Glossary

§ 354(i) – 26 Del. C. § 354(i).

§ 354(j) – 26 Del. C. § 354(j).

SS 1 - Senate Substitute No. 1 for Senate Bill No. 119, 145th Gen. Assembly, 2d Sess., *enacted as* 77 Del. Laws ch. 451 (2010), *and codified in various provisions of* 26 Del. C. §§ 354-363.

2010 REPSA amendments - same as SS 1.

SB 124 - Senate Bill No. 124 with Senate Amend. No. 1, 146th Gen. Assembly, 1st Sess., *enacted as* 78 Del. Laws ch. 99 (2011), *and codified in various provisions of* 26 Del. C. §§ 352-354, 364.

Bloom amendments - same as SB 124.

SS1 SD – floor proceedings on SS 1 in the Senate (June 22, 2010).

SS1 HD – floor proceedings on SS 1 in the House of Representatives (June 29, 2010).

Bloom SD – floor proceedings on SB 124 in the Senate (June 16, 2011).

Bloom HD – floor proceedings on SB 124 in the House of Representatives (June 23, 2011).

McDowell remarks – remarks of State Senator Harris McDowell in legislative proceedings.

Williams remarks – remarks of State Representative Dennis E. Williams in legislative proceedings.

O'Mara remarks – remarks of DNREC Secretary Collin O'Mara in legislative proceedings.

DeLuca remarks – remarks of State Senator Anthony DeLuca in legislative proceedings.

Sawyer remarks – remarks of Governor's Deputy Chief of Staff Geoffrey Sawyer in legislative proceedings.

Kowalko remarks – remarks of State Representative John Kowalko in legislative proceedings.

RH Dict. – *Webster's unabridged dictionary* (Random House 2d ed. 2001)

1. **Introduction**

The § 354(i) & (j) "Circuit Breakers" - New Provisions to Protect Electric Consumers Against Higher Energy Bills

Subsections 354(i) and (j) were added as part of the 2010 reworking of the State's Renewable Energy Portfolio Standards Act. These 2010 amendments had three goals. First, some changes would "strengthen" the renewable energy portfolio requirements by increasing (and extending) the annual percentage requirements for upcoming years. Second, other modification would provide new incentives for electric suppliers to look to local labor and local manufacturing to meet the increased renewable energy levels demanded of them. And third, several changes would add protections for all electric consumers to guard against them having to bear any significant adverse cost consequences that might arise from both the old, and now strengthened, renewable energy portfolio requirements.

Subsections 354(i) & (j) were the major mechanisms to achieve this third goal. The two provisions came highly touted to the legislative floors. Senator McDowell, the prime sponsor of the bill, told his Senate colleagues, that the bill – in these two subsections - "provides consumer protection by limiting any rate impact it may create."[1] And on the House side, co-sponsor Representative D.E. Williams echoed the provisions' significance. As he reported to House members, "very importantly, what it adds that the prior versions of this did not have is ratepayer protection by introducing limits of cost impacts on this."[2] On the House floor, Secretary O'Mara told the Representatives that by including the subsections, the proponents of the bill were "trying to make sure there's price protections in place where currently there are none."[3] As the Secretary explained: there are "right now no price protections in place under current law in the State of Delaware" so the two subsections would add "the circuit breaker that does freeze the program if there are adverse rate impacts."[4]

1 SS1 SD at 3 (McDowell). *See also* SS1 SD at 4 (McDowell) (bill "provides for ratepayer protection against cost impacts").

2 SS1 HD at 3-4 (Williams).

3 SS1 HD at 6 (O'Mara).

4 SS1 HD at 7-8 (O'Mara). In responding to a Representative's question about the experience in California with similar ambitious renewable percentage targets, Secretary O'Mara said that one of the two failures in California was that "they did not put the consumer protections in place we're talking about, so there have been adverse impacts there because they did not take that step." SS1 HD at 18 (O'Mara). According to him, the Delaware bill was an effort to "correct those two mistakes and learn from their, learn from their - the problems that they've had there so we don't

Moreover, the sponsors and the Secretary O'Mara all described the consumer protection provisions as easily administered and decisive. Both Senator McDowell and the Secretary used the metaphor of a "circuit breaker" to describe the protections afforded by subsections 354(i) and (j). Senator McDowell said:

> [a]ny time the cost impact of the photovoltaic goes up by 1 percent, the utility involved can push what we like to call a circuit breaker. In other words, they can suspend the program for that year and simply extend the portfolio forward a year for their utility.[5]

In more detail, he outlined:

> [w]e've also built safety valves into this bill. I told you about the circuit breaker that we have put in where any utility who can show that its rates are going up or would go up by 1 percent in case of -- of solar, the retail electric would go up by 1 percent in a year in the cases of solar, or 3 percent in the overall, they could push the circuit breaker and suspend their participation in the program for one year. And so that is a very, very serious rate production -- ratepayer protection.[6]

In the other chamber, Secretary O'Mara offered a similar picture of how subsections 354(i) & (j) would work:

> But most importantly, by having a circuit breaker, if you will, an actual price control, whereby if the, if the ratepayer impacts exceed a certain amount, that the entire program freezes in place, we can ensure ratepayers that there won't be any adverse impacts from this legislation.[7]

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replicate their mistakes." *Id*. Earlier, the Secretary had said that the consumer protection related to solar percentages (§ 354(i)) were "more stringent and much more – has much greater ratepayer protection than New Jersey or Maryland – both of which have a 2 percent [solar] carve out – because we believe we need to protect ratepayers during this tough economic time." SS1 HD at 14 (O'Mara).

5 SS 1 SD at 4-5 (McDowell).

6 SS1 SD at 9 (McDowell). *See also* SS1 SD at 26-27 (McDowell) (offering similar description of circuit breaker protection applicable to all utilities).

7 SS1 HD at 6-7 (O'Mara).

The mechanics he explained would be:

> So under the legislation, if the -- as soon as there's a 1 percent impact from the solar portion of the bill, the, the target level freezes in place for that entire calendar year and then starts up again after it.[8]

Finally, both legislative chambers heard the bill's sponsor and major proponent promise that the consumer impact protections would be triggered by the percentage formulas, have real bite, and not be illusory. Again, Senator McDowell said:

> *[a]ny time* the cost impact of the photovoltaic goes up by 1 percent, the utility involved can push what we like to call a circuit breaker. In other words, they can suspend the program for that year and simply extend the portfolio forward a year for their utility.[9]

In other words, according to the Senator:

> [t]he biggest thing and part of which is what I've called the circuit breaker, *whereby, if their rates go -- start to go up, and they can demonstrate by empirical data that their rates are going up more than or as much as the numbers we have here, which is 3 percent overall, 1 percent for solar, as a result of participating in the solar, their rates go up in one year by 1 percent or more, they can push the circuit breaker and they don't have to comply.*[10]

In the House, Secretary O'Mara was just as explicit. Speaking to the solar requirements cost cap provision, he said:

> [y]ou'll *never* have more than a 1 percent impact in any given year for the solar, for the solar portion of the, of – the solar requirements as written in the legislation.[11]

In sum, the legislative proceedings show that subsections 354(i) and (j) were meant to give electric consumers a real "wallet" entitlement: protection against bearing in their electric

8 SS1 HD at 13 (O'Mara).

9 SS 1 SD at 4-5 (McDowell) (emphasis added).

10 SS 1 SD at 26-27 (McDowell) (emphasis added).

11 SS1 HD at 13-14 (O'Mara) (emphasis added).

bills significant costs arising from the costs of complying with renewable energy portfolio requirements. Moreover, this entitlement was meant to be easily invoked and have real effect. The central question in this rule-making proceeding is whether the proposed “cost cap/freeze” rules are consistent with this legislative vision.

2. **Proposed Rule § 5.0 Must be Struck and be Rewritten**

Before the legislative houses, both Senator McDowell and Secretary O'Mara portrayed the percentages in both subsections 354(i) & (j) as not just necessary, but sufficient (if not exclusive), grounds for a renewable energy portfolio "freeze." In the picture they painted, once the total costs of renewable energy compliance reach the relevant 1 or 3 percent figure, the "circuit breaker" trips to "suspend participation"[12] so that "the entire program freezes in place."[13] Unfortunately, proposed rule § 5.0 paints a different landscape. It makes the statutory percentage levels necessary, but not sufficient, conditions for a "freeze." Proposed rule §§ 5.2, 5.3. To throw in another metaphor, the statutory percentage levels are not "stop" signs but merely "rumble strips." Once the statutory levels are reached, a "freeze" ensues *only* if the Director then works through an all-encompassing list of considerations (assigned to four factors) and then determines a freeze is called for. Proposed rule §§ 5.4-5.8. Yet, this four-factor superstructure constructed by the proposed rules is not to be found in the text of subsections 354(i) & (j) and indeed runs counter to their language. And, as shown above, the "additional consideration" regime is inconsistent with the "intent" of the legislature as reflected in above-recited legislative history. Consequently, proposed rule § 5.0 must be struck. It must be rewritten to reflect that breach of either of the two statutory percentages is - in itself - sufficient to require the Director to declare a relevant freeze.

a. Background Principles

The first duty in any rule-making – as indeed the primary obligation of any executive branch action – is to take care that the laws be *faithfully executed*. Del. Const., art. III, § 17 (emphasis added). An agency's duty is to ensure execution of the General Assembly's law, not to make up the law on its own. Consequently, "an administrative body exercising purely statutory powers must find in the [legislative] act its warrant for the exercise of any authority it claims." *State v. Berenguer*, 321 A.2d 507, 509 (Del. Super. 1974) (Walsh, J.) (internal quotation and citation omitted). And the concurrent principle is that an agency has no authority to choose to suspend the operation - in full or in part - of a law previously enacted; the power to suspend law rests exclusively with the General Assembly. Del. Const. art. I, § 10 ("no power of suspending laws shall be exercised but by authority of the General Assembly"). No general warrant empowers an agency to nullify a law it does not like – or that the agency believes will lead to bad results - simply by failing to faithfully implement it.

This bar against executive branch suspension of laws plays out in two ways. First, if an

12 SS1 SD at 5, 9 (McDowell).

13 SS1 HD at 7, 13 (O'Mara).

agency wishes to forego adhering to the terms of a statute, it must point to a *legislative provision* that explicitly allows for such a "suspension" and also charts the factual circumstances that must exist to trigger the agency's action. *See, e.g., Marshall Field & Co. v. Clark*, 143 U.S. 649, 680-94 (1892). Second, any such power to suspend or to ignore statutory provisions is not to be lightly inferred from legislative text; it must be clear and definite. As a Delaware court said years ago: "[i]mplied authority in an executive officer to repeal, extend or modify a law may not lawfully be inferred from authority to enforce it." *State v. Retowski*, 175 A. 325, 327 (Del. Gen. Sess. 1934). Moreover, by the rule-making process, an agency cannot change the legislative scheme. Thus, again in the language of one Delaware court:

> Legislation, however, may not be enacted under the guise of its exercise by adopting a rule or regulation which is out of harmony with, or which alters, extends or limits the Act, or which is inconsistent with the clear legislative intent as therein expressed. *Thus, as in the present case, where a right is granted to a class by statute, the agency administering such statute may not by the adoption and promulgation of a rule or regulation add to the condition of that right a condition not stated in the statute, nor may it exclude from that right a class of persons included within the terms of the statute.*

Wilmington Country Club v. Del. Liquor Commission, 91 A.2d 250, 255 (Del. Super. 1952) (emphasis added). Accordingly, an agency cannot, by rule-making, impose a blanket prohibition on issuing some category of permits when the legislative scheme sets forth a process to obtain permits premised on a case-by-case consideration of various statutorily-described factors. *See In the Matter of Dept. of Natural Resources and Environmental Control*, 401 A.2d 93, 95-96 (Del. Super. 1978) (Walsh, J.). Logically, the converse is just as true: an agency cannot, by rule, make discretionary a decision that the statutory scheme makes mandatory.

b. The Proposed Rule § 5.4 Discretionary Process Violates § 354(i) & (j)

Section 5.0 of the proposed regulations violates these first principles. The provisions of subsections 354(i) and (j) speak explicitly in terms of a freeze to be implemented if the total costs of SREC or REC compliance exceed the specified percentage of the total retail costs of electricity of electric suppliers. Those percentage levels are the "circuit breakers" described by Senator McDowell and Secretary O'Mara on the legislative floors. The two "safety valves" were put into place to protect a specified class – electric consumers – from suffering significant adverse electric billings from the renewable energy portfolio requirements. These two "circuit breakers" were "very, very serious ratepayer protection[s]," needed not only to fill a gap in earlier Delaware renewable legislation but to prevent the possible adverse rate impacts that seemingly plagued similar ambitious renewable efforts in other states such as California.

But proposed rules §§ 5.3 through 5.8 alter all these consumer protections. The proposed rules remake the "circuit breaker" metaphor used by Senator McDowell and Secretary O'Mara into a "fuse and penny" regime. If costs of compliance exceed the applicable percentage cap, the Director does not freeze or suspend the renewable program. Rather, he embarks on a four-factor analysis to determine whether a freeze is to be imposed. He is to consider a whole gamut of inputs, from overall energy market conditions, "avoided cost benefits," "external" savings from cleaner energy, to economic development advantages. Only if – after some unspecified weighing of these open-ended factors – the Director decides a freeze is appropriate will one be forthcoming. If the factors, in his mind, point otherwise he can refuse to impose a freeze and, inserting the penny, continue the "normal" renewable portfolio requirements. Of course, to do so will cause consumers to continue to finance costs of compliance in excess of the percentage cap amounts set forth in the statutory subsections.

Initially, proposed rule § 5.4 makes both Senator McDowell and Secretary O'Mara into liars. The Senator told his colleagues that "[*a*]*ny time*" the cost impact goes up beyond the 1 solar cap percentage level, the solar renewable program will be suspended.[14] Secretary O'Mara had a similar explanation: the subsections provide "an actual price control whereby if the ratepayer impacts exceed a certain amount that the entire program freezes in place."[15] In fact, he represented that "[y]ou'll never have more than a 1 percent impact in any given year for the solar, for the solar portion of the, of – the solar requirements as written in the legislation."[16] Yet all of these statements will not hold true under proposed rule § 5.4. For under it, if the Director deems a freeze unwarranted under the four-factor test, there will be times the "program" will not freeze even though the cost impact exceeds the percentage limit. So too, under § 5.4 even if solar compliance costs of compliance exceed 1 per cent of total retail costs in any given year, consumers might be still forced to pay such higher than cap rates if the Director determines economic development demands it, or some other law provides some form of offsetting economic benefits to consumers. In such a case, contrary to the Secretary's promise, consumers will see more than a 1 percent impact in their bills.

Second, the proposed rule § 5.4 regime is inconsistent with the normal understanding of

14 SS1 SD at 4-5 (McDowell). *See also* SS1 SD at 9 (McDowell) ("any utility who can show that its rates are going up or would go up by 1 percent in case of -- of solar, the retail electric would go up by 1 percent in a year in the cases of solar, or 3 percent in the overall, they could push the circuit breaker and suspend their participation in the program for one year").

15 SS1 HD at 6-7 (O'Mara).

16 SS1 HD at 13-14 (O'Mara).

what constitutes a "cost cap." One does not generally view a "cost cap" as an invitation to undertake a process to properly value renewable energy or to determine the effect renewable energy might assert on energy prices. Rather, as Secretary O'Mara recognized, a "cost cap" is "an actual price control," directed at putting a reasonable and predictable limit on the costs customers will have to bear as a result of suppliers' efforts to meet renewable energy portfolio obligations. The process set forth in proposed § 5.4 is far afield from a "cost cap."

But, most importantly, none of the four factors set forth in proposed rule § 5.4 are mentioned in the 2010 legislation or in subsections 354(i) and (j). None of the factors were mentioned by anyone on the legislative floors in 2010. In addition, on the legislative floor, there was nary of peep about the power of the Director (then Energy Coordinator) to override the percentage "circuit breakers." The four trumping factors, and their definitions (proposed rules §§ 5.5 through 5.8), are creations of DNREC, not the legislature. And as noted, they change the whole "cost cap" scheme.

The proposed rule § 5.0 superstructure is then nothing more than a "suspension" of the "circuit breaker" cost cap formulas set forth in subsections 354(i) and (j). Given that, it is incumbent on DNREC to show that the General Assembly – by explicit language - gave the agency the power to override the statutory formula "circuit breakers." It is not enough for DNREC to assert some implicit grant of such power; it must point to an explicit legislative direction, with conditions announced by the legislature. Del. Const. art. I, § 10.

(1) The Director "*May* Freeze"

The notice in the Register of Regulations does not announce the language or theory that DNREC looks to to sustain the four-factor freeze regime outlined in proposed § 5.0. Perhaps DNREC will argue that the use of the phrase the "Energy Coordinator . . . may freeze" in both subsections 354(i) and (j) provides the needed legislative endorsement for the proposed rule's multi-factor trumping regime. DNREC may say that it's the use of the word "may," rather than "shall," in describing the freeze power, that vests the Director with final discretion about whether to impose a freeze.

But in statutory linguistics the word "may" can often reflect both "permission" coupled with "obligation," rather than permissive "discretion." As the Delaware judges, sitting en banc, said years ago:

> But the word, "may," ordinarily permissive in quality, is frequently given a mandatory meaning, and is given that meaning where a public body or officer is clothed by statute with power to do an act which concerns the public interest, or

> the rights of third persons. In such cases, what they are empowered to do for the sake of justice, or the public welfare, the law requires shall be done. The language, although permissive in form, is, in fact, peremptory.

duPont v. Mills, 196 A. 168, 173 (Del. Court *en banc* 1937). This interpretive principle – that "may" can mean "must" - has a long pedigree. *See Supervisors of Rock Island County. v. U.S.*, 71 U.S. (4 Wall) 435, 44-47 (1866) (outlining prior cases and applying principle). *Cf. Wilson v. U.S.*, 135 F.2d 1005, 1009 (3d Cir. 1943) (citing Delaware and federal case law) *See also Nevada Power Co. v. Watts*, 711 F.2d 913, 920-921 (10th Cir. 1983).[17]

Here the use of the word "may" in subsections 354(i) and (j) fits comfortably within the peremptory meaning articulated in *Mills*. First, those subsections were added to the RESPA in 2010 to "provide consumer protections by limiting any rate impacts."[18] In fact, both Secretary O'Mara and sponsoring Senator McDowell told legislators that these provisions were key components to the 2010 changes: that they brought cost protections to customers that had been previously missing from the REPSA. And in the two subsections, the General Assembly (followed by the Governor) laid out when a freeze was to be declared. The criteria were outlined to protect bill-paying consumers..[19] If that is so, then it would seem illogical for the General Assembly to then turn around and allow an executive officer (the Director) to ignore the protections granted to consumers by decreeing "no freeze" even if the statutorily-described cap percentages have been met. The consumer protection provisions so highly touted in 2010 would then be nothing more than illusory promises easy to be ignored or evaded.

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17 Even in lay usage, the term "may" is often used to denote obligation, rather than discretionary choice. For example, in my youth when I misbehaved, my mother would frequently be quick to tell me that "you *may* go to your room for what you just did." I never took the "may" in her directive to mean that I could exercise some level of discretion and choose not to obey the banishment and instead stay in the kitchen.

18 SS 1, Synopsis.

19 Or in the words of the Supreme Court 150 years ago:

> The power is given, not for [the officer's] benefit, but for [the third party's]. It is placed with the depositary to meet the demands of right, and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless.

Supervisors of Rock Island, 71 U.S. at 1009.

Of course, context is crucial in order to tilt the term “may” either to permissive discretion or peremptory obligation. *See State ex rel. Foulger v. Layton*, 194 A. 886, 889 (Del. Super. 1937). And it is true that the § 354(i) and (j) subsections use both “may” and “shall” in their consumer protection dictates. The Director “may freeze” the REPSA obligations if his office determines the percentage levels have been breached and then any such freeze “shall be lifted” if compliance costs can reasonably be expected to again go to sub-cap percentage levels. Often, such use of both “may” and “shall” in the same provision can suggest an intentional legislative intent to differentiate the permissive from the obligatory. *Foulger*, 194 A. at 889. *Cf. U.S. ex rel. Siegel v. Thoman*, 156 U.S. 353, 359-60 (1895). But in the context of *these* subsections, that rule is hardly iron tight. In fact, the use of the differing words reflects the differing nature of the Director's called-for actions. The REPSA statute sets forth escalating statutory renewable percentage requirements for each successive year. Subsections 354(i) and (j) allow the Coordinator (now Director) to decree a halt to both compliance and to the escalator if certain statutorily-described criteria have been met. In that case, he “may” decree a suspension of the program and a stop to the escalator. The “may” power is simply a grant of *permission* to go outside the otherwise applicable statutory framework once the described cap dollar criteria have been found to exist. It is not a grant of discretion, but simply a grant of power – to be exercised on behalf of consumers - to put a stop to the otherwise called-for obligation and percentage change. In that context, “may” is just as imperative as “shall.” In contrast, the later reference to the freeze “shall be lifted” is of course obligatory. It is a call for a return to the normal statutory scheme if the cost cap limits will likely not be breached.[20] In this context - where power is granted to make a deviation from the otherwise governing statutory scheme - the both “may” and “shall” impose obligatory duties.

In the context of subsections 354(i) and (j), the Director's duty is clear: once the statutory cost cap percentage has been reached, it is his duty to freeze the program and the annual percentage requirements. He might have to consult with the PSC about the mechanics of such a freeze, but he lacks the power go further, override the consumer protections which are at the heart of the two subsections, and refuse to impose the called-for freeze.

20 In fact, the proposed rules themselves ignore any difference between the words “may” or “shall” as used in subsections § 354(i) or (j). Thus, as noted, the proposed rules make the freeze a discretionary act, presumably looking to the word “may”. But the proposed rules also make the lifting of the freeze a similarly discretionary action, even though the statutory subsections use the term “shall” to describe the Director's obligation to resume the renewable obligation. Proposed rule § 7.2 says that once the Director makes the determination required by statute (that the costs of compliance can reasonably be expected to be less than the statutory percentage), then the Director will make a further determination whether to lift the freeze utilizing the same four factors that informed his prior freeze declaration.

(2) The "Coordinator in consultation with the Commission"

DNREC may also rely upon the language in subsections 354(i) and (j) that directs the Director to act "in consultation with the [PSC]." DNREC may argue that such consultative obligation suggests that the Director must have some discretionary authority to impose, or forego, a freeze. Of course, the initial problem is that the proposed rule § 5.0 does not speak to any consultation with the PSC before the Director makes his decision whether to ignore or honor the percentage cost cap limits. There is no mention of any PSC input into his four-factor consideration process. The decision whether to ignore the "circuit breaker," and continue the RESPA obligations and yearly increases, is vested solely in the Director.

More significantly, the problem with seeing discretion being granted by these requirements for PSC "consultation" is that the exact same phrase is used later in the same subsections when they outline when the Director is to to lift a previously imposed freeze. In the latter context, there is also a requirement for the Coordinator (Director) to consult with the PSC. But in those instances, the underlying command to the Director is not "may," but "shall." Instead of granting discretion to the Director in either scenario, the requirements for PSC consultation in both contexts are simply directions that the Director should work with the PSC about the mechanics for implementing the Director's freeze and renewal decisions.[21] The language is not a dictate for the Director to confer with the PSC about whether a freeze should be imposed, or should later be lifted, even though the applicable statutory cap criteria have been fulfilled.

c. Conclusion

In sum, the proposed rule § 5.4 multi-factor regime is not only "out of harmony with," but also "alters" the provisions of subsections 354(i) and (j), and it does so "in a manner inconsistent with the clear legislative intent as therein expressed."[22] Just as importantly, it deprives electric consumers of a right granted to them by the General Assembly, the right to have the RESPA program freeze if compliance costs exceed a certain specified percentage. Instead, proposed rule § 5.0 adds – impermissibly – further conditions to this legislatively granted consumer right. It must be withdrawn because it is a process unauthorized by the

21 The provisions of 26 Del. C. § 362(b) support this view that the duty to consult with the PSC does not imply a grant of discretion to the Director, but merely reflects a directive for coordination in the freeze mechanics with the PSC. That provision directs the PSC to adopt rules "to specify the procedures for freezing the minimum cumulative solar photovoltaic requirements as authorized under § 354(i) and (j)." Unfortunately, the PSC has punted the whole process to DNREC. 26 DE Admin. Code 3008, § 3.2.21.

22 *Wilmington Country Club*, 91 A.2d at 255.

General Assembly.

3. **Proposed Rules §§ 4.2.4 and 4.3.4 Correctly Count Bloom Energy QFCPP Surcharges as "Costs of Compliance"**

Both subsections 354(i) and (j) key the "circuit breaker" trip to a comparison: the percentage ratio that the "total cost of complying with" the applicable annual renewable requirement bears to the " the "total retail cost of electricity for retail electric suppliers."[23] Both proposed rules §§ 4.2.4 and 4.3.4 *appropriately* include in the "costs of compliance" calculation the amounts that DP&L's customers pay to Bloom Energy as QFCPP payments.

Under the 2011 Bloom amendments, all of DP&L's customers pay monthly Bloom Energy QFCPP surcharges to Bloom Energy. These charges ensure that Bloom's QFCPP subsidiary meets its costs in generating electric energy that it sells into the PJM market. To give value to such customer subsidies, energy output from the Bloom Energy QFCPP is assigned REC and SREC "equivalency" status under REPSA.[24]

It may be true that the energy output from the Bloom Energy QCFPP does not technically fit the REC or SREC definition under either 26 Del. C. § 352(18) or 352(25). The Bloom Energy generation "equivalencies" cannot be traded. Instead, they can only be used by DP&L to meet its post-2012 responsibility to "procur[e] RECs, SRECs and any other attributes needed to comply with subsection [354](a) . . . with respect to all energy delivered to [its] end use customers."[25] But in that role the Bloom Energy output equivalencies are a means to "comply" with the REPSA annual percentage requirements. The energy output "shall *fulfill* [DP&L's] state-mandated *REC and SREC requirements* set forth in § 354."[26] Each megawatt hour of energy output represents "[*f*]*ulfillment* of the *equivalent* of 1 REC."[27] And such output can also "*fulfill a portion of SREC requirements* at a ratio of 6 MWH of RECs per 1 MWH of SRECs." [28] Moreover, these equivalents are fungible, just like tradable RECs. They need not

23 Both the compliance cost numerator and total retail cost of electricity denominator are measured during the same compliance year.

24 26 Del. C. § 364(b), (d)(1)f.-j. (mandatory QFCPP surcharge); 26 Del. C. § 353(d) (hours of output generation from QFCPP can be used to fulfill annual renewable energy percentage requirements).

25 26 Del. C. § 354(e).

26 26 Del. C. § 353(d) (emphasis added).

27 26 Del. C. § 353(d)(1) (emphasis added).

28 26 Del. C. § 353(d)(1)a. (emphasis added).

be applied in the year the energy is produced, but can be "banked" and used by DP&L to "*fulfill its REC and SREC requirements* in accordance with this section" in any later compliance year. The equivalencies exist and are operative until actually "applied to *fulfill such requirements*."[29]

Second, the 2011 Bloom amendments did not alter the section 354(a) annual percentage REPSA standards. Instead, they simply allow the energy output from Bloom natural gas powered fuel cells to gain status as REC (and SREC) "equivalents." Those equivalents then can be used to meet or "fulfill" the *pre-existing* REPSA percentage requirements. The monthly payments by DP&L's customers to Bloom for such REC "equivalents" (used to fulfill "the state-mandated REC and SREC requirements set forth in § 354") are part and parcel of the "total cost of complying with" "the minimum cumulative solar photovoltaics requirements" or "the minimum cumulative eligible energy resources requirement." 26 Del. C. § 354(i) & (j). "Fulfill" and "comply with" are synonyms. RH Dict. at 774 (synonyms for "fulfill" are "meet, ensure, fill, *comply with"*).

Once again, that's exactly how many understood the mechanics of integrating the Bloom Energy surcharge and output into the pre-existing REPSA regime. The synopsis to the 2011 Bloom amendments announced that the "Bill allows the energy output from fuel cells manufactured in Delaware that can run on renewable fuels to be *an eligible resource to fulfill a portion of the requirements* for a Commission-regulated utility *under the Renewable Portfolio Standards Act*." (emphasis added).[30] The Bloom bill's proponents explained the mechanism in just that way. *See* Bloom SD (DeLuca remarks) (bill allows "enough headroom for Delmarva *to fulfill* a portion of *its REC requirements* under the Renewable Portfolio Standards Act with baseload type energy generated and manufactured in Delaware") (emphasis added); (Sawyer remarks) (enabling legislation would "allow Delaware manufactured fuel cells *to count towards* Delmarva's RPS requirements" which adds "value back to ratepayers" and is an "important piece of deal") (emphasis added). *Accord* Bloom HD (Kowalko remarks) ("very simply, this is enabling legislation, *not a reformulation or a new definition of a renewable portfolio standard or renewable energy credits,* or, in fact, the term renewable In the vernacular that is expressed now, it stays the same. But *it is a reconsideration of those terms and values so that we might apply the existing Code* to facilitate new technology manufacturing that Bloom company will be bringing to this State and 1500 jobs that will be brought to this State.") (emphasis added).

29 26 Del. C. § 353(d)(1)c. (emphasis added).

30 SB 124, Synopsis.

The purchases of REC-equivalents by DP&L's customers via the Bloom tariff surcharges are equivalent to the "REC purchases" listed as one type of cost of compliance under subsections 354(i) and (j).[31] And even if REC-equivalent purchases are not exactly congruent with "REC purchases," the purchase costs of the REC "equivalents" that are used to "fulfill" "REC and SREC requirements" easily fall with the circle of expenses and outlays that are captured by the "total cost of compliance" definitional sentence in subsection 354(j).[32]

Nor can it be argued that the Bloom Energy QFCPP surcharges levels must be excluded from the "total cost of compliance" amount because those mandatory charges have reached levels that could not have been foreseen in 2010 when the General Assembly set the "circuit breaker" percentage levels. It must be remembered that in 2010, there was already in place a mandatory non-bypassable charge that DP&L customers were to pay to meet the costs of purchased power and RECs from the Bluewater Wind off-shore project.[33] Much like the later scheme for Bloom QFCPP output "equivalencies," REPSA accorded output from the Bluewater wind farm project special status. For each MWhr of output that DPL purchased under the wind farm contract, the utility could "receive 350% credit toward meeting the renewable energy portfolio standards established pursuant to this chapter."[34] In 2010, the PSC had already estimated the Bluewater Wind purchase costs, in terms of both actual energy prices and REC

31 It does not make a difference that DP&L's customers, not Delmarva, pay Bloom the monies used to fund QFCPP output which, in turn, earns the REC equivalents. First, the "total cost of compliance" listing in subsection 354(j) (as wells as in § 354(i)) identifies "REC purchases" (and "SREC purchases") as qualifying costs but does not specify that such purchase must be made by DP&L. The language is silent about who must be the buyer. In addition, the listing recognizes "costs *associated with ratepayer funded* renewable energy rebate programs" as falling within "the total cost of compliance." This language assumes that charges paid directly by customers - not just those purchase costs incurred by a utility - can also qualify as a "cost of compliance." In fact, the Green Energy Fund charge – which in part fits within the rebate listing for an included "cost of compliance" – is a direct customer payment, not an outlay by DP&L. *See* 26 Del. C. § 1014(a).

32 Both subsections 354(i) and (j) say that the "total cost of compliance" *shall include* the listed outlays and payments. The express use of the word "include" reflects a legislative decision not to limit "the total cost of compliance" to the specifically listed costs but rather to also encompass similar charges and expenses. *See Coastal Barge Corp. v. Coastal Zone Ind. Control Board*, 492 A.2d 1242, 1247 (Del. 1985) ("a term whose statutory definition declares what it 'includes' is more susceptible to extension of meaning by construction than where the definition declares what a term 'means'").

33 26 Del. C. § 364(a).

34 26 Del. C. § 356(c).

payments. Once the wind project would became operational, those Bluewater Wind REC payment costs were apparently to be factored into the "total cost of compliance" for renewables under subsections 354(j).[35] But by 2011, Bluewater Wind had faltered and its contract would not likely proceed. So, in the 2011 Bloom amendments, the General Assembly linked the Bloom QFCPP surcharge amounts to the previously-anticipated Bluewater Wind costs. The Bloom surcharge payments by DP&L's delivery customers could not exceed the cost they would have borne under the Bluewater Wind calculations.[36] If the Bluewater Wind payment amounts were to be factored into the subsection 354(j) cap formula, then the "substitute" Bloom surcharges – which could not exceed the Bluewater costs – could not have been unanticipated and meant to be excluded from "the total cost of compliance."

35 *See* SS1 HD at 15 (O'Mara) (during discussions of 2010 amendments, Secretary O'Mara alludes to the Bluewater Wind project and the price stability it would bring to energy procurement).

36 26 Del. C. § 364(d)(1)c.

4. The "Total Retail Costs of Electricity" in Proposed Rules §§ 2.0 and 4.4 Should be Clarified and Rewritten

Both subsections 354(i) and (j) measure the total costs of compliance against the "total retail cost of electricity for electric suppliers" in order to determine if a freeze is mandated. Proposed rule § 2.0 offers a definition of "[t]otal retail costs of electricity" as:

> the total costs expended by retail electric suppliers to produce, purchase, distribute and deliver retail energy to serve the non-exempt load during a particular compliance year.

The proposed definition starts off well: it defines costs in terms of those costs borne by retail electric suppliers, not end-use consumers. It also talks of the costs being associated with "retail energy." In those provisions, the focus is correctly on the costs incurred for the purchase or production of "wholesale energy." But the inclusion of the terms "distribute" and "deliver" blur that focus. Those terms could be inappropriately read to allow in the "total retail costs of electricity" phrase the charges imposed for delivering – over the distribution system – electric energy to end-users. At a minimum, the definition should be rewritten to delete those terms. The definition should capture, as explained below, that the amount to be calculated only includes costs related to the energy "supply" portion of a consumer's bill, and does not encompass any charges or costs related to delivery or distribution to end users.

The potential confusion arising from the definition is also further compounded by proposed rule § 4.4.4. That provision says the Division "will determine the Total Retail Costs of Electricity *as all customer costs for non-exempt load customers for a particular compliance year*." (emphasis added). The latter qualifying phrase, alluding to "all customer costs" clouds the reach of the total retail costs phrase. "Customer costs" are undefined, and could be read to include distribution charges, and other costs incurred by consumers, unrelated to the charges for energy supply. Moreover, the § 4.4.4 direction to look to "customer costs," and not to "costs expended by retail electric suppliers" (per the § 2.0 definition) shifts the entire focus.

At a minimum, the proposed rules related to "Total Retail Costs of Electricity" should be clarified: (1) to emphasize that total retail costs of electricity do not include any costs incurred, or charges paid by consumers, for delivery of the electric energy over the electric distribution wires and (2) to explicitly exclude from the "total retail cost of electricity" any costs which also would count as within the "total cost of complying" with the renewable energy mandates.

In rewriting the above provisions, one would do well to go back to the statutory text. If the key statutory phrase were to read "the total [] cost of electricity for retail electricity suppliers," then I suspect that most would agree that the phrase referred to the outlay, expense, or price *incurred*, *borne, or paid by* retail electric suppliers to produce or procure electricity.[37] After all, the phrase refers to the total "cost of electricity *for retail electricity suppliers."* In common parlance, that would be the retail suppliers' "wholesale costs" for electric energy.

Indeed, this reading is supported by the text of the similar cost cap protection applicable in the case of the Delaware Electric Cooperative and municipal electric companies. For them, the total cost of complying with their own versions of renewable energy requirements "shall not exceed [3 or 1] % of the total cost of the purchased power of the [affected] utility for any calendar year."[38] The statutory benchmark for them is the "total cost of the purchased power of the utility." Or, in other words, the calculation looks to the total cost that was (or will be) paid by the utility to purchase the power it will use during the relevant calendar year? Here too, this statutory wording looks to the outlays made, or prices paid, *by the utility* in order to purchase power. Again, that represents the utility's "wholesale costs" for electric energy supply.

It is quite legitimate to look to this language related to the cost cap for the electric cooperative and municipal electric ventures to give meaning to the phraseology used in the DP&L cost cap subsections. After all, all of the cost cap cap regimes were enacted in the same legislation. Indeed, the proponents of the bill indicated that the DP&L caps and the Co-op and municipal caps – although worded somewhat differently and with differing outcomes – were congruent.[39] Thus, if the Cooperative's and municipals' cost cap provisions are premised on 1 and 3 percentages applied to "the total cost of the purchased power of each utility for any calendar year" then a comparable baseline should be used under subsections 354(i) and (j). "[T]he total retail cost of electricity for retail electricity suppliers" should equate to the "total cost of the purchased [or produced] power" of retail electric suppliers.

Indeed, there is a theory to support the use of "wholesale costs" as the denominator in the cost cap provisions for DP&L. One can read the provisions of subsections 354(i) and (j) as calling for a comparison: a comparison between the costs incurred for electric supply *with the renewable mandates* and the costs for the same amount of power *if no renewable mandates*

37 "Cost" is commonly defined to mean "1. The price paid to acquire, produce, accomplish, or maintain something." RH Dict. at 457.

38 26 Del. C. § 363(f), (g).

39 SS1 SD at 26-27 (McDowell) (noting that the bill provided the same 1% and 3% cost cap circuit breakers protections for DP&L, the municipal utilities, and the Delaware Cooperative).

existed. The numerator in the comparison - "the total costs of compliance" defines the additional, or incremental, costs incurred because of the renewable mandates. This "renewable premium" amount is then compared to the costs which would have been incurred for procuring power in the absence of the mandates: this is the "total retail cost of electricity for retail electricity suppliers." If the additional, incremental premium costs exceed the power cost baseline by the relevant prescribed cap percentage, then the "cost impact" of the particular mandate is too high and the "circuit-breaker" freeze is triggered.[40]

This explanation points to why the baseline denominator – the costs for power if no renewable mandates were in place – should be keyed to the suppliers' "wholesale costs," not the retail costs for supply billed to, or collected from, end-use customers. The proposed rule should explicitly exclude from the "total retail cost of electricity" any amount that would also be included in the "total cost of compliance." Thus, the total retail cost of electricity should not include any of the QFCPP surcharge amounts. Similarly, it should not include any amounts collected by DP&L in fulfilling its almost exclusive responsibility to procure RECs and SRECs for all non-exempt load. Moreover, the rule should include a directive that in the case of end users acquiring energy supply under a post-2012 "transitional" electric supply contract the costs of any REC or SREC costs embedded in the charges must be excluded from the "total retail costs of electricity."

So then, all of the above points towards use of the cost of the power produced or purchased by retail electric suppliers as the relevant denominator for the subsections 354(i) and (j) cost cap formulas. But if that is so, how does one deal with the subsections' use of the phrase "total *retail* cost of electricity"? What is the *retail* cost of electricity *for* a retail supplier? I think the "retail" adjective is meant to make sure the benchmark includes not only the "true wholesale purchase costs" of the retail electric suppliers but also the suppliers' additional costs to retail the supply product – but still exclusive of (1) the renewable premium (the costs to comply with the renewable mandates) and (2) any retail delivery or distribution charges. Thus a retail supplier purchases or generates power at wholesale but might then have to include in his charges for the retail sale of such power its additional expenses for back office

40 This is exactly how Ohio has structured its renewable cost cap. *See* Ohio Rev. Code § 4928.64(C)(3) (electric distribution utility "need not comply with a benchmark . . . to the extent that its reasonably expected cost of that compliance exceeds its reasonably expected cost of otherwise procuring or acquiring the requisite electricity by three per cent or more"). *See also* Ore. Rev. Stat.This is exactly how Ohio has structured its renewable cost cap. *See* Ohio Rev. Code § 4928.64(C)(3) (electric distribution utility "need not comply with a benchmark . . . to the extent that its reasonably expected cost of that compliance exceeds its reasonably expected cost of otherwise procuring or acquiring the requisite electricity by three per cent or more"). *See also* Ore. Rev. Stat. § 469A.100(1)-(6). Expressed another way, such cost caps set forth the percentage of retail supply costs that can be collected to cover the incremental costs of renewable energy.

operations and profit. Those costs could be included in the “total *retail* costs of electricity for retail electricity suppliers.” Put another way, the benchmark denominator for a particular supplier includes the supplier's incurred costs to produce or acquire electric power – *sans* any incremental renewable premiums - plus any additional costs that it might have incurred to turn that “raw” purchased power into a retail product (again without including any renewable premium). Such a reading complies with cost cap comparative theory and allows each word in the statutory text to be given meaning.

5. The "Freeze" Provisions in Proposed Rules §§ 6.0 and 7.0 Need to Modified to Explain the Effects of a Freeze

While proposed rules §§ 6.0 and 7.0 outline the mechanics for imposing (and lifting) a "freeze," they do not delineate exactly what that term entails. The rules should be modified to give explicit guidance about what a "freeze" means., and what effect it has. DP&L and its retail consumers need to be informed of what obligations cease once a "freeze" is declared.

Subsections 354(i) and (j) each actually contain two "standstill" directives. For example, under § 354(j), the Director may freeze "the *minimum cumulative eligible energy resources requirement*" if "the total cost of complying with *this requirement* during a compliance year" exceeds the applicable 3 percent cap. (emphasis added). The "requirement" that is so "frozen" is the one expressed in subsection 354(a): to include in the total amount of retail sales of electricity to Delaware end-users a minimum percentage of electric energy sales with eligible energy resources. Once a "freeze" is imposed, it is this "requirement" that ends: a retail electric supplier (before) – and DP&L (now) – no longer has the duty to accumulate any additional RECs and SRECs to meet the annual percentage number that would otherwise would prevail under subsection 354(a).[41] This "freeze" is the "cost cap" part of the consumer protections granted under subsections 354(i) and (j). Once such "freeze" is in place, the responsible entity – now DP&L and suppliers with transitional contracts - need not acquire further RECs or SREC for REPSA compliance purposes. And, end use customers need not pay for any further RECs or SRECs as part of their billings.[42]

This "freeze" (reflecting a stay of any further obligation to procure RECs and SRECs) only ends when the Director finds that "the total cost of compliance can reasonably be expected to be under the [applicable 1 or 3 %] threshold." But until such finding is forthcoming, the whole REPSA obligation remains suspended.

The second standstill directive in subsections 354(i) and (j) relates to what happens after a freeze is in effect: "[i]n the event of a freeze, the *minimum cumulative percentage* from

41 26 Del. C. § 354(e) (with 2012 compliance year, DP&L has responsibility for procuring RECs, SRECs, and any other attributes to comply with subsection (a) of this section"). *See also* 26 Del. C. § 354(h) (compliance with subsection 354(a) percentage minimums is meant by accumulating equivalent volume of RECs and SRECs).

42 26 Del. C. § 358(f)(1) (retail supplier can only recover "actual dollar for dollar costs incurred in complying with a state mandated renewable energy portfolio standard"). If the "compliance" requirement is lifted under the "freeze" procedure, then the supplier, and now DP&L, cannot incur and bill any additional costs to comply with the frozen mandate.

eligible energy resources shall remain at the percentage for the year in which the freeze was instituted." (emphasis added).[43] This initially applies when the Director investigates whether to enter a "resumption" order. In making his determination whether expected compliance costs will be below the applicable cost cap percentage, he is to use the annual percentage figure that prevailed during the freeze year.

So, under subsections 354(i) and (j) there are two "stoppages." One is the "cost cap" freeze ending any further obligation to procure and pay for further RECs and SRECs. The second is the "freeze" in the otherwise escalating yearly renewable percentage amounts.

Both Secretary O'Mara and Senator McDowell alluded to this two-step freeze process in explaining the new consumer protection to the legislative members. Thus, Secretary O'Mara explained:

> But most importantly, by having a circuit breaker, if you will, an actual price control, whereby if the, if the rate payer impacts exceed a certain amount, *that the entire program freezes in place,* we can ensure ratepayers that there won't be any adverse impacts from this legislation.[44]

Further:

> So under the legislation, if the -- as soon as there's a 1 percent impact from the solar portion of the bill, the, *the target level freezes in place for that entire calendar year and then starts up again after it. You'll never have more than a 1 percent impact in any given year for the solar, for the solar portion of the, of – the solar requirements as written in the legislation.*[45]

And Senator McDowell told the Senators the same sort of thing:

> [a]ny time the cost impact of the photovoltaic goes up by 1 percent, the utility involved can push what we like to call a circuit breaker. *In other words, they can suspend the program for that year and simply extend the portfolio forward by a*

43 Thus, the "cost cap" freeze suspends the "minimum cumulative eligible energy resources *requirement"* while the second directive defers any increase in the "minimum cumulative *percentage."*

44 SS1 HD at 7-8 (O'Mara) (emphasis added).

45 SS1 HD at 13 (O'Mara) (emphasis added).

> *year for their utility.*[46]

And:

> We've also built safety valves into this bill. I told you about the circuit breaker that we have put in where any utility who can show that its rates are going up or would go up by 1 percent in case of -- of solar, the retail electric would go up by 1 percent in a year in the cases of solar, or 3 percent in the overall, they could push the circuit breaker *and suspend their participation in the program for one year.*[47]

Thus, both the Secretary and Senator speak of first freezing or suspending participation in the program – ending the need to expend additional sums to procure further RECs or SRECs (the cost cap) - and then, secondly, extending the portfolio forward a year, that is, maintaining the percentage level for compliance from the earlier freeze year.

Now, both the Secretary and Senator in their legislative floor comments seemingly assumed that the "freeze" provision would work *within* a compliance year. They assume that someone – either the utility, the electric supplier, the PSC, or the State Energy Office – would be able to track the "total retail cost of electricity for retail electricity suppliers" as well as the "total cost of complying" contemporaneously and concurrently on an on-going basis throughout each compliance year. When compliance costs (measured over some time frame) exceeded (or were projected to exceed) the cost cap percentages as applied to retail electric suppliers' "total retail cost of electricity" (during the same time frame period), a cost cap freeze would then be called and the program would be suspended. After that, no more RECs and SRECs would have to be procured, and customers would not be obligated to pay any further REC and SREC costs. Presumably, the suppliers would then be able to somehow lower their total compliance costs for the next year and then the program would start up again the succeeding compliance year (although at the minimum percentage level applicable to the earlier "frozen" year).[48]

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46 SS1 SD at 4-5 (McDowell) (emphasis added).

47 SS1 SD at 9 (McDowell) (emphasis added).

48 Senator McDowell also suggested that the "circuit breaker" freeze was to be done on a utility-by-utility basis, with each utility holding the power to pull the "circuit breaker" trigger during a compliance year. Under such a scenario, it might be possible for a utility to track its own costs of compliance and its own retail costs of electricity to make the intra-year cost comparisons. But such a single utility view of the freeze process is hard to square with the text of subsections 354(i) and (j). Those provisions speak to obligations and costs in the plural, not the singular. Thus, the

SS1 seemingly charged the PSC to come up with a the rules to how to continuously monitor compliance costs and total retail costs of electricity for retail electric suppliers.[49] But the PSC did not create any such mechanisms for on-going, intra-year monitoring of either compliance costs or total retail costs of electricity. Instead, the PSC simply repeated the statutory formulas and deferred to the Director and Energy and Climate Division for implementation. 26 DE Admin. Code 3008 § 3.2.21.

The presently proposed rules – almost out of necessity – use an "end-of-year" time frame to determine whether a freeze is required under either subsection 354(i) or (j). The total cost of compliance, as well as the total retail cost of electricity for retail electricity suppliers, are to be computed and compared after the end of a compliance year, using the full costs for the entire compliance year. Proposed rule §§ 4.0 & 8.0.

But if the annual year-end, look-back analysis is the only practical one, then the question becomes how to apply the two-step freeze components in that context. If the cost of compliance for the just completed compliance year exceeds the applicable cost cap percentage what happens? Under the statutory text, and the legislative floor statements, it would appear that a freeze should then be called and "the entire program" frozen or suspended. This would mean that compliance in the present year would be halted in its entirety – at least going forward. Neither DP&L, nor its customers, would have any further obligation to acquire, apply, or pay for any RECs and SRECs for that present year. The exception to such a suspension would arise only if the Director - contemporaneous with his announcement of the

statutory language speaks in terms of freezing the minimum eligible energy and solar photovoltaic requirements "for regulated *utilities*" (plural). not a single "regulated utility" or a singular retail electricity supplier. So too, as to the "total retail cost of electricity" figure, the statutory text reference is to such total cost "for retail electric *suppliers*" rather than the cost for a singular "supplier." The costs to be determined and utilized are those for plural "suppliers" rather than a single supplier. Of course, once you must measure costs of compliance against multiple retail electric suppliers' costs of electricity, it is hard to see how there can be any utility-by-utility application of the freeze provisions. Finally, such a single utility process is even more difficult now that DP&L holds the almost exclusive responsibility to procure RECs and SRECs for its entire delivery load. Under such a change, DP&L acquires RECs and SRECs for all its delivered load, and its customers bear those total costs of compliance. Yet not all of the electricity which necessitate such RECs or SRECs will be sold by DP&L; other suppliers can still make retail sales of electric supply. Thus, to have symmetry between compliance costs and retail electric supply costs for suppliers, you have to apply the freeze across the board. And you must look to the electric supply costs for all electric suppliers, not just the SOS supply costs for DP&L.

49 26 Del. C. § 362(b).

freeze – would also find that the costs of compliance for the present year could be expected to be under the cost cap percentage limit. If such determination was made, then compliance in the present year could move forward, but utilizing the prior year's renewable percentage levels. If the Director cannot make such a finding for the present year, the suspension would continue through the entire present compliance year. Indeed, it would continue through any later compliance years until the Director can make the relevant finding that compliance costs will be under the freeze percentage as applied to a future year's expected total retail cost of electricity for retail electricity suppliers..

The proposed rules should make explicit what is entailed in a "freeze," DP&L, and its customers, need to know what are their future obligations if a "freeze" is declared.

6. **Technical Glitches in Proposed Rules**

a. § 2.0 Definitions

"Exempt load" and "Non-exempt Load":

The two definitions appear to be the same, collapsing any distinction between "exempt" and "non-exempt" load. It is hard to understand the meaning, import, or effect of the references in both definitions to the load not including loads "supplied by a third party supplier."

"Qualified fuel cell project" or "QFCP":

If the reference is to the actual generating project, the reference should use the terminology in the statutory definition (26 Del. C. § 352(17)) and be designated a "qualified fuel cell provider project" and "QFCPP."

"REC costs of compliance," "Renewable Energy Cost of Compliance," and "Solar Renewable Energy Cost of Compliance":

There seems to be two, almost identical, definitions for REC costs of compliance. One should be removed. Secondly, the definitions for REC and Solar costs of compliance are not parallel definitions. They should be reworked to read the same, subject to the necessary REC and SREC differences. The REC costs of compliance definitions refer to costs expended by "retail electric suppliers or electric distribution utilities" to achieve compliance. The definition should be broadened to include costs incurred by customers, not just suppliers and utilities. Payments to the Green Energy Fund are costs directly incurred by customers, not DP&L (26 Del. C. § 1014(a)). Similarly, QFCPP surcharges are paid directly by consumers to Bloom Energy with DP&L only acting as a collection agent. Both are compliance costs incurred by consumers, not by a supplier or a utility. Given that the proposed rules explicitly recognize QFCPP payments as costs of compliance then any "up-front" definition should not be limited to costs expended by suppliers and utilities. Perhaps the better approach is simply to define the terms by reference to the later rules describing the content of the "costs of compliance."

"Retail Electricity supplier" and "Third party supplier":

The two definitions overlap and appear to be redundant. Perhaps the better approach is simply to track the statutory definition of retail electricity supplier in 26 Del. C. § 352(22). However, there should also be a definition of electric distribution utility linking that term to "a commission-regulated electric company" under 26 Del. C. § 354(e). Such would bring DP&L

under both definitions.

"REC offset hours" and "SREC offset hours"

I do not have any qualms with the definitions. In general, I would change the term "offset" to "equivalency" to better conform to the statutory language.

b. § 5.0 Determination by the Director

As detailed in part 2 of these comments, this section should be rewritten to remove all references to the Director having discretion to impose, or to forego, a freeze, once the statutory cost cap percentages have been met. With such rewrite of § 5.0, the definitions related to the factors used in §§ 5.4-5.8 should also be removed from proposed rule § 2.0.

c. § 6.0 Implementation

As detailed in part 5 of these comments, the section should be rewritten to amplify what happens when a freeze is required. Also, § 6.2 should be struck. The question of what effect a freeze might have on contractual procurement commitments should be worked out in further proceedings. In fact, proposed § 6.2 would negate the statutory freeze protections granted consumers under subsections 354(i) and (j). If consumers will still be obligated to pay for RECs and SRECs under pre-existing contracts although the cost caps have, or will be, breached, then the cost cap statutory protections are a nullity.

d. § 7.0 Lifting a Freeze

For the reasons detailed in part 2 of these comments, proposed rule §§ 7.2 and 7.3 should be rewritten. A freeze should be lifted if the Director makes the determination described in the statute: that expected compliance costs will not exceed the applicable cost cap percentage applied to the expected retail costs of electricity. No further discretion should be vested in the Director.

e. § 8.0 Administration

Proposed rule § 8.1.6 refers to calculating the average QFCPP offset cost for the compliance year "under section 7.0." Proposed § 7.0 does not include any formula for calculating such an averaged cost. In fact, no other section sets forth a clear process for making that calculation.

Proposed rule § 8.1 requires cost reports from electric suppliers and DP&L within 90 days after the end of the compliance year, that would be by August 29. This date should be reworked after consultation with the PSC. Under the PSC's current rules, electric suppliers holding transitional supply contracts need not transfer all of their RECs and SRECs for such transitional load to DP&L until September 1. 26 Admin. Code 3008 § 3.2.3.1.3. Moreover, DP&L has 120 days after the end of the compliance year to surrender the needed RECs and SRECs. 26 Admin. Code 3008 § 3.2.3. In light of those dates, it might be difficult for an electric supplier (holding a transitional contract) or DP&L to provide costs of compliance by August 29.