Vest, Lisa A. (DNREC)

From: Gary Myers <garyamyers@yahoo.com>
Sent: Wednesday, September 16, 2015 9:25 AM
To: Vest, Lisa A. (DNREC)
Cc: Noyes, Thomas G. (DNREC)
Subject: REPSA Cost Cap Rule-making Proceeding - NOPR 18 DE Reg. 432 (Dec. 1, 2014)
Attachments: PSC Order No 8717 (march 3, 2015).pdf; PSC Order 8764-2.pdf

Follow Up Flag: Follow up
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Hearing Officer Vest:

I write once again, and on a regular schedule, to inquire whether any further materials or decisions have been filed in the above captioned rule-making. In particular, I ask whether the Division of Climate and Energy has filed a TSM or other responsive document? I also ask whether any further comments or documents or materials has been added to the record.

Second, I ask whether any recommendation has been issued by you? Similarly, has the Secretary issued any order? **Will something in this matter now be published in the Oct. 1 edition of the DE Register of Regulations?**

If there any new submissions or issuances, could you please provide electronic copies to me by return e-mail.

For the record, I would note that since the cost cap provisions were added to REPSA in 2010, neither the the prior State Energy Office nor the current Division has over the ensuing four years ever made any "determination" - one way or another - whether the costs of compliance for renewables generally and the carved-out solar components exceed the percentage caps set forth in 26 Del. C. sec. 354(i) & (j). It is not a question of the Division undertaking the analysis and concluding that breach has occurred. Instead, the Division has never made any analysis over the last four years of whether a breach has, or has not, occurred.

Regardless of any debate whether the Director has the discretion to, or is required to impose, a "freeze," the two subsections clearly impose a duty on the Division **within each compliance year** to make the determination whether the particular costs of compliance exceed the prescribed statutory percentage limits. **These are not discretionary obligations.** And the duty is one imposed by the statutory subsections, not by any rule. The Division had, and has, the duty to make the "determinations" each compliance year with or without any rule. So far, the Division has never complied with that statutory obligation.

In the meantime, all available external sources suggest that the determinations would show that the percentage caps in both subsections have already been breached. Delmarva Power's IRP plans consistently forecast costs exceeding the percentage caps.

And, just this Summer, the Public Service Commission's Staff did rough estimates of the results under both cost caps. In doing so, the Staff used the formula proposed in the Division's 2014 NOPR - one that supposedly compares increases in compliance costs from year to year. Even using that formula (which I think plainly violates the statutory text and all legislative history), the Staff concluded that **both** percentage cost caps have been breached for compliance years 2012 and 2013. Staff suggests that they will be breached in the upcoming compliance year. *See* PSC Order No. 8717 at pg. 3 (March 3, 2015); PSC Order No. 8764: Findings of Fact, Conclusions of Law and Final Opinion in Support of Order No. 8717 at paras. 21 (Moore, DP&L), 24 (Staff) (July 21, 2015) (electronic copies attached).

Those "findings" suggest that if indeed the correct formula was used - one that makes the cost comparison within the same compliance year - the two cost caps would be even more overrun for those two earlier compliance years.

This month DP&L will file its REPSA Compliance Filing for the 2014 Compliance year. It will include its costs of compliance for that year. I would hope that the Division will this year undertake the analysis to make the required

statutory "determinations" whether the cost caps have been breached. **The Division should do so under the statutory text without awaiting any completion of this long, long protracted rule-making.**

The Division first proposed its rules in Dec., 2013. In that initial proposal, the Division set forth the formula used in the statutory text - one that compared total compliance and retail supply costs in the same compliance year. Then, one year later, the Division announced that it had received a formal legal opinion that such formula was not the "best reading" of the supposedly ambiguous statutory text and the better reading was for a one year to next comparison formula.

So what's the hold up? If the DAG told the Division that the one year vs. next year formula was the best reading of the text - and the one the courts would embrace - why hasnt the rule moved forward? If the DOJ holds to its position (even though another DAG has expressed - on behalf of the DPA - that such reading is wrong), then promulgate the rule and let the courts have the final call. On the other hand, if the DAG has not retreated from the prior opinion, why has it taken so long to get the current "best reading"? The text was studied for almost a year before the DAG's last formal opinion. How much more analysis and study is needed to come to the new "best reading" now?

The formula is needed now. As said earlier, the Division has an obligation to make the "cost cap" determinations each compliance year. It appears the Division is now relying on the slow pace of this rule-making to forego making those determinations. But again, the statute, not any rule, imposes the duty.

Before the legislative houses, both former Sec. O'Mara and Senator McDowell described the costs caps as needed "consumer protections" that would act as "circuit breakers" preventing consumers from paying run-away compliance costs beyond the limits set by the subsections. This rule making about such circuit breakers now has a penny fuse appearance - using anything to put off the inevitable "breach" determinations that will come under any formula ground in the subsections' text. In the meantime, the penny fuse approach has left the consumers' house burning.

Thank you for your prompt response. Please include this is e-mail in the administrative record in this rule-making.

Gary Myers
217 New Castle Street
Rehoboth Beach, DE 19971
<garyamyers@yahoo.com>
(302) 227-2775

BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF DELAWARE

IN THE MATTER OF THE APPLICATION OF DELMARVA POWER & LIGHT COMPANY FOR APPROVAL OF THE 2015 PROGRAM FOR THE PROCUREMENT OF SOLAR RENEWABLE ENERGY CREDITS (FILED DECEMBER 9, 2014)	)))))	PSC DOCKET NO. 14-0560

ORDER NO. 8717

AND NOW, this 3rd day of March, 2015, the Delaware Public Service Commission ("Commission") determines and orders the following:

WHEREAS, on December 9, 2014, pursuant to 26 *Del. C.* §351 *et seq.*, Delmarva Power & Light Company ("Delmarva") filed an application (the "Application") with the Commission requesting approval of its 2015 Program for the Procurement of Solar Renewable Energy Credits (the "2015 Program"); and

WHEREAS, the 2015 Program is based on requirements set forth in the Renewable Energy Portfolio Standards Act ("REPSA") which was enacted in 2007 and amended in subsequent years. See 26 *Del. C.* §§351 to 364. The 2011 Amendments made Delmarva responsible for procuring RECs[1] and SRECs[2] necessary for compliance with respect to all energy delivered to Delmarva's distribution customers beginning in compliance year 2012 (June 2012 - May 2013); and

WHEREAS, the 2015 Program is based on recommendations of the Renewable Energy Taskforce, which is charged with making such

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[1] A "REC" is defined in 26 *Del. C.* §352(18).
[2] An "SREC" is defined in 26 *Del. C.* §352(25).

recommendations to the Commission and other entities.[3] See 26 *Del. C.* §§ 360(d), (d)(2), and (d)(3). The 2015 Program is also based on the Pilot Program,[4] the 2013 Program,[5] and the 2014 Program[6] for the Procurement of Solar Renewable Energy Credits (collectively the "SREC Programs""), which the Taskforce developed and which the Commission previously approved; and

WHEREAS, in Order No. 8698 (January 6, 2015), the Commission opened this docket, ordered certain deadlines for the filing of petitions to intervene and public comments on the Application, and set an evidentiary hearing date for this matter for March 3, 2015; and

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[3] 26 *Del. C.* §360(a)(2) provides, in pertinent part, that the Taskforce is charged with making recommendations about and reporting on the following and matters related thereto: a. Establishing balanced markets mechanisms for REC and SREC trading; b. Establishing REC and SREC aggregation mechanisms and other devices to encourage the deployment of renewable, distributed renewable, and solar energy technologies in Delaware with the least impact on retail electricity suppliers, municipal electric companies and rural electric cooperatives; c. After an analysis by the Taskforce, the annual progress towards achieving the minimum cumulative percentages for all renewable energy resources including, but not limited to, solar and other eligible energy resources and making appropriate recommendations based upon deliberate and factual analysis and study; d. Minimizing the cost for complying with any portion of this subchapter based upon deliberate and factual analysis and study; e. Establishing revenue certainty for appropriate investment in renewable energy technologies, including, but not limited to, consideration of long-term contracts and auction mechanisms; f. Establishing mechanisms to maximize in-state renewable energy generation and local manufacturing; and g. Ensuring that residential, commercial, and utility scale photovoltaic and solar thermal systems of various sizes are financially viable and cost-effective investments in Delaware.

[4] The Commission approved the Pilot Program via Order Nos. 8075 (November 8, 2011) and 8093 (December 20, 2011) in PSC Docket No. 11-399.

[5] The Commission approved the 2013 Program via Order Nos. 8281 (January 22, 2013) and 8450 (September 10, 2013) in PSC Docket No. 12-526.

[6] The Commission approved the 2014 Program via Order Nos. 8551 (April 15, 2014) and 8629 (September 9, 2014) in PSC Docket No. 14-41.

WHEREAS, pursuant to 29 *Del. C.* §8716, on December 16, 2014, the Delaware Public Advocate filed his statutory notice of intervention; and

WHEREAS, pursuant to 26 *Del. Admin. C.* §1001-2.9, on February 11, 2015, the Department of Natural Resources and Environmental Control timely filed a petition for leave to intervene; and

WHEREAS, Staff performed a review of the 2015 Procurement Program application to ensure compliance with recommendations made by the Renewable Energy Taskforce, Delaware Code, the Commission's regulations, prior orders and applicable law. The 2015 Program contained changes related to the management of the bid deposit, the amount of SRECs required and allocated by tier, and the transfer agreement payment structure. Staff supports the changes to the procurement process as outlined in the Application; and

WHEREAS, on December 1, 2014, the Department of Natural Resources and Environmental Control's Division of Energy and Climate ("DNREC") published proposed rules for Implementation of Renewable Energy Portfolio Standards Cap Provisions ("Cost Cap Rules"). DNREC presented a method for calculating the cost of compliance and noted that the proposed Cost Cap Rules would take effect beginning with compliance year 2013. Using DNREC's method of calculating the cost of compliance, Staff's calculations indicated that for the 2012 and 2013 compliance year, the cost caps have been reached. Therefore, the 2015 Program has the

potential to exceed the proposed cost caps. However, there is uncertainty in the revisions to the proposed rules; and

WHEREAS, the Commission, having reviewed the record in this case; and having received and reviewed the Application; and having heard oral argument from the participants at the evidentiary hearing held on March 3, 2015; and having deliberated in public at that March 3, 2015 evidentiary hearing;

NOW, THEREFORE, IT IS ORDERED BY THE AFFIRMATIVE VOTE OF NOT FEWER THAN THREE COMMISSIONERS:

1. The Commission grants Delmarva's Application regarding the 2015 Program with the changes that we discussed and accepted during deliberations.

2. The Commission will enter a formal Findings and Opinion in support of this Order at a later date.

3. The Commission reserves the jurisdiction and authority to enter such further Orders in this matter as may be deemed necessary or proper.

BY ORDER OF THE COMMISSION:

/s/ Dallas Winslow
Chair

/s/ Joann T. Conaway
Commissioner

/s/ Jaymes B. Lester
Commissioner

/s/ Jeffrey J. Clark
Commissioner

_____
Commissioner

ATTEST:

/s/ Donna Nickerson
Acting Secretary

BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF DELAWARE

IN THE MATTER OF THE APPLICATION OF DELMARVA POWER & LIGHT COMPANY FOR APPROVAL OF THE 2015 PROGRAM FOR THE PROCUREMENT OF SOLAR RENEWABLE ENERGY CREDITS (FILED DECEMBER 9, 2014)	))))))	PSC DOCKET NO. 14-0560

ORDER NO. 8764

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL OPINION IN SUPPORT OF ORDER NO. 8717

AND NOW, this 21st day of July, 2015, the Delaware Public Service Commission ("Commission") issues the following findings and opinion in support of Order No. 8717, dated March 3, 2015.

Summary of the Evidence

1. On December 9, 2014, pursuant to 26 *Del. C.* §351 et seq., Delmarva Power & Light Company ("Delmarva") filed an application (the "Application") with the Commission requesting approval of its 2015 Program for the Procurement of Solar Renewable Energy Credits (the "2015 Program").

2. The 2015 Program is based upon the requirements set forth in the Renewable Energy Portfolio Standards Act ("REPSA") as enacted in 2007 and subsequently amended. See 26 *Del. C.* §§351 - 364. The 2011 Amendments made Delmarva responsible for procuring RECs and SRECs necessary for compliance with respect to all energy delivered to Delmarva's distribution customers beginning in compliance year 2012 (June 2012 - May 2013).

3. The 2015 Program is also based on recommendations from the Renewable Energy Taskforce (the "Taskforce"),[1] which is charged with making such recommendations to the Commission and other entities, as well as prior Delmarva procurement programs,[2] all of which the Taskforce developed and the Commission previously approved.

4. According to Delmarva's Application, "The purpose of the 2015 Program is to continue the goals of the SREC Programs of creating a market for SRECs in Delaware and providing a mechanism for the procurement of SRECs to ensure that retail electricity suppliers meet the requirements set forth in the REPSA." *See* Application at 5-6.

5. The 2015 Program will utilize a public solicitation for SRECs for different categories of solar generators based on their capacity. *See* App. at 6 and Ex. A. The 2015 Program will procure SRECs from five different tiers of solar generators, with three tiers under the category of "New Systems" and two under the category of "Existing Systems." *Id.* at 7 and Ex. A at 8. All five tiers will be competitively bid, as they were in the 2014 Program. *Id.*; Ex. A at 19.

6. Based on Delmarva's forecasted load, it intends to procure a minimum of 9,000 SRECs through the long term auction as follows:

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[1] *See* 26 *Del. C.* §§360(d), (d)(2), and (d)(3).

[2] *See* the Pilot Program for the Procurement of Solar Renewable Energy Credits, the 2012 Program for the Procurement of Solar Renewable Energy Credits, the 2013 Program for the Procurement of Solar Renewable Energy Credits, and the 2014 Program for the Procurement of Solar Renewable Energy Credits.

Tiers N-1, E-1, and E-2 = 4,400 SRECs;

Tier N-2 = 2,300 SRECs; and

Tier N-3 = 2,300 SRECs.

7. After it acquires the 9,000 SRECs, Delmarva may procure up to 3,000 additional SRECs through the auction, regardless of the tier, using the least expensive SRECs from New Systems and Existing Systems. *See* App. at 8; Ex. A at 21-22.

8. Each owner whose bid is selected will enter into a standard form "Transfer Agreement" with the SEU.[3] *See* Ex. A at Appendix A. The form of the Transfer Agreement is largely the same as the one used for the 2014 Program and has been modified only to take into account changes in the 2015 Program. *See* App. at 8. Each Transfer Agreement will have a term of 20 years. *Id.*; Ex. A at 12. For the first ten years of the Agreement, the SREC price will be the accepted bid price. *Id.*; Ex. A at 14. For the remaining ten years of the Agreement, the SREC price will be fixed at $35.00 per SREC. *Id.*; Ex. A at 14.

9. The primary differences between the 2014 Program and the 2015 Program are as follows:

a. An increase in the authorized number of SRECs to be purchased through the long term auction;

b. For the first 10 years of the contract, the bid price will be paid for the SRECs, and for the remaining ten years of the contract, $35.00 per SREC will be paid;

c. No bids will be permitted in multiple tiers unless a tier is undersubscribed;

d. No bids above $400.00 will be accepted;

[3]Because Delmarva found the SEU to be effective in administering prior SREC Programs, it proposes that the SEU will also administer the 2015 Program. *Id.* at 6.

e. Owners of Existing Systems who default on their bids by not signing a contract will not be permitted to bid in the subsequent long-term auction; and

f. Delmarva reserves the right to reject any or all bids above a threshold price per SREC (as determined by Delmarva).

See App. at 9.

10. The Application included an outline for the 2015 Program, the form of SREC Transfer Agreement that is used in connection with the 2015 Program, and the redlined proposed changes between the 2014 Program and the 2015 Program.

11. Delmarva requested the Commission to schedule the matter for decision no later than February 2015. *See* App. at p. 9. Delmarva also noted that the Taskforce recommended that the next auction for SRECs for the compliance year starting June 1, 2015, begin no later than April 30, 2015. *See* App. at Ex. C.

12. On January 6, 2015, in Order No. 8698, the Commission ordered Delmarva to provide public notice of the Application in two newspapers on or before January 16, 2015, and to file affidavits of such publication on or before the start of the evidentiary hearings for this matter. *See* Order No. 8698, ¶1. The Commission also set February 13, 2015, as the deadline for written comments and petitions to intervene, and designated Mark Lawrence as the hearing examiner for this matter for the sole purpose of granting or denying intervention petitions and motions for admission of counsel pro hac vice. *Id.* at ¶¶2-3.

13. On December 16, 2014, the Division of the Public Advocate (the "DPA") filed its statutory notice of intervention in this matter.

14. Delmarva filed the affidavits of publication in two different newspapers on January 15, 2015.

15. On February 11, 2015, the Delaware Department of Natural Resources and Environmental Control Division of Energy and Climate ("DNREC") filed a petition to intervene in this matter.

16. On February 25, 2015, Delmarva filed an amendment to the Application to clarify that bids above a determined price, as established by Delmarva (and not the SEU) can be rejected. On that same day, the Hearing Examiner granted DNREC's petition for leave to intervene. *See* Order No. 8719.

17. On March 3, 2015, the Commission conducted a public evidentiary hearing on the Application.

18. At the evidentiary hearing, Glenn Moore, Delmarva's Regional Vice President, testified about the 2015 Program. He first reported that the outcome from the 2014 auction had been very successful (with one caveat). *See* Tr. at 12. Mr. Moore stated that the 2014 average auction price was slightly above $71.00 per SREC,[4] which was extremely low compared to the [prices in the] surrounding states, and was significantly lower than any other jurisdiction in which Pepco Holdings, Inc., the parent of Delmarva, does business. *See* Tr. at 12-13. He further

[4] Although Mr. Moore referred to "RECs," these are in fact "SRECs" here.

testified that although Delmarva received very good prices in the 2014 auction, that auction was slightly undersubscribed, whereas the 2013 auction was three or four times oversubscribed. *See* Tr. at 13. Mr. Moore believed one reason for this result was because in 2013 and 2014, some bids were zero dollars for the first seven years. *See* Tr. 13-14. Mr. Moore testified that Delmarva believed that those zero dollar per SREC prices probably kept some people on the sidelines for 2014. *See* Tr. at 14. When the number of bidders dropped, Mr. Moore believed that actually raised the SREC price a little. *Id.*

19. For 2015, Mr. Moore testified that he believed Delmarva would procure a significant amount of SRECs at a very competitive price compared to the other jurisdictions in which Pepco Holdings, Inc. does business. *See* Tr. at 15.

20. Next, Mr. Moore testified regarding the differences between the 2014 Program and the 2015 Program. First, he stated that Delmarva is increasing the number of SRECs it will buy from 7,000 to 9,000. *Id.* In addition, Delmarva can choose to buy (at its discretion and regardless of tiers) up to 3,000 more of the least expensive SRECs. *Id.* at 16. Hence, it is possible that Delmarva could buy up to 12,000 SRECs in total as part of the 2015 Program. *Id.* Next, the price of the SRECs for the first ten years would be based on the bids while the price for the next ten years would be set at $35.00 per SREC. *Id.* Third, while no bids above $400.00 would be accepted, Delmarva had the right, in its discretion, not to accept bids above a price that

the company deems to be too high. *Id.* Furthermore, if a person bids into the auction and decides not to provide their SRECs to Delmarva after having been awarded the price, that person would not be eligible for any long-term contracts in subsequent years; Mr. Moore explained this was necessary to ensure that Delmarva would receive those SRECs that were bid into the auction. *Id.* at 18. Finally, if a system is bid into the auction and that system wants a bonus for using labor from Delaware or materials from Delaware but has not been identified as qualifying for such a bonus, the SEU has the option to not return the bid deposit and decline to enter into a transfer agreement with the owner of such system. *Id.* Mr. Moore also noted that Delmarva filed a modification to the Application to clarify that only Delmarva has the right to set a price above which bids would not be accepted. *Id.* at 19.

21. Mr. Moore also testified about a memorandum filed by Staff which raised an issue regarding DNREC's pending rulemaking process to develop regulations to implement the RPS cost cap provisions. *Id.* at 20. Mr. Moore stated that no determination could be made regarding the RPS cost caps until after the final DNREC regulations were adopted and implemented. See Tr. at 21. In addition, Mr. Moore pointed out that the legislation on RPS cost caps has two components; first, DNREC develops the rules and determines whether they have exceeded the rules, but then the Director of the Division of Energy and Climate has the decision to freeze or not to freeze Delmarva's purchase of

SRECs. *Id.* Hence, Mr. Moore concluded that even if the new DNREC rules are issued and the threshold has been exceeded, the Director of the Division of Energy and Climate still determines whether Delmarva's purchase of SRECs should be frozen. *Id.* Mr. Moore concluded by stating that Delmarva is required to and has an obligation to obtain these SRECs, that certainty is an important component to the process, and that a delay could have a significant impact on the amount and cost of SRECs available through the auction. *Id.* at 22.

22. Robert Underwood, Program Administrator for DNREC's Division of Energy and Climate and the Director of the Taskforce, and Thomas Noyes, Principal Planner for the Utility Policy DNREC Division of Energy and Climate, testified in support of the 2015 Program. *See* Tr. at 24-27 and 32-35. Mr. Underwood described the role of the Taskforce in developing the 2015 Program as well as the lessons learned and the areas in which the Taskforce could improve. He stated that there has been a lot of stakeholder involvement in the process, including the DPA, PSC Staff and Delmarva. *See* Tr. at 25-26. Mr. Underwood also testified that in DNREC's view, the 2015 Program was designed to maximize price discipline through competitive bidding while meeting the requirements of the REPSA. *Id.* at 26. Mr. Noyes testified that the 2015 Program was the result of carefully considered adjustments to the 2013 and 2014 Programs and that the 2015 Program included additional flexibility while meeting the overall requirements of the statute. *Id.* at 34-35.

He also testified that DNREC supported the 2015 Program and urged the Commission to adopt it. *Id.* at 35.

23. Although the DPA did not present a witness, counsel to the DPA did state that the DPA's office had participated very actively in the Taskforce process and in the Taskforce negotiations. *See* Tr. at 35-36. In addition, the DPA noted that the Public Advocate had been vocal in previous years when the SREC auction parameters had been discussed in asking for changes to the auction and the procedures being considered to make the auctions more favorable to ratepayers. *Id.* at 36. The DPA was satisfied that the changes made to the 2015 Program addressed its concerns with respect to those procedures, and therefore supported the 2015 auction parameters as proposed. *Id.*

24. Clishona Marshall, a Staff Public Utilities Analyst, testified that she had reviewed the Application and compared it against the previous years' applications. *Id.* at 37-38. She testified that she had filed a memorandum which included a discussion of the issue regarding the proposed cost cap regulations from DNREC. *Id.* at 39. She indicated that Staff had performed some rough calculations without many of the externality features that DNREC would have included if it had performed the calculations. *Id.* at 39. She then testified that based on these calculations and the proposed regulations as they existed in December of 2014, it appeared as though the cost cap in the REPSA may have been reached; however, she also testified

that with changes to the regulations, and inclusion of other factors such as externalities, the cost cap may not be exceeded. *Id.* at 39-40. Nevertheless, Staff recommended that the 2015 Program be approved without any changes. *Id.* at 41.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

25. The Application requested that the Commission approve the 2015 Program.

26. The Commission has jurisdiction over this matter pursuant to 26 *Del. C.* sub. ch. III-A, "Renewable Energy Portfolio Standards."

27. The Commission must determine whether the proposed 2015 Program complies with REPSA. For the reasons that follow, we find that the 2015 Program meets the criteria of REPSA and is in the public interest. Therefore, based upon the evidence presented, we approve the Application as submitted and as set forth in Order No. 8717 (March 3, 2015).

28. The purpose of REPSA is to "establish a market for electricity from [renewable energy resources] in Delaware, and to lower the cost to consumers of electricity from these resources." 26 *Del. C.* §351(c). REPSA further acknowledged that a market for renewable energy resources in Delaware would improve air quality and public health; increase electric supply diversity; protect against price volatility and supply disruption; improve transmission and distribution; and create new economic development opportunities. 26 *Del. C.* § 351(b).

29. To meet these objectives, REPSA requires Delmarva to purchase a minimum percentage of sales[5] from Eligible Energy Resources (as defined in REPSA) to meet a portion of all Delaware retail energy suppliers' annual retail load. REPSA was amended in 2010 to create the Taskforce. 26 *Del. C.* §360(d). The Taskforce is charged with making recommendations about and reporting on trading mechanisms to support the growth of renewable energy markets, particularly establishing a balanced market mechanism for REC and SREC trading, and establishing the deployment of solar energy technologies with the least impact on retail electricity suppliers, municipal electric companies, and rural electric cooperatives. *Id.* Its members include representatives of the DPA, the Commission, Delmarva, the Delaware Electric Cooperative, municipal electric companies, the SEU, the Delaware Solar Energy Coalition, and members appointed by the DNREC Secretary, *Id.* §360(d)(1).

NOW, THEREFORE, IT IS HEREBY ORDERED BY THE AFFIRMATIVE VOTE OF NOT FEWER THAN THREE COMMISSIONERS:

30. The 2015 Program is approved as submitted for the reasons expressed above.

31. The Commission reserves the jurisdiction and authority to enter such further Orders in this matter as may be deemed necessary or proper.

[5] REPSA sets forth the minimum percentage of retail energy sales to end-users that must come from Eligible Energy Resources, including solar photovoltaics, which increases over time to a requirement of 25% in 2025. 26 *Del. C.* §354(a).

BY ORDER OF THE COMMISSION:

/s/ Dallas Winslow
Chair

/s/ Joann T. Conaway
Commissioner

/s/ Harold B. Gray
Commissioner

/s/ K. F. Drexler
Commissioner

/s/ Mike Karia
Commissioner

Attest:

/s/ Donna Nickerson
Secretary

Vest, Lisa A. (DNREC)

From: Gary Myers <garyamyers@yahoo.com>
Sent: Tuesday, September 22, 2015 8:04 AM
To: Vest, Lisa A. (DNREC)
Cc: Noyes, Thomas G. (DNREC)
Subject: REPSA Cost Cap Rule-making Proceeding - NOPR 18 DE Reg. 432 (Dec. 1, 2014)

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For the record, I would note that since the cost cap provisions were added to REPSA in 2010, neither the the prior State Energy Office nor the current Division has over the ensuing four years ever made any "determination" - one way or another - whether the costs of compliance for renewables generally and the carved-out solar components exceed the percentage caps set forth in 26 Del. C. sec. 354(i) & (j). It is not a question of the Division undertaking the analysis and concluding that breach has occurred. Instead, the Division has never made any analysis over the last four years of whether a breach has, or has not, occurred.

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In the meantime, all available external sources suggest that the determinations would show that the percentage caps in both subsections have already been breached. Delmarva Power's IRP plans consistently forecast costs exceeding the percentage caps.

And, just this Summer, the Public Service Commission's Staff did rough estimates of the results under both cost caps. In doing so, the Staff used the formula proposed in the Division's 2014 NOPR - one that supposedly compares increases in compliance costs from year to year. Even using that formula (which I think plainly violates the statutory text and all legislative history), the Staff concluded that **both** percentage cost caps have been breached for compliance years 2012 and 2013. Staff suggests that they will be breached in the upcoming compliance year. *See* PSC Order No. 8717 at pg. 3 (March 3, 2015); PSC Order No. 8764: Findings of Fact, Conclusions of Law and Final Opinion in Support of Order No. 8717 at paras. 21 (Moore, DP&L), 24 (Staff) (July 21, 2015) (electronic copies attached).

Those "findings" suggest that if indeed the correct formula was used - one that makes the cost comparison within the same compliance year - the two cost caps would be even more overrun for those two earlier compliance years.

This month DP&L will file its REPSA Compliance Filing for the 2014 Compliance year. It will include its costs of compliance for that year. I would hope that the Division will this year undertake the analysis to make the required statutory "determinations" whether the cost caps have been breached. **The Division should do so under the statutory text without awaiting any completion of this long, long protracted rule-making.**

The Division first proposed its rules in Dec., 2013. In that initial proposal, the Division set forth the formula used in the statutory text - one that compared total compliance and retail supply costs in the same compliance year. Then, one year later, the Division announced that it had received a formal legal opinion that such formula was not the "best reading" of the supposedly ambiguous statutory text and the better reading was for a one year to next comparison formula.

So what's the hold up? If the DAG told the Division that the one year vs. next year formula was the best reading of the text - and the one the courts would embrace - why hasnt the rule moved forward? If the DOJ holds to its position (even though another DAG has expressed - on behalf of the DPA - that such reading is wrong), then promulgate the rule and let the courts have the final call. On the other hand, if the DAG has not retreated from the prior opinion, why has it taken so long to get the current "best reading"? The text was studied for almost a year before the DAG's last formal opinion. How much more analysis and study is needed to come to the new "best reading" now?

The formula is needed now. As said earlier, the Division has an obligation to make the "cost cap" determinations each compliance year. It appears the Division is now relying on the slow pace of this rule-making to forego making those determinations. But again, the statute, not any rule, imposes the duty.

Before the legislative houses, both former Sec. O'Mara and Senator McDowell described the costs caps as needed "consumer protections" that would act as "circuit breakers" preventing consumers from paying run-away compliance costs beyond the limits set by the subsections. This rule making about such circuit breakers now has a penny fuse appearance - using anything to put off the inevitable "breach" determinations that will come under any formula ground in the subsections' text. In the meantime, the penny fuse approach has left the consumers' house burning.

Thank you for your prompt response. Please include this is e-mail in the administrative record in this rule-making.

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