2015 NOPR, Carried-Over Comment

Part 6 of G. Myers' Comments filed January 10, 2015 in Response to NOPR, 18 DE Reg. 432 (Dec. 1, 2014)

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

Just as in the earlier 2013 roll-out, the current proposed rule §§ 6.0 and 7.0 outline the mechanics for imposing (and lifting) a "freeze." But, once again, the sections do not delineate exactly what that term entails. The rules should be modified to give explicit guidance about what a "freeze" means., and what effect it has. DP&L, its retail consumers, the PSC, and the Division itself need to understand exactly what obligations cease once a "freeze" is declared.

Subsections 354(i) & (j) each actually contain two "standstill" directives. For example, under § 354(j), the Director may freeze "the *minimum cumulative eligible energy resources requirement*" if "the total cost of complying with *this requirement* during a compliance year " exceeds the applicable 3 percent cap. (emphasis added). The "requirement" that is so "frozen" is the one expressed in subsection 354(a): the obligation to include in the total amount of retail sales of electricity to Delaware end-users a minimum percentage of electric energy sales with eligible energy resources. Once a "freeze" is imposed, it is this "requirement" that ends: a retail electric supplier (before) – and DP&L (now) – no longer has the duty to accumulate any additional RECs and SRECs to meet the annual percentage number that would otherwise would prevail under subsection 354(a). [1] This "freeze" is the "cost cap" - part of the consumer protections granted under subsections 354(i) & (j). Once such "freeze" is in place, the responsible entity – now DP&L and suppliers with transitional contracts - need not acquire further RECs or SREC for REPSA compliance purposes. And, end-use customers need not pay for any further RECs or SRECs as part of their billings. [2] That is the *first* freeze: the one specifically so denominated in the subsections.

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

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1 26 Del. C. § 354(e) (since the 2012 compliance year, DP&L has held the responsibility for procuring RECs, SRECs, and any other attributes to comply with subsection (a) of section 354). this section). *See also* 26 Del. C. § 354(h) (compliance with subsection 354(a) percentage minimums is met by accumulating equivalent volume of RECs and SRECs).

2 26 Del. C. § 358(f)(1) (retail supplier can only recover "actual dollar for dollar costs incurred in complying with a state mandated renewable energy portfolio standard"). If the "compliance" requirement is lifted under the "freeze" procedure, then the supplier, and now DP&L, cannot incur and bill any additional costs to comply with the frozen mandate.

The second standstill directive in subsections 354(i) and (j) relates to what happens after the first freeze is in effect: "[i]n the event of a freeze, the *minimum cumulative percentage* from eligible energy resources shall remain at the percentage for the year in which the freeze was instituted." (emphasis added).[3] This initially applies when the Director investigates whether to enter a "resumption" order. In making his determination whether expected compliance costs will be below the applicable cost cap percentage, he is to use the annual percentage figure that prevailed during the "freeze" year.

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

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

> But most importantly, by having a circuit breaker, if you will, an actual price control, whereby if the, if the rate payer impacts exceed a certain amount, *that the entire program freezes in place,* we can ensure ratepayers that there won't be any adverse impacts from this legislation.[4]

Further:

> So under the legislation, if the -- as soon as there's a 1 percent impact from the solar portion of the bill, the, *the target level freezes in place for that entire calendar year and then starts up again after it. You'll never have more than a 1 percent impact in any given year for the solar, for the solar portion of the, of – the solar requirements as written in the legislation.*[5]

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

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

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

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

> [a]ny time the cost impact of the photovoltaic goes up by 1 percent, the utility involved can push what we like to call a circuit breaker. *In other words, they can suspend the program for that year and simply extend the portfolio forward by a year for their utility.*[6]

And:

> We've also built safety valves into this bill. I told you about the circuit breaker that we have put in where any utility who can show that its rates are going up or would go up by 1 percent in case of -- of solar, the retail electric would go up by 1 percent in a year in the cases of solar, or 3 percent in the overall, they could push the circuit breaker *and suspend their participation in the program for one year.*[7]

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

Admittedly, both the Secretary and the Senator in their legislative floor comments seemingly assumed that the "freeze" provision would come into play *within* a compliance year. They assume that someone – either the utility, the electric supplier, the PSC, or the State Energy Office – would be able to track the "total retail cost of electricity for retail electricity suppliers" as well as the "total cost of complying" contemporaneously and concurrently on an on-going basis throughout each compliance year. When compliance costs (measured over some time frame) exceeded (or were projected to exceed) the cost cap percentages as applied to retail electric suppliers' "total retail cost of electricity" (during the same time frame period), a cost cap freeze would then be called and the program would be suspended. After that, no more RECs and SRECs would have to be procured, and customers would not be obligated to pay any further REC and SREC costs. Presumably, the suppliers would then be able to somehow lower their total compliance costs for the next year and then the program would start up again the succeeding compliance year (although at the minimum percentage level applicable to the earlier "frozen" year).[8]

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

7 SS 1 SD at 9 (McDowell) (emphasis added).

8 Senator McDowell also suggested that the "circuit breaker" freeze was to be done on a utility-by-utility basis, with each utility holding the power to pull the "circuit breaker" trigger during a

SS 1 seemingly charged the PSC to come up with a the rules to how to continuously monitor compliance costs and total retail costs of electricity for retail electric suppliers. [9] But the PSC did not create any such mechanisms for on-going, intra-year monitoring of either compliance costs or total retail costs of electricity. Instead, the PSC simply repeated the statutory formulas and deferred to the Director and Energy and Climate Division for implementation. 26 DE Admin. Code 3008 § 3.2.21.

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

But if the annual year-end, look-back analysis is the only practical one, then the question becomes how to apply the two-step freeze components in that context. If the cost of compliance for the just completed compliance year exceeds the applicable cost cap percentage what happens? Under the statutory text, and the legislative floor statements, it would appear

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compliance year. Under such a scenario, it might be possible for a utility to track its own costs of compliance and its own retail costs of electricity to make the intra-year cost comparisons. But such a single utility view of the freeze process is hard to square with the text of subsections 354(i) and (j). Those provisions speak to obligations and costs in the plural, not the singular. Thus, the statutory language speaks in terms of freezing the minimum eligible energy and solar photovoltaic requirements "for regulated *utilities*" (plural). not a single "regulated utility" or a singular retail electricity supplier. So too, as to the "total retail cost of electricity" figure, the statutory text reference is to such total cost "for retail electric *suppliers*" rather than the cost for a singular "supplier." The costs to be determined and utilized are those for plural "suppliers" rather than a single supplier. Of course, once you must measure costs of compliance against multiple retail electric suppliers' costs of electricity, it is hard to see how there can be any utility-by-utility application of the freeze provisions. Finally, such a single utility process is even more difficult now that DP&L holds the almost exclusive responsibility to procure RECs and SRECs for its entire delivery load. Under such a change, DP&L acquires RECs and SRECs for all its delivered load, and its customers bear those total costs of compliance. Yet not all of the electricity which necessitate such RECs or SRECs will be sold by DP&L; other suppliers can still make retail sales of electric supply. Thus, to have symmetry between compliance costs and retail electric supply costs for suppliers, you have to apply the freeze across the board. And you must look to the electric supply costs for all electric suppliers, not just the SOS supply costs for DP&L.

9 26 Del. C. § 362(b).

that a freeze should then be called and "the entire program" frozen or suspended. This would mean that compliance in the present year would be halted in its entirety – at least going forward. Neither DP&L, nor its customers, would have any further obligation to acquire, apply, or pay for any RECs and SRECs for that present year. The exception to such a suspension would arise only if the Director - contemporaneous with his announcement of the freeze – would also find that the costs of compliance for the present year could be expected to be under the cost cap percentage limit. If such determination was made, then compliance in the present year could move forward, but utilizing the prior year's renewable and solar percentage levels. If the Director cannot make such a finding for the present year, the suspension would continue through the entire present compliance year. Indeed, it would continue through any later compliance years until the Director can make the relevant finding that compliance costs will be under the freeze percentage as applied to a future year's expected total retail cost of electricity for retail electricity suppliers..

The proposed rules should make explicit what is entailed in a "freeze," DP&L, its customers, the PSC, and indeed the Division need to know what are each's obligations if a "freeze" is declared.