

**Public Service Commission Regulation Docket No. 56**  
**PSC Regulation 3008, *Rules and Procedures to Implement the Renewable Energy Portfolio Standard***

**March 2, 2018**

**COMMENTS OF THE DNREC DIVISION OF ENERGY & CLIMATE**

**Background**

On February 1, 2018, the Public Service Commission published a third proposed revision of Regulation 3008, *Rules and Procedures to Implement the Renewable Energy Portfolio Standard*, related to the Renewable Energy Portfolio Standards Act (“REPSA”) cost cap provisions (26 *Del. C.* § 354(i) & (j)). These two sections of REPSA authorize, but do not require, the Director of the Division of Energy & Climate (“Director”), in consultation with the Public Service Commission (“PSC” or “Commission”), to freeze the Renewable Portfolio Standard (“RPS”) for Delmarva Power if the cost of compliance with the overall RPS exceeds 3 percent of the total retail costs of electricity, or exceeds 1 percent for solar photovoltaics.

DNREC argues that two significant provisions in the proposed regulation are unlawful:

1. The Commission overstepped its authority by assigning itself the authority to decide whether to impose a freeze under the cost cap provisions.
2. The Commission erred by including Bloom Energy in the calculation of the cost of compliance, even though Bloom Energy is not defined as a renewable resource in REPSA.

In his March 1, 2018 letter to the Commission, DNREC Secretary Shawn Garvin stated that REPSA established a consultative process for freezing the RPS. (Secretary Garvin’s letter is attached hereto.) He further expressed his desire that DNREC and the Commission would work collaboratively to address this important decision:

We can expect to disagree, but we should not expect that one state agency would ignore the authority conferred upon another state agency. The word “consultation” in § 354(i) & (j) reflects an expectation that DNREC and the PSC will work together in a collegial manner in executing our responsibilities under the law—even when we express our disagreement on substantive matters. I hope that you will give due weight to the authority granted to DNREC under these provisions and reconsider your decision.

The following further details DNREC's arguments and rationale.

## **Argument**

*1. The Commission erred by assigning itself the authority to decide whether to impose a freeze under the cost cap provisions.*

There are four reasons for rejecting this provision and respecting DNREC's statutory authority in this matter: A. The proposed regulation is inconsistent with the plain language of the statute. B. The proposed regulation was presented to the public without the benefit of a written rationale before soliciting public comments. C. The rationale offered at the December 7, 2017 hearing is to prompt legislative action rather than implement the statute as enacted. D. The substance of the proposed regulation exceeds the "limited purpose" cited by this Commission in reopening this docket.

A. The proposed regulation is inconsistent with the plain language of the statute.

The two sections referenced above provide that "[t]he State Energy Coordinator [Director of the Division of Energy & Climate] in consultation with the Commission, may freeze the minimum cumulative eligible energy resources requirement for regulated utilities..." DNREC has argued previously in this docket that the word "may" clearly confers discretion to the Director of the Division of Energy & Climate, but more importantly, the statute vested DNREC with the authority and discretion to make the decision to freeze the RPS. The Commission's decision attempts to take that discretion away from DNREC and place authority in this matter in the Commission's hands.

Under Delaware law, "[i]t is well established that administrative agencies ... derive their powers and authority *solely* from the statute creating such agencies and which define their powers and authority."<sup>1</sup> On appeal, a court will review an agency's enabling statute to determine the extent of its power and to decide whether the agency has exceeded its authority.<sup>2</sup>

The Public Service Commission is a public body created by statute.<sup>3</sup> As such, the Commission's authority is limited to those powers vested in the Commission by the General Assembly. Among its circumscribed statutory authority, the Commission has the ability to promulgate regulations, but that power is not absolute. The Commission's regulatory authority is limited to specific topics, and nowhere does its enabling statute vest the Commission with the authority to preempt the Administrative Procedures Act ("APA") by removing the authority vested in another agency.

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<sup>1</sup> *Office of the Comm'n, Del. Alcoholic Beverage Control v. Appeals Comm'n, Del. Alcoholic Beverage Control*, 116 A.3d 1221, 1226 (Del. 2015) (quoting *Wilmington Vitamin & Cosmetic Corp. v. Tigue*, 183 A.2d 731, 740 (Del. Super. 1962) (emphasis in original)).

<sup>2</sup> *Am. Ins. Ass'n v. Del. Dept. of Ins.*, 2006 WL 3457623, at \*3 (Del. Super. Nov. 29, 2006) (citing *State v. Raley*, 1991 WL 18114, at \*1 (Del. Super. Feb. 8, 1991)).

<sup>3</sup> 26 Del. C. §§ 101-711.

B. The proposed regulation was presented to the public without the benefit of a written rationale before soliciting public comments.

Order No. 9016 does not include the Commission's rationale for asserting that the Commission has the final authority in declaring a freeze. In order to provide informed comments, the public should have had the Commission's reasoning in writing before the public comment period opened. Since that was not provided, the public, DNREC, and other parties do not have the benefit of knowing the Commission's rationale on these issues before submitting comments. Further, without a clearly stated rationale from the Commission, the public may not fully appreciate the substance or implications of what the Commission is proposing in this docket.

C. The rationale offered at the December 7, 2017 hearing is to prompt legislative action rather than implement the statute as enacted.

DNREC has reviewed the record of the Commission's December 7, 2017 hearing. After hearing the arguments, Chair Winslow cited one of the commentators in support of the motion to amend Regulation 3008 to give the Commission, not DNREC, the authority to decide to impose a freeze.

It seems to me that it's either that way or [the commentator's] way—in my opinion.<sup>4</sup>

The comments referred to by Chair Winslow advocated for a decision that would instigate legislative action in this matter.<sup>5</sup> In the absence of written rationale offered by the Commission, DNREC is left to conclude that the Commission agreed with the commentator, and based its decision on that same sentiment – the need to create circumstances that would prompt legislative action. The regulatory task before the Commission is to implement the law as written and respect the statutory roles of DNREC and the PSC.

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<sup>4</sup> Video recording at 2:06:45.

<sup>5</sup> “If you adopt your [Staff's] rule, it won't get fixed. What's the other option being offered? Our option. I can guarantee you that if you adopt our option, there will be a bill in the legislature in the next session.” Video recording at 1:03:20.

D. The substance of the proposed regulation exceeds the “limited purpose” cited by this Commission in reopening this docket.

The Commission reopened Regulation Docket No. 56 “for the limited purpose of complying with the Memorandum Opinion, issued December 30, 2016, in *Delaware Division of the Public Advocate v. Delaware Public Service Commission*.” The Commission opened the docket to consider a very limited set of issues based on the Court’s decision. As such, the Commission should not expand the scope of this docket to change the plain meaning of the statute. Moreover, Judge LeGrow did not find that the Commission had the statutory authority to freeze the RPS, and the Commission cannot use the Court’s Memorandum Opinion as a basis for expanding its own statutory authority.

The Commission had options before it that would fit within the limited purpose it set when it reopened Regulation Docket No. 56. The Commission strayed beyond this limited purpose in Section 3.2.21.6.2 by assigning itself the authority to decide whether to impose a freeze under the cost cap provisions.

*2. The Commission erred by including Bloom Energy in the calculation of the cost of compliance.*

There are four reasons, based on the statute, for not including Bloom Energy or QFCP costs in the cost of compliance: A. The statutory text does not include Bloom in the enumerated costs. B. Bloom is not an “eligible energy resource” (renewable energy resource) as defined by REPSA. C. Bloom does not generate renewable energy credits or RECs. D. DNREC does not have the statutory authority to freeze Bloom costs.

## **Conclusion**

Two of the provisions in the proposed regulation are unlawful: 1. The Commission overstepped its authority by assigning itself the authority to decide whether to impose a freeze under the cost cap provisions; and 2. The Commission erred by including Bloom Energy in the calculation of the cost of compliance. The Commission should not adopt the proposed regulation as final, and instead amend these provisions, so that they are consistent with the statute.

Respectfully submitted,

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