



Comments of Jeremy Firestone¹ on Revised Proposed Rules for RPS Cost Caps

December 8, 2015

I have reviewed the most recent revision of the proposed rules and make the following comments.

1. In 7.3, the proposed rules do not conform to the statute. The proposed rules (7.3) provide that the Director “shall lift” the freeze if the total cost of compliance “falls below” the relevant threshold. However, the General Assembly requires that the Director lift the freeze if the total cost of compliance “can reasonably be expected to be under the ... threshold.” 26 Del Code Section 354(i and j). Thus, under the statute, the Director is required to lift the freeze if it can be “reasonably be expected” to be under an applicable threshold. Thus, the statute does not require certainty (“if”), but rather, “if the Director reasonably expects.”
2. DNREC proposed definition of the word “freeze” inappropriately refers to a “suspension” of the annual increase. A freeze and a suspension of the annual increase are not the same thing, with a suspension implying that the REC requirements are not only frozen during the pendency of the freeze, but that it postpones future increases as well. A “freeze” should simply be a freeze. In other words, the word “freeze” should be defined in a manner that sets (freezes) the REC percentage in place unless and until the freeze is lifted, at which time the REC percentage required would correspond to those set forth by the General Assembly for a given year in 26 Del Code 354(a)—that is, 26 Del Code 354(a) simply resumes. Take the minimum requirements in 2015 (13%), 2016 (14.5%), 2017 (16%), and 2018 (17.5%). If a freeze were put in place in 2015 and lifted in 2018, compliance in 2018 should be at 17.5% as specified in the Delaware Code. In sum, a freeze only freezes, it does not postpone future increases as well.
3. In section 5.4 and 5.5, DNREC has specified a number of factors for the Director to consider when deciding whether or not implement a freeze. These are not

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additional statutory criteria. Indeed, rather than DNREC expanding its discretion, it is in fact limiting it. As I have indicated in earlier comments (October 19, 2012, which I incorporate by reference), the use of the word “may,” provides DNREC with discretion. Although it is useful for DNREC to provide guidance to the public on the factors it will consider in deciding how to exercise its discretion and indeed, provides some useful transparency, DNREC should not cede discretion in these rules. Thus, in addition to the factors included, it should include a catch-all factor that informs the public that DNREC might also consider other relevant, but unspecified, considerations. As well, the factors specified in section 5.4 and 5.5 on which the Director will base his discretion should also explicitly include those factors specified in my earlier incorporated comments of October 19, 2012, including:

- a. **The absolute dollar change in average consumer bills adjusted for inflation since June 2010.** Because the cost cap provision was added as a consumer protection, the baseline cost of energy at the time of enactment, as adjusted by inflation is relevant.
- b. **The percentage dollar change in average consumer bill adjusted for inflation since June 2010.** For the same reason as specified in a.
- c. **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.
- d. **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%.
- e. **The incremental (year to year increase) cost of RECs.** From a consumer standpoint, 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.
- f. **The cumulative cost of RECs as a percentage of total retail costs since inception of the program.** When the PSC considers long-term contracts, it considers long-term effects on consumers. This is particularly important for renewable energy contracts because one of their attributes is long-term price stability.
- g. **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. DNREC should be more willing to implement a freeze if the reason REC costs exceeded the

threshold was because REC costs increased than because other costs have decreased since the purpose of the provision was to guard against consumer paying too much for RECs.

Given EPA's Clean Power Plan, DNREC should include the following factor as well:

h. The effect that a freeze would have on compliance with Delaware's responsibilities under the Clean Power Plan.

4. External costs of generation should be included in the definition of the "Total Retail Costs of Electricity." As I noted in my October 19, 2012 comments, the cost cap was put in place as a consumer protection measure. The total cost that a consumer bears from electricity generation includes not only what she pays on her bill but the external costs of generation which she also pays in terms of, for example, higher health care costs, etc.
5. The definition of "REC cost of compliance" should be expanded to include the savings from renewable energy, including the relevant factors specified in 5.4 and 5.5 such as the benefits of displacing coal and natural gas generation, the economic benefits associated with renewable generation and the effect of renewable energy on the market, including price suppression effects, as these effects all decrease the cost of compliance to consumers.
6. DNREC and others in the State appear to be miscalculating the cost of renewable energy credit (RECs) in long-term contracts for renewable energy, capacity and RECs. Those contracts include the land-based wind contracts entered into by Delmarva Power and approved by the Delaware Public Service Commission (DEPSC) that bundled energy, capacity and RECs and provided them for one price. The approval of those contracts was supported by analyses undertaken by various consultants to the DEPSC staff, Delmarva Power and perhaps others. Those analyses examined, for example, the then present and likely forward-looking nodal energy prices at the node the energy would be injected and at the then present and forward-looking REC prices and then compared those to the bundled price in a proposed long-term contract. The contracts were approved as a price hedge against the possibility of higher prices in the future.

The future turned out differently: There was the global recession, which affected load projections (hence demand). We also entered the age of hydraulic fracturing, which affected both supply and price, neither of which were modeled. As a result, costs to supply electricity tumbled. REC prices are also somewhat lower than projected, presumably given the tremendous improvements in wind power technology, resulting in much lower costs to produce wind energy and more wind energy RECs on the market. In other words, the long-term wind contracts ended up to be expensive hedges against higher prices, as prices are in fact lower.

What I understand to be the modus operandi to calculate REC costs is the following. Let's assume the all-in-price of a contract is \$80/MWh and the energy is now sold \$40/MWh (for simplicity sake, we will assume the capacity credit = \$0). The way REC costs are calculated is to subtract \$40 from \$80 and to assign a cost of \$40/REC. The problem with this is that the contract was premised on an energy cost and a REC cost. So, again, assume that the \$80/MWh was premised on \$65/MWh for energy and \$15/MWh for RECs. What has in fact happened is that ratepayers are paying for an expensive contract for energy—effectively taking a loss of \$25/MWh (65-40). Assume RECs are now trading for \$10/MWh. The ratepayers are overpaying for RECs by \$5/MWh, as the RECs continue to cost them \$15/MWh, the price on which entry into the contract was based. A bad deal on energy does not metamorphose into a worse deal for RECs. The deal for the purchase of RECs is the deal for RECs and the cost of a REC does not change simply because the Commission approved a contract that has resulted in Delmarva Power paying above-market prices for energy. (All that said, I am not saying that it is a mistake to enter into long-term contracts, only that costs and benefits should they arise need to be allocated accordingly).

7. While the cost cap provisions are not as clearly drafted as they could have been, the General Assembly was clear that it was DNREC that was to make the decision on (a) whether a freeze should be imposed and (b), for any freeze DNREC chose to put in place, whether the cost conditions had changed such that DNREC was required as a matter of law to lift the freeze. Although the General Assembly could have left the entire matter to DNREC, it is perhaps unsurprising that it reserved two limited roles to the Commission given its oversight of retail electricity rates and of regulated utility REC obligations (although it is unclear whether the Commission's role is smaller for RECs than for SRECs).

First, DNREC was instructed to consult with the Commission on a decision to enact or lift a freeze. Second, the General Assembly narrowly directed the Commission to promulgate rules specifying how to implement any such DNREC freeze ("procedures for freezing,") including adjusting alternative compliance payments. The use of the limiting word "procedures" makes clear that the General Assembly did not authorize the Commission to promulgate rules specifying substantive standards on how to calculate whether a cost cap was breached (or was "reasonably expected" to have fallen back below such cap) or standards on how DNREC should exercise its discretion to freeze. Thus, DNREC properly accepted Gary Myers' petition to promulgate rules.

8. The proposed rule properly excludes Bloom Energy. The statutory text does not support inclusion of Bloom. For example: It distinguishes between a fuel cell powered by renewable fuels, and Bloom. In addition, Bloom generation works to decrease RECs required to be purchased but it does not itself involve the purchase of RECs. Bloom fails explicitly to fall within the definitions set out in 26 Del Code 352 (19, 20 and 25) and thus are not included in 26 Del Code 354 (i,

j). Moreover, it makes sense that the General Assembly intended to exclude Bloom Energy costs from counting against the cost caps. If it were otherwise, Bloom would have immediately had substantial, if not devastating, effect on the cost cap thresholds in the law, and thus on the REC requirements. The purpose of the cost cap was not to tarnish renewables with the Bloom brand, which uses a non-renewable fossil fuel as its fuel source (compare, e.g., wind power-wind; solar power-the sun) but rather to protect consumers from electricity costs that could theoretically result from renewable energy.