

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

IN THE MATTER OF THE PETITION OF )  
THE DELAWARE DIVISION OF THE )  
PUBLIC ADVOCATE AND THE CAESAR )  
RODNEY INSTITUTE TO REQUEST THE )  
PUBLIC SERVICE COMMISSION TO )  
AMEND 26 *DEL. ADMIN. C.* §3008-3.2.21 )PSC DOCKET NO. 15-1462  
TO ISSUE REGULATIONS GOVERNING )  
WHEN A FREEZE OF THE MINIMUM )  
PERCENTAGES OF ELIGIBLE ENERGY )  
RESOURCES AND SOLAR PHOTO- )  
VOLTAICS MAY BE DECLARED )  
PURSUANT TO 26 *DEL. C.* §§354(i) AND (j) )  
(FILED OCTOBER 2, 2015 AND OCTOBER )  
12, 2015) )

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**ORDER NO. 8807**

**I. INTRODUCTION**

1. On October 2, 2015, the Division of the Public Advocate ("DPA") filed a petition requesting the Delaware Public Service Commission (the "Commission") to reopen its rulemaking docket to specify the procedures for freezing the minimum cumulative renewable energy requirements pursuant to 26 *Del. C.* §§354(i) and (j). On October 12, 2015, the Caesar Rodney Institute ("CRI") filed a petition supporting the DPA's petition.<sup>1</sup> On October 27, 2015, the Delaware Department of Natural Resources and Environmental Control ("DNREC") filed a Petition for Leave to Intervene in this docket. On October 27, 2015, the Commission Staff ("Staff") and the Delaware Department of Natural Resources and Environmental Control ("DNREC") filed a Joint

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<sup>1</sup> Although the Commission did not enter an order consolidating the two petitions, we considered and deliberated on them together at our regularly-scheduled meeting on November 3, 2015. We will refer to the petitions jointly as the "Petition" in this Order, and to the DPA and CRI together as "Petitioners."

Motion opposing the petitions and requesting the Commission to deny them (the "Joint Motion"). The DPA and CRI filed a joint response ("Joint Response") to the Joint Motion on October 29, 2015. We also received a letter signed by eight members of the Delaware House of Representatives supporting the Petition, and written comments from Dr. Jeremy Firestone and the Mid-Atlantic Renewable Energy Coalition opposing the Petition.

2. On November 3, 2015, the Commission met at its regularly-scheduled meeting to consider the Petition, the Joint Motion, and the Joint Response, and to hear oral argument from the parties. After deliberations, the Commission denied the Petition. This Order explains the Commission's findings and decision.

## **II. BACKGROUND**

3. 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>2</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

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<sup>2</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 Commission will refer to the Division of Energy and Climate throughout the rest of this Order.

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).

4. 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 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)).

5. In May 2011, this Commission issued regulations with respect to 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>3</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.

6. On three different occasions - in 2012, 2014 and 2015 - DNREC has published proposed rules specifying procedures for freezing the minimum cumulative renewable energy requirements pursuant to 26 *Del. C.* §§354(i) and (j). Proposed regulations are currently pending before a DNREC Hearing Officer. The Comment deadline is December 8, 2015. See *November 2015 Register of Regulations*, Department of Natural Resources and Environmental Control, Division of Energy and Climate, 102 "Implementation of Renewable Energy Portfolio Standards Cost Cap Provisions."

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<sup>3</sup> The Delaware Energy Office is now DNREC's Division of Energy and Climate. The Commission will refer to it as "DNREC" or the "Division of Energy and Climate" throughout the rest of this Order.

**III. THE PETITION**

7. The Petitioners argued that the REPSA defines "Commission" as the Delaware Public Service Commission, and that 26 *Del. C.* §362(b) assigns to the Commission, not to DNREC, the authority to promulgate regulations specifying the procedures for declaring a freeze of the minimum cumulative renewable energy requirements. They acknowledged that 26 *Del. C.* §§354(i) and (j) 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. They further acknowledged that 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, the Petitioners contended, those were steps 2 and 3: the first step was promulgating the regulations that specify *how* the cost of compliance with the renewable energy mandates and the total retail cost of electricity are calculated. The Petitioners argued that such authority belongs solely to this Commission pursuant to 26 *Del. C.* §362(b). Petition, ¶¶2, 6.

8. The Petitioners argued that the goal of statutory construction is to give effect to the General Assembly's intent, citing *Zambrana v. State*, 118 A.3d 775, 776 (Del. 2015) and *Terex Corp. v. Southern Track & Pump, Inc.*, 117 A.2d 537, 543 (Del. 2015). They contended that 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 do so. The Petitioners contended that the

General Assembly clearly intended in Section 362(b) to entrust the authority to promulgate regulations governing the procedures for freezing the renewable energy requirements to the Commission, not to DNREC. Therefore, the Petitioners claimed, 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, citing *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). *Id.* ¶7.

9. The Petitioners further argued that neither 26 Del. C. §§354(i) nor (j) gave the Commission authority to delegate its responsibility for specifying the procedures for freezing the renewable energy requirements to DNREC, and the Commission could not delegate its authority to DNREC *sua sponte*. *Id.* ¶8, citing *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).

**IV. THE JOINT MOTION**

10. DNREC and Staff presented several arguments in opposition to the Petition. First, they contended that the Commission had already promulgated regulations in 2011 specifying the procedures for freezing or unfreezing the minimum cumulative renewable energy requirements. Joint Motion at ¶4. Second, they asserted that the DPA and CRI had had "ample opportunity" to raise their contentions during the Commission's 2011 regulation docket. *Id.* Third, they argued that the Commission had already considered and rejected an argument from Vote Solar in the 2011 regulation docket that the Commission should adopt regulations addressing the cost calculation. *Id.* Fourth, they contended that 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). They further contended that DNREC's rulemaking process had been "open and transparent." *Id.* at ¶5 and p. 5. Fifth, they argued that DNREC "ha[d] not proposed any regulation that purports to establish a *procedure* for freezing or unfreezing the minimum resource requirements;" but rather, that the

proposed regulations only "govern[ed] how [DNREC] will administer its obligations under §§354(i) and (j)." *Id.* at ¶6. Sixth, they claimed that "[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. Seventh, they contended that the General Assembly did in fact confer the authority to calculate 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. Finally, they asserted that the Petitioners' interpretation of the REPSA amendments would write DNREC out of the statute. *Id.* at ¶¶9-10.

**V. THE JOINT RESPONSE**

11. The Petitioners acknowledged that the Commission had already issued regulations supposedly specifying the procedure for freezing or unfreezing the minimum cumulative resource requirements, but argued that those regulations simply regurgitated the language of Sections 354(i) and (j) that say that DNREC will make the determination that the costs of compliance exceed the statutory thresholds. They contended that those sections do not say that DNREC has the authority to promulgate the regulations by which it will be determined whether the costs of compliance and the total retail cost of electricity have exceeded the cost caps and that was because the General Assembly assigned that task to the Commission in Section

362(b). Again, the Petitioners asserted that the Commission could not abdicate its authority for promulgating regulations specifying the procedure for freezing the minimum cumulative renewable energy requirements to DNREC. Joint Response at ¶¶10-11. They further observed that no law or rule forbids the Commission from reopening a regulation docket, noting that the Commission has reopened dockets many times to consider proposed rule changes even without a change in law. They identified Regulation Docket No. 49 as an example of the Commission reopening a rulemaking docket to consider proposed changes in the absence of a change in law. Last, they noted that every Commission order provides that the Commission retains the jurisdiction and authority to issue such further orders as it deems necessary or proper. *Id.* ¶12.

12. Next, the Petitioners acknowledged that they could have raised the issue during the Commission's 2011 rulemaking docket, but that did not foreclose the Commission from reopening the rulemaking docket. They contended that under DNREC's and Staff's logic, the Commission could only reopen a rulemaking proceeding if the law changed, but the Commission had not adopted such a position. The Petitioners again cited the reopening of Regulation Docket No. 49, observing that no change in the law had prompted its reopening and that parties had raised issues that could have been raised during one of the previous times that regulation docket had been reopened to consider changes to the rules. *Id.* ¶13.

13. The Petitioners challenged DNREC's and Staff's contention that the Commission had rejected Vote Solar's suggestion that it

promulgate regulations regarding the cost calculation, noting that one of the reasons the Commission gave for rejecting Vote Solar's request was that Vote Solar had not proposed a definition. *Id.* at ¶14, citing *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 Suppliers* (Opened August 23, 2005; Re-opened September 4, 2007; August 5, 2008; and September 22, 2009), Regulation Docket No. 56, Order No. 7933 (Del. PSC Mar. 22, 2011) at ¶21, p. 11). The Petitions argued that it would be speculative to predict how the Commission may have decided had Vote Solar offered a definition. *Id.* The Petitioners also observed that Delmarva Power & Light Company's ("Delmarva") website contained a DNREC-approved description of what was included in the renewable compliance charge as a result of an agreement reached in Docket No. 13-250, which described the renewable compliance charge as including the costs of solar and general renewable energy and Delaware Qualified Fuel Cells. *Id.* ¶15.

14. Next, the Petitioners argued that 29 Del. C. §8003(7) was an enabling statute that described the DNREC Secretary's powers, duties and functions, and did not govern the issue raised here because well-established tenets of statutory construction provide that when two statutes are inconsistent, it is presumed that the General Assembly intended the more specific, later-enacted statute to control, citing *Heath v. State*, 983 A.2d 77, 81 (Del. 2009); see also 73 Am. Jur. 2d, Statutes, §161 (statutes complete in themselves, relating to a specific subject, take precedence over general statutes or other statutes that deal only incidentally with the same question). The

Petitioners contended that 26 *Del. C.* §362(b) specifically authorized the Commission to promulgate procedures for freezing the minimum cumulative renewable energy requirements, which was inconsistent with 29 *Del. C.* §8003(7). They argued that the REPSA was complete in itself, relating to a specific subject - renewable energy resources - whereas 7 *Del. C.* §8003(7) was a general grant of authority to the DNREC Secretary, and that the REPSA was not only more specific but was enacted later than 29 *Del. C.* §8003(7). Consequently, applying canons of statutory construction, the Petitioners contended that the Commission had to presume that the General Assembly intended 26 *Del. C.* §362(b)'s delegation of authority to the Commission to establish the procedures for freezing and unfreezing the renewable energy requirements to supersede the general grant of authority to DNREC's Secretary to make regulations. *Id.* ¶17. The Petitioners further contended that DNREC's response to Gary Myers' petition to initiate a rulemaking procedure was irrelevant, and that DNREC's rulemaking process had not been open and transparent. *Id.* ¶¶18-19. In that regard, they noted that the Administrative Procedures Act requires an agency to allow for comments on proposed regulations, and that DNREC had not explained the reasons for the changes it made in each of the iterations of the proposed rules. *Id.* ¶19-20.

15. The Petitioners next argued that DNREC and Staff had tortured the interpretation of the word "procedures." They contended that a fundamental rule of statutory construction was that words used in a statute must be given their ordinary meaning, and that "procedure" was defined as "'the act, method or manner of proceeding

in some action; esp., the sequence of steps to be followed.'" *Id.* ¶21-22, citing *Ross v. Department of Correction*, 697 A.2d 377, 378 (Del. 1997); *Acierno v. New Castle County*, 2006 WL 1668370, \*5 and n.45 (Del. Ch. June 8, 2006) and <http://www.yourdictionary.com/procedure#websters>. *Id.* ¶¶21-22.

16. With respect to DNREC's and Staff's argument that Section 362(b) only gave the Commission authority to adopt procedures for freezing the minimum solar requirements, the Petitioners agreed that the language of Section 362(b) only specifically referenced solar. However, they pointed out that the statute went on to say "as authorized under § 354(i) and (j)," and observed that subsection (j) only addressed eligible energy resources. The Petitioners argued that the object of statutory construction is to ascertain the legislature's intent from the language used, and that "the strict construction of statutory language is more of an aid than an end, and does not eliminate other guides to interpretation from consideration. *Id.* ¶24, quoting *Angelini v. Court of Common Pleas*, 205 A.2d 174, 176 (Del. 1964). The Petitioners concluded that the General Assembly clearly intended to give the Commission authority to promulgate rules governing the procedures for *both* solar photovoltaics *and* eligible energy resources; otherwise there was no purpose for the language "as authorized under § 354(i) and (j)." *Id.* ¶24. The Petitioners also disputed DNREC's and Staff's argument that under the Petitioners' interpretation of 26 *Del. C.* §§354(i) and (j), there would be no need for DNREC's participation, asserting that the same argument could be

made about the Commission's participation under DNREC's and Staff's position. *Id.* ¶25.

17. The Petitioners next took issue with DNREC's and Staff's argument that Sections 354(i) and (j) give DNREC the authority to promulgate regulations specifying the procedures for freezing the minimum renewable energy requirements, arguing that Section 362(b) gives that authority to the Commission. *Id.* ¶26.

18. Finally, the Petitioners contended that DNREC and Staff misstated that the Petitioners were asking the Commission to determine whether the cost caps had been reached. The Petitioners acknowledged that Sections 354(i) and (j) placed the responsibility for determining whether the cost caps have been reached on DNREC. *Id.* ¶28.

#### **VI. DISCUSSION AND DECISION**

19. The language of the REPSA is not a model of clarity. We believe that the language could be improved to make the respective responsibilities of the Commission and DNREC clearer, and we question whether the aims of the statute will be accomplished given the dispute about how to interpret the language. We urge the General Assembly to clarify those responsibilities going forward. In the meantime, we interpret Sections 354(i) and (j) to provide DNREC with the primary responsibility for issuing regulations governing when a freeze of the minimum percentages of eligible energy resources and solar photovoltaics may be declared. (3-0, Commissioner Gray abstaining).

#### **VII. ORDER**

**AND NOW**, this 3<sup>rd</sup> day of December, 2015, it is hereby ordered that:

20. DNREC's Petition for Leave to Intervene is granted (by a 4-0 vote of the Commissioners (Commissioner Drexler not present)).

21. The Petition of the DPA and CRI is **DENIED** (by a 3-0 vote of the Commissioners; Commissioner Drexler not present; Commissioner Gray abstaining).

22. Docket No. 15-1462 is hereby closed (by a 3-0 vote of the Commissioners; Commissioner Drexler not present; Commissioner Gray abstaining).

23. The Commission reserves jurisdiction and authority to enter such further orders as may be deemed necessary or proper.

**BY ORDER OF THE COMMISSION:**

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Chair

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Commissioner

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Commissioner

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Commissioner

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Commissioner

ATTEST:

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Secretary