

**Maryland General Assembly
Department of Legislative Services**

**Proposed Regulations
Public Service Commission
(DLS Control No. 14-155)**

Overview and Legal and Fiscal Impact

The proposed regulations implement Chapter 3 of 2013, the Maryland Offshore Wind Energy Act of 2013.

The proposed regulations appear to contravene legislative intent regarding the maximum allowed price for electricity generated by an approved project.

There is no fiscal impact on State or local agencies, as the regulations merely implement Chapter 3 of 2013 (HB 226). The commission's assessment is generally consistent with the fiscal and policy note for HB 226; however, the price structure established for offshore wind renewable energy credits (ORECs) does not appear to comply with the legislative intent of the law. Specifically, the regulations authorize a maximum *levelized* OREC price of \$190 (in 2012 dollars, which may average to \$190 over the multiple-year life of the contract), as opposed to a \$190 *limit* (in 2012 dollars) for any OREC in any year.

Regulations of COMAR Affected

Public Service Commission:

Electricity Suppliers: General Provisions: COMAR 20.51.01.02

Administrative Provisions: COMAR 20.51.02.02 and .08

Renewable Energy Portfolio Standard Program:

General: COMAR 20.61.01.03, .05, and .06

Consumer Protection, Reporting, and Enforcement: COMAR 20.61.04.01 and .02

Offshore Wind: COMAR 20.61.06.01-.20

Legal Analysis

Background

Chapter 3 (House Bill 226) of 2013, the Maryland Offshore Wind Energy Act, requires the Public Service Commission (PSC) to adopt processes for receiving, assessing, and deciding applications for qualified offshore wind energy projects. Qualified projects will generate electricity that is factored into the State's renewable energy portfolio standard (RPS). The legislation goes into great detail on the matters that must be included and considered in each application, the considerations that the commission must make when assessing each application, and the mechanism for sale of project electricity and environmental attributes, through the creation and sale of ORECs, over a minimum operational term of 20 years. These proposed

regulations implement those provisions of Chapter 3 that deal directly with offshore wind energy projects and related matters.

Summary of Regulations

The proposed regulations add a new COMAR Chapter 20.61.06 that deals specifically with offshore wind project applications, commission consideration of the applications, contract terms, and the handling of ORECs created by the projects. Much of the proposed language closely follows the detailed statutory framework.

Regulation .01 sets up the general application process. The regulation requires the commission to open a 180-day application period once it receives its first complete application for a proposed offshore wind project. (Regulation .01B) Within that window, any number of applicants may submit one or more project applications for the commission to consider. Once the application period closes, the commission has 180 days to approve, conditionally approve, or deny the applications. (Regulation .01G) The commission will conduct a preliminary screening of all complete applications. (Regulation .01D) More than one project may be approved, so long as the sum of the approved projects does not result in cumulative rate payer impacts exceeding statutory caps. There may be more than one application period. (Regulation .01I)

The specific application requirements and contents are listed in Regulation .02. The regulation lists detailed organizational and financial information about the applicant, project owners, and lenders. (Regulation .02F) Extensive details about the proposed project, siting, capacities are required under Regulation .02G through I. Additional financial and contracting information, including the proposed use of minority business enterprises and planned skilled labor outreach, are required under Regulation .02J and K. The cost-benefit analysis that Regulation .02L specifies comports with the detailed list in the statute. The proposed OREC schedule and components are specified in Regulation .02M through O. The schedule may propose either a one-part or a two-part OREC price not exceeding \$190 per megawatt-hour in *levelized* 2012 dollars, while the rate payer impact may not exceed \$1.50 a month for an average residential customer or 1.5% for a nonresidential customer. (Regulation .02M) The use of a levelized figure is discussed under “Legal Issue” and “Statutory Authority and Legislative Intent”, *below*.

The criteria by which each application will be evaluated are stated in Regulation .03. The threshold criteria include compliance with certain statutory provisions, contract date and term, OREC price schedule compliance, and matters relating to commercial viability and practicality. (Regulation .03A) In addition, each application that clears the threshold will be subject to both an extensive qualitative review and a quantitative review. (Regulation .03B(1) and (2)) The commission must rank all applications, and may not approve any application that fails to meet statutory price caps. (Regulation .03C) Any approval must be conditioned on execution of a memorandum of understanding regarding soliciting minority investors, and on establishment of a plan setting minority business enterprise participation goals and procedures, as well as any other condition the commission requires. (Regulation .03E) The minority business plan is further developed in Regulation .06.

Because the proposed leasing area for offshore wind energy projects is in federal waters, any siting concerns must be addressed through federal procedures. Regulation .04 requires the

commission to verify that representatives of the Department of Defense and the maritime industry have had an opportunity to express their concerns through the federal leasing process.

Tracking the statute, Regulation .05 requires a successful applicant to deposit certain funds in the Maryland Offshore Wind Business Development Fund. *See* PU § 7-704.1(g).

Regulation .07 requires the commission to establish the offshore wind RPS obligation based on specified projections of the creation of ORECs by qualified offshore wind projects, and authorizes the commission to adjust the standard periodically on a forward-looking basis at least three years out.

The commission must establish the actual OREC purchase obligation and replacement price schedule under Regulation .08. Once the economic inputs have been established for the schedule, each update must be scored using the same model for consistency.

In order to handle payment for electricity and its renewable attributes, Regulation .09 governs the appointment of an escrow administrator. It also governs the duties of the administrator and how the administrator may be replaced. Regulations .10, .11, and .12 establish invoicing and payment procedures for ORECs and the responsibilities of administrators in those processes, as well as the sale of ORECs through the PJM markets.

In conformity with the statute, Regulation .13 requires a qualified offshore wind project to pass along to rate payers at least 80% of the value of all state and federal grants, rebates, tax credits, and similar benefits. *See* PU § 7-704.1(c)(8). Electric companies must establish procedures for rate payer refunds under Regulation .14.

Under Regulation .15, ORECs in excess of those needed to satisfy the offshore wind RPS obligation may be banked for future use or may be applied to satisfy other Tier 1 RPS obligations in accordance with specified procedures.

Regulation .16 deals with the commencement of operations of an offshore wind project, including escrow transfers, reserve accounts, and what happens in case of certain delays.

Although the initial term of a qualified offshore wind project is 20 years, it may be extended for up to two 5-year terms. Regulation .17 requires each project to provide information to the commission in order for the commission to assess whether or not an extension is appropriate. Regulation .18 establishes annual reporting requirements for qualified offshore wind projects.

The termination of a project term, including distribution of escrowed funds, completion of various duties, and final reporting, are covered by Regulation .19. Regulation .20 states that the provisions of Chapter 20.61.06, like the authorizing legislation, are severable. *See* § 9 of Ch. 3, Acts of 2013.

The proposed regulations also make conforming changes in existing regulations, shown in the first few pages of the submission. The commission adds a newly defined term, “administrator”, to the general provisions on electricity suppliers in COMAR 20.51.01.02, and adds appropriate references to administrators in other portions of the electricity supplier regulations in COMAR Chapters 20.51.02 and .03.

In the existing regulations on the RPS program, the proposal adds many newly defined terms relating specifically to offshore wind energy projects in COMAR 20.61.01.03. Provisions on the required purchase of ORECs and satisfaction of the RPS are added, as well as the exclusion of certain industrial process load and agricultural load from the OREC purchase obligation. (COMAR 20.61.01.05 and .06) The proposal adds OREC information to the annual RPS report required of each electricity supplier. (COMAR 20.61.04.02)

The proposal also includes other minor conforming changes to existing regulations.

Legal Issue

The proposed regulations vary from the intent of the authorizing legislation by allowing a project applicant to use a maximum electricity price “levelized” over the projected contract term of an offshore wind project rather than limiting the price to meet the statutory cap each year of the term. *See below.*

Statutory Authority and Legislative Intent

The commission cites §§ 2-121, 7-507, and 7-701 through 7-713 of the Public Utilities Article (PU) as authority for the proposed new regulations on offshore wind projects, and various subsets of those sections for conforming changes made to existing regulations. This authority is correct and complete. Except as noted below, the regulations comply with the legislative intent of the law.

Section 2-121 of the Public Utilities Article authorizes the commission to adopt reasonable regulations as necessary to carry out any law that relates to the commission. Section 7-507 requires a person that engages in the business of an electricity supplier in the State to hold a license issued by the commission. Sections 7-701 through 7-713 deal with the renewable energy portfolio standard. More specifically, § 7-704.1 authorizes a person to submit an application to the commission for approval of a proposed offshore wind project after the effective date of regulations implementing the section and § 7-704.2. Section 7-704.2 requires the commission to determine the offshore wind energy component of the renewable energy portfolio based on the projected annual creation of ORECs by qualified offshore wind projects. Section 7-704.2(f) requires the commission to adopt regulations to carry out §§ 7-704.1 and 7-704.2 on or before July 1, 2014.

The one substantive issue regarding legislative intent in the proposed regulations relates to the maximum price for electricity from an approved project that the commission may authorize. The fiscal note for House Bill 226 of 2013 analyzed costs based on an absolute cap in the proposed OREC price schedule of “\$190 per megawatt-hour in 2012 dollars” for electricity from an approved project, reflecting precisely the text of § 7-704.1(e)(1)(iv) of the Public Utilities Article in the bill. The proposed regulations allow the price to exceed the \$190 ceiling in any given year so long as the price over the 20-year term of the contract does not exceed \$190 “in levelized 2012 dollars.” *See* Regulations 20.61.06.01H (notice of indexes used), .02M(1)(a) and (b) (price schedule in application contents), and .03A(3) (evaluation criteria).

However, the proposed regulations also require that any project application, even one with a forecasted commodity price that exceeds \$190 in a year, may not yield a projected retail electricity price impact that would exceed \$1.50 or 1.5% a month for an average residential or

nonresidential customer, respectively, as required under PU § 7-704.1(e)(ii) and (iii). The proposed regulations explicitly refer to these statutory limits in the provisions on application contents, evaluation criteria, and project ranking by the commission. See Regulations 20.61.06.01H (application contents), .02M(1)(i) and (ii) (price schedule requirements), and .03B(2)(i) (quantitative analysis); cf. .08C and D (order establishing OREC purchase obligations and price schedule).

The question for this committee is whether the commission's decision to allow an electricity price of \$190 per megawatt-hour in *levelized* 2012 dollars, *i.e.*, that may at some point over a 20-year contract term exceed that number while remaining generally under it, is consistent with the intent of the General Assembly when its legislation requires that "the price set in the proposed OREC price schedule does not exceed \$190 per megawatt-hour in 2012 dollars", with no other temporal qualification. PU § 7-704.1(e)(1)(iv).

The practical interplay between the "levelized" language in the OREC price schedule provisions of the proposed regulations and the requirement to meet the \$1.50 and 1.5% rate impact caps in PU § 7-704.1(e)(1)(ii) and (iii) is not known.

Technical Corrections and Special Notes

The Statement of Purpose originally submitted to this committee merely stated that the proposed regulations "implement the Maryland Offshore Wind Act of 2013." This fails to put the public on notice of what the proposal actually does. The commission staff has provided a revised statement to AELR staff and submitted it for publication with the text of the proposed regulations.

Other minor corrections of a typographical nature will be made to the proposed regulations at time of publication.

Fiscal Analysis

There is no fiscal impact on State or local agencies, as the regulations merely implement Chapter 3 of 2013 (HB 226). The commission's assessment is generally consistent with the fiscal and policy note for HB 226; however, the price structure established for ORECs does not appear to comply with the legislative intent of the law. Specifically, the regulations authorize a maximum *levelized* OREC price of \$190 (in 2012 dollars, which may average to \$190 over the multiple-year life of the contract), as opposed to a \$190 *limit* (in 2012 dollars) for any OREC in any year.

Agency Estimate of Projected Fiscal Impact

The commission advises that the regulations have the following fiscal impacts:

- Special fund revenues for the PSC increase by \$2.0 million in fiscal 2015 pursuant to a required transfer from the Strategic Energy Investment Fund (SEIF) under Chapter 3 of 2013. This transfer is from money derived from the Exelon-Constellation merger approved by PSC in Case No. 9271, Order 84698 on February 17, 2012, and is to be used by PSC to contract the services of independent consultants. PSC advises that these

monies will be deposited in the Public Utilities Offshore Wind Energy Fund. Special fund expenditures from this fund increase correspondingly for PSC to contract for consulting services.

- Special fund revenues increase for the Maryland Offshore Wind Business Development Fund (MOWBDF) by \$1.5 million in fiscal 2015 and by \$1.0 million in fiscal 2016 pursuant to required transfers from SEIF under Chapter 3 of 2013. Special fund expenditures increase correspondingly as MEA, in consultation with the Maryland Offshore Wind Business Development Advisory Committee, provides financial and business development assistance to certain emerging businesses in the State (MOWBDF revenues and corresponding expenditures also increase from developer payments, as discussed in the additional comments).
- Beginning as early as fiscal 2018 (but possibly later if a project takes longer to complete), residential customers experience a \$1.50 per month (in 2012 dollars) surcharge on their electric bills – based on annual consumption of 12,000 kilowatt-hours. Nonresidential customers (including local and State government) experience a 1.5% increase in their total annual electric bills.

The Department of Legislative Services disagrees with this assessment, as the regulations merely implement Chapter 3 of 2013 (HB 226), the fiscal impact is a result of that legislation and not the regulations. However, the commission’s assessment is generally consistent with the fiscal and policy note for HB 226, except that the price structure established for ORECs under the regulations does not appear to comply with the legislative intent of the law.

Statute specifies that a price of \$190 per OREC not be exceeded for any OREC in any year, which is reflected in the analysis presented in the fiscal and policy note for HB 226. The General Assembly did not contemplate use of a levelized OREC price schedule. Instead, the \$190 was discussed as being a cap, including in the fiscal and policy note for HB 226. Specifically, the fiscal and policy note assumed the same generation, prices, capacity factor, number of residential ratepayers, and energy consumption profiles as PSC in its “AEO Baseline \$190 OREC Scenario.” The OREC price in that analysis never exceeded \$190 in 2012 dollars (based on projected inflation rates at the time).

However, the regulations authorize a maximum *levelized* OREC price of \$190 (averaged to \$190 over the multiple-year life of the contract), as opposed to a \$190 *limit* for any OREC in any year. This presents an issue because a maximum OREC price that is levelized over the life of a contract *may* allow for OREC prices above \$190 in one or more years – with a corresponding lower price in other years – to bring the average OREC price to \$190. While using a levelized OREC price does not necessarily *require* this to be the case (it is possible that a commission-approved levelized OREC price schedule could include no OREC prices above \$190), it may conflict with statutory language by authorizing OREC prices above \$190 in one or more years.

Impact on Budget

There is no impact on the State operating or capital budget as the regulations merely implement Chapter 3 of 2013. Section 4 of Chapter 3 requires the transfer of funds from SEIF to PSC in order for PSC to contract for independent consultants needed to carry out the legislation.

Specifically, the funds from SEIF that are to be transferred are from the offshore wind contribution required as one of the conditions of the merger between Constellation Energy Group and Exelon Corporation. Section 4 specifies that \$1.0 million is transferred in fiscal 2014 and \$2.0 million is to be transferred in fiscal 2015. The first \$1.0 million from this transfer was added to PSC's fiscal 2014 appropriation in Supplemental Budget No. 1 during the 2013 session. The fiscal 2015 budget includes the \$2.0 million transfer. Chapter 3 also requires the transfer of \$1.5 million in fiscal 2015 and \$1.0 million in fiscal 2016 from SEIF to MOWBDF.

Agency Estimate of Projected Small Business Impact

The commission advises that the regulations have a meaningful impact on small businesses in the State. The Department of Legislative Services disagrees with this assessment, as the regulations merely implement Chapter 3 of 2013. The small business impact is a result of that legislation and not the regulations. However, the commission indicates that the small business impact is that contained in the fiscal and policy note for HB 226, which indicated a meaningful impact on small businesses. Broadly, all small businesses are affected to the extent that their electricity rates increase – up to 1.5% under the legislation. Conversely, any small businesses that receive funding from MOWBDF and/or participate in any offshore wind industry established due to the legislation stand to benefit.

Additional Comments

The fiscal and policy note for HB 226 assumes that developer payments of \$2.0 million annually are made into MOWBDF from fiscal 2015 through 2017 (this is a condition required of the developer to receive PSC approval for a proposed project). However, commission staff advises that these payments are more likely to occur from fiscal 2016 through 2018, given the timing of these regulations, the unknown commencement date of the application period (it begins when the first administratively complete application is received by PSC), and the potential need for the full 180-day evaluation period by the commission, among other factors.

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