

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) PSC REGULATION DOCKET NO. 56
SUPPLIERS (OPENED AUGUST 23, 2005;)
REOPENED SEPTEMBER 4, 2007; AUGUST 5,)
2008; SEPTEMBER 22, 2009; AUGUST 17,)
2010; SEPTEMBER 20, 2011))

FINAL FINDINGS, OPINION AND ORDER NO. 8150

BEFORE COMMISSIONERS:

JOANN T. CONAWAY, Acting Chair
J. DALLAS WINSLOW, Commissioner
JAYMES B. LESTER, Commissioner
JEFFREY J. CLARK, Commissioner

APPEARANCES:

For the Delaware Public Service Commission Staff ("Staff"):

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Telemac N. Chryssikos, Esq., Counsel
Harry A. Warren, President

For the Division of the Public Advocate:

MICHAEL DAMIEN SHEEHY
Public Advocate

For Delmarva Power & Light Company ("Delmarva"):

TODD L. GOODMAN, ESQ.
Associate General Counsel

Member of the Public, Gary A. Myers, Esq.

I. INTRODUCTION

1. In 2005 the General Assembly enacted, and the Governor signed into law, the "Renewable Energy Portfolio Standards Act," 26 Del. C. §§351-364 (the "RPS Act"), which, beginning in 2007, required every retail electric supplier to annually accumulate a portfolio of renewable energy credits ("RECs") and solar renewable energy credits ("SRECs") equivalent to a specified percentage of its retail electric supply sales in Delaware.

2. In 2006 the Delaware Public Service Commission (the "Commission") promulgated "Rules and Procedures to Implement the Renewable Energy Portfolio Standard" (the "RPS Rules") (Order No. 6931 dated June 6, 2006). We have revised the RPS Rules from time to time to reflect amendments to the RPS Act. See PSC Order No. 7377, dated Apr. 17, 2008; PSC Order No. 7494, dated Dec. 16, 2008; PSC Order No. 7653, dated Sep. 22, 2009; and PSC Order No. 7933 dated March 22, 2011.

3. On July 7, 2011, the Governor of the State of Delaware signed into law amendments to the RPS Act (the "Amendments") which, among other things, amended various sections of the RPS Act to add Delaware-manufactured fuel cells to the RPS Act and allow energy output from those fuel cells to be considered a resource eligible to fulfill a portion of a Commission-regulated electric company's

("CREC")¹ renewable energy credit requirements under the RPS Act.² The Amendments were part of a comprehensive State economic development and renewable energy program in which Bloom Energy Corporation ("Bloom") will construct new natural gas-powered fuel cell baseload generation in Newark, Delaware.³ The Amendments created a regulatory framework whereby Delmarva and Bloom would jointly submit tariffs enabling and obligating the CREC to collect from its customers non-bypassable charges for Bloom's incremental site preparation, filing, administrative and other costs. 26 Del. C. §§364(b), (c). Furthermore (and significantly for purposes of this proceeding), the Amendments also removed the responsibility for acquiring RECs and SRECs necessary to satisfy the RPS requirements from retail electric suppliers and assigned that responsibility to the CREC. Beginning with compliance year 2012 (which commences on June 1, 2012), the CREC will be solely responsible for acquiring RECs and SRECs for all Delaware load, including that supplied by retail electric suppliers. See 26 Del. C. §354(e).

4. By Order No. 8026 dated September 6, 2011, we authorized proposed amendments to the RPS Rules to be published in the *Delaware Register of Regulations*. We received comments thereon from WGES, Delmarva, the Retail Energy Suppliers' Association and the Delaware Solar Energy Coalition. To address those comments, Staff convened several workshops in November 2011 and January 2012. There was active participation at the workshops and Staff revised the proposed amended

¹ Delmarva Power & Light Company is currently the only CREC in Delaware.

² Senate Bill No. 124 as amended by Senate Amendment No. 1 (78 Del. Laws ch. 99) (July 7, 2011).

³ For more detail on the provisions of the Amendments involving the Bloom project, see PSC Order No. 8079 dated December 1, 2011.

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RPS Rules to reflect agreements reached at among the workshop participants.

5. By Order No. 8102 dated January 31, 2012, we ordered publication of the proposed revised RPS Rules in the March 2012 *Delaware Register of Regulations*. We further ordered Staff to publish notice of the rulemaking to develop final RPS Rules in the *News Journal* and the *Delaware State News*. We set April 2, 2012 as the deadline for comments on the proposed amended RPS Rules, and stated that we would conduct a public hearing on the proposed amended RPS Rules on April 17, 2012.

6. The proposed amended RPS Rules were published in the March 2012 issue of the *Delaware Register of Regulations*, and the required public notice was published in the *News Journal* and the *Delaware State News*. WGES and Gary Myers, Esq. timely filed comments on the proposed amended RPS Rules.

7. On April 12, 2012 Staff filed a response to WGES' and Mr. Myers' comments. On April 16, 2012, WGES replied to Staff's response to its comments.

8. We conducted the duly-noticed public hearing on the proposed amended RPS Rules on April 17, 2012, at which we heard argument from counsel for Staff, Delmarva and WGES and from Mr. Myers. We then deliberated in public session and voted unanimously to approve the proposed amended RPS Rules as proposed in Order No. 8139 dated April 17, 2012. In that Order, we stated that we would explain our reasons for approving the proposed amended RPS Rules in a subsequent

order. This is the Commission's final findings, opinion and order on the proposed amended RPS Rules.

II. THE AMENDED RPS ACT

9. New section 354(e) of the RPS Act provides: "Beginning with compliance year 2012, commission-regulated electric companies shall be responsible for procuring RECs, SRECs and any other attributes needed to comply with subsection (a) of this section with respect to all energy delivered to such companies' end use customers." Prior to this amendment, each retail electric supplier providing supply service to Delaware customers had been responsible for procuring the RECs and SRECs necessary to comply with the RPS Act's requirements for its load. The General Assembly recognized that changing the party responsible for procuring RECs and CRECs might affect these suppliers, their customers, the CREC and its customers. Consequently, new 26 Del. C. §§353(c) and (d) state:

(c) The Commission shall develop rules to transition the REC and SREC procurement responsibility set forth in § 354(e) of this title. The purpose of such rules shall be:

(1) To adequately protect electric suppliers that entered into contracts to provide RECs and SRECs to retail electric customers prior to the transition of REC and SREC procurement responsibility under § 354(e) of this title;

(2) To adequately protect against overpayment of the cost of RPS obligations for customers of electric suppliers who are parties to supply contracts that were entered into prior to the transition of REC and SREC procurement responsibility under § 354(e) of this title; and

(3) To adequately protect commission-regulated electric suppliers and customers thereof from

having to incur alternative compliance payments or other costs that would have been avoided but for the failure of an electric supplier to continue retiring RECs or SRECs associated with its retail supply contracts existing at the time of the transition of REC and SREC procurement responsibility under § 354(e) of this title. To the extent such protection involves a temporary reduction to the RPS obligation or to the price of an alternative compliance payment required of a commission-regulated electric supplier made necessary by the failure described above, the Commission is authorized to make the necessary temporary reductions notwithstanding the RPS obligations otherwise required by this chapter.

(d) The Commission shall develop procedures for tracking the generation output of qualified fuel cell provider projects such the energy produced by such projects shall fulfill the commission-regulated electric company's state-mandated REC and SREC requirements set forth in § 354 of this title as follows:

(1) Fulfillment of the equivalent of 1 REC for each megawatt-hour of energy produced by a qualified fuel cell provider project.

a. The commission-regulated electric company can use energy output produced by a qualified fuel cell provider project to fulfill a portion of SREC requirements at a ratio of 6 MWH of RECs per 1 MWH of SRECs. The commission-regulated electric company may utilized a portion of energy output from a qualified fuel cell provider project in any given year to fulfill no more than 30% of the SREC requirements unless:

1. Due to lack of SREC availability in the market, the alternative would be to incur alternative compliance payments; or

2. The SREC obligations set forth in Schedule 1 of § 354 of this title are increased, and then only to the extent necessary to fulfill the increased SREC obligations.

b. The Secretary of DNREC may, after coordination with the Commission and a commission-regulated electric company, adjust the requirements of this section including permitting

a commission-regulated electric company participating in a commission-approved project to exceed the percentages set forth in this section.

c. The right of a commission-regulated electric company to use energy output produced by a qualified fuel cell provider project to fulfill its REC and SREC requirements in accordance with this section shall not expire until actually applied to fulfill such requirements.

(2) The commission-regulated electric company has the ability to apply the REC and SREC equivalent fulfillment benefits described in this section for 20 MW in addition to the 30 MW set forth in § 364 of this title for future customer sited applications of qualified fuel cell provider fuel cells. Separate tariff provisions must first be approved by the Commission for such installations above the original 30 MW.

26 Del. C. §§353(c), (d).

10. To implement Sections 353(c) and (d) and 354(e), Staff proposed the following amendments to the RPS Rules:

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

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 expires⁴, 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 *Del. Admin. C.* §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

⁴ For purposes of this rule, a contract will be considered to have expired as of the date of the end of the original contract term. Any extension(s) to the original contract term will, for purposes of this rule, be considered a new contract.

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 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 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 determined by the Secretary of DNREC in consultation with the Commission.

III. COMMENTS RECEIVED

11. As noted previously, Gary Myers, Esq. and WGES submitted comments on the proposed amended RPS Rules.

A. Mr. Myers' Comments

12. Mr. Myers commented on the proposed amendments to 26 *Del. Admin. Code* §§3.2.3, 3.2.3.2, 3.2.3.2.1 and 3.2.4.

13. With respect to proposed Rule 3.2.3.2, Mr. Myers stated that the Amendments did not explicitly authorize Delmarva to recover its costs of procuring RECs and SRECs, unlike previous provisions applicable to retail electric suppliers. According to Mr. Myers, proposed Rule 3.2.3.2 "seeks to remedy that omission by directing DP&L to recover its 'RPS compliance costs' ... through 'a non-bypassable charge' imposed on 'all of its distribution system customers'" based "'on the weighted average cost of RECs and SRECs supplied by'" Delmarva. (Myers Comments at 1). Mr. Myers identified two issues with proposed Rule 3.2.3.2. First, the RPS Act and the RPS Rules exclude retail load amounts sold and delivered to industrial customers with peak demand exceeding 1500 KW; however, since proposed Rule 3.2.3.2 as drafted did not incorporate this exemption, it appeared as though the rule permitted Delmarva to recover its RPS compliance costs from these exempt customers. Mr. Myers opined that Delmarva's cost recovery should be subject to the same exemption for industrial customers with loads exceeding 1500 kW, and thus recommended changing proposed Rule 3.2.3.2 to remove exempted load industrial customers from any responsibility for Delmarva's RPS compliance costs. *Id.* at 1-2. Second, Mr. Myers stated that under the pre-Amendment RPS Act, retail

electric suppliers could only recover their actual RPS compliance costs from customers, and that Delmarva should have no greater recovery rights than those suppliers. Hence, he recommended changing proposed Rule 3.2.3.2 to: (1) make clear that the total recovery of weighted actual costs cannot exceed Delmarva's actual RPS compliance costs; and (2) ensure that such actual costs are limited to those that Delmarva incurs to achieve compliance in the particular compliance year. *Id.* at 2.

14. Next, Mr. Myers noted that although proposed Rule 3.2.3 mirrored 26 *Del. C.* §354(e)'s language, both the Amendments and the proposed amended RPS Rules continued to refer to the duties and rights of "retail electric suppliers." *Id.* at 2, citing 26 *Del. C.* §§354(g), (h); 356(a)-(e); 358(d)-(f); 360(a) and 362(a); proposed amended RPS Rules 3.2.12 through 3.2.17. Mr. Myers stated that the proposed amended rules should explicitly provide that Delmarva succeeds to the rights and obligations of retail electric suppliers, including the recovery and notice provisions of 26 *Del. C.* §358(f) and RPS Rules Section 4.0 requiring at least annual notice to end-use delivery customers of the total RPS compliance costs for a compliance year. *Id.* at 2-3.

15. Last, Mr. Myers identified two issues with proposed amended RPS Rule 3.2.4. First, he contended that it incorrectly stated the provisions of 26 *Del. C.* §353(d). *Id.* at 3-4. Second, he questioned whether the Secretary of the Department of Natural Resources and Environmental Control could constitutionally have the authority to determine REC and SREC equivalency, and expressed concerned that the

Secretary would use proposed Rule 3.2.4 to bolster an argument that he did have such authority at some future time. (Myers Comments at 4-5; 4/17/12 Tr. at 828, 831). Mr. Myers contended that both issues could be resolved by changing the language of proposed Rule 3.2.4 to state that "CRECs may use 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)." *Id.* at 5 (emphasis in original).

B. WGES' Comments

16. WGES stated that to comply with then-existing RPS requirements, it negotiated contracts with Perdue Farms in Bridgeville and Wilmington Friends School in Wilmington to construct solar power facilities at these locations. Construction was completed on both facilities in 2011, and both were operational as of the date of the public hearing (April 17, 2012). WGES claimed that it based its decision to invest approximately \$7.5 million in these facilities largely on its long-term SREC requirements under the RPS Act, and the facilities' output was intended "reasonably to match" WGES' SREC needs: according to it, the facilities' total SREC production in compliance years 2011 and 2012 would have "roughly matched WGES' total SREC requirements had the prior RPS Act remained in effect. (WGES Comments at 1, 3). It stated that it was the only retail electric supplier finding itself in this situation. *Id.* at 4.

17. WGES asserted that the Amendments "effectively dissolved the SREC market" in Delaware. *Id.* at 3. It contended that before the Amendments were adopted there were multiple buyers and sellers of SRECs at prices ranging from \$200-\$300 per SREC from 2009 to early

2011. *Id.*, citing www.srectrade.com. The Amendments making Delmarva the sole purchaser of SRECs for RPS compliance, coupled with Delmarva's suspension of SREC purchasing in anticipation of the pilot program auction, had caused SREC trading to decline "drastically," as a result of which SRECs were now trading in the \$70 range. *Id.*

18. WGES contended that the proposed amended RPS Rules should be rejected for several reasons. First, it claimed that the proposed amended RPS rules did not satisfy new Section 353(c) (1)'s mandate that the retail electric suppliers that entered into contracts to provide RECs and SRECs to retail electric customers prior to the General Assembly's transition of that responsibility to the CREC pursuant to Section 354(e) be adequately protected, and the then-upcoming pilot program auction did not provide the required adequate protection. (WGES Comments at 4-6; WGES Reply Comments at 1-3). According to WGES, "[t]he phrase 'contracts to provide RECs and SRECs to retail customers' in §353(c) (1) is reasonably interpreted to include supplier contracts to procure or produce the SRECs provided to retail customers." (WGES Comments at 4). WGES asserted that the "plain language of Section 353(c)(1) requires the transition rules to adequately protect any electricity supplier such as WGES that invested in Delaware-sited solar projects in order to provide for the long-term RPS needs of its Delaware retail customers." *Id.*, emphasis in original. WGES acknowledged that proposed Rule 3.2.3.4 could allow WGES to obtain adequate protection through a contract negotiated with a CREC, but asserted that proposed Rule 3.2.3.4 "create[d] no certain path nor specif[ied] parameters for assuring that outcome," especially

since Delmarva had been unwilling to discuss such an agreement. *Id.* WGES claimed that it was "uniquely and adversely affected" by the proposed RPS Rules since it would not be able to self-supply SRECs after its transitional retail contracts expired and could not be assured that it would be able to sell or otherwise realize value from its SRECs. *Id.* Thus, in WGES' view, the only way to ensure that it would be adequately protected from the transition of the SREC procurement responsibility was for the RPS Rules to require Delmarva to purchase WGES's SRECs for the average price that Delmarva paid for all other SRECs it procures for the compliance year during which the SRECs are transferred. *Id.* at 5.

19. WGES argued that the existence of the pilot program auction did not provide the adequate protection required by Section 353(c)(1) because the pilot program did not mention retail electric suppliers, did not contain any special provisions for such suppliers, and did not provide a "certain path" to protect those suppliers. *Id.* at 6. WGES admitted that it was likely to bid its SRECs into the pilot program auction to mitigate its risk, but this action did not resolve the deficiencies in the proposed RPS Rules. *Id.* at 6.

20. Second, WGES argued that the proposed amended RPS Rules would violate the Contract Clause of the United States Constitution because it would impair its contracts with Perdue and Wilmington Friends. (WGES Comments at 4-5; WGES Reply Comments at 3). WGES contended that impairing its contracts would be "tantamount to an unwarranted exercise of the state's police power," and the General Assembly did not identify any public interest, any "significant and

legitimate" public purpose, or any "broad and general social or economic problem" that would be resolved by impairing its contracts. *Id.* at 5.

IV. STAFF'S REPLY COMMENTS

21. Staff submitted a written response to the comments of Mr. Myers and WGES.

A. Response to Mr. Myers' Comments

22. Staff argued that most of Mr. Myers' requested changes were unnecessary, especially in light of the statutory June 1 deadline for implementing the proposed amended RPS Rules. Staff noted that Mr. Myers had acknowledged that his suggested revisions would merely clarify the language. In Staff's view, the proposed RPS Rules sufficiently advised the entities subject to them of their obligations thereunder, and neither the workshops' retail electric suppliers nor the CREC had commented that the language required clarification. (Staff Reply at 4, 6). Staff noted that each of the workshop participants had assented to the proposed language, and that it was possible they could construe Mr. Myers' suggested changes as a substantive revision to the proposed rules. (4/17/12 Tr. at 832). Staff argued that the proposed revisions could be reconsidered when the RPS Rules were next amended. *Id.* at 820. Last, Staff acknowledged that the RPS Rules could not expand the Commission's regulatory authority beyond what the Amendments provided. (Staff Comments at 6).

23. Staff contended that the Commission need not reach Mr. Myers' constitutional argument because the Commission's jurisdiction does not extend to opining on whether a statute it is charged with

enforcing is constitutional. *Id.* at 7, citing *Davis v. Delaware Health & Social Services/Division of Child Support*, Del. Ch., 2010 WL 1502659 (April 6, 2010); *Greene v. Dept. of Services for Children, Youth and Their Families*, Del. Super., 2009 WL 5176536 (Nov. 24, 2009). During questioning from the Commission at the public hearing, Staff noted that those cases did not specifically preclude agencies from considering the constitutionality of statutes they are charged with enforcing, but rather suggested that agencies should decline to do so. (4/17/12 Tr. at 822).

B. Response to WGES' Comments

24. Staff argued that the Commission should reject WGES's contentions because: (1) WGES was seeking to be made whole for its investment in the solar facilities, which was not the General Assembly's intent; (2) the proposed amended RPS Rules were not invalid under the Contract Clause; and (3) the Commission lacked authority to force Delmarva to enter into a contract to purchase WGES' SRECs. (Staff Comments at 9-10).

25. With respect to its first argument, Staff contended that the General Assembly recognized that changing the procurement responsibility from retail electric suppliers to Delmarva would affect retail electric suppliers, their customers, Delmarva, and its customers, and sought to balance those effects by requiring that regulations addressing the transition of the procurement responsibility provide adequate protection for each of those constituencies. Staff emphasized the use of the word "adequately" versus words such as "fully" or "completely" that the General Assembly

could have chosen if it wanted to ensure that retail electric suppliers were made whole. Staff cited the general rule of statutory interpretation that words used in a statute should be given their common, ordinary meaning, and argued that WGES' interpretation of "adequate" would enlarge the word's meaning. *Id.* at 10.

26. Staff explained how the proposed RPS Rules provided adequate protection for each of the constituent groups, including retail electric suppliers. It noted that any investment that a retail electric supplier made in renewable facilities to meet its RPS requirements for retail load that it had under contract before June 1, 2012 would *not* be stranded: investments that correspond to the retail supply contracts existing as of the June 1, 2012 transition date may still be used to meet RPS transitional obligations. *Id.* at 10-11. As for retail electric suppliers' customers, the proposed RPS Rules provided that Delmarva will assess a non-bypassable RPS charge based on the weighted average cost of the RECs and SRECs that Delmarva supplied. Then, because retail electric suppliers' customers were already paying some amount for RPS compliance in their supply rates, Delmarva will credit those customers with an amount equal to the non-bypassable charge. Staff explained that there was no way to determine exactly what amount each retail electric supplier's customers' rates include for RPS compliance (and it could vary from customer to customer depending on when the contract was entered into); consequently, it had to develop a mechanism that would adequately (not fully, not completely) protect those customers from being double-charged. *Id.* at 11. Finally, as for Delmarva and its customers, the

proposed RPS Rules set forth procedures in the event that a retail electric supplier did not fully comply with the Amendments or the RPS Rules, which may not fully and completely reimburse Delmarva and its customers but which would adequately protect them from going out of pocket due to a retail electric supplier's compliance failures. *Id.* at 11-12.

27. Staff contended that while one could possibly read Section 353(c) (1)'s language as WGES did, the rest of the Amendments suggested that Staff's interpretation was correct. Staff cited Delaware Supreme Court authority supporting the proposition that a statute must be construed in whole rather than in parts and each part or section of the statute should be read in light of every other part or section to produce a harmonious whole. *Id.* at 12-13, citing *Doroshov, Pasquale, Krawitz & Bhaya v. Nanticoke Memorial Hospital, Inc.*, 36 A.3d 336, 343-44 (Del. 2012); *Spencer v. Goodill*, 17 A.3d 552, 555 (Del. 2011); *Coastal Barge Corp. v. Coastal Zone Industrial Control Board*, 492 A.2d 1242, 1245 (Del. 1985). Staff noted that Section 353(c)'s other subsections addressed existing contracts between the retail electric suppliers and their existing retail customers or their existing retail supply obligations, not contracts that the retail electric supplier entered into to serve some future load that the retail electric supplier did not have under contract as of the June 1, 2012 transition date. *Id.* at 13.

28. Next, Staff contended that WGES' proffered interpretation would lead to a transition period of 15-20 years (the length of the WGES contracts with Perdue and Wilmington Friends). Staff argued that

nothing in the Amendments suggested that the General Assembly intended the transition to take that long. *Id.*

29. Last, Staff observed that WGES was going to participate in the pilot program auction, and suggested that the results of that auction could render its complaint moot. It conceded that WGES' contention that the pilot program did not specifically address retail electric suppliers was accurate, but contended that those arguments were irrelevant because if WGES' bid in the auction was accepted, it would receive either the administratively-set price or its bid price for its SRECs. Consequently, Staff suggested that WGES' complaint was premature. *Id.* at 14.

30. With respect to WGES' Contract Clause claim, Staff first responded that WGES did have the opportunity to obtain value for its SRECs through the pilot program auction or selling them in other states having RPS requirements such as Pennsylvania. *Id.* at 14; 4/17/12 Tr. at 851.

31. Next, Staff argued that the Contract Clause was not implicated by the proposed amended RPS Rules because those rules did not alter any obligations under WGES' contracts with Perdue or Wilmington Friends. Perdue and Wilmington Friends remained obligated to supply SRECs to WGES and WGES remained obligated to purchase them. (Staff Comments at 15). Staff argued that the Supreme Court authority WGES cited was distinguishable because in each case the challenged statute or regulation changed the rights or obligations to one of the contracting parties, and even then the Court did not conclude that the Contract Clause had been violated. *Id.* at 15 & n.4.

32. Third, Staff contended that even if the Contract Clause was implicated, the proposed amended RPS Rules were not invalid because the Supreme Court had held that a statute does not violate the Contract Clause simply because it restricts or even altogether bars the performance of duties created by contracts entered into prior to its enactment, and that a significant consideration in considering whether there had been a Contract Clause violation was whether the complaining party's industry had been regulated in the past. *Id.* at 15-16. Staff noted that WGES had acknowledged that it had been subject to Delaware's RPS laws since entering the Delaware market in 2006, and argued that in light of the numerous amendments to the RPS statutes since its enactment, WGES (as a sophisticated company) could or should have foreseen that the RPS laws could be amended to alter procurement obligations. *Id.* at 16-17.

33. Finally, Staff argued that the General Assembly did not authorize the Commission to force a CREC to purchase WGES' SRECs. It pointed to instances in the Amendments where the General Assembly had granted the Commission authority to require a CREC to take some action, and contended that the General Assembly would have included similar language in the Amendments if it had intended for the Commission to require the CREC to purchase a retail electric supplier's SRECs. *Id.* at 17.

V. WGES' REPLY COMMENTS

34. One day prior to the public hearing, WGES responded to Staff's reply comments. It agreed that the "adequate protection" language of Section 353(c) (1) did not mean "full" or "complete"

protection, and that statutory provisions should be reasonably construed as a whole. (WGES Reply Comments at 2). However, WGES contended that in enacting the Amendments the General Assembly did not exercise its police power to impair existing contracts. It argued that Staff's interpretation disregarded Section 353(c) (1)'s "plain language" requiring adequate protection for retail electric suppliers during the transition of procurement responsibilities, and that Staff had not "made its point that the language of §353(c) (1) is limited to retail supply contracts between suppliers and customers because of the language of §353(c) (2) and (3)." *Id.* In WGES' view, the language of Sections 353(c) (2) and (c) (3) did not delimit the scope of the language in Section 353(c) (1) requiring adequate protection for retail electric suppliers. *Id.*

35. WGES next contended that it was not seeking a 15- to 20-year transition period, but instead a "rather quick transition" through an assignment of the SRECs produced by the Perdue and Wilmington Friends facilities or a Commission order directing the CREC to enter into a contract with WGES to purchase those SRECs. *Id.* at 2-3.

36. WGES again contended that the existence of the SREC pilot program auction and WGES' participation in that auction did not change the clear meaning of Section 353(c) (1), although it acknowledged that if it received an administratively-set price or its bid price would "logically mitigate" its complaint. *Id.* at 3.

37. WGES argued that the Contract Clause prohibits a state from impairing private contracts except for when the state exercises its

police power for the public interest, and contended that all of the Supreme Court cases it cited "appl[ie]d] this fundamental principle." *Id.* It reiterated its earlier contention that the General Assembly did not intend to impair SREC self-supply contracts that existed prior to the transition of procurement responsibility. *Id.*

38 Last, WGES disagreed with Staff that the Commission lacked authority to require a CREC to enter into a contract with it to purchase its SRECs, arguing that Section 353(c) (1) provided the Commission with such authority. It contended that the proposed amended RPS Rules required further revision to require the CREC to purchase SRECs from a retail electric supplier and to clarify the pricing criteria to be used for such purchase. WGES suggested that the Commission could either approve the average price the CREC paid for all other SRECs that it procured for the applicable compliance year, or that the Commission could open a subsequent proceeding to address that issue. *Id.*

VI. DELMARVA'S AND THE PUBLIC ADVOCATE'S COMMENTS

39. Neither Delmarva nor the Public Advocate submitted written comments; however, both appeared at the public hearing to support the proposed amended RPS Rules. Delmarva acknowledged that several of Mr. Myers' revisions had merit, but expressed concern that neither it nor other workshop participants had had an opportunity to review them and so agreed with Staff that they could be considered at a later time. (4/17/12 Tr. at 836-37). Delmarva agreed with Staff that the Commission need not address Mr. Myers' challenge to the constitutionality of Section 353(d). *Id.* at 823. Delmarva also

supported Staff's interpretation of Section 353(c) over WGES' interpretation. *Id.* at 869-76.

40. The Public Advocate suggested building into the Commission order a deadline for reviewing the clarifications that Mr. Myers raised. *Id.* at 837-38. He did not address the constitutionality issue. With respect to WGES' contentions, the Public Advocate argued that WGES bore the risk for making a business decision to enter into long-term SREC procurement contracts. He noted that the SREC price for a long-term contract should be significantly less than a short-term contract price because of uncertainty, but since it was not possible to ascertain what price was built into WGES' contracts versus an average price for SRECs during a particular compliance year, WGES could potentially obtain a windfall at the expense of Delmarva ratepayers. *Id.* at 886-88.

VII. DISCUSSION

41. For the reasons that follow, we unanimously approve the proposed amended RPS Rules, with the caveat that we direct Staff to reopen this regulation docket as soon as reasonable after the close of the legislative session to consider the proposed revisions raised by Mr. Myers, as well as any other revisions that may become necessary if the RPS Act is further amended.

42. With respect to Mr. Myers' contentions, we believe that our direction to reopen the docket to consider his proposed revisions disposes of his comments on that issue. We do not necessarily agree with his argument that proposed RPS Rule 3.2.4 inaccurately restates the Amendments. But, in any event, this is an issue that can be

addressed when the docket is reopened. We are aware that the June 1, 2012 transition date is rapidly approaching. The retail electric suppliers and CREC require the certainty of approved rules in order to effect the changes in their RPS obligations wrought by the General Assembly. We decline to address Mr. Myers' argument that Section 353(d) of the Amendments unconstitutionally delegates authority to the DNREC Secretary to change REC and SREC equivalencies. We have been told by counsel that Delaware courts have cautioned agencies regarding interpreting the constitutionality of the statutes that they administer. *See Davis v. Delaware Health & Social Services/Division of Child Support*, Del. Ch., 2010 WL 1502659 (April 6, 2010); *Greene v. Dept. of Services for Children, Youth and Their Families, Del. Super.*, 2009 WL 5176536 (Nov. 24, 2009). Thus, we do not speak to the constitutionality of the delegation made in Section 353(d). As discussed previously, we are not convinced that our recitation of the statute in our regulations is somehow an endorsement of the DNREC Secretary's interpretation of his authority with respect to determining REC and SREC equivalencies. At the same time, we understand the position that simply citing to the statutory section might be a better approach. But this can be sorted out with more clarity when we reopen the docket after the end of the legislative session.

43. We also decline to adopt WGES' proposed revisions to the RPS Rules. WGES made what it considered to be a reasonable investment decision to self-supply SRECs over the long term under the RPS law as it then existed, but the change in the RPS law has changed the economics of that investment decision. We are sympathetic to WGES'

position, but we cannot agree that adequate protection under Section 353(c) (1) requires the revision to the RPS Rules that it seeks. We assume that the General Assembly was aware of the fact that most retail electric suppliers had short-term (one- to two-year) contracts with their retail electric customers. It is clear to us that the General Assembly recognized that making the CRECs solely responsible for procuring RECs and SRECs for all Delaware load, including that supplied by retail electric suppliers, would potentially have a negative impact on those retail electric suppliers, their customers, the CRECs and the CRECs' customers, and Sections 353(c) (1), (c) (2) and (c) (3) represent the General Assembly's attempt to balance the negative impacts on those entities. It is equally clear to us that insofar as the retail electric suppliers' interest is concerned, the interest the General Assembly sought to adequately protect was their interest in not stranding the investment they had already made to supply SRECs for their existing retail electric supply contracts with end users; not investment made to cover future, yet-to-be-signed retail supply contracts.

44. Section 353(c) only requires *adequate* protection for these entities. We think the General Assembly's use of the word *adequately*, as opposed to other words it could have chosen, reflects a deliberate decision on its part. As the agency charged with implementing the statute, we believe that we are required to interpret it in such a manner as to balance the competing interests of the entities identified in subsections (c)(1), (c)(2) and (c)(3). In response to our question about what effect WGES' proffered RPS Rule would have on

ratepayers, the Public Advocate explained that WGES could reap a windfall profit if we forced Delmarva to purchase its SRECs at the average price that Delmarva paid for all other SRECs in a particular compliance year. (4/17/12 Tr. at 887). There were no evidentiary hearings in this matter, and there is nothing in the record that indicates the price that WGES is paying for the SRECs under the Perdue and Wilmington Friends contracts. In light of this, we decline to adopt an interpretation that would not balance those interests, but rather favor the interest of only one retail electric supplier. We think Staff's proffered interpretation of the Section 353(c) (1) language, considered in light of the entire amendment to the RPS, is the appropriate one.

45. We are not persuaded by WGES' Contract Clause argument. As Staff pointed out (and WGES did not dispute), none of the obligations of the parties under its Perdue and Wilmington Friends contracts changed; only WGES' expectation of the benefits of those contracts changed. Thus, because the proposed amended RPS Rules do not impair WGES' contracts with Perdue or Wilmington Friends, we do not believe the Contract Clause is implicated.

46. Finally, we do not believe that the Amendments give us the authority to force the CREC to contract to purchase WGES' SRECs. We note that the Amendments contain other provisions where the General Assembly did direct us to order Delmarva to purchase the output from the Bloom fuel cells, and directed us to order Delmarva to enter into contracts with winning bidders in an SREC pilot program auction, but did not provide any such direction with respect to retail electric

suppliers. We think this omission is significant, and we decline to add provisions to the Amendments that the General Assembly did not itself include.

VIII. ORDER

AND NOW, this 15th day of May 2012, IT IS HEREBY ORDERED BY THE UNANIMOUS VOTE OF THE COMMISSIONERS:

1. That the proposed RPS Rules that were attached to Order No. 8139 dated April 17, 2012 as Exhibit "A" (the "Final RPS Rules") are approved as final.

2. That as soon as reasonable after the conclusion of the current legislative session, Staff shall reopen this regulation docket to consider changes to the language of the RPS Rules and to reflect any further amendments made to the RPS Act in the current legislative session.

3. That the Commission reserves the jurisdiction and authority to enter such further Orders in this matter as may be deemed necessary or proper.

BY ORDER OF THE COMMISSION:

Chair

/s/ Joann T. Conaway
Commissioner

/s/ Jaymes B. Lester
Commissioner

/s/ Dallas Winslow
Commissioner

/s/ Jeffrey J. Clark
Commissioner

ATTEST:

/s/ Alisa Carrow Bentley
Secretary