

DEPARTMENT OF STATE
PUBLIC SERVICE COMMISSION

Statutory Authority: 26 Delaware Code, Section 209(a) (26 **Del.C.** §209(a))
26 **DE Admin. Code** 3008

FINAL

IN THE MATTER OF THE ADOPTION OF RULES AND PROCEDURES TO IMPLEMENT THE RENEWABLE ENERGY PORTFOLIO STANDARDS ACT, 26 DEL. C. §§ 351-363, AS APPLIED TO RETAIL ELECTRICITY SUPPLIERS (OPENED AUGUST 23, 2005; REOPENED SEPTEMBER 4, 2007; AUGUST 5, 2008; AND SEPTEMBER 22, 2009; SEPTEMBER 7, 2010)	 	PSC REGULATION DOCKET NO. 56
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ORDER NO. 7933

This 22nd day of March, 2011, the Commission determines and Orders the following:

Background

1. In 2005, General Assembly enacted the “Renewable Energy Portfolio Standards Act,” 26 **Del.C.** §§351-364 (2006 Supp.) (“REPSA”). Pursuant to REPSA, a minimum percentage of the electricity that retail electric suppliers and municipal electric companies sell to Delaware end-users in each compliance year (defined as the year beginning with June 1 and ending on May 31 of the following year) must be from “eligible energy resources” or “EER” (renewable energy). REPSA included a “Schedule I” setting forth escalating minimum percentages of EER for several years, beginning with 1% in 2007 and ending with 10% in 2019. See 75 **Del. Laws** ch. 205. REPSA also allowed an electric supplier to meet its obligations by accumulating or purchasing “renewable energy credits (“RECs”) equivalent to a specified percentage of its retail electric supply sales in Delaware.

2. The General Assembly amended REPSA in 2007 to, among other things, require a specific amount of EER from solar photovoltaics (“solar PVs”) and to exempt from Schedule 1 suppliers who acquired any portion of their renewable energy supply portfolio for the 2007-09 compliance years under wholesale renewable energy supply contracts procured pursuant to the 2005-06 Standard Offer Services (“SOS”) auctions that were in effect on the date of those auctions. See 76 **Del. Laws**, ch. 165, §4. Thus, although after the amendment all electric suppliers were required to have 4% of their total retail sales from EER for compliance year 2009, that minimum percentage for the same period was capped at 2% (see Schedule 1 (Revised)) for suppliers who acquired their supply pursuant to the 2005-06 SOS auctions. That is, the suppliers who acquired their supply pursuant to the 2005-06 SOS auctions were “grandfathered” at the 2% level.

3. In 2006, the Commission promulgated “Rules and Procedures to Implement the Renewable Energy Portfolio Standard” (the “RPS Rules”). See Order No. 6931 (June 6, 2006). The Commission has revised its RPS Rules from time to time to reflect various amendments to the RPS Act. See, e.g., PSC Order Nos. 7377 (Apr. 17, 2008), 7494 (Dec. 16, 2008), and 7699 (Dec. 8, 2009).

4. The General Assembly again amended REPSA in 2010. See Senate Substitute No. 1 for Senate Bill No. 119 (77 **Del. Laws** ch. 451) (July 28, 2010) (“SS 1”). Among other things, SS 1:

- Modified the minimum percentages of sales that must be from EER and solar PVs and extended the period for the minimum standard from 2019 to 2025. Notably, SS 1 increased the minimum percentages from solar PVs starting in 2011, but, for three separate years, SS 1 *reduced* the minimum percentage for EER.
- Established a mechanism to freeze the minimum requirements under certain circumstances.
- Provided credits toward the minimum requirements for Delaware-sited solar and wind installations, as long as a certain percentage of the equipment used in the installation is manufactured in Delaware, and/or where facilities are constructed or installed with a certain percentage of Delaware workers.
- Increased the amount of solar alternative compliance payments.
- Provided the State Energy Coordinator with the authority to review the reasonableness of alternative compliance payments and solar alternative compliance payments.
- Established a Renewable Energy Task Force to review trading mechanisms and other structures to support growth of renewable trading markets in Delaware.
- Explicitly provided the Commission with the authority to promulgate rules and regulations with respect to certain of the REPSA amendments.

Significantly for purposes of our later discussion, this version of REPSA omitted any grandfathering provision.

5. By Order No. 7834 (Sep. 9, 2010), the Commission proposed to modify the RPS Rules to reflect SS 1’s amendments

to REPSA and caused the proposed amended RPS Rules to be published in the *Delaware Register of Regulations* as required by the Administrative Procedures Act. Order No. 7834 also required publication of a notice regarding the proposed changes to the RPS Rules, which notice included a deadline for comments to the proposed changes and set a hearing date for consideration of the changes.¹

Comments to the Proposed Rules

6. The Commission received written comments to the proposed RPS Rules from the Retail Energy Supply Association (“RESA”), Washington Gas Energy Services, Inc. (“WGES”), and the Vote Solar Initiative (“Vote Solar”). RESA, WGES the Delaware Solar Energy Coalition (“DSEC”) and Delmarva Power & Light Company (“Delmarva”) provided oral comments at the February 22 and March 8, 2011 public meetings.

7. RESA and WGES² first ask us to include in the proposed amended RPS Rules a provision allowing suppliers that are parties to long-term fixed-price contracts extending beyond the date the amended REPSA goes into effect (“pre-existing contracts”) to comply with the EER and solar PV percentages that were in effect when those suppliers entered into those contracts.³ (RESA Comments at 4-5; WGES Comments at 1-2). In short, RESA and WGES ask us to include a “grandfathering” provision in the regulations even though the amended REPSA contains no such provision. Certain of RESA’s members and WGES contend that they have locked into pre-existing contracts based upon REPSA’s prior minimum requirements, and requiring them to comply with the increased percentages from 2011 onward would increase the costs to their existing customers. (RESA Comments at 4; WGES Comments at 1-2).

8. WGES states that the impact on its existing contractual commitments of complying with the new SREC requirements would be more than \$600,000 over the three-year period identified in SS 1. (WGES Comments at 2). One RESA member present at the hearing estimated that the impact on its existing customer contracts would be \$400,000. (2/22/11 Tr. at 723). DSEC questioned the accuracy of these amounts, stating that SRECs are trading on the spot market at substantially less than the solar alternative compliance payment price. (*Id.* at 736). Delmarva stated that exempting only choice contracts from the increased REPSA requirements would be unfair to Standard Offer Service (“SOS”) customers because SOS customers would not be subject to the exemption; thus, “choice” customers would be receiving a significant discount that was not available to SOS customers. (3/8/11 Tr. at 784-85).

9. In support of their contention that we have the authority to exempt existing contracts from the requirements of the amended REPSA through our RPS Rules, RESA and WGES primarily rely upon 26 **Del.C.** §362(a), which requires the Commission’s RPS Rules to be “as consistent as possible with those of other states in the region with similar requirements in order to minimize the compliance burdens imposed by [REPSA] and in order to avoid duplication of effort.” 26 **Del.C.** §362(a). (RESA Comments, pp. 5-8). RESA argues that REPSA does not prohibit us from exempting existing contracts because Section 362 “affords the Commission the discretionary power and flexibility it needs to consider precisely these types of issues when promulgating its regulations” (*Id.* at 6). Additionally, RESA claims that changes in RPS standards in other states, such as Maryland and Massachusetts, have included grandfathering clauses exempting pre-existing contracts from new RPS requirements. (*Id.* at 6-7). RESA further claims that proposed RPS Rule 3.2.2 permits us to modify minimum cumulative percentage requirements for existing contracts through our regulations. (*Id.* at 7).

10. As to proposed Rule 3.2.16, which recognizes the ability of the newly-created State Energy Coordinator (in consultation with the Commission) to freeze the minimum cumulative EER requirements for “regulated utilities” under certain circumstances pursuant to 26 **Del.C.** §354(i)-(j), RESA believes the rule should allow a freeze for *all* electric suppliers, not just Commission-regulated electric companies. (*Id.*, p. 8). RESA also criticizes REPSA’s failure to appoint an electric supplier representative to the Renewable Energy Task Force created by SS 1. To ameliorate this perceived deficiency, RESA urges the Commission to “open a docket for market participants to comment on proposed issues for consideration before the Task Force.” RESA states that this will ensure that the Task Force will be informed and “will have before it the accumulated experience of all stakeholders, not just those ... granted an appointment to the Task Force, when making decisions regarding the establishment of trading mechanisms and other structures to promote the growth of a renewable energy market in Delaware.” (*Id.*, p. 11).

11. As drafted, proposed Rule 3.2.16 (following REPSA), states that for a freeze to occur, the Delaware Energy Office (“DEO”) must determine that the costs of compliance exceed a certain percentage “of the total retail cost of electricity.” Vote Solar comments that Rule 3.2.16 should define “total retail cost of electricity;” that the definition should be “quantified based on the retail cost of electricity for end-users;” and that the Commission should draw experience from other states. Vote Solar does not offer a proposed definition, nor does it identify the states that have addressed this issue. (See Vote Solar Comments, pp. 3-4).

12. Proposed Rule 3.2.15, like the statute, establishes a process whereby the Commission can, under certain

1. Due to a clerical error, the proposed changes to the RPS Rules had to be republished. See PSC Order No. 7862 (requiring republication and re-noticing the comment deadline and a new hearing date).

2. In addition to its own comments, WGES agreed with and supported RESA’s comments. (WGES Comments at 2).

3. For example, SS 1 increased the minimum percentage of solar PVs from .048% in 2011 to 2%.

circumstances, accelerate or slow the scheduled percentage increases toward meeting the goal of 25% by 2025. REPSA and proposed Rule 3.2.15 prohibit acceleration unless there is a finding that the average price for RECs and SRECs eligible for RPS compliance has been below a “predetermined market-based price threshold to be established by the Commission” for two consecutive years. See 26 Del.C. §354(j); proposed Rule 3.2.15. Section 354(j) requires the Commission to establish the “predetermined market-based price threshold” in consultation with the DEO. Although it acknowledges that the provisions of §354(j) do not take effect until compliance year 2014, Vote Solar urges the Commission “to take a proactive role and develop a plan for considering its future responsibilities” to establish this threshold with the DEO. (Vote Solar Comments, p. 5).

Discussion

13. At our regularly scheduled Commission meeting held on February 22, 2011, we heard argument from the commenters and Staff, and considered the proposed amendments to the RPS Rules and the comments received. After some discussion, we voted to table our consideration of the proposed amended rules until our next meeting. We now approve the proposed amendments to the RPS Rules as originally proposed and do not make any changes based upon the comments received.

14. We decline to include the grandfathering provision for which RESA and WGES advocate. First, it is well established in Delaware that agency regulations must be consistent with statutory policy. *Stoltz v. Delaware Real Estate Comm’n*, 473 A.2d 1258, 1263 (Del. Super. 1984). “Legislation ... may not be enacted under the guise of its exercise by adopting a rule or regulation which is out of harmony with, or which alters, extends or limits the Act, or which is inconsistent with the clear legislative intent as therein expressed.” *Wilmington Country Club v. Delaware Liquor Comm’n*, 91 A.2d 250, 255 (Del. Super. 1952). “An administrative agency may not adopt regulations which are inconsistent with the provisions of the enabling statute or out of harmony with, or extend the limits of, the Act which created it.” *Matter of Appeal of Dept. of Natural Resources and Environmental Control*, 401 A.2d 93, 96 (Del. Super. 1978).

15. If we include the requested grandfathering provision in the proposed RPS Rules, we believe we will be impermissibly “extend[ing] the limits of the Act which created it.” *Wilmington Country Club*, 91 A.2d at 255. We think it clear that the General Assembly knew how to include a grandfathering provision, as demonstrated by its express inclusion of such a provision in the previous iteration of §354. SS 1, which amended §354, omitted the provision that grandfathered pre-existing contracts. “When a legislative body amends a prior enactment by a material change in the language, it is presumed that a change in the meaning was intended.” *Simmons v. Delaware State Hosp.*, 660 A.2d 384, 389 (Del. 1995); see also *Giuricich v. Emtrol Corp.*, 449 A.2d 232, 237 (Del. 1982); *Daniel D. Rappa, Inc. v. Engelhardt*, 256 A.2d 744, 746 (Del. 1969). Thus, we must presume that the General Assembly intended to remove the grandfathering provision from §354.

16. Similarly, courts “may not engraft upon a statute language which has clearly been excluded therefrom by the Legislature.” *Alfieri v. Martinelli*, 647 A.2d 52, 54 (Del. 1994); *Giuricich, supra* at 238. If courts cannot engraft language that the Legislature has excluded, then it must be equally true that we cannot do so either. Including a grandfathering provision in the RPS Rules would be tantamount to adding a provision to §354 that the General Assembly chose not to include.

17. We disagree with RESA’s position that 26 Del.C. §362 permits us to include a grandfathering provision in the RPS Rules. That section merely requires our rules to be as “consistent as possible [with those of other states] in order to minimize the compliance burdens imposed by [REPSA] and in order to avoid duplication of effort.” All this means is that if a rule is valid under REPSA, §362 requires it to be as consistent “as possible” with the rules of neighboring jurisdictions. Before we can make a rule consistent with that of another jurisdiction, we must be able to promulgate such a rule in the first instance. A substantive enlargement of the statute under the guise of rulemaking is not permitted. See *American Insurance Association v. Delaware Department of Insurance*, 2008 WL 44322 (Del. Super. Jan. 2, 2008). Even if we did interpret §362 as RESA urges, its reliance upon Maryland is misplaced, because Maryland’s statute expressly included a grandfathering provision. (See RESA Comments, p. 6). That is not the case here.

18. Last, we reject RESA’s contention that proposed RPS Rule 3.2.2 permits us to modify the increased SREC requirements for existing contracts. Rule 3.2.2 is essentially unchanged from its previous iteration; the only change being proposed is the addition of the words “and SRECs” behind the word “RECs” in the second sentence thereof. The first sentence, which is the source of the discretion that RESA contends we have, is not being amended. That sentence provides that:

A Retail Energy Supplier’s compliance with Schedule 1¹ shall be based on accumulating RECs and SRECs equivalent to the current Compliance Year’s Cumulative Minimum Percentage of Total Retail Sales of each Retail Electricity Product sold to End-Use Customers and subject to Section 3.2.3 and, where applicable, Commission regulations.

(RPS Rule 3.2.2). Section 3.2.3 addresses the exemption provided in REPSA for EERs that were operational before

1. Schedule 1 in RPS Rule 3.2.1 of course, did change to track the amended Schedule 1 set forth in the amended REPSA.

December 31, 1997 and REPSA's mandate that beginning in 2026, all EERs used to meet the cumulative minimum percentage requirements be New Generation Resources. We do not read this rule as giving us discretion to exempt existing contracts from the amended REPSA obligations. It simply describes how a retail electric supplier shall comply with its REPSA obligations, whatever the General Assembly may determine those obligations to be.

19. We also reject RESA's argument that proposed Rule 3.2.16 should freeze RPS requirements for all electric suppliers, not just regulated electric companies. Section 354(j) of REPSA, which authorizes the freeze, specifically limits it to "regulated utilities." 26 Del.C. §354(j). Again, were we to include such a provision in the regulations, we would be effecting an impermissible substantive enlargement of the statute under the guise of rulemaking.

20. Finally, RESA's complaint that the General Assembly should have appointed an electric supplier to the Renewable Energy Task Force is more appropriately directed to the General Assembly, as it represents a disagreement with the statute rather than with any of the proposed RPS Rules. REPSA expressly identifies the entities that the General Assembly determined should be members of the Task Force, and we cannot second-guess that determination. Moreover, if RESA believes that electric suppliers are not adequately represented, it, and any of its members, is free to attend Task Force meetings and provide input. Given that, there is no need for us to "open a docket for market participants to comment on proposed issues for consideration before the Task Force."

21. We decline Vote Solar's invitation to define the term "total retail cost of electricity," which appears in proposed Rule 3.2.16 and which is the term used (but undefined) in REPSA § 354(i). Vote Solar did not offer a definition and, moreover, §354(i) of REPSA provides that the "State Energy Coordinator in consultation with the Commission may freeze" the solar requirement when the cost of compliance exceeds 1 percent of the "total retail cost of electricity for retail electricity suppliers." Consequently, the Commission thinks it best to refrain from defining "total retail cost of electricity" until it confers with the State Energy Coordinator in the context of considering a freeze on the solar requirement.

22. Last, Vote Solar's comment that the Commission should "take a proactive role and develop a plan for considering its future responsibilities" to establish the market threshold with the DEO does not require a modification to the proposed rules. We are well aware of our responsibilities, and they do not need to be included in the RPS Rules. Moreover, as Vote Solar acknowledges, the provisions of this section of REPSA do not take effect until compliance year 2014.

23. It should be apparent that the comments raise public policy considerations that are potentially inconsistent. Obviously, the General Assembly, by increasing the minimum cumulative percentages that must come from solar PVs and EERs in each compliance year, has established a public policy in favor of encouraging renewable energy. It is also obvious that by deregulating the electric supply function, the General Assembly believes that competition for the provision of such electric supply should be encouraged. Approving RESA's and WGES' proposed grandfathering provision would encourage competition at the expense of encouraging renewable energy in the short term. Also, allowing grandfathering for retail energy suppliers and not for Delmarva's SOS customers would be unfair to Delmarva's SOS customers who must pay the added cost of compliance with the new RPS requirement immediately upon its effective date. With these competing interests in mind, the Commission recognizes the policy considerations favorable to grandfathering existing contracts and would expect that it will be a topic for the General Assembly to address should there be further amendment to Delaware's REPSA. In the instant case, however, it is not for the Commission to grant exceptions to the statutory effective date without clear authorization from the General Assembly.

NOW, THEREFORE, IT IS HEREBY ORDERED BY THE AFFIRMATIVE VOTE OF NO FEWER THAN THREE COMMISSIONERS:

1. That, pursuant to 26 Del.C. §§209(a) and 821 and 29 Del.C. §§10111 et seq., the Commission hereby promulgates the revised "Rules and Procedures to Implement the Renewable Energy Portfolio Standard" (the "RPS Rules"), a true and correct copy of which is attached hereto as Exhibit A, as official regulations as defined by 29 Del.C. §1132. The revised RPS Rules replace the regulations existing at 26 DE Admin. Code §3008.

2. That, pursuant to 26 Del.C. §§10113 and 10118, the Commission Secretary shall transmit to the Registrar of Regulations for publication in the *Delaware Register* a copy of this Order and the approved RPS Rules. An exact copy of the RPS Rules attached hereto shall be published as final, official regulations in the *Delaware Register*.

3. Pursuant to 29 Del.C. §10118(g), the effective date of this Order shall be 10 days from the date this Order is published in its final form, in full or as a summary, in the *Delaware Register*.

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:

Arnetta McRae, Chair

Jeffrey J. Clark, Commissioner

Joann T. Conaway, Commissioner

Jaymes B. Lester, Commissioner

Dallas Winslow, Commissioner

ATTEST:

Alisa Carrow Bentley, Secretary

3008 Rules and Procedures to Implement the Renewable Energy Portfolio Standard

1.0 Definitions

1.1 The following words and terms, when used in this Regulation, should have the following meanings unless the context clearly indicates otherwise:

"Alternative Compliance Payment" or "ACP" means a payment of a certain dollar amount per megawatt hour, which a Retail Electricity Supplier may submit in lieu of supplying the minimum percentage of RECs required under Section 3.3.4 of this Regulation.

"Commission" means the Delaware Public Service Commission.

"Compliance Year" means the calendar year beginning with June 1 and ending with May 31 of the following year, for which a Retail Electricity Supplier must demonstrate that it has met the requirements of this Regulation.

"Customer-Sited Generation" means a Generation Unit that is interconnected on the End-Use Customer's side of the retail electricity meter in such a manner that it displaces all or part of the metered consumption of the End-Use Customer.

"DNREC" means Delaware Department of Natural Resources and Environmental Control.

"Eligible Energy Resources" means the following energy sources located within the PJM region or imported into the PJM region and tracked through the PJM Market Settlement System:

Solar Photovoltaic Energy Resources means solar photovoltaic or solar thermal energy technologies that employ solar radiation to produce electricity or to displace electricity use;

Electricity derived from wind energy;

Electricity derived from ocean energy including wave or tidal action, currents, or thermal differences;

Geothermal energy technologies that generate electricity with a steam turbine, driven by hot water or steam extracted from geothermal reservoirs in the earth's crust;

Electricity generated by a fuel cell powered by Renewable Fuels;

Electricity generated by the combustion of gas from the anaerobic digestion of organic material;

Electricity generated by a hydroelectric facility that has a maximum design capacity of 30 megawatts or less from all generating units combined that meet appropriate environmental standards as determined by DNREC (see DNREC Regulation's Secretary's Order No. 2006-WA-002735);

Electricity generated from the combustion of biomass that has been cultivated and harvested in a sustainable manner as determined by DNREC, and is not combusted to produce energy in a waste to energy facility or in an incinerator (see DNREC Regulation's Secretary's Order No. 2006-WA-002735);

Electricity generated by the combustion of methane gas captured from a landfill gas recovery system; provided, however, that:

Increased production of landfill gas from production facilities in operation prior to January 1, 2004 demonstrates a net reduction in total air emissions compared to flaring and leakage;

Increased utilization of landfill gas at electric generating facilities in operation prior to January 1, 2004 (i) is used to offset the consumption of coal, oil, or natural gas at those facilities, (ii) does not result in a reduction in the percentage of landfill gas in the facility's average annual fuel mix when calculated using fuel mix measurements for 12 out of any continuous 15 month period during which the electricity is generated, and (iii) causes no net increase in air emissions from the facility; and

Facilities installed on or after January 1, 2004 meet or exceed 2004 Federal and State air emission standards, or the Federal and State air emission standards in place on the day the facilities are first put into operation, whichever is higher.

"End-Use Customer" means a person or entity in Delaware that purchases electrical energy at retail prices from a Retail Electricity Supplier.

"Fund" means the Delaware Green Energy Fund.

"**GATS**" means the Generation Attribute Tracking System developed by PJM-Environmental Information Services, Inc. (PJM-EIS).

"**Generation Attribute**" means a non-price characteristic of the electrical energy output of a Generation Unit including, but not limited to, the Unit's fuel type, geographic location, emissions, vintage, and RPS eligibility.

"**Generation Unit**" means a facility that converts a fuel or an energy resource into electrical energy.

"**Industrial Customer**" means an End-Use Customer with a North American Industry Classification System (NAICS) Manufacturing Sector Code.

"**Municipal Electric Company**" means a public corporation created by contract between 2 or more municipalities pursuant to provisions of Title 22, Chapter 13 of the **Delaware Code** and the electric utilities that are municipally owned within the State of Delaware.

"**New Renewable Generation Resources**" means Eligible Energy Resources first going into commercial operation after December 31, 1997.

"**Peak Demand**" shall have the same meaning as and be determined consistently with how such term or a similar term is defined and determined in the applicable utility's tariff then in effect and approved by the Commission. For customers with more than one account, the peak demands shall be aggregated for all accounts. The calculation will be applied in the current year based on the Peak Demand, as defined above, in the prior year.

"**PJM**" or "**PJM Interconnection**" means the regional transmission organization (RTO) that coordinates the movement of wholesale electricity in the PJM region, or its successors at law.

"**PJM region**" means the area within which the movement of wholesale electricity is coordinated by PJM Interconnection. The PJM region is as described in the Amended and Restated Operating Agreement of PJM.

"**Renewable Energy Credit**" or ("**REC**") means a tradable instrument comprised of all the Generation Attributes equal to 1 megawatt-hour of electricity derived from Eligible Energy Resources and that is used to track and verify compliance with the provisions of this Regulation. A REC does not include emission reduction credits and/or allowances encumbered or used by a Generation Unit for compliance with local, state, or federal operating and/or air quality permits associated with the 1 megawatt-hour of electricity.

"**Renewable fuel**" means a fuel that is derived from Eligible Energy Resources. This term does not include a fossil fuel or a waste product from a fossil fuel source.

"**RPS**" and or "**Renewable Energy Portfolio Standard**" means the percentage of electricity sales at retail in the State that is to be derived from Eligible Energy Resources.

"**Retail Electricity Product**" means an electrical energy offering that is distinguished by its Generation Attributes only and that is offered for sale by a Retail Electricity Supplier to End-Use Customers. Multiple electrical energy offerings with the same Generation Attributes may be considered a single Retail Electricity Product.

"**Retail Electricity Supplier**" means a person or entity that sells electrical energy to End-Use Customers in Delaware, including, but not limited to, non-regulated power producers, electric utility distribution companies supplying standard offer, default service, or any successor service to End-Use Customers. A Retail Electricity Supplier does not include a Municipal Electric Company for the purposes of this Regulation.

"**Rural Electric Cooperative**" means a non-stock, non-profit, membership corporation organized pursuant to the Federal "Rural Electrification Act of 1936" and operated under the cooperative form of ownership.

"**Solar Alternative Compliance Payment**" or "**SACP**" means a payment of a certain dollar amount per megawatt-hour, which a Retail Electricity Supplier or Municipal Electric Supplier may submit in lieu of supplying the Minimum Percentage from Solar Photovoltaic required under Section 3.3.4 of this Regulation.

"**Sustainable Energy Utility**" or ("**SEU**") is the nonprofit entity according to the provisions of 29 **Del.C.** §8059 that develops and coordinates programs for energy end-users in Delaware for the purpose of promoting the sustainable use of energy in Delaware.

"**Solar Renewable Energy Credit**" or "**SREC**" means a tradable instrument that is equal to 1 megawatt-hour of retail electricity sales in the State that is derived from Solar Photovoltaic Energy Resources and that is used to track and verify compliance with the provisions of this Regulation.

"**Total Retail Sales**" means retail sales of electricity within the State of Delaware exclusive of sales to any Industrial Customer with a Peak Demand in excess of 1,500 kilowatts.

11 DE Reg. 1670 (06/01/08)

13 DE Reg. 952 (01/01/10)

2.0 Purpose and Scope

- 2.1 The benefits of electricity from renewable energy resources accrue to the public at large, and electric suppliers and consumers share an obligation to develop a minimum level of these resources in the electric supply portfolio of the State. The purpose of this Regulation, in support of 26 **Del.C. §351–363 Subchapter III-A**, is to set forth the rules for governing the RPS.
- 2.2 This Regulation shall apply to all retail electricity sales in the State of Delaware except for retail electricity sales of Municipal Electric Companies and retail electricity sales to any Industrial Customer with a Peak Demand in excess of 1,500 kilowatts.
 - 2.2.1 An Industrial Customer with Peak Demand in excess of 1,500 kilowatts may elect to have their load exempt from this Regulation provided that they meet the definitions found in Section 1.1 and:
 - 2.2.1.1 submit a notice to the Commission's Staff including, but not limited to, Name and Address of Industrial Customer, and NAICS Code and load for each account;
 - 2.2.1.1.1 the Commission's Staff shall, within thirty (30) days of receipt of the notice, provide to the Industrial Customer an acknowledgement of the status, exempt or non-exempt, of the Industrial Customer and;
 - 2.2.1.1.2 submit the Commission's Staff acknowledgement referenced in Section 2.2.1.1.1 of this Regulation to their Retail Electricity Supplier.
 - 2.2.2 For an End-Use Customer with multiple accounts totaling in excess of 1,500 kilowatts within an applicable utility's service territory and served by a single Retail Electricity Supplier, to have their load exempt, the aggregate of their accounts with an NAICS Manufacturing Sector Code must have a Peak Demand of at least 751 kilowatts and they must follow the procedure found in Section 2.2.1.
- 2.3 Any Rural Electric Cooperative that is has opted-out of Commission regulation by its membership pursuant to 26 **Del.C. §223** of the **Delaware Code** shall, for all purposes of administering and applying this Regulation, be treated as a Municipal Electric Company during any period of time the Rural Electric Cooperative is exempt from Commission regulation.
- 2.4 A Rural Electric Cooperative may elect to be exempt from the requirements of this Regulation ~~provided that, on or before June 1, 2006, they:~~ if it develops and implements a program for its ratepayers that is comparable to the RPS beginning in 2013. A Rural Electric Cooperative electing to be exempt from this Regulation must notify the Commission of such election and shall be subject to the requirements set forth in 26 Del.C. §363. A Rural Electric Cooperative not electing to be exempt from this Regulation shall be subject to this Regulation and the applicable provisions of 26 Del.C. §363.
 - ~~2.4.1 submit a written notice to the Delaware General Assembly;~~
 - ~~2.4.2 submit a written notice to the Commission;~~
 - ~~2.4.3 alert their End-Use Customers with notices inserted in two (2) consecutive electricity bills;~~
 - ~~2.4.4 offer their End-Use Customers a voluntary program for purchasing renewable energy under competitive rates; and~~
 - ~~2.4.5 either contribute to the Delaware Green Energy Fund at levels commensurate with other Retail Electricity Suppliers or create an independent fund separate from the Delaware Green Energy Fund to be used in support of energy efficiency technologies, renewable energy technologies, or demand side management programs, into which they make payments of \$0.178 for each megawatt-hour they sell, transmit, or distribute in the State.~~

11 DE Reg. 1670 (06/01/08)

3.0 Administration of RPS

- 3.1 Certifying Eligible Energy Resources:
 - 3.1.1 The Commission through its Staff will certify Generation Units as Eligible Energy Resources based on the definition of Eligible Energy Resources found in Section 1.1 of this Regulation.
 - 3.1.2 Any Generation Unit seeking certification as an Eligible Energy Resource must submit an Application for Certification as an Eligible Energy Resource Under the Delaware Renewable Energy Portfolio Standard (Application) to the Commission. This may include Customer-Sited Generation or a Generation Unit owned or operated by a Municipal Electric Company.
 - 3.1.3 Commission Staff will review the Application and will notify the applicant of its approval as an Eligible Energy Resource or of any deficiencies in their Application within 30 days of receipt. The applicant will have the opportunity to revise their submission, if appropriate.
 - 3.1.4 If Commission Staff finds the Generation Unit to be in compliance with ~~Sections 1.0 and 3.0 of this Regulation, as well as any this Regulation and~~ other applicable ~~Delaware statute law~~, Commission Staff will issue a State of Delaware Certification Number.

- 3.1.5 Upon receipt of the State of Delaware Certification Number, a Generation Unit will be deemed an Eligible Energy Resource.
- 3.1.6 Upon designation as an Eligible Energy Resource, the Generation Unit's owner shall be entitled to one (1) ~~Renewable Energy Credit~~ REC for each mega-watt hour of energy derived from Eligible Energy Resources other than Solar Photovoltaic Energy Resources. Upon designation as an Eligible Energy Resource, the owner of a Generation Unit employing Solar Photovoltaic Energy Resources shall be entitled to one (1) ~~Solar Renewable Energy Credit~~ SREC for each mega-watt hour of energy derived from Solar Photovoltaic Energy Resource. SRECs and RECs will be created and supplied by the PJM-EIS GATS, or its successor at law. Eligible Energy Resources are subject to applicable PJM-EIS GATS rules and shall pay applicable PJM-EIS GATS fees.
- 3.1.6.1 ~~However, if in the future, The Commission may establish or participate in another renewable energy tracking system, if the Commission finds that PJM-EIS's GATS is not applicable or not suited to meet the needs or requirements of the RPS. the Commission may establish or participate in another renewable energy tracking system.~~
- 3.1.7 ~~RECs or SRECs created by Eligible Energy Resources on or after June 1, 2006 shall be valid to meet retail electricity supplier requirements, subject to Section 3.2.3 of this Regulation.~~
- 3.1.7.4 If a Generation Unit is deemed an Eligible Energy Resource under Section 3.1 and the Eligible Energy Resource's GATS account continues to be maintained in good standing, the Eligible Energy Resource may achieve a Delaware designation for RECs or SRECs recorded with PJM-EIS's GATS for the calendar year being traded in GATS at the time of the Commission Staff's approval of the Eligible Energy Resource, ~~but no earlier than June 1, 2006.~~
- 3.1.8 An Eligible Energy Resource will remain certified unless substantive changes are made to its operational characteristics. Substantive changes include, but are not limited to changes in fuel type, fuel mix and generator type. An Eligible Energy Resource making substantive changes to its operational characteristics shall notify the Commission of such changes at least 30 days prior to the effective date of such changes. At such time, the Generation Unit shall submit a revised Application, which shall be subject to ~~the process laid out in review and re-certification pursuant to~~ Section 3.1 of this Regulation.
- 3.1.9 RECs or SRECs created by an Eligible Energy Resource shall remain valid for compliance, subject to Section 3.2.3 and Section 3.3.3 of this Regulation, even if that Eligible Energy Resource is subsequently decertified for eligibility.
- 3.2 Compliance with RPS
- 3.2.1 The Total Retail Sales of each Retail Electricity Product sold to End-Use Customers by a Retail Electricity Supplier during any given Compliance Year shall include a minimum percentage of electrical energy sales from Eligible Energy Resources and Solar Photovoltaics as shown in Schedule 1. ~~Any portion of a Retail Electric Supplier's renewable energy supply portfolio for 2007, 2008 and 2009 Compliance Years that is acquired under wholesale renewable energy supply entered into pursuant to the 2005 or 2006 Delaware Standard Offer Services ("SOS") auctions shall be subject to the provisions of this Regulation as shown in Schedule 2 below that were in effect on the date of the 2005 or 2006 SOS auction.~~

SCHEDULE 1		
Compliance Year (beginning June 1st)	Cumulative Minimum Percentage from Solar Photovoltaics Energy Resources	Minimum Cumulative Percentage from Eligible Energy Resources
2007		2.0%
2008	0.011%	3.0%
2009	0.014%	4.0%
2010	0.018%	5.50%
2011	0.04820%	7.0%
2012	0.09940%	8.5%
2013	0.20160%	10.0%
2014	0.35480%	11.5%
2015	0.559 1.0%	13.0%
2016	0.803 1.25%	14.5%
2017	1.11250%	16.0%
2018	1.54775%	18.017.5%
2019	2.005%	2019.0%

<u>2020</u>	<u>2.25%</u>	<u>20.00%</u>
<u>2021</u>	<u>2.50%</u>	<u>21.00%</u>
<u>2022</u>	<u>2.75%</u>	<u>22.00%</u>
<u>2023</u>	<u>3.00%</u>	<u>23.00%</u>
<u>2024</u>	<u>3.25%</u>	<u>24.00%</u>
<u>2025</u>	<u>3.50%</u>	<u>25.00%</u>

SCHEDULE 2

Compliance Year (beginning June 1st)	Minimum Cumulative Percentage from Solar Photovoltaics Energy Resources	Minimum Cumulative Percentage from Eligible Energy Resources
2007		1.00%
2008	0.011%	1.50%
2009	0.014%	2.00%
2010	0.018%	5.00%
2011	0.048%	7.00%
2012	0.099%	8.50%
2013	0.201%	10.00%
2014	0.354%	11.50%
2015	0.559%	13.0%
2016	0.803%	14.5%
2017	1.112%	16.00%
2018	1.547%	18.00%
2019	2.005%	20.00%

Minimum Cumulative Percentage from Eligible Energy Resources includes the Minimum Cumulative Percentage from Solar Photovoltaics

- 3.2.2 A Retail Electricity Supplier's compliance with Schedule 1 shall be based on accumulating RECs and SRECs equivalent to the current Compliance Year's Cumulative Minimum Percentage of Total Retail Sales of each Retail Electricity Product sold to End-Use Customers and subject to Section 3.2.3 and, where appropriate, Commission regulations.¹ Such RECs and SREC's shall be filed annually with the Commission within 120 days following the completion of the Compliance Year.
- 3.2.3 Each Retail Electricity Supplier can provide no more than 1% of each Compliance Year's Total Retail Sales from Eligible Energy Resources operational before December 31, 1997. The remainder of each year's retail sales, up to the required amount as specified in Section 3.2.1 of this Regulation must come from New Renewable Generation resources. In Compliance Year 2020~~6~~ and for each Compliance Year thereafter, all Eligible Energy Resources used to meet the cumulative minimum percentage requirements set by the Commission rules shall be New Renewable Generation Resources.
- 3.2.4 A Retail Electricity Supplier shall not use RECs or SREC's used to satisfy another state's renewable energy portfolio requirements for compliance with Schedule 1. A Retail Electricity Supplier may sell or transfer any RECs or SRECs not required to meet this Regulation.
- 3.2.5 On or after June 1, 2006, Eligible Energy Resources may create and accumulate RECs or SRECs for the purposes of calculating compliance with the RPS.
- 3.2.6 Aggregate generation from small Eligible Energy Resources, 100 kilowatts of capacity or less, may be used to meet the requirements of Schedule 1, ~~or Schedule 2~~ provided that the generators or their agents, on an annual basis, document the level of generation, as recorded by appropriate metering.

1. The Commission understands the legislation to mean that the Total Retail Sales of *each* Retail Electricity Product sold to End-Use Customers during a given Compliance Year shall include a minimum percentage of SRECs and RECs determined by the current Cumulative Minimum Percentage as defined in Schedule 1 ~~or Schedule 2~~. The Commission shall, in another proceeding, further define how SRECs and RECs from Green Power products, as that term is defined in Commission Docket Number 49, are to be tracked and utilized for compliance in the RPS.

- 3.2.7 A Retail Electricity Supplier or Rural Electric Cooperative shall receive 300% credit toward meeting the Minimum Cumulative Percentage from Eligible Energy Resources of Schedule 1 ~~or Schedule 2~~ of the RPS for energy derived from the following sources installed on or before December 31, 2014:
- 3.2.7.1 Customer-Sited solar photovoltaic physically located in Delaware; or
 - 3.2.7.2 A fuel cell powered by Renewable Fuels, for Retail Electricity Suppliers, and a fuel cell sited in Delaware for Rural Electric Cooperatives.
- 3.2.8 A Retail Electricity Supplier or Rural Electric Cooperative shall receive 150% credit toward meeting the RPS for wind energy installations sited in Delaware on or before December 31, 2012.
- 3.2.9 A Commission regulated electric company shall receive 350% credit toward meeting the Renewable Energy Portfolio Standards established for energy derived from off-shore wind energy installations sited off the Delaware coast on or before May 31, 2017.
- 3.2.9.1 To be entitled to 350% credit, contracts for energy and renewable energy credits from such off-shore wind energy installations must be executed by Commission regulated electric companies prior to commencement of construction of such installations.
 - 3.2.9.2 Commission regulated electric companies shall be entitled to such multiple credits for the life of contracts for renewable energy credits from off-shore wind installations executed pursuant to section 3.2.9.
- 3.2.10 A Retail Electricity Supplier or a Rural Electric Cooperative shall receive an additional 10% credit toward meeting the RPS for solar or wind energy installations sited in Delaware provided that a minimum of 50% of the cost of the renewable energy equipment, inclusive of mounting components, are manufactured in Delaware.
- 3.2.11 A Retail Electricity Supplier or a Rural Electric Cooperative shall receive an additional 10% credit toward meeting the RPS for solar or wind energy installations sited in Delaware provided that the facility is constructed and/or installed with a minimum of 75% in-state workforce.
- 3.2.102 A Retail Electricity Supplier or a Rural Electric Cooperative shall receive credit toward meeting the RPS for electricity derived from the fraction of eligible landfill gas, biomass or biogas combined with other fuels (for a Rural Electric Cooperative the Eligible Energy Resource must be sited in Delaware).
- 3.2.143 Cumulative minimum percentage requirements of Eligible Energy Resources and Solar Photovoltaic Resources shall be established by Commission rules for Compliance Year 20206 and each subsequent year. In no case shall the minimum percentages established by Commission rules be lower than those required for Compliance Year 204925 in Schedule 1 or Schedule 2. Each of the rules setting such minimum percentage shall be adopted at least two years prior to the minimum percentage being required.
- 3.2.124 Beginning in Compliance Year 2010, and in each Compliance Year thereafter, the Commission may review the status of Schedule 1 and Schedule 2 and report to the legislature on the status of the pace of the scheduled percentage increases toward the goal of 205%. If the Commission concludes at this time that the schedule either needs to be accelerated or decelerated, it may also make recommendations to the General Assembly for legislative changes to the RPS.
- 3.2.135 Beginning in Compliance Year 2014, and in each Compliance Year thereafter, the Commission may, in the event of circumstances specified in this subsection and after conducting hearings, accelerate or slow the scheduled percentage increases towards meeting the goal of 205%. The Commission may only slow the increases if the Commission finds that at least 30% of RPS compliance has been met through the ACP or SACP for three (3) consecutive years, despite adequate planning by the Retail Electricity Suppliers. The Commission may only accelerate the scheduled percentage increases after finding that the average price for RECs and SRECs eligible for RPS compliance has, for two (2) consecutive years, been below a predetermined market-based price threshold to be established by the Commission. The Commission shall establish the predetermined market-based price threshold in consultation with the Delaware Energy Office. Rules that would alter the percentage targets shall be promulgated at least two years before the percentage change takes effect. In no event shall the Commission reduce the percentage target below any level reached to that point.
- 3.2.16 The minimum percentages from Eligible Energy Resources and Solar Photovoltaic Energy Resources as shown in Schedule 1 may be frozen for Commission-regulated electric companies as authorized by, and pursuant to, 26 Del.C. § 354(i)-(j). For a freeze to occur, the Delaware Energy Office must determine that the cost of complying with the requirements of this Regulation exceeds, for Solar Photovoltaic Energy Resources, 1%, and for Eligible Energy Resources, 3%, of the total retail cost of electricity for retail electricity suppliers during the same compliance year. The total cost of compliance shall include the costs associated with any ratepayer funded state renewable energy rebate program, REC and SREC purchases, and ACPs and SACPsalternative compliance payments.

- 3.2.16.1 Once frozen, the minimum cumulative requirements shall remain at the percentage for the compliance year in which the freeze was instituted.
- 3.2.16.2 The freeze may be lifted only upon a finding by the State Energy Coordinator, in consultation with the Commission, that the total cost of compliance can reasonably be expected to be under the 1% or 3% threshold, as applicable.
- 3.2.17 The Renewable Energy Taskforce shall be formed for the purpose of making recommendations about the establishment of trading mechanisms and other structures to support the growth of renewable energy markets in Delaware according to 26 Del.C. §360(d).
- 3.3 Verification of Compliance with the RPS
 - 3.3.1 Within 120 days of the end of a compliance year, each Retail Electricity Supplier who has made sales to an End-use Customer in the State of Delaware must submit a completed Retail Electricity Supplier's Verification of Compliance with the Delaware Renewable Energy Portfolio Standard Report (Report) which includes, but is not limited to, evidence of the specified number of SRECs and RECs required for that Compliance Year according to Schedule 1 ~~or Schedule 2~~ and the Total Retail Sales of each Retail Electricity Product.
 - 3.3.2 SRECs or RECs must have been created by PJM-EIS's GATS, or its successor at law or pursuant to Section 3.1.6.1 of this Regulation.
 - 3.3.3 SRECs or RECs, submitted for compliance with this Regulation, may be dated no earlier than three (3) years prior to the beginning of the current Compliance Year.
 - 3.3.4 The three (3) year period referred to in 3.3.3 shall be tolled during any period that a renewable energy credit or solar renewable energy credit is held by the SEU as defined in 29 Del.C. §8059.
 - 3.3.5 In lieu of standard means of compliance with the RPS, any Retail Electricity Supplier may pay into the Fund a SACP or ACP pursuant to ~~the provisions of~~ , and in such amounts as stated in, 26 Del.C. §358, or in such other amounts as may be determined by the State Energy Coordinator of the Delaware Energy Office consistent with 26 Del.C. §354(a)(d)-(e).
 - 3.3.6 The Commission Staff shall notify any Retail Electricity Supplier of any compliance deficiencies within 165 days of the close of the current Compliance Year. If the Retail Electricity Supplier is found to be deficient by the Commission Staff, the Retail Electricity Supplier shall be required to pay the appropriate ACP or SACP, according to Section 3.3.4 of this Regulation. All such payments shall be due within 30 days of notification by the Commission Staff. Upon receipt of payment, the Retail Electricity Supplier shall be found to be in compliance for that given year.
 - 3.3.7 All compliance payments, made by the Retail Electricity Supplier, shall be payable to the Delaware Green Energy Fund and sent to the Commission.

11 DE Reg. 1670 (06/01/08)

12 DE Reg. 1110 (02/01/09)

13 DE Reg. 952 (01/01/10)

4.0 Recovery of Costs

- 4.1 A Retail Electricity Supplier may recover, through a non-bypassable surcharge on its supply portion of the bill, actual dollar for dollar costs incurred in complying with the State of Delaware's RPS, except that any compliance fee assessed pursuant to Section 3.3.4 and its subsections of these Rules and Regulation shall be recoverable only to the extent authorized by Section 4.2 of this Regulation.
- 4.2 A Retail Electricity Supplier may recover any ACP or SACP if the payment of an ACP or SACP is the least cost measure to ratepayers as compared to the purchase of RECs and SRECs to comply with the RPS; or if there are insufficient RECs and SRECs available for the Retail Electricity Supplier to comply with the RPS.
- 4.3 Any cost recovered under this section shall be disclosed to customers at least annually on inserts accompanying customer bills.
- 4.4 Special provisions for customers of Public Service Commission regulated electric companies. All costs arising out of contracts entered into by a Commission regulated electric company pursuant to 26 Del.C. §1007 (d) shall be distributed among the entire Delaware customer base of such companies through an adjustable non-bypassable charge which shall be established by the Commission. Such costs shall be recovered if incurred as a result of such contracts unless, after Commission review, any such costs are determined by the Commission to have been incurred in bad faith, are the product of waste or out of an abuse of discretion, or in violation of law.

11 DE Reg. 1670 (06/01/08)

12 DE Reg. 1110 (02/01/09)

5.0 Other General Rules

- 5.1 Under Delaware's Freedom of Information Act, 29 **Del.C.** ch. 100, all information filed with the Commission is considered of public record unless it contains "trade secrets and commercial or financial information obtained from a person which is of a privileged or confidential nature." 29 **Del.C.** §10002(d)(2). To qualify as a non-public record under this exemption, materials received by the Commission must be clearly and conspicuously marked on the title page and on every page containing the sensitive information as "proprietary" or "confidential" or words of similar effect. The Commission shall presumptively deem all information so designated to be exempt from public record status. However, upon receipt of a request for access to information designated proprietary or confidential, the Commission may review the appropriateness of such designation and may determine to release the information requested. Prior to such release, the Commission shall provide the entity that submitted the information with reasonable notice and an opportunity to show why the information should not be released.
- 5.2 Any End-Use Customer, Retail Electricity Supplier, Eligible Energy Resource, potential Eligible Energy Resource or other interested party to which this Regulation may apply may file a complaint with the Commission pursuant to the Rules of Practice and Procedure of the Delaware Public Service Commission.
- 5.3 The failure to comply with this Regulation may result in penalties, including monetary assessments, suspension or revocation of eligibility as an Eligible Energy Resource, or other sanction as determined by the Commission consistent with 26 **Del.C.**, §205(a), §217, and §1019.

10 DE Reg. 151 (07/01/06)

11 DE Reg. 1670 (06/01/08)

14 DE Reg. 1218 (05/01/11)

14 DE Reg. 1241 (05/01/11)