 (06/01/08)

13 DE Reg. 952 (01/01/10)

14 DE Reg. 1241 (05/01/11)

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.,** Subchapter III-A, 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 its load exempt from this Regulation provided that it meets the definitions found in Section 1.1 and:

2.2.1.1 submits 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 submits the Commission's Staff acknowledgement referenced in ~~S~~subsection 2.2.1.1.1 ~~of this Regulation~~ to its 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 its load exempt, the aggregate of its accounts with an

NAICS Manufacturing Sector Code must have a Peak Demand of at least 751 kilowatts and it must follow the procedure found in ~~S~~subsection 2.2.1.

2.3 Any Rural Electric Cooperative that has 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 if it develops and implements a program for its ratepayers that is comparable to the RPS beginning in 2013. A Rural Electric Cooperative electing to be exempt from this Regulation must notify the Commission of such election and shall be subject to the requirements set forth in 26 **Del.C.** §363. A Rural Electric Cooperative not electing to be exempt from this Regulation shall be subject to this Regulation and the applicable provisions of 26 **Del.C.** §363.

11 DE Reg. 1670 (06/01/08)

14 DE Reg. 1241 (05/01/11)

3.0 Administration of RPS

3.1 Certifying and Decertifying 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 ~~S~~subsection 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 Customer-sited generation is eligible to be considered an Eligible Energy Resource provided the facility is physically located in Delaware.

3.1.4 Commission Staff will review the Application and will notify the applicant of its approval as an Eligible Energy Resource or of any deficiencies in its Application

within 30 days of receipt. The applicant will have the opportunity to revise its submission, if appropriate.

3.1.5 If an Eligible Energy Resource, once notified by Commission Staff, fails to provide the required documentation or missing information within 60 days of the date of such notification, the Application will be dismissed and must be resubmitted.

3.1.6 If Commission Staff finds the Generation Unit to be in compliance with this Regulation and other applicable law, Staff will issue a State of Delaware Certification Number.

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

3.1.8 Upon designation as an Eligible Energy Resource, the Generation Unit's owner shall be entitled to one (1) REC for each mega-watt hour of energy derived from Eligible Energy Resources other than Solar Photovoltaic Energy Resources. Upon designation as an Eligible Energy Resource, the owner of a Generation Unit employing Solar Photovoltaic Energy Resources shall be entitled to one (1) SREC for each mega-watt hour of energy derived from Solar Photovoltaic Energy Resource. SRECs and 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.

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

3.1.9 If a Generation Unit is deemed an Eligible Energy Resource 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 or SRECs 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.

3.1.10 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 review and re-certification.

3.1.11 An Eligible Energy Resource must provide updates to any changes to information submitted in the Application within 30 days of those changes becoming effective. These changes include but are not limited to changes in ownership of the generating unit, changes in ownership of the RECs or SRECs, changes in system size, or the deactivation of the unit.

3.1.12 RECs or SRECs created by an Eligible Energy Resource shall remain valid for compliance, subject to ~~S~~subsection 3.2.7, ~~S~~subsection 3.3.3 and ~~S~~subsection 3.3.4~~ of this Regulation~~, even if that Eligible Energy Resource is subsequently decertified for eligibility.

3.1.13 An Eligible Energy Resource may be decertified for any of the following:

3.1.13.1 Failure to comply with ~~S~~subsections 3.1.1 through 3.1.11;

3.1.13.2 A material change in circumstances that causes it to become ineligible for certification under ~~S~~subsection 3.1;

3.1.13.3 Fraud or misrepresentation in the Application or to PJM-EIS GATS;

3.1.13.4 Failure to properly update the Commission on changes to information submitted in the Application; or

3.1.13.5 Good cause as determined by the Commission.

3.2 Compliance with RPS

3.2.1 The Total Retail Sales of each Retail Electricity Product delivered 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 and Solar Photovoltaics as shown in Schedule 1.

SCHEDULE 1

Compliance Year (beginning June 1st)	Cumulative Minimum Percentage from Solar Photovoltaics Energy Resources	Minimum Cumulative Percentage from Eligible Energy Resources
2007		2.0%
2008	0.011%	3.0%

2009	0.014%	4.0%
2010	0.018%	5.0%
2011	0.20%	7.0%
2012	0.40%	8.5%
2013	0.60%	10.0%
2014	0.80%	11.5%
2015	1.0%	13.0%
2016	1.25%	14.5%
2017	1.50%	16.0%
2018	1.75%	17.5%
2019	2.00%	19.0%
2020	2.25%	20.00%
2021	2.50%	21.00%
2022	2.75%	22.00%
2023	3.00%	23.00%
2024	3.25%	24.00%
2025	3.50%	25.00%

Minimum Cumulative Percentage from Eligible Energy Resources includes the Minimum Cumulative Percentage from Solar Photovoltaics

3.2.2 A Retail Electricity Supplier's compliance with Schedule 1 shall be based on accumulating RECs and SRECs equivalent to the current Compliance Year's Cumulative Minimum Percentage of Total Retail Sales of each Retail Electricity Product sold to End-Use Customers subject to ~~S~~subsection 3.2.7 ~~of these Regulations~~ and, where appropriate, other Commission regulations. Each Retail Electricity Suppliers shall file a report detailing its compliance with its RPS obligations within 120 days following the end of Compliance Year 2011.

3.2.3 Beginning June 1, 2012, every ~~Commission-regulated electric companies (~~"CREC"~~)~~ shall be responsible for procuring RECs, SRECs, and any other attributes needed to comply with the minimum percentage requirements set forth in 26 **Del.C.** §354 and Section 3.2.1 with respect to all energy delivered to the CREC's End-Use Customers. Such RECs and SRECs shall be filed annually with the Commission within 120 days following the completion of the Compliance Year. In

fulfilling the duty imposed upon it by 26 **Del.C.** §354(e), a CREC shall succeed to, and assume, the obligations, entitlements, and responsibilities imposed or allowed to a "retail electricity supplier" under the provisions of 26 **Del.C.** §§354-362, subsections ~~and Sections~~ 3.2~~,~~ and 3.3, and Sections 4.0 and 5.0 ~~of these regulations~~.

3.2.3.1 The transitional process set forth in these Regulations shall apply to all Retail Electricity Suppliers that entered into retail electric supply contracts prior to March 1, 2012 that include RPS compliance costs for Compliance Year 2012 and thereafter and that extend beyond June 1, 2012 (such retail electric supply contracts shall be referred to as “Transitional Retail Contracts”. The transitional process will end when the particular contract expires, or is otherwise terminated, or is modified to transfer the RPS compliance costs to the CREC, whichever occurs first.

3.2.3.1.1 On or before March 1, 2012, each Retail Electricity Supplier shall provide the CREC, the Commission Staff and the DPA with identification of all End-Use Customers supplied through a Transitional Retail Contract and shall further provide such supporting data as may be requested. Such identification shall include, but shall not be limited to, the name of the End-Use Customer and the expiration date of the Transitional Retail Contract. All such information required to be submitted hereunder may be submitted confidentially by the Retail Electric Supplier.

3.2.3.1.2 End-Use Customers who dispute their designation may file a complaint with the Commission according to 26 **DE Admin. Code** §1000.

3.2.3.1.3 Retail Electricity Suppliers shall transfer the RECs and SRECs necessary to meet their RPS compliance obligations for each Transitional Retail Contract for the respective Compliance Year beginning with Compliance Year 2012, to the CREC’s GATS account for retirement at no cost to the CREC. The CREC will provide to the respective Retail Electricity Supplier the sales number based on metered data pertaining to the identified Transitional Retail Contracts for determining its RPS obligation with preliminary data on or before June 15th, and final data on or before August 15th. Ninety percent of the Retail Electricity Supplier’s expected total RECs/SRECs necessary for compliance with its RPS obligations for each Transitional Retail Contract shall be transferred to the CREC’s GATS account on or before August 1st following the end of the Compliance Year, and the remaining RECs and SRECs necessary for compliance with the Retail Electricity Supplier’s RPS compliance obligations for each Transitional Retail Contract shall be transferred to the CREC’s GATS account on or before September 1st following the end of the Compliance Year. Should either of these deadlines fall on a weekend or legal holiday, the deadline will be the next business day following August 1st and September 1st.

3.2.3.1.4 If a Retail Electricity Supplier fails to transfer to the CREC's GATS account sufficient RECs or SRECs to comply with its RPS obligations for each Transitional Retail Contract, it shall reimburse the CREC for the CREC's weighted average purchase cost of procuring such RECs and /or SRECs necessary to comply with the Retail Electricity Supplier's obligations and/or any associated ACPs or SACPs by the CREC. The CREC shall accept the retail supplier's designation of Transitional Retail Contracts in determining the RPS obligation for such supplier.

3.2.3.1.4.1 The CREC shall notify the Retail Electricity Supplier of its deficiency and the amount owed to the CREC by October 1st of each year. The CREC shall provide the Retail Electricity Supplier with all supporting documentation of the costs incurred, if requested by the Retail Electricity Supplier. The Retail Electricity Supplier shall have fifteen (15) business days to reimburse the CREC or to advise the Commission in writing of any dispute relating to the deficiency. Interest shall accrue for any late payment (after the 15 business days) and shall be payable to the CREC. The interest rate shall be based on Delmarva's short term debt rate in effect on the date when the payment was due from the Retail Electricity Supplier.

3.2.3.1.5 To protect a CREC and its customers from incurring an ACP or SACP due to a Retail Electricity Supplier's failure to transfer the appropriate number of RECs and/or SRECs necessary for compliance with its RPS obligations during the transitional process, a CREC may request the Commission to approve a temporary reduction in its RPS obligation or a reduction in the ACP or SACP price for that Compliance Year.

3.2.3.2 Beginning with sales as of June 1, 2012, the CREC will charge all of its distribution system End-Use Customers for RPS compliance costs through a non-bypassable charge based on the weighted average cost of the RECs and SRECs supplied by the CREC.

3.2.3.2.1 Industrial Customers whose peak demand is in excess of 1500 kilowatts and have been acknowledged by the Commission as having their load exempted from the RPS compliance obligations pursuant to 26 **Del.C.** §353(b), ~~and~~ Section~~s~~ 1,0, and subsections 2.2.1~~,~~ and 2.2.2, shall not be charged the RPS compliance cost permitted by ~~S~~subsection 3.2.3.2.

3.2.3.2.2 For a particular compliance year, the total recovery of the RPS compliance costs by the CREC, shall not be an amount greater than the CREC's actual dollar for dollar costs incurred for that compliance year in complying with the State of Delaware's RPS, except that any compliance fee assessed pursuant to

26 **Del.C.** §358(d) and Ssubsection 3.3.5 ~~of this Regulations~~ shall be recoverable only to the extent authorized by 26 **Del.C.** §358(f)(2) and Ssubsection 4.2 ~~of this Regulation~~.

3.2.3.2.3 The CREC will credit the distribution portion of the bill of the End-User Customers identified in Ssubsection 3.2.3.1.1 ~~of these Regulations~~ by the amount equal to the non-bypassable charge for the duration of the Transitional Retail Contract.

3.2.3.3 The CREC and Retail Electricity Suppliers shall place on their websites customer education pertaining to the RPS non-bypassable charge and credit required in Ssubsections 3.2.3.2 and 3.2.3.2.1. The CREC shall also include information on the RPS non-bypassable charge and credit on its bill message or bill insert.

3.2.3.4 Retail Electricity Suppliers that prior to March 1, 2012, have entered into contracts to purchase or produce RECs and/or SRECs specifically for Delaware RPS compliance may offer to the CREC those RECs and/or SRECs. The price would be determined by separate agreement between the Retail Electricity Supplier and the CREC. In no case shall the CREC be obligated to purchase any RECs/SRECs from the Retail Electricity Supplier.

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).

3.2.5 Energy output must be tracked using PJM-EIS GATS or its successor at law or pursuant to Ssubsection 3.1.8.1 ~~of this Regulation~~.

3.2.6 The right of Commission-regulated electric companies to use energy output produced by a Qualified Fuel Cell Provider Project to fulfill their REC and SREC requirements shall not expire until actually applied to fulfill such requirements.

3.2.7 No CREC, or Retail Electricity Supplier with existing contractual electric supply obligations can provide 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 Ssubsection 3.2.1 ~~of this Regulation~~ must come from New Renewable Generation resources. In Compliance Year 2026 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.

3.2.8 A Retail Electricity Supplier shall not use RECs or SRECs used to satisfy another state's renewable energy portfolio requirements for compliance with ~~S~~subsection 3.2.1 and Schedule 1. A Retail Electricity Supplier may sell or transfer any RECs or SRECs not required to meet this Regulation.

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

3.2.10 Eligible Energy Resources that do not settle though the PJM Market settlement system must document their actual output of generation, as recorded by appropriate metering, as frequently as PJM-EIS-GATS shall prescribe.

3.2.11 Aggregate generation from small Eligible Energy Resources totaling 100 kilowatts or less of capacity, may be used to meet the requirements of ~~S~~subsection 3.2.1 and Schedule 1 provided that the generators or their agents shall document the level of generation, as recorded by appropriate metering, as frequently as PJM-EIS-GATS shall prescribe.

3.2.12 A Retail Electricity Supplier or Rural Electric Cooperative shall receive 300% credit toward meeting the Minimum Cumulative Percentage from Eligible Energy Resources of ~~S~~subsection~~s~~ 3.2.1 and Schedule 1 of the RPS for energy derived from the following sources installed on or before December 31, 2014:

3.2.12.1 Customer-Sited solar photovoltaic physically located in Delaware; or

3.2.12.2 A fuel cell powered by Renewable Fuels for Retail Electricity Suppliers, and such a fuel cell sited in Delaware for Rural Electric Cooperatives.

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

3.2.14 A CREC shall receive 350% credit toward meeting the RPS for energy derived from off-shore wind energy installations sited off the Delaware coast on or before May 31, 2017.

3.2.14.1 To be entitled to 350% credit, contracts for energy and renewable energy credits from such off-shore wind energy installations must be executed by CREC prior to commencement of construction of such installations.

3.2.14.2 CREC shall be entitled to such multiple credits for the life of contracts for renewable energy credits from off-shore wind installations executed pursuant to subsection 3.2.14.

3.2.15 A Retail Electricity Supplier or a Rural Electric Cooperative shall receive an additional 10% credit toward meeting the RPS for solar or wind energy installations sited in Delaware, provided that a minimum of 50% of the cost of the renewable energy equipment, inclusive of mounting components, relates to Delaware manufactured equipment.

3.2.16 A Retail Electricity Supplier or a Rural Electric Cooperative shall receive an additional 10% credit toward meeting the RPS for solar or wind energy installations sited in Delaware provided that the facility is constructed and/or installed with a workforce that consists of at least 75% Delaware residents and/or the installing company employs in total a minimum of 75% workers who are Delaware residents.

3.2.17 A Retail Electricity Supplier or a Rural Electric Cooperative shall receive credit toward meeting the RPS for electricity derived from the fraction of eligible landfill gas, biomass or biogas combined with other fuels (for a Rural Electric Cooperative the Eligible Energy Resource must be sited in Delaware).

3.2.18 Cumulative minimum percentage requirements of Eligible Energy Resources and Solar Photovoltaic Resources shall be established by Commission rules for Compliance Year 2026 and each subsequent year. In no case shall the minimum percentages established by Commission rules be lower than those required for Compliance Year 2025 in ~~S~~subsection~~s~~ 3.2.1 and Schedule 1. Each of the rules setting such minimum percentage shall be adopted at least two years prior to the minimum percentage being required.

3.2.19 Beginning in Compliance Year 2010, and in each Compliance Year thereafter, the Commission may review the status of ~~S~~subsection 3.2.1 and Schedule 1 and report to the legislature on the status of the pace of the scheduled percentage increases toward the goal of 25%. 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.

3.2.20 Beginning in Compliance Year 2014, and in each Compliance Year thereafter, the Commission may, in the event of circumstances specified in this section and after conducting hearings, accelerate or slow the scheduled percentage increases towards meeting the goal of 25%. The Commission may only slow the increases if the Commission finds that at least 30% of RPS compliance has been met through the ACP

or SACP for three (3) consecutive years, despite adequate planning by the CREC and, where applicable, Retail Electricity Suppliers with existing contractual electric supply obligations. The Commission may only accelerate the scheduled percentage increases after finding that the average price for RECs and SRECs 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.

~~3.2.21 The minimum percentages from Eligible Energy Resources and Solar Photovoltaic Energy Resources as shown in Section 3.2.1 and Schedule 1 may be frozen for CRECs as authorized by, and pursuant to, 26 **Del.C.** § 354(i)-(j). For a freeze to occur, the Delaware Energy Office must determines that the cost of complying with the requirements of this Regulation exceeds 1% for Solar Photovoltaic Energy Resources and 3% for Eligible Energy Resources of the total retail cost of electricity for Retail Electricity Suppliers during the same Compliance Year. The total cost of compliance shall include the costs associated with any ratepayer funded state renewable energy rebate program, REC and SREC purchases, and ACPs and SACPs alternative compliance payments.~~

~~3.2.21.1 Once frozen, the minimum cumulative requirements shall remain at the percentage for the Compliance Year in which the freeze was instituted.~~

~~3.2.21.2 The freeze may be lifted only upon a finding by the State Energy Coordinator, in consultation with the Commission, that the total cost of compliance can reasonably be expected to be under the 1% or 3% threshold, as applicable.~~

3.2.21 Implementation of Renewable Energy Portfolio Standards Cost Cap Provisions

3.2.21.1 Within 120 days after the end of each Compliance Year, the CREC shall submit to the E&C Director the following information for the applicable Compliance Year:

3.2.21.1.1 The total costs associated with the purchase of SRECs retired to comply with the RPS;

3.2.21.1.2 The total costs associated with all Solar Alternative Compliance Payments as allowed under subsection 4.2;

3.2.21.1.3 The total costs associated with the purchase of RECs retired to comply with the RPS;

3.2.21.1.4 The total costs associated with all Alternative Compliance Payments as allowed under subsection 4.2; and

3.2.21.1.5 The Total Retail Cost of Electricity.

3.2.21.2 Within 120 days after the end of each Compliance Year, the Division of Energy & Climate shall determine the following information for the applicable Compliance Year:

3.2.21.2.1 The total costs associated with any ratepayer funded state solar rebate program; and

3.2.21.2.2 The total costs associated with any ratepayer funded state renewable energy rebate program.

3.2.21.3 The Total Cost of Compliance for Renewable Energy shall be calculated as:

3.2.21.3.1 The total costs associated with any ratepayer funded state solar rebate program, plus

3.2.21.3.2 The total costs associated with the purchase of SRECs retired to comply with the RPS, plus

3.2.21.3.3 The total costs associated with all Solar Alternative Compliance Payments as allowed under subsection 4.2, plus

3.2.21.3.4 The total costs associated with any ratepayer funded state renewable energy rebate program, plus

3.2.21.3.5 The total costs associated with the purchase of RECs retired to comply with the RPS, plus

3.2.21.3.6 The total costs associated with all Alternative Compliance Payments as allowed under subsection 4.2.

3.2.21.4 The Total Cost of Compliance for Solar Renewable Energy shall be calculated as:

3.2.21.4.1 The total costs associated with any ratepayer funded state solar rebate program, plus

3.2.21.4.2 The total costs associated with the purchase of SRECs retired to comply with the RPS, plus

3.2.21.4.3 The total costs associated with all Solar Alternative Compliance Payments as allowed under subsection 4.2.

3.2.21.5 Within 135 days after the end of each Compliance Year, the E&C Director or its assigned delegate shall calculate the Total Cost of Compliance for Renewable Energy and the Total Cost of Compliance for Solar Renewable Energy as described in subsections 3.2.21.3 and 3.2.21.4 as a percent of the Total Retail Cost of Electricity for the applicable Compliance Year, and shall submit in writing to the Commission its calculations determining whether:

3.2.21.5.1 The Total Cost of Compliance for Solar Renewable Energy during a Compliance Year exceeds 1% of the Total Retail Cost of Electricity during the same Compliance Year; or

3.2.21.5.2 The total Cost of Compliance for Renewable Energy during a Compliance Year exceeds 3% of the Total Retail Cost of Electricity during the same Compliance Year.

3.2.21.6 If the E&C Director's calculations determine that either subsection 3.2.21.5.1 or 3.2.21.5.2 is met, then in no fewer than 10 days nor more than 30 days the Commission shall conduct at a regularly-scheduled meeting a consultation between the E&C Director and the Commission as to whether a Freeze of the yearly increase in the Minimum Cumulative Percentage from Solar Photovoltaics requirement or a Freeze of the yearly increase in the Minimum Cumulative Percentage from Eligible Energy Resources requirement for CRECs should be instituted as set forth in 26 **Del.C.** §§ 354 (a), (b), (i), and (j).

3.2.21.6.1 Within 20 days after the consultation, the E&C Director or its assigned delegate shall submit to the Commission its written determination, including the bases for that determination, to declare or not declare a Freeze.

3.2.21.6.2 The written determination shall constitute a Final Agency Action of DNREC under 29 **Del. C.** § 10141(b) and as required by this Regulation.

3.2.21.6.3 If the E&C Director determines a Freeze should be declared, the Commission shall issue an Order to the CREC to remain at the Minimum Cumulative Percentage from Eligible Energy Resources or the Minimum Cumulative Percentage from Solar Photovoltaics at the percentage required during the Compliance Year for which the calculation of subsection 3.2.21.5 was performed.

3.2.21.7 In the event of a Freeze of the yearly increase in the Minimum Cumulative Percentage from Solar Photovoltaics for CRECs, if the E&C Director makes a finding that, consistent with the calculation set forth in subsection 3.2.21.5, the Total Cost of Compliance for Solar Renewable Energy can reasonably be expected to be less than 1% of the Total Retail Cost of Electricity during the next Compliance Year, the E&C Director shall provide written notification of its finding to the Commission.

3.2.21.8 In the event of a Freeze of the yearly increase in the Minimum Cumulative Percentage from Eligible Energy Resources for CRECs, if the E&C Director makes a finding that, consistent with the calculation set forth in subsection 3.2.21.5, the Total Cost of Compliance for Renewable Energy can reasonably be expected to be less than 3% of the Total Retail Cost of Electricity during the next Compliance Year, the E&C Director shall provide written notification of its finding to the Commission.

3.2.21.9 In no fewer than 10 days nor more than 30 days after receipt of written notification from the E&C Director, the Commission shall conduct at a regularly-scheduled meeting a consultation between the E&C Director and the Commission as to whether a Freeze of the yearly increase in the Minimum Cumulative Percentage from Eligible Energy Resources requirement or a Freeze of the yearly increase in the Minimum Cumulative Percentage from Solar Photovoltaics requirement for CRECs should be lifted as set forth in 26 **Del.C.** §§ 354 (a), (b), (i), and (j).

3.2.21.9.1 Within 20 days after the consultation, the E&C Director or its assigned delegate shall submit to the Commission its written determination, including the bases for that determination, of whether the total cost of compliance can reasonably be expected to be under the thresholds set forth in subsections 3.2.21.7 or 3.2.21.8.

3.2.21.9.2 The written determination shall constitute a Final Agency Action of DNREC under 29 **Del.C.** § 10141(b) and as required by this Regulation.

3.2.21.9.3 If the E&C Director determines that the total cost of compliance can reasonably be expected to be under the thresholds set forth in 3.2.21.9.1, the Commission shall issue an Order to the CREC to resume increasing the Minimum Cumulative Percentage from Eligible Energy Resources or the Minimum

Cumulative Percentage from Solar Photovoltaic Resources requirement beginning in the Compliance Year for which the calculations of subsections 3.2.21.7 or 3.2.21.8 were performed. When a CREC is ordered to resume the increase of the Minimum Cumulative Percentage, the requirement shall be that of the Compliance Year immediately following the percentage required when the Freeze was instituted.

3.2.22 The Renewable Energy Taskforce shall be formed for the purpose of making recommendations about the establishment of trading mechanisms and other structures to support the growth of renewable energy markets in Delaware according to 26 **Del.C.** §360(d).

3.3 Verification of Compliance with the RPS

3.3.1 Within 120 days of the end of the Compliance Year 2011, 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 SRECs and RECs required for that Compliance Year according to Schedule 1 and the Total Retail Sales of each Retail Electricity Product. Beginning with the Compliance Year 2012, the CREC 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 SRECs and RECs required for the Compliance Year according to Schedule 1 and the Total Retail Sales of each Retail Electricity Product according to Ssubsection 3.2.3.

3.3.2 SRECs or RECs must have been created by PJM-EIS's GATS or its successor at law, or pursuant to Ssubsection 3.1.8.1 of this Regulation.

3.3.3 SRECs or 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 The three (3) year period referred to in Ssubsection 3.3.3 shall be tolled during any period that a renewable energy credit or solar renewable energy credit is held by the SEU as defined in 29 **Del.C.** §8059.

3.3.5 In lieu of standard means of compliance with the RPS, any Retail Electricity Supplier may pay into the Fund an SACP or ACP pursuant to, and in such amounts as stated in, 26 **Del.C.** §358, or in such other amounts as may be determined by the State Energy Coordinator of the Delaware Energy Office consistent with 26 **Del.C.** §354(i)-(j).

3.3.6 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 or SACP, according to ~~S~~subsection 3.3.5 ~~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.

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

11 DE Reg. 1670 (06/01/08)

12 DE Reg. 1110 (02/01/09)

13 DE Reg. 952 (01/01/10)

14 DE Reg. 1241 (05/01/11)

16 DE Reg. 790 (01/01/13)

4.0 Recovery of Costs

4.1 A Retail Electricity Supplier may recover, through a non-bypassable surcharge actual dollar for dollar costs incurred in complying with the State of Delaware's RPS, except that any compliance fee assessed pursuant to ~~S~~subsection 3.3.5 ~~of these Rules and Regulation~~ shall be recoverable only to the extent authorized by ~~S~~subsection 4.2 ~~of this Regulation~~.

4.2 A Retail Electricity Supplier may recover any ACP or SACP if the payment of an ACP or SACP is the least cost measure to ratepayers as compared to the purchase of RECs and SRECs to comply with the RPS; or if there are insufficient RECs and SRECs 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.

4.4 Special provisions for customers of CRECs. All costs arising out of contracts entered into by a CREC pursuant to 26 **Del.C.** §1007 (d) shall be distributed among the entire Delaware customer base of such companies through an adjustable non-bypassable charge which shall be established by the Commission. Such costs shall be

recovered if incurred as a result of such contracts unless, after Commission review, any such costs are determined by the Commission to have been incurred in bad faith, are the product of waste or out of an abuse of discretion, or in violation of law.

11 DE Reg. 1670 (06/01/08)

12 DE Reg. 1110 (02/01/09)

14 DE Reg. 1241 (05/01/11)

5.0 Miscellaneous

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, Qualified Fuel Cell Provider Project 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.

10 DE Reg. 151 (07/01/06)

11 DE Reg. 1670 (06/01/08)

14 DE Reg. 1241 (05/01/11)

15 DE Reg. 1625 (05/01/12)