BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF DELAWARE

IN THE MATTER OF THE ADOPTION OF RULES AND REGULATIONS TO IMPLEMENT THE PROVISIONS OF 26 *DEL.* C. CH. 10 RELATING TO THE CREATION OF A COMPETITIVE MARKET FOR RETAIL ELECTRIC SUPPLY SERVICE (OPENED APRIL 27, 1999; REOPENED JANUARY 7, 2003; SEPTEMBER 22, 2009; SEPTEMBER 7, 2010; JULY 17, 2012; AND JULY 14, 2021)	)))))))))	PSC REGULATION DOCKET NO. 49

FINDINGS, OPINION, AND ORDER NO. 9965

AND NOW, this 26th day of January 2022, the Delaware Public Service Commission ("Commission") determines and orders as follows:

I. BACKGROUND

1. On September 17, 2021, the Governor of the State of Delaware signed into law Senate Bill 2, which amended the *Renewable Energy Portfolio Standards Act* and the *Electric Utility Restructuring Act of 1999* to accelerate the adoption of community-owned solar photovoltaic systems in Delaware and to establish a regulatory process to be implemented by the Commission relating to community-owned energy generating facilities ("CEFs").[1]

2. Senate Bill 2 instructed the Commission to promulgate regulations: (1) to provide for customers participating in a CEF ("subscribers") to be credited on their electric bills for the customers' subscribed percentage of generation produced by the CEF valued at the sum of the volumetric (kwh) components of the distribution service charges and supply service charges;[2] (2) in consultation with the Consumer Protection Unit of the Delaware Department of Justice ("CPU"), to provide consumer protections for customers of CEFs;[3] and (3) to provide

[1] Senate Bill 2 amended §§ 353, 360, 1001, and 1014 of Title 26 of the Delaware Code.
[2] 26 *Del. C.* § 1014(f)(1).
[3] 26 *Del. C.* § 1014(f)(20).

the requirements for obtaining a Certificate to Operate.[4] Senate Bill 2 directed the Commission to open a rulemaking docket to consider such regulations by August 1, 2021, and to promulgate such regulations no later than March 11, 2022, unless such deadline is extended by law.[5]

3. On July 14, 2021, by Order No. 9842, the Commission reopened the above-captioned docket and directed Commission Staff ("Staff") to draft amendments to its *Rules for Certification and Regulation of Electric Suppliers*, codified at 26 *Del. Admin. C.* § 3001 ("*Supplier Rules*"), in compliance with the new requirements set forth by Senate Bill 2. Staff drafted such amendments and circulated them to those stakeholders who participated in the drafting of Senate Bill 2, including the CPU, the Delaware Division of the Public Advocate ("DPA"), Delmarva Power & Light Company ("Delmarva"), Department of Natural Resources and Environmental Control ("DNREC"), Sierra Club, Delaware Solar Energy Coalition ("DSEC"), Caesar Rodney Institute, Delaware Municipal Electric Corporation, Delaware Electric Cooperative, Delaware Sustainable Energy Utility, and Coalition for Community Solar Access ("CCSA").

4. In August 2021, Staff reviewed the comments it received on the draft amendments, met on several occasions with various stakeholders, and made certain changes to the draft amendments based on the comments and meetings. On September 15, 2021, by Order No. 9883, the Commission accepted Staff's revised draft as its proposed regulations ("Proposed Regulations") and directed publication thereof in the October 1, 2021 edition of the *Delaware Register of Regulations*. The published notice, which also appeared in the October 1, 2021 editions of the *Delaware State News* and *The News Journal* newspapers, established a November 17, 2021 hearing date and a deadline for written public comment of December 2,

[4] 26 *Del. C.* § 1014(f)(12).
[5] 26 *Del. C.* § 1014(f)(23).

2021.[6] The notice provided, however, that to be considered at the November 17, 2021 hearing, written materials must be submitted on or before November 1, 2021.

5. On or before November 1, 2021, the Commission received written comments from 12 different organizations or individuals. Based on those comments, Staff made numerous clarifying revisions to the Proposed Regulations, as well as certain other process changes. Prior to the November 17, 2021 hearing, Staff provided its recommended changes to the Proposed Regulations to the Commission in redline form as well as a clean version ("Revised Proposed Regulations").

6. On November 17, 2021, the Commission conducted a duly noticed public hearing on the Revised Proposed Regulations (the "Hearing").[7] At the Hearing, the Commission heard public comment from 12 individuals and sworn testimony from one witness, who testified on behalf of Staff. The Commission also entered three exhibits into the evidentiary record.[8] After deliberations, the Commission voted to accept the Revised Proposed Regulations as final, subject to any changes that may be warranted based on any additional written comments received by the December 2, 2021 deadline.

7. On or before December 2, 2021, the Commission received another four submissions of written public comment, which Staff did not believe warranted any further revision to the Revised Proposed Regulations. Based on a clarification sought at the Hearing, however, Staff recommended a revision to the Revised Proposed Regulations at subsection

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[6] The Administrative Procedures Act ("APA"), specifically 29 *Del. C.* § 10118(a), requires that the opportunity for public comment be extended for a minimum of 15 days after the final public hearing on a proposed regulation.

[7] References to the transcript of the Hearing will be cited as "Tr. __."

[8] Exhibit 1 consists of the affidavits of publication of notice of the Hearing from the *Delaware State News* and *The News Journal* newspapers. Exhibits 2 and 3, respectively, are the Revised Proposed Regulations, in redline form showing the proposed changes Staff made after receiving written public comment, and the Revised Proposed Regulations in clean form.

16.6.6[9] as well as minor corrections to subsections 16.5.3.11, 16.5.4, and 17.2.2.[10] At its January 26, 2022 meeting, the Commission considered this written order, which ratifies, supports, and memorializes its November 17, 2021 vote to adopt the Revised Proposed Regulations, including Staff's revised subsections described in footnotes 9 and 10, *supra*. Below, the Commission provides a brief summary of the evidence and information submitted as well as our findings of fact and conclusions of law.[11]

II. SUMMARY OF EVIDENCE AND INFORMATION SUBMITTED

8. Below is a summary of Staff's testimony, the written public comments submitted by the participants, and the public comments offered orally at the Hearing. Given that Staff incorporated many of the comments received in the Revised Proposed Regulations, the summary of public comment focuses on those substantive items that remained in dispute as of the December 2, 2021 deadline for written public comment.

9. **Staff**. At the Hearing, Pam Knotts, Senior Policy Advisor for the Commission, testified under oath on behalf of Staff.[12] Ms. Knotts summarized the Proposed Regulations, noting that they track the requirements from Senate Bill 2 to be considered a CEF and add certain details concerning the Commission's certification process. More specifically, the Proposed Regulations:

Increase the maximum size of CEF systems to 4 megawatts;

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[9] At subsection 16.6.6, Staff recommended adding the following underlined language: "On an annual basis, Delmarva may audit an individual Subscriber's subscribed amounts to ensure the amount does not exceed 110% of the Subscriber's annual usage, calculated on the average of the two previous 12-month periods of actual electrical usage, utilized at the time of the reassessment. *See* Tr. 896.

[10] At subsection 16.5.3.11, Staff recommended replacing "may" with "shall" to clarify that subscriber contract will terminate, with no termination fee, if the subscriber moves out of Delmarva's service territory. At subsection 16.5.4, Staff recommended adding the following underlined language: "A Contract for Residential Subscribers or Small Commercial Subscribers may not:". At subsection 17.2.2, Staff recommended adding "or the Community Energy Facility's Final Certificate to Operate" at the end of that subsection to make sense of its addition of "or Community Energy Facility" at the beginning of that subsection.

[11] The APA provides that when adopting or amending a regulation, an agency shall issue its conclusion in an order which includes a "brief summary of the evidence and information submitted" and a "brief summary of its findings of fact with respect to the evidence and information..." 29 *Del. C.* § 10118(b).

[12] Tr. 805-817.

> Eliminate the requirement that all customers of a system must be located on the same distribution feeder;
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> Eliminate the requirement that all customers of a system must be identified before the system can be built;
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> Set forth the requirements for certification as a CEF;
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> Provide compensation to the CEF owner for 10% or less of unsubscribed energy;
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> Require each CEF owner to certify that it serves at least 15% low-income customers; and
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> Provide for the regulation of these systems by the Public Service Commission.[13]

10. Ms. Knotts testified that the Proposed Regulations set up a two-step process for a developer or owner of a generating facility to become certified as a CEF.[14] First, the applicant must obtain a Preliminary Certificate to Operate, which establishes project viability. To qualify for a Preliminary Certificate to Operate, the applicant must offer proof of site control and provide a completed interconnection study or a signed interconnection agreement with Delmarva. To obtain a Final Certificate to Operate, the applicant must provide details regarding its financial, managerial, and operational ability to adequately serve the public as a CEF. At this stage, the applicant provides the background and experience of its operating team, it provides the required bonding, and it provides a form of contract and contract summary it will be using for residential subscribers.

11. According to Ms. Knotts, the two-step process was developed because the solar developers who participated in this proceeding advised Staff that, in order to obtain project financing, they needed certification from the Commission that establishes project viability.[15] However, at the time when they need to secure financing, they may not have determined yet

[13] Tr. 807-809.
[14] Tr. 809.
[15] Tr. 810.

who would be operating the facility and therefore could not demonstrate, at that time, managerial and operational capabilities. Nor could they provide the contracts they would use for residential subscribers at that time. For these reasons, Staff developed the two-step process for certification.

12. Ms. Knotts testified that Staff included stakeholders in its development of the Proposed Regulations.[16] After the Commission re-opened this docket, Staff circulated an initial draft of the amendments to those stakeholders who participated in the drafting of Senate Bill 2. Staff continued to engage the stakeholders, incorporating many of their recommendations, throughout the rulemaking process. Ms. Knotts concluded that the Commission's adoption of the Proposed Regulations as final would be in the public interest because they track the requirements of Senate Bill 2 and, in so doing, remove certain barriers to the development of community energy facilities in Delaware and expand the number of Delmarva customers who can participate in distributed solar generation.[17]

13. **DPA**. On November 1, 2021, the DPA submitted written comments and Andrew Slater, Public Advocate, spoke at the Hearing. Most of the DPA's recommendations were clarifying in nature and Staff accepted many of them as part of its Revised Proposed Regulations.[18] The DPA stated, however, that its most critical recommendation was for the Commission to delete proposed subsection 16.10.4, which Staff kept in its Revised Proposed Regulations.[19] Proposed subsection 16.10.4 states:

> Delmarva shall recover the credited supply and distribution costs provided to Subscribers and the Community Energy Facility in accordance with its tariff.

[16] Tr. 811-812.
[17] Tr. 813-814.
[18] Tr. 818.
[19] DPA's 11/1/2021 comments, at 7.

14. The DPA noted that Delmarva's tariff currently has no specific provision addressing recovery of credited supply and distribution costs provided to CEF subscribers. The DPA stated the following:

> As a result of a discussion with Delmarva representatives on October 20, 2021, Delmarva stated that it interprets Senate Bill 2 to permit it to recover CEF-related costs from non-CEF customers. Delmarva explained that it plans to request the Commission for approval of a tracker in which it will record bill credits and recover them through a surcharge assessed against *all Delmarva customers* – not the CEF or its Subscribers.[20]
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> This proposal is in direct opposition to the language and intent of Senate Bill 2, which specifically provides that "the community-owned energy generating facility shall be responsible for *any additional costs* incurred by the electric distribution company, including billing-related costs associated with community-owned energy generating facility customers." [26 *Del. C.* § 1014(f)(6)] (emphasis added).[21]

15. The DPA contended that § 1014(f)(6) clearly placed "the responsibility for *any* costs that Delmarva incurs on the CEF and its subscribers."[22] The DPA noted that the statute uses the term "including," which means that the listing in the statute is "'exemplary, not exclusive.'"[23] The DPA contended that if the General Assembly had wanted to limit the costs for which CEFs and their subscribers would be responsible, it could easily have done so, but it did not because it recognized the potential for non-CEF customers to subsidize CEF subscribers.[24]

16. At the Hearing, the Public Advocate reiterated the DPA's position that proposed subsection 16.10.4 ignores the intent of § 1014(f)(6).[25] He noted that the statute is silent on Delmarva filing a tariff to recover any costs from non-CEF customers. The Public Advocate contrasted the statutory silence on recovering costs from non-CEF customers to the statutory

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[20] *Id.* at 5-6 (emphasis in the original).
[21] *Id.* at 6.
[22] *Id.* at 6.
[23] *Id.* at 6.
[24] *Id.* at 7-8.
[25] Tr. 819-820.

pronouncement relating to the Bloom Energy fuel cells, which specifically instructed the Commission to approve a tariff providing for a non-bypassable charge to recover Bloom's fuel cell costs from all ratepayers.[26] Instead, the Public Advocate asserted that the General Assembly provided that CEFs will be responsible for "any additional costs" – with no exceptions.[27]

17. In addition, the Public Advocate argued that at no time during any of the community solar forums or calls during which Senate Bill 2 was being crafted was the issue raised.[28] Had the topic been raised, it would have been vetted in the proper forum and brought to the attention of the General Assembly "for the needed remedy."[29] The Public Advocate noted that § 1014(f)(6) does not limit the "additional costs" for which CEFs are responsible to "billing related costs" because of the use of the word "including" prior to "billing related costs."[30] The Public Advocate cited judicial caselaw[31] and the legislative drafting manual for the proposition that "including" is not a limiting term.

18. The Public Advocate also asserted that, if the Commission changes the calculation of the 15% low-income requirement from a percentage of the number of customers to a percentage of the generation capacity, there will be fewer low-income customers participating in the CEF program.[32] Regarding Delmarva's recommendation for a periodic review by the Commission, the Public Advocate pointed out that the statute already instructs the Commission to review the financial health of the utility.[33]

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[26] Tr. 820.
[27] Tr. 821.
[28] Tr. 821. When asked by the Public Advocate if she recalled whether the recovery of CEF costs from all the ratepayers was discussed at Senator Hansen's forums, Staff Witness Knotts testified that she did not "remember that issue being directly addressed." Tr. 816-817.
[29] Tr. 822.
[30] Tr. 822-823.
[31] The caselaw cited (*i.e.*; *City of Dover v. International Tel. & Tel. Co.*, 514 A.2d 1086, 1089 (Del. 1986) and *Woessner v. Air Liquide, Inc.*, 242 F.3d 469, 475 (3d Cir. 2001) also appeared in DPA's 11/1/2021 written comments, at 6.
[32] Tr. 914-915.
[33] *Id.*

19. **DNREC.** Tom Noyes, DNREC's Principal Planner for Utility Policy, offered limited comments at the Hearing. Mr. Noyes stated that DNREC is not proposing substantive changes to the Revised Proposed Regulations because of the extensive stakeholder work behind the proposal and because the Revised Proposed Regulations reflect Senate Bill 2.[34]

20. **Delmarva.** On November 1, 2021, Delmarva submitted initial written comments. Many of Delmarva's recommendations were procedural or clarifying in nature, or related to its own reporting requirements, which were adopted by Staff in the Revised Proposed Regulations.

21. Delmarva supported subsection 16.10.4, which states that "Delmarva shall recover the credited supply and distribution costs provided to Subscribers and the Community Energy Facility in accordance with its tariff." Delmarva stated that it will file for a new tariff provision that will call for recovery of the supply credits via its existing procurement cost adjustment ("PCA") and for the recovery of distribution credits though a distribution rate rider.[35] Delmarva noted that the proposed recovery mechanism will be subject to Commission review and approval.

22. Delmarva asserted that, if it were required to recover the credits provided to subscribers from the CEFs, the CEFs may be deterred from participating in Delaware's community solar program.[36] The community solar program is expected to constitute an important component of achieving Delaware's RPS requirements. Delmarva noted that distribution bill credit amounts are not recovered from community solar facilities in its affiliates' jurisdictions, including the District of Columbia and Maryland. Instead, those costs are recovered via a tariffed rate rider.[37]

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[34] Tr. 827.
[35] Delmarva's 11/1/2021 comments, at 9-10.
[36] *Id.* at 9.
[37] *Id.* at 9, n.1.

23. Delmarva recommended adding to the Proposed Regulations a Commission review requirement to avoid problems that may emerge due to CEFs over time.[38] Delmarva suggested language that directed the Commission to "periodically review the impact of Community Solar Rules and recommend changes or adjustments necessary for the economic health of utilities, the continued reliability of the electric grid, and the interests of electric distribution customers."

24. At the Hearing, counsel for Delmarva stated that Delmarva fully supported the Revised Proposed Regulations, other than the omission of Delmarva's recommended periodic review by the Commission.[39] According to Delmarva, in order to mitigate complications with real world application of the regulations, which may emerge over time with advances in technology or with legislative changes, Commission review should be required "to enable the process of revisitation of these [regulations] as needed."[40]

25. On December 2, 2021, Delmarva submitted additional written comments expressing its full support of the Revised Proposed Regulations. In particular, Delmarva supported subsection 16.10.4, which contemplates that Delmarva's recovery of supply credits to subscribers (and unsubscribed energy credits to CEFs) will occur via the PCA and that Delmarva will submit a proposed tariff to recover distribution credits through a distribution rate rider. Delmarva agreed with the statements at the Hearing from Staff and several solar developers that recovering credit-related costs from the CEFs would undermine Delaware's community solar program and would likely deter CEFs from participating in the program.[41]

26. **CCSA, Sierra Club, and DSEC ("Joint Commenters").** On November 1, 2021, the Joint Commenters submitted written comments, stating that they were generally

[38] *Id.* at 10.
[39] Tr. 831.
[40] *Id.*
[41] Delmarva's 12/2/2021 comments, at 2.

supportive of the Proposed Regulations; however, certain changes were necessary to ensure the efficient functioning of a market and to facilitate project financing.

27. The Joint Commenters objected to including CEFs in the same requirement for third-party verification of subscriptions that retail suppliers are subject to when enrolling new customers.[42] The Joint Commenters asserted that community solar contracts offer some form of tangible economic benefit, typically in the form of guaranteed bill savings. In addition, community solar subscribers can typically cancel their subscription at any time. For these reasons, no third-party verification of enrollment was necessary at this juncture.

28. The Joint Commenters recommended that the regulations require CEF applicants to provide a security deposit in order "to avoid speculative, poorly conceived projects that enter the program but fail to move forward or deliver their promised benefits."[43] They further recommended that projects larger than 500 kilowatts post a security deposit equal to $25 per kilowatt, meaning that for a four-megawatt project, the security deposit would be $100,000. The security deposit should be in a form acceptable to the Commission such as cash, a letter of credit, or a surety bond and should be refundable when the project is ready for commercial operation. In addition, according to the Joint Applicants, CEF applicants should be required to have obtained all non-ministerial permits and approvals because permitting is a significant development risk that should be borne by the project developer.[44]

29. The Joint Commenters recommended that the regulations specify the duration of Delmarva's obligation to purchase power from a given CEF.[45] In other states that have community solar programs, the utility is required to enter into a power purchase agreement with community solar projects that guarantee payment for energy generated by the project for

[42] Joint Commenters' 11/1/2021 comments, at 4.
[43] *Id.* at 5.
[44] *Id.* at 5-6.
[45] *Id.* at 11.

a period of at least 25-35 years, which matches the estimated life span of the solar panels installed in each project. According to the Joint Commenters, it is necessary to clearly state the project's guaranteed term in the regulations to ensure project owners and commercial lenders can clearly understand the revenue stream that will be financed.[46]

30. The Joint Commenters stated that their highest priority issue was Delmarva's recovery of costs from CEFs.[47] Senate Bill 2 states that the CEF "shall be responsible for any additional costs incurred by the electric distribution company, including billing-related costs associated with community-owned energy generating facility customers." The Joint Commenters are concerned that the regulations do not require the normal due process required for imposing additional charges on customers, such as an evidentiary hearing. Instead, the regulations require that Delmarva submit "semi-annual reports" with the Commission. The Joint Commenters proposed language that would impose a cost cap in the form of a one-time per megawatt charge, as well as clarify that the upgrade costs may not be a profit generating source for Delmarva. Under the Joint Commenters' proposal, if the total costs are $500,000 or lower, then the utility may proceed with the semi-annual report approach. However, if the cost exceeds $500,000, a proceeding will be required to determine whether such costs are necessary. According to the Joint Commenters, the most important aspect of this issue was the lack of certainty that an unknown charge would create for project financing.[48]

31. On December 2, 2021, the Joint Commenters submitted additional comments asserting:

> In its comments, the DPA seems to be conflating the value of the monetary bill credit community solar customers receive with DPL's incremental costs to administer the program. DPA's argument that Subsection 16.10.4 should be amended to require community-owned energy generating facilities to pay [Delmarva] for all of the bill credit costs demonstrates DPA's

[46] *Id.* at 11-12.
[47] *Id.* at 12.
[48] *Id.* at 13.

> misunderstanding of how successful community solar programs work. As we noted during the hearing, **if adopted, this would prevent any and all projects from being built** and would completely undermine the policy goals of [Senate Bill 2]. Alternatively, if the position held by the [Joint Commenters], PSC Staff, [Delmarva] and others is adopted, the [Senate Bill 2] CEF program will look very similar to other Exelon community solar programs in Maryland and D.C. and would spur developer and subscriber interest.[49]

32. The Joint Commenters also expressed their support for changing the percentage basis for the 15% low-income requirement from number of low-income customers to the capacity of the low-income subscriptions. Because low-income customers often reside in smaller houses or apartments, they typically subscribe to smaller subscription sizes from community solar facilities, according to the Joint Commenters. By counting the number of low-income subscribers, rather than the percentage of capacity, the actual capacity going to serve low-income households would likely be much less than 15% of the program.[50]

33. **TurningPoint Energy**. On November 1, 2021, Salar Naini, Executive Vice President, Business Development of TurningPoint Energy, submitted written comments. Mr. Naini supported CCSA's written comments, with the exception of CCSA's recommendation to include a permitting requirement as part of project qualification. According to Mr. Naini, at one point, Senator Hansen's working group included a permitting requirement in a draft of the legislation, but the stakeholders agreed to remove the requirement and instead only include the requirements that remained in Senate Bill 2. Adding a permitting requirement now, therefore, would contradict legislative intent, according to Mr. Naini.[51]

34. At the Hearing, Mr. Naini explained that, prior to Senate Bill 2, the biggest barrier to CEF development was that unless a customer was on the same distribution feeder as the CEF, they only received credit against their generation charges, not their distribution

[49] Joint Commenters' 12/2/2021 comments, at 1 (emphasis in original).
[50] *Id.* at 3.
[51] TurningPoint's 11/1/2021 comments, at 2.

charges.[52] With Senate Bill 2, all subscribers can receive bill credits applied against both the generation and distribution charges. According to Mr. Naini, the DPA's suggestion that CEFs pay for the bill credits, however, would effectively reverse that benefit, resulting in no projects being built.[53]

35. **ECA Solar.** On October 29, 2021, Todd Fryatt of ECA Solar, a Massachusetts-based solar developer, submitted written comments. Mr. Fryatt proposed a number of clarifying edits as well as a reduction to Staff's review period of an application for a Final Certificate to Operate, in subsection 16.2.4.2, from 90 days to 45 days.[54] In addition, Mr. Fryatt recommended increasing the allowable number of CEF subscriptions, per customer, from four to 10, in subsection 16.6.2. Mr. Fryatt asserted that a limitation of four subscriptions per customer will negatively affect "low-income facilities, local government entities, non-profits (*i.e.*, public educational institutions) and master metered facilities" because it will limit their ability to fully participate in community-based solar photovoltaic systems.[55] On November 22, 2021, Mr. Fryatt submitted additional written comment, seeking definitions of "master-metered facility" and "public entity" and again recommending an increase from four to 10 CEFs for the limitation on CEFs per subscriber.

36. At the Hearing, Vincent Moschella of ECA Solar asserted that the limitation of four CEF subscriptions per customer may restrict access to the low-income community because master-metered low-income facilities may only be able to subscribe a portion of their consumption to a particular CEF project, thereby leaving the rest of the building out of the program.[56] By leaving out that portion of the building, the amount of solar that can be built will be limited because of the 15% low-income mandate, according to Mr. Moschella. Mr.

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[52] Tr. 847-848.
[53] Tr. 849.
[54] In the Revised Proposed Regulations, Staff reduced its review period in subsection 16.2.4.2 from 90 days to 60 days.
[55] ECA Solar's 10/29/2021 comments, at 2-3.
[56] Tr. 856.

Moschella also asserted that the inclusion of a $100,000 bond for projects does nothing except add administrative burden to the State. Given that the CEF program does not have a firm cap, there is no harm in issuing certificates of eligibility without a deposit requirement.[57]

37. **Chaberton Energy**. On November 1, 2021, Michael Biggins, Development Manager for Chaberton Energy, submitted written comments. Mr. Biggins generally supported the proposed amendments but urged the Commission to revise the amendments as suggested by the Joint Commenters.

38. **Sierra Club**. On November 1, 2021, the Delaware Chapter of the Sierra Club submitted written comments, noting that it also filed joint comments with CCSA and DSEC. The Sierra Club objected to the requirement for photo identification for individuals to qualify for low-income eligibility in subsection 16.4.2.3.[58] The Sierra Club also recommended more specifics as to what costs are recoverable from CEFs and a maximum amount that Delmarva may recover per CEF to ensure that any costs being recovered are both necessary and appropriate in scale. The Sierra Club also recommended that Delmarva be required to deliver information to the CEFs to ensure that customers are receiving the bill credits for which they are paying and that any credit rollovers are accounted for correctly.

39. At the Hearing, Dustyn Thompson of the Delaware Chapter of the Sierra Club, asserted that community solar is a form of virtual net metering and that a goal of Senate Bill 2 was to bring community solar in line with net metering regarding the bill credits received by subscribers.[59] Prior to Senate Bill 2, participants had to be on the same distribution feeder to receive the same, full benefit received by rooftop solar participants in the net metering program.

[57] Tr. 858.
[58] Staff removed the requirement for photo identification as part of its Revised Proposed Regulations.
[59] Tr. 862.

The intent of Senate Bill 2 was to line up the benefits between rooftop solar and community solar, according to Mr. Thompson.[60]

40. **DSEC**. At the Hearing, Dale Davis from DSEC stated that the regulations are at a point "where we think we've got a workable program."[61] Mr. Davis expressed some concern regarding the suggested, last-minute changes to the Proposed Regulations. While they may be worth consideration, he did not believe they should be included at this point in time.[62] Mr. Davis asserted that Delaware is finally getting a viable community solar program with a significant amount of low-income participation.

41. **Affinity Energy Management ("Affinity")**. On November 1, 2021, Ed Jackson, of Affinity, submitted written comments. Mr. Jackson's main concern was the ability for low- and moderate-income customers to qualify despite not holding an individual Delmarva account in their name. He noted that Affinity works with several non-profits that own residential or multi-family properties that house low-income tenants. Mr. Jackson acknowledged that the Proposed Regulations addressed his concern, but he recommended that the owner or operator of a multi-family property be able to attest to their tenants' low-income eligibility rather than require the tenants to submit proof of low-income eligibility.[63] At the Hearing, Mr. Jackson noted that the Revised Proposed Regulations took into account his written comments.[64]

42. **United States Solar Corporation ("US Solar")**. On November 1, 2021, Ross Abbey, Director, Regulatory and Legislative Affairs for US Solar, submitted written comments. Mr. Abbey requested numerous clarifying changes, several of which Staff

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[60] Tr. 863-866.
[61] Tr. 869.
[62] Tr. 870.
[63] In the Revised Proposed Regulations, Staff added subsection 16.4.1.3, which provides that for master-metered buildings, proof of income eligibility may consist of a written attestation of the owner or operator that their tenants meet the income eligibility requirements.
[64] Tr. 871-872.

incorporated in the Revised Proposed Regulations. In addition, Mr. Abbey recommended that subsection 16.2.4.3 limit the validity of a Final Certificate to Operate to 25 years from the date of commercial operation, to coincide with the 25-year warranty for solar panels.[65] According to Mr. Abbey, having a known term for the program helps facilitate project finance and contracting by setting a common expectation across all stakeholders.

43. Mr. Abbey also recommended that the 15% low-income subscriber requirement be pegged to 15% of the CEF's capacity rating (rather than to the number of subscribers in the CEF), because it makes monitoring, enforcement, and compliance much easier.[66] According to Mr. Abbey, pegging the 15% low-income requirement to the CEF's capacity simplifies enforcement, because any shortfall in meeting the 15% requirement during the term of the CEF would result in unsubscribed energy until the CEF remedies the shortfall. Unsubscribed energy is compensated at a much lower rate, which creates an incentive for the CEF operator to avoid falling below the 15% low-income capacity requirement, as done in other states.

44. Mr. Abbey recommended deleting subsection 16.4.3, which states that a CEF's "failure to satisfy the low-income requirements may result in a penalty, including monetary assessment, or revocation of its Final Certificate to Operate."[67] Mr. Abbey asserted that the specter of project default would risk causing collateral harm to the project's other subscribers and project financing. Mr. Abbey suggested that, instead, the Commission move to a 15% capacity requirement and rely on the lower compensation rate for unsubscribed energy as a disincentive to falling below the 15% low-income capacity requirement.[68]

45. Mr. Abbey recommended deleting subsection 16.5.4.4, which provides that contracts for residential or small commercial subscribers may not contain a provision that

[65] US Solar's 11/1/2021 comments, at 4.
[66] *Id.* at 9.
[67] *Id.* at 11.
[68] *Id.* at 9, 11.

"limits or releases the liability of the Community Energy Facility for not performing the contract."[69] According to Mr. Abbey, subsection 16.5.4.4 is an unjustified restriction on the freedom to contract. For example, when an applicant is unable to build a CEF because the interconnection cost turns out to be infeasible, subscribers should not be allowed to file a legal claim for exemplary or business-expectation damages. Mr. Abbey noted that US Solar's standard subscriber agreement allows for no-fault cancellation under this scenario prior to the project achieving commercial operation.

46. At the Hearing, Mr. Abbey reiterated his recommendation for a "program contract" term because having a known term for the "public contract" helps facilitate project finance.[70] Mr. Abbey also sought clarification of subsection 16.6.6.1 regarding how often Delmarva will test a subscriber's subscription size to ensure it does not exceed the 110% of usage maximum. (Staff Witness Knotts responded that subscription size is tested annually.[71]) Mr. Abbey also favored basing the 15% low-income requirement on capacity rather than number of subscribers because it is easier to administer and monitor.[72]

47. Mr. Abbey also objected to subsection 16.6.6.3, which prohibits CEFs from charging subscribers more than the bill credits received, because while CEFs typically provide a discount, they should be able to charge a premium, if agreed to by the subscriber.[73] (In response, Staff Witness Knotts testified that most of the discussions with industry stakeholders involved a guaranteed discount for subscribers and she could not, therefore, envision a business model where the CEF charged more than the subscriber saved from the bill credits.)[74]

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[69] *Id.* at 13.
[70] Tr. 891.
[71] Tr. 896. In addition, see footnote 8, *supra*, for the clarification Staff made to subsection 16.6.6 in the final draft of the Revised Proposed Regulations.
[72] Tr. 901-902.
[73] Tr. 898.
[74] Tr. 899.

48. **Laurel Passera**. At the Hearing, Laurel Passera, Policy Director for CCSA, asserted that, based on her experience in other states, "it is very important to ensure a disciplined approach for community solar projects that requires a high bar for entry."[75] As such, CEFs should be required to post a performance security deposit, which she suggested would be provided to Delmarva, within 10 days of receiving a Preliminary Certificate to Operate. Regarding Delmarva's recovery of billing related costs from CEFs, Ms. Passera stated that, after many discussions with Staff and other stakeholders, she believes that Staff landed on a good compromise solution in the Revised Proposed Regulations.[76]

49. Ms. Passera disagreed with the DPA's position with respect to cost recovery of the bill credits.[77] Requiring CEFs to pay Delmarva for the bill credits would "completely undermine the program."[78] According to Ms. Passera, the main reason stakeholders approached the General Assembly to amend the existing statute was to update the bill credit value from being a generation-only rate to a generation and delivery rate. The DPA's proposal to charge CEFs the value of the bill credit would not only ensure that no projects are built, but it would also undermine the intent of the General Assembly's effort to update the statute.[79]

50. **John Nichols**. On November 1, 2021, John Nichols submitted written comments. Mr. Nichols noted that CEFs will reduce the amount of electricity Delmarva delivers, which means, because of volumetric pricing, that Delmarva will need to increase distribution rates to collect the revenue required to maintain infrastructure. As a measure of Delmarva's support for community-based solar, Mr. Nichols recommended that the regulations require Delmarva to bear all costs attributed to revenue losses due to CEFs. In addition, Mr. Nichols recommended that the Commission direct Delmarva to study, at its own expense, the

[75] Tr. 838-839.
[76] Tr. 841.
[77] Tr. 842.
[78] *Id.*
[79] Tr. 843.

expected loss of revenue before the Commission adopts the Proposed Regulations.[80] Mr. Nichols also submitted a chart, produced by the Global Carbon Project, showing global CO2 emissions by country.

51. At the Hearing, Mr. Nichols noted that, according to Our World in Data, which is a site maintained by Oxford University, even if the U.S. carbon emissions went to zero, global emissions would continue to rise.[81] In addition, Mr. Nichols asserted that the Proposed Regulations fail to address the significant environmental problems associated with large-scale solar deployments, and he recommended an independent environmental assessment to determine adverse effects on flora and fauna.[82]

52. **Anne Kirby.** On November 1, 2021, Anne Kirby submitted written comments. Ms. Kirby questioned the need for a photo identification and a utility bill for low-income eligibility. Ms. Kirby also asserted that the regulations should clarify that a non-community solar project may be co-located with a CEF. Ms. Kirby recommended that if a subscriber increases usage, for example by purchasing an electric vehicle, there should be an easy pathway for increasing their subscription level. Ms. Kirby also stated that a CEF should not be penalized if a low-income subscriber has elevated out of qualification during participation.

53. At the Hearing, Ms. Kirby stated that she represents Green Building United. Ms. Kirby questioned Staff as to whether the recommendations from her written comments were incorporated in the Revised Proposed Regulations. Staff Witness Knotts responded that several of Ms. Kirby's recommendations were incorporated, including removing the need for a photo identification and a utility bill for low-income eligibility and clarifying that a non-community solar project may be co-located with a CEF.[83] However, Staff did not allow for

[80] Mr. Nichols' 11/1/2021 comments, at 1.
[81] Tr. 872-873.
[82] Tr. 877.
[83] Tr. 884-885.

low-income subscribers who lose their eligibility for low-income status to continue to be qualified as low-income because that would be inconsistent with the low-income requirement from Senate Bill 2.[84]

54. **Mid-Atlantic Solar and Storage Industry Association ("MSSIA").** On December 2, 2021, Michael Andrew Wall of MSSIA submitted written comments. Mr. Wall asserted that third-party verification like that required for retail utility sales is unnecessary because community solar subscribers typically receive a financial benefit from their subscription. Mr. Wall also supported Delmarva's reporting of billing costs under subsection 16.10.2 and the 24-month deadline for obtaining a Final Certificate to Operate after issuance of the Preliminary Certificate to Operate, with the possibility of a 12-month extension. Mr. Wall recommended, however, the additional requirement of a refundable security deposit as a condition of such extension so that unviable projects are not allowed to continue consuming resources.[85]

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

55. The Commission has jurisdiction over this matter pursuant to 26 *Del. C.* § 1014(f)(1), (f)(20), and (f)(23).

56. Based on the public comment received in this matter, Staff made numerous clarifying, procedural, or otherwise minor revisions to the Proposed Regulations, which were published in the October 1, 2021 *Register of Regulations*. Under the APA, if such changes are not substantive, the Commission is not required to republish the regulation as a new proposal, which would be subject to the public comment and hearing requirements for new proposals.[86] Staff submits that the instant revisions to the Proposed Regulations are nonsubstantive changes. No participant has suggested otherwise.

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[84] Tr. 886.
[85] MSSIA's 12/2/2021 comments, at 2.
[86] 29 *Del. C.* § 10118(c).

57. The APA's definition of "substantive" provides that "requirements, other than procedural, for obtaining ... a license of any kind" are "substantive."[87] Here, each change to the Proposed Regulations is either: (1) clarifying in nature (and therefore not changing the substance or intent of the original subsection); or (2) procedural in nature; that is, relating to the process by which a CEF applicant obtains its Certificate to Operate. The APA's definition of "substantive" carves out procedural requirements; therefore, the Commission agrees with Staff and finds that the changes to the Proposed Regulations are nonsubstantive. In addition, the Commission agrees with Staff that the four written submissions filed after the Hearing (as summarized above) do not warrant further revision to the Revised Proposed Regulations.

58. As most participants recognized in this rulemaking, Staff engaged in a robust stakeholder process, over several months, in drafting and revising the Proposed Regulations.[88] Even so, the Commission understands that, with a new, multifaceted program, unanticipated issues will arise, which may warrant our review of the CEF rules for further improvement, provided any further revisions remain consistent with the language and the intent of Senate Bill 2. Based on the record in this matter, however, the Commission agrees with Staff[89] and finds that the proposed amendments comply with the new requirements from Senate Bill 2 and are in the public interest because they will accelerate the adoption of community-owned solar photovoltaic systems in Delaware. Regarding the remaining objections from the participants in this matter, the Commission offers the following discussion and conclusions.

59. **Subsection 16.10.4 – Delmarva's recovery of the billing credits**. Subsection 16.10.4 authorizes Delmarva "to recover the credited supply and distribution costs provided to Subscribers and the Community Energy Facility in accordance with its tariff." While

[87] 29 *Del. C.* § 10102(9).
[88] Importantly, Staff consulted with the Consumer Protection Unit of the Department of Justice on the consumer protection requirements in the regulations, as required by Senate Bill 2. 26 *Del. C.* § 1014(f)(20).
[89] Tr. 813.

Delmarva's tariff does not at this time specify how such recovery will take place, the participants agree that subsection 16.10.4 paves the way for Delmarva to file for approval of a mechanism for recovery of the billing credits it will provide to CEF subscribers – not from CEFs but from its customers. In this way, Delmarva will be socializing the cost of the billing credits across all or part of its customer base, as it does now for the billing credits it provides for net-metered rooftop solar generation via its distribution rate, which is set by base rate cases.[90]

60. The DPA argued that because Senate Bill 2 provides that CEFs "shall be responsible for any additional costs incurred by the electric distribution company...," Delmarva must recover the billing credits from the CEFs as an "additional cost."[91] The Commission disagrees that the intent of the General Assembly was to include the billing credits as an "additional cost" to be collected from the CEFs. As many of the participants asserted, collecting the billing credits from the CEFs would, in effect, take away the full retail rate[92] compensation the General Assembly provided to CEF subscribers under Senate Bill 2.[93]

61. Moreover, it is unclear that the billing credits for distribution are an "additional cost" or whether they are more accurately viewed as a reallocation of existing distribution costs necessary to serve CEF subscribers that will be socialized across Delmarva's customer base (in a manner to be determined later).[94] The billing credits for generation are not an "additional cost" because much of the supply cost will be "recovered" by virtue of the savings to Delmarva from the avoided supply purchases from its wholesale suppliers (due to the generation from

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[90] *See* Tr. 919.
[91] DPA's 11/1/2021 comments, at 5-7.
[92] More precisely, Senate Bill 2 provides for billing credits to be applied against the supply and distribution components of the retail rate, but not the social and environmental rate riders. 26 *Del. C.* § 1014(f)(1).
[93] *See* Tr. 842-843, 847-850, 862-866, 918-919.
[94] Staff argued that the billing credits are not "additional costs." Tr. 919-922.

the CEFs),[95] with any remaining supply costs (due in part to the difference between the price of wholesale supply and Delmarva's standard offer service rates) reallocated from CEF subscribers to Delmarva's customer base (in a manner to be determined later).

62. By approving subsection 16.10.4, the Commission is not approving any particular mechanism for recovery of the billing credits and, to be clear, is not determining whether such recovery of the distribution credits will take place via rate rider (as Delmarva prefers)[96] or via the distribution rate itself or whether such recovery of the remaining supply costs will be recovered via the PCA (as Delmarva prefers)[97] or otherwise. The Commission is acknowledging, however, that Delmarva's recovery of the billing credits from its customers (rather than the CEFs) is appropriate, given the intent of Senate Bill 2 to facilitate the development of CEFs by applying the billing credits against both the supply and distribution rates of CEF subscribers.

63. **Subsection 16.10.2 – CEF responsibility for additional costs incurred by Delmarva.** In accordance with Senate Bill 2, subsection 16.10.2 provides that the CEF shall be responsible for any additional costs incurred by Delmarva for its implementation of the CEF program, including billing-related costs associated with the CEF subscribers. At subsection 16.10.2.1, Delmarva is obligated to submit a report to the Commission, within 30 days of the effective date of these regulations, that provides such costs and a calculation of the associated charges to CEFs. Thereafter, Delmarva must file semi-annual reports on its cost recovery mechanism, pursuant to subsection 16.10.2.2. The Joint Commenters recommended that subsection 16.10.2 specify additional procedures that Delmarva must follow to gain approval

[95] 26 *Del. C.* § 1014(f)(4) provides that Delmarva "shall use energy generated from a [CEF] to offset purchases from wholesale electricity suppliers for standard offer service."
[96] Delmarva's 11/1/2021 comments, at 9-10.
[97] *Id.*

from the Commission before such charges are imposed, if the "additional costs" exceed $500,000.

64. The Commission first notes that charges to CEFs reflecting Delmarva's incremental cost of implementing the CEF program are not the equivalent of charges to customers for electric service, and therefore do not require the same level of process before they can be imposed. The CEF developers will see Delmarva's costs 30 days after the effective date of these regulations, with updates provided semi-annually. If they object to the charges, they can seek redress at the Commission, at any time. In fact, subsection 16.10.2.3 specifies that if a CEF disputes the charges or the cost recovery mechanism, it may file a complaint with the Commission in accordance with the Commission's Rule of Practice and Procedure. The Commission finds that the reporting and complaint procedures provide sufficient transparency and due process for these charges regarding Delmarva's incremental cost associated with the CEF program.

65. **Subsection 16.6.2 – four or ten CEFs per subscriber.** ECA Solar's two representatives objected to the limitation of four CEFs per subscriber in subsection 16.6.2, arguing that the limitation may restrict access to the program and could disproportionately affect low-income families.[98] ECA Solar recommends that the four-CEF limitation be increased to ten.

66. The Commission approves the four-CEF limitation because it is not clear from the record that CEF participation will be materially hindered by allowing no more than four CEF subscriptions per subscriber. Furthermore, no other solar developer objected to the four-CEF limitation and Delmarva, which must ensure its billing system can process multiple CEFs per customer, supported the limitation. Delmarva's input on this issue is important as it must:

[98] ECA Solar's 11/1/2021 comments, at 2-3; Tr. 856.

(1) track credits per CEF subscription; (2) display separate credit amounts for each CEF subscription on its customers' bills; and (3) identify each CEF on the bill.[99]

67. **Program term**. The Joint Commenters recommended that the regulations specify the duration of Delmarva's obligation to purchase power from a given CEF, noting that in other states that have community solar programs, the utility is required to enter into a power purchase agreement ("PPA") with community solar projects which guarantees payment for energy generated by the project for a period of at least 25-35 years.[100] According to the Joint Commenters and US Solar, CEF investors need a guaranteed program term associated with a revenue stream in order to finance community solar projects.

68. Under the Delaware CEF program, Delmarva will not purchase energy from the CEFs under a PPA, and, therefore, there is no contract term to establish in the regulations. Consistent with Senate Bill 2, a CEF's revenue stream will continue for as long as it complies with the regulations and has subscribers – and so long as the CEF statute and regulations remain in effect. Fixing a program term, therefore, would not guarantee a revenue stream for CEFs like a PPA's contract term would – it would simply provide an arbitrary termination date for the CEF project. For these reasons, the Commission declines to establish an end date for CEF projects at this time.

69. **Percentage basis for low-income measurement**. The Joint Commenters and US Solar recommended that the percentage calculation for the 15% low-income requirement be based on the generation capacity of low-income participation measured against the project capacity, rather than on the number of low-income subscribers measured against total subscribers for a project. They submit that a capacity measurement would be easier to administer and enforce and would enhance low-income participation. The DPA, on the other

[99] Subsection 16.9.1.1.
[100] Joint Commenters' 11/1/2021 comments, at 11.

hand, asserted that moving to a capacity measurement would result in fewer low-income participants.[101]

70. Senate Bill 2 requires that CEFs certify that "participants in the community-owned energy generating facility include at least 15% low income customers..."[102] Given the specific references to "participants" and "customers" and the absence of any reference to capacity, it is reasonable for the Proposed Regulations to require a measurement of the percentage of low-income participation as the number of low-income subscribers divided by the number total subscribers for each CEF. It is unclear how such a measurement would be more difficult to administer and enforce than a measurement based on capacity. If a CEF loses one low-income customer, which results in that CEF falling below the 15% requirement, it follows that the CEF needs to add one low-income customer, irrespective of the usage of the lost customer and the added customer. That would not be the case if the percentage requirement were based on capacity. Regarding whether a capacity requirement would result in greater or less low-income participation, the Commission is concerned foremost with complying with the language and intent of Senate Bill 2 and, as noted above, the percentage measurement based on number of participants clearly meets the Senate Bill 2 requirement for low-income participation.

71. **Security deposit and permitting requirement**. The Joint Commenters and Ms. Passera recommended that projects larger than 500 kilowatts post a security deposit equal to $25 per kilowatt, meaning that for a four-megawatt project, the security deposit would be $100,000.[103] According to the Joint Commenters, a deposit requirement will help to avoid speculative, poorly conceived projects, and would be refundable upon the successful completion of the project. In addition, the Joint Commenters asserted that CEF applicants

[101] Tr. 914-915.
[102] 26 *Del. C.* § 1014(f)(16)e.
[103] Joint Commenters' 11/1/2021 comments, at 5.

should be required to have already obtained all non-ministerial permits and approvals because permitting is a significant development risk.[104]

72. On the other hand, Mr. Moschella of ECA Solar asserted that the inclusion of a deposit requirement does nothing except add administrative burden to the State and, given that Delaware's CEF program does not have a firm cap on the number of projects allowed, there is no harm in issuing certificates of eligibility.[105] Mr. Naini of TurningPoint asserted that adding a permitting requirement now would contradict legislative intent.[106]

73. At this time, the Commission does not believe a deposit requirement, or a permitting requirement, is warranted. The Proposed Regulations already require CEF applicants to demonstrate project viability via proof of site control, interconnection feasibility, and operational and financial capabilities.[107] Senate Bill 2 includes these three requirements – but does not expressly require deposits or completed permitting.[108] If, once the new CEF program is underway, Delmarva encounters issues concerning non-viable projects consuming resources, it can advise the Commission and we can revisit the inclusion of deposit or permitting requirements.

74. **Subsection 16.5.4.4 – release from liability.** Mr. Abbey of US Solar recommended deleting subsection 16.5.4.4, which provides that contracts for residential or small commercial subscribers may not contain a provision that "limits or releases the liability of the Community Energy Facility for not performing the contract."[109] Mr. Abbey argued that when an applicant is unable to build a CEF because the interconnection cost turns out to be infeasible, subscribers should not be allowed to file a legal claim for exemplary or business expectation damages. The Commission notes, however, that a CEF cannot contract with

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[104] *Id.* at 5-6.
[105] Tr. 858.
[106] TurningPoint's 11/1/2021 comments, at 2.
[107] *See* subsections 16.2.3.1.11, 16.2.3.1.12, and 16.2.4.1.14.
[108] 26 *Del. C.* § 1014(f)(12).
[109] US Solar's 11/1/2021 comments, at 13.

subscribers until it obtains a Final Certificate to Operate, which means that the CEF will already have seen Delmarva's interconnection study and the cost of any necessary upgrades before it undertakes any contractual obligations with subscribers.[110] Mr. Abbey's example, therefore, does not apply to the Delaware program. Moreover, the Commission views the prohibition on a release from liability *for nonperformance* of the residential and small commercial contract as an important consumer protection. Such a clause, however, does not prevent a CEF from including a contract term that expressly allows for early termination under specified, reasonable terms and conditions. As such, the Commission will not remove subsection 16.5.4.4 at this time.

75. **Subsection 16.4.3 – penalty for low-income noncompliance.** The Commission declines Mr. Abbey's recommendation to delete the subsection 16.4.3 penalty for a CEF's failure to meet the 15% low-income requirement because the penalty section is consistent with Senate Bill 2[111] and having a meaningful penalty set out in the regulations will likely assist in enforcement.

76. **Subsection 16.6.6.3 – prohibition on charging subscribers more than billing credits.** The Commission also declines Mr. Abbey's recommendation to delete the prohibition on charging subscribers more than the value of the billing credits at subsection 16.6.6.3. Staff Witness Knotts testified that the models that the industry stakeholders discussed with Staff did not involve a premium paid by subscribers, and she could not envision a business model where the CEF charged more than the subscriber saved from the bill credits.[112] Moreover, subsection 16.6.6.3 is an important protection for unsophisticated consumers who may find themselves

[110] *See* subsections 16.2.1 and 16.2.3.1.12.
[111] 26 *Del. C.* § 1014(f)(13) provides that the "Commission may impose penalties, including monetary assessments, and may suspend or revoke the Certificate to Operate" on a CEF for its failure to comply with the regulations.
[112] Tr. 899.

losing money on a CEF subscription when the intent of Senate Bill 2 was to remove the existing economic barriers to community solar in order to promote its development.

77. **Periodic review of regulations.** In its initial comments and at the Hearing, Delmarva argued for the insertion of a subsection that requires the Commission to periodically review the CEF regulations to avoid problems that may emerge due to CEFs over time.[113] Based on its additional written comment, submitted December 2, 2021, it appears that Delmarva no longer objects to Staff's omission of such a requirement. In any event, as noted by the DPA,[114] the statute already instructs the Commission to review the impact of the regulations on the financial health of the utility.[115] In addition, the APA provides that agencies may initiate proceedings to amend a regulation on the motion of an agency member or at the request of any person who so petitions the agency.[116] For these reasons, the Commission finds that a requirement in the regulations for periodic review of the regulations is unnecessary.

78. **Third-party verification of enrollments**. The Joint Commenters,[117] MSSIA,[118] and Laurel Passera[119] objected to the inclusion of a requirement for third-party verification of CEF enrollments. The Proposed Regulations, however, do not require third-party verification. The definition of third-party verification at Section 1.0 provides certain requirements for third-party verification *when it is conducted* but does not, by itself, require CEFs to conduct third-party verification. Subsection 16.12.3.3, which addresses CEF third-party verification, only requires that CEFs retain third-party verification recordings, *if applicable*, for five years. If a CEF chooses not to conduct third-party verification, then the

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[113] Delmarva's 11/1/2021 comments, at 10; Tr. 831-832.
[114] Tr. 915.
[115] Under 26 *Del. C.* § 1014(g), the "Commission shall periodically review the impact of net-metering rules in this section and recommend changes or adjustments necessary for the economic health of utilities."
[116] 29 *Del. C.* § 10114.
[117] Joint Commenters' 11/1/2021 comments, at 4.
[118] MSSIA's 11/1/2021 comments, at 1.
[119] Tr. 844.

retention requirement is not applicable. Subsection 11.7.1, on the other hand, specifically requires *electric suppliers* to conduct third-party verification. No analogous requirement exists in Section 16 that would apply to CEFs.

79. **Revenue loss study and environmental assessment.** Mr. Nichols recommended that the Commission direct Delmarva to study the expected loss of revenue due to the CEF program before the Commission adopts the Proposed Regulations.[120] While the Commission is certainly interested in the billing impact on Delmarva's customer base due to the CEF program, and will be reviewing such impact moving forward, Senate Bill 2 clearly establishes the value of the billing credits from CEF generation, directs the Commission to administer a program based on those credits, and provides a deadline of March 11, 2022 for these regulations. For these reasons, such a study is not warranted prior to adoption of the regulations and the Commission therefore declines Mr. Nichol's recommendation.

80. The Commission also declines Mr. Nichols' recommendation for an independent environmental assessment of the adverse effects of large-scale solar deployments[121] because Senate Bill 2 includes no such directive and, instead, directs the Commission to promulgate regulations by March 11, 2022, to allow the CEF program to commence without delay. Furthermore, such a study, if warranted, would be more appropriately considered by DNREC.

NOW, THEREFORE, IT IS HEREBY ORDERED BY THE AFFIRMATIVE VOTE OF NOT FEWER THAN THREE COMMISSIONERS:

1. That, pursuant to 26 *Del. C.* § 1014(f)(1), (f)(20), and (f)(23), and for the reasons set forth above, the Commission hereby adopts as final the proposed amendments (as revised) to its *Supplier Rules*, which are attached as Exhibit "A" as a clean copy and Exhibit "B" in the

[120] Mr. Nichols' 11/1/2021 comments, at 1.
[121] Tr. 877.

form required by the *Delaware Manual for Drafting Regulations* for submission to the Registrar of Regulations.[122]

2. That, pursuant to 29 *Del. C.* § 10118(e), the Secretary of the Commission shall transmit a copy of this Order, including Exhibits "A" and "B," to the Registrar of Regulations for publication in the March 1, 2022 edition of the *Delaware Register of Regulations*. An exact copy of the amended regulations shall be published in the *Delaware Register of Regulations* as the Commission's official regulation as defined in 29 *Del. C.* § 1132.

3. That, pursuant to 29 *Del. C.* § 10118(g), the effective date of the amendments shall be the later of March 11, 2022, or ten days after publication in the *Delaware Register of Regulations.*

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

BY ORDER OF THE COMMISSION:

Dallas Winslow, Chairman

/s/ Joann T. Conaway
Joann Conaway, Commissioner

/s/ Harold Gray
Harold Gray, Commissioner

[122] The required form is that underlined text is used to indicate new text added at the time of the proposed action, ~~stricken~~ text indicates text being deleted at the time of the proposed action, **[bracketed bold]** language indicates text added between when the regulation was proposed and the time the final order is issued, and **[~~bracketed bold stricken~~]** test indicates language deleted between when the regulation was proposed and the time the final order is issued. *Delaware Manual for Drafting Regulations*, at 9.

/s/ Manubhai Karia
Manubhai "Mike" Karia, Commissioner

/s/ Kim Drexler
Kim F. Drexler, Commissioner

ATTEST:

Malika Davis
Malika Davis, Acting Secretary