



Washington Gas Energy Services

A Washington Gas Affiliated Company

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April 2, 2011 DELAWARE P.S.C.

Hand Delivery

Ms. Alisa Carro Bentley
Secretary
Public Service Commission
Of Delaware
861 Silver Lake Boulevard
Cannon Building, Suite 100
Dover, Delaware 19904

Re: PSC Regulation Docket No. 56

Dear Ms. Bentley:

Enclosed for filing please find an original and ten (10) copies of "Comments" of Washington Gas Energy Services, Inc. on proposed revisions to the Commission's Rules and Procedures to Implement the Renewable Energy Portfolio Standard as set forth in Order no. 8102 issued January 31, 2012. A copy of these comments have been mailed to parties on the official service list in this docket.

Respectfully submitted,

Telemac N. Chryssikos
Attorney

Enclosure

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE**

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) PSC REGULATION DOCKET NO. 56
SUPPLIERS (OPENED AUGUST 23, 2005;)
RE-OPENED SEPTEMBER 4, 2007, AUGUST)
5, 2008, SEPTEMBER 22, 2009, AUGUST 17,)
2010, SEPTEMBER 6, 2011))

**COMMENTS OF
WASHINGTON GAS ENERGY SERVICES, INC.**

Washington Gas Energy Services, Inc. (WGES) hereby files comments on the proposed, revised Renewable Energy Portfolio Standard (RPS) regulations published for comment in the Delaware Register of Regulations as directed by Order No. 8102 issued January 31, 2012 in the captioned docket. The regulations implement the requirements of Senate Bill No. 124, as amended by Senate Amendment No. 1 and signed into law on July 7, 2011 (78 Del. Law Ch. 99). Among other things, the new law amended the RPS Act, 26 Del C. §§ 351 – 364 by adding new § 353 (c), § 353 (d) and § 354 (e) (2011 RPS Amendments).

WGES' SITUATION AND THE DEFICIENCY IN THE PROPOSED REGULATIONS

To provide solar electricity to its customers and to self-supply its solar renewable energy credit (SREC) obligations under the RPS law as a retail electricity supplier (supplier), WGES invested approximately \$7.5 million in solar power facilities in Delaware. The facilities have been built pursuant to contracts with two customers negotiated in 2010, and construction of both facilities was completed in 2011. Both facilities have been certified by the Commission for the purpose of RPS compliance. They are now operating with over 1,800 kW of rated capacity and generate SRECs that WGES is applying to meet its Delaware RPS obligations until the end of the 2011 compliance year and for certain transitional responsibilities beyond that date.

The economic feasibility of the investments in these facilities was based, in large part, on the long-term SREC requirements provided for in the structure of Delaware's RPS law, a structure that has been significantly altered by the 2011 RPS Amendments. These amendments made Commission-regulated electric companies solely responsible for procuring SRECs for RPS compliance effective June 1, 2012.

In consideration of these significant alterations of Delaware's RPS law, the Delaware General Assembly included § 353 (c) (1) in the 2011 RPS Amendments requiring the Commission to adopt regulations that provide adequate protection to suppliers with contracts to

provide customers with RECs and SRECs. The proposed regulations in this docket fail to provide the required adequate protection to a supplier like WGES that has invested in self-supply solar capacity, and thus the regulations fall short of the legislative mandate. Accordingly, the regulations should be further revised to provide that adequate protection as discussed below.

2011 RPS AMENDMENTS AND THE PROPOSED REGULATIONS

Effective June 1, 2012, the beginning of compliance year 2012, Commission-regulated electric companies, the largest and the only one providing standard offer service (SOS) being Delmarva Power and Light Company (Delmarva), "shall be responsible for procuring RECs, SRECs and any other attributes needed to comply" with the percentages set out in § 354 (a) for all electricity supply delivered to retail customers in Delaware (§354 (e)). As of that date Delmarva will be the sole entity needing to buy SRECs in its service territory for purpose of RPS compliance.

To transition to Delmarva's new responsibility the Commission is directed to develop rules that adequately protect three groups: (1) "electric suppliers that entered into contracts to provide RECs and SRECs to retail electric supply customers prior to the transition;" (2) "customers of electric suppliers who are parties to supply contracts that were entered into prior to the transition against overpayment of the cost of RPS obligations;" and (3) "Delmarva and its customers from incurring alternative compliance payments or other costs that may be caused by the failure of electric suppliers to continue retiring RECs or SRECs associated with their existing retail supply contracts during the transition" (§ 353 (c)).

After proposing revised RPS regulations and asking for comments (Order No. 8026 issued September 6, 2011), and after Staff held two workshops on the regulations, the Commission adopted for publication and comment the regulations at issue (Order No. 8102 issued January 31, 2012). With one notable exception the regulations properly implement the 2011 RPS Amendments. The rules allow "transitional retail contracts" between suppliers and customers to remain in effect until they expire with procedures for assigning the SRECs supporting the contracts to Delmarva for retirement;¹ the rules protect customers of such suppliers from overpaying for RPS compliance during the transition; and the rules protect Delmarva and its customers from having to absorb any costs if suppliers fail to transfer SRECs and RECs to Delmarva during the transition.

The rules do not, however, protect suppliers like WGES that built, own and operate solar facilities in Delaware to self-supply SRECs to meet their RPS obligations. Specifically, Section 3.2.3.4 of the regulations acknowledges the issue, but does not provide any assurance of adequate protection for WGES as required by the 2011 RPS Amendments. Section 3.2.3.4 provides:

¹ The revised RPS regulations contain a detailed procedure for transitioning suppliers' retail supply contracts with customers that have an RPS component in the price, have terms that extend beyond June 1, 2012, and were entered into prior to March 1, 2012 (Section 3.2.3.1). Retail suppliers must provide Delmarva with a list of their transitional retail contracts and assign their previously purchased or produced SRECs and RECs provided in the contracts to Delmarva (from their PJM GATS accounts to Delmarva's PJM GATS account) beginning June 1, 2012.

Retail Electricity Suppliers that prior to March 1, 2012 have entered into contracts to purchase or produce RECs and/or SRECs specifically for Delaware RPS compliance may offer to the CREC those RECs and/or SRECs. The price would be determined by separate agreement between the Retail Electricity Supplier and the CREC. In no case shall the CREC be obligated to purchase any RECs/SRECs from the Retail Electricity Supplier.

While Section 3.2.3.4 could potentially lead to a situation where WGES achieves adequate protection, the regulations create no certain path or parameters to assuring that outcome. It is relevant to note, in this regard, that at no time since the publication of the regulations has Delmarva been willing to discuss or begin to negotiate such an agreement with WGES.

WGES SOLAR INVESTMENTS WERE MADE TO MEET RPS OBLIGATIONS

WGES entered the Delaware competitive retail supply market in 2006 and like all suppliers has been responsible for complying with the RPS laws. WGES undertook to meet its SREC obligations both by making SREC purchases in the competitive market and by investing in two solar facilities in Delaware. One solar facility, with a rated capacity of 1.579 MW was constructed on Perdue's property in Bridgeville, Delaware pursuant to a contract that was negotiated in 2010 and has a 15-year term. The other solar facility with a rated capacity of 240 kW was constructed on the property of the Wilmington Friends School in Wilmington, Delaware pursuant to a contract that was also negotiated in 2010 and has a 20-year term. The two facilities have a combined peak output of over 1,800 kW and represent an investment of approximately \$7.5 million.

The output of the facilities was intended reasonably to match the SREC needs of WGES's customer base. In compliance years 2011 and 2012, total SREC production from the two facilities would have roughly matched WGES' total SREC requirements had the 2011 RPS Amendments not been enacted.

THE 2011 RPS AMENDMENTS EFFECTIVELY DISSOLVED THE SREC MARKET

§ 354 (e) of the 2011 RPS Amendments, among other things, makes Delmarva the sole buyer of SRECS beginning June 1, 2012 for RPS compliance. With Delmarva as the only buyer of SRECs, a true "market" for SRECs has been effectively dissolved. The dissolution of the SREC market is clear when the behavior of that market since the adoption of the 2011 RPS Amendments is considered. Prior to the adoption of those amendments, there were multiple buyers and sellers of SRECs in Delaware, and SREC market values were in the range of \$200 to \$300 per SREC throughout 2009, 2010 and early 2011 according to data from SRECTrade (see www.srectrade.com). Since that time, with Delmarva slated to be the sole entity authorized to purchase SRECs for RPS compliance, and having suspended its purchasing of SRECs in anticipation of an upcoming pilot program auction, trading in SRECs has fallen off drastically and SREC values have fallen to the \$70 range in Delaware. These circumstances validate the course of action taken by the General Assembly to provide adequate protection for suppliers in WGES's situation as set forth in § 353 (c) (1).

SECTION 3.2.3.4 DOES NOT PROVIDE THE REQUIRED ADEQUATE PROTECTION

The wording of Section 3.2.3.4 is not consistent with the requirements of § 353 (c) (1) which requires the Commission to adopt rules that “adequately protect electric suppliers that entered into *contracts to provide RECs and SRECs to retail customers* prior to the transition of REC and SREC procurement responsibility under Section 354(e) of this title” (emphasis added). The phrase “contracts to provide RECs and SRECs to retail customers” in § 353 (c) (1) is reasonably interpreted to include supplier contracts to procure or produce the SRECs provided to retail customers. In particular the plain language of Section 353 (c) (1) requires the transition rules to adequately protect any electricity supplier such as WGES that invested in Delaware-sited solar projects in order to provide for the long-term RPS needs of its Delaware retail customers. The wording of Section 3.2.3.4 acknowledges that these contracts are an appropriate subject for the regulations to address, but provides no definitive protection in connection with those contracts.

While Section 3.2.3.4 could potentially lead to a situation where WGES might achieve adequate protection in a contract negotiation with a Commission-regulated electric company, the regulations create no certain path nor specify parameters for assuring that outcome. As noted, at no time since the publication of the regulations has Delmarva been willing to discuss or even begin to negotiate such an agreement with WGES.

WGES is not aware of another similarly situated licensed retail electricity supplier doing business in Delaware. WGES is uniquely and adversely affected by Section 3.2.3.4 in that it would no longer be able to self-supply SRECs to its retail sales after its transitional retail contracts expire, and it has no assurance of its ability to sell or otherwise realize value from those SRECs.

SECTION 3.2.3.4 SHOULD BE REVISED TO AVOID THE IMPAIRMENT OF PRIVATE CONTRACTS

Section 3.2.3.4 as written would set aside or otherwise impair the contracts WGES has in place to self-supply its SREC obligations because WGES no longer has an RPS obligation and has no clear opportunity or path to realizing value from those SRECs. In enacting § 353 (c) (1), the General Assembly did not intend that result.

Contracts are the foundation of competitive energy markets and more broadly the foundation of doing business in the United States. The U. S. Constitution prohibits a state from impairing “the Obligation of Contracts” (U. S. Constitution, Article I, § 10, clause 1), except in the exercise of its police power “to safeguard the vital interests of its people,” *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 410 (1983). A state law cannot impair private contracts unless the law reflects the sound the proper exercise of the state’s police power, *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978), *Yeatman v. Public Service Commission*, 126 Md. 513, 95 A. 158 (1915). The long standing, controlling principle is (*Manigault v. Springs*, 199 U.S. 473, 50 L. Ed. 274, 26 S. Ct. 127):

“It is the settled law of this Court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may there be affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the government to protect lives, ... health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals.”

Here, the General Assembly understood that § 354 (e) (assigning sole responsibility for SREC procurement to Delmarva) would impair existing private contracts entered into to provide SRECs to customers, including contracts that suppliers would have to enter into to acquire the needed SRECs. That this is the case is clear from § 353 (c) (1) which provides adequate protection for private contracts affected by § 354 (e). The General Assembly did not exercise its police power and set aside or otherwise impair these private contracts. It did not identify any overriding harm to the public interest that would require the private contracts to be impaired. *Morgan Stanley Capital Group, Inc. v. Public Utility District of No. 1 of Snohomish County, Washington, et al.*, 554 U. S. 527 (2008). Rather, the General Assembly sought to assure the public interest in honoring private contract obligations by requiring that contract holders be adequately protected. Further, the General Assembly did not identify any significant and legitimate public purpose that would be served or any broad and general social or economic problem that would be resolved if the SREC contracts at issue are set aside or otherwise impaired before their terms expire, *City of Charleston v. Public Service Commission of West Virginia*, 57 F. 3d 385 (4th Cir.), *Allied Structural Steel Co.*, 438 U.S. at 250. If those contracts are impaired, as would be the case under Section 3.2.3.4 as worded, that would be tantamount to an unwarranted exercise of the state’s police power, a result not intended by the General Assembly.

SECTION 3.2.3.4 SHOULD BE REVISED TO MANDATE ADEQUATE PROTECTION FOR SELF SUPPLY SREC CONTRACTS

As Delmarva is now the only buyer of SRECs in Delaware effective June 1, 2012, Section 3.2.3.4 should be revised to require Delmarva to purchase SRECs from a supplier holding SREC supply contracts entered into in order to comply with Delaware RPS requirements. To protect both customers and suppliers, as is also required by § 353 (c) (2) and (3), WGES suggests that Section 3.2.3.4 be further revised to clarify the pricing criteria that Delmarva should use to purchase such SRECs. Proper pricing for such a purchase was not discussed at the workshops held in this rulemaking, but WGES suggested that a price that would protect customers and suppliers would be the average price Delmarva is paying for all other SRECs it procures for the compliance year during which the SRECs are transferred.

For transitional retail contracts entered into prior to March 1, 2012 that include an SREC component, the regulations require that suppliers transfer an adequate supply of SRECs to Delmarva’s GATS account for retirement at no cost to Delmarva. At the same time to protect supplier customers from overpayment, those transitional contract customers will receive a credit on their bills equal to the non-by-passable charge otherwise charged by Delmarva to reflect its

RPS compliance costs. Note that the proposed non-bypassable charge and offsetting credit are based upon the average cost of SRECs that Delmarva procures for the given compliance year. No customer would be harmed, therefore, if the SRECs acquired by Delmarva under a revised Section 3.2.3.4 from Delaware solar facilities built and owned by suppliers prior to the enactment of the 2011 RPS Amendments were purchased at the same average cost.

If the Commission determines that further consideration would need to be given to the pricing issue, then it should open a subsequent proceeding to take up that issue.

THE PILOT AUCTION DOES NOT PROVIDE THE REQUIRED ADEQUATE PROTECTION

Earlier RPS amendments passed in 2010 created a Renewable Energy Task Force to make "recommendations about the establishment of trading mechanisms and other structures to support the growth of renewable energy markets in Delaware" (26 Del. C. § 360(d)). The Taskforce began meeting in September 2010 before Delmarva became obligated to procure all SRECs for all electricity deliveries in Delaware under the 2011 RPS Amendments. On August 22, 2011 the Taskforce voted to approve and recommend a pilot program, and on September 16, 2011 Delmarva filed an application in Docket 11-399 for approval of the pilot program. After conducting an evidentiary hearing on November 8, 2011, the Commission approved the pilot program with modifications (Order No. 8093, Docket 11-399, issued December 20, 2011).

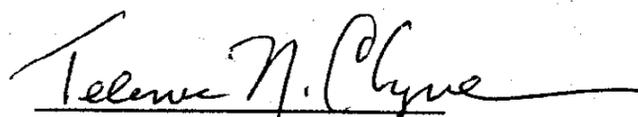
The pilot program was not intended to nor can it be interpreted to fulfill the adequate protection requirement for suppliers in the 2011 RPS Amendments. The pilot program makes no mention of such suppliers, contains no special provisions with respect to such suppliers, and provides no certain path for such suppliers to be protected. WGES notes that given the uncertainty of proper protection inherent in proposed Section 3.2.3.4 in this docket, and given the substantial financial risks associated with a failure to achieve adequate protection, WGES will likely submit bids in the pilot program as a risk mitigation strategy. The Commission should not construe this action by WGES as resolving the deficiencies in Section 3.2.3.4, nor should it prejudice the Commission's decision making in this docket.

CONCLUSION

§ 353 (c) (1) requires the Commission to adopt transition regulations that provide adequate protection to electric suppliers that entered into contracts to provide RECs and SRECs to retail electric supply customers, and this protection would logically include suppliers that invested in solar facilities to self-supply their SREC obligations. Section 3.2.3.4 fails to provide any definitive protection and thus falls short of the mandate of § 353 (c) (1). Accordingly, Section 3.2.3.4 should be revised to require Commission-regulated electric companies to purchase SRECs from a supplier holding SREC supply contracts entered into in order to comply with Delaware RPS requirements and to specify pricing that protects both suppliers and customers. An appropriate price would be the average price the Commission-regulated electric company pays for all other SRECs it procures for the compliance year. The Commission might also order that a subsequent proceeding on establishing a fair price be undertaken.

WHEREFORE, for the reasons set forth in these comments and other reasons the Commission may deem appropriate, WGES asks the Commission to revise Section 3.2.3.4 to make it mandatory that a Commission-regulated electric company like Delmarva purchase SRECs at the Commission-regulated electric company's average SREC procurement costs, or such other price as the Commission determines adequately protect all parties, from a supplier like WGES that owns and operates solar facilities in Delaware that were negotiated and were under construction prior to enactment of the 2011 RPS Amendments.

Respectfully Submitted,



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Attorney

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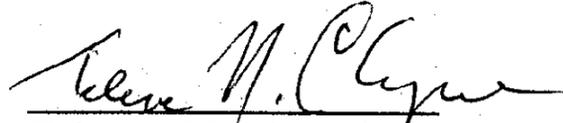
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April 2, 2012

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Comments of WGES was mailed on April 2, 2012 to each person or party on the official service list.


Telemac N. Chryssikos