

DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL
DIVISION OF ENERGY AND CLIMATE

Statutory Authority: 26 Delaware Code, Section 354(i) and (j) (26 **Del.C.** §354(i) & (j))

FINAL

Secretary's Order No.: 2015-EC-0047

104 Implementation of Renewable Energy Portfolio Standards Cost Cap Provisions

Date of Issuance: December 15, 2015

Effective Date of the Amendment: January 11, 2016

Under the authority vested in the Secretary of the Department of Natural Resources and Environmental Control ("Department" or "DNREC") pursuant to 7 **Del.C.** §§6006, 6010, 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.

The revised new regulation that will be adopted through this Order represents the culmination of more than three years of work that include multiple discussions with stakeholders, representatives of both private and public utilities, environmental advocacy organizations, legislators, and, of course, the public in general, along with three formal public hearings in two years. This revised new regulation is responsive to the concerns that have been raised in these discussions and through the public hearing process over the course of the last few years.

Background, Procedural History and Findings of Fact

This Order relates to the proposed revised new regulation, to wit: *Regulations Governing the Implementation of the Renewable Energy Portfolio Standards Cost Cap Provisions*, pursuant to 26 **Del.C.** §354(i) & (j) - 7 **DE Admin. Code** 104. The Department's Division of Energy and Climate commenced the regulatory development process with Start Action Notice 2012-03 dated April 16, 2012. The Department published its initial proposed new regulation in the December 1, 2013 *Delaware Register of Regulations*.

After numerous public workshops, stakeholder meetings, discussions and reviews, the Department placed legal notices in both the *News Journal* and the *Delaware State News* advertising that a public hearing would be held on January 8, 2014, to provide an opportunity for the public to comment on the proposed new regulation. Members of the public attended that public hearing, and many provided comment to the Department regarding the same, both at the time of the hearing and during the post-hearing time period. The public comment period closed following the first hearing on January 24, 2014.

Subsequent to the record closing for comment after this initial public hearing in January of 2014, the Department's Division of Energy and Climate then began a thorough review of the record that had been generated to date with respect to this proposed promulgation, including, but not limited to, a detailed review of the formal hearing transcript, and all comment received from both the regulated community and the public at large. As a result of that review, and as a result of some of the comment received, revisions were made to the initial proposed regulation at that time, as the Department believed that numerous suggestions were meritorious and should be incorporated into the proposed regulation being developed in this matter.

At that same time, it was determined that the revisions made by the Department to this proposed new regulation were substantive enough to necessitate further vetting to both the regulated community and the public at large. Thus, after formal legal notice in both the *Delaware State News* and *The News Journal* was effected by the Department, and re-publication of this revised proposed new regulation in the *Register of Regulations* was made on December 1, 2014, a second public hearing was held once again at the Public Service Commission Conference Room Auditorium, 861 Silver Lake Blvd., Dover, Delaware on January 7, 2015.

As was the case at the first public hearing, members of the public attended the hearing on January 7, 2015, and many provided comment on the proposed revised new regulation, both at the time of the hearing and during the post-hearing time period. Given the amount of feedback the Department received subsequent to this second hearing, the Department issued a press release on January 20, 2015, announcing that the time period for public comment would be extended in this matter, in order to allow the Department to receive additional public comment in this matter. The public comment period closed following the second hearing on February 16, 2015.

Following the close of the public comment period subsequent to the second public hearing, the Department once again began its review of the voluminous amount of comment received to date in this matter. Again, many meritorious comments were taken into consideration, and, accordingly, substantive changes were made to the previously revised regulation, such that a third public hearing was deemed necessary. Thus, after once again effecting formal legal notice in both the *Delaware State News* and *The News Journal*, and re-submitting this revised proposed new regulation in the *Register of Regulations*

for re-publication on November 1, 2015, a third public hearing was held at the Public Service Commission Conference Room Auditorium, 861 Silver Lake Blvd., Dover, Delaware on November 23, 2015. A few members of the public attended this third hearing, and once again comment was received by the Department regarding this proposed regulation, both at the hearing and during the post-hearing phase of this matter.

Subsequent to the third (and final) public hearing on November 23, 2015, the hearing record closed for public comment at close of business on December 8, 2015. At that time, the Department thoroughly reviewed that hearing's transcript, along with all additional comments received, and then prepared its formal Technical Response Memorandum ("TRM"), dated December 14, 2015, which documents the exhaustive review performed by the Department with regard to this proposed regulatory promulgation, and offers the Department's response to all comments received throughout this long regulatory process.

The Department has the statutory basis and legal authority, pursuant to 29 **Del.C.** §8003(7), to issue rules and regulations deemed necessary by the Secretary. Specifically, this rulemaking is in reference to the statutory authority specifically granted to DNREC's Division of Energy & Climate under 26 **Del.C.** §354(i) & (j). It should also 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.

Subsequent to receiving the Division of Energy and Climate's aforementioned TRM, The Department's presiding hearing officer, Lisa A. Vest, then prepared a Hearing Officer's Report dated December 15, 2015 ("Report"). The Report documents the proper completion of the required regulatory development process, establishes the record, and recommends the adoption of the proposed revised new regulation 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 revised new regulation, to wit: 7 **DE Admin. Code** 104: *Regulations Governing the Implementation of the Renewable Energy Portfolio Standards Cost Cap Provisions*, pursuant to 26 **Del.C.** §354(i) & (j), is well-supported. Therefore, the recommendations of the Hearing Officer are hereby adopted, and I direct that the proposed regulatory revised new regulation 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 revised new regulation. The adoption of this revised new regulation will allow Delaware to adopt rules to govern how the Department's Director of the Division of Energy and Climate administer their obligations under 26 **Del.C.** §354(i) & (j). It should be noted that the statute directs when and whether said Director may institute a freeze on the implementation of Delaware's Renewable Energy Portfolio Standards, as provided for in 26 **Del.C.** §354.

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 revised new regulation, pursuant to 29 **Del.C.** §8003(7), to wit: to issue rules and regulations deemed necessary by the Secretary. Specifically, this rulemaking references the statutory authority specifically granted to DNREC's Division of Energy & Climate, pursuant to 26 **Del.C.** §354(i) & (j);

2. The Department has jurisdiction under its statutory authority, pursuant to 7 **Del.C.** Ch. 60, to issue an Order adopting this proposed revised new regulation as final;

3. The Department provided adequate public notice of the initial proposed new regulation and all proceedings in a manner required by the law and regulations, provided the public with an adequate opportunity to comment on said new regulation, including at the times of each public hearing and all post-hearing phases of this promulgation as referenced in detail above, consistent with 29 **Del.C.** §10118(a), in order to consider all public comment on the same before making any final decision;

4. Due to substantive changes made to the proposed regulatory language during the course of this rulemaking process, the Department caused the revised proposed new regulation to be re-published in the State of Delaware *Register of Regulations* on December 1, 2014, and then again with additional revisions on November 1, 2015, provided the public with an ample amount of days to comment on the same as referenced above, and held the record open most recently through close of business on December 1, 2015, in order to consider all public comment on these proposed revised regulatory amendments before making any final decision;

5. While the Department made recent additional changes to the proposed regulatory language, as set forth in the above-referenced TRM of December 14, 2015, such changes do not alter the meaning or function of the proposed new regulation, and therefore no additional re-publication or noticing of this proposed regulation is necessitated at this time;

6. The Department's Hearing Officer's Report, including its established record and the recommended proposed revised new regulation, as set forth in its Appendix "B", are hereby adopted to provide additional reasons and findings for this Order;

7. Promulgation of the proposed revised new regulation to the proposed 7 **DE Admin. Code** 104: *Regulations Governing the Implementation of the Renewable Energy Portfolio Standards Cost Cap Provisions*, pursuant to 26 **Del.C.** §354(i) & (j), will allow Delaware to adopt rules to govern how the Department's Director of the Division of Energy and Climate administer their obligations under 26 **Del.C.** §354(i) & (j). It should be noted that the statute directs when and

whether said Director may institute a freeze on the implementation of Delaware's Renewable Energy Portfolio Standards, as provided for in 26 **Del.C.** §354(a);

8. The Department has reviewed this proposed revised new regulation in the light of the Regulatory Flexibility Act, consistent with 29 **Del.C.** Ch. 104 (version applicable to all regulations initially published on or before December 31, 2015), and believes the same to be lawful, feasible and desirable, and that the recommendations as proposed should be applicable to all Delaware citizens equally;

9. The Department's proposed revised new regulation, as re-published in the November 1, 2015 Delaware *Register of Regulations*, and as revised and set forth in Appendix "B" of the aforementioned Hearing Officer's Report, is adequately supported, is not arbitrary or capricious, and is consistent with the applicable laws and regulations. Consequently, it is approved as a final revised new regulation, which shall go into effect ten days after its publication in the next available issue of the Delaware *Register of Regulations*; and

10. The Department shall submit this Order approving as final the proposed revised new regulation as a final new regulation, to wit: 7 **DE Admin. Code** 104: *Regulations Governing the Implementation of the Renewable Energy Portfolio Standards Cost Cap Provisions*, pursuant to 26 **Del.C.** §354(i) & (j), 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.

David S. Small
Secretary

104 Implementation of Renewable Energy Portfolio Standards Cost Cap Provisions

1.0 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 **[staff of 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 **[staff of the]** PSC, determine whether a freeze should be implemented.
- 5.4 In making a determination, the Director **[may 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 Implementation

If the Director determines that a freeze should be implemented under Section 5.0 above, the Director, in consultation with the staff of the PSC, will declare the freeze 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.]

[7.0 6.0]Lifting of a Freeze

- [Z6].1** If a freeze has been imposed, the Division will calculate compliance costs, using the methods described in Section 4.0 of this regulation.
- [Z6].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.
- [Z6].3** If the total cost of compliance falls below the 3 percent threshold in Section 5.2 of this regulation or **[the]** 1 percent threshold in Section 5.3 of this regulation, the Director shall lift a freeze following consultation with the **[staff of the]** PSC.
- [Z6].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:
 - [Z6].4.1** provide prior notice of the lifting of the freeze to the PSC; and
 - [Z6].4.2** publish notice of the lifting of the freeze in the next appropriate issue of the Delaware *Register of Regulations*.

[8.0 7.0]Administration

- [87].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:
 - [87].1.1** the Renewable Energy Cost of Compliance for that compliance year;
 - [87].1.2** the Solar Renewable Energy Cost of Compliance costs for that compliance year; and
 - [87].1.3** the Total Retail Costs of Electricity for that compliance year.
- [87].2** Within 30 days from receipt of the information described in Section **[8.4 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.

- [87].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 ~~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*].
- [87].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.
- [87].5** The Director shall make a final determination, including effective date, [and] 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.

[9.0 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.