

**October 12, 2016**

**MEMORANDUM**

To: Lisa Vest, Hearing Officer

Through: Philip Cherry, Director, Division of Energy & Climate  
Rob Underwood, Energy Program Administrator, Division of Energy & Climate

From: Emily St. Clair, Planner II, Division of Energy & Climate

Date: October 12, 2016

Re: Proposed Regulation 2105 Evaluation, Measurement & Verification Regulations  
Proposed to Implement 29 *Del. C.* §8059

You presided over a public hearing on Monday, August 29, 2016 at 6:00 p.m. at the Richardson & Robbins auditorium, 89 Kings Highway, Dover, Delaware 19904 on Proposed Regulation 2105 Evaluation, Measurement & Verification Regulations, Proposed to Implement 29 *Del. C.* §8059

The following exhibits were introduced into the record at the hearing:

Exhibit 1	A copy of Senate Bill 150
Exhibit 2	A copy of Senate Bill 150 with House Amendment 2
Exhibit 3	A copy of an October 23, 2014 memorandum to the Office of the Governor, Members of the Senate Natural Resources and Environmental Control Committee and Members of the House Environmental and Natural Resources Committee with the approved SAN #2014-08 to develop regulations to govern the expansion of cost-effective energy efficiency programs in Delaware pursuant to 29 <i>Del. C.</i> §8059(h)(3)
Exhibit 4	A copy of Register Notice and proposed regulations, as it appeared in the August 1, 2016 Delaware Register of Regulations

Exhibit 5	Evidence for the publication of the legal notice in the Delaware Public meetings calendar, Delaware State News, the News Journal and WBOC
Exhibit 6	A copy of the completed regulatory flexibility analysis and impact statement form as it appears in the Delaware Register of Regulations
Exhibit 7	A copy of the Press Release as it appears on the news.delaware.gov website
Exhibit 8	A copy of 29 Delaware Code §8059 as it appears on the Delaware Code website
Exhibit 9	A copy of the power point presentation as given at the public hearing in Richardson and Robbins Building on August 29, 2016

The following offered oral comments at the hearing on August 29, 2016:

<b>Name</b>	<b>Affiliation</b>
Tony DePrima	Delaware Sustainable Energy Utility (SEU)

The Department received written comments from the following after the hearing:

<b>Date Received</b>	<b>Name</b>	<b>Affiliation</b>
August 30, 2016	Regina Iorri	Delaware Division of the Public Advocate (DPA)
September 13, 2016	Jamie Nutter	Delaware Municipal Electric Corporation, Inc (DEMEC)

All of the above listed documents are attached.

This memorandum provides a summary of the comments received and the response of the Division of Energy & Climate.

### **1. Comments on the Definition of Program Administrator**

Tony DePrima indicated he would like a definitional change of “Program Administrator”.

The enabling legislation, specifically 8059(h), is geared towards affected energy providers. And the definition of an “affected energy provider” under 8059A is –it means an affected electric energy provider or an affected natural gas distribution company. We think that same, exact language should be entered in for the definition of a program administrator.

Hearing Transcript, p 13, line 6-15

### ***Department Response***

The Department intentionally defined the program administrator as “investor-owned or municipal utility or other entities administering any energy efficiency programs governed under 8059(h)” so that more entities who wished to be included in the statewide energy reduction goals could do so. The Department acknowledges the request for more clarity around the definition and will change the definition of Program Administrators to read as follows: “means any effected energy providers, as defined by 29 Delaware Code § 8059(h) and any other entities who deliver energy efficiency programs and want the energy savings generated to count towards the statewide energy reduction goals”. This edit is for clarity and greater understanding for the regulated community.

## **2. Comments of the Definition of Deemed Savings**

The DPA recommends that the last three sentences of the definition be stricken.

The DPA argued that:

We do not believe that they add any value to the understanding of what ‘deemed savings’ means, and only serve to introduce confusion about the role of the EEAC.

Iorii, p. 2

### ***Department Response***

The Department accepts these comments, and will remove the last three sentences in the definition of deemed savings in section 3.0 of the proposed regulations to provide the clarity that the DPA is seeking. The definition still reads the same after the modification, and does not change the meaning of deemed savings.

## **3. Comments on Section 5.3.1 in the regulations**

The DPA does not think that the regulations should contain a provision for DNREC to hire a consultant.

The DPA does not believe it is necessary to write a consultant’s role into a regulation.

Iorii, p. 2

### ***Department Response***

The regulations read as follows:

DNREC *may* hire an EEAC Consultant to represent the EEAC and to assist with the planning and oversight of EM&V activities in Delaware (emphasis added).

The Department believes that since the regulations do not require DNREC to hire a consultant, and the requested edits will not change that, there is no value to be gained by changing section 5.3.1. There will be no changes to the regulations as a result of this comment.

#### **4. Comments on section 6.2.1. Cost- Benefit Requirements**

The DPA believes that the language is in conflict with the legislation that states all programs and portfolios must pass the cost-benefit test.

Nevertheless, we continue to believe that the language continues to be in conflict with the legislations. Individual programs must be cost effective.

Iorii p. 3

#### ***Department Response***

The Department does not agree that language is in conflict with the legislation. The following sections clearly state that every program must pass the cost-benefit test:

6.2.1 – PAs shall develop *programs* and portfolio plans to achieve overall positive net benefits based on the cost-effectiveness test described below (emphasis added).

6.2.1 – PAs are responsible for providing prospective planned cost-effectiveness test results to EEAC for review at the *program* and portfolio level (emphasis added).

6.2.2.1 – *Programs* are considered cost-effective when the benefit-cost ratio as determined by the Total Resource Cost test is greater than one (emphasis added).

We believe the language is very clear and repeatedly outlines that programs and portfolios must pass the cost benefit test. To further clarify, the Department will change the first sentence of 6.2.1 to read, “Energy Efficiency programs and portfolios...” and will remove the word “overall” from the second sentence of 6.2.1. The intent of the section remains intact, and there are no fundamental changes to the requirements in this section.

#### **5. Comments on Discount Rates versus Weighted Average Cost of Capital**

The DPA feels that the designated discount rate of 4% is very low and appears to reflect the discount rate typically used in the Societal Cost Test. They would like the discount rate to be replaced with the Weighted Average Cost of Capital (WACC).

#### ***Department Response***

The 4% real discount rate is appropriate because the Total Resource Cost (TRC) test takes the perspective of the economy as a whole, and therefore a discount rate that reflects a societal time preference of investment is more relevant than a rate based on the private cost of capital (e.g. WACC). Also, efficiency investments are lower risk than traditional supply-side investments, and therefore future benefits should not be discounted as highly. Discount rates should be specified in real, not nominal, terms to eliminate the effects of inflation on cost-effectiveness calculations; based on projected near-term inflation rates, a 4% real discount rate is conservative (i.e., more likely to understate, rather than overstate, future benefits). There will be no changes to the regulations as a result of this comment.

## **6. Comments on Sections 6.2.5 and 6.2.6 EEAC and DNREC Responsibilities**

These sections establish the responsibilities of the EEAC and DNREC with regards to benefit-cost analysis. The DPA would like the clarification on intent of DNREC responsibilities for benefit-cost analysis, further:

The DPA is somewhat confused by these two sections of the Proposed Regulations. Sections 8059 (h)(1)(b) of the Delaware Energy Act states that the EEAC, not DNREC, shall collaborate with the Public Service Commission (PSC) and the DPA to “recommend candidate energy efficiency, and reduction, and emission-reducing fuel-switching program elements that are cost-effective, reliable and feasible, including financing mechanisms.

Iorii, p. 4

### ***Department Response***

The Department notes DPA’s concern, and will move section 6.2.6.1 to become the new section 6.2.5.4 under the EEAC Responsibilities for Benefit-Cost Analysis. This will add the clarification the DPA is seeking without changing the intent and overall purpose of the statement, or shifting responsibilities. DNREC holds the position of chair of the EEAC; it is the responsibility of the Chair to reach out to PSC and DPA for any collaboration efforts on behalf of the full Council. Therefore, by moving section 6.2.6.1 to become the new 6.2.5.4 there will be no change in intent or shift of responsibility fundamentally.

## **7. Comments on the 7.2.4 Terminology**

The DPA is seeking clarification on a terminology issue:

If the term “components” is meant to refer to individual programs that comprise a portfolio, it should be changed to “programs”. Otherwise, the term “components” should be defined.

Iorii, p. 4

### ***Department Response***

The Department acknowledges the terminology disparity. This is a missed edit from the earlier stages of the regulations. The intent is to refer to individual programs that comprise a portfolio, as the DPA indicated. The Department will change “components” to “programs”. The two terms can be used interchangeably, but for consistency across the regulations, the missed edit will be corrected to “programs”. This edit will not modify the intent of the section.

## **8. Comments on the Mandatory Requirements of the Regulations**

DEMEC states:

DEMEC representatives participated in the EEAC meetings as part of the promulgation of the Regulations, and DEMEC does not believe DNREC intends the Regulation to be mandatory as to DEMEC.

Nutter, p. 5

In order to avoid any confusion, however, DEMEC respectfully requests that DNREC respond to these comments by either: 1) amending the Regulation to include a provision mirroring the first sentence of section 85059(h)(1)(f) as a part of Paragraph 5.4 detailing the responsibilities of Program Administrators; or 2) confirming DEMEC’s interpretation as to the non-binding nature of the Regulation in the Secretary’s Order adopting the Regulation.

Nutter, p. 6

### ***Department Response***

The enabling legislation and resulting Delaware Code changes are clear as to who is mandated to follow the EM&V regulations.

In the spirit of brevity and simplicity, we have added the following language to section 1.0, “Affected energy providers that are not regulated by the Commission may elect to develop, implement and fund programs for energy efficiency and peak demand reduction recommended for approval by the boards of directors for rural electric cooperative or the pertinent local regulatory authorities for municipal electric companies”. The addition of this statutory language does not change the intent of these regulations nor whom they apply to since it is simply restating the aforementioned statute.