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September 13, 2016

BY ELECTRONIC MAIL

Ms. Lisa Vest
Hearing Officer
Department of Natural Resources and Environmental Control
89 Kings Highway
Dover, DE 19901

RE: Proposed Regulation 2015 – EM&V Procedures and Standards

Dear Ms. Vest:

These comments to the Department of Natural Resources and Environmental Control's ("DNREC") proposed Regulation 2105[1] (the "Regulation") are submitted on behalf of Delaware Municipal Electric Corporation, Inc. ("DEMEC"). DEMEC is a statutorily created Joint Action Agency that serves as a wholesale electric utility for nine Delaware municipalities that operate electric distribution utilities.[2] Collectively, DEMEC's member utilities provide electric service to more than 67,000 end-use meters and a total population of nearly 130,000 Delaware residents.

The purpose of the Regulation is to adopt uniform, standardized procedures for evaluating, measuring, verifying, and reporting ("EM&V") the energy savings that result from implementation of energy efficiency and demand response programs (collectively "efficiency programs"). As currently drafted, however, the Regulation does not clearly recognize DEMEC's absolute authority to independently develop, fund and implement efficiency programs determined to be in the best interests of municipal ratepayers. DEMEC's plenary authority to implement efficiency programs within municipal service territories is both inherent and

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[1] The Regulation was published in the August, 2016, issue of the Delaware Register of Regulations and posted online at:
http://regulations.delaware.gov/register/august2016/proposed/20%20DE%20Reg%2095%2008-01-16.htm.

[2] DEMEC's nine member municipalities are Clayton, Dover, Lewes, Middletown, Milford, Newark, New Castle, Seaford and Smyrna.

statutorily conferred[3], and its exercise is not subject to, and does not require, DNREC review or approval. Consequently, DEMEC respectfully requests that the Regulation, or the Secretary's Order adopting the Regulation, expressly confirm DEMEC's exemption from the requirements in the Regulation related to energy efficiency program and portfolio development and cost-benefit analysis. Delaware law and the legislative history behind the enactment of Senate Bill 150[4] ("SB150") by the 147th General Assembly supports DEMEC's request.

History of Statutory Energy Efficiency Requirements

A. Energy Efficiency Resource Standards

In 2009, the General Assembly recognized and prioritized cost-effective energy efficiency as an energy supply resource through enactment of the 'Energy Efficiency Resources Standards Act of 2009' ("EERS").[5] For "affected electric energy providers" such as DEMEC, the EERS establishes aggressive energy efficiency and peak demand reduction targets that increase incrementally from 2% in 2011 to 15% by 2015.[6] The EERS further requires affected electric energy providers to report their electric consumption and peak usage data to DNREC on an annual basis, and vests DNREC with authority to promulgate regulations establishing the EM&V procedures under which utilities are to demonstrate compliance.[7] The manner by which utilities achieve compliance, however, is not mandated. The EERS specifically affords each affected electric energy provider with complete autonomy to implement and fund efficiency programs. This autonomy is codified §1505(b) of the EERS, which provides that "[e]ach individual affected energy provider may determine how best to fund activities necessary to achieve the energy savings goals within its service territory and implement programs as it sees fit."[8]

Within a few years of passage of the EERS, it became apparent that Delaware was unlikely to achieve the legislated efficiency targets by 2015. An EERS Workgroup Report submitted to DNREC in June of 2011 reported that modifications to the "1) funding for efficiency investments; 2) efficiency targets; and/or 3) the timeframe to accomplish the targets" were necessary if Delaware was going to achieve the efficiency gains mandated by the EERS.[9] The Workgroup Report identified an extreme disparity between the funding available for efficiency programs and the levels of investment estimated to be necessary for Delaware to achieve the EERS targets.[10] Compounding the funding disparity is a financial disincentive against efficiency

[3] 29 *Del. C.* §8059(h)(1)f. (discussed below).
[4] 79 *Del. Laws* c. 395. The link to Senate Bill 150 and its legislative history is available at: http://legis.delaware.gov/LIS/lis147.nsf/vwLegislation/SB+150/$file/legis.html?open.
[5] 26 *Del. C.* c. 15, *et. seq.*; 77 *Del. Laws* c. 188.
[6] 26 *Del. C.* §1502(a)(1).
[7] 26 *Del. C.* §§1503(b) and 1504(a).
[8] 26 *Del. C.* §1505(b).
[9] State of Delaware *Energy Efficiency Resource Standards Workgroup Report* (June 14, 2011)("Workgroup Report") at p. 1. The entire Workgroup Report is available at: http://www.dnrec.delaware.gov/energy/information/Documents/EERS/Final%20EERS%20Workgroup%20Report.pdf.
[10] Workgroup Report at p. 1 and 32.

investments in the EERS that prohibits Public Service Commission-regulated utilities - i.e. Delaware's largest electric distribution utility - from rate recovering any efficiency investments.[11] The Workgroup Report, therefore, identified policy alternatives that could be used to stimulate more investment in efficiency programs and move toward the EERS' goal of a 15% reduction in overall energy consumption.[12] Many of these recommendations, including rate recovery for cost-effective energy efficiency investments and a linkage between the EERS and the State's renewable portfolio standard ("RPS"),[13] would become part of legislation introduced in 2013 in response to the Workgroup Report.

B. House Bill 179 and Senate Bill 150

House Bill 179[14] and Senate Bill 150 were both introduced in June of 2013 during the first session of the 147th General Assembly. As introduced, Senate Bill 150 ("SB150") was exclusively legislation that amended the Sustainable Energy Utility's enabling act to implement recommendations made by the General Assembly's Joint Sunset Committee. There were no provisions in HB150 dealing with energy efficiency at all. House Bill 179 ("HB179"), on the other hand, was introduced in response to the Workgroup Report to simplify the EERS and drive investments in efficiency programs. Although HB179 passed the House of Representatives on June 13, 2013, it was never acted on in the Senate. Through the art of legislative compromise, however, virtually all of HB179 was grafted into SB150 through a House amendment and ultimately became law when SB150 was enacted.[15]

The provisions from HB179 that became law as a part of SB150 include: the requirement that affected energy providers continue to implement cost-effective energy efficiency programs notwithstanding progress toward the EERS energy savings targets[16]; the creation of an advisory council (the "EEAC") to assist affected energy providers develop efficiency programs and make recommendations for cost-effective energy efficiency program portfolios[17]; the inclusion of EM&V costs within the cost-effectiveness test for program portfolios[18]; Public Service Commission review and approval of rate recovery for EEAC-approved efficiency programs implemented by regulated utilities[19]; a linkage with the RPS that allows electric utilities to apply a portion of their energy efficiency savings toward RPS requirements if certain conditions are met[20]; EEAC collaboration with affected energy providers to promote efficiency programs

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11 26 *Del. C.* §1505(g).
12 Workgroup Report at §7.2, p. 44-50.
13 26 *Del. C.* §351, *et. seq*.
14 The link to HB179 and its legislative history is available online at: http://legis.delaware.gov/LIS/LIS147.NSF/vwLegislation/HB+179?Opendocument.
15 The link to House Amendment No. 2 to HB150 is available online at: http://www.legis.delaware.gov/LIS/lis147.nsf/vwLegislation/HA+2+to+SB+150/$file/legis.html?open.
16 29 *Del. C.* §8059(h).
17 29 *Del. C.* §8059(h)(1)a - c.
18 29 *Del. C.* §8059(h)(1)d.
19 29 *Del. C.* §8059(h)(1)e.
20 29 *Del. C.* §8059(h)(1)f.

through a common marketing platform[21]; and DNREC promulgation of EM&V procedures and standards.[22]

Also carried over to SB150 from HB179 is an express statutory recognition of DEMEC's complete autonomy to develop and implement efficiency programs and portfolios independent of the EEAC's review or approval. The relevant statutory provisions are codified as subparagraph b., c. and f. of §8059(h)(1) of Title 29. Pursuant to subparagraph b. the EEAC is to recommend 3-year program portfolios and savings targets for each affected energy provider.[23] Subparagraph c. then requires affected energy providers to develop implementing plans, budgets and schedules designed to reflect the EEAC's recommended program portfolios. This requirement, however, is prefaced by subparagraph c.'s introductory phrase "Unless otherwise provided . . . ."[24] The inclusion of the language "Unless otherwise provided" is an intentional reference by the Legislature to the exemption for DEMEC and other non-regulated affected energy providers codified in subparagraph f. Subparagraph f. states:

> f. Affected energy providers that are not regulated by the [Public Service] Commission may elect to develop, implement and fund programs for energy efficiency and peak demand reduction recommended for approval by the boards of directors for rural electric cooperatives or the pertinent local regulatory authorities for municipal electric companies. For purposes of any comparable plan implemented pursuant to the requirements of § 363 of Title 26, energy efficiency resulting in a reduction in overall energy consumption that exceeds 10% of the electricity provider's 2007 electric consumption shall constitute an eligible energy resource under § 352(6) of Title 26, provided such energy provider has first achieved the 15% energy savings goal as required by § 1502(a)(1) of Title 26 and determined pursuant to paragraph (h)(3) of this section. Such energy efficiency shall be measured and verified as provided in paragraph (h)(3) of this section.[25]

Other provisions of §8059(h) enacted through passage of HB150 impose requirements as to which DEMEC is not exempt. For instance, the energy savings from efficiency programs implemented by DEMEC must be evaluated, measured and verified using the EM&V standards adopted by DNREC in order for those savings to be counted toward DEMEC's EERS requirements.[26] As is the case with the EERS though, DEMEC retains ultimate authority and autonomy pursuant to §8059(h)(1)f. to develop and deliver the efficiency programs it believes will meet the State's legislated efficiency goals in a manner consistent with the best interests of DEMEC's member municipalities and ratepayers.

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21 29 *Del. C.* §8059(h)(1)g.

22 29 *Del. C.* §8059(h)(3).

23 29 *Del. C.* §8059(h)(1)b. provides: "The advisory council shall recommend 3-year program portfolios and define associated savings targets for the consideration of each affected energy provider.".

24 29 *Del. C.* §8059(h)(1)c. states, in relevant part: "Unless otherwise provided, affected energy providers shall prepare and submit to the advisory council 3-year program plans, schedules, and budgets designed to reflect the recommended program portfolios, including the defined energy savings targets.".

25 29 *Del. C.* §8059(h)(1)f.

26 29 *Del. C.* §8059(h)(3).

Regulation 2105

DNREC's proposed Regulation 2105 does not clearly recognize DEMEC's authority to implement efficiency programs independent of the EEAC. The Regulation makes no reference to DEMEC's statutory authority under §8059(h)(1)f. to develop and deliver efficiency programs as it deems appropriate. The lack of reference to §8059(h)(1)f. in the Regulation creates unnecessary confusion. Section 8059(h) of Title 29 envisions the EEAC playing a complimentary role, making recommendations in the development of efficiency programs to assist DEMEC with achieving progress toward the EERS' targets. The Regulation, however, makes the EEAC the entity responsible for coordinating and overseeing all statewide energy efficiency program evaluations and EM&V related activities, including the approval of portfolio-level budgets.[27]

The Regulation tasks the EEAC with developing a comprehensive 3-year EM&V plan, including overall EM&V budgets, and a general plan of EM&V activities to be conducted each year.[28] Program Administrators, a term the Regulation uses instead of, but which encompasses, the statutory term "affected energy providers", are responsible under the Regulation for implementing the EM&V activities necessary for their energy efficiency portfolio.[29] The requirements placed on Program Administrators such as DEMEC include advising the EEAC in advance of major changes to existing programs so that the EEAC can "develop or approve necessary EM&V plans."[30] The Regulation also requires Program Administrators to provide prospective and retrospective cost-effectiveness test results at the program and portfolio level for review by the EEAC.[31] Each of these requirements arguably crosses into areas as to which DEMEC has full decision-making authority.

Conclusion

DEMEC representatives participated in the EEAC meetings as part of the promulgation of the Regulation, and DEMEC does not believe DNREC intends the Regulation to be mandatory as to DEMEC. DNREC representatives repeatedly confirmed during the promulgation of the Regulation that DEMEC may use the EM&V provisions of the Regulation if it wants to, but it is not required to do so. DEMEC's interpretation, based on of the relevant statutory provisions and the Regulation, is that it may develop and implement efficiency programs determined to be in the best interest of its member municipalities and their ratepayers, but the energy savings from any such programs must be measured, evaluated and confirmed using the standards and procedures adopted by DNREC in the Regulation in order to count toward DEMEC's EERS requirements. In order to avoid any confusion, however, DEMEC respectfully requests that DNREC respond to these comments by either: 1) amending the Regulation to include a provision mirroring the first sentence of §8059(h)(1)f. as a part of Paragraph 5.4 detailing the responsibilities of Program

[27] Regulation 2015 at ¶5.2.1.
[28] Regulation 2015 at ¶5.2.5.1 and 2.
[29] Regulation 2015 at ¶5.4.2.
[30] Regulation 2015 at ¶5.4.3.
[31] Regulation 2015 at ¶6.2.1.

Administrators[32]; or 2) confirming DEMEC's interpretation as to the non-binding nature of the Regulation in the Secretary's Order adopting the Regulation.

I appreciate your consideration of these comments. If you have any questions or would like additional information, I am available at your convenience.

Respectfully submitted,

/S/ James D. Nutter

James D. Nutter

JDN

cc: Scott Lynch, CEM
Energy Services Manager
Delaware Municipal Electric Corporation, Inc.

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32 The requested addition to Paragraph 5.4 would appear as follows in the Regulation:

> 5.4.7 Program Administrators that that are not regulated by the Public Service Commission may elect to develop, implement and fund programs for energy efficiency and peak demand reduction recommended for approval by the boards of directors for rural electric cooperatives or the pertinent local regulatory authorities for municipal electric companies.