

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

**IN THE MATTER OF THE PETITION OF )  
THE DIVISION OF THE PUBLIC ADVOCATE )  
TO REQUEST THE PUBLIC SERVICE )  
COMMISSION TO AMEND 26 DEL.ADMIN. CODE )  
§3008.3.2.21 TO ISSUE REGULATIONS )  
GOVERNING WHEN A FREEZE OF THE ) DOCKET NO. 15-\_\_\_\_  
MINIMUM PERCENTAGES OF ELIGIBLE )  
ENERGY RESOURCES AND SOLAR )  
PHOTOVOLTAICS MAY BE DECLARED )  
PURSUANT TO 26 DEL. C. §§354(i) AND (j) )  
(Filed October 2, 2015) )**

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**PETITION OF THE DIVISION OF THE PUBLIC ADVOCATE TO REQUEST THE  
DELAWARE PUBLIC SERVICE COMMISSION TO AMEND 26 DEL. ADMIN. CODE  
§3008.3.2.21 TO ISSUE REGULATIONS GOVERNING WHEN A FREEZE OF THE  
MINIMUM PERCENTAGES OF ELIGIBLE ENERGY RESOURCES AND SOLAR  
PHOTOVOLTAICS MAY BE DECLARED PURSUANT TO 26 DEL. C. §§354(i) AND (j)**

Pursuant to the authority granted to it in 29 Del. C. §§8716(e)(1) and (2), the Division of the Public Advocate (“DPA”) hereby respectfully submits this petition (“Petition”) requesting the Public Service Commission (the “Commission”) to amend 26 Del. Admin. Code §§3008.3.2.21 to issue regulations governing when a freeze of the minimum percentages of eligible energy resources and solar photovoltaics may be declared pursuant to 26 Del. C. §§354(i) and (j). In support of its Petition, the DPA states as follows:

1. In 2010, the General Assembly amended Section 354 of the Renewable Energy Portfolio Standards Act (“REPSA”) to add provisions allowing for a freeze of the minimum renewable energy purchase requirements for regulated utilities under certain circumstances. The amendments added the following:

(i) The State Energy Coordinator<sup>1</sup> in consultation with the Commission, may freeze the minimum cumulative solar photovoltaics requirement for regulated utilities if the Delaware Energy Office determines that the total cost of complying with this requirement during a compliance year exceeds 1% of the total retail cost of electricity for retail electricity suppliers during the same compliance year. In the event of a freeze, the minimum cumulative percentage from solar photovoltaics shall remain at the percentage for the year in which the freeze is instituted. The freeze shall be lifted upon a finding by the Coordinator, in consultation with the Commission, that the total cost of compliance can reasonably be expected to be under the 1% threshold. The total cost of compliance shall include the costs associated with any ratepayer funded state solar rebate program, SREC purchases, and solar alternative compliance payments.

(j) The State Energy Coordinator in consultation with the Commission, may freeze the minimum cumulative Eligible Energy Resources requirement for regulated utilities if the Delaware Energy Office determines that the total cost of complying with this requirement during a compliance year exceeds 3% of the total retail cost of electricity for retail electricity suppliers during the same compliance year. In the event of a freeze, the minimum cumulative percentage from Eligible Energy Resources shall remain at the percentage for the year in which the freeze is instituted. The freeze shall be lifted upon a finding by the Coordinator, in consultation with the Commission, that the total cost of compliance can reasonably be expected to be under the 3% threshold. The total cost of compliance shall include the costs associated with any ratepayer funded state renewable energy rebate program, REC purchases, and alternative compliance payments.

26 Del. C. §§354(i), (j).

2. In the same legislation, the General Assembly added a new subsection (b) to Section 362 of the REPSA. It provided:

For regulated utilities, the Commission shall further adopt rules and regulations *to specify the procedures for freezing the minimum cumulative solar photovoltaic requirement as authorized under § 354(i) and (j) of this title*, and for adjusting the

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<sup>1</sup> The State Energy Coordinator position no longer exists. The Department of Natural Resources and Environmental Control's ("DNREC") Division of Energy and Climate is now the pertinent entity for participating in this determination with the Commission. The DPA will refer to the Division of Energy and Climate throughout the rest of this Petition.

alternative compliance payment and solar alternative compliance payment as authorized under § 358(d)(4) and (e)(3) of this title.

26 *Del. C.* §362(b). The REPSA defines “Commission” as the Delaware Public Service Commission. 26 *Del. C.* §352(2). (It also defines DNREC in §352(5)).

3. In May 2011, the Commission issued regulations purporting to implement 26 *Del. C.* §§354(i) and (j). 26 *Del. Admin. Code* §3008.3.2.21 provides:

3.2.21 The minimum percentages from Eligible Energy Resources and Solar Photovoltaic Energy Resources as shown in Section 3.2.1 and Schedule 1 may be frozen for CRECs as authorized by, and pursuant to, 26 **Del.C.** § 354(i)-(j). For a freeze to occur, the Delaware Energy Office<sup>2</sup> must determine [sic] that the cost of complying with the requirements of this Regulation exceeds 1% for Solar Photovoltaic Energy Resources and 3% for Eligible Energy Resources of the total retail cost of electricity for Retail Electricity Suppliers during the same Compliance Year. The total cost of compliance shall include the costs associated with any ratepayer funded state renewable energy rebate program, REC and SREC purchases, and ACPs and SACPs alternative compliance payments.

3.2.21.1 Once frozen, the minimum cumulative requirements shall remain at the percentage for the Compliance Year in which the freeze was instituted.

3.2.21.2 The freeze may be lifted only upon a finding by the State Energy Coordinator, in consultation with the Commission, that the total cost of compliance can reasonably be expected to be under the 1% or 3% threshold, as applicable.

4. DNREC apparently believes that it has the statutory authority in the first instance to promulgate regulations specifying the procedures for freezing the minimum cumulative solar photovoltaic and eligible energy resource requirements under 26 *Del. C.* §§354(i) and (j). On three different occasions – in 2012, 2014 and 2015 – it has published proposed rules specifying such procedures.

5. The DPA has filed comments addressing DNREC’s proposed rules. In those comments, the DPA has argued that DNREC does not have the authority to promulgate rules

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<sup>2</sup> The Delaware Energy Office is now DNREC’s Division of Energy and Climate. The DPA will refer to the Division of Energy and Climate throughout the rest of this Petition.

specifying the procedures for declaring a freeze of the minimum cumulative percentages; rather, 26 *Del. C.* §362(b) assigns that authority to the Commission.

6. 26 *Del. C.* §§354(i) and (j) do require the Commission and DNREC's Division of Energy and Climate to consult together to determine whether a freeze should be implemented, and if so, whether it should subsequently be lifted. And those sections further state that DNREC's Division of Energy and Climate will determine whether the 3% and 1% cost caps have been reached. But those are steps 2 and 3. The first step is promulgating the regulations that specify *how* the cost of compliance with the renewable energy mandates and the total retail cost of electricity are calculated. *That* is the authority that DNREC believes it has. And *that* is the authority that the DPA believes belongs solely to this Commission pursuant to the clear language of 26 *Del. C.* §362(b).

7. The goal of statutory construction is to give effect to the General Assembly's intent. *Zambrana v. State*, 118 A.3d 775, 776 (Del. 2015); *Terex Corp. v. Southern Track & Pump, Inc.*, 117 A.2d 537, 543 (Del. 2015). The General Assembly could have given that authority to DNREC in the REPSA, since DNREC is a defined term in the REPSA and DNREC is specifically assigned other responsibilities in the REPSA. But it did not. The General Assembly clearly intended to entrust the authority to promulgate regulations governing the procedures for freezing the renewable energy requirements to the Commission, not to DNREC. Therefore, because DNREC lacks the statutory authority to promulgate regulations describing how the costs of compliance with the renewable energy mandates and the total retail cost of electricity are calculated, it will be exceeding its authority if it promulgates such regulations. *See Delaware Department of Natural Resources & Environmental Control v. Sussex County*, 34 A.3d 1087 (Del. 2011) (General Assembly delegated zoning authority to counties; DNREC

lacked statutory authority to engage in zoning practices; thus, DNREC regulations establishing buffer zones for Inland Bays, mandatory requirements on Inland Bays homeowners' association and deed restrictions for Inland Bays homeowners exceeded its authority and were void); *Cartanza v. Delaware Department of Natural Resources and Environmental Control*, 2008 WL 4682653 (Del. Ch., Master's Report Oct. 10, 2008), *adopted* 2008 WL 4682653 (Del. Ch. Jan. 12, 2009) (DNREC not permitted to set own criteria by which State Resource Area designations were to be made when enabling statute specifically provided such authority to another body; regulations in which DNREC set such criteria exceeded its authority).

8. Furthermore, neither 26 *Del. C.* §§354(i) nor (j) give the Commission authority to delegate its responsibility for specifying the procedures for freezing the renewable energy requirements to DNREC. And the Commission cannot delegate its authority to DNREC *sua sponte*. See, e.g., *Matador Pipelines, Inc. v. Oklahoma Water Resources Board*, 742 P.2d 15 (Okla. 1987) (agency cannot delegate statutory duty to other agencies); *Lake Isabella Development, Inc. v. Village of Lake Isabella*, 674 N.W.2d 40 (Mich. Ct. App. 2003) (agency could not delegate authority to municipality); *Booker Creek Preservation Inc. v. Southwest Florida Water Management District*, 534 So.2d 419 (Fla. Dist. Ct. App. 5<sup>th</sup> Dist. 1988) (agency cannot delegate statutory duty to other agencies).

**WHEREFORE**, the Division of the Public Advocate respectfully requests this Commission to open a docket to promulgate regulations specifying the procedures for freezing the minimum cumulative solar photovoltaic and eligible energy resource requirements under 26 *Del. C.* §§354(i) and (j).

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