BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE

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**

COMMENTS OF THE DELAWARE DIVISION OF THE PUBLIC ADVOCATE ON PROPOSED RULES TO IMPLEMENT 26 *DEL. C.* §§354(i) AND (j) PROMULGATED BY THE DELAWARE PUBLIC SERVICE COMMISSION AND PUBLISHED ON FEBRUARY 1, 2018

The Delaware Division of the Public Advocate ("DPA") hereby submits the following comments regarding the Delaware Public Service Commission's ("PSC") proposed regulations published in the Delaware Register of Regulations on February 1, 2018 titled "3008 Rules and Regulations to Implement the Renewable Energy Portfolio Standard (Opened August 23, 2005)" (the "Proposed Regulations").[1] These comments address the proposed regulations that the Commission approved after hearing argument from several commenters, including the DPA, on December 7, 2017.[2] While the DPA does not expect the Commission to change the determinations it made during its public deliberations on December 7, 2017, the DPA submits these comments to preserve its ability to challenge whatever regulations the Commission ultimately approves as final.

[1] 21 DE. Reg. 620 (2/1/18).

[2] The DPA filed two previous sets of comments addressing these proposed regulations. Among other things, those comments described the General Assembly's enactment of the Renewable Energy Portfolio Standards Act ("REPSA"), subsequent amendments to REPSA, and the events that led to the PSC's reopening of this regulation docket. In an attempt to reduce the amount the Commissioners are required to read, and on the assumption that the Commissioners are well versed in that background, the DPA will omit that description.

A. Introduction – Applicable Legal Principles.

In deciding whether the Proposed Regulations or some other commenter's proposal(s) should be adopted, the PSC must interpret the REPSA. The Delaware Code provides basic statutory interpretation guidance:

> Words and phrases shall be read with their context and shall be construed according to the common and approved usage of the English language. Technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.[3]

Thus, where – as here – the General Assembly has specifically defined "retail electricity suppliers" and "end-use customers," the PSC must apply those definitions as they are written; it may not substitute some other language.

Furthermore, the Commission is bound by the same rules of statutory construction that apply to courts interpreting statutes:

> In construing a statute, this Court must search for the legislative intent. Courts have no authority to depart from the clear meaning of a statute or ignore its mandatory provisions. If, however, there is more than one reasonable interpretation, the Court applied accepted methods of statutory interpretation to determine the legislature's intent. "To that end, the statute must be viewed as a whole, and literal or perceived interpretations which yield mischievous or absurd results are to be avoided." This Court "also ascribe[s] a purpose to the General Assembly's use of particular statutory language and construe[s] it against surplusage if reasonably possible.[4]

B. The Proposed Regulation's Definition of "Total Retail Cost of Electricity" Is Contrary to the General Assembly's Carefully-Crafted Definitions of "Retail Electricity Supplier" and "End-Use Customer" in the REPSA.

The Proposed Regulations' definition of "Total Retail Cost of Electricity" should be revised as follows:

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[3] 1 *Del. C.* §303.

[4] *Delaware Division of the Public Advocate v. Public Service Commission*, 2016 WL 7494899 (Del. Super. Dec. 30, 2016) at *4 (hereafter "*DPA v. PSC").*

> "Total Retail Cost of Electricity **for Retail Electricity Suppliers**" means the **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** ~~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.

(additions in bold; deletions in strikethrough).

Sections 354(i) and (j) of Title 26 require a calculation of "the total retail cost of electricity for retail electricity suppliers." The General Assembly defined "retail electricity supplier," but unfortunately it did not define "total retail costs of electricity."

The Proposed Regulations define the "total retail cost of electricity" (omitting the "for retail electricity suppliers") as "the total costs paid by Non-Exempt Customers of the PSC-regulated electric company ["CREC"] for the supply, transmission, distribution and delivery of retail electricity, including costs paid to third party suppliers, during a respective Compliance Year."[5] They thus define the total retail cost of electricity as the cost to the *end-use customer*. But Sections 354(i) and (j) unambiguously state that it is the "total retail cost of electricity *for retail electric suppliers*" that is to be calculated, *not* the total retail cost to end-use customers, and the definitions of "retail electricity supplier" and "end-use customer" equally unambiguously limit the definition of "retail" to the cost of the retail electricity product sold and purchased. By ignoring the "for retail electricity suppliers" language of Sections 354(i) and (j), the Proposed Regulations render that statutory language surplusage[6] and "collapse the plain, and presumably

[5]Proposed Regulations at §1.0, Definitions.

[6]*DPA v. PSC* at *4; *see also Chase Alexa LLC v. Kent County Levy Court*, 991 A.2d 1148 1152 (Del. 2010): "'[W]ords in a statute should not be construed as surplusage if there is a reasonable construction which will give them meaning, and courts must ascribe a purpose to the use of statutory language, if reasonably possible.'" (internal quotation omitted).

intentional, statutory distinction"[7] that the General Assembly made between "retail electric suppliers" and "end-use customers." And in including distribution and delivery costs as components of the total retail cost of electricity, they impermissibly engraft upon the definitions of "retail electricity supplier" and "end-use customer" language that the General Assembly deliberately excluded.[8]

Even if Sections 354(i) and (j) were ambiguous,[9] when they are read with the whole of REPSA, it is clear that the General Assembly intended that the "total retail cost of electricity for retail electricity suppliers" to be the cost that those suppliers charge end-use customers for electricity, and not the cost that end-user customers pay for having that electricity distributed and delivered to them. "Statutes must be construed as a whole, in a way that gives effect to all of their provisions and avoids absurd results."[10] As a result of the Electric Utility Restructuring Act of 1999,[11] electricity is a commodity that end-users can purchase from their choice of suppliers. The Proposed Regulations' definition does not recognize this. Therefore, it does not give effect to all of the statutory provisions and produces an absurd result.

1. REPSA's Definitions of "Retail Electricity Product," "Retail Electricity Supplier," and "End-Use Customer" Make Clear that the "Total Retail Cost of Electricity for Retail Electricity Suppliers" in Sections 354(i) and (j) Excludes Distribution and Delivery Charges.

a. The Restructuring Act Created a Commodity – Electricity – That Customers Can Purchase from Many Suppliers, But Customers Have Only One Source for Distribution and Delivery Service.

Interpreting Sections 354(i) and (j) (and the definitions that go hand in hand with those sections) requires an understanding of what restructuring did to the electric utility industry.

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[7] *DPA v. PSC* at *5.
[8] *Humm v. Aetna Cas. & Sur. Co.*, 656 A.2d 712, 715 (Del. 1995).
[9] A statute is ambiguous when it is reasonably susceptible of two different interpretations. *Chase Alexa, supra* at 1151.
[10] *Chase Alexa, supra* at 1152; *see also DPA v. PSC* at *4.
[11] 26 *Del. C.* §§1001 *et seq.* ("Restructuring Act")

Before restructuring, utilities were vertically integrated. They owned the generation plants that produced the power supply (generation or electricity); they owned the transmission and distribution lines that delivered that power supply (electricity) to customers; and they billed for all of those functions in one bundle. But in 1999, the General Assembly unbundled the supply, transmission, distribution and delivery functions. It created a new commodity -- supply/generation – that could be (and is) sold and purchased. Thus, it is legally irrelevant whether one can or cannot hold an electron in one's hand,[12] because the General Assembly has defined these electrons as a commodity capable of being sold and purchased separate and apart from the distribution and delivery service that gets it to where it is ultimately consumed.

The General Assembly stated that the Restructuring Act was intended to allow "[c]ustomers of Delaware electric distribution utilities … *to have the opportunity*, but not the obligation, *to purchase electricity from their choice of electric suppliers* … ."[13] The Restructuring Act further provides:

> On or before April 15, 1999, DP&L shall file with the Commission a detailed plan for implementing retail competition in DP&L's Commission-designated service territory. Such plan shall include: …
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> *Separate prices or rates for electric supply, transmission, distribution and other services* (which may later be combined for billing purposes);… .[14]

The Restructuring Act did *not* give customers of Delaware electric distribution utilities a similar opportunity to choose who distributes and delivers that electricity to them, however. Instead, those customers are obligated to receive that service from the distribution utility that has the state-granted monopoly to serve them - Delmarva.

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[12]December 7, 2017 Transcript at page 1075, lines 3-8.
[13]26 *Del. C.* §1003 (emphasis added).
[14]*Id.* at §1005(a)(1)a. (emphasis added).

a. REPSA Recognizes the Difference Between Supply and Other Services, And Specifically Limited the Definitions of "Retail Electricity Product," "Retail Electricity Supplier" and "End-Use Customer" to the Provision and Use of Electric *Supply*.

In defining "retail electricity product," "retail electricity supplier" and "end-use customer" in REPSA, the General Assembly recognized the distinction between "electric supply" and "transmission, distribution and other services." A "retail electricity product" means "an electrical energy offering that is distinguished by its generation attributes and that is offered for sale by a retail electricity supplier or municipal electric company to end-use customers."[15] A "retail electricity supplier" means "a person or entity that *sells electrical energy* [that is, supply] 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."[16]And an "end-use customer" means "a person or entity in Delaware that purchases *electrical energy* [that is, supply] *at retail prices from a Retail Electricity Supplier* or municipal utility."[17] None of these definitions mentions anything about distribution or delivery.

A statute can define terms as the legislature sees fit in order to make its intent clear.[18] "If the General Assembly sees fit to provide a definition for a word or a phrase in a statute, 'a court will be bound by that definition.'"[19] Furthermore, "[a] definition which declares what a term

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[15]*Id.* at §352(21).
[16]26 *Del. C.* §352(22) (emphasis added). The PSC's current Regulations repeat this definition verbatim. *See* 26 *Del. Admin. C.* §3008.1.1.
[17]*Id.* at §352(7) (emphasis added). The PSC's current Regulations repeat this definition, except for omitting "or municipal utility." *See* 26 *Del. Admin. C.* §3008.1.1.
[18]*C & T Associates, Inc. v. Government of New Castle County*, 408 A.2d 27, 30 (Del. Ch. 1979).
[19]*Chrysler Corp. v. State*, 457 A.2d 345, 349 (Del. 1983).

'means' … excludes any meaning that is not stated."[20] Following these principles, the Delaware Legislative Drafting Manual instructs that the word "means" should be used "if a definition is intended to *exhaust* the meaning of a term."[21] The General Assembly used the word "means" in defining "retail electricity product," "retail electricity supplier" and "end-use customer." That means that those definitions are exhaustive. Because "retail electric supplier" means "a person or entity that *sells electrical energy* to end-use customers in Delaware," that excludes all other interpretations and admits of no further addition. It therefore cannot mean "a person who sells distribution and delivery services to end-use customers in Delaware," which is what the Proposed Regulations say. Delmarva (the electric distribution company supplying SOS) is included in the definition because it sells electrical energy (SOS) to end-use customers, *not* because it also sells distribution and delivery services to end-use customers.

b. The Proposed Regulations Render the Language "For Retail Electricity Suppliers" Surplusage And Leads to an Absurd Result.

Although it is unclear on what other basis the Commission reached its decision that "total retail cost of electricity" means all costs that go into an end-user's total bill,[22] it does seem clear from the Commission's deliberations that it was swayed by Staff's argument that:

- The electricity that end-use customers buy from either Delmarva or a third-party supplier must be provided to the customer before it can be used.
- Therefore, the "total retail cost of electricity for retail electricity suppliers" necessarily includes distribution and delivery service costs.

This is wrong as a matter of law because it does not recognize the distinction that the General Assembly made between the cost of electricity as a commodity that can be sold by itself and the cost of how that electricity gets to end-users. This legal error therefore renders the Commission's

[20] *Burgess v. U.S.*, 553 U.S. 124, 130 (2008) (internal quotations and citations omitted).
[21] Delaware Legislative Drafting Manual, Rule 26(a) ("Legislative Drafting Manual") (emphasis added).
[22] The Commission has not yet issued an order explaining its reasoning.

conclusion that "the total retail cost of energy for retail electricity suppliers" necessarily includes distribution and delivery costs erroneous as well.

Assuming that the Commission will rely on Staff's argument when it issues a final order, the DPA will address Staff's arguments.

Staff "parses the language of [Sections 354(i) and (j)] into 'three separate and distinct'" parts.[23] First, it explores the word "retail." Second, it purports to identify "retail electricity suppliers." Last, it discusses what the word "for" means.[24] It explores each of these in isolation, without reference to the rest of the statute, because that is the only way that it can justify its failure to reflect the statute's clear directive when it is read as a whole. Isolating Section 354's words and phrases, however, "violates a fundamental rule of statutory construction – that a statute's words and phrases should *not* be read in isolation."[25] When the statute is read as a whole, the only sensible and logical conclusion is that the appropriate measure is the retail price that retail electricity suppliers (which includes Delmarva as the SOS provider) charge to their customers.

Even if Staff's isolation of the statute's words and phrases were permissible, it still does not produce the conclusion that Staff reaches. Staff says that "'[r]etail' inextricably defines the 'total costs of electricity,'" and therefore "denotes all bottom-line costs of all electricity sold for end-use."[26] It then concludes that it is "axiomatic that no commodity of electricity exists without its being delivered to a point of sale" because customers cannot purchase electricity from a

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[23]*Division of Family Services v. O'Bryan*, 164 A.3d 58, 62 (Del. 2017).
[24]Staff Recommendations at 6-7.
[25]*O'Bryan*, 164 A.3d at 62, citing *Terex Corp. v. S. Track & Pump*, 117 A.3d 537, 543 (Del. 2015) ((quoting *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assoc.*, 484 U.S. 365, 371, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988)) and *Coleman v. State*, 729 A.2d 847, 851 (Del. 1999) ((quoting *Daniels v. State*, 538 A.2d 1104, 1110 (Del. 1988)) (emphasis added).
[26]Staff Recommendations at 7.

store.[27] This *non sequitur* demonstrates a fundamental lack of understanding of what electric utility restructuring did. As discussed above, restructuring unbundled the supply function from the transmission, distribution and delivery functions to create a competitive market for electricity supply, and in so doing created a product (electricity) that can and does exist without being delivered to a point of sale. Consequently, as discussed above, whether an end-user can purchase electricity from a store (or hold electrons in one's hand) is legally irrelevant.

Second, Staff asserts that because the definition of "retail electricity supplier" includes Delmarva as the standard offer service ("SOS") provider, and because Delmarva is the exclusive distribution utility, and because every end-use customer is located in Delmarva's footprint, the "total cost of retail electricity supply for retail electricity suppliers" necessarily encompasses distribution and delivery costs.[28] Staff acknowledges that there is no competitive market for distribution and delivery service, but claims that because the definition of "retail electricity supplier" includes the electric distribution utility (Delmarva), which also provides distribution and delivery service, distribution and delivery service costs must be included in the statutory language.[29] This is not only circular, but it is legally wrong. As we have previously explained, the General Assembly used the word "means" in the definitions of both "end-use customer" and "retail electricity supplier." "Retail electric supplier" means "a person or entity that *sells electrical energy* to end-use customers in Delaware;" it does *not* mean "a person who sells distribution and delivery services to end-use customers in Delaware." "Where a statute specifically defines an operational term in a definitional section, a court will be bound by that

[27] *Id.*
[28] Staff Recommendations at 7.
[29] *Id.*

definition … .”[30] Delmarva (the electric distribution company supplying SOS) is included in the definition of “retail electricity supplier” because it sells electrical energy (SOS) to end-use customers, not because it also sells distribution and delivery services to end-use customers. And the statutory definition includes third-party suppliers that provide no distribution or delivery service to end-use customers.

Last, Staff explores what the word “for” means in the phrase “for retail electricity suppliers.” It reasons that the statute’s use of the word “retail” “must be included in interpreting other language, and therefore precludes” an interpretation that it would be the costs for the retail electricity supplier because they buy their power at wholesale and resell it at retail prices. From this, it concludes that there is only one “retail” sale, and that is the one from Delmarva to the end-use customers.[31] Under Staff’s interpretation, there is only one retail electric supplier: Delmarva. First, this is inconsistent with Staff’s earlier acknowledgement that the definition of “retail electric supplier” encompasses non-Delmarva third-party suppliers.[32] Second, this is directly contrary to the Restructuring Act, which unbundled the electric supply function from the distribution and delivery functions and made it possible for end-use customers to purchase their electricity supply directly from their choice of whatever third-party suppliers offer retail electric supply in Delaware.

Staff’s definition of the “total retail cost of electricity” ignores the fact that the General Assembly created a commodity called electricity supply that could be sole by itself when it enacted the Restructuring Act. It is inconsistent with the statutorily-defined terms “end-use customer” and “retail electricity suppliers,” which are explicitly limited to the supply function. It

[30]*In re Digex Shareholder s Litigation*, 789 A.2d 1176, 1199 (Del. Ch. 2000), citing *Stiftel v. Malarkey*, 384 A.2d 9, 21 (Del. 1977).
[31]Staff Recommendations at 7-8.
[32]*See id.* at 7 (“Any other entity selling electricity to end-use customers likewise falls within the expansive definition.”)

excludes the phrase "for retail electricity suppliers," which are clearly the entities for which the "total retail cost of electricity" are being calculated, and in doing so, it improperly writes the "for retail electricity suppliers" language out of Sections 354(i) and (j). It must be rejected.

c. The Different Language that the General Assembly Used in Section 363 for Cooperatives and Municipalities Does Not Change the Fact That the "Total Retail Cost of Electricity for Retail Electricity Suppliers" Does Not Include Distribution and Delivery Charges.

Staff argues that the General Assembly used the term "the total cost of purchased power" in the REPSA section applying to municipal electric companies and rural electric cooperatives, thus implying that the "total retail cost of electricity" includes more than the cost of supply.[33] But this is irrelevant. When a statute specifically defines an operative term in a definitional section, a court (and Staff and this PSC) is "bound by that definition and shall not resort to another statute to interpret that term."[34] Because REPSA specifically defines "retail electricity supplier" in its definitional section, it is improper to resort to Section 363 to attempt to re-define it.

Assuming that it were proper to look to Section 363, we agree that the provisions for municipal utility companies and rural electric cooperatives are different. We further agree that the "total retail cost of electricity for retail electricity suppliers" includes more than the cost of supply. We have never claimed that it does not. Third-party suppliers do not charge their

[33] *Id.* at 7-8 (citing 26 *Del. C.* §§363(f), (g)).
[34] *Digex, Inc., supra* at 1199 (finding that where Delaware General Corporation Law (DGCL) defined "voting stock" in its definitional section, court would not look to another section of DGCL to interpret the defined term).

customers only the wholesale costs that they pay for supply without any markup; at a minimum, they add a profit margin because they are not in the business to lose money. Delmarva also tacks on a profit margin to SOS: it is called the "reasonable allowance for retail margin" or "RARM."[35] The "retail price" that the end-users pay therefore includes the wholesale cost of supply, plus any other costs that retail electric suppliers include in the final price (such as transmission and taxes), plus their profit margin. Staff's characterization of the DPA's argument as meaning that we believe that "the total retail costs of electricity for retail energy suppliers" includes only their wholesale cost of supply is erroneous.

We further acknowledge that when the General Assembly inserts a provision in a statute, that decision is presumed to be purposeful.[36] But it is not surprising that the General Assembly used different terms for municipal utilities and retail electric cooperatives: those entities are not for-profit and are not regulated by the PSC. When the General Assembly amended REPSA to include Sections 354(i) and (j), it knew that municipal utilities and rural electric cooperatives were not regulated by the PSC. The General Assembly also knew that municipal utilities serve customers living within their municipal boundaries and use the money made from selling electricity to provide other non-utility services to their residents (police protection, fire protection, repairing roads, libraries, etc.). The General Assembly also knew that rural electric cooperatives return all profits to their member customers. And the General Assembly also knew that for-profit retail electricity suppliers supplying electricity to end-users do neither of these. Therefore, it sensibly used different language for the different entities.

d. If The General Assembly Had Wanted the "Total Retail Cost of Electricity" to Include Distribution and Delivery Charges, It Would Not Have Included "for Retail Electricity Suppliers" Immediately

[35] *See* Exhibit F to the Application in PSC Docket No. 16-0304.
[36] *Humm, supra* at 715.

Afterward.

If the Commission's interpretation were correct, there was no need for the General Assembly to include the phrase "for retail electricity suppliers" after "the total retail cost of electricity" because the "total retail cost of electricity" would encompass supply, distribution and delivery – after all, that is what retail means, right? But the General Assembly *did* include that phrase, and the PSC cannot ignore it. The "total retail cost of electricity for retail electric suppliers" is the *supply* costs plus whatever else retail electricity suppliers include in the retail price they charge for electrical energy (the "electrical energy at *retail prices*"[37]). It is *not* supply *plus* distribution and delivery, because retail electricity suppliers do not pay distribution and delivery charges.

3. Staff's Proposed Definition Results in Charging End-Use Customers Twice for the Same Costs.

Including the distribution and delivery costs that end-use customers pay means that customers pay those costs twice: once on their bills, and again by including them in the calculation of the total retail cost of electricity for retail electric suppliers. This is not what the General Assembly had in mind.

Staff claims that the DPA's proposed regulation "charges end-use customers twice for supply costs."[38] This claim assumes that the cost of RECs and SRECs are part of supply costs. Not so: purchasing RECs and SRECs from wind or solar generators is not equivalent to purchasing the energy that produced those RECs and SRECs. Delmarva can, and does, purchase RECs and SRECs separately from energy. Delmarva purchases SRECs in annual procurement options and on the spot market to satisfy its REPSA requirements, but it does not purchase the energy that generates those SRECs. Similarly, the agreement in the recent Exelon-PHI merger

[37]26 *Del. C.* §352(7) (definition of "end-use customer") (emphasis added).
[38]Staff Recommendations at 10.

case provides for Delmarva to issue RFPs to purchase RECs – not the energy that produces those RECs, but RECs alone.[39]

* * *

Sections 354(i) and (j) are unambiguous: the appropriate measure is the total retail cost of electricity to *retail electricity suppliers*, not end-use customers. The DPA's interpretation gives effect to both the use of the word "retail" in "total retail cost of electricity" and to the phrase "for retail electricity suppliers:" the cost to be compared to the total cost of REPSA compliance is the

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[39]Delmarva has three contracts for both wind energy and RECs. In 2006, when price caps expired, market-based electricity supply costs increased by as much as 59%. In response to public outcry, the General Assembly enacted the Electric Utility Retail Customer Supply Act of 2006 to "stabilize" the supply market, which resulted in Delmarva entering into four long-term wind energy supply contracts. One was for a project that never materialized; the other three were for land-based wind, pursuant to which Delmarva bought both RECs and energy. But, because the Restructuring Act (and PSC orders implementing it) require Delmarva to purchase load-following baseload generation for its SOS supply, Delmarva has been unable to use the wind farms' non-baseload energy generation for SOS, and has had to sell that energy at the delivery point for whatever the PJM locational marginal price ("LMP") is at the time.

The combination of the influx of wind generation and the fact that wind is intermittent has tended to suppress LMPs in PJM. The resulting LMPs for energy have not been high enough to offset the fixed cost prices in the wind farm contracts when the wind-generated energy is sold at LMP. The "loss" on the energy sale portion of the fixed cost prices in the wind farm contracts is charged to the cost of REPSA compliance because what customers receive for that payment is the REC. This risk was known when the PSC was reviewing the contracts. Delmarva's and Staff's consultants agreed that the forward energy market projections at the time indicated that the "loss" on energy sales, if any, would be small, and Staff's consultant's model predicted that, averaged over the term, the land-based wind contract prices were likely to be below market. Unfortunately, those market projections have proved inaccurate so far.

Below is an illustration of how the calculation described above works (the numbers used are not necessarily actual contract or average LMP numbers):

All-in wind farm contract price for RECs and energy (cost of REC = $30 – cost of energy = $60):	$90 MWh
LMP at delivery point (energy):	$25/MWh
Loss on Sale of Energy	$35/MWh

The $35 Net Energy loss goes into the cost of compliance along with the $30 cost of the REC itself.

Thus, even though these contracts are for both energy and RECs, the cost of compliance can easily be calculated, and customers are not paying twice for supply.

total cost that the retail electricity supplier charges the end-use customer for its electrical energy. By including distribution and delivery costs in the "total cost of retail electricity" and by ignoring the "for retail electricity suppliers" language, the Proposed Regulations' definition ignores basic tenets of statutory construction and improperly rewrites 26 *Del. C.* §§354(i) and (j).[40] The General Assembly made a clear distinction between "retail electricity suppliers" and "end-use customers;" if it had intended to mean the total retail cost for end-use customers, it would not have included the phrase "for retail electricity suppliers." But it did, and the Commission cannot close its eyes to that.

This PSC has specifically acknowledged that it cannot substantively enlarge a statute under the guise of rulemaking.[41] But it did exactly that in approving the Proposed Regulations' definition of "total retail cost of electricity." The DPA respectfully requests the Commission to reconsider its determination on this issue.

[40]*Zambrana v. State*, 118 A.3d 775, 776 (Del. 2015) (courts "have no authority to vary the terms of a statute of clear meaning or ignore mandatory provisions").
[41]*Id.* at ¶¶17, 19, pages 9, 11.