

February 7, 2018

Joseph DeLosa
Public Service Commission
Cannon Building, Suite 100
861 Silver Lake Blvd.
Dover, DE 19904

By electronic mail only

Re: **Reg. Dckt. No. 56,**

*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; REOPENED SEPTEMBER 4,
2007; AUGUST 5, 2008; SEPTEMBER 22, 2009; AUGUST 17, 2010;
SEPTEMBER 6, 2011; SEPTEMBER 18, 2012; FEBRUARY 2, 2017)
PSC NOPR, 21 DE Reg. 620 (Feb. 1, 2018)
Third Round Comments of Gary Myers*

Dear Mr. DeLosa::

Pursuant to the public notice posted in the February 1, 2018 Register of Regulations (21 DE Reg. 620), and pursuant to the provisions of 29 Del. C. §§ 10116 & 10118(a), I am hereby submitting the attached comments for consideration in the third round of the above-captioned PSC rule-making proceeding. I ask that they may be made part of the record in that proceeding.

As regard to these comments, two filing cautions are needed. The comments have been constructed separately and contain only a header reference to my name and other identifying information. Consequently, this cover letter should accompany those comments into the record. Because I am only filing electronic copies of my comments, all of the electronic files - cover letter and omments - should also be kept linked or connected in order to identify the comments as mine.

Please, by return e-mail, acknowledge receipt of the comments and confirm that all the documents have been included in the record.

If you have any questions, please contact me. If you desire that I file hard, paper copies of my comments or the transcripts please let me know.

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*308 Rules and Procedures to Implement the Renewable Energy
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A. "Total Retail Cost of Electricity for Retail Electricity Suppliers"

I continue to assert that under the text of the relevant cost cap provisions, and consistent with legislative history, "the total retail cost of electricity for retail electricity suppliers" in 26 Del. C. § 354(i) & (j) encompass only the costs of selling electric energy supply by retail electricity suppliers. Consequently, that phrase excludes any costs paid by consumers for delivery or other non-supply products or services. See Myers' Initial Comments at 30-24 (March 31, 2017); Myers' Rebuttal Comments at 16-21 (Sept. 28, 2017). I incorporate those earlier comments here.

Staff's view, adopted by the majority of the Commissioners at the December 7, 2017 deliberations, is that Delmarva Power - because it sells electrical energy as a Standard Offer Supplier, is a "retail electric supplier" not only in its sales of energy but in all its functions, including its delivery and distribution services. Such a spillover capture, Staff says, applies not only to the delivery of Delmarva's SOS retail energy product, but to any delivery of energy sold by third-party retail electricity suppliers. This construct runs counter to the definition of "retail electricity supplier" in 26 Del. C. § 352(22) which limits the "supplier" role to a person or entity that "sells *electrical energy* to end-use customers." (emphasis added).

B. The Ability to Forgo a Freeze Called for by the Statutory Percentage Cap

Similarly, I continue to believe that neither the E&C Director nor the Commission has the power to forego declaring a freeze once the relevant cost cap limit has been breached in a compliance year. See Myers' Initial Comments at 23-29 (March 31, 2017); Myers' Rebuttal Comments at 10-15 (Sept. 28, 2017). Such a "no discretion" rule, suggested in the statutory text and explicitly adopted in the legislative history, avoids the inevitable problems that will arise under the currently proposed freeze/no freeze discretionary scheme offered by Staff and endorsed by the Commissioners at the December 7th deliberations. The currently proposed scheme will surely engender arguments about whether the Commission, or the Director, has the "final" say about foregoing a statutorily-called for freeze. But it will also bog the process down in repeated debates about

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what factors can, or cannot, be considered, in exercising such discretion. The statutory text's silence about any such discretionary factors, in itself, strongly suggests that in enforcing any cap freeze there was to be no room for any thumbs up or down vote for foregoing a freeze. The *statutory* cost cap provisions adopted specific numbers - 3 and 1 percent - to govern not only when a freeze is called for, but just as significantly, when a prior freeze should be lifted. If the Director, or the Commission, were to have discretion about when to impose a freeze why have the numbers at all?

However, if the Commission believes that a freeze is indeed a discretionary call, I think the proposed rule should be modified to explicitly announce who has the penultimate authority to make throw the freeze flag or keep or keep it in one's pocket. At the deliberations on December 7, Staff - in a colloquy with the Commissioners and DNREC - explained that under the proposed regime the Commission would hold the final say on imposing or foregoing a freeze. Staff explicitly said that under its proposed rule (adopted by the Commissioners) the Commission could "veto" a no-freeze determination made by DNREC. Staff suggested the such "final say" authority arises not only from the Commission's exclusive power to generally regulate Delmarva Power but also from the specific power granted to it to superintend Delmarva Power's compliance with the REPSA standards. *See* 26 Del. C. § 353(a). PSC Reg. Dckt. No 56, 27 Tr. 1080, 1082-84 (Dec. 7, 2017).

The proposed rule should make explicit that the Commission holds the final say on whether to forego a freeze. Thus, the proposed rules should be amended as follows (with change in italics):

3.2.21.6.1 Within 20 days after the consultation, the E&C Director or its assigned delegate shall submit to the Commission its written determination, including the bases for that determination, to declare or not declare a Freeze.

3.2.21.6.2 At the next regularly-scheduled Commission meeting the Commission shall consider the determination. *After deliberations, the Commission shall make its own decision whether*

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*to institute or forego a Freeze and issue a final Order to the CREC
to implement that decision.*

C. Change to the Description of the Bloom Energy Surcharges as a Cost of Compliance

In the total cost of compliance sections, the new proposed rules frequently describe the "[t]he amount the CREC paid for the QFCPP output that it used to fulfill its REC requirement" and "[t]he amount the CREC paid for the QFCPP output that it used to fulfill its SREC requirement." See Proposed rules 3.2.21.1.6., 3.2.21.1.7., 3.2.21.3.7., 3.2.21.3.8., & 3.2.21.4.4. These elements, seemingly adopted from earlier DPA comments, seek to capture within the "cost of compliance" the payments made to Bloom Energy which yield REC and SREC equivalents from the Bloom Energy QFCPP output. The glitch is that the rule provisions use the phrase "the amount *the CREC paid* for the QFCPP output." However, the 2011 Bloom amendments to REPSA and Delmarva's implementing QFCP-RC tariff sections make abundantly clear that Delmarva Power has neither a "purchaser" or contractual counter-party status with the Bloom QFCPP. Delmarva, the entity, make no purchases from the QFCPP either in terms of energy, capacity, or any other item. As section 364(b) puts it:

A commission-regulated electric company participating in a qualified fuel cell provider project shall collect and disburse funds solely as the agent for the collection and disbursement of funds for the project and shall have no liability except to comply with the tariff provisions to be established as set forth in subsection (d) of this section.

See also 26 Del. C. § 364(d) ("Tariff provisions enabling and obligating commission-regulated electric companies, *acting in the role of an agent for collection and disbursement, to collect charges on behalf of a qualified fuel cell provider project . . .*"). Consequently, Delmarva, as the "commission-regulated electric company," does not "pay" for the QFCPP output, nor does it pay for the RECs and SRECs that accrue from such output. Delmarva simply acts as the QFCPP's agent, collecting monies paid by Delmarva customers and disbursing

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them to its principal, the Bloom QFCPP. *as the agent* of the QFCPP. It is important to keep that statutorily-decreed status intact.

I suggest changing the various phrases to "[t]he amount the CREC disbursed to the QFCPP for output that was used to fulfill the CREC's REC requirement" and "[t]he amount the CREC disbursed to the QFCPP for output that was used to full the CREC's SREC requirement." These changes more closely track the statutory text's explanation of Delmarva Power's role.