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MEMORANDUM

TO: Lisa Vest, Hearing Officer

THRU: Philip Cherry, Director, Division of Energy & Climate

THRU: Robert Underwood, Energy Program Administrator, Division of Energy & Climate

FROM: Thomas Noyes, Principal Planner for Utility Policy, Division of Energy & Climate

DATE: December 14, 2015

SUBJECT: Proposed Regulation 104 Implementation of Renewable Energy Portfolio Standards Cost Cap Provisions (Proposed Rules to Implement 26 *Del. C.* §354(i) & (j))

You have presided over three hearings on the Proposed Regulation 104 Implementation of Renewable Energy Portfolio Standards Cost Cap Provisions (Proposed Rules to Implement 26 *Del. C.* §354(i) & (j)):

1. January 8, 2014 at 6:00 p.m. in the Public Service Commission hearing room, 861 Silver Lake Boulevard, Dover, Delaware;
2. January 7, 2015 at 6:00 p.m. in the Public Service Commission hearing room, 861 Silver Lake Boulevard, Dover, Delaware; and
3. November 23, 2015 at 6:00 p.m. in the Public Service Commission hearing room, 861 Silver Lake Boulevard, Dover, Delaware.

I have reviewed the comments and exhibits submitted for the public record. The following comments and exhibits are referred to in this memorandum:

- Petition for Rulemaking from Gary Myers dated November 2, 2011
- DNREC Start Action Notice 2012-03 dated April 16, 2012
- Written comments by Dr. Chad Tolman dated August 5, 2012
- "Full cost accounting for the life cycle of coal," in "Ecological Economic Review," New York Academy of Sciences 1219, pages 73-98
- Transcript of the Senate debate on Senate Substitute Number 1 for Senate Bill Number 119 on June 22, 2010
- Transcript of the House debate on Senate Substitute Number 1 for Senate Bill Number 119 on June 29, 2010
- Delaware Public Service Commission's ("PSC") comments on the proposed REPSA regulations, approved by the PSC on January 7, 2014
- Hearing Transcript, January 8, 2014
- Comments by Professor Jeremy Firestone dated January 8, 2014
- Comments by David Stevenson on behalf of the Caesar Rodney Institute ("CRI") dated January 8, 2014
- Comments from Todd Goodman on behalf of Delmarva Power ("DPL") dated January 15, 2014
- Comments from Gary Myers dated January 21, 2014
- Comments from Lee Ann Walling on behalf of Delaware Interfaith Power & Light ("DEIPL") dated January 22, 2014
- Comments from Bruce Burcat on behalf of the Mid-Atlantic Renewable Energy Coalition ("MAREC") dated January 24, 2014
- Comments from Dale Davis on behalf of the Delaware Solar Energy Coalition ("DSEC") dated January 24, 2014
- Comments from John Irwin on behalf of the Delaware Chapter of the Sierra Club ("Sierra") dated January 24, 2014
- Comments from Gary Myers, December 17, 2014
- Comments of DEIPL dated February 10, 2015
- Comments of Linde LLC, February 10, 2015
- Senate Floor Debate re Senate Bill 124, June 6, 2011
- House Energy Committee Hearing on Senate Bill 124, June 22, 2011
- House Floor Debate re Senate Bill 124, June 23, 2011
- Petition of the Division of the Public Advocate and the Caesar Rodney Institute to amend 26 Del. Admin. C. § 3008-3.2.21
- Joint Motion Of DNREC and the PSC Staff in PSC Docket No. 15-1462
- PSC Order No. 8807, Docket No. 15-1462
- Comments of the Division of the Public Advocate ("DPA") dated November 13, 2015
- Comments of the Maryland, DC, and Virginia Solar Energy Industries Association and the Delaware Solar Energy Coalition ("MDV-SEIA and DSEC") dated December 7, 2015
- League of Women Voters of Delaware (LWVDE") comments dated December 7, 2015
- Comments of Sarah Buttner dated December 7, 2015
- PJM Renewable Integration Study, Executive Summary Report, March 31, 2104

- Designing Austin Energy's Solar Tariff Using A Distributed PV Value Calculator, by Karl R. Rábago, Leslie Libby, Tim Harvey, Austin Energy, and Benjamin L. Norris, Thomas E. Hoff, Clean Power Research
- Comments of Jeremy Firestone dated December 8, 2015
- Comments by Amy Roe, Ph.D. on behalf of the Delaware Audubon Society dated December 8, 2015
- Comments of the Delaware Chapter of the Sierra Club dated December 8, 2015
- Comments by Public Service Commission Staff received December 8, 2015
- Comments from John Nichols, including four attachments, received December 8, 2015

This memorandum provides a summary of the comments received and the response of the Division of Energy & Climate. In response to the comments received, the Department has revised Proposed Regulation 104 Implementation of Renewable Energy Portfolio Standards Cost Cap Provisions ("Regulation"), which is attached.

For the purposes of this Regulation, the Division of Energy & Climate ("Division") is considered the successor agency to the Energy Office, and the Director of the Division of Energy & Climate ("Director") is considered the Energy Coordinator.

I. Comments on DNREC's Legal Authority for Promulgating a Regulation in this Matter

The Division of the Public Advocate ("DPA") argued that DNREC does not have the authority under the statute to promulgate a regulation in this matter, citing 26 *Del. C.* § 362(b) which requires the Commission to adopt rules and regulations to specify the procedures for freezing the minimum cumulative solar photovoltaic requirement as authorized by § 354(i) and (j). (DPA, November 13, 2015. pp. 3-4)

The DPA and the Caesar Rodney Institute ("CRI") filed a petition on this matter with the Public Service Commission (DPA and CRI Petition, PSC Docket No. 15-1462). The PSC Staff and the DNREC Division of Energy & Climate filed a joint motion to dismiss:

> 5. Second, under 29 Del. C. § 8003(7), DNREC has the authority and right to issue rules and regulations deemed necessary by the Secretary:
>
> > (7) Establish and promulgate such rules and regulations governing the administration and operation of the Department as may be deemed necessary by the Secretary and which are not inconsistent with the laws of this State.
>
> Furthermore, DNREC was within its authority and responded properly to the petition for rulemaking on these issues filed by Mr. Gary Myers, which referenced 26 Del. C. § 10114 of the Administrative Procedures Act, which permit an agency to initiate "Proceedings for the adoption, amendment or repeal of a regulation … at the request of any person who so petitions the agency on a form prescribed for that purpose by the Director of the Office of Management and Budget."
>
> Upon receiving the Myers petition, the Division of Energy & Climate initiated a rulemaking proceeding in response to the properly presented petition and in the interest

> of transparency. The Division chose to promulgate a regulation in the interest of engaging stakeholders in an important matter of statutory interpretation. The regulatory process initiated by DNREC has yielded an open, transparent process in which a variety of interested parties, including the PSC Staff, the DPA, the CRI, the environmental community, and others have had a forum to express their views and influence the proceedings.
>
> Join Motion, PSC Staff and DNREC, Docket No. 15-1462, October 27, 2015, pp. 4-5

The Commission denied the petition of the Public Advocate and Caesar Rodney Institute in Order No. 8807. The DPA filed an appeal of the PSC order on December 7, 2015.

The Maryland, DC, and Virginia Solar Energy Industries Association and the Delaware Solar Energy Coalition agreed that the Division has the authority to promulgate rules in this matter, citing the join motion filed by DNREC and the PSC Staff in PSC Docket No. 15-1462. (MDV-SEIA and DSEC, December 7, 2015, p. 3)

Department Response

DNREC has the authority, under 29 *Del. C.* § 8003(7), to issue rules and regulations deemed necessary by the Secretary:

> (7) Establish and promulgate such rules and regulations governing the administration and operation of the Department as may be deemed necessary by the Secretary and which are not inconsistent with the laws of this State.

This rulemaking is in reference to statutory authority specifically granted to the DNREC Division of Energy & Climate under 26 *Del. C.* § 354(i) & (j).

DNREC was within its authority and responded properly to the petition for rulemaking in response to a petition filed by Gary Myers, which referenced 29 *Del. C.* § 10114 of the Administrative Procedures Act:

> Proceedings for the adoption, amendment or repeal of a regulation may be initiated by an agency on the motion of an agency member or at the request of any person who so petitions the agency on a form prescribed for that purpose by the Director of the Office of Management and Budget.

The Division of Energy & Climate initiated a rulemaking proceeding in response to the properly presented petition in an important matter of statutory interpretation. The Department is proceeding with promulgating a regulation in this matter.

II. Comments on the Calculation of the Cost of Compliance

1. Comments on Whether the Calculation Should Use Total or Annual Change in Costs

Several parties raised the question of whether the 3 percent or 1 percent cost cap refers to total cost of compliance or the incremental or annual change in the cost of compliance.

John Irwin, writing for the Delaware Chapter of the Sierra Club, argued that the cost should be interpreted to mean the year-over-year increase:

> When calculating the costs, the rules should be looking at the incremental increase from year to year, not the cumulative cost from the beginning of the program. It seems unrealistic to think we could shift to 25% renewable energy by 2025 and only increase the cost by 3% cumulatively vs conventional energy throughout the whole period.
>
> Sierra, January 24, 2014, p. 2

Professor Jeremy Firestone included this question as one of five criteria to be considered in implementing the cost cap provisions:

> Fourth, the incremental year-to-year increased costs of RECs. Consumers are not just concerned about the total cost, but they are concerned about price spikes. Indeed, you know, we had the earlier legislation after the 59 percent rate hikes, which resulted from 100 percent supply increase. And then we got changes to the law because consumers are concerned about rate spikes, people can't plan.
> And so it's relevant whether REC costs in a year that pushed you over the threshold, the total REC costs increased by a dollar per household per month or if it was five dollars or what have you.
>
> 2013 Hearing Transcript, pp. 16-7

However, he did not argue that the cost cap should measure the year-over-year change, only that the annual change should be considered in determining whether to impose a freeze under the cost cap provisions.

In the Senate debate, Senator Harris McDowell described the cost cap in a way that suggests it is intended to measure the year-over-year change instead of total cost:

> I told you about the circuit breaker that we have put in where any utility who can show that its rates are going up or would go up by 1 percent in case of -- of solar, the retail electric would go up by 1 percent in a year in the cases of solar, or 3 percent in the overall, they could push the circuit breaker and suspend their participation in the program for one year.
>
> Senate Debate on SB 119, p. 9

> The biggest thing and part of which is what I've called the circuit breaker, whereby, if their rates go -- start to go up, and they can demonstrate by empirical data that their rates are going up more than or as much as the numbers we have here, which is 3 percent overall, 1 percent for solar, as a result of participating in the solar, their rates go up in one year by 1 percent or more, they can push the circuit breaker and they don't have to comply.
>
> Senate Debate on SB 119, pp. 26-7

The DPA argued that "the General Assembly meant for the comparison to be between these items for *the same compliance year*." (DPA, February 16, 2015, p. 2)

Department Response

The argument that the cost should be interpreted to be the year-over-year increase instead of the total cost may be a reasonable policy position. The RPS, as revised in 2010, covers 15 years. The cost caps of 1 percent and 3 percent are comparable to what could be considered a reasonable annual price increase in energy costs. While the legislative debate may suggest a year-over-year interpretation, the language of the statute itself refers to "the total cost of complying with this requirement," not the amount of increase in the total cost from one year to the next.

The total annual interpretation of the cost of compliance reflects the statutory language, which refers to the total cost of compliance "during the same compliance year." While comments in the floor debate by the sponsor described the cost cap in a way that supports a year-over-year interpretation (in which the 3 percent and 1 percent are interpreted as the change from one year to the next), we have concluded that the statutory language does not allow for a different interpretation based on language used in the floor debate. This interpretation is supported by the Deputy Attorney General we consulted in this matter.

The final Regulation promulgated by the Department reflects the total annual interpretation of the cost of compliance.

Dr. Firestone said that the year-over-year change should be considered in deciding whether to impose a freeze. Sharp changes in compliance costs or overall energy price spikes could be taken into account under Subsection 5.4.1, and no change to the Regulation is needed to consider his suggestion.

2. Comments as to Whether the Qualified Fuel Cell Provider Project Costs Should Be Included in the RPS Costs

Several commenters raised the question of whether costs of a Qualified Fuel Cell Provider Project ("QFCPP" or "Bloom Energy") should be included in the cost of compliance.

John Irwin argued that Bloom Energy output should not count towards the cost:

> The costs for using fuel cells to comply with the RPS should not be counted in the calculation of costs of compliance.
>
> Sierra, January 24, 2014, p. 1

Bruce Burcat, representing the Mid-Atlantic Renewable Energy Coalition (MAREC), said that the Bloom Energy costs "should not count towards the cost cap, in our opinion." (Hearing Transcript, January 8, 2014, p. 38) In his written comments, Burcat offered two specific reasons for not including Bloom costs:

> a. Because Bloom Energy offsets or associated RECs do not fall into the category of being considered attributes of an Eligible Energy Resource, as they are derived as a result of fuel cell technology utilizing natural gas (not "powered by renewable fuels"), these costs should not count towards the cost cap.

> b. It is also evident that the Bloom Energy arrangement which resulted in special legislation to deal with this project (primarily for economic development purposes) was meant to be judged from a cost perspective on a different basis than envisioned by the cost cap provisions of the RPS law. In fact, 26 Del. C. §364(d)(1)c place a distinct cost cap restriction on the Bloom arrangement which had to be met prior to Commission approval of this long-term arrangement.
>
> MAREC, January 24, 2014, p. 3

Mr. Burcat, in MAREC's comments filed in December, 2015, repeated his earlier arguments and stated that "[r]emoving the costs associated with Bloom Energy projects from the cost cap calculation was the correct change." (MAREC, December 8, 2015, p. 2)

Dale Davis, representing the Delaware Solar Energy Coalition, offered three arguments for not including Bloom Energy costs:

> 1. The cost of QFCP should not be included in the cost calculations
>
> a. QFCPs have their own cost caps specifically addressed and calculated in title 26.
> b. While enabled under legislation, natural gas fired fuel cells are not qualified to produce either RECs or SRECs accumulated on PJM-Gats for retirement to satisfy REPS requirements.
> c. QFCP provisions and implementation do not include the actual purchase and retirement of RECs or SRECs. Therefore they do not meet the criteria established for inclusion in cost cap calculations
>
> DSEC, January 24, 2014, p. 1

The Delaware Chapter of the Sierra Club supported the exclusion of Bloom costs from the cost of compliance, noting that the "QFCPP is not listed as an "eligible energy resource" in the original RPS Cost Cap statute," and further argued that Bloom costs used to support an economic development project should not affect a decision to freeze the RPS:

> The cost burden of financing schemes for Delaware Economic Development Office investment contracts should not provide an opportunity to cap the RPS. Doing so is acting contrary to the purpose and legislative intent of the RPS.
>
> Sierra, December 8, 2015, p. 2

The Delaware Audubon Society wrote that they "support the exclusion of QFCPP in Section 4.0 Calculation of the Cost of Compliance." (Audubon, p. 4)

The League of Women Voters of Delaware supports the exclusion of Bloom costs:

> We also agree that the costs of deploying Bloom fuel cells should not be considered in calculating the price of renewable energy. We have long believed that, unless the methane or other fuel used in the cells is derived from a renewable source, such as land fill gas, the energy generated is not accurately described as "renewable."
>
> LWVDE, December 7, 2015, p. 1

Gary Myers argued that the Bloom costs should be included:

> The purchases of REC-equivalents by DP&L's customers via the Bloom tariff surcharges are equivalent to the "REC purchases" listed as one type of cost of compliance under subsections 354(i) and (j). And even if REC-equivalent purchases are not exactly congruent with "REC purchases," the purchase costs of the REC "equivalents" that are used to "fulfill" "REC and SREC requirements" easily fall with the circle of expenses and outlays that are captured by the "total cost of compliance" definitional sentence in subsection 354(j).
>
> Myers, January 21, 2014, p. 17

Mr. Myers, in his final comments, argued that while Bloom output does not meet the definition of renewable energy in the statute, it is used to fulfil the REC requirement. He referenced Secretary O'Mara's testimony before the PSC in the Bloom docket to support his view:

> Testifying before the PSC in the proceeding to adopt the QCFPP mechanisms and rates, the Secretary reported that because Bloom's fuel cell technology emits significantly less pollution than traditional combustion technologies and is ready to operate on renewable fuels, "the State had determined that it should be considered as a generation resource that can be used to satisfy the requirements of Delaware's Renewable Portfolio Standard."
>
> Myers, November 24, 2015, p. 14

Mr. Myers referred to the Delmarva Power billing transparency docket before the PSC, where the Division argued that Bloom Energy should not be broken out as a separate line on customer bills:

> "We should be mindful of the relationship between QFCP costs and REPSA compliance costs. QFCP costs are incurred to meet a portion of DPL's RPS requirement, which reduces the number of RECs and SRECs DPL needs to buy to meet the requirement. Rather than break all of the resources used for RPS compliance, DNREC sees it appropriate to report REPSA compliance as one cost, while providing customers with detailed information on the costs/kwh on the website as DPL proposes." (PSC Dckt. No. 13-250, T. Noyes (Div. of Climate and Energy) Letter to J.R. Smith (PSC) at pg. 2 ¶ (2) (Sept. 8, 2015)
>
> Myers, November 24, 2015, pp. 15-16

PSC Staff's December 2015 comments argue that QFCP costs should be included, citing the same letter from DNREC in the Delmarva Power billing transparency docket. (PSC Staff, December 8, 2015, p. 3)

The DPA argued that Bloom costs should be included, citing DNREC's position in the Delmarva Power billing transparency docket and the need to buy more RECs if DPL could not use Bloom offsets. (DPA, November 13, 2015, pp.7-11)

Mr. Nichols also argued that Bloom costs should be included:

> DNREC erroneously excluded the Bloom Energy tariff when calculating the compliance costs under REPSA. Passage of the legislation that established the Bloom Energy feed-in tariff removed wind and solar generation subsidies from the supply charge calculation in order to make the Bloom Energy tariff non-bypassable. This does not mean it can be excluded as a compliance cost. In fact, the legislation acknowledges Bloom Energy is a compliance cost by reducing the amount of SREC's and REC's Delmarva Power must purchase based on electricity generated by a "Qualified Fuel Cell Provider".
>
> Nichols, December 8, 2015

Mr. Myers went on to argue that excluding Bloom from the cost of compliance "invites the possibility of federal preemption of the entire Bloom Energy scheme," stating the FERC has jurisdiction over wholesale contracts for energy and capacity sold into the PJM markets. (Myers, pp. 19-20) He did say in a footnote that he saw grounds for a preemption challenge regardless of how it is treated in the calculation of the cost of compliance:

> 48 This does not mean that such schism of the Bloom surcharges from energy and capacity sales revenues would necessarily save the Bloom scheme from a preemption challenge. There are too many other things in the Bloom amendments scheme that suggest it was an effort to provide a subsidy to Bloom for the production costs related to its wholesale sales. If so the Bloom scheme would be FERC jurisdictional and subject there to a "just and reasonableness" review.
>
> Myers, November 24, 2015, p. 40 footnote

Department Response

Because the cost cap provisions were adopted in 2010, before the adoption of the QFCPP provisions in 2011, the statute does not anticipate the use of QFCPP energy as an offset to RPS compliance requirements. The sections of the statute authorizing the QFCPP offset do not offer any guidance on how this novel and unique provision is to be considered in implementing the cost cap provisions. The Bloom project was approved by the General Assembly and the PSC a year after the RPS cost cap provision was established.

It was noted that there are several references in the legislative debate to Bloom "RECs" or REC equivalents or including Bloom in the RPS. However, these references are not consistent with the language of the statute which does not include QFCPP output as a renewable resource capable of generating RECs. The Department conferred with a Deputy Attorney General assigned to this matter, who advised that, as a general rule, the text of the enacted legislation, including the synopsis, controls over testimony or comments as part of the legislative debate.

Likewise, comments on behalf of the Department in the PSC proceeding on the interpretation of another section of REPSA (specifically the DPL Billing Transparency Docket) should not carry any weight in interpreting the specific statutory language at question in this rulemaking.

The possibility of a FERC preemption challenge cited by Mr. Myers is a question that exceeds the scope of this rulemaking proceeding. The Bloom tariff is authorized by statute and set by PSC order, and is not at issue in this proceeding, which is limited to the interpretation of § 354(i) & (j).

Several commenters pointed out that fuel cells using natural gas are not included in the list of eligible energy resources under the Renewable Energy Portfolio Standards Act ("REPSA"). Bloom Energy output is used (by statute and PSC order) as an "offset" to required REC purchases to meet some of DPL's RPS compliance costs. However, Bloom is treated differently than renewable energy sources under the statute in the following ways, supporting its removal from consideration under the cap:

- Bloom is not an "eligible energy resource" as defined by the statute; in other words it is not a renewable source of energy.

- Bloom does not generate RECs (defined as tradable instruments in REPSA), but instead the power generated by Bloom is used to offset DPL's required REC or SREC purchases.

- QFCP output is not included in the two sections in question, § 354(i) & (j), which use identical language on the components that shall be included in the total cost of compliance:

  > The total cost of compliance shall include the costs associated with any ratepayer funded state renewable energy rebate program, SREC [REC] purchases, and alternative compliance payments.

  PSC Regulation 3008, adopted in 2011, echoes this provision.

  > 3.2.21 The total cost of compliance shall include the costs associated with any ratepayer funded state renewable energy rebate program, REC and SREC purchases, and ACPs and SACPs alternative compliance payments.

- Large industrial customers (greater than 1,500 MW) have the option of exempting themselves from RPS compliance charges, but do not have the legal ability to exempt themselves from QFCPP charges, which are "non-bypassable" under REPSA.

- Bloom has its own "cost cap" set by statute, which was required to be met before approval of the tariff by the Public Service Commission. Once established, the Bloom tariff can only be changed in very limited circumstances. The PSC does not have authority on its own to alter or abolish the Bloom tariff.

- DNREC does not have the statutory authority to freeze Bloom costs.

In summary, QFCPP costs are treated very differently in REPSA. They are not defined as renewable energy, § 354(i) & (j) do not require that QFCPP costs be included in the calculation, and the Division cannot freeze the QFCPP charges. The Department has not changed the Regulation on this point, and QFCPP costs are not included in calculating the cost of compliance.

3. Comment on Whether the Cost of Compliance Should Include the Green Energy Fund

Dr. Firestone argued that the Green Energy Fund should not be included in the cost of compliance:

> The proposed rules, I believe, inappropriately in Section 4.2 include costs related to the Green Energy Fund in compliance costs.
>
> I think Section 354(j) is very clear. It talks about the cost of complying with this requirement. The Green Energy Fund is found in an entirely different part of the code in Title 29 rather than Title 26, which is the Act. And so I think that that's not an inappropriate inclusion.
>
> 2014 Hearing Transcript, pp. 13-14

Department Response

The two sections in question, §§ 354(i) & (j), includes identical language on the cost of compliance:

> The total cost of compliance shall include the costs associated with any ratepayer funded state renewable energy rebate program, SREC [REC] purchases, and alternative compliance payments.

The Department notes that the Green Energy Fund is a ratepayer funded state renewable energy rebate program, and concludes that its costs properly belong in the calculation. The Department has not changed this provision in the Regulation.

4. Comments on Whether the "Total Retail Costs of Electricity" in the Calculation Should Include Transmission and Distribution Costs

Mr. Myers argued that the phrase "total retail cost of electricity" means only the cost of energy and does not include transmission and distribution costs:

> At a minimum, the proposed rules related to "Total Retail Costs of Electricity" should be clarified: (1) to emphasize that total retail costs of electricity do not include any costs incurred, or charges paid by consumers, for delivery of the electric energy over the electric distribution wires and (2) to explicitly exclude from the "total retail cost of electricity" any costs which also would count as within the "total cost of complying" with the renewable energy mandates.
>
> Myers, January 21, 2014, p. 19

Mr. Myers continued by arguing that the "total retail cost of electricity" should represent "the retail suppliers' "wholesale costs" for electric energy." (Myers, January 21, 2014, p. 20) He went on to compare the language governing Delmarva Power to the language governing the Delaware Electric Cooperative and municipal electric companies:

> Indeed, this reading is supported by the text of the similar cost cap protection applicable in the case of the Delaware Electric Cooperative and municipal electric companies. For

> them, the total cost of complying with their own versions of renewable energy requirements "shall not exceed [3 or 1] % of the total cost of the purchased power of the [affected] utility for any calendar year." The statutory benchmark for them is the "total cost of the purchased power of the utility."
>
> Myers, January 21, 2014, p. 20

The Public Advocate "prefers removing the transmission, distribution and delivery costs from the definition," and argued that the definition "could instead be called 'Total Retail Costs of Electric Supply.'" (DPA, November 13, 2015, p. 12)

John Nichols also argued that "total retail cost of electricity" should be interpreted to include only supply costs:

> REPSA specifically refers to the the "supply" charge as the base to be used when calculating the cost-cap provision, not all revenue received by Delmarva Power - including distribution charges and capacity charges, as calculated by DNREC.
>
> Nichols, December 8, 2015

Dr. Firestone argued that the "total retail cost of electricity" should mean all customers' costs:

> As the bill is to protect consumers, and consumers pay retail, the REC comparator should be retail costs. For the same reason, and because the statute use the word "total," the retail costs in question should be the full retail cost paid by consumers (including supply and REC costs, distribution, Green Energy costs, and mandatory base charges) and not be limited to only supply and REC costs.
>
> Firestone, October 19, 2012, p. 9

The PSC noted that the statute provides different standards for DPL than it does for municipal electric companies and rural electric cooperatives:

> In these sections the statute refers to the "total retail cost of electricity" without defining it which is one of the reasons for the creation of these rules. In 26 *Del. C.* §363(f) and (g) the statute also refers to the provisions for municipal electric companies and rural electric cooperatives in determining the costs of complying with the renewable energy requirements. However for the municipals and rural electric cooperatives the statute defines the total cost as the "purchased power" of the utility. This differs from the "total retail cost of electricity". We believe that the legislators meant this distinction and therefore the total costs must be defined differently.
>
> PSC, January 7, 2014, pp. 1-2

PSC Staff's 2015 comments supported the inclusion of transmission, distribution and delivery costs, noting the difference in statutory language between referencing regulated utilities in one section and for municipal electric companies and rural electric cooperatives in a different section:

> This distinction implies that "total retail cost of electricity" includes more than "purchased power" or supply. DNREC defines the "Total Retail Costs of Electricity" as

> the total costs paid by customers of the Commission-Regulated Electric Company for the supply, transmission, distribution and delivery of retail electricity to serve non-exempt customers, including those served by third party suppliers, during the respective compliance year. Staff does not propose a change to this definition.
>
> PSC Staff, December 8, 2015, p. 4

Department Response

The Department does not agree that the phrase "total retail costs of electricity" should be interpreted to include only supply costs. The phrase "total retail cost of electricity" properly includes all of the costs on customers' bills. Electricity is not a retail product unless and until it is delivered to customers. It is not physically possible to buy electricity from Delmarva Power without using the company's transmission and distribution assets. Since transmission and distribution costs are part of Delmarva Power's customers' bills, these costs are reasonably included in the calculation.

The argument that the phrase "total retail costs of electricity" should be interpreted to mean DPL's wholesale costs is not consistent with the meaning of the word "retail." DPL is not a retail customer; it buys electricity in wholesale markets.

The DPA's suggestion that the definition "could instead be called 'Total Retail Costs of Electric Supply'" seems to reflect the DPA's interpretation of the intent of the statute rather than the statutory language itself.

The Department agrees with the PSC that the difference in the language in the sections covering municipal electric companies and rural electric cooperatives is indicative that the phrase "total retail cost of electricity" should be understood to mean all of customers' retail costs. The difference in statutory language referencing regulated utilities in one section and municipal electric companies and rural electric cooperatives in a different section is instructive in interpreting the language. The cost cap provision in §354(i) & (j) refers to "the total retail cost of electricity" while the cost cap provisions for municipal electric companies and rural electric cooperatives are found in §363 (f) & (g), which refer to "the total cost of the purchased power."

The Department does not agree with the argument that the retail cost of electricity should exclude the cost of compliance with REPSA. Compliance with REPSA is part of the total cost of electricity to retail customers. The Department interprets the language of the statute to mean the actual costs that actual customers are paying, not the costs if certain components of customers' bills were excluded from the price of electricity.

The Department has not changed the Regulation on this point.

5. Comment on Whether the Cost of Compliance Should Include Third Party Suppliers

The PSC commented that the costs of third party supplier customers should be included in the calculation, and proposed that the reference to third party suppliers as a separate cost category be removed from the Regulation.

Department Response

The Department agrees that the third party supplier customers should be included in the calculation and has adopted the PSC's amendment to remove any references in the Regulation on this point.

6. Comment on How the Cost of Compliance for the Synergics Wind Energy Farm Should Be Calculated

Mr. Stevenson, representing the Caesar Rodney Institute ("CRI"), argued that a method is needed "to calculate the cost of Renewable Energy Credits generate by the 100 MW Synergics Wind Energy Farm." DPL does not buy RECs from this facility, but buys the energy and sells it to the grid. CRI suggests a method for calculating the cost:

> We suggest that the value of the credits be calculated as cost/MWh for this wind power less the average cost of power paid for all sources which is currently running about $35/MWh.
>
> CRI, January 8, 2014, p. 1

Dr. Firestone argued that the energy costs of wind power contracts should not be included in the cost of RPS compliance:

> A bad deal on energy does not metamorphose into a worse deal for RECs. The deal for the purchase of RECs is the deal for RECs and the cost of a REC does not change simply because the Commission approved a contract that has resulted in Delmarva Power paying above-market prices for energy.
>
> Firestone, December 8, 2015, p. 4

Department Response

It is the Department's understanding that the method proposed by CRI is similar to the method used by DPL for calculating the cost of compliance for this project.

It may turn out that the Synergics Wind Energy Farm or another renewable energy project could in the future deliver energy and environmental attributes RECs or SRECs for less than the average cost of power for the market as a whole.

The Department has not changed the Regulation on this point.

III. Comments on Discretion on Whether or When to Declare a Freeze of the RPS

Mr. Myers and Mr. Stevenson argued that the statute requires that the Director must freeze implementation of the RPS if the cost of compliance exceeds 3 percent (or 1 percent for solar PV) of the total retail cost of electricity. Myers cites the legislative debate of Senate Substitute No. 1 for Senate Bill No. 119 of the 145th General Assembly in making his argument:

> In sum, the legislative proceedings show that subsections 354(i) and (j) were meant to give electric consumers a real "wallet" entitlement: protection against bearing in their electric bills significant costs arising from the costs of complying with renewable energy portfolio requirements. Moreover, this entitlement was meant to be easily invoked and have real effect. The central question in this rule-making proceeding is whether the proposed "cost cap/freeze" rules are consistent with this legislative vision.
>
> Myers, January 21, 2014, pp. 5-6

Mr. Myers offered several legal citations in support of his argument:

> But in statutory linguistics the word "may" can often reflect both "permission" coupled with "obligation," rather than permissive "discretion." As the Delaware judges, sitting en banc, said years ago:
>
> > But the word, "may," ordinarily permissive in quality, is frequently given a mandatory meaning, and is given that meaning where a public body or officer is clothed by statute with power to do an act which concerns the public interest, or the rights of third persons. In such cases, what they are empowered to do for the sake of justice, or the public welfare, the law requires shall be done. The language, although permissive in form, is, in fact, peremptory.
>
> *duPont v. Mills*, 196 A. 168, 173 (Del. Court *en banc* 1937). This interpretive principle – that "may" can mean "must" – has a long pedigree. See *Supervisors of Rock Island County. v. U.S.*, 71 U.S. (4 Wall) 435, 44-47 (1866) (outlining prior cases and applying principle). Cf. *Wilson v. U.S.*, 135 F.2d 1005, 1009 (3d Cir. 1943) (citing Delaware and federal case law) See also *Nevada Power Co. v. Watts*, 711 F.2d 913, 920-921 (10th Cir. 1983).
>
> Myers, January 21, 2014, pp. 10-11

Mr. Myers included an anecdote from his childhood in a footnote to the legal arguments quoted above:

> Even in lay usage, the term "may" is often used to denote obligation, rather than discretionary choice. For example, in my youth when I misbehaved, my mother would frequently be quick to tell me that "you may go to your room for what you just did." I never took the "may" in her directive to mean that I could exercise some level of discretion and choose not to obey the banishment and instead stay in the kitchen.
>
> Myers, January 21, 2014, p. 11, footnote 17

Mr. Stevenson agreed with Myers on the question of discretion:

> Sections 5.2 and 5.3 – The Director does not have discretion to waive an RPS freeze if the 1% or 3% annual caps are exceeded. The caps were set as absolute maximums by the legislature to protect electric ratepayers. The cap was described as a "Circuit Breaker" in legislative discussions that would absolutely trip to protect ratepayers.
>
> CRI, January 8, 2014, p. 1

Linde LLC asked that the rules be amended to eliminate any discretion on the part of the Director:

> - Elimination of discretionary evaluations to modify or soften enforcement of the 3% cost limit (1% solar).
>
> Linde, February 10, 2015, p. 3

John Nichols refers to legislative intent to argue that the word "may" does not confer discretion:

> While REPSA uses the word "may" to determine the implementation of the 3% cost-cap, it is clear the legislative intent was to apply the cost-cap if/when the subsidies exceed 3% of the supply charge. DNREC's failure to apply the cost-cap as a firm spending limit will most likely lead to litigation and the corresponding expenses of defending an error in judgement.
>
> Nichols, December 8, 2015

The PSC Staff's December 2015 comments likewise refer to use of the term "circuit breaker" in the legislative debate as indicative of determine intent.

Dr. Firestone, the Sierra Club, MAREC, DEIPL, DSEC and the MDV-SEIA argued that the statute gives the Director discretion. Dr. Firestone offered four arguments in favor of ascribing discretion to the Division Director:

> When it set forth DNREC's consideration of a freeze, the General Assembly used the permissive "may" freeze rather than "shall" indicating discretion.
> …
> To being with, if "may" were mandatory, there would be no reason for the General Assembly to direct DNREC to consult with Commission before imposing a freeze.
> …
> Second, on one hand, the General Assembly gave DNREC exclusive authority to determine whether the threshold was reached, but on the other hand required DNREC to consult with the Commission in determining whether to implement a freeze.
> …
> Third, construing "may" as mandatory would require a court to conclude that the General Assembly authorized the implied impairment of Delmarva's contracts; contracts that it either authorized (e.g., the land-based wind contracts) or mandated (e.g., the 30% procurement contracts) and that were approved by a state agency, the Public Service Commission.
> …
> Fourth, later in the same provision, when discussing the criteria for lifting the freeze, the General Assembly states that DNREC, in consultation with the Commission, "shall" lift the freeze provided "total cost of compliance can reasonably be expected to be under the 3% threshold.
>
> Firestone, October 19, 2012, pp. 2-3

Dr. Firestone offered legal citations that support the view that the statute gives discretion to the Director:

> The Delaware courts however have made clear that no such nondelegation doctrine issue arises in the present context. Cannon v State of Delaware, 807 A.2d 556; 55 ERC (BNA) 1504 (DE S.CT. 2002); Hall v. Casson, 1990 Del. Super. LEXIS 130 (Del Sup. 1990); Atlantis 1 Condominium Association v. Bryson, 403 A.2d 711; 9 ELR 20798 (DE S.CT 1979).
>
> In Cannon, the Delaware Supreme Court noted that it is not always "feasible for the General Assembly to set precise guidelines." In such circumstances, "the presence of administrative procedural safeguards may compensate for the lack of precise statutory standards." This is a long-standing rule as the Atlantis 1 Condominium Court held that when a nondelegation doctrine challenge is made, the focus turns toward the totality of protections against administrative arbitrariness, including safeguards and standard, *regardless whether those protections are set forth in the legislation itself or in the procedures used by the administrative agency to execute the legislation*. (citations omitted, emphasis added). In other words, DNREC through rulemaking can itself ensure that concerns over due process are addressed.
>
> More specifically, the Hall court noted that a "delegation of legislative authority may be cast in general terms when the administrative agency is charged with protecting public health and safety…." (citing among other cases, In Re Appeal of Dept. of Natural Resources and Environmental Control, 401 A.2d 93, 95 (1978). As the RPS has as its charge the development of clean, non-polluting, healthy renewable energy sources, such a grant may be general. Moreover, "the authority granted to an administrative agency should be construed so as to permit the fullest accomplishment of the legislative intent or policy. An expressed legislative grant of power or authority to an administrative agency includes the grant of power to do all that is reasonably necessary to execute that power or authority. Atlantis 1 Condominium Court, citing Kreshtool v. Delmarva Power and Light Co., Del.Super., 310 A.2d 649 (1973).
>
> Firestone, October 19, 2012, pp. 5-6

Dr. Firestone argued that one citation offered by Mr. Myers is not useful in this matter:

> It is worth noting that Dupont v. Mills, 39 Del. 42; 196 A. 168 (SUP. CT. DE 1937), which Mr. Myers relies on, does not suggest a contrary outcome. In that case, the Court was called upon to construe the meaning of "may" in the following sentence.
>
> > "Any or all of said Bonds may be redeemed at the option of the Board of School Trustees at par and accrued interest at any interest period after the expiration of five (5) years from the date of said Bonds."
>
> Firestone, October 19, 2012, p. 4

Dr. Firestone offered a word of caution in using legislative debate to guide the interpretation of statutory language:

> As an initial matter, courts should be cautious of attributing the statements of individuals as being representative of the General Assembly as a whole. See e.g., Zedher v. United

> States, 547 U.S. 489 (2006) (Scalia, J. Concurring). This is particularly true in the present case, given that the statements in the two chambers conflict with each other and, depending on how one reconciles those statements' ambiguities they may conflict with the statute itself.
>
> Firestone, October 19, 2012, p. 4

Lee Ann Walling, representing Delaware Interfaith Power & Light, concurred that the statue gives the Director discretion:

> We believe the wording of the law clearly gives your agency discretion on whether to freeze the RPS even if certain cost conditions are present.
>
> DEIPL, January 22, 2014, p. 1

Mr. Burcat, representing MAREC, offered two arguments in favor of discretion:

> First, it is clear and unambiguous that the permissive word "may" was used in this context, rather than the mandatory word "shall."
>
> MAREC, January 24, 2014, p. 2

In his second argument, Mr. Burcat noted that the provision requiring consultation with the Commission is indicative of discretion:

> If the 3% cost cap were to be [a] mandatory act, then why have the Commission consult with the Coordinator when a freeze would be required to be imposed in any event?
>
> MAREC, January 24, 2014, p. 2

Mr. Davis offered similar arguments on behalf of DSEC:

> a. The statue specifically uses the word "May" to give the Director discretion in determining that if the cost of REPS should exceed the cap, if the ongoing benefits outweigh those costs.
> b. The Director is further instructed to consult with the PSC prior to implementing a freeze, an action that would service [sic] no purpose if there was no discretion available to the Director.
> c. The stature then purposefully uses the word 'Shall" to indicate that once a freeze has been implemented, it "Shall" be lifted when the cost cap is no longer exceeded. The Director is specifically not given any discretion, and must lift a freeze once the costs have declined below the cap.
> d. The word "May" directly indicates the use of discretion, while "Shall" indicates a compulsory mandate. It is unreasonable to interpret these words as having an identical definition, particularly as they are used to indicate disparate levels of discretion in the statute.
>
> DSEC, January 24, 2014, p. 2

The Delaware Chapter of the Sierra Club concurred:

> We agree that the legislation intentionally uses the words 'may freeze' in the statute and that the State Energy Coordinator (or Director of Climate and Energy) should use judgment in determining whether to freeze the RPS requirements. We agree that a freeze 'shall' be lifted if the costs of resumption can be expected to drop below the caps.
>
> Sierra, January 24, 2014, p. 1

The Sierra Club continued to support the view that the statute confers discretion in subsequent comments:

> We would like to point out that the emphasis on "may" in the legislation, not "must" or "shall" institute a freeze. Therefore, we interpret this to mean that a freeze is not mandatory, even if the cost of compliance meets the 1% for solar renewable energy and 3% for renewable energy thresholds.
>
> Sierra, December 8, 2015, p. 1

The joint comments filed by the MDV-SEIA and DSEC support the view that the statute gives the Director the discretion on deciding whether to freeze the RPS:

> Furthermore, when the General Assembly granted the State Energy Coordinator - now Director of Energy and Climate - discretion to enact a freeze, they also granted discretion on the reasons to enact a freeze. When the director considers whether to implement the freeze, it is permissible for the Director to take into account variables beyond just the 1% and 3% ratepayer impact thresholds.
>
> MDV-SEIA and DSEC, December 7, 2105, p. 3

Department Response

The Department agrees that the statute clearly confers discretion. The word "may" is appropriately taken at face value, and cannot reasonably be interpreted to mean "shall" or "must" given the plain language of the statute. The Department conferred with the Deputy Attorney General assigned to this matter, who advised that the use of "may" in this statute evidences an intent to convey discretion. There is no ambiguity.

The context of the statute reinforces the view that the word "may" confers discretion. The word "shall" is used in the same paragraphs in referring to lifting a freeze. Clearly the word "shall" here means that the Director does not have discretion when it comes to lifting a freeze. When two different words are used in the same paragraph of the same statute, one can only conclude that the legislature meant for them to convey different meanings.

It was argued that the requirement requiring consultation with the Commission suggests discretion. Why require consultation if there is no decision to be made? On the other hand, the phrase is used in sentences with the word "shall" as well as the word "may." Thus, the reference to consultation with the Commission is suggestive, but is not in itself decisive.

The Department believes that the legal arguments and case law cited by Myers do not carry sufficient weight to require the Department to disregard the plain meaning of the statute. There is no ambiguity in the contrasting use of "may" and "shall", and thus no need to look elsewhere for

purposes of statutory construction. The Department believes that the case law cited by Dr. Firestone is more convincing in demonstrating legal precedent for the exercise of discretion as provided in the statute. Dr. Firestone's look at one of the citations offered by Myers, *Dupont v. Mills*, shows that the use of the word "may" in this vastly different legal context is not instructive in this matter.

Arguments that the legislative debate is necessary or helpful in construing the plain meaning of the word "may" to mean "shall" or "must" are not convincing. Mr. Myers has attempted to demonstrate that words used by Senator McDowell in the legislative debate saying the RPS "*will be* suspended" if the cost cap is breached are indicative of legislative intent (Senate Debate on SB 119, pp. 4-5). Yet in the same debate, Senator McDowell said that a utility "*could* push the circuit breaker" (Senate Debate on SB 119, p. 9), and later said "they *can* push the circuit breaker" (Senate Debate on SB 119, pp. 27). These contradictions highlight the unreliability of using sometimes ambiguous floor debate to reinterpret clear statutory language.

Dr. Firestone offered a U.S. Supreme Court opinion that calls for caution in interpreting conflicting statements from individuals as being representative of legislative intent. The Department conferred with the Deputy Attorney General assigned to this matter, who advised that, as a general rule, the text of the enacted legislation, including the synopsis, controls over testimony or comments as part of the legislative debate. This is particularly true where the statutory language is clear and unambiguous, and does not require statutory construction or interpretation when properly read in context.

Mr. Myers argued that a "legislative vision" underlies the cost cap provisions, and said that "[t]he central question in this rule-making proceeding is whether the proposed 'cost cap/freeze' rules are consistent with this legislative vision" (Myers, January 21, 2014, p. 6). The Department does not agree. The central task in this proceeding is to promulgate rules that are consistent with the language of the statute.

In summary, the plain legislative language clearly confers discretion. The Department has not changed the Regulation to eliminate exercise of the discretion given to the Director.

IV. Comments on the Factors to be Considered in Deciding Whether to Impose a Freeze

Mr. Davis, representing the Delaware Solar Energy Coalition (DSEC) supported the use of the criteria listed in Section 5.4, specifically mentioning externalities reported in the DPL Integrated Resource Plan (IRP) and avoided cost calculations and recommending that "energy savings to renewable energy system owners" should be included in the criteria:

> 2. Inclusion of externality calculations
> a. The IRP process has established substantial precedence to suggest that externalities should be considered in the calculation of the retail cost of energy and avoided cost rates.
> b. The IRP also clearly establishes the cost of said externalities.
> c. Such externalities that directly offset RPS costs to ratepayers should be included in cost calculations
> 3. Avoided Capacity costs

> a. Net metered Renewable Energy Systems provided a capacity value to the grid that is not realized by the system owner.
> b. Wind and Solar projects interconnected to the PJM grid are typically assigned a capacity value ranging from .3-.4.
> c. The value of this capacity should be calculated as follows:
> (Name plate capacity of net metered systems by technology) X (Average PJM capacity factor by technology) X (average utility demand charge to end use customers)
> The resultant capacity savings should be […] subtracted from the RPS compliance cost.
> 4. Long term Renewable energy costs
> a. Solar Renewable energy system costs do not escalate. Once the systems are paid for thorough initial savings, they continue to generate power throughout the life of equipment, typically measured in decades.
> b. Energy savings to renewable energy system owners should be considered as a reduction in compliance costs.
>
> DSEC, January 24, 2014, pp. 1-2

Mr. Irwin, on behalf to the Sierra Club, wrote:

> We support the listed considerations in section 5.4.
>
> The benefits that accrue to the public at large have a real value. Delmarva's IRP has included a calculation of health and mortality benefits from renewable resources that are significant and lower costs that don't show up on the utility bill. The costs of climate change are reduced to the extent we do not add carbon dioxide to the atmosphere. It makes sense to use the federal cost of carbon as a starting point for quantifying some of these benefits as well as the costs of using conventional fossil fuels. The costs to rate payers is not limited to what's on our utility bill.
>
> Sierra, January 24, 2014, pp. 1-2

Mr. Irwin further noted:

> We need to take into account the cost shifting that happens with non-renewable sources like fossil fuels and nuclear energy which makes them look cheaper than they really are.
>
> Sierra, January 24, 2014, pp. 1-2

The Sierra Club has continued to support the use of externalities:

> We strongly support the language in §5.7 pertaining to the externality costs of health and mortality costs and environmental impacts, and the need to rely upon well-documented research.
>
> There are very significant costs of energy generation from fossil fuels that are not included in the end-use consumer cost of electricity. These health, social and environmental costs are externalized and place a burden on public health and the economy. Therefore the inclusion of avoided externality costs from transitioning to renewable energy is critical to accurately calculating the cost of the RPS.

> We support the Division's reliance on the EPA cost of carbon, and believe this number to be conservative. In the future the social cost of carbon is likely to be found to have been much higher than we thought; however we understand the need to rely upon well documented and conservative estimates for the purpose of getting this regulation finalized.
>
> We would like to see the avoided cost of externalities from all conventional fuels (including coal, natural gas and nuclear) taken into account in calculating the RPS cost of compliance. While we recognize that the externality costs of coal are the most well understood and documented, it is also important to consider the negative health, economic, societal and environmental externalities of natural gas and nuclear over their entire life cycle (from extraction to waste generated).
>
> Sierra Club December 8, 2015, pp. 2-3

Ms. Walling referred to the DPL IRP as confirming the value of externalities:

> DEIPL quotes extensively from Delmarva Power's Integrated Resource Plan because so often the only focus during these debates on renewable energy is the retail cost of electricity in the here and now. **Here we have the regulated utility itself using extensive modeling to tell the other story – of millions of dollars saved, illnesses prevented, and deaths averted by moving away from coal and other fossil fuels to cleaner sources.**
>
> DEIPL, January 22, 2014, pp. 2-3

DEIPL, in its comments dated February 10, 2015, argued that the discretion granted the Director allows for consideration of other factors:

> Opponents of the proposed rule would suggest that the decision to suspend the RPS schedule should be based solely on the value of the retail price of electricity. If this were the case and what the legislature had in mind, consultation with the public service commission would not have been included and the word "**shall**" would have purposely been used rather than the word "**may**".
>
> DEIPL, February 10, 2015

Dr. Firestone included "factors such as health externalities, reduced risk of sea level rise, locational benefits in terms of reducing congestion charges, etc." in his list of criteria to be considered in determining whether to impose a freeze (Exhibit 7, p. 8). He referred to the IRP as being required to consider externalities by PSC rules:

> Rule 6.14 requires Delmarva Power to "include a current evaluation, detailing and giving consideration to environmental benefits and externalities associated with the utilization of specific methods of energy production." Rule 2.0 defines "Externalities" are defined to include the "social, health, environmental and/or welfare costs or benefits of energy which result from the production, delivery or reduction in use through efficiency improvements, and which are external to the transaction between the supplier (including the supplier of efficiency improvements) and the wholesale or retail customer." Given that the General Assembly was motivated by the desire to protect consumers, it is

> appropriate for DNREC to consider the extent to which consumers are being benefited in exchange for any direct costs they are paying for RECs.
>
> Firestone, October 19, 2012, p. 8

Sarah Buttner argued that the General Assembly cited the externality benefits of renewable energy in the statute itself:

> The General Assembly recognized the benefits of renewable energy. In 26 Del. C. § 351, the Code states:
>
> > "The General Assembly finds and declares that the benefits of electricity from renewable energy resources accrue to the public at large, and that electric suppliers and consumers share an obligation to develop a minimum level of these resources in the electricity supply portfolio of the state. These benefits include improved regional and local air quality, improved public health, increased electric supply diversity, increased protection against price volatility and supply disruption, improved transmission and distribution performance, and new economic development opportunities."
>
> Buttner, December 7, 2015, p. 1-2

The League of Women Voters of Delaware wrote in support the use of externalities:

> We are pleased to see that the calculation of the cost of compliance for both solar and other sources of renewable energy now includes externality offsets for NOX and SO2 based on the 2012 Delmarva Power Integrated Resource Plan (IRP) and for CO2 emissions based on current estimates of the social cost of carbon. We agree that these offset estimates are conservative and the real costs of the avoided emissions may eventually be shown to be much higher. However, the use of conservative estimates is justified if it will minimize delays in the adoption of these new regulations.
>
> LWVDE, December 7, 2015, p. 1

The PSC, in its 2014 comments, recommended that the DPL IRP be used as a reference for externality benefits:

> Staff respectfully suggests that the externally [sic] benefits used should be consistent with the Commission-Regulated Electric Company's currently filed IRP.
>
> PSC, January 7, 2014, p. 2

Mr. Burcat supported the proposed criteria in his comments:

> MAREC believes that the use of various factors such as energy market conditions, avoided cost benefits from renewables, externality benefits and economic development impacts from renewable energy development are all reasonable and justifiable given the clear discretion provided in the cost cap legislation.
>
> MAREC, January 24, 2014, p. 4

Mr. Burcat cited seven studies documenting avoided cost or price suppression benefits that exert downward pressure on grid energy prices and noted that these benefits accrue directly to customers:

> Specifically, with respect to the Director's discretion in 5.4.2 as further defined in 5.6, there are numerous studies outlining the price reducing impacts of renewable energy when it participates in the wholesale energy market like PJM's. There are now a number of studies, which have concluded that wind generation participating in organized wholesale electricity markets, like PJM, can actually serve to reduce the price of electricity to the ultimate benefits of consumers. Essentially, when wind bids into the market at little or no cost, because it has not associated fuel cost, it will displace higher cost electricity resources, which leads to a lower clearing price and lower costs to consumers.
>
> MAREC, January 24, 2014, pp. 4-5

One of the studies cited by Mr. Burcat is the PJM Renewable Integration Study, which calculates the market impacts of increasing the use of renewable resources in the PJM region over a ten year period. The study calculated price impacts for nine different scenarios of increased use of renewable energy and found significant price impacts for all scenarios:

> Every scenario examined resulted in lower PJM fuel and variable Operations and Maintenance (O&M) costs as well as lower average …
>
> PJM Renewable Integration Study, p. 7

Ms. Buttner also cited the PJM study, and further mentioned that Austin Energy has developed a "Value of Solar" rate, which is calculated annually and includes energy savings, generation capacity savings, fuel price hedge value, transmission and distribution savings and environmental benefits. (Buttner, December 7, 2015, p. 2-4)

Dr. Chad Tolman said that climate impacts should be considered in his workgroup session comments, citing the "Cost of Coal" study ("Full cost accounting for the life cycle of coal," pp. 73-98):

> On the high end, Epstein et al. estimate the average climate change cost to society at about 10¢/kWhr or $100 MWh. Since an ordinary powdered coal plant produces about a ton of CO2 per MWh, that means a cost to society of about $100/ton of CO2 emitted. Natural gas, while cleaner burning than coal, still produces about 0.5 ton of CO2 per MWh of electricity generated.
>
> Tolman, August 5, 2012, pp. 2-3

The study calculates the climate damage from combustion emissions of CO2 and N2O to be 1.02 cents/kWh to 10.20 cents/kWh, with a best estimate of 3.06 cents/kWh ("Full cost accounting for the life cycle of coal," p. 92).

Mr. Irwin cited climate costs as an important consideration:

> We believe that the original intention was to encourage a transition to clean, renewable energy sources. The reasons included the health and mortality benefits of reducing fossil fuel pollution, as well as the urgent need to reduce the emission of carbon dioxide because of its contribution to raising global average temperatures and the resultant climate changes. These climate changes, with effects including drought, fires, extreme heat and cold events, sea level rise, increased disease ranges, national security risks and many others, will entail an unknown but certainly large cost to the nation, including us in Delaware.
>
> Sierra, January 24, 2014, p. 1

The joint comments filed by the MDV-SEIA and DSEC support the use of the factors in making a determination:

> Renewable energy sources provide a tangible benefit to ratepayers since they are a low cost of energy during times of peak demand. The associated price suppression effect is essential to incorporate into any compliance cost calculation.
>
> MDV-SEIA and DSEC, December 7, 2015, p. 3

The comments further elaborate in two footnotes:

> 7 Adding renewable energy sources to the electricity market reduces, or "suppresses" the price of energy to the consumer. Renewables - whether wind, solar, or other form - operate without fuel costs. Particularly at times of high electricity demand, these low operating cost renewables displace resources with substantially higher operating costs, which in turn lowers the price consumers pay for electricity. This consumer benefit is called the "price suppression effect" and has been studied by PJM, among others.
> 8 GE Energy Consulting, PJM Renewable Integration Study (PRIS) 2014. http://www.pjm.com/committees-and-groups/subcommittees/irs/pris.aspx
>
> MDV-SEIA and DSEC, December 7, 2015, p. 3

The Delaware Audubon Society generally supported the use of externality benefits, but asked that the range of benefits considered be expanded:

> The definition of externality benefit as proposed in the regulations is too narrow to encompass all of the externality benefits of the Renewable Portfolio Standard, which include reduced climate change and pollution impacts on Delaware's IBAs. The reduction in costs, as described in Section 2.0, is not equivalent to the creation of benefits by the RPS. We therefore ask that the definition of externality benefits in Section 2.0 be amended as follows:
>
> > "Externality benefits" means reductions in environmental, health and mortality costs and improvements in habitat resulting from reduced emissions.
>
> Delaware Audubon, December 8, 2015, p. 3

Delaware Audubon proposed a change in the Regulation on how the Director makes use of another environmental consideration:

> To ensure that the externality benefits of the Renewable Portfolio Standard are properly accounted for within these regulations, we ask that the language of Section 5.4 be changed to require a more comprehensive consideration of externality benefits as follows:
>
> 5.4 In making a determination, the Director ~~may~~ shall consider:
>
> Delaware Audubon, December 8, 2015, p. 3

Dr. Firestone supported the use of the factors to be used on considering whether to declare a freeze:

> In section 5.4 and 5.5, DNREC has specified a number of factors for the Director to consider when deciding whether or not implement a freeze. These are not additional statutory criteria. Indeed, rather than DNREC expanding its discretion, it is in fact limiting it.
>
> Firestone, December 8, 2015, pp. 1-2

Mr. Stevenson argued that the statute does not specifically allow for offsetting factors:

> The RPS legislation established no allowance for the Director to consider market conditions, avoided cost, externalities, or the economic impacts of renewable energy sources. DNREC is creating these reasons for waiving the freeze out of thin air. Also, the proposed considerations are subject to wide interpretation as to the cost impact and will be very difficult to calculate in an objective way.
>
> CRI, January 8, 2014, p. 1

Linde LLC asked that no other considerations be allowed under the rules:

- Modify the proposed rules contained in the NOPR Proposal to reflect:
  - Implementation of absolute RPS Program freeze levels and cost control limits at a 3% level (1% solar) of retail electric supplier total costs.

Linde, February 10, 2015, p. 3

Mr. Myers argued that the criteria should be stricken from Section 5.0:

> As detailed in part 2 of these comments, this section should be rewritten to remove all references to the Director having discretion to impose, or to forego, a freeze, once the statutory cost cap percentages have been met.
>
> Myers, January 21, 2014, p. 29

Mr. Nichols submitted four articles on allergies and asthma to argue that particulate matter is not a health hazard:

> Attached are four article that are representative of a growing body of academic research. They focus on the rising incidence of allergies and hay fever among children, explaining that the urbanization of our society is leading to asthma, over-sensitized allergic responses, and other respiratory problems in later life because urban children are shielded from the early childhood exposure to allergens common in rural environments.

> Early exposure allows the human immune system to properly identify harmless background substances and respond less aggressively. Thus, it is not reduced particulate matter that improves health outcomes. Rather, it is the non-exposure of children to dust, dirt, pollen, and other natural and anthopogenic materials that primarily accounts for the rising number of diagnosed asthma cases, along with improved diagnostic techniques.
>
> Nichols, December 8, 2015

The DPA argued that the Director (in consultation with the PSC) is constrained in deciding whether to freeze the RPS:

> Neither the Director nor the Commission has been provided with the statutory authority to consider any other factors.
>
> DPA, February 16, 2105, p. 7

The DPA argued that the criteria being proposed have no objective basis:

> But we *cannot* ascertain the amount of the factors set forth in proposed Rule 5.4. There are *no* "objective benchmarks." There is *no* source to which we can look to easily determine the exact cost of the overall market conditions. There is *no* source from which we can easily determine the exact cost of the avoided cost benefits from the RPS. There is *no* source to which we can look to easily determine the externality benefits of changes in energy markets. And there is *no* source from which we can easily determine the economic impacts of the deployment of renewable energy in Delaware. These costs will be whatever the Director, *in his sole discretion,* determines them to be.
>
> DPA, February 16, 2105, p. 7

PSC Staff, in its most recent comments, argued that externalities should not be considered:

> The statutory language does not mention external benefits that are to be included in the calculation. The transcripts to the debates indicate that the legislature was concerned about rate impact and what the increase in renewables would mean to a ratepayer's bill, and therefore the cost caps were implemented as a consumer protection against too high of a cost. In the respective debates as cited above there was no discussion or consideration of the inclusion of the cost of external benefits in the bill languages.
>
> PSC Staff, December 8, 2015, pp. 4-5

The PSC Staff noted the need to consider the benefits of renewable energy in a collegial manner and in a balanced context:

> The Commission staff is committed to working with the Division of Energy and Climate and all stakeholders to ensure the applicable rules are balanced between the interests the Delaware General Assembly finds that renewables contribute to the public at large and the costs that are paid by the ratepayers.
>
> PSC Staff, December 8, 2015, p. 1

Department Response

The statute clearly confers discretion to the Director in deciding whether and when to impose a freeze. Mr. Myers predicates his argument for removing these criteria on his view that the Director does not have discretion. Section 5.4 is crafted to guide the Director in the use of measurable criteria based on the legislative rationale in § 351 (b) of REPSA in making a decision. The DPA argued that the Director may not consider any other factors, in effect limiting the discretion conferred by statute. Firestone argued that the criteria are allowable under the statutory discretion given the Director, saying that "rather than DNREC expanding its discretion, it is in fact limiting it."

The cost cap provision is clearly intended to limit the cost impact of the RPS to DPL customers. The criteria listed in Section 5.4 involve measurable economic impacts that affect all Delawareans, including DPL customers. Contrary to the DPA's argument, sources do exist for these criteria. For instance, several studies have been introduced into the record that demonstrate that avoided cost or price suppression effects are real and can be calculated. As for externalities, Delmarva Power has included externality calculations in its last three Integrated Resource Plans (IRPs) submitted to the PSC. The IRP, cited by Walling, Irwin, Firestone, Burcat and the PSC as a source for externality calculations, is a document required by statute, and created and reviewed through a PSC docket.

The Sierra Club and Dr. Tolman said the criteria should include climate impacts, a subject covered only briefly in the IRP. The Department will look to similarly reliable sources for such calculations.

Delaware Audubon argued that habitat impacts be considered. The Department has changed the definition of Externality benefits to include the phrase "improvements to habitat."

> "Externality benefits" means reductions in environmental, health and mortality costs **[and improvements in habitat]** resulting from reduced emissions.

Delaware Audubon argued that the Director be required to consider the factors described in Section 5.4. The Department believes this is an appropriate suggestion, while noting that final discretion on whether to freeze the RPS remains with the Director.

The Department has changed the final Regulation to read:

> 5.4 In making a determination, the Director **[~~may~~] [shall]** consider:

The Department has changed the final Regulation to clarify the reference to avoided cost benefits:

> 5.6 Avoided cost benefits from the RPS may include avoided system costs and price suppression effects attributable to the deployment of renewable energy **[that result in lower net electricity costs]**.

The Department has slightly enlarged the list of externality criteria to include environmental impacts and harmonize the section with the definition of externality benefits in the Regulation.

The Department has changed the final Regulation to include this reference to eternality benefits and the IRP:

> 5.7 Externality benefits of changes in energy markets may include externality savings in health and mortality costs and environmental impacts due to policies promoting cleaner energy in Delaware and regional energy generation. To the extent possible, the externality savings should be consistent with the current IRP filed by the Commission-Regulated Electric Company, except where other published methods or studies are determined to be more appropriate.

V. Comments on Consultation with the Public Service Commission on Imposing a Freeze

The PSC, DPA, Dr. Firestone, MAREC and DSEC noted that the statute requires "consultation with the Commission" in deciding whether or when to declare a freeze. This statutory requirement was omitted from a previous version of the draft regulation.

PSC Staff's 2015 comments argued that the language should refer to the Commission and not the PSC Staff:

> The Cost Cap Rules state that the Director shall consult with the "staff of the PSC" concerning freezing or lifting of the freeze. This does not reflect the statutory language, which states "in consultation with the Commission" for freezing or lifting of the freeze. The proposed Rules should be revised to require "consultation with the Commission," not the "staff of the PSC".
>
> PSC Staff, December 8, 2015, p. 3

The DPA likewise argued that the statute refers to the Commission, not PSC Staff, citing FOIA requirements. (DPA, November 13, 2015, pp. 5-7)

The PSC's regulation, 26 *Del. Admin. C.* §3008-3.2.21, does not specify the manner of consultation:

> 3.2.21 The minimum percentages from Eligible Energy Resources and Solar Photovoltaic Energy Resources as shown in Section 3.2.1 and Schedule 1 may be frozen for CRECs as authorized by, and pursuant to, 26 Del.C. § 354(i)-(j). For a freeze to occur, the Delaware Energy Office must determines that the cost of complying with the requirements of this Regulation exceeds 1% for Solar Photovoltaic Energy Resources and 3% for Eligible Energy Resources of the total retail cost of electricity for Retail Electricity Suppliers during the same Compliance Year. The total cost of compliance shall include the costs associated with any ratepayer funded state renewable energy rebate program, REC and SREC purchases, and ACPs and SACPs alternative compliance payments.
>
> > 3.2.21.1 Once frozen, the minimum cumulative requirements shall remain at the percentage for the Compliance Year in which the freeze was instituted.
> >
> > 3.2.21.2 The freeze may be lifted only upon a finding by the State Energy Coordinator, in consultation with the Commission, that the total cost of

> compliance can reasonably be expected to be under the 1% or 3% threshold, as applicable.

Department Response

The statute is clear in requiring "consultation with the Commission" in deciding whether to impose a freeze. The PSC's own regulation properly reflects the statutory language. The Department has corrected this oversight in the Regulation, which includes references to consultation with the Commission (not PSC staff) in sections 5.2, 5.3, 6.3 and 7.3.

For the sake of clarity, it should be noted that the DPA did not argue that the Commission has approval authority over the Director's decision. Likewise, the PSC staff's comments did not assert any requirement for the Commission to approve the Director's decision. The PSC's regulation on this matter does not include any requirement that the Commission ratify or approve the Director's decision. It has not been argued, and the Department does not believe, that the phrase "consultation with the Commission" requires the PSC to approve the Director's decision to freeze or not to freeze the RPS.

VI. Comments on the Implementation Schedule

1. Comments on the Reporting Period and Timetable for the Director's Decision

In its comments (DPL, January 15, 2014, p. 5), DPL noted that the company's RPS report is filed with the PSC 120 days after the end of a compliance year, and recommended that the length of time for reporting the cost of compliance in Section 8.1 be changed to 150 days. Speaking for DPL, Todd Goodman and Rick Swink described the reporting challenges involved:

> [MR. GOODMAN]: We compiled and filed an RPS report, which is not the cost -- it's, you know, the RECs that were required and all that -- within 120 days. And the reason we can't do it quicker than that is because the suppliers, some of them don't give us the information we need until 110 days.
> So even getting it in within 120 days is tough. And that, again, is not the costs. So we would ask to add another 30 days for us to, you know, compile all the costs that we incur, that the suppliers, that we then billed out to customers as we described a moment ago.
> I don't think it would be possible to do an accurate job in less than that amount of time. So we would ask that, again, to make sure that it's accurate, done correctly, if we could change that 90 days to 150 days.
> And if you needed further explanation as to why it's necessary, we would be more than happy.
> MR. SWINK: One addition to that is we calculated from the 150 days adding the 30, all the additional periods that were specified to the point where the Director publishes the final decision whether to freeze or not. And that would be on February 15, on or around February 15, which would be prior to us having to calculate our rates and give us time to publish the rates for next year and the price compare for other suppliers for the next year.
> January 8, 2014 Hearing Transcript, pp 27-8

Myers cites the PSC's compliance rules and suggests that the date "be reworked after consultation with the PSC" (Myers, p. 30).

The Sierra Club asked for further public review of the Director's determination:

> We would like the public notice of this annual review to be clarified and to include greater opportunity for public involvement. Specifically:
>
> > 8.3 Within 30 days of receipt of the calculations of the cost of compliance from the Division, the Director shall make a **draft** determination as described in Section 5.0 of these regulations, **publicly notice the draft determination through the DNREC Public Notice Email Distribution List**, and present to the Registrar for publication.
> >
> > 8.4 The public will have ~~15~~ **30** days from the publication and public notice of the Director's draft determination to offer comment **and request a public hearing**. The Director may **grant a public hearing** or alter or amend the determination based on review of the public comments.
> >
> > 8.5 The Director shall make a final determination and present it to the Registrar for publication **and publicly notice via the DNREC Public Notice Email Distribution List** within 15 days of receipt of public comments. The determination shall be effective upon its publication.
> >
> > **8.6 Decisions of the Director may be appealed via the Environmental Appeals Board within 60 days of publication and public notice of the final determination.**
>
> Sierra, December 8, 2015, p. 4

Department Response

The Department acknowledges the reporting challenges described by DPL and Myers, but believes that these challenges can be managed. The reporting period in the Regulation will be 90 days:

> 7.1 Within 90 days after the end of any compliance year, the Commission-Regulated Electric Company shall submit to the Division in writing and electronically the following information for the applicable compliance year:

The Department believes the Sierra Club's proposal would be cumbersome, unnecessary under the statute, and would add considerable time and uncertainty to implementing the statute—uncertainty that could have a serious impact on the development of renewable energy markets even if a freeze is not declared. The Department is not changing the Regulation in response to the Sierra Club's recommendation.

2. Comment on Which Compliance Year Should Be the First Considered under these Regulations

Mr. Stevenson argued that the Division should calculate the cost of compliance for Compliance Year ending May 31, 2013:

> We believe the first Compliance Year calculated should be 2012 so a decision on whether to freeze the RPS will be made as soon as possible to protect electric ratepayers. A calculation using the earlier year might also highlight any problems with the methodology.
>
> CRI, January 8, 2014, p. 1

Department Response

The recommendation that the calculation first be performed for Compliance Year 2012 is not practicable.

The final Regulation reads:

> 3.2 These rules will be applied immediately upon enactment.

3. Comments on Freezing Compliance within a Compliance Year

Mr. Myers argued that compliance with REPSA should be halted within a compliance year if a determination is made to freeze the RPS, citing the legislative debate:

> Now, both the Secretary and Senator in their legislative floor comments seemingly assumed that the "freeze" provision would work within a compliance year. They assume that someone – either the utility, the electric supplier, the PSC, or the State Energy Office – would be able to track the "total retail cost of electricity for retail electricity suppliers" as well as the "total cost of complying" contemporaneously and concurrently on an on-going basis throughout each compliance year.
>
> Myers, January 21, 2014, p. 25

> Under the statutory text, and the legislative floor statements, it would appear that a freeze should then be called and "the entire program" frozen or suspended. This would mean that compliance in the present year would be halted in its entirety – at least going forward.
>
> Myers, January 21, 2014, p. 26

Linde LLC requested an immediate freeze:

> Linde requests DNREC to implement the following actions:
>
> - Freeze the Delaware Renewable Portfolio Standards (RPS) Program as required by Title 26 Section §354 items (i) & (j) for a 3% cost cap violation effective immediately.
>
> Linde, February 10, 2015, p. 3

The League of Women Voters supports the use of the compliance year:

> We have no objection to calculating the total annual cost of compliance based on a compliance year defined as starting on June 1 and ending on May 31 of the following year.
>
> LWVDE, December 7, 2015, p. 1

Department Response

The Department does not believe it is either appropriate or practicable to freeze the RPS during a compliance year. The procurement of RECs and SRECs during a compliance year is based on decisions made annually. The process established in this Regulation should make it possible to understand where costs are and anticipate the cost impact for current compliance year. It would be neither necessary nor practicable continually calculate the cost of compliance during the compliance year.

The Department has not changed the Regulation on this point.

VII. Comments on the Implementation of a Freeze

Mr. Myers argued that the statute specifies that a freeze would preclude any increase in the percentage of renewable energy procured under the statute:

> Once a "freeze" is imposed, it is this "requirement" that ends: a retail electric supplier (before) – and DP&L (now) – no longer has the duty to accumulate any additional RECs and SRECs to meet the annual percentage number that would otherwise would prevail under subsection 354(a).
>
> Myers, January 21, 2014, pp. 23-4

> The second standstill directive in subsections 354(i) and (j) relates to what happens after a freeze is in effect: "[i]n the event of a freeze, the *minimum cumulative percentage* from eligible energy resources shall remain at the percentage for the year in which the freeze was instituted."
>
> Myers, January 21, 2014, pp. 23-4

DPL, in its comments, proposed using the statutory language, "suspension of enforcement or implementation of the annual increase in REC and SREC percentage requirements," in the definition of "Freeze."

Department Response

The Department has changed the definition in the Regulation as proposed by DPL:

> "Freeze" means suspension of enforcement or implementation of the **[annual increase in]** REC and SREC percentage requirements of the RPS as provided for under 26 Del.C. §§352(3) & 354(a).

VIII. Comment on Discretion on Whether or When to Lift a Freeze of the RPS

Mr. Myers noted that Section 7.2 of the proposed Regulations used the word "may" instead of "shall" in terms of lifting a freeze:

> But the proposed rules also make the lifting of the freeze a similarly discretionary action, even though the statutory subsections use the term "shall" to describe the Director's obligation to resume the renewable obligation. Proposed rule § 7.2 says that once the Director makes the determination required by statute (that the costs of compliance can reasonably be expected to be less than the statutory percentage), then the Director will make a further determination whether to lift the freeze utilizing the same four factors that informed his prior freeze declaration.
>
> Myers, January 21, 2014, p 12, footnote 20

The Department notes that the word "may" is inconsistent with the statutory word "shall" and has revised the Regulation accordingly:

> 6.3 If the total cost of compliance falls below the 3 percent threshold in Section 5.2 of these rules or the 1 percent threshold in Section 5.3 of these rules, the Director shall lift a freeze following consultation with the staff of the PSC.

IX. Comments on the Impairment of Existing Contracts

Dr. Firestone proposed a new Section as the appropriate place to place the clause stating that a freeze could not impair existing contracts for RECs and SRECs.

Mr. Myers argues that existing contracts for REC and SREC should be subject to cancellation, though he does not suggest a mechanism for doing this.

Department Response

REPSA provides for DPL to procure an increasing percentage of renewable energy annually until 2025. As noted above, the Department has defined a freeze to be the "suspension of enforcement or implementation of the annual increase in REC and SREC percentage requirements of the RPS." Long term contracts for the procurement of RECs and SRECs generally do not increase the total amount of RECs or SRECs procured by DPL from one year to the next.

The statute does not include a mechanism for cancelling existing contracts. Mr. Myers does not propose a mechanism for impairment or cancellation of existing contracts. Which authority or court would DNREC use to undo contracts? Myers does not say.

The Department has revised the Regulation to incorporate Firestone's recommendation in a new section:

> **8.0 Existing Contracts**

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

X. Proposed Technical Edits

The PSC and DPL offered numerous technical edits by submitting marked-up copies of the proposed Regulation. Mr. Myers offered a series of proposed changes to fix "technical glitches" (Myers, December 17, 2014, pp. 27-30). Mr. Burcat pointed out an error in the definition of "non-exempt load."

Department Response

The Department agrees with most of the technical changes offered by the PSC and DPL as helpful contributions to crafting clear regulations. Most of those changes do not alter the meaning or function of the Regulation, and are incorporated by the Department in the final Regulation.

The technical changes proposed by Mr. Myers are either similar to those proposed by the PSC and DPL, and are either already incorporated in the revised Regulation or are related to his substantive points discussed elsewhere in this memorandum.

The error pointed out by Mr. Burcat is being fixed by way of the technical edits proposed by the PSC and accepted by the Department.

Section 6.0 was determined to be redundant, and its language was incorporated in Section 7.3:

> **[7.3]** Within 30 days of receipt of the calculations of the cost of compliance from the Division, the Director will, after receipt of the calculations **[and consultation with the PSC]**, make a determination as described in Section 5.0 of these rules and **[~~present to the Registrar for publication~~] [notify, the Commission-Regulated Electric Company that filed reports on RPS compliance. The Director will also publish notice of the freeze in the next appropriate issue of the Delaware *Register of Regulations*]**.

Sections 7.0, 8.0 and 9.0 have been renumbered accordingly.

Attachments