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October 28, 2010

**BY FED EX**

Alisa Carrow Bentley, Secretary  
Delaware Public Service Commission  
861 Silver Lake Boulevard  
Cannon Building, Suite 100  
Dover, Delaware 19904

**Re: PSC Regulation Docket No. 56**

Dear Ms. Bentley:

Enclosed please find, on behalf of the Retail Energy Supply Association, an original and 15 copies of its Comments in the above-referenced proceeding.

Please be advised that a Motion and Certification for Admission *pro hac vice*, including Applicant's Certification, and draft order for Brian R. Greene, Esq. will be submitted for consideration under separate cover.

Please contact me should you have any questions regarding this matter.

Sincerely,

Brian R. Greene

BRG/dls

Enclosures

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

**IN THE MATTER OF THE ADOPTION OF  
RULES AND PROCEDURES TO  
IMPLEMENT THE RENEWABLE  
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;  
AND SEPTEMBER 22, 2009; SEPTEMBER  
7, 2010)**

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**PSC REGULATION DOCKET NO. 56**

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**COMMENTS OF  
THE RETAIL ENERGY SUPPLY ASSOCIATION**

**Introduction and Summary**

On September 7, 2010 the Commission issued Order No. 7834 in this docket proposing to update its Renewable Portfolio Standards (“RPS”) Rules to reflect recent amendments to the Renewable Portfolio Standards Act (“RPS Act”).<sup>1</sup> Among other things, these amendments modify electric suppliers’ minimum cumulative percentage requirements for sales from Eligible Energy Resources<sup>2</sup> and Solar Photovoltaic Energy Resources,<sup>3</sup> allow the Commission to freeze minimum cumulative percentage requirements for Commission-regulated utilities, and establish a Renewable Energy Taskforce to review trading mechanisms and other structures to support growth of renewable trading markets in Delaware.

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<sup>1</sup> 26 Del. C. §351-364.

<sup>2</sup> Eligible Energy Resources include Solar Photovoltaic Energy Resources, wind energy, ocean energy (including tidal action, currents or thermal differences), geothermal energy technologies that generate electricity with a steam turbine, electricity generated by a fuel cell powered by renewable fuels, electricity generated by the combustion of gas from the anaerobic digestion of organic material, hydroelectric energy from certain facilities and energy generated by the combustion of biomass or methane gas under certain circumstances. See 26 Del. C. § 352 (6).

<sup>3</sup> Solar Photovoltaic Energy Resources are solar photovoltaic or solar thermal energy technologies that employ solar radiation to produce electricity or to displace electricity use. 26 Del. C. §352 (6).

The Retail Energy Supply Association (“RESA”) is a nonprofit organization and trade association that represents the interests of its members in regulatory proceedings in the Mid-Atlantic, Great Lakes, New York and New England regions.<sup>4</sup> RESA’s members include providers of competitive supply and related services in the Mid-Atlantic States, including Delaware.

Title 26, Section 362 of the Delaware Code requires that the Commission adopt rules and regulations necessary to implement the provisions of the RPS Act as it applies to retail electricity suppliers, making them as consistent as possible with those of other states in the region with similar requirements in an effort to minimize the compliance burdens imposed by the statute and to avoid duplication of effort.<sup>5</sup> Two of the proposed changes to the RPS Rules raise concern for RESA members to the extent they would increase, rather than decrease, compliance burdens for retail electricity suppliers. Specifically, the amendments (1) fail to consider impacts on existing forward-looking contracts between retail electric suppliers and their customers and (2) create an un-level playing field by permitting the Commission to freeze minimum cumulative percentage requirements from Eligible Energy Resources and Solar Photovoltaic Energy Resources for only Commission-regulated utilities.

While not part of the proposed RPS Rules, RESA members also wish to comment on the Commission’s appointment to the Renewable Energy Taskforce (“Taskforce”) pursuant to Section 360 of the RPS Act. The Taskforce is created pursuant to the RPS

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<sup>4</sup> RESA’s members include ConEdison *Solutions*; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; Exelon Energy Company; GDF SUEZ Energy Resources NA, Inc.; Green Mountain Energy Company; Hess Corporation; Integrys Energy Services, Inc.; Just Energy; Liberty Power; NextEra Energy Services; PPL EnergyPlus; Reliant Energy Northeast, LLC; and Sempra Energy Solutions LLC. The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of RESA.

<sup>5</sup> 26 Del. C. § 362.

Act to make “recommendations about the establishment of trading mechanisms and other structures to support the growth of renewable energy markets in Delaware.”<sup>6</sup> However, this Taskforce, because it does not appoint a retail electricity supplier, might not adequately take into consideration the accumulated experience, viewpoints and interests of retail electricity suppliers when making recommendations to support the growth of renewable energy markets in Delaware. To ensure retail suppliers’ and other unrepresented parties’ accumulated expertise and substantive experience with renewable energy markets throughout the United States benefits and informs the Taskforce’s recommendations, RESA suggests the Commission create a separate docket to allow all market participants to comment on issues presented to the Taskforce and to assist the Taskforce in its mission.

RESA strongly encourages this Commission to consider the impact these regulations may have on the market for competitive retail suppliers in Delaware. It is with this concern in mind that RESA submits for the Commission’s review the following comments to the proposed RPS Rules set forth in Commission Order 7834.

**I. The Commission should use its discretionary power to exempt existing contracts from the minimum cumulative percentage requirements that would otherwise apply starting in 2010. (RPS Rule 3.2)**

Commission RPS Rule 3.2 establishes the requirements for retail electricity suppliers to comply with the new RPS. Rule 3.2.1 requires the total retail sales by retail electricity suppliers to consist of minimum cumulative percentages of Eligible Energy Resources and Solar Photovoltaic Energy Resources from 2007 onwards.<sup>7</sup> The most recent amendments to the RPS Act change the minimum cumulative percentages

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<sup>6</sup> 26 Del. C. § 360 (d)

<sup>7</sup> The minimum cumulative percentages were initially set in 2006 (Commission Order 6931) and modified in 2008 (Commission Order 7377) and 2009 (Commission Order 7494).

requirements starting in 2010. Accordingly, retail electricity suppliers' fixed-price long-term contracts that extend past the date these changes go into effect are impacted and retail electricity suppliers and their customers risk bearing sudden, significant impacts.

**A. Failing to grandfather existing contracts would hinder not just current, but future contractual relationships in Delaware and harm electric suppliers, their customers, and ultimately renewable energy resource providers throughout Delaware.**

Setting renewable energy requirements several years into the future creates certainty and a regulatory environment that permits electric energy suppliers in Delaware to enter into forward-looking fixed-price contracts with their customers. Each of these fixed-price contracts considers the retail supplier's renewable obligations and includes the estimated cost of these obligations in the contract price. While most, but not all, of these fixed-price contracts address regulatory risk by including pass-through provisions that accommodate changes in the law, enforcing these provisions could have significant negative implications for a customer, the retail supplier's relationship with its customers and for Delaware's competitive retail energy markets in general.

Today, customers rely on the price certainty offered by retail suppliers when organizing their business affairs, particularly in this difficult economic environment. Retail suppliers are able to offer customers these fixed-price forward-looking contracts only if they perceive minimal regulatory risk in Delaware.

The RPS Act and the resulting Commission regulations, as they existed prior to the recent amendments, set forth the minimum cumulative percentage requirements retail electricity service providers were required to satisfy from Eligible Energy Resources and Solar Photovoltaic Energy Resources almost two decades into the future, providing regulatory certainty for market participants in the state's retail energy market. Passing

the Commission's proposed RPS Rules without consideration of existing contracts removes the regulatory certainty these regulations are intended to create and generate the perception of undue regulatory risk in Delaware.

Setting such a precedent discourages suppliers and their customers from entering into contracts that would otherwise provide significant value and certainty to customers. A perceived inability to rely on existing plan requirements for contracts that are already executed will tend to limit offers by suppliers to shorter-term propositions and retail suppliers in Delaware would face the increased cost of procuring renewable energy supply on the spot market and likely pass these costs onto customers. This in turn would increase the compliance burden for all participants in the Delaware retail energy markets not just with respect to contracts that exist today, but for contracts contemplated for the future. The result is the opposite of what the RPS Act intended; rather than grow the market for renewable energy resources in Delaware, the procurement of renewable energy resources in the state would become costlier and more burdensome for all parties involved.

**B. The Commission has the power to grandfather existing contracts, setting positive precedent and promoting the development and supply of renewable energy resources in Delaware.**

Section 362(a) of Title 26 of the Delaware Code requires the Commission to make its regulations as consistent as possible with those of other states in the region to minimize the compliance burdens imposed by this statute and to avoid the duplication of effort. In other states, such as Maryland and Massachusetts, changes to RPS standards

have typically included grandfathering clauses that exempt existing contracts from new RPS requirements to minimize compliance burdens.<sup>8</sup>

The RPS Act does not prohibit the Commission from exempting existing contracts from the new minimum cumulative percentage requirements. Rather, Section 362 affords the Commission the discretionary power and flexibility it needs to consider precisely these types of issues when promulgating its regulations under the RPS Act. In complying with Section 362's requirement that the Commission pass regulations consistent with those of other states, the Commission should consider Maryland's 2010 statute that specifically grandfathers existing contracts. Maryland Senate Bill 277 which, among other things, altered certain renewable energy portfolio standards in certain years for electricity derived from solar energy, contained the following language in Sections 3 and 4 which are now the law in Maryland:

SECTION 3. AND BE IT FURTHER ENACTED, That this Act shall be construed to apply only prospectively and may not be applied or interpreted to have any effect on or application to any contract existing before the effective date of this Act.

SECTION 4. AND BE IT FURTHER ENACTED, That this Act shall take effect January 1, 2011.<sup>9</sup>

In addition, Massachusetts's recent revisions to its Class I Renewable Portfolio Standards (225 CMR 14.08 (3)(b)(3)), exempted contracts executed prior to January 1, 2010 from the new standards.<sup>10</sup> In complying with Section 362's requirement that the Commission minimize the compliance burdens imposed on market participants, the Commission need

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<sup>8</sup> For example, Massachusetts grandfathered existing contracts in response to comments from RESA in its ongoing consideration and revision of the proposed Class I Renewable Portfolio Standard. See "Draft Proposed Regulation," § 14.08(3)(b)(3), available at <http://www.mass.gov/Eoeea/docs/doer/renewables/biomass/225%20CMR%2014.00%20091710%20to%20SoS.PDF> (page 29 of the PDF document).

<sup>9</sup> A copy of Maryland Senate Bill 277 is available at: <http://mlis.state.md.us/2010rs/bills/sb/sb0277e.pdf>.

<sup>10</sup> See footnote 8.

only look to the detriment, set forth above, that a perceived increase in regulatory risk could pose to the retail energy market and also the problems that can occur when a retail supplier enforces the “change of law” provisions in its contract with its customers. Section 362 sets forth the flexibility and discretion the Commission needs to ensure contractual relationships remain intact and unharmed under the proposed RPS Rules.

In the alternative, proposed RPS Rule 3.2.2 also permits the Commission to modify minimum cumulative percentage requirements for existing contracts. Proposed RPS Rule 3.2.2 sets forth how retail electricity suppliers must comply with Schedule 1 (setting forth the minimum cumulative percentage requirements). Specifically, minimum cumulative percentage requirements shall be based on accumulating Renewable Energy Credits (“RECs”) and Solar Renewable Energy Credits (“SRECs”) equivalent to the current compliance year’s cumulative percentage of total retail sales subject, “where appropriate,” to Commission regulations.<sup>11</sup>

Accordingly, to accommodate existing contracts under the proposed RPS Rules, the Commission could adopt a new regulation that exempts existing contracts from the RPS Rules and, pursuant to proposed RPS Rule 3.2.2, makes existing contracts subject to this new Commission regulation, rather than proposed Rule 3.2.1 setting forth the new minimum cumulative percentage requirements.

The Commission thus has the power to pass regulations or otherwise interpret existing law to ease the compliance burdens for retail suppliers who have existing fixed-price, forward-looking contracts that comply with the previous minimum cumulative percentage requirements, but not the new, revised requirements. RESA urges this Commission to use the flexibility and discretion provided in Section 362 of the RPS Act

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<sup>11</sup> RPS Rule 3.2.2.



or, in the alternative, proposed RPS Rule 3.2.2, to exempt existing forward-looking contracts from the increased minimum cumulative percentage requirements set forth in the revised RPS Act.

**II. The Commission should revise its regulations to permit freezing minimum cumulative percentage requirements from Eligible Energy Resources and Solar Photovoltaic Energy Resources for *all* electric service providers in Delaware, not just Commission-regulated electric companies. (Proposed RPS Rule 3.2.16)**

Proposed RPS Rule 3.2.16 permits the Commission to freeze the required minimum cumulative percentage requirements from Eligible Energy Resources or Solar Photovoltaic Energy Resources for Commission-regulated electric companies when the Delaware Energy Office determines that the cost of complying with the minimum requirements for Eligible Energy Resources exceeds 1% of the retail cost of electricity for Commission-regulated electric companies during the same compliance year or when the cost of complying with the Solar Photovoltaic Energy Resources exceeds 3% of the retail cost of electricity for Commission-regulated electric companies during the same compliance year. This rule implements Section 362 (b) of Title 26 of the Delaware Code.

Proposed RPS Rule 3.2.16 produces an unequal playing field that directly conflicts with the requirement of the Commission to minimize compliance burdens for retail electricity suppliers in Delaware.<sup>12</sup> Limiting the application of the freeze to Commission-regulated electric companies greatly increases the compliance burdens for unregulated electric suppliers. If the Commission were to enforce the freeze on regulated electric companies only, unregulated electric suppliers would face a market in which they are significantly disadvantaged. Regulated electric companies would be able to pass on the savings they accrue from providing electricity from less expensive resources to their

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<sup>12</sup> 26 Del. C. § 362(a).

customers, while unregulated electric suppliers could not. Faced with the option of paying less for electricity, customers would migrate towards regulated electric companies, reducing competition and thus negatively impacting the Delaware retail electricity markets.

Moreover, the Commission would be setting discouraging precedent if it adopts a rule that permits a freeze on minimum cumulative percentage requirements for regulated electric companies but not for unregulated electric companies. Specifically, if the Commission were to adopt this rule, many retail electricity suppliers would view the environment for unregulated retail electricity suppliers as negative in Delaware, choosing to forego opportunities in this state and instead sell electricity elsewhere. Such decisions would run directly contrary to the purpose behind the new, proposed RPS Rules, discouraging rather than encouraging the development of renewable energy resources in Delaware.

RESA urges this Commission to consider the impact of passing such a one-sided freeze provision for Commission-regulated utilities and use the flexibility and discretion set forth specifically in Section 362 of the RPS Act to minimize the heavy compliance burdens that would otherwise result for retail electricity suppliers.

**III. RESA urges the Commission to ensure that retail electricity supplier interests are adequately represented before the Renewable Energy Taskforce. (26 Del. C. § 360).**

Title 26 Section 360 of the RPS Act establishes the Renewable Energy Taskforce (“Taskforce”) 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.”<sup>13</sup> While the Secretary of the Delaware Department of Natural Resources and Environmental Control, this Commission, Delmarva Power & Light, the Delaware Electric Cooperative, municipal electric companies, the Sustainable Energy Utility, the Delaware Public Advocate and the Delaware Solar Energy Coalition all have at least one appointment to the Taskforce, retail electricity suppliers are afforded no such appointments. Without adequate representation from retail electricity suppliers, the Taskforce risks ignoring substantial accumulated experience and important viewpoints when making recommendations on how best to support the growth of renewable energy markets in Delaware.

RESA members participate in retail markets throughout Mid-Atlantic, Midwest, and Northeast United States. In each of these regions retail electricity suppliers have participated in RPS deployments that use a variety of market mechanisms and other devices designed to promote the deployment of renewable energy within each state. RESA members’ combined experience in these retail markets is particularly valuable in any consideration of what established market mechanisms, aggregation mechanisms or other devices would be best suited to promote REC and SREC trading in Delaware. RESA’s combined experience in these markets would also shed light on the mechanisms best suited to decrease compliance costs, establish revenue certainty and thereby encourage the deployment of renewable, distributed renewable, and solar energy technologies throughout Delaware. Yet, the Taskforce, as it exists today, does not appear to include representatives from the retail community and would benefit from retail electricity suppliers’ substantial, accumulated experience.

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<sup>13</sup> 26 Del. C. § 360 (d).

Accordingly, RESA suggests that the Commission open a docket for market participants to comment on proposed issues for consideration before the Taskforce. By opening up topics before the Taskforce to a broader constituency, the Commission ensures that the Taskforce remains informed and has before it the accumulated experience of all stakeholders, not just those of the parties granted an appointment to the Taskforce, when making decisions regarding the establishment of trading mechanisms and other structures to promote the growth of a renewable energy market in Delaware.

As important and valuable participants in Delaware's retail energy markets and as a constituency that has consistently dealt with RPS deployments in other states, the Commission, in its representation before the Taskforce, should take advantage of the substantive experience and resulting viewpoints of competitive electric suppliers within its jurisdiction.

#### **IV. Conclusion**

RESA is pleased to respond to the Commission's request for comments regarding proposed RPS Rules in Delaware. For the reasons set forth above, RESA strongly urges the Commission to consider the impacts the proposed regulations will have on existing fixed-price electric supply contracts and on the competitiveness of Delaware's retail energy markets in the event the Commission chooses to freeze minimum cumulative percentage requirements only for Commission-regulated utilities. The flexibility and discretion afforded through Section 362 of the RPS Act allow the Commission to make the changes necessary to ensure the growth of renewable energy resources in Delaware.

With respect to the Renewable Energy Taskforce, RESA members also suggest the Commission open a separate docket to consider the substantive accumulated

experience of retail electricity suppliers and thereby fully inform the Taskforce when commenting on matters affecting the development of Delaware's renewable energy markets.

Respectfully submitted,

RETAIL ENERGY SUPPLY ASSOCIATION

By Counsel



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