

# DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL

## DIVISION OF ENERGY AND CLIMATE

Statutory Authority: 29 Delaware Code, Section 8003(7) (29 Del.C. §8003(7))  
7 DE Admin. Code 2102

### FINAL

Secretary's Order No.: 2017-EC-0017

RE: Approving Final Regulatory Repeal of 7 DE Admin. Code 2102: *Implementation of the Renewable Energy Portfolio Standards Cost Cap Revisions*

#### 2102 Implementation of Renewable Energy Portfolio Standards Cost Cap Provisions

Date of Issuance: July 3, 2017

Effective Date of the Repeal: August 11, 2017

Under the authority vested in the Secretary of the Department of Natural Resources and Environmental Control ("Department" or "DNREC") pursuant to 29 Del.C. §8003(7), the following findings of fact based on the record, reasons and conclusions are entered as an Order of the Secretary in the above-referenced regulatory proceeding.

#### Background, Procedural History and Findings of Fact

This Order relates to the proposed regulatory repeal of 7 DE Admin. Code 2102: *Implementation of the Renewable Energy Portfolio Standards Cost Cap Revisions* ("RPS Cost Cap Regulations"), previously promulgated by DNREC in 2016 to direct when and how the Department's Director of the Division of Energy & Climate ("DEC") may freeze implementation of the Renewable Portfolio Standards ("RPS") under 26 Del.C. §354(i) & (j). The purpose of this action is to repeal the Department's existing 7 DE Admin. Code 2102, in order to be consistent with the State of Delaware Public Service Commission ("PSC") Regulation No. 3008, *Rules and Procedures to Implement the Renewable Energy Portfolio Standard*, and to be compliant with a recent commitment made to Delaware Superior Court Judge Abigail LeGrow in the matter of *DPA v. DNREC* (litigation initiated by the State of Delaware's Division of the Public Advocate to challenge 7 DE Admin. Code 2102).

Delaware's *Renewable Energy Portfolio Standards Act*, as amended by Senate Substitute 1 to Senate Bill 119 in June 2010, includes a cost cap provision for regulated electric utilities. According to that provision, the Department's Director of the DEC may freeze the RPS if the cost of compliance exceeds 3% of the total retail costs of electricity for the RPS as a whole, or 1% of total retail costs of electricity for solar photovoltaic. 7 DE Admin. Code 2102 directs how the Department's DEC calculates the cost of compliance, directs how the DEC Director decides whether and when to freeze the RPS, and directs how said Director decides whether and when to lift a freeze.

DNREC initially promulgated the aforementioned RPS Cost Cap Regulations in response to a Petition for Rule-making filed with its DEC on November 2, 2011. Thereafter, the Department's Start Action Notice ("SAN") No. 2012-03 was signed by then DNREC Secretary Collin O'Mara on April 16, 2012, and the initial proposed new regulation was published in the *Delaware Register of Regulations* on December 1, 2013. Over the course of the following two and half years, two work group sessions and three public hearings were held by the Department regarding this proposed regulatory action. Members of the public attended those public hearings, and many provided comment to the Department on the draft regulation throughout DNREC's formal regulatory development process. Three draft regulations were published before the final regulation was published in the *Delaware Register of Regulations* on January 1, 2016. Subsequent to said regulation having become effective on January 11, 2016, the first annual Director's Determination (pursuant to 7 DE Admin. 2102) was finalized in April of 2016.

The State of Delaware's Division of the Public Advocate ("DPA") filed parallel lawsuits in Delaware's Superior Court in 2016, which initiated litigation against both DNREC and the Public Service Commission ("Commission", "PSC") regarding the above-referenced RPS regulatory provisions. In December of 2016, Judge Abigail LeGrow issued a Memorandum Opinion in *DPA v. PSC*, which directed the PSC to revise its Regulation No. 3008, *Rules*

and Procedures to Implement the Renewable Energy Portfolio Standard, pursuant to its statutory authority under 26 Del.C. §362(b). The PSC decided not to appeal Judge LeGrow's Opinion, and thereafter, the Commission commenced the process for promulgating its own regulations consistent with the Court's decision. In light of the PSC's decision, DNREC chose to take a collaborative course of action with the Commission, and began the process to formally repeal its RPS Cost Cap Regulations.

It should be noted that DNREC did not concede any of the arguments made to Judge LeGrow in *DPA v. DNREC*. Instead, on January 30, 2017, DNREC wrote Judge LeGrow to ask for a stay in said case, to allow time to formally repeal 7 DE Admin. Code 2102, pursuant to Delaware's Administrative Procedures Act. On February 1, 2017, Judge LeGrow agreed that it was procedurally premature to issue an order voiding 7 DE Admin. Code 2102, and granted the stay. Judge LeGrow further held that once DNREC had completed the process to formally repeal its RPS Cost Cap Regulations, the Court would dismiss DPA's appeal as moot at that time.

The Department has the statutory basis and legal authority to act with regard to the proposed repeal of 7 DE Admin. Code 2102, pursuant to 29 Del.C. §8003(7). The repeal of an existing regulation requires the same public process as either adopting or amending an existing regulation. Thus, the Department's Division of Energy and Climate commenced its regulatory repeal of 7 DE Admin. Code 2102 with the approval of SAN No. 2017-02, signed by then DNREC Secretary David Small on February 10, 2017. Accordingly, the proposed regulatory repeal of 7 DE Admin. Code 2102 (illustrated as a strike-through of the entire existing regulatory text) was published in the Delaware Register of Regulations on March 1, 2017, and a public hearing was held on March 22, 2017. Consistent with 29 Del.C. §10118(a), the public hearing record remained open for public comment through April 7, 2017.

Members of the public attended the March 22, 2017 public hearing, and comment was received by the Department throughout the course of this regulatory process, all of which voiced support for the formal repeal of 7 DE Admin. Code 2102. It should be noted that all proper notification and noticing requirements concerning this matter were met by the Department. Proper notice of the hearing was provided as required by law.

Hearing Officer Vest prepared a Hearing Officer's Report dated June 15, 2017 ("Report"). The Report documents the proper completion of the required regulatory amendment process, establishes the record, and recommends the formal repeal of 7 DE Admin. Code 2102: *Implementation of the Renewable Energy Portfolio Standards Cost Cap Revisions* as attached to the Report as Appendix "B".

### Reasons and Conclusions

Based on the record developed by the Department's experts and established by the Hearing Officer's Report, I find that the proposed regulatory repeal of 7 DE Admin. Code 2102: *Implementation of the Renewable Energy Portfolio Standards Cost Cap Revisions*, is well-supported. Therefore, the recommendations of the Hearing Officer are hereby adopted, and I direct that the proposed regulatory repeal be promulgated as final.

I find that the Department's experts in the Division of Energy and Climate fully developed the record to support adoption of this regulatory repeal. The repeal of 7 DE Admin. Code 2102: *Implementation of the Renewable Energy Portfolio Standards Cost Cap Revisions* will allow Delaware to be consistent with the State of Delaware Public Service Commission ("PSC") Regulation No. 3008, *Rules and Procedures to Implement the Renewable Energy Portfolio Standard*, and to be compliant with a recent commitment made to Delaware Superior Court Judge Abigail LeGrow in the matter of *DPA v. DNREC*.

In conclusion, the following reasons and conclusions are entered:

1. The Department has the statutory basis and legal authority to act with regard to the proposed regulatory repeal to 7 DE Admin. Code 2102: *Implementation of the Renewable Energy Portfolio Standards Cost Cap Revisions*, pursuant to 29 Del.C. §8003(7);

2. The Department has jurisdiction under its statutory authority, pursuant to 29 Del.C. §8003(7), to issue an Order adopting the proposed repeal of 7 DE Admin. Code 2102 as final;

3. The Department provided adequate public notice of the proposed regulatory repeal and all proceedings in a manner required by the law and regulations, provided the public with an adequate opportunity to comment on the proposed regulatory repeal, including at the time of the public hearing held on March 22, 2017, and held the record open through close of business on April 7, 2017, consistent with 29 Del.C. §10118(a), in order to consider public comment on the proposed regulatory repeal before making any final decision;

4. The Department's Hearing Officer's Report, including its established record and the recommended proposed regulatory repeal as set forth in Appendix "B", are hereby adopted to provide additional reasons and

findings for this Order;

5. The proposed regulatory repeal of 7 **DE Admin. Code** 2102: *Implementation of the Renewable Energy Portfolio Standards Cost Cap Revisions*, will enable the Department to be consistent with the State of Delaware Public Service Commission ("PSC") Regulation No. 3008, *Rules and Procedures to Implement the Renewable Energy Portfolio Standard*, and to be compliant with a recent commitment made to Delaware Superior Court Judge Abigail LeGrow in the matter of *DPA v. DNREC*;

6. The Department has reviewed these proposed regulatory repeal in the light of the Regulatory Flexibility Act, consistent with 29 **Del.C.** Ch. 104, and believes the same to be lawful, feasible and desirable, and that the recommendations as proposed should be applicable to all Delaware citizens equally;

7. The Department's proposed regulatory repeal, as published in the March 1, 2017 Delaware *Register of Regulations*, and as set forth in Appendix "B" as noted above, is adequately supported, is not arbitrary or capricious, and is consistent with the applicable laws and regulations. Consequently, it is approved as a final regulatory repeal, which shall go into effect ten days after its publication in the next available issue of the Delaware *Register of Regulations*; and

8. The Department shall submit this Order approving as final the proposed repeal of 7 **DE Admin. Code** 2102: *Implementation of the Renewable Energy Portfolio Standards Cost Cap Revisions* to the *Delaware Register of Regulations* for publication in its next available issue, and provide such other notice as the law and regulation require and the Department determines is appropriate.

Shawn M. Garvin  
Secretary

## 2102 Implementation of Renewable Energy Portfolio Standards Cost Cap Provisions

### 4.0 Purpose

~~These rules govern how the Director of the Division of Energy & Climate (Director) and the Division of Energy & Climate (Division) administer their obligations under 26 **Del.C.** §354(i) & (j). The statute directs when and whether the Director may institute a freeze on the implementation of the Renewable Energy Portfolio Standards as provided for in 26 **Del.C.** §354(a).~~

### 2.0 Definitions

~~For purposes of this regulation, the following words and phrases shall have the following meaning unless the context clearly indicates otherwise:~~

~~"**Alternative compliance payment**" means a payment of a certain dollar amount per megawatt hour, which a Commission-Regulated Electric Company may submit in lieu of supplying the minimum percentage of RECs from Eligible Energy Resources required as defined and set by 26 **Del.C.** §§352(1) and 358(d).~~

~~"**Avoided system costs**" means reductions in electric generation, transmission or distribution costs.~~

~~"**Commission-Regulated Electric Company**" means the same as an Electric Distribution Company in 26 **Del.C.** §1001(12).~~

~~"**Compliance year**" means the calendar year beginning with June 1 and ending with May 31 of the following year, for which a Commission-Regulated Electric Company must demonstrate that it has met the requirements of the subchapter known as the "Renewable Energy Portfolio Standards Act".~~

~~"**Director**" means the Director of the Division of Energy & Climate, who is considered the State Energy Coordinator for the purpose of these rules.~~

~~"**Division**" means the Division of Energy & Climate, the successor agency to the Delaware Energy Office.~~

~~"**End use customer**" means a person or entity in Delaware that purchases electrical energy at retail prices from regulated electric utilities.~~

~~"**Exempt sales**" means the retail customer sales of a Commission-Regulated Electric Company that is not included in the total retail sales for RPS compliance.~~

~~“Externality benefits” means reductions in environmental, health and mortality costs and improvements in habitat resulting from reduced emissions.~~

~~“Freeze” means suspension of enforcement or implementation of the annual increase in the RPS as provided for under 26 Del.C. §§352(3) & 354(a).~~

~~“Green Energy Fund” means the grant program authorized under 29 Del.C. §8057.~~

~~“Integrated Resource Plan” or “IRP” means the plan filed by the Commission Regulated Electric Company to meet the requirements of 26 Del.C. §1007(c) & (d).~~

~~“Non-exempt sales” means the retail customer sales of a Commission Regulated Electric Company that is included in the total retail sales for RPS compliance.~~

~~“PJM” or “PJM interconnection” means the regional transmission organization that coordinates the movement of wholesale electricity in the PJM region, or its successors at law.~~

~~“Price suppression effects” means reductions in energy or capacity costs due to competitive pressures from renewable resources.~~

~~“PSC” means the Delaware Public Service Commission.~~

~~“REC costs of compliance” means the total costs expended by the Commission Regulated Electric Company to achieve the applicable RPS percentage standards for RECs during a respective compliance year.~~

~~“REC percentage requirements” and “SREC percentage requirements” mean the renewable energy portfolio requirements for each compliance year as set forth in 26 Del.C. §354(a).~~

~~“Renewable Energy Cost of Compliance” means the total costs expended by the Commission Regulated Electric Company to achieve the applicable RPS percentage standards for all renewable energy during a respective compliance year.~~

~~“Renewable Energy Credit” or “REC” means a tradable instrument defined by 26 Del.C. §352(18) used to demonstrate compliance with the percentage requirements set forth in 26 Del.C. §354(a).~~

~~“RPS” means the renewable portfolio standard, the minimum percentage of total electricity sales delivered to Delaware end use customers that is derived from eligible energy resources established under 26 Del.C., §354.~~

~~“Solar alternative compliance payment” means the payment of certain dollar amounts expended in lieu of supplying the minimum percentage from solar photovoltaics as defined and set by 26 Del.C. §§352(24) and 358(e).~~

~~“Solar Renewable Energy Cost of Compliance” means the total costs expended by a Commission Regulated Electric Company to achieve the applicable RPS percentage standards for solar photovoltaic renewable energy during a respective compliance year.~~

~~“Solar Renewable Energy Credit” or “SREC” means the tradable instrument defined by 26 Del.C. §352(25) used to demonstrate compliance with the percentage requirements set forth in 26 Del.C. §354(a).~~

~~“Third party supplier” means an electricity supplier that sells power to end use customers delivered over the distribution facilities of the Commission Regulated Electric Company. It does not include the Commission Regulated Electric Company, Rural Electric Cooperatives or Municipal Electric Companies.~~

~~“Total Retail Costs of Electricity” means 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 a respective compliance year.~~

### **3.0 Application**

3.1 These rules shall apply only to a Commission Regulated Electric Company. These rules shall not apply to electric supply provided by either:

3.1.1 an exempted municipal electric company or a municipal utility (as set forth in 26 Del.C. §363); or

~~3.1.2 an exempted rural electric cooperative or a rural electric cooperative (as set forth in 26 Del.C. §363).~~

~~3.2 These rules will be applied immediately upon enactment.~~

#### **4.0 Calculation of the Cost of Compliance**

~~4.1 The Division shall calculate the Renewable Energy Cost of Compliance, the Solar Renewable Energy Cost of Compliance and the Total Retail Cost of Electricity as follows.~~

~~4.2 The Division shall calculate the Renewable Energy Cost of Compliance for a particular compliance year to be:~~

~~4.2.1 the total of contributions to that portion of the Green Energy Fund used to support the development of renewable resources, plus~~

~~4.2.2 the cost of RECs and SRECs retired to satisfy the RPS requirement, plus~~

~~4.2.3 all Alternative Compliance Payments.~~

~~4.3 The Division shall calculate the Solar Renewable Energy Cost of Compliance for a particular compliance year to be:~~

~~4.3.1 the total of contributions to that portion of the Green Energy Fund used to support the development of photovoltaic renewable resources, plus~~

~~4.3.2 the cost of SRECs retired to satisfy the RPS requirement, plus~~

~~4.3.3 all Solar Alternative Compliance Payments for the solar photovoltaic requirement.~~

~~4.4 The Division will determine the Total Retail Costs of Electricity as all customer costs for non-exempt load customers for a particular compliance year.~~

#### **5.0 Determination by the Director**

~~5.1 The Director shall review the calculations of the Division.~~

~~5.2 If the Division calculations show that the Renewable Energy Cost of Compliance is greater than 3 percent of the Total Retail Costs of Electricity for the compliance year, the Director shall, after consulting with the PSC, determine whether a freeze should be implemented.~~

~~5.3 If the Division calculations show that the Solar Renewable Energy Cost of Compliance is greater than 1 percent of the Total Retail Costs of Electricity for the compliance year, the Director shall, after consulting with the PSC, determine whether a freeze should be implemented.~~

~~5.4 In making a determination, the Director shall consider:~~

~~5.4.1 the overall energy market conditions;~~

~~5.4.2 the avoided cost benefits from the RPS;~~

~~5.4.3 the externality benefits due to the RPS; and~~

~~5.4.4 the economic impacts of the deployment of renewable energy in Delaware.~~

~~5.5 Overall market conditions may include shifts in energy prices, long term market trends, adjustments for short term fluctuations, changes in compliance costs, consumer benefits of other state energy policies such as the implementation of energy efficiency programs, and the overall cost of energy to consumers.~~

~~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.~~

~~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.~~

~~5.8 Economic development benefits may include the overall economic activity attributed to jobs created by the development of renewable energy in Delaware.~~

## **6.0 Lifting of a Freeze**

- 6.1 ~~If a freeze has been imposed, the Division will calculate compliance costs, using the methods described in Section 4.0 of this regulation.~~
- 6.2 ~~The Director will review the calculation and determine whether to lift a freeze using the methods and criteria described in Section 5.0 of this regulation.~~
- 6.3 ~~If the total cost of compliance falls below the 3 percent threshold in subsection 5.2 of this regulation or the 1 percent threshold in subsection 5.3 of this regulation, the Director shall lift a freeze following consultation with the PSC.~~
- 6.4 ~~If a freeze is lifted, the Director will promptly notify, electronically and by mail, the Commission-Regulated Electric Company that filed reports on RPS compliance. The Director will also:~~
  - 6.4.1 ~~provide prior notice of the lifting of the freeze to the PSC; and~~
  - 6.4.2 ~~publish notice of the lifting of the freeze in the next appropriate issue of the Delaware *Register of Regulations*.~~

## **7.0 Administration**

- 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:~~
  - 7.1.1 ~~the Renewable Energy Cost of Compliance for that compliance year;~~
  - 7.1.2 ~~the Solar Renewable Energy Cost of Compliance costs for that compliance year; and~~
  - 7.1.3 ~~the Total Retail Costs of Electricity for that compliance year.~~
- 7.2 ~~Within 30 days from receipt of the information described in subsection 7.1 of this regulation from the Commission-Regulated Electric Company, the Division shall calculate the cost of compliance as described in Section 4.0 of this regulation and present the results to the Director.~~
- 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 this regulation and 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*.~~
- 7.4 ~~The public will have 15 business days from the publication of the Director's determination to offer comment. The Director may alter or amend the determination based on review of the public comments.~~
- 7.5 ~~The Director shall make a final determination, including effective date, provide public notice to the Registrar, and notify electronically and by mail the PSC, the Commission-Regulated Electric Company, and other interested parties within 15 business days of the close of public comments.~~

## **8.0 Existing Contracts**

~~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.~~

**19 DE Reg. 643 (01/01/16)**

**21 DE Reg. 152 (08/01/17) (Final)**