



STATE OF DELAWARE
**DEPARTMENT OF NATURAL RESOURCES AND
ENVIRONMENTAL CONTROL**

RICHARDSON & ROBBINS BUILDING
89 KINGS HIGHWAY
DOVER, DELAWARE 19901

OFFICE OF THE
SECRETARY

PHONE
(302) 739-9000

DEC 02 2019

The Honorable Dallas Winslow, Chairman
Dr. Raj Barua, Executive Director
Public Service Commission
861 Silver Lake Boulevard
Cannon Building, Suite 100
Dover, DE 19904

Re: November 21, 2019 Letter
PSC Regulation Docket No. 56

Dear Chairman Winslow and Mr. Barua:

We are in receipt of the Public Service Commission's ("Commission") November 21, 2019 letter, which raises three matters: (1) the significance of the November 13, 2019 date identified in the PSC October 8, 2019 memorandum, (2) the reasoning as to why the Department of Natural Resources and Environmental Control ("DNREC") did not submit calculations by that date, and (3) notification that the Commission has placed this matter on the agenda for its December 5, 2019 meeting. In response, DNREC respectfully suggests that this matter is not appropriate for consideration at the Commission's December 5, 2019 meeting, and requests that the Commission defer any consideration of the calculation or a freeze of the percentage of electricity which should come from renewable energy (the "RPS percentage") under the Renewable Energy Portfolio Standards Act ("REPSA") through the end of the current compliance year, May 31, 2020, to allow the Administration to pursue a legislative solution to these issues.

This Matter is Premature for the December 5, 2019 Meeting

These issues are premature for the Commission's December 5, 2019 meeting. First, the Administration has expressed its desire that the underlying disputes between DNREC and the Commission be resolved via legislation. Secretary of State Bullock and I have been engaged on a path forward. Such a legislative solution would not only resolve the disputes underlying the

Superior Court litigation, but also further strengthen and extend REPSA to continue to build Delaware's renewable energy market, reduce harmful emissions, and continue to support the falling costs of renewables to Delaware ratepayers. To that end, discussions with members of the General Assembly are underway. The agencies, State government as a whole, regulated parties and other interested parties, such as Delaware's solar industry, will all benefit from a non-litigation resolution of these disputes that provides certainty on REPSA's path into the future.

There is nothing essential about the November 13, 2019 date noted in your letter. That date has already been postponed from October 14, 2019, as specified in Commission Staff's prior August 7, 2019 memorandum. The purpose of the delay was to allow Superior Court Judge Wharton to rule on the motions that are currently pending before him (DNREC's motion to stay implementation of the Commission's Regulations, and the Commission's and Division of Public Advocate's ("DPA") motions to dismiss DNREC's Superior Court case) before the date specified by the Commission for DNREC to submit its calculations. Judge Wharton has not yet ruled on the pending motions and therefore DNREC considers that submission of such calculations is not consistent with the delay contemplated by the parties.

Because of the Administration's desire for a legislative solution to these disputes and because Judge Wharton has not yet ruled on the pending motions, it is premature to place this issue on the agenda for the Commission's December 5, 2019 meeting. The Commission's consideration of these issues will benefit from Judge Wharton's ruling and the parties determining what their next steps may be, including appeal or otherwise, rather than taking action that may be premature, unnecessary, or contrary to the Court's ruling.

This Matter Should Be Stayed Through the End of the Current Compliance Year

As you note, there has been no affirmative request for postponement; indeed, DNREC did not believe one was necessary. Nevertheless, please consider this DNREC's request that the Commission defer action on this matter through the end of the current compliance year, May 31, 2020, to allow the Administration to pursue a legislative solution to these disputes and to update and extend REPSA. No parties will be harmed by such a deferment, rather it will maintain the status quo. The RPS percentages for the 2019 compliance year began on June 1, 2019. *See 26 Del. C. §§ 352(3), 354(a)*. Delmarva Power & Light ("Delmarva") has already been purchasing credits for the 2019 compliance year and solar and renewable providers have relied on those levels.

DPA suggested in its November 8, 2019 letter to Judge Wharton and during the November 12, 2019 oral argument that the RPS percentage should be held "at the 2018-2019 levels." (DPA November 8, 2019 letter at 1.) DNREC respectfully points out that there is no support whatsoever in the statute to revert to 2018 levels. Rather, even if a freeze were implemented it would cause the RPS percentage "to remain at the percentage for the year in which the freeze is instituted." *26 Del. C. §§ 354(i), (j)*. As we have been in the 2019 compliance year since June 1, 2019, there simply is no mechanism to revert to 2018 levels.

The Commission's Calculation Conflicts with the Statute

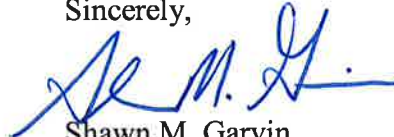
DNREC again reminds the Commission that, among other things, REPSA (a) does not support the Commission's demand that DNREC provide its calculations on a docket, (b) does not support the Commission's regulations purporting to allow the Commission to override DNREC's freeze determination, or (c) does not subject DNREC's freeze determination to judicial review. The statutory language is clear. It is DNREC's decision and DNREC's discretion, in consultation with the Commission, on whether a freeze should be implemented. 26 Del. C. §§ 354(i), (j). Nowhere is there statutory support for the Commission to override DNREC's decision. Compare 26 Del. C. §§ 354(i), (j) with 26 Del. Admin. C. 3008-3.2.21.6. As REPSA provides the authority for the freeze determination to DNREC, and DNREC's actions are generally not subject to judicial review under the Administrative Procedures Act, see 29 Del. C. § 10161(a), the Commission's Regulations further conflict with the General Assembly's intent.

Finally, DNREC again urges the Commission to recognize that the calculation established by its Regulations conflicts with the plain language of REPSA and undermines the intent of the General Assembly. Among other things, Bloom Energy costs should not be included in the total cost of compliance. The "the total cost of complying with this requirement" specified in 26 Del. C. §§ 354(i) and (j) (emphasis added) refers to the "solar photovoltaics requirement" and "eligible energy resources requirement" specified immediately before in the very same sentences. Bloom Energy is neither solar photovoltaic nor an eligible energy resource, as its fuel cells utilize natural gas. See 26 Del. C. §§ 352(6)(a) (solar photovoltaic are "technologies that employ solar radiation to produce electricity"), 352(6)(e) (to be an eligible energy resource, fuel cells must be "powered by renewable fuels"), 352(20) (renewable fuels do "not include fossil fuel[s]"). Thus, the Regulations, see 26 Del. Admin. C. 3008-3.2.21.3.7-8, directly conflict with REPSA.

Purporting to require DNREC to provide calculations in conflict with REPSA serves no useful purpose. Furthermore, including Bloom Energy costs – as the Commission's Regulations purport to require – will lead to calculations supporting a long term freeze of 12 years or more, which is plainly at odds with the General Assembly's intent. That intent is express in REPSA: "scheduled percentage increases toward the goal of 25% from eligible energy resources." 26 Del. C. § 354(c); see also *id.* §§ 351, 354(d). Indeed, a 12 year freeze would also violate the requirement that, for the RPS percentages for "compliance year 2026 and each subsequent year," "[i]n no case shall the minimum percentages established by Commission rules be lower than those required for compliance year 2025 in Schedule I." 26 Del. C. § 354(b). It further conflicts with the sponsor's description of the provision as a one-year "circuit breaker" during floor debate. See Floor Debate on Senate Substitute No. 1 for Senate Bill No. 119 at 4-5, 9 (June 22, 2010). The Commission should not undermine the General Assembly's intent.

In summary, DNREC respectfully suggests (1) that this matter is premature to be placed on the agenda for the Commission's December 5, 2019 meeting and (2) that the Commission should respect the Administration's desire for a legislative solution that would resolve the disputes between the Commission, DPA and DNREC and update and extend REPSA, and should therefore defer any consideration of calculations or a freeze until the end of the current compliance year, May 31, 2020. DNREC welcomes further dialogue with the Commission, as may be appropriate, about this litigation, the Regulations, potential legislative solutions, or on other topics of mutual interest.

Sincerely,



Shawn M. Garvin
Secretary

cc: The Honorable Joann Conaway, Commissioner
The Honorable Harold Gray, Commissioner
The Honorable Kim Drexler, Commissioner
The Honorable Manubhai C. Karia, Commissioner
The Honorable Jeffrey Bullock, Secretary of State