

**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. C.*)
§3008.3.2.21 TO ISSUE REGULATIONS)
GOVERNING WHEN A FREEZE OF THE) DOCKET NO. 15-1462
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))

ORDER NO. 8807

AND NOW, this 3rd day of November, 2015:

WHEREAS, on October 2, 2015, the Division of the Public Advocate ("DPA") filed a petition requesting the Delaware Public Service Commission (the "Commission") 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) of the Renewable Energy Portfolio Standards Act ("REPSA"); and

WHEREAS, on October 9, 2015, the Caesar Rodney Institute ("CRI") filed a petition supporting the DPA's petition (hereafter, the "DPA/CRI Petition"); and

WHEREAS, the DPA and CRI contend that: (1) Section 362(b) of the REPSA gives this Commission, and not the Department of Natural Resources and Environmental Control ("DNREC") the authority to promulgate rules and regulations to specify the procedures for freezing the minimum cumulative eligible energy resource and solar photovoltaic requirements as authorized under REPSA Sections 354(i)

and (j); and (2) the Commission does not have the authority to delegate that responsibility to DNREC; and

WHEREAS, on October 27, 2015, DNREC and the Commission Staff ("Staff") jointly filed a Motion to Deny the DPA/CRI Petition ("Joint Motion"), arguing that: (1) the Commission has already promulgated regulations in 2011 specifying the procedures for freezing or unfreezing the minimum cumulative renewable energy requirements (Joint Motion at ¶4); (2) the DPA and CRI had "ample opportunity" to raise these issues during the Commission's 2011 regulation docket (*Id.*); (3) the Commission already considered and rejected an argument that the Commission adopt regulations addressing the cost calculation (*Id.*); (4) 29 *Del. C.* §8003(7) gives DNREC the "authority and right "to issue rules and regulations that the Secretary deems necessary, and that DNREC responded to a request by Gary Myers to open a regulation docket addressing Sections 354(i) and (j) (*Id.* at ¶5); (5) DNREC "has not proposed any regulation that purports to establish a *procedure* for freezing or unfreezing the minimum resource requirements;" rather, they claim the proposed regulations only "govern how it will administer its obligations under §§354(i) and (j) (*Id.* at ¶6); (6) "[i]f the General Assembly had wanted the Commission to write a prescriptive analytical process for calculating the cost of compliance, there would be no need to have a separate agency such as DNREC involved in the calculation or consulting with the Commission on a potential freeze" (*Id.* at ¶7); (7) the General Assembly did in fact confer the authority to calculating the cost of compliance on DNREC in §§354(i) and (j) because the calculation of the costs of compliance is

"a separate and precedent step" to a decision to freeze the renewable energy requirements (*Id.* at ¶8); and (8) the Petitioners' requested relief would write DNREC's role out of the REPSA (*Id.* at ¶¶9-10); and

WHEREAS, on October __, 2015, the DPA and CRI filed a Response (the "Response") to the Joint Motion rebutting the arguments in the Joint Motion; and

WHEREAS, the Commission met at its regularly-scheduled November 3, 2015 meeting and heard oral argument and deliberated in public on the DPA/CRI Petition, the Joint Motion and the Response;

NOW, THEREFORE, IT IS HEREBY ORDERED BY THE AFFIRMATIVE VOTE OF NOT FEWER THAN THREE COMMISSIONERS:

1. The DPA/CRI Petition is **GRANTED**.
2. The Commission finds that 26 *Del. C.* §362(b) specifically invests this Commission with the authority to promulgate rules and regulations to specify the procedures for freezing the minimum cumulative eligible energy resource and solar photovoltaic requirements as authorized under REPSA Sections 354(i) and (j), and that this Commission cannot delegate that authority to any other entity. Upon further reflection, we overrule our previous decision in Order No. 7933 that we refrain from defining "total retail cost of electricity" until we confer with DNREC in the context of considering a freeze. RESPA was amended in 2010; it is now five years since the amendment which was intended to protect ratepayers from excessive costs was enacted and there is some suggestion that the cost caps have been exceeded in previous years.

3. The Commission accepts the DPA's and CRI's rebuttal arguments in their Response and rejects the arguments in DNREC's and the Staff's Joint Motion for the reasons stated in the Response.

4. We hereby reopen Regulation Docket No. 56 for consideration of the appropriate procedures for freezing the minimum cumulative eligible energy resource and solar photovoltaic requirements as authorized under REPSA Sections 354(i) and (j). We direct Staff to draft proposed regulations for publication in the *Register of Regulations* no later than the January 1, 2016 issue of the *Register*. The proposed regulations shall be subject to the requirements of the Administrative Procedures Act, 29 Del. C. §§10101 et seq. in all respects. We further direct Staff to convene a workshop for interested parties to discuss the proposed regulations during the month of January 2016.

5. The Commission reserves the jurisdiction and authority to enter such further Orders as may be deemed necessary or proper.

BY ORDER OF THE COMMISSION:

Chair

Commissioner

Commissioner

Commissioner

Commissioner

ATTEST:

Secretary