

To the Chair and Commissioners of the Public Service Commission:

PSC Dckt. No. 56 - REPSA Cost Cap Regulation

Unfortunately, I find that I cannot attend the continued hearing and argument before the Commission set for June 5. Recently rescheduled obligations as a Grandfather call and always trump the opportunity to argue about energy laws. ***I ask that the Commissioners accept this written presentation in lieu of my personal appearance on June 5.*** I will try to be be succinct.

My focus is on the "third issue:" the question whether DNREC's Energy Division ("the Director") has an **obligation** to impose a "freeze" on the REPSA obligations once she finds the percentage cap expressed in one or the other of the statutory cost cap subsections has been exceeded for a compliance year. DNREC argues there is no such obligation, but only discretion vested in the Director in that scenario. In other words, she can waive or forego any "freeze" even if the percentage limit has been left behind. DNREC says that is so because the statutory provisions say the Director "may" freeze the REPSA requirements.

I am a firm believer that what governs is enacted words, not non-textual legislative intentions. But there is something really disquieting about DNREC's "discretion" argument here. Everyone who has read the transcripts of the legislative debates on the 2010 Renewable Energy amendments - which added the two cost cap provisions - can easily agree on one thing: that on the legislative floor both former DNREC Secretary Colin O'Mara and Senator McDowell described the cost cap provisions as "circuit breakers." If it can be shown that the cost of renewables during the compliance year would likely, or had already, exceeded the 1 or 3 percent cap amounts set forth in the subsections, the cost cap "circuit breaker" would trip and the renewable program would "freeze "or be "suspended" for that year. Senator McDowell spoke to his Senate colleagues using this "circuit breaker" terminology at least three times, saying the breaker could be punched (and the renewable obligation suspended) *"any time"* one or the other percentage limit was passed. Secretary O'Mara used the "circuit breaker" description at least twice, noting, for example, that with such mechanism in place there could *"never"* be a cost impact of greater than one percent (the statutory percentage cap) in the case of the solar requirements.

DNREC says that these "circuit breaker" descriptions, which call for a freeze once the percentage cap levels have been breached, are not what the text of the statute says. And DNREC asserts, such text controls, not the comments of the Senator and Secretary. The text uses the term "may . . . freeze:" that shows discretion to forego a freeze even if the cost cap percentage levels have been breached.

The necessary implication from DNREC's argument is that both the bill's sponsor, Senator McDowell, and DNREC's own Secretary made egregious mistakes on the chambers' floors in how they described the cost cap provisions being voted upon acting as "circuit breaker" protections for consumers. That's a disturbing notion. In effect, DNREC now suggests its own Secretary did not understand - and thus wrongly described - how the cost cap freeze provisions would work.

While Delaware courts often look to legislative history to decipher unclear text, I can say I am not a big fan of legislative history generally. But this case is different. Senator McDowell's and Secretary O'Mara's "circuit breaker" descriptions did not come in some obscure legislative document that probably no one might read. Nor did they come in some post-enactment recitation of what was intended. Rather, the "circuit breaker" descriptions came as Senator McDowell and Secretary O'Mara explained to the assembled Senators and Representatives from the legislative floor what the new "substitute" bill would do and how its cost cap provisions would work to ensure consumers would never bear renewable costs above the bill's percentage limits. And most significantly, those comments about "circuit breaker" protections came moments before those Senators and Representatives cast final votes on the substitute bill.

DNREC might argue that if the Commission goes with the "circuit breaker" scheme outlined by Senator McDowell and Secretary O'Mara, the Commission would be impermissibly "rewriting" the text of the cost cap provisions. But that is not necessarily so. In my reams of earlier comments, I explained how the simple word "may" does not have any set, singular, meaning and that in the case of legal text, both dictionaries and a hundred years of court cases reflect that "may" is routinely used to impose obligation, not just permission and discretion. As the court cases show, this is often the case where the word "may" is used to confer on a public officer the authority to deviate from the normal regime in order to provide a conferred right or further the public interest. That makes sense: why would the legislature - after carefully setting out in the law the conditions under which the officer has the permission to confer an entitlement or award a benefit in a public interest then turn around and give the officer unfettered discretion to ignore those specific conditions and deny the entitlement or benefit? So in the cost cap statutory provisions the word "may" - by itself - does not resolve obligation or discretion.

DNREC says, "may" must confer discretion because the cost cap provisions use the obligatory word "shall" in neighboring sentences describing when a freeze "shall be lifted." Again, in my comments, I pointed out why it was acceptable to use "may" to impose obligation in the freeze section and "shall" in the reinstatement sentence. In any event, when this "may" and "shall" wording is stacked up against how Senator McDowell and Secretary O'Mara explained how such text would work, the legislative history tilts the scale.

The text of the cost cap provisions easily accept the "circuit breaker" descriptions told to the legislators by Senator McDowell and Secretary O'Mara. The circuit breaker scheme avoids all the problems of DNREC - or the Commission - exercising standardless, unfettered discretion. It avoids the tug of war about who has the final say in any such freeze discretion. But most importantly it is consistent with how how the members of the General Assembly were led to believe by DNREC's own Secretary about how the costs cop consumer protections they voted to enact would operate.

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