Comments of Gary Myers November 24, 2015
DNREC, NOPR, 19 DE Reg. 397 (Nov. 1, 2015)
102 Implementation of Renewable Energy Portfolio Standards
Cost Cap Provisions

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.

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

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

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.

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

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

Delmarva or *DP&L* - Delmarva Power & Light Company

2014 IRP - Delmarva Power and Light Co., *2014 Integrated Resource Plan* (PSC Dckt. No. 14-559, filed Dec. 2, 2014 with full version made available to public on July 8, 2015)

2015 DP&L REC Compliance Report - Delmarva Power and Light Co., *Retail Electric Supplier's RPS Compliance Report, Compliance Period: June 1, 2014 - May 31, 2015* (filed with PSC Oct. 1, 2015)

Bloom Energy 2015 Annual Report - Diamond State Generation Partners, *Annual Report for QFCP-RC Operations June 2014-May 2015* (filed with PSC June, 2015)

NREL - J. Heeter, *et al.*, Delmarva Power and Light Co., *Survey of State-Level Cost and Benefit Estimates of Renewable Portfolio Standards* (Nat'l. Renewable Energy Lab. & Lawrence Berkeley Nat'l. Lab. May, 2014)

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

1. **Introduction**

Back in 2010, Colin O'Mara, then-Secretary of DNREC, told the members of the House on the floor of their chamber that if they passed SS 1 they would be enacting "price protections'" for consumers where "there currently are none" and would "ensure ratepayers that there won't be any adverse impacts from this legislation." [1] Those protections, added as subsections 354(i) & (j), he emphasized, would impose "an actual price control," in the form of a "circuit breaker," "whereby if the, if the ratepayer impacts exceed a certain amount, that the entire program freezes in place." [2] As he told it, the protections would be iron-tight. Thus, in the case of the solar energy carve-out:

> 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.[3]

The House passed SS 1. The Senate, having already heard similar representations about a "circuit breaker" to protect consumers from the impact of renewable costs, had already signed on. The Governor quickly assented.

The question now in this rule-making is whether the then-Secretary's promises are to be honored in the Division's rules. Or will the rules throw aside his pledge of an "actual price control" to "circuit break" high costs to be replaced by a discretionary power vested in the Director that would allow consumers to suffer dollar impacts that go way beyond the percentage limited amounts directed by the legislation?

a. The Cost Cap is Already Busted

Subsection 354(j) commands the Director to impose a freeze on any further compliance with the percentage renewable energy standards (26 Del, C. § 354(a)) if his Division " determines that the total cost of complying with this requirement during a

1 SS 1 HD at 6-7 (O'Mara).

2 SS 1 HD at 6-7 (O'Mara).

3 SS 1 HD at 13-14 (O'Mara) (emphasis added). A more detailed recounting of what transpired in the legislative floor proceedings for SS 1 - and the representations made there - is set forth in part 2 of these comments.

compliance year exceeds 3% of the total retail cost of electricity for retail electricity suppliers during the same compliance year." He has the same obligation as to the solar renewable energy carve-out requirements: to impose a freeze on further compliance if "the total cost of complying with this requirement during a compliance year exceeds 1% of the total retail cost of electricity for retail electricity suppliers during the same compliance year."

No one can doubt that the percentage triggers set forth in the above two "cost cap/freeze" subsections have already been pulled. In its 2014 IRP filing, Delmarva Power projected that the total cost of complying with the overall renewable energy procurement requirements for the present 2015-16 compliance year would hover around 5.68 % of the total electric supply and delivery bill for a typical residential customer of DP&L.[4] Under DP&L's predictions, that percentage would climb to 6.51 % by compliance year 2017-18 and increase even further to 7.36 % by 2020-21.[5]

The picture is not much different on the solar side. For the current year, DP&L's prediction is that solar compliance costs represent .78 % of the residential customer's total bill. By 2017-18, the percentage will be 1.23%, a level above 1 %. And by 2020-21, DP&L predicts, the percentage will almost double to 2.15 %.[6]

Of course, in the IRP table, the percentages were derived by applying the total costs of compliance against a customer's combined electric supply, transmission, and distribution charges. As set forth in part ?? of these comments, the correct comparison base is not the customer's total bill but the retail electricity supplier's cost of electric supply. And one way to approximate that supplier cost is too focus the comparative look solely on the electric supply portion of a customer's bill, without adding on transmission or distribution charges. And if the supply portion figures in the IRP Table 10 are in fact used, the resulting compliance cost percentages spike significantly. For overall REC compliance, the percentages come in 9.98 % (2015-16), 11.72 % (2017-18), and 12.1 %

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4 2014 IRP at pg. 74, Table 10 (full version released July 8, 2015). DP&L assumed that a typical customer would use 1000 kwh of electricity during the monthly billing period. In figuring all the compliance cost percentages, DP&L "grossed up" the delivery charges by including the same renewable compliance costs that it was measuring. This, in effect, lowers any percentage calculation.

5 2014 IRP at pg. 74, Table 10.

6 2014 IRP at pg, 74, Table 10.

(2020-2021). The same thing happens on the solar side, with much higher compliance cost percentages: 1.36 % (2015-16), 2.21 % (2017-18), and 3.62 % (2020-21).[7]

Delmarva is not the only one to report that the percentage limits set forth in subsections 354(i) & (j) are breached and will continue to be left behind for years to come. Using public information, researchers from the National Renewable Energy Laboratory and the Lawrence Berkeley National Laboratory projected that Delaware's renewable compliance costs already have exceeded the statutory cost cap limit, and will continue to do into the future. As they saw it:

> In Delaware, Delmarva Power & Light's RPS procurement costs for 2012 appear to have exceeded the 3 % cost cap; however, the administrative rules for implementation of the cost cap are still under development (as of this writing) and it is therefore not yet practically enforceable.[8]

See also NREL at pg. 50, Fig. 11 (chart reflecting that for Delaware the estimated historical cost amounts exceed the 3 % cost cap). *Accord* NREL at pgs. 42-43, Figs. 9 & 10 (charts showing that Delaware RPS charges in 2012 approximate or exceed 4 % of average statewide retail electricity rates).

b. DP&L Customers Bear Very High Renewable Compliance Costs

If one wants to know why the cost cap protection levels have already been breached, one need only look at what DP&L's customers pay for renewable energy compliance. Those compliance costs are very, very high.

For the period June 2014 through May, 2015, the Diamond State Generation Partners QFCPP (Bloom Energy's generation subsidiary) produced 226,578 MWh of electricity. During the same period, DP&L customers paid to Diamond State a total of $ 36,394,872 (that's $ 36 million) in QFCPP surcharges. [9] Thus, each MWh of QFCPP production earned (on average) $ 160.63 in surcharge payments. Given that the DNREC Secretary has assigned 2 REC equivalencies to each MWh of QFCPP production, each

7 2014 IRP at pg. 74, Table 10.

8 NREL at pg. 49. The NREL survey utilized projections in DP&L's 2012 IRP. The 2014 IRP projected higher percentages than that earlier IRP.

9 Bloom Energy 2015 Annual Report at pg. 3.

REC equivalency used during the 2014-15 compliance year ended up costing DP&L's customers (on average) $ 80.31. That *$ 80* number is multiples over the *$ 25* per MWh alternative compliance payment amount that the General Assembly set long ago as the maximum amount an retail electricity supplier (and now DP&L) should pay for a substitute REC.[10]

In fact, if you add the costs paid by customers for QFCPP REC equivalencies and for actual RECs used for the 2014-15 compliance year, the average cost per REC (or its equivalency) was $ 54.93. [11] Once more that number exceeds by almost 100 % the legislatively imposed ACP for the cost of a substitute REC.

Once again, outside observers see the same conclusion. NREL at pg. 29 ("In the case of Delaware, the state's lone distribution utility , Delmarva Power & Light, has met much of its compliance obligation with long term bundled PPAs, *and the above market costs of these resources are greater than spot market REC prices.*") (emphasis added).[12]

c. The Crucial Question

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10 *See* 26 Del. C. § 358(d). In 2014-15, 427,308 of these $ 80 REC equivalencies were used to fulfill the overall total REC requirement of 776,872 RECs. In the 2014 compliance year, DP&L did not utilize any REC equivalencies to form a SREC equivalent. In the prior compliance year, it did use some REC equivalencies on the solar side. Given that it takes six REC equivalencies to "make" a single SREC equivalency, the solar equivalencies used in the previous year cost DP&L's customers (on average) $ 490.50. Again that number was above the $ 400 alternative solar compliance payment that was to cap the cost of a SREC fill-in. *See* 26 Del. C. § 358(e).

11 DP&L reported REC purchase costs for the 393,175 RECS used in the 2014-15 compliance year as $ 8,360,294. 2015 DP&L REC Compliance Report at pg. 3. At $ 80.31 an equivalency, the 427,308 QFCPP REC equivalencies which were also used cost approximately $ 34,317,105. This leads to a total cost of $ 42,677,105 for the overall 776,892 RECs (or equivalencies) needed.

12 The surveyors calculated the "above-market" prices for RECs and SRECs under several of DP&L's renewable energy contracts as well as the $241/MWh price under the Bloom Energy commitment. This led them to conclude that " Delmarva's RPS surcharge, which serves to recover the entirety of the above-market costs of the utility's RPS resources costs in each year, *equated to an average above-market cost of $55/mwh in 2012.* " NREL at pg. 29 n. 24 (emphasis added).

Against this backdrop, the crucial question for this rule-making is what "consumer protection" did the General Assembly impose when it enacted subsections 354(i) and (j). The "plain reading" of the text of those provisions reveals them to be exactly what then-Secretary O"Mara said they would be: "actual price controls." They were meant to act as automatic "circuit breakers" which would freeze further compliance with the renewable energy portfolio requirements if the incremental costs of renewable compliance turn out to exceed the statutorily described percentage limits. That process describes a "cost cap:" a reasonable, predictable, and easy to administer limit on the costs that customers should be called upon to shoulder to meet renewable energy benchmarks.

But the Division's proposed rules paint a different mechanism. Rather than have a simple, easy to apply, cap formula to protect consumers against excessive costs, the Division's proposed rules call for a yearly exercise that allows it to assay the costs and benefits of renewable energy requirements regardless of the above-cap consumer pocketbook costs. Under the proposed rule, various factors are to be determined and weighed, and then the Director will finally determine how much customers should or should not pay for renewable energy compliance. But it's hard to find the Division's construct in the statutory text. Maybe just as significant, when the General Assembly considered SS 1 and its cost cap provisions, the legislators were cognizant of the environmental, health, and economic development benefits of encouraging renewable energy sources.[13] With that knowledge in mind, the legislature, in the text that it passed, struck the balance between those benefits and the dollar and cents burdens electric customers should be forced to pay. That tip point was set at the two percentage cost cap limits. The Division cannot point to anything in the statutory text (or even the legislative history) which suggests that once having set the two tip-points, the legislature was then willing to allow the Director to revisit and reset the balance each and every year.

13 SS 1 HD 8-9, 17-20 (O'Mara); SS 1 SD 9-11 (McDowell), 25-26 (Bushweller), 28-29 (Simpson).

2. **The § 354(i) & (j) "Circuit Breakers" - New, Easily-Administered Provisions to Protect Electric Consumers from Suffering Excessively Higher Electric Bills Due to Renewable Energy Mandates**

As this proceeding plods through its third round, it is important to recall and repeat - one more time - exactly why the subsection 354(i) & (j) cost cap rules came about and how they were sold by their proponents to the General Assembly membership.

The two subsections 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 retail 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 onerous 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." [14] 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." [15] On the House floor, then-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." [16] 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

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

15 SS 1 HD at 3-4 (Williams).

16 SS 1 HD at 6 (O'Mara).

the program if there are adverse rate impacts."[17]

Moreover, the sponsors and 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) & (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.[18]

Later he outlined the scheme in more detail:

> [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.[19]

In the other chamber, Secretary O'Mara offered a similar picture of how

17 SS 1 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." SS 1 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 replicate their mistakes." *Id*. Earlier, the Secretary had said that the consumer protection related to solar percentages (§ 354(i)) was "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." SS 1 HD at 14 (O'Mara).

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

19 SS 1 SD at 9 (McDowell). *See also* SS 1 SD at 26-27 (McDowell) (offering similar description of circuit breaker protection applicable to all utilities).

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.[20]

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.[21]

Finally, in the legislative chambers the members heard not only the bill's prime sponsor, but one of its major proponents, promise that the consumer impact protections would be triggered by the percentage formulas, would have real bite, and would 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.[22]

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.*[23]

20 SS 1 HD at 6-7 (O'Mara).

21 SS 1 HD at 13 (O'Mara) (emphasis added).

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

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

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.[24]

In sum, the legislative proceedings show that subsections 354(i) & (j) were meant to give electric consumers a real "wallet" entitlement. The subsections were intended to protect consumers from facing excessively large electric bills swollen by run-away incremental costs incurred to comply with renewable energy portfolio requirements. n.[25] Moreover, this entitlement was meant to be one that could be easily invoked and have real, immediate effect.

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24 SS 1 HD at 13-14 (O'Mara) (emphasis added).

25 Subsections 354(i) & (j) both rely on "incremental cost" tests for measuring whether consumers are paying too much for renewables. Each subsection's formula measures the incremental costs paid by customers under the particular renewable energy portfolio requirement over what amounts they would have paid for electric supply in the absence of that renewable mandate. Each then caps those incremental costs at a specified percentage of the underlying electric supply costs. In other words, the cost cap formulas cabin how much customers' bills can "go up" due to renewable energy requirements as compared to the benchmark electric supply cost that would have been paid without the renewable energy obligation. S 1 SD at 9 (McDowell). *See also* SS 1 SD at 26-27 (McDowell) (offering similar description of circuit breaker protection applicable to all utilities).

3. **Proposed Rule §§ 4.2 and 4.3 Violate the Statutory Text by Excluding Bloom Energy QFCPP Surcharges as Components of the "Total Cost of Complying"**

Both subsections 354(i) & (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." [26] In the two prior versions of its proposed rules, the Division correctly included the amounts paid by DP&L customers as QFCPP surcharges as falling within the "total cost of complying." Now, without any explanation, the Division has reversed course and chosen, in the third version of its rules, to exclude such surcharge amounts from any calculation of the "total cost of complying." In doing so, the Division condemns its now proposed rules to not only violating the statutory text, but also ignoring prior legislative history and contravening earlier and recent DNREC public representations.

Under the 2011 Bloom amendments, all of DP&L's customers pay monthly Bloom Energy QFCPP surcharges to Bloom Energy. [27] These charges ensure that Bloom's QFCPP generation subsidiary meets its costs in generating the 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.[28]

a. Statutory Text

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).

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26 The Division - after making a switch in its second version of its proposed rules - has now bowed to the clear statutory text and agrees that both the compliance cost numerator and total retail cost of electricity for suppliers denominator are measured by costs incurred during the same compliance year.

27 Technically the surcharge amounts are collected by DP&L as a mere collection agent and then paid over to Diamond State Generation Partners, the Bloom subsidiary that operates the QFCPP. In this portion of the comments, I will use the term Bloom to refer both to the parent and the Diamond State generation subsidiary.

28 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).

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." [29] But in that context 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." [30] Each megawatt hour of energy output represents "[*f*]*ulfillment* of the *equivalent* of 1 REC."[31] And such output can also "*fulfill a portion of SREC requirements* at a ratio of 6 MWH of RECs per 1 MWH of SRECs." [32] Moreover, these equivalents are fungible, just like tradable RECs. They need not 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*."[33]

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"*).

b. Legislative History

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29 26 Del. C. § 354(e).

30 26 Del. C. § 353(d) (emphasis added).

31 26 Del. C. § 353(d)(1) (emphasis added).

32 26 Del. C. § 353(d)(1)a. (emphasis added).

33 26 Del. C. § 353(d)(1)c. (emphasis added).

That's exactly how many involved in the enactment of the Bloom Amendments understood the mechanics of how the Bloom Energy output and surcharge would be integrated into the existing REPSA regime. Thus, 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).[34] The Bloom Energy bill's proponents explained the mechanism in just that way. *See* SB 124 SD (Sen. 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); (Mr. 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* SB 124 HD (Rep. 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 in all).

c. Prior DNREC Representations

(1) Secretary O'Mara

Indeed, then-Secretary O'Mara portrayed the REC equivalency language in much the same way just three months after the Bloom amendments were enacted. Testifying before the PSC in the proceeding to adopt the QCFPP mechanisms and rates, the Secretary reported that because Bloom's fuel cell technology emits significantly less pollution than traditional combustion technologies and is ready to operate on renewable fuels, "the State had determined that *it should be considered as a generation resource that can be used to satisfy the requirements of Delaware's Renewable Portfolio Standard*.".[35] According to the Secretary, it was the State which had "proposed that generation output from the solid oxide fuel cells that are identified as an economic

34 SB 124, Synopsis.

35 PSC Dckt. No. 11-362, O'Mara Direct Testimony Tr. at 3 (emphasis added).

development opportunity *should be used to satisfy the requirements of Delaware's RPS."*.[36] As the Secretary saw it, the Bloom amendments' structure would allow DP&L to "predictably and *cost-effectively* fulfill a significant portion of their RPS obligations, which reduces the chance Delmarva will pay Alternative Compliance Payments or buy renewable energy credits generated outside of Delaware which do not provide local economic development."[37] And he noted the favorable impact such approach would have on Delmarva's customers' REPSA compliance costs emphasizing: "[b]y using Delaware manufactured fuel cells *to help Delmarva satisfy its obligations under the RPS*, *it may actually be less costly to Delmarva consumers than without the project."*[38]

The picture Secretary O'Mara painted was one where the output from the fuel cell project would be used to "satisfy" DP&L's REPSA obligations. Hence, they would be available to "fulfill" or "comply" with those requirements. Moreover, the Bloom QFCPP equivalencies (paid for by the Bloom surcharges) would act as a substitute for RECs and allow for compliance in a more "cost-effective" way: the equivalencies would allow foregoing other types of compliance costs such as ACPs or the purchase of RECs from out-of-State sources. And, the costs of RPS compliance using such equivalencies would, he said, likely come in "less *costly*" to "Delmarva consumers" than if no QCFCPP was built. Under the landscape that Secretary O'Mara offered, the Bloom equivalencies - and the costs paid for them - were indeed to be part of the "total cost of complying" with the annual REPSA requirements. \

(2) The Climate and Energy Division

Finally, just two months ago, the Division of Climate and Energy told the PSC that it was important to note that "*QFCP[P] is an integral part of the Renewable Compliance Charge."*[39] As the Division went on to say:

> We should be mindful of the relationship between QFCP costs and REPSA compliance costs. QFCP costs are incurred to meet a portion of DPL's RPS

36 PSC Dckt. No. 11-362, O'Mara Direct Testimony Tr. at 4 (emphasis added).

37 PSC Dckt. No. 11-362, O'Mara Direct Testimony Tr. at 10 (emphasis added).

38 PSC Dckt. No. 11-362, O'Mara Direct Testimony Tr. at 10 (emphasis added).

39 PSC Dckt. No. 13-250, T. Noyes (Div. of Climate and Energy) Letter to J.R. Smith (PSC) at pg. 1 ¶ 4 (Sept. 8, 2015) (emphasis added).

> requirement, which reduces the number of RECs and SRECs DPL needs to buy to meet the requirement. *Rather than break all of the resources used for RPS compliance, DNREC sees it appropriate to report REPSA compliance as one cost*, while providing customers with detailed information on the costs/kwh on the website as DPL proposes."[40]

Thus, from the inception of the Bloom Energy scheme, everyone has understood that the REC equivalencies accorded Bloom Energy output are used to "fulfill" or "comply with" the RESPA minimum requirements and that the Bloom Energy surcharges which bought such equivalencies necessarily represent a portion of the "total cost of complying" with those REPSA requirements.

Before now, in its earlier two versions of the proposed rules, the Division also understood that concept and included such QFCPP charges as encompassed within the ordinary meaning of "total cost of complying," Yet now, without articulating any reasons, the Division proposes to exclude such charges as a "cost of compliance." This shift comes with some irony: the Division advances its new view - treating Bloom surcharges are outside the realm of "the total *cost of complying*" - while concurrently urging the PSC to include such Bloom surcharges amounts in a single "Renewable *Compliance* Charge" listed on customers' bills.

b. The Statutory "Includes" Definitions for "Total Cost of Compliance"

Perhaps the Division's new view here is premised on the fact that subsection 354(j) includes a definitional sentence that announces that "[t]he total cost of compliance shall include the costs associated with any ratepayer funded state renewable energy rebate program, REC purchases, and alternative compliance payments." Subsection 354(i) has a mirroring definitional sentence for solar compliance costs. Admittedly, neither REC (or SREC) equivalencies nor QFCPP surcharges are mentioned in those statutory listings, which were crafted in 2010 almost a year before the Bloom amendments were enacted. The Division might believe that the absence of any mention of such payments in the two definitional lists excludes OFCPP surcharges from being considered as part of any "total cost of compliance." But the two lists in the definitional sentences are prefaced by the term "includes." When a statutory definition uses the term "include," the presumptive common understanding is that such term "signal[s] that the

40 PSC Dckt. No. 13-250, T. Noyes (Div. of Climate and Energy) Letter to J.R. Smith (PSC) at pg. 2 ¶ (2) (Sept. 8, 2015) (emphasis added).

list that follows is meant to be illustrative rather than exclusive." [41] Or as our Supreme Court has said: "[a] term where the statutory definition declares what it 'includes' is more susceptible to extension of meaning by construction than where the definition declares what a terms "means"'[42] Here, 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 Delaware Legislative Drafting Manual*, Rule 26. Definitions: the Meaning of "Means" and "Includes," Rule 26 (a), (b) (2015 ed.) ("Use 'means' if a definition is intended to exhaust the meaning of the term[;]" "[u}se 'includes' if a definition is intended to make clear that the term encompasses only some of the specific matter.").

So the definitional lists in subsections 354(i) & (j) - couched in terms of "include[s]" - are neither exhaustive nor exclusive for what falls with the "total cost of complying." In fact, the Bloom Energy surcharge payments easily share the same characteristics as the costs described in the definitional listings. REC-equivalents purchased by DP&L's customers via the Bloom tariff surcharges are equivalent to the "REC purchases" and "SREC purchases" listed as one subset of the total cost of compliance under subsections 354(i) & (j). Indeed the statutory text, as well as the legislative history, is rife with statements that such REC equivalencies will be used to fulfill DP&L's "REC and SREC requirements."

It does not make a difference that DP&L's customers, not Delmarva Power, 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 two statutory listings recognize "costs *associated with any ratepayer funded* renewable energy rebate programs" or " costs associated with any ratepayer funded state solar rebate program" 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 part of the "total cost of compliance." In fact, the Green Energy Fund charge – which in part supports ratepayer-funded rebate programs – is a direct customer payment, not an outlay by DP&L. *See* 26 Del. C. § 1014(a). Yet the Division includes the relevant portion of Green Energy

41 *Samantar v. Yousuf*, 560 U.S. 305, 317 (2010).

42 *Coastal Barge Corp. v. Coastal Zone Ind. Control Board*, 492 A.2d 1242, 1247 (Del. 1985).

charges within its proposed rules as a "cost of compliance."

c. Are the Bloom Surcharges "Too Big" to Represent Costs of Compliance

So too, no one can argue that the Bloom Energy QFCPP surcharges must be excluded from the “total cost of complying" figure because the dollar amounts of such mandatory charges have now reached levels that could not have been foreseen in 2010 when the General Assembly set the “circuit breaker” cost cap percentage levels. It must be remembered that in 2010, when the cost caps were enacted, 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 wind project. [43] Much like the later scheme for Bloom QFCPP output “equivalencies,” the REPSA statute accorded special status to the output from the Bluewater wind farm project. For each MWH 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.” [44] In 2010, the PSC had already approved the Bluewater Wind purchase costs, in terms of both actual energy prices and REC payment levels. Once the wind project got going, those Bluewater Wind REC payment costs apparently would be factored into the “total cost of complying” for renewables under subsections 354(j).[45] 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 amounts to be paid by DP&L's delivery customers could not exceed the cost they would have borne under the Bluewater Wind power agreement.. [46] Yet, if the Bluewater Wind REC payment amounts were to be treated as "costs of compliance" factored into the subsection 354(j) cost cap formula, then the later “substituted” Bloom surcharges – which could not exceed the overall Bluewater Wind payment levels – could not have been unanticipated, and hence meant to be excluded

43 26 Del. C. § 364(a).

44 26 Del. C. § 356(c).

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

46 26 Del. C. § 364(d)(1)c.

from "the total cost of complying."

d. The Division Courts A Federal Preemption Challenge by Excluding the QFCPP Surcharge Amounts From the Total Costs of Complying

Finally, no one should suggest that the Bloom Energy surcharges can be excluded from the "total costs of complying" under subsections 354(i) & (j) because the surcharges constitute, in whole or in part, payments to Bloom Energy's generating subsidiary for its production of energy and capacity, not renewable energy equivalencies. To make that argument one invites the possibility of federal preemption of the entire Bloom Energy scheme.

Under the division of regulatory authority spelled out by the Federal Power Act, Delaware cannot mandate the appropriate price to be paid to the Bloom subsidiary for its sales of electrical energy and capacity into the PJM wholesale markets. Similarly, Delaware cannot determine the level of payments to be made to the Bloom generator to compensate it for those sales of energy and capacity. FERC holds the *exclusive* power to determine and oversee the reasonableness of rates and compensation charged or received for the wholesale sale of energy and capacity. 16 U.S.C. §§ 824(b), 824d(a), 824e(a), Any effort by a State to set such wholesale prices, or to set the compensation received by a wholesale generator, violates federal law and is preempted. *California Public Utilities Commission*, 132 FERC ¶ 61,047, paras. 64, 69 & 72 (2010), *order granting clarification and dismissing rehearing*, 133 FERC ¶ 61,059 (2010); *Midwest Power Systems, Inc.*, 78 FERC ¶ 61,067, pgs. 5-6 (1997); *Conn. Light and Power Co.*, 70 FERC ¶ 61,012 at pgs. 2, 11, 17-19 (1995). [47] This exclusive federal power applies even if the State-set price does not involve an actual transactional sale of energy or capacity to the payors, but instead represents a State-decreed supplemental subsidy to be paid to the generator to cover its production costs beyond the amounts it receives in selling its energy and capacity into a FERC-endorsed regional wholesale spot market. *See PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467, 476 (4th Cir. 2014) (state program that required ratepayers to make subsidy payments to the generator so it could meet its costs of production in amounts above the proceeds it received in PJM regional spot market for energy and capacity sales was field preempted because the subsidy scheme "functionally

47 The only exception from this exclusive federal jurisdiction is for wholesale sales made by Qualified Facilities under the federal PURPA regime. There the State may set "avoided cost" rates. The Bloom generating subsidiary is not a QF so PURPA does not apply to the Bloom amendments scheme.

sets the rate that [the generator] receives for its sales in the PJM market"), *cert. granted*, Nos. 14-614 & 14-623 (U.S. Oct. 15, 2015). *Accord PPL EnergyPlus, LLC v. Solomon* , 766 F.3d 241, ___ (3d Cir. 2014) (similar type of state program field preempted because by directing subsidy payments to generator beyond what it received in PJM capacity market, the state utility board was "essentially set[ting] a price for wholesale energy sales for LCAPP generators"), *petitions for cert. pending,* Nos. 14-634 & 14-694 (U.S.).

What all this means is that *if* the Bloom Energy subsidy scheme is to have *any* chance of avoiding a significant preemption challenge, then the Bloom Energy surcharges must be construed as something else than subsidy payments for the cost of production of energy and capacity. In such a context, the only response has to be that the Bloom generator's sale of energy and capacity into the PJM markets is the only wholesale sale involved under the scheme and that the Bloom surcharges paid by DP&L's customers represent not subsidy payments for production of energy and capacity but rather payments for non-FERC-jurisdictional sales of a renewable attribute. *See California Public Utilities Commission* , 132 FERC ¶ 61,047 at para. 31 n. 62. But even then, to escape federal preemption, the Bloom surcharge amounts must be not just price "unbundled" from the energy and capacity transaction but the surcharge must represent a sale of the renewable attribute "independent" from the Bloom generator's energy and capacity sales. *See WSSP, Inc.*, 139 FERC ¶ 61,061, paras. 18-26 (2012). If the Bloom surcharges do not represent an independent transaction in renewable attributes, then the whole Bloom scheme remains FERC "jurisdictional."

Again, this means that unless the Division wants to push the Bloom Energy amendments into the risk of being preempted, the Division must allocate to the "costs of compliance" under the cost caps formula the *entire* amount of the Bloom surcharge payments made by DP&L's customers. And, that means, the Bloom surcharges must be considered as part of the "total cost of complying" with the REPSA requirements.[48]

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48 This does not mean that such schism of the Bloom surcharges from energy and capacity sales revenues would necessarily save the Bloom scheme from a preemption challenge. There are too many other things in the Bloom amendments scheme that suggest it was an effort to provide a subsidy to Bloom for the production costs related to its wholesale sales. If so the Bloom scheme would be FERC jurisdictional and subject there to a "just and reasonableness" review.

4. **Proposed Rule §§ 5.2-5.8 Are Contrary to the Statutory Scheme and Ultra Vires and Must be Struck**

Before the legislative houses, both Senator McDowell and then-Secretary O'Mara portrayed the percentage limits 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" [49] so that "the entire program freezes in place."[50]

Unfortunately, the Division has chosen to continue to sketch a different landscape in its proposed rule §§ 5.2-5.8. Those provisions (which mirror similar provisions that were proposed in the 2013 and 2014 versions) make the statutory percentage levels necessary, but not sufficient, conditions for a "freeze." Proposed rule §§ 5.2-5.8. To throw in another metaphor, under the proposed rules 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 considerations" regime is inconsistent with the "intent" of the legislature as reflected in the legislative history recounted in part 2 of these comments. Consequently, proposed rule §§ 5.2 through 5.8 must be struck. The Division's rules must be rewritten to reflect that breach of either of the two statutory percentages caps 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.

49 SS 1 SD at 5, 9 (McDowell).

50 SS 1 HD at 7, 13 (O'Mara).

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 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, an agency cannot, by the rule-making process, 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 §§ 5.2-5.8 Discretionary Process Violates § 354(i) & (j)

Sections 5.2-5.8 of the proposed regulations violates these first principles. The provisions of subsections 354(i) & (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 for retail electricity suppliers. Those percentage levels are the "circuit breakers" described by Senator McDowell and Secretary O'Mara on the floors of the legislative chambers. The two "safety valves" were put into place to protect a specified class – electric consumers – from suffering significant adverse electric billings due to 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 rule §§ 5.2 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, if he follows that course, consumers will then continue to finance costs of compliance in excess of the percentage cap amounts set forth in the statutory subsections.

Initially, proposed rule §§ 5.2-5.8 make both Senator McDowell and former 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.[51] Secretary O'Mara had a similar description: the new provisions would

51 SS 1 SD at 4-5 (McDowell). *See also* SS 1 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").

provide "an actual price control whereby if the ratepayer impacts exceed a certain amount that the entire program freezes in place." [52] It would be a "circuit breaker *that does freeze* the program if there are adverse rate impacts." [53] In fact, he represented that "*as soon as* there's a 1 per cent impact from the solar portion of the bill, *the target level freezes in place.*"[54] That means, 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."[55] Yet all of these statements will not hold true under proposed rule §§ 5.2-5.8. For under it, if the Director deems a freeze unwarranted under the four-factor test, there will be times that the "program" will not freeze even though the cost impact exceeds the statutory percentage limit. So too, under §§ 5.2-5.8 even if solar compliance costs of compliance exceed 1 per cent of total retail costs in any given year, consumers might be still be forced to pay such higher than cap rates if the Director determines economic development demands it, or if the Director believes that there is some form of avoided costs to be encouraged. In cases, contrary to the former Secretary's promises, consumers will continue to bear more than a 1 percent renewable impact in their bills.

Second, the proposed rule §§ 5.2-5.8 regime is inconsistent with the normal understanding of what constitutes a "cost cap." One does not generally view a "cost cap" as an invitation to undertake an administrative process to assess the value of 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 an electric suppliers' efforts to meet renewable energy portfolio obligations. The process set forth in proposed §§ 5.2-5.8 is far afield from a "cost cap."

But, most importantly, none of the four factors set forth in proposed rule §§ 5.4-5.8 are mentioned in the 2010 legislation or in subsections 354(i) & (j). None of the factors were mentioned by *anyone* on the legislative floors during the SS1 legislative proceedings 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

52 SS 1 HD at 6-7 (O'Mara).

53 SS 1 HD at 7-8 (O'Mara) (emphasis added).

54 SS 1 HD at 13 (O'Mara) (emphasis added).

55 SS 1 HD at 13-14 (O'Mara) (emphasis added).

breakers." The four trumping factors, and their definitions (proposed rules §§ 5.4 through 5.8), are creations of the Division, not the legislature. And as noted, they change the whole "cost cap" scheme.

The proposed rule §§ 5.2-5.8 superstructure is then nothing more than a "suspension" of the "circuit breaker" cost cap formulas set forth in subsections 354(i) & (j). Given that, it is incumbent on the Division 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 the Division to assert some implicit grant of such power; the Division must point to an explicit legislative direction that allows for the exercise of the claimed discretion. And the conditions that allow for such discretion must be ones set by the legislature, not the agency. Del. Const. art. I, § 10.

(1) The Director "*May* Freeze"

So far in this long protracted proceeding the Division has failed to point to any statutory provision, phrase, or even word that it says compels - or even allows - the four-factor freeze regime outlined in proposed §§ 5.2-5.8. The proposed rule's discretionary regime was challenged on legal grounds in comments in response to the Division's 2013 and 2014 rule proposals. Yet, the Division has still not put into the record in this matter any response to those legal challenges. In fact, it has said nothing about the font of its authority to override or forego a freeze called for by the statutory criteria.

Perhaps the Division might argue that the use of the phrase the "Energy Coordinator . . . may freeze" in both subsections 354(i) & (j) provides the needed legislative endorsement for the proposed rule's multi-factor trumping regime. The Division 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 just 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) (emphasis added). 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, 444-47 (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).[56] And it has been applied more recently. In *Breech v. Hughes Tool Co.*, 189 A.2d 428, 431-32 (Del. 1963), the Court scrutinized a statutory procedural provision that said the court "may compel the appearance of the defendant" by seizure of property. Responding to the defendant's assertion that the use of the word "may" left the court with discretion whether to issue such a seizure order, the Court said it thought "the use of verb 'may' is without significance."[57] Rather, as the Court explained, because "[i]t has never been suggested, so far as we know, that the use of the process by a litigant is controllable by the court's discretion" it followed that the litigant "is entitled to it as a matter of right, just as he is entitled to a writ of summons."[58]

In fact, most dictionaries acknowledge that the term "may" denotes obligation or duty when the term is used in legal texts to describe an official's duty to enforce a right granted by statute. In that scenario, the presumptive definition is to equate "may" to a required duty, rather than the power to exercise some discretion. *See The American Heritage dictionary of the English Language* at 1112 "may" (3d ed. 1992) ("5. To be obliged; must. Used in statutes, deeds, and other legal documents."); *Webster's New World College Dictionary* at 889 "may" (4th ed. 1999) ("6. *Law* shall; must"); *Black's Law Dictionary* at 1127 "may" (10th ed. B. Garner editor 2014) ("3. Loosely, is required to; shall; must . . . . . In dozens of cases, courts have held *may* to be synonymous with *shall* or *must*, usu. in an effort to effectuate what is said to be legislative intent.").

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56 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.

57 189 A.2d at 431.

58 189 A.2d at 431-32.

Of course, context may be the crucial ingredient to determine whether the term "may" expresses permissive discretion or peremptory obligation. *See State ex rel. Foulger v. Layton*, 194 A. 886, 889 (Del. Super. 1937). But once again, such context frequently reveals that the term "may" imposes the obligation of "must." For example, in *Miller v. Spicer*, 602 A.2d 65, 67 (Del. 1991), the Court confronted the State statutory anti-discrimination scheme which said that a victim of discrimination "may file" a complaint before the supervising administrative agency. The victim argued that the use of the term "may" made the administrative remedy not just permissible, but discretionary. As he saw it, the plain meaning of the word "may" meant he was free to pursue an independent, judicial private cause of action for the discriminatory injury prescribed by the statute. If the administrative remedy was to be exclusive, he said, the statutory text would have read "shall." The Court said that while the term "may" is normally viewed as a grant of permission "the test is a contextual one and the mere use of a term does not control the question of legislative intent if the statute suggests a different construction." [59] To the Court, the use of the term "may file" was consistent with a notion - not of discretion - but of obligation: if the injured victim was going to pursue remedies, he had to use the exclusive administrative remedy set forth in the statute.

In the end, the use of the word "may" in subsections 354(i) & (j) fits comfortably within the peremptory meaning regime articulated long ago in *duPont v. Mills*. First, these two subsections were added to the RESPA in 2010 to "provide consumer protections by limiting any rate impacts." [60] In fact, both Secretary O'Mara and sponsoring Senator McDowell told legislators that these provisions were key components to the 2010 changes: they brought to electric consumers actual price control protections that had been previously missing from the REPSA. The percentage cost caps represented a "right" granted to third parties, the bill-paying electric consumers. [61] And in

59 602 A.2d at 67.

60 SS 1, Synopsis.

61 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.

the two subsections, the General Assembly (followed by the Governor) laid out explicitly when such a protective freeze was to be declared. Thus, it would seem illogical for the General Assembly to then turn around and allow an executive branch employee (the Director) to forego these protections granted to consumers by decreeing "no freeze" even if a statutorily-described cap percentage has been met. For, in such a situation, the consumer protection provisions so highly touted in 2010 would then be nothing more than illusory promises easy to be ignored or evaded.

It is true that the § 354(i) and (j) subsections both use "may" and "shall" in their consumer protection dictates. The Director "may freeze" the REPSA obligations if his office determines a percentage level has been breached and then later any such freeze "shall be lifted" if compliance costs can reasonably be expected to again go to sub-cap percentage levels. And it is true that in many cases the use of both "may" and "shall" in the same provision can suggest a 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 see Breech,* 189 A.2d at 431-32 (under statutory procedural attachment scheme, the use of the term "may" does not afford court discretion to decline to order writ for property seizure even though the relevant statutory provision contained both terms "may" and "shall").

However, in the context of *these* subsections, the above rule seems to recede. In fact, the use of both "may" and "shall" in the subsections simply reflects the differing nature of the Director's called-for actions. The REPSA statute sets forth escalating statutory renewable energy percentage requirements for each successive year. Subsections 354(i) & ((j) allow the Coordinator (now Director) to decree a halt to both present REPSA compliance and to the yearly percentage escalator if certain statutorily-described criteria have been met. In that case, he "may" decree a suspension of the program and force a stop to the escalator command. The "*may*" power is simply a grant of *permission* for the Director to lift the otherwise applicable statutory framework once the described cost cap 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 REPSA obligation and the yearly change in renewable energy percentages. In that context, "may" is just as imperative as "shall." In contrast, the provisions' later references that defines when a prior freeze "shall be lifted" is of course obligatory. It defines when the earlier grant of permission to to go outside the "normal" statutory scheme must end. In this context - where the statute grants a power to make a deviation from the otherwise governing statutory scheme - both "may" and "shall" impose identical obligatory duties on the Director.

In the context of subsections 354(i) & (j), the Director's duty is clear: once the statutory cost cap percentage has been reached, he must do his duty and 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 to go further and override the "circuit breaker" consumer protections which are at the heart of the two subsections.

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

The Division may also rely upon the language in subsections 354(i) & (j) that directs the Director to act "in consultation with the [PSC]." The Division may argue that such consultative obligation suggests that the Director holds some discretionary authority to decide whether to impose, or forego, a freeze. But 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.[62]

c. Conclusion

In sum, the proposed rule §§ 5.2-5.8 multi-factor regime is not only " out of harmony with," but also "alters" the provisions of subsections 354(i) & (j), and it does so "in a manner inconsistent with the clear legislative intent as therein expressed." [63] Just as importantly, it deprives electric consumers of a right granted to them by the General

62 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.

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

Assembly: the right to have the RESPA program freeze if compliance costs exceed a certain specified percentage. Proposed rule §§ 5.2-5.8 adds – impermissibly – further conditions to this legislatively granted consumer right. It must be withdrawn because it creates a process unauthorized by the General Assembly.[64]

64 The definitions in the definitional section of the proposed rules that are linked to the discretionary regime under §§ 5.2-3-5.8 should also be vacated. So should the administrative process set forth in proposed rule §§ 8.3-8.5.

5. The "Total Retail Costs of Electricity" Definitions in Proposed Rule §§ 2.0 and 4.4 Are Inconsistent with Statutory Text and the Statutory Cost Cap Scheme

Under the proposed rules the cost cap limit is set by applying the 1 or 3 % figure against the "Total Retail Costs of Electricity." [65] In turn, the term "Total Retail Costs of Electricity" is specifically defined as:

> the total costs *paid by customers [of DP&L] for the supply, transmission, distribution and delivery of retail electricity* to serve non-exempt customers, including those served by a third party suppliers, during a respective compliance year.

Proposed rule § 2.0 "Total Retail Costs of Electricity" (emphasis added). *See similarly* Proposed rule § 4.4 ("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). Two things are central to these rules: (1) that the total costs of electricity are to be measured by the costs paid by retail customers and (2) such costs include not only the amounts paid for retail electric energy but also the charges for the delivery and distribution of such energy commodity. The problem is that the proposed rules' definitions - and their focus on customers' costs, all costs, and distribution and delivery charges - go directly against the text of subsections 354(i) & (j).

a. § 354(i) & (j) Speak of the "Total Retail Cost of Electricity *for Retail Electricity Suppliers*," Not the Retail Costs Paid by Customers

First, both subsections 354 (i) & (j) apply the statutory cost cap percentages against "the total retail cost of electricity *for retail electricity suppliers*." (emphasis added). That text specifically keys the benchmark figure to the "cost of electricity *for retail electricity suppliers*," not the cost of electricity for retail customers or retail end-users. The statutory text says nothing about "costs paid by customers," or "all customer costs," or even all revenues or costs *received by* retail electricity suppliers. [66] Rather, it directs that the appropriate reference is the "cost *of* electricity *for* retail electricity

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65 Proposed rule §§ 5.2 & 5.3.

66 In fact, the Division, in its 2013 version of its proposed rules, references the costs "expended by retail electricity suppliers." It has now changed the focus from suppliers to customers. The Division does not explain how such a change is supported by the statutory language.

suppliers:" that is, the outlay, expense, or price *incurred*, *borne, or paid by retail electricity suppliers* to produce or procure electricity.[67] Under the statutory text the focus is on the cost of electricity *for retail electricity suppliers*, not the costs or charges paid by retail customers or consumers. The proposed rules' attempt to change the focus from electric supplier costs, to charges paid by retail customers simply contravenes the language chosen, and enacted, by the General Assembly. The Division has never identified what statutory reading allows it to make such a change in focus.

b. What are Electricity Costs for Retail Electricity Suppliers?

So what costs do retail electric *suppliers* pay for "electricity?" The answer is provided by REPSA's definition of a "retail electricity supplier." By statute, it's an entity "that sells *electric energy* to end use customers." [68] It can be an independent "power producer" or an electric distribution company acting in a capacity as a standard offer supply provider.[69] A retail electricity supplier's business and its commodity is "electric energy." A retail supplier thus bears the costs of procuring (at wholesale), or producing on its own, the "electric energy" that it will then sell to end-use customers.

(1) Retail Electricity Suppliers Do Not Incur Distribution or Delivery Charges

But such a "retail electric" or "retail electricity" supplier does not bear the work, or costs, of delivering or distributing its electric energy commodity. In the restructured electricity world that prevails for DP&L, distribution and delivery services are separate and distinct from the sale of electric energy. The former are provided by Delmarva in its role as an electric distribution company. [70] By statute, the charges for delivery services provided by the distribution utility (such as DP&L) must be separately charged from the charges imposed for the electric energy supplied by the standard offer provider or a third

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

68 26 Del. C. § 352(22) (emphasis added). *Cf.* 26 Del. C. § 352(21) ("retail electricity product" is "electrical energy product"); 26 Del. C. § 10001(14) ("electric supplier" "sells electricity to end users").

69 26 Del. C. § 352(22).

70 26 Del. C. § 10001(10), (12).

party retail electric supplier.[71] DP&L bears the costs of delivery and its customers pay to it the separate charges for delivery. *Retail electricity suppliers* simply do not accrue any costs related to the delivery or distribution functions; those services are not a "retail cost of electricity" *for* those suppliers. As such, delivery and distribution costs and charges are not within the statutory component and thus cannot be included in the proposed rule's "Total Cost of Retail Electricity."

(2) What Costs Do Retail Electricity Suppliers Bear for "Retail Electricity"?

So what really is in the cost of electricity for suppliers? For sure it includes the costs the electricity supplier incurs to procure or produce the electric energy it then re-sells. That might be described as the supplier's "wholesale" cost of power. Yet the exact phrases in subsections 354(i) & (j) are the "total *retail* cost of electricity for retail electricity suppliers." The adjective *retail* suggests that the described amount includes more than suppliers' "wholesale" costs of power. Instead the term suggests that the benchmark should include not just the “true wholesale purchase or production costs” of the retail electric suppliers but also the suppliers' additional costs incurred by them in order to retail the electrical energy commodity. The benchmark would thus include wholesale purchase or production costs plus the "back-office" and other additional costs incurred by suppliers to retail their electrical energy product.

(3) A Surrogate for the Suppliers' Retail Cost of Electricity

The Division, for purposes of cost cap supervision, could require retail electricity suppliers to report their "wholesale costs" and their additional retailing costs. But there is a ready stand-in for those amounts: the retail charges for electricity separately billed on an electric end-user's bill. Presumably, the amount a retail electricity supplier charges end-users for "electric supply" represents its costs for procuring and selling the electrical energy product. If that assumption holds, the Division could use the electric supply charges paid by customers to represent the retail electricity costs for electric suppliers. Thus, the Division could require the suppliers directly, or DP&L (if it has such information), to report the total amounts charged, or received, for the separate electric supply services in the compliance year. This aggregated amount could then be deemed the "total retail cost of electricity for retail electricity suppliers." And that amount could then be used in analyzing the cost caps for that compliance year.

71 26 Del. C. § 10006(a)(5).

Of course, the above amount must exclude several charges. First, as explained initially, the total amount cannot include any delivery or distribution charges. Second, it cannot include 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. QFCPP surcharges are not a cost for retail electric suppliers. Similarly, the total aggregate cannot include any amounts collected by DP&L in fulfilling its almost exclusive responsibility to procure RECs and SRECs for all non-exempt load. Those charges are now assigned to DP&L; they are not costs incurred or borne by retail electricity suppliers. Finally, in the context of post-2012 "transitional" electric supply contracts the costs of any REC or SREC costs embedded in the supply charges must be excluded from the "total retail costs of electricity."

c. Parallel Cost Cap Regime Enacted in the Same Legislation Speaks to Electric Supply Only

Indeed, the above analysis is supported by the text of the similar statutory cost cap protections that prevail for 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." [72] 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 just the power commodity. The benchmark does not include amounts charged or collected by the utility for delivery or distribution. Instead the benchmark is limited to the cost of the electric energy that the utility purchased and which it then sold to the utility's members or its customers. Again, that represents the electric energy supply cost "for the utility."

It is quite legitimate to look to this language related to the cost cap for the electric cooperative and municipal electric ventures in order to give meaning to the phraseology used in the cost cap subsections applicable to DP&L's customers. After all, all of these 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 – were congruent.[73] Thus, if the Cooperative's and municipals' cost

72 26 Del. C. § 363(f), (g) (emphasis added).

73 SS 1 SD at 26-27 (McDowell) (noting that the bill provided the same 1% and 3% cost cap

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) & (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 electricity suppliers.

The proposed definition of "Total Retail Electricity Costs" and proposed rule § 4.4 must be rewritten to confirm to the statutory text and the statutory scheme. Any new definition should only include the aggregate amount of costs or charges received by electric suppliers for providing their electric energy product. It cannot include any delivery or distribution costs or any charges or any costs that might be included in the total costs of compliance.

circuit breakers protections for DP&L, the municipal utilities, and the Delaware Cooperative).

6. **Proposed Rule § 9.0 is Not Authorized by Law and Is Without Any Record Basis and Must be Struck**

Proposed rule § 9.0 declares: "[i]n implementing a freeze under these rules, existing contracts for the production of RECs, SRECs, or delivery of other environmental attributes shall not be abrogated." Two things are immediately apparent about this section. First, the break point for "existing contracts" is not the date of the enactment of subsections 354(i) & (j), but rather the date a freeze might be declared under those cost cap provisions. Thus, a contract can be an "existing" one - and immune from the cost cap protections - even if it was made after subsections 354(i) & (j) became law. All that is required for a contract to earn the cost cap exemption is that it was made at some time before the announcement of a freeze. Second, the across-the-board exemption granted by § 9.0 will likely overwhelm, and end, the statutory cost cap protections. Under this proposed provision, even if a cost cap freeze is called-for under the statute and announced by the Director, DP&L's customers will have to continue to pay above-cap renewable compliance costs just so long as those compliance costs can be tied to one or more "existing" contracts for the production of RECs, SRECs, renewable energy supply, or other environmental attributes. The contracts would thus trump the statutory cost-cap limits; customers would have to pay for the contract RECs, SRECs, and equivalencies even if such payments result in compliance costs that are way above the percentage cap limits; Indeed, if DP&L were to execute contracts to acquire and cover *all* of its anticipated renewable energy obligations, then the cost cap protections in subsections 354(i) &and (j) could never go into effect. All above-cap compliance costs would be protected from the cost cap limits by the exemption granted for costs arising from "existing" contracts.

Proposed rule § 9.0 is invalid for several reasons.

First, the Division has never identified any statutory text, section, or provision that empowers it to grant an exemption from the statutory cost-cap provisions in the case of "existing contracts." Subsections 354(i) & (j) do not contain any mention (express or otherwise) that "existing contracts" are to be given a "pass" from the cost cap "circuit breakers" and any resulting "freeze." Nor has the Division pointed to any other statute, or even any other regulation, which grants it, or DNREC, any such power to craft a waiver from the cost cap limits for such contracts. The Division, under fundamental principles of administrative law, cannot simply make up such an exemption out of whole cloth.

Second, there is no legal impediment that would bar applying the cost cap limitations to "existing" contracts related to renewable energy, RECs, SRECs, or equivalencies. As pointed out above, the focus of § 9.0 is not on whether the contract was made before subsections 354 (i) & (j) became law in 2010, but whether the contract was made before a cost cap freeze has been declared. The question is - at least in the case of post-2010 contracts - why would anyone feel it necessary to excuse such a contract from the reach of the earlier passed statutory cost cap provisions? Ever since *Ogden v. Saunders* , 25 U.S. (12 Wheat.) 213 (1827) was decided 188 years ago, the common understanding has been that where a statutory provision might accord one party to a contract relief from his contractual obligations in certain defined circumstances, the enforcement of such law in the case of an agreement made *after* the enactment of the statute works no impairment of that later contract. As the *Ogden* majority explained, in such situation no impairment accrues (1) because every later contract is implicitly made with reference to, and is governed by, then existing law or (2) because existing law forms a part of the obligations in every subsequent contract. After all, in making their later contract, the parties were on notice of the relief that might be available to one or the other under the then existing statute. If that is so, there can be little claim later of either surprise, reliance, or unfairness if the pre-contract statutory provision might later be brought to bear?

So why does § 9.0 grant an exemption from the cost cap provisions for contracts that have come into existence afterward the 2010 enactment date? In that scenario, both DP&L and the counter-party had notice that the cost cap provisions might one day, in specified circumstances, free electric supply customers from paying for run-away renewable energy costs. They had the opportunity to negotiate the terms of that agreement in light of that possibility. Maybe some did - the Division has not put into this record the terms of any actual agreements. But even if they did not include such terms in their agreement, that failure cannot then require a "repeal" of the consumer protection enacted earlier by the General Assembly.

Indeed, it is also pretty clear that there would be no legal impediment to applying the cost cap provisions even in the case of renewable energy contracts originally made before those provisions became law. *See, e.g., Exxon Corp. v. Eagerton* , 462 U.S. 178, 189-95 (1983) (statute that precluded oil and gas producers from passing-through to its purchasers increased severance taxes did not offend constitutional Impairment of Contract Clause even though earlier existing contracts called for producers and their customers to share severance taxes). *See also Energy Reserves Group Inc. v. Kansas Power & Light Co.,* 459 U.S. 400, 410-19 (1983) (in previously heavily regulated gas production industry, federal Contract Clause did not invalidate state law that barred producers from using "governmental price escalator" clauses set forth in earlier contracts to increase intrastate gas production prices). *Accord Midland Realty Co. v. Kansas City Power & Light Co.*, 300 U.S. 109, 113 (1937) ("But the State has power to annul or supersede rates previously established by contract between utilities and their customers."); *Producers Transportation Co. v. Railroad Comm'n of* California, 251 U.S. 228, 232 (1920) ("A common carrier cannot, by making contracts for future transportation . . ., prevent or postpone the exertion by the State of the power to regulate the carrier's rates and practices. Nor does the contract clause of the Constitution interpose any obstacle to the exertion of that power.").

So, there is no legal bar to applying the subsection 354(i) & (j) cost caps and freezes in the case of "existing" contracts. And, as pointed out above, the Division has not, and probably cannot, point to any statutory provision which gratuitously grants an exemption from those sections to existing contracts. Those two things are enough in themselves to make § 9.0 impermissible.

But perhaps the Division will claim that it has some generalized authority to grant such exemption "as a matter of good policy." However, an administrative agency is powerless to make policy in the absence of some statutory authority to so act. Even if one puts that fatal response aside, proposed rule § 9.0 still cannot be sustained. A "policy" rule can only be crafted on a record to justify its imposition. Here, the Division has not put into the record anything to justify the blanket exemption § 9.0 seeming grants to "existing" contracts. The record is devoid of any information about how many "existing" contracts may exist, now or in the future. Nor is there any data about when such contracts were made: before or after 2010. Similarly, the record provides no information about what terms are in such types of contracts. Have the parties dealt explicitly with the cost cap/freeze possibility? More generally, do the contracts have boiler-plate provisions that say the contract obligations are subject to all later laws or regulations related to renewable energy compliance? Moreover, what facts support the granting of such an exemption? The record does not provide any answers.

Instead, the Division has simply declared the broad waiver rule *ex ante* without developing any record about the extent, nature, and indeed terms of any such exempted contracts. An agency is not a legislature; if it wishes to make policy by rule it must do so by offering a reasoned basis grounded in the record. That has not been done here.

The Division needed to identify the statutory provision that explicitly grants it the authority to exempt certain contracts from the reach of a duly enacted cost cap law. And it needed to develop a factual record that supported its exempted contract rule. The Division has done neither, and, consequently, proposed Rule § 9.0 is *ultra vires* and must be struck.

7. **Other Technical Glitches in Proposed Rules**

a. § 2.0 Definitions

“Exempt sales” and “Non-exempt sales”

The two definitions describe the sales in terms of "the retail customer sales of a Commission-Regulated Electric Company." But the coverage provisions of REPSA extend to total retail sales made by all suppliers, except sales made to large industrial customers. Thus exempt and non-exempt load may be served by third party suppliers, not just by DP&L. In fact the proposed definition of "Total Retail Costs of Electricity" recognize such scope. In contrast the exempt/non-exempt sales definitions appear to limit the scope to only DP&L supply sales. The limitation should be removed.

“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/Renewable costs of compliance. The REC one should be removed.

All of the "cost of compliance" definitions refer to "the total costs expended by a Commission-Regulated Electric Company." The definitions should be broadened to include costs incurred, or expended, by customers, not just DP&L or indeed by any supplier. Payments to the Green Energy Fund are costs directly incurred, and paid, by customers, not by DP&L [74] Similarly, QFCPP surcharges are paid directly by consumers to Bloom Energy and DP&L with DP&L only acting as a collection agent. [75] But, as the Division recognizes in proposed rule §§ 4.2.1 & 4.3.1, the Green Energy monies are "compliance costs" even though they are amounts paid by consumers, not by DP&L or by a supplier. So too, as explained in part 3 of these comments, the Bloom Energy QFCPP surcharges are costs of compliance, even though they are paid by DP&L's customers and not by DP&L. The DP&L expenditure phrase should be struck from the "costs of compliance" definitions.

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74 26 Del. C. § 1014(a) (DP&L to include charge in rates, collect monies from consumers, and pay over monthly to State's Green Energy Fund).

75 26 Del. C. § 364(b), (d)(1)(i).

b. § 4.2.3

This provision should be amended to include both the costs of Alternative Compliance Payments *and* Solar Alternative Compliance Payments,