Comments of Jeremy Firestone\textsuperscript{1} on Proposed Rules for RPS Cost Caps\textsuperscript{2}

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In general, the proposed rules are well thought out, but there are a number of areas, where the rules depart explicitly from the statute; in other cases, the rules could be clarified. Finally, the rules appropriately provide the Energy and Climate Division Director with discretion of whether or not to implement a freeze once the Director determines that the three (3\%) percent threshold has been reached.

First, the departures:

1. The proposed rules (section 4.2.1) inappropriately include the costs related to the Green Energy Fund in compliance cost, but section 354 (j) refers to the cost of complying with “this” requirement. This requirement is the RPS, referred into in earlier subsections of section 354. The Green Energy Fund is an entirely different part of the code, in Title 29 rather than Title 26, was adopted in 2003 as part of the Delaware Energy Act, while the RPS was adopted in 2005, and such is clearly outside of scope of “this” requirement,

2. Section 354(j) only grants the State Energy Coordinator/Energy and Climate Division Director the discretion to freeze the RPS after consultation with the Public Service Commission. The proposed rules however fail to require such consultation and thus must be modified. After the fact notification (section 6.1.1), is not sufficient.

3. The statute is clear: the Director may only consider a freeze if the cost of compliance “exceeds” the 3\% threshold; the proposed rules (5.2; 5.3) provide she may do so if the costs are “equal to” or are greater than the threshold.

4. The proposed rules (7.3) provide that the Director “may determine when and whether to lift” freeze. However, the statute is clear that the State Energy Coordinator does not have discretion. Rather, the freeze “shall be lifted” if

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\textsuperscript{2} I incorporate by reference, Pre-Rulemaking Comments of Jeremy Firestone on Renewable Portfolio Standards Cost Considerations (October 19, 2012), attached hereto as Attachment A.
the total cost of compliance can “reasonably be expected” to be under threshold.

Second, the clarifications:

1. Section 6.2 of the proposed rules provides that “In implementing a freeze under these rules, existing contracts … shall not be abrogated. That is a good first step, but it assumes that a freeze could be implement in all circumstances where existing contracts are not abrogated. If all of a given year’s RPS obligations are being met through existing contracts, a freeze could not be implemented. I suggest that this concept be moved to its own section, e.g., section 9, entitled, “Abrogation of Contracts” and DNREC simply state that “Notwithstanding any other provision in these rules, existing contracts for the production or delivery of RECs, SRECs, renewable energy supply or other environmental attributes shall not be abrogated.”

2. DNREC should clarify and explicitly include each of the following criteria when deciding whether or not to enact a freeze or should acknowledge that they are included within the language and concepts provided in the proposed rules (Sections 5.4 - 5.8; 7.2)

   a. The absolute dollar change in average consumer bills adjusted for inflation since June 2010. Because the provision was added to protect consumers, the change in cost of energy since enactment, as adjusted by inflation, is relevant.

   b. The percentage of RECs held. From a cost-benefit perspective, there is a vast difference between consumers paying 3% of retail costs for RECs for renewable energy resources equal to 5% of load and that same percentage for renewable energy resources equal to 25% of load.

   c. The absolute cost of RECs in the year in question as a percentage of total retail costs. The cost of RECs to consumers at a given moment in time is relevant. Thus, with a jurisdictional threshold of 3%, it is relevant whether the percentage, for example is 3.1% or 10%.

   d. The incremental (year to year increase) cost of RECs. Consumers may be most concerned about year--to-year price increases because price spikes create difficulties for consumers to plan. Thus, it is relevant whether REC costs increased by $1 or $5.

   e. The cumulative cost of RECs as a percentage of total retail costs since program inception. When the PSC considers long-term contracts, it considers long-term effects on consumers. DNREC should as well. From a consumer’s standpoint, the to-date effect on one’s wallet is relevant.
The reason why REC costs increased as a percentage of total retail costs.

REC costs can increase as a percentage of total retail costs because REC costs have increased or other costs have decreased or both. A freeze has greater justification if the threshold is exceeded because REC costs increased than if other costs decreased, since the purpose of the provision is to guard against consumer paying too much for RECs.

Lastly, DNREC has discretion to implement a freeze.

1. The General Assembly used the permissive “may” freeze rather than “shall” indicating discretion.

2. Also support by “legislative intent,” which is determined by a review of the “statutory context and purpose” on a “case-by-case basis”
   a. If “may” mandatory there would be no need for DNREC to consult with the PSC prior to implementing a freeze.
   b. Interpreting as mandatory would require courts to conclude that the General Assembly had impliedly repealed/modified existing Delmarva Power contracts.
   c. Because section 354 (j) includes both “may” (freeze) and “shall” (lift the freeze) suggests that the primary meaning of “may” (permissive) was intended by the General Assembly.
   d. In 26 Del Code. § 363(f-g), for municipal electric companies and rural electric cooperatives, provided hard caps, using the language “shall not exceed” compared to 354 (j), “may” freeze

3. Legislative statements unhelpful
   a. Should exercise caution in attributing the statements of individuals as being representative of the General Assembly as a whole
   b. Senator Harris McDowell statement
      i. There is an option to freeze, but option is held by utilities
         1. Not clear whether he was talking about Delmarva Power or Munis and the Coop.
   c. Collin O’Mara in House
      i. If solar RPS exceeds 1% threshold, the RPS would be frozen.
         1. This is a true and accurate statement regarding § 363, and its application to the Munis and the Coop.
ii. Consumer protection provisions were included to ensure there would not be adverse impacts from the legislation.

1. Suggests intent was not to protect consumers from price effects associated with the existing RPS, but only price effects that might be caused by that portion of the RPS that was added by the 2010 legislation

4. If, assuming arguendo, giving “may” its common sense meaning would result in an improper, standardless delegation, the consumer protection provisions in their entirety must be struck down because construing “may” as mandatory is manifestly inconsistent with statutory intent.