CONCISE EXPLANATORY STATEMENT

In accordance with the Administrative Procedures Act, Section §42-35-2.6 of the General Laws of Rhode Island, following is a concise explanatory statement:

AGENCY: Division of Public Utilities and Carriers
RULE IDENTIFIER: **815-RICR-30-05-1**
RULE TITLE: Rules Applicate to Nonregulated Power Producers

REASON FOR RULEMAKING:
The Division is directed by statute (RI Gen. Laws 39-1-21.1 as amended in 2016) The General Assembly approved legislation to include a requirement that nonregulated power producers which are Obligated Entities (as defined in RIGL 39-26-2) provide the Division with evidence of financial security. The Division is directed by statute to set the level of financial security between $25,000 and $500,000 with this proposed regulation setting that requirement at $250,000. In the event of an obligated entity's bankruptcy, the securities would be available to pay any unmade Alternative Compliance Payments to Commerce Corporation, or any fines or consumer rebates ordered by the Division.

ANY FINDING REQUIRED BY LAW AS A PREREQUISITE TO THE EFFECTIVENESS OF THE RULE:
(See Above)

TESTIMONY AND COMMENTS: Note: A second notice of public comment period in this docket (Docket D-16-113) was necessitated by provisions of R.I. Gen Laws § 42-35-4 which establishes a 180 day period after the close of public comment within which the final rules must be filed with the Secretary of State. Since the final rules were not filed with the Secretary of State within the 180 days following May 1, 2017, the law required that this rulemaking be re-initiated. **The testimony includes that made at the initial hearing, and public comment period as well as the comments filed in response to the second notice.**

Public Hearing

On April 20, 2017, the Division conducted a duly noticed public hearing in this docket for the purpose of taking public comment on the proposed set of rules. The hearing was conducted in Hearing Room A, located on the first floor of the Division's offices located at 89 Jefferson Boulevard, Warwick, Rhode Island 02888. The following attorneys entered appearances at the hearing:

Appearances:
For the Advocacy Section:
Christy Hetherington, Esq.
Special Assistant Attorney General

For the Retail Energy Supply Association ("RESA"):
Robert J. Munnelly, Jr., Esq.
Davis Malm & D'Agostine, P.C.

Also present at the formal hearing were Mr. Thomas Kogut, Division Rulemaking Coordinator/Legislative Liaison; Mr. Marc Hanks, Direct Energy (Member of RESA); Mr. Andy Mitrey, Archer Energy; Ms. Miriam Cohen, Energy Auction House; and, Mr. Wayne E. Gardner, Genie Retail Energy, Inc. Not all of those present at the hearing chose to offer public comment or enter a formal appearance.

Division Rationale For The Amendments To The Rules

Mr. Thomas Kogut, Associate Administrator for Cable/Chief of Information for the Division of Public Utilities and Carriers, appearing in his role as Rulemaking Coordinator and Legislative Liaison for the Division, testified in support of the proposed rules. Mr. Kogut began his remarks by noting that the

legislation that led to this rule-making proceeding was not the result of a Division legislative initiative. He explained that it was his understanding that the legislation arose from discussions in 2015 between Public Utilities Commission staff and Senate policy staff concerning a number of utility-related issues. One of the issues being discussed arose from the bankruptcy of a nonregulated power producer (an obligated entity) that had gone out of business and left the state owing a significant amount in alternative compliance payments under the renewable energy standard. Mr. Kogut went on to explain that following these discussions, the first iteration of the legislation was presented to the Senate in February 2016, and subsequently a version was approved by the Senate with a companion act later adopted by the House. This legislation essentially directed the Division to select a proper level of financial security somewhere between a minimum of $25,000.00 and a maximum of $500,000.00 for obligated entities (that is, those nonregulated power producers which are also obligated entities). Mr. Kogut went on to testify that the Division began the process of drafting the implementing regulations as required by the Administrative Procedures Act, including presenting the proposed regulations to the Governor's Office of Regulatory Reform ("ORR") for review and approval. As an integral part of the process of preparing the proposed amendments to the Division's existing rules, Mr. Kogut stated, the Division generated a cost benefit analysis to assist it in trying to determine an appropriate level of securitization to begin with.14

In late February/early March of 2017, after ORR reviewed the draft amendments, and the supporting cost benefit analysis, ORR notified Mr. Kogut that the Division had its approval to proceed with this rulemaking action. Shortly thereafter, on March 28, 2017, Mr. Kogut testified, he took the necessary steps to publish the notice of hearing, the proposed amendments to the rules, and the cost benefit analysis on the Division's public web site. .

Next, Mr. Kogut turned his discussion to the Division's thought processes leading up to its proposed amendment, and specifically to its decision to settle on a securitization level of $250,000.00 for all nonregulated power producers who were obligated entities. He explained that when the legislation was first enacted, there was a period of rather extensive internal discussions amongst Division staff; the initial consensus was that perhaps the securitization level should be set somewhere near the lowest authorized, $25,000.00. Upon further consideration, though, the Division came to the conclusion that a level of $50,000.00 or less would be woefully inadequate to address the specific legislative intent behind the legislation – to provide some significant financial protection to the State. Mr. Kogut explained that the legislation that led to this proceeding was borne out of a particular obligated entity, Glacial Energy, filing for bankruptcy in 2014. At that point in time, Glacial Energy owed, or would have owed, the State roughly $277,000.00 in alternative compliance payments ("ACPs"), an amount that is referenced in the cost benefit analysis15 that was done for this proceeding, and was also reported in the fiscal year 2014 renewable energy standard reports that are filed on the Division's web site. Given that background, Mr. Kogut explained, the Division staff discussed a few other possible scenarios, and then engaged Daymark Energy Advisors to conduct a review of the matter. That generated a memorandum by Mr. Marc Montalvo of Daymark that discussed that matter in some detail (the memorandum was circulated to a number of members of the industry in order to solicit their views), and eventually led the Division to take a look at the upper end of the securitization range established by the General Assembly in its legislation. It became obvious that if the Division were to entertain seriously establishing a securitization requirement of $500,000.00 or so, it could only be done in the form of a tiered approach if the Division were not to create a barrier to entry for many smaller potential nonregulated power producers. A tiered approach, however, presented its own set of administrative issues for the Division, as it would have to develop a method of identifying which tier each nonregulated power producer qualified for, and for tracking when nonregulated power producer's had to move up or down to a different tier.

As Mr. Kogut pointed out, the Division currently has a very hands-off approach to nonregulated power producers. Rhode Island was the first state to eliminate a vertically integrated utility structure (often referred to as "deregulation") back in 1996. He opined that early adoption by Rhode Island means that a lot of our statutory and regulatory language regarding how regulators react to competitive energy suppliers still traces back to the very beginning of this whole process, well before legislators, regulators – or the industry – really understood how things were going to operate in reality; this old "boilerplate" statutory and regulatory regime has not always been a comfortable fit for the way the industry and market place has evolved after twenty years. The result is that we do not currently require competitive suppliers

to file monthly or quarterly or really ever, their total sales in any types of increments. We only get that information, to the extent we receive it at all, from a separate document that is generated by the local distribution company, a document that has a significant lag time built in.

All of that means that if the Division were to adopt a tiered approach to securitization based on volumetric sales, it would have to require the nonregulated power producers that are obligated entities to provide the Division with real-time reports concerning their sales, something that they do not currently have to do and which might be a bit difficult for some of them – particularly the newer and smaller companies – to accomplish. In addition, the Division would then have to have the means of handling all of that additional paperwork, as well as the corresponding securities, and verifying that the volumetric sales figures matched up with the level of securities provided. In Mr. Kogut's opinion, it makes far more sense for everyone for the Division to choose a single level of securitization for all nonregulated power producers that are obligated entities that offers substantial protection to the State – in this case, the midpoint of $250,000.00 was chosen as the best compromise – without burdening either the nonregulated power producers or the Division with burdensome new reporting requirements.

Mr. Kogut then pointed out that other states in the Northeast have already chosen this approach – a single level of securitization set at $250,000.00. That flat fee allows the states to avoid the extra administrative burden of managing a tiered system, while also avoiding placing additional requirements on the competitive energy suppliers in their dealings with the State. That same level of $250,000.00 would also have been sufficient to largely address the one realworld example of a competitive energy supplier leaving the Rhode Island market via bankruptcy that the statute was designed to address. That is, a level securitization fee of $250,000.00 would be sufficient to protect the State from a similar-size competitive supplier going out of business and failing to satisfy its renewable energy standard obligations to the State.

In response to questions from the Hearing Officer, Mr. Kogut explained that if the Division were to adopt a tiered approach, it might well have to hire additional staffing to manage the increased work load. Currently only one member of the Division's accounting staff handles the current annual renewables work resulting from nonregulated power producers filings, but that staff member is also responsible for assisting on numerous other types of utility rate cases. If it were suddenly necessary to track the notes of financial security filings, volumetric sales reports, and other similar filings, it would be reasonable to presume that some additional staffing might be required. In turn, Mr. Kogut explained, applying the basic principle of cost causation, the Division might then have to pursue some type of legislative remedy allowing the Division to assess nonregulated power producers that are obligated entities to recover the Division's costs of managing the securitization program. Such costs would not be de minimis, and the Division would like to avoid having to both incur and recover those administrative costs associated with choosing the tiered approach (not to mention the associated reporting costs that would be incurred by the competitive suppliers themselves under a tiered approach).

Public Comments On Amended Rules

Only three individuals offered public comment at the hearing. They were, in order of appearance, Attorney Robert J. Munnelly, Jr., representing the Retail Energy Supply Association ("RESA"); Mr. Marc Hanks, Senior Manager for Government Regulatory Affairs at Direct Energy, and Acting Chair of the Retail Energy Supply Association; and, finally, Mr. Andy Mitrey, Archer Energy. Attorney Robert J. Munnelly, Jr., opened by stating that he planned to make some general statements regarding RESA's thoughts and positions on the proposed amendments. He agreed with Mr. Kogut that what Rhode Island has really been undergoing over the last 20 years is restructuring rather than deregulation. His client appreciates the research and work that the Division did in formulating these amendments, but would prefer that a sliding scale be instituted ranging from a low of $100,000.00 up to the current proposed level of $250,000.00 for securitization. RESA believes that such a sliding scale would satisfy two goals. First, it would protect the State from sustaining inappropriate losses if an obligated entity declared bankruptcy, and second it would avoid being a barrier to entry into Rhode Island. Mr. Munnelly opined that using a sliding scale would hit a better balance between to two goals, especially with respect to smaller suppliers who may still be trying to decide whether or not to enter the Rhode Island market at all. Mr. Munnelly then

went on to point out that Rhode Island is simply a smaller state, and therefore presents a more limited upside for entry compared to some of its neighbors. He stated that he did not believe Rhode Island would want to create a situation where a competitive supplier might be interested in entering the market in Rhode Island, but after looking at the costs and process issues and the regulatory scheme ultimately decides to devote its attentions to some other state. He pointed out that the cost benefit analysis done by the Division shows that there is not much competition in Rhode Island at the moment, with only a relatively limited number of players, and argued that it would be in the interests of Rhode Island consumers to have more choices. With respect to the $250,000.00 limit proposed by the amended rules, Mr. Munnelly indicated that Division staff were correct to suggest that limit had also been adopted in a number of other states in the region, such as Connecticut, New Jersey, Pennsylvania and Maryland. However, he believed that the smaller states in the area – such as New Hampshire, Maine and possibly Delaware – had generally adopted the sliding scale approach with a lower entry bar. The bigger states such as Connecticut, New Jersey, Pennsylvania and Maryland, offer bigger playing fields that arguably justifies the higher financial security in those states because there is simply more room to grow in those states, and thus less reason for a competitive supplier to simply bypass them.

Mr. Munnelly then went on to suggest that the administrative burden on the Division of an annual filing by each NPP reflecting that NPP's revenues should be fairly minimal. If the filing form clearly reflects, from the supplier's standpoint, what its revenues are, it should be relatively simple to determine what their bond level should be on the sliding scale RESA supports. He also noted that the Division should have some sort of standing order on confidentiality because this type of revenue information is very sensitive to many companies and should not be part of the public record. Mr. Munnelly believes it really should be a simple matter of filling in some blanks and comparing the answers to a table to determine the level of security required for each company. There would probably be models of such a system available from other states that are currently using it. In his concluding remarks, Mr. Munnelly agreed that the Division had made a real effort to keep the industry informed of this rulemaking from quite early in the process, and that the Division (in the form of Mr. Kogut) had actively sought industry input on this process from the very beginning.

The next person to offer public comment was Mr. Marc Hanks, speaking both as Direct Energy's Senior Manager for Government Regulatory Affairs and the Acting Chair of the Retail Energy Supply Association. After adopting the remarks already made by Mr. Munnelly, Mr. Hanks chose to emphasize the importance of striking the right regulatory balance, "the so-called Goldilocks Effect." He explained that, as a leading national energy marketer, Direct Energy has no particular issue with the proposed securitization level of $250,000.00 proposed by the Division in this proceeding. Mr. Hanks wished to point out, however, that with respect to some of the smaller suppliers or new market entrants that might be contemplating entry in to the Rhode Island electricity market, that $250,000.00 level could be perceived as something of a threshold issue.

Because of that concern for smaller suppliers, Mr. Hanks explained that RESA would prefer to advocate for incrementalism in setting securitization levels. That is, it would prefer to see the Division establish a range of securitization levels tied to supplier revenues, with the range beginning at $100,000.00 and ending at $250,000.00. He believes that a flat level set at $250,000.00 would be too much of a barrier for some of the smaller suppliers. Mr. Hanks reiterated, however, that RESA believes that instituting some type of financial security program is important, and that the bar should be high, but at a reasonable level. In his concluding comments, Mr. Hanks pointed out that RESA is a trade association representing 20 active retail suppliers, not all of whom are licensed as NPPs in Rhode Island, but which do represent a good cross-section of NPPs or retail suppliers in the Rhode Island marketplace. He also pointed out that the General Assembly itself established a range from $25,000.00 at the low end to$500,000.00 at the high end, and he believes that should be taken as evidence that the General Assembly was taking into account those smaller retail suppliers or NPPs.
In response to a question from the Hearing Officer regarding the cost to a company such as Mr. Hanks' of procuring securitization, Mr. Hanks said he did not know off hand how much it cost Direct Energy, but that he would find out and provide that information to the Division when he and Mr. Munnelly filed RESA's post-hearing comments.

The third person to offer public comment at the hearing was Mr. Andy Mitrey, President of Archer Energy. Mr. Mitrey noted that his business was one of the small suppliers operating in Rhode Island. He explained that he has been involved in the industry as a whole for about 20 years, having previously servedas President of Border Energy, a mid-size marketing company, prior to forming Archer Energy about three years ago. Prior to forming Border Energy, he had served as Director of Credit for American Electric Power, a large utility based out of Ohio; while with American Electric Power he had also chaired the ERCOT Credit Committee, establishing credit for the Texas market. Mr. Mitrey was also involved in establishing credit requirements for the Ohio market when that state deregulated. All in all, he is intimately familiar with all the aspects of providing collateral and credit to both utilities and to the states where the utilities operate.

In his opinion, there is a need to be collateral put into place to backstop the obligations that nonregulated power producers would have to the various states where they operate. Mr. Mitrey does, however, question the amount chosen -- $250,000.00. He points out that seven states have lesser amounts than that, and that a level that high can cause an artificial barrier to market entry, especially for smaller players. In some cases, it may come down to a small supplier choosing to go into a state other than Rhode Island simply because there is more growth potential for a similar size credit requirement.

Mr. Mitrey stated that he did understand that the Glacial bankruptcy had an impact on Rhode Island, but he is not sure that the actual impact was as great as the perceived impact. He believes that it might have been better to look at the actual market damages if you went out and covered those rather than the ACP cost as the Division appears to have done. He thinks that the REC costs at the time would have resulted in actual market damages of closer to $100,000.00 rather than the more than $250,000.00 in ACP cost that the Division looked at. While he believes having collateral posted is a great idea, he prefers the sliding scale of $100,000.00 to $250,000.00 that RESA has proposed. He believes that as a NPP brings more risk to the market, it should have to post more collateral, and that by keeping the collateral threshold initially low, it will allow more competitors to come into the market. Mr. Mitrey does not believe that a sliding scale would pose that much additional burden on the Division's administrative staff because the local distribution company, National Grid, has data on how many megawatts each NPP is selling right at its fingertips. He sees no reason why the Division could not simply impose a reporting requirement on National Grid to provide that sort of information directly to the Division as needed. With respect to the cost of providing security, Mr. Mitrey's experience has been that some of the cost measures to post cash or certificates of deposit can be very prohibitive because the NPP has to have the financial backing behind each one of those. Surety bonds, on the other hand, tend to be more reasonable in cost. Based on his personal experience, Mr. Mitrey believes the cost is going to be anywhere from 2% to 3% of the face value of the bond for a small company.

With respect to letters of credit, the NPP will have to have something to backstop that kind of security, and that will increase the cost dramatically versus a surety bond. Posting cash, of course, reduces your ability to market your product. A larger company like Direct Energy can better afford the $250,000.00 level of securitization than can a smaller company like Archer Energy. In response to a question from the Hearing Officer regarding the cost to a company such as Mr. Mitrey's of procuring securitization, Mr. Mitrey said he did not know off hand how much it cost Archer Energy, but that he would find out and provide that information to the Division when he filed Archer's posthearing comments.

Division Closing Remarks Regarding The Amendments To The Rules

In response to some questions from the Hearing Officer, Mr. Kogut addressed the efforts he made leading up to this proceeding to solicit information from the industry. He explained that he spoke personally with a number of industry members in the early stages of the rulemaking process, particularly seeking information regarding the costs of securitization, but with little success.
The Division then turned over what feedback it had received from the industry to Daymark with a request that it try to give the Division some recommendations. Mr. Kogut further explained that quite early on Division staff had generated a list of email addresses for all nonregulated power producers that have done business in Rhode Island (everyone from TransCanada to the very smallest aggregator entities) and sent the notice of hearing (with draft amended rules) to each of those entities. Since the legislation – and

amended rules – is really only aimed at the rather small subset of all nonregulated power producers who are obligated entities, his attempts to inform the industry were quite comprehensive and inclusive. He personally spoke directly to some entities – such as RESA and Direct Energy – and copied them directly on this rulemaking process. The rulemaking was noticed on both the Division's web site and that of the Rhode Island Secretary of State; the latter web site has a rules tracker function that allows anyone interested in a particular rulemaking proceeding to receive automatic notifications of the progress of that proceeding. As of the morning of the hearing, however, none of the 98 entities to whom he had sent the initial notice had submitted anything in writing to him concerning this rulemaking.

Finally, Mr. Kogut pointed out that the Division's consultant, Daymark, did suggest a tiered system in which any obligated entity with sales of more than 100,000 MWh would have to provide securitization of $500,000.00, and any obligated entity with sales of up to 100,000 MWh would only be required to provide securitization of $250,000.00. In other words, Daymark recommended that every obligated entity provide at least $250,000.00 in securitization, but that the larger obligated entities (or, at least, those with more sales) would have to provide the maximum level of securitization allowed by the law.

Post-Hearing Public Comments

The Division received three sets of written comments following the public hearing from: Ms. Miriam J. Cohen, Regional Sales Director, Energy Auction House; Robert J. Munnelly, Jr., Esq., attorney for the Retail Energy Supply Association; and, Mr. Andy Mitrey, President, Archer Energy, LLC.The first set of written comments were those of Ms. Miriam J. Cohen, Regional Sales Director, Energy Auction House. Ms. Cohen opened her comments by noting that she is neither a lawyer nor a nonregulated power producer, but that she has a comprehensive background in this arena and that her interests in this rulemaking proceeding are all consumer driven. Ms. Cohen believes that forcing NPPs to present real collateral in order to operate in the Rhode Island market is a valuable consumer protection, and may help the state in assisting quality NPPs. However, she also believes that having a flat rate of $250,000.00 of security required of all NPPs could reduce the applicant pool (of NPPs) seeking to do business in Rhode Island and end up giving consumers fewer possible choices among distribution company alternatives, and encouraging newer and smaller NPPs to concentrate their efforts in states with lower barriers.

Ms. Cohen argues that a financial security requirement beginning at $100,000.00 would appeal to smaller and newer NPPs (with parameters to be determined somehow by the Division), with the amount of security required to increase on a sliding scale. She suggests that the distribution company could be required to provide reports to the Division on the sales agreements of all NPPs that would allow the Division to adjust the security levels required as those sales volumes increase or decrease.

The second set of comments was received from Robert J. Munnelly, Jr., Esq., attorney for the Retail Energy Supply Association. Mr. Munnelly's comments generally restated, and amplified upon, his testimony and that of his colleague, Mr. Marc Hanks, Senior Manager of Corporate and Regulatory Affairs, Direct Energy (a RESA member), at the hearing. He began by noting that his client supported the flexible approach adopted in proposed rule Section 1.3.A.9.a of allowing four different mechanisms for establishing statutory financial security requirements that were well below the $500,000.00 statutory maximum, but recommended that the Division adopt one of two alternatives to the $250,000.00 flat fee adopted in the proposed rules. The first alternative suggested on behalf of RESA was that the Division reduce the fixed financial security amount of $250,000.00 adopted in the proposed amended rules to a fixed financial security amount of just $100,000.00"as an incremental step to institute this requirement." In RESA's view, this lower level of fixed security would still meet "the statutory requirements while reducing the associated administrative burdens for both the Division and NPPs alike."

RESA points out that if, after a period of time, the Division determines RESA's proposed $100,000.00 level of fixed security was insufficient to protect the State, the Division has the right to amend these rules to increase the statutory limits in the future.

RESA's second alternative set out in its written comments to the Division's proposed fixed security amount was to eliminate that amount entirely and replace it with a sliding scale approach ranging from a low of $100,000.00 to a high of $250,000.00, with each NPPs place on that sliding scale dependent on a percentage of its total sales. Larger NPPs, or those simply not interested in submitting an annual filing report regarding sales, could simply retain the option of maintaining the maximum $250,000.00 fixed security amount. RESA indicated that similar approaches have been adopted in other smaller deregulated states, including Delaware, Maine, and New Hampshire (and the District of Columbia). RESA believes such an approach would encourage, rather than impede, new market entrants. RESA also objects to the proposed rules use of the term "investment grade" in the definition of the corporate guarantee alternative to a bond or other financial security, believing that such a requirement "is not a necessary or reasonable requirement when seeking to confirm that a large corporation is sufficiently credit-worthy not to require submission of a Rhode Island-specific bond, and it is likely to raise definitional and administrative problems that will complicate use of this otherwise attractive option for larger suppliers." RESA notes, in a footnote, that its membership believes that the costs of providing financial security will vary greatly, depending on which of the four alternatives is chosen by a particular NPP, with the cost of a surety bond being the least costly. RESA's membership has also advised RESA that, depending on the size and creditworthiness of the NPP in question, a surety bond would typically cost between one and two percent of the face value of the security, or $2,500.00 to $5,000.00, exclusive of the staff resources devoted to applying for or securing issuance of the bond. The membership's finance personnel have indicated that some of the other options could cost as much as full face value of the instrument. Thus, RESA argues that financial security would be relatively costly to smaller suppliers, and an excessive requirement would harm consumers by limiting the extent of customer-beneficial choice and competition.

Mr. Mitrey, of Archer Energy, LLC, made similar observations, both in his testimony at the hearing and in his later written comments on behalf of Archer, noting in his testimony that in his experience the cost of obtaining a surety bond would run between two and three percent of the face value of the bond. Both Archer and RESA observed that using Alternative Compliance Payments ("ACP") as the benchmark for assessing the loss engendered by an NPP leaving the market with its obligations unsatisfied might not be the best approach. Both argued that the better approach would be to look not at the value of the stranded ACP, but at the replacement cost for those stranded ACPs. They suggested that such an approach would have reduced the apparent losses suffered by the State in the Glacial Energy of New England bankruptcy to much less than the $270,000.00 plus referenced in Mr. Kogut's remarks, and thus would justify setting the security benchmark at less than the $250,000.00 proposed in these amended rules.

No further written public comments were received following the Division's re-initiation of this rulemaking proceeding on November 8, 2017. The record closed effective 4:00 p.m., Friday, December 8, 2017.

Discussion And Findings

A. Prefatory Remarks

While the Division does not intend to impose unnecessary regulatory burdens that would serve as a potential barrier to competition, it is charged with implementing the statutory provisions as they have been enacted into law. Those provisions in this case suggest that the General Assembly wished to provide the State itself with a certain level of financial security with respect to the activities of competitive energy suppliers seeking to operate in Rhode Island, and did so in the context of a competitive supplier having left the state "holding the bag" with respect to well over $250,000.00 in obligations when that competitive supplier left the Rhode Island market suddenly. Clearly, the General Assembly's intention in amending R.I.G.L. § 39-1-27.1 was to protect the interests of the State by ensuring that any nonregulated power producer that was an obligated entity wishing to do business in Rhode Island must first provide the State with concrete evidence of that obligated entity's financial soundness and ability to satisfy its obligations to the State even should that obligated entity later choose to stop doing business in Rhode Island for any reason whatsoever. In other words, the General Assembly was clearly more concerned with safeguarding the financial interests of the State than in encouraging companies of marginal financial soundness to enter into Rhode Island for the purpose of participating in the competitive energy market.

For that reason, the Division has elected in all cases to hew as closely as possible to the statutory language in amending this set of rules as the best way to ensure that it is carrying out the General Assembly's intent. The appropriate forum for arguing in favor of language more favorable to competitive suppliers was before the General Assembly prior to passage of the legislation, not the Division now. The Division must enforce the law as written; it may not change the intent of that law through regulatory fiat. In arriving at this conclusion, we gave due consideration to R.I.G.L. § 42-35.1-4, concerning regulatory flexibility. We note specifically that the General Assembly made liberal use of the verbs "shall" and "will" in the legislation amending R.I.G.L. § 39-1-27.1(c)(9) regarding the new requirements of evidence regarding financial soundness, particularly for obligated entities. "Shall" means "has a duty to" or "is required to" under strict standards of drafting. BLACK'S LAW DICTIONARY 1379 (7th ed. 1999). "Will" appears to be used by the General Assembly interchangeably with "shall" in directing specific actions. "Will" in that context is a verb defined as "am (is, are, etc.) expected or required to" take a specific action. RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY 2175 (2nd ed. 2001). Accordingly, we have tried to follow the statutory language used by the General Assembly whenever possible in preparing these rules, and have not chosen to impose requirements any more stringent toward the NPPs than those required by the legislation, choosing instead a level of financial security roughly mid-way between the minimum of $25,000.00 and the maximum of $500,000.00 specified in the legislation. Indeed, the $250,000.00 amount settled on by the Division was consistent with the amount of loss actually sustained by the State in the incident which appears to have triggered this legislation. The Division does not believe that R.I.G.L. § 42-35.1-4 gives it carte blanch to negate, ignore or rewrite clear statutory directions in the interests of easing the regulatory burden on small businesses. What it does do is allow an agency to choose among options available to it – if any – consistent with the existing statutory language in formulating the regulations intended to implement that statutory language. We cannot rewrite the law, we can only strive to implement the clear intent of the law. If the statute provides options, or is sufficiently general or ambiguous to allow freedom of interpretation, we may take advantage of that freedom in the interests of limiting regulatory burdens while still satisfying the needs of the State consistent with the clear intent of the General Assembly. In this case, we have found the law to be clear and directive in nature, and sufficiently free of unnecessary regulatory burdens (consistent with its stated purpose of protecting consumers), that there has been little need to add regulatory gloss to the statutory language other than choosing the appropriate level of securitization.

B. Discussion of Public Comments

All of the public commenters, both at the hearing and in writing later, express similar concerns, primarily with the Division's decision to require a fixed financial security amount of $250,000.00. RESA did, however, offer two specific alternatives to the Division's proposed fixed financial security amount of $250,000.00 in its written posthearing comments. The first suggested alternative was to reduce the fixed financial security amount, at least initially, to a fixed financial security amount of $100,000.00; RESA suggests that if the Division subsequently determines that amount to be too low, the Division could initiate a new proceeding to raise the amount to a more appropriate level.

While the Division agrees that more data is always preferable to less when establishing standards of any type, it must point out that the sole data point currently available comes from the bankruptcy of a single NPP, Glacial Energy, while owing the State some $277,000.00 in alternative compliance payments ("ACPs"). Thus, the data that is available to us suggests that an initial fixed financial security amount of $100,000.00 is clearly insufficient to protect the State's interests. Indeed, the $250,000.00 in initial fixed financial security that the Division settled upon in these draft rules was a bit lower than the amount of unpaid ACPs from the Glacial Energy bankruptcy, but we believe it to be a more reasonable starting point for protecting the State's interests. As a practical matter, the larger and more established NPPs are probably less likely to fail than the newer start-ups, and we believe that security in the amount of $250,000.00 will generally be adequate to protect the State from another Glacial Energy while we are at the same time sure that $100,000.00 in fixed financial security will not. Accordingly, we must reject RESA's first alternative proposal.

With respect to RESA's second alternative proposal, a sliding scale approach ranging from a low of $100,000.00 to a high of $250,000.00, with each NPPs place on that sliding scale dependent on a percentage of its total sales, the Division has the following observations. First of all, Rhode Island presents a situation that is not really comparable to any of the other small jurisdictions cited by RESA. Rhode Island is more compact and densely populated than any of the other jurisdictions (except for the District of Columbia), and like the District (but no other jurisdiction), there is only a single distribution company for NPPs to deal with. Unlike any of the other jurisdictions (including the District), there is only one main daily newspaper of general circulation throughout the state (the Providence Journal; the District, in addition to the Washington Post is also served by the Baltimore Sun and the New York papers, as well as some daily papers from the surrounding communities), and really only one television outlet per network for the entire state, making it far easier for any NPP to market in Rhode Island and deal with the mundane (but very important) aspects of billing and collection. In that sense, the cost of entering the Rhode Island market, and doing business here, should be comparatively lower than that in any of the other jurisdictions cited by RESA.

Second, any type of sliding scale will necessarily require more effort on the part of both the NPPs and Division if the statutory goal of protecting the financial interests of the State is to be met. When an NPP first obtains permission to do business in Rhode Island, it does not yet have any sales and the amount of security it would need to provide would, of course, be quite low. Depending on fluctuations in the energy market, the new NPP's sales could either remain flat upon entry, or they could rocket up substantially and quickly. (For example, when the local distribution company sought a significant increase in the energy commodity component of its bill this past summer (a "pass-through" cost from the producers), NPPs in this state saw an immediate and significant increase in their sales because for the first time in years – spot market fluctuations aside – they were able to beat the standard offer by a significant amount over a significant period of time.) As the NPPs' sales fluctuate, the amount of securitization the State requires a would fluctuate as well, and there would need to be a means of capturing that data on the fly if the State's interests were to be adequately protected. That would mean frequent reporting requirements placed on the NPPs and a need for Division personnel to review the resultant data and determine the new levels of securitization required. That type of requirement would, indeed, present a disincentive to a new NPP (particularly a small startup) seeking to enter our market (and an incentive for established NPPs to consider leaving); no one wants that. For these reasons, the Division must reject a recommendation to adopt a sliding scale at this time.

With respect to RESA's objection to the proposed rules' use of the term "investment grade" in the definition of the corporate guarantee alternative to a bond or other financial security, believing that such a requirement "is not a necessary or reasonable requirement when seeking to confirm that a large corporation is sufficiently credit-worthy," the Division would like to point out three things. First, not every corporation who might wish to choose this option is necessarily going to be a "large corporation" that is "sufficiently credit-worthy," and these rules must address all potential NPPs regardless of their size. Second, this is only one of four types of acceptable evidence of financial soundness; an NPP that does not want to furnish a "corporate guarantee from an investment grade entity" can always choose another option. Finally, these rules are about establishing what the State considers to be acceptable "evidence of financial soundness" that will make the State confident that a particular NPP can meet all of its financial obligations to the State, not what an NPP considers should be "good enough" to satisfy the State.
With respect to the cost of providing evidence of financial soundness to the Division, the public comment was generally in agreement that a surety bond was likely to be the cheapest alternative for NPPs, that the cost would vary depending on the size and creditworthiness of the NPP, and that the cost to purchase a security bond would range from a low of one percent (per RESA) to a high of about three percent (per Archer) of the face value of the surety bond (i.e., the cost of a surety bond in the amount of $250,000.00 would probably range between $2,500.00 and $7,500.00, depending on the size and creditworthiness of the particular NPP). The Division does not believe $2,500.00 is an unreasonable cost for a financially sound NPP to be expected to pay; the administrative cost of procuring such a bond, which was unquantified by any of the public commenters, would in the Division's view be simply a reasonable cost of doing business. While we grant that $7,500.00 might discourage a small and uncreditworthy NPP from trying to enter the Rhode Island market, such a result is not necessarily a bad thing. Indeed, those are the types of companies that present the greatest financial risk to the State, the very types of companies these

rules are intended to protect the State from. While additional competition in the market is good, that increased competition only benefits the consumers and the Rhode Island marketplace if the new competitors have sufficient financial soundness to live up to their financial obligations to their customers and to the State.

With respect to the comments of both Archer and RESA that using the face value of stranded ACPs when the market price of replacing those ACPs at the time of Glacial Energy of New England's bankruptcy was much lower, the Division notes that the General Assembly's intention was to protect the State from financial loss on a going forward basis. Market prices, including presumably those for ACPs will vary over time, and could presumably move either up or down. If an NPP similar in size and activity in Rhode Island were to go bankrupt in the future, stranding $270,000.00 or so in ACPs owed to the State, what would the cost of replacing those ACPs be to the State at that time? The market costs could be either more or less than that in effect at the time of Glacial Energy's failure. There is no way to know what that future cost will be at this time. The Division believes, however, that level of security chosen by the Division at this time should be enough, on average, to protect the interests of the State without being unreasonably expensive for any financially sound NPP to procure. Accordingly, the Division believes that the best course of action is to maintain that level at $250,000.00 for the present, and adjust it up or down depending on what the State's future experience shows is adequate.

CHANGE TO TEXT OF THE RULE:

Aside from a change in the Effective Date anticipated in the first notice, there are no substantive changes from either noticed proposed rule and the final version.

REGULATORY ANALYSIS:
In the development of the proposed adoption, consideration was given to: (1) alternative approaches; (2) overlap or duplication with other statutory and regulatory provisions; and (3) significant economic impact on small business. No alternative approach, duplication, or overlap was identified based upon available information. This regulation has been reviewed by the Office of Regulatory Reform.

DATE THE FINAL RULE WAS SIGNED BY THE AGENCY HEAD:
DATED AND EFFECTIVE AT WARWICK, RHODE ISLAND ON January 5, 2018
With an effective date of March 7/2018