217 New Castle Street
Rehoboth Beach, DE 19971
November 2, 2011

Carolyn Synder
Director, Division of Energy and Climate
State Energy Coordinator
DNREC
1203 College Park Drive, Suite 101
Dover, DE 19904

Re: *Petition for Regulation or Rule-making under 29 Del. C. § 10114:*
Rules Implementing the Provisions of 26 Del. C. § 354(i) & (j)

Dear Director Snyder:

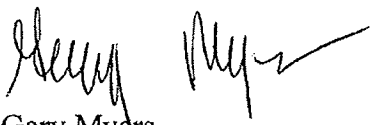
I am sending these materials to you because the Department of Natural Resources and Environmental Control told me that you had succeeded to the office of the State Energy Coordinator (29 Del. C. § 8053(b)) and that the new Division of Energy and Climate is the successor to the State Energy Office (29 Del. C. § 8053(a)).

Enclosed is my petition asking the State Energy Coordinator and the State Energy Office to initiate a rule-making procedure under 29 Del. C. § 10114. The requested rules would describe how the Coordinator and Energy Office will interpret and implement the duties imposed upon them by 26 Del. C. § 354(i) & (j). I believe that both the Coordinator and the Office qualify as an "agency." 29 Del. C. § 10102(1). The reasons for the request and the parameters for the requested rules are set forth in the Petition attached to the OMB form. Because that OMB form also requires the submission of the "full text" of the proposed regulation, I have also enclosed my version of the proposed rules.

Section 10114 of the APA sets guidelines for a multi-member agency to act upon a petition for rule-making. A multi-member agency must act at its next meeting, provided the rule-making filing is made 5 days before such meeting. I recognize that the Division of Energy and Climate is a not multi-member agency. However, I would think that section 10114 requires a prompt response from the Division, either choosing to initiate the requested rule-making proceeding or providing reasons why the Division declines to do so.

If you have any more questions, or need more information, please contact me at (302) 227-2775 during the day or by Internet e-mail addressed to <garyamyers@yahoo.com>. If you need an electronic copy of the filing, either in .odt (LibreOffice) or .pdf (Acrobat) format, please let me know and I can provide either by e-mail.

Respectfully submitted,



Gary Myers

Enclosures

OMB Petition for Regulation-Making Proceedings
Petition for Rule-making Under 29 Del. C. § 10114
Proposed Rules for Implementing 26 Del. C. § 354(i) & (j)

STATE OF DELAWARE
OFFICE OF MANAGEMENT AND BUDGET

PETITION FOR REGULATION-MAKING PROCEEDINGS

PURSUANT TO 29 DEL.C.§10114

NAME OF REQUESTING PERSON OR AGENCY: Gary Myers

DATE: Nov. 2, 2011

ADDRESS:
217 New Castle Street
Rehoboth Beach, DE 19971

PHONE NUMBER: (302) 227-2775

FAX NUMBER: None

ACTION REQUESTED: ☒ New Regulation ☐ Amendment ☐ Repeal ☐ Emergency Regulation

IF REGULATION IS AN EMERGENCY, STATE REASON. (Attach All Appropriate Documentation)

not applicable

STATEMENT OF PURPOSE: (Attach a full text of proposed regulation and/or amendment. State reason for repeal, if appropriate.)

See attached

LIST ALL SUPPLEMENTAL INFORMATION WHICH MAY BE RELATED TO PROPOSED REGULATION. e.g. GOVERNOR'S EXECUTIVE ORDERS, STATUTORY REFERENCES, GOVERNMENT CASE DECISIONS, ORGANIZATIONAL CHANGES, ZONING ORDINANCE CHANGES, ETC.

See references in Attachments

SIGNATURE: Gary A. Myers

DATE: Nov. 2, 2011

PETITION FOR RULE-MAKING UNDER 29 Del. C. § 10114

This petition asks the State Energy Coordinator and the State Energy Office to undertake a rule-making under the provisions of 29 Del. C. §§ 10113-10118. The requested rules would describe how the Coordinator and Energy Office will perform the duties imposed upon each under the provisions of 26 Del. C. § 354(i) & (j).[1] As explained more fully below, such regulations should answer the following questions:

- How will the Energy Office define the statutory threshold criteria under 26 Del. C. § 354(i) & (j) for implementing a "freeze" of the annual minimum REC and SREC requirements?

- How will the Energy Office define the thresholds for implementing a "freeze" after June 1, 2012, when the obligation to meet annual REC and SREC requirements passes from retail electric suppliers to regulated electric distribution companies (such as Delmarva Power & Light Company)?

- Will the Bloom Energy fuel cell project surcharge amounts collected from Delmarva Power & Light Company's ratepayers (under 26 Del. C. § 364(b)-(d)) be included in the "the total cost[s] of complying" with annual SREC and REC requirements for purposes of the threshold calculations under subsections 354(i) & (j)?

- What, if any, additional criteria will the Energy Coordinator use in deciding whether to impose the "freeze" for any one year once the thresholds have been satisfied? and

- What process will be used by the Energy Coordinator and Energy Office to determine when a "freeze" imposed under subsection 354)(i) & (j) should be lifted?

---

1 If the Energy Office has been absorbed into another office by the recent, non-statutory reorganization of the Department of Natural Resources and Environmental Control, this petition is addressed to the new office and officers that have succeeded to the functions assigned to the Energy Coordinator and Energy Office under subsections 354(i) & (j).

A. **BACKGROUND**

1. In 2010, the General Assembly and the Governor amended the "Renewable Energy Portfolio Standards Act," 26 Del C. §§ 351-364.[2] The new amendments increased and extended the minimum percentage of renewable energy and solar supply credits that each retail electric supplier must meet until the year 2025 (and beyond).[3] But the amendments also concurrently provided "consumer protections by limiting any rate impacts" that might arise from these increased requirements.[4] Thus, subsections 354(i) & (j) now provide:

> (i) The State Energy Coordinator in consultation with the Commission, may freeze the minimum cumulative solar photovoltaics requirement for regulated utilities if the Delaware Energy Office determines that 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. In the event of a freeze, the minimum cumulative percentage from solar photovoltaics shall remain at the percentage for the year in which the freeze is instituted. The freeze shall be lifted upon a finding by the Coordinator, in consultation with the Commission, that the total cost of compliance can reasonably be expected to be under the 1% threshold. The total cost of compliance shall include the costs associated with any ratepayer funded state solar rebate program, SREC purchases, and solar alternative compliance payments.
>
> (j) The State Energy Coordinator in consultation with the Commission, may freeze the minimum cumulative eligible energy resources requirement for regulated utilities if the Delaware Energy Office determines that the total cost of complying with this requirement during a compliance year exceeds 3% of the total retail cost of electricity for retail electricity suppliers during the same compliance year. In the event of a freeze, the minimum cumulative percentage from eligible energy resources shall remain at the

2 77 Del . Laws ch. 451 (July 28, 2010).

3 26 Del. C. § 354(a), *as amended by* 77 Del. Laws ch. 451, § 1 (2010).

4 Sen. Substitute No. 1 for Senate Bill No. 119, 145th General Assembly, "Synopsis."

> percentage for the year in which the freeze is instituted. The freeze shall be lifted upon a finding by the Coordinator, in consultation with the Commission, that the total cost of compliance can reasonably be expected to be under the 3% threshold. The total cost of compliance shall include the costs associated with any ratepayer funded state renewable energy rebate program, REC purchases, and alternative compliance payments.[5]

2. The provisions of subsections 354(i) & (j), and the increased minimum SREC and REC percentages, became effective in July, 2010. Thus, the "freeze" provision applies to REC and SREC procurement for the just-completed 2010 compliance year as well as subsequent compliance years. Under rules of the Public Service Commission ("PSC"), retail suppliers must have submitted their annual reports for the 2010 compliance year by October 1, 2011. Presumably, the Energy Office will be using such 2010 year reports to determine whether the "freeze" thresholds have been met for the current 2011 compliance year.

3. To date neither the Energy Coordinator nor the Energy Office has adopted, or even proposed, rules to describe and define how each will monitor and - if needed - implement the cost-containment requirements set forth in subsections 354(i) & (j). The 2010 amendments to the Renewable Energy Portfolio Standards Act also charged the PSC to adopt regulations for implementing subsections 354(i) & (j) for "regulated utilities." However, consistent with the subsections' text, the PSC has deferred to the Energy Office and Energy Coordinator to work out the details for divining when a "freeze" in SREC and REC percentages is required.[6]

---

5 26 Del. C. § 354(i) & (j), *as added by* 77 Del. Laws ch. 451, § 11 (2010).

6 26 DE Admin Code 3008, "Rules and Procedures to Implement the Renewable Energy Portfolio Standard" § 3.2.16.

B. **NEED FOR REGULATIONS**

4. Formal, *ex ante* and published regulations interpreting subsections 354(i) & (j) are needed to provide guidance and certainty to electric suppliers, electric distribution companies, and electric customers about what numbers will trigger a "freeze" of the REC and SREC percentage requirements and how such a "freeze," once declared, will be administered. As outlined below, several ambiguities exist in the wording and phraseology of subsections 354(i) & (j). They should be resolved by an open rule-making with the opportunity for public comment.[7] In fact, the current timing requirements for reporting SREC and REC compliance make any yearly *ad hoc* decision-making process problematic. Under current PSC rules, suppliers need not report compliance – and presumably cost figures – until four months after the close of the compliance year. Thus, the Energy Office has only eight months to determine if the cap thresholds have been exceeded for that prior year, and then impose a percentage freeze for the current year. A better process would be to have the "cap" rules in place before such time so that the regulated utilities, as well as consumers, can anticipate, much earlier, a possible freeze in the current year's SREC and REC percentages.

5. In addition, now is a particularly appropriate time to begin such a

---

7 Questions about the "correct" interpretation of the statutory language in subsections 354(i) & (j) affect persons outside the Energy Office, including electric consumers, electric suppliers, and electric distribution companies. Consequently, the Energy Office cannot rely on intra-agency "understandings" to resolve the questions. Rather, the interpretation and implementation issues must be considered and decided in a APA rule-making process. *Cf. Butler v. Insurance Commissioner*, 686 A.2d 1017, 1023 (Del. 1997) (Insurance Commissioner cannot rely on unwritten policies in administering reinstatement under agent licensing statute, but must promulgate rules under APA).

rule-making. On June 1, 2012, the obligation to procure RECs and SRECs will pass from retail electric suppliers to Delmarva Power & Light Co.[8] With such a shift, explicit rules about how the "cap" subsections will be applied in such a new regime should be in place. In particular, those rules should detail how DP&L is going to obtain and report the necessary "total retail cost of electricity for retail electricity suppliers" figures that are necessary for determining whether a SREC or REC percentage freeze is necessary.

6. Third, the PSC has recently approved a tariff to obligate retail customers of DP&L to make payments to Bloom Energy to subsidize its wholesale electric output from a 30mw fuel cell project.[9] Under the statutory scheme, each Mwh of output from such subsidized project will be given the equivalency of one or more RECs (and derivately SRECs) to count towards annual renewable energy percentage requirements.[10] As of now, those customer payments to Bloom are scheduled to begin in late 2012 or 2012. It would be appropriate, if not necessary, to have formal regulations in place by that time to answer the question whether those Bloom Energy subsidy payments to be made by DP&L customers - given that they result in alteration of the SREC and REC requirements for DP&L - should be counted towards the "costs of complying" with such annual percentage requirements.

---

8 26 Del. C. § 354(e), *as added by* 78 Del. Laws ch. 99, § 5 (July 7, 2011).

9 26 Del. C. § 364(b)-(d), *as added by* 78 Del. Laws ch. 99, § 8 (2011).

10 26 Del. C. § 353(d), *as added by* 78 Del. Laws ch. 99, § 2 (2011).

C. ISSUES TO BE RESOLVED IN REGULATIONS

7. The regulations sought should address the following issues:

(a) Which entities are encompassed by the phrase "regulated utilities" in subsections 354(i) & (j), both before and after June 1, 2012? Are "retail electric suppliers" covered by such phrase, either as obligated entities prior to June 1, 2012, or as "grandfathered" obligated entities under subsection 353(c) after June 1, 2012.[11]

(b) What is the meaning and scope of the phrase "total retail cost of electricity for retail electricity suppliers" in subsections 354(i) & (j)? Does the benchmark phrase look to:

(1) total retail charges (including distribution and supply charges) imposed by retail electric suppliers and distribution companies?

(2) total retail supply charges (exclusive of distribution charges) imposed by retail electric suppliers?

(3) total retail supply charges (exclusive of distribution, capacity, or REC and SREC charges) imposed by retail suppliers? or

(4) total *wholesale* costs of electricity procured by retail suppliers to serve retail customers?[12]

(c) Does the phrase "total retail cost of electricity for retail electricity suppliers" encompass charges or costs related only to "total retail sales" or does it encompass charges or costs related to "total retail sales" *plus* load sold or delivered to customers "exempt" under 26 Del. C. §§ 352(25) and 353(b)?

(d) Are the 1% and 3% threshold amounts which trigger a freeze to be calculated for each retail supplier or "regulated utility" or are they determined based upon the aggregated "total retail cost" for all electric suppliers?

---

11 26 Del. C. § 353(c), *as added by* 78 Del. Laws ch. 99, § 2 (2011).

12 *Cf.* 26 Del. C. § 363(f)-(g), *as added by* 77 Del. Laws ch. 451, § 21 (2010) (imposing similar REC and SREC percentage caps on municipal and cooperative electric utilities based upon 3 and 1 percentages applied to "total cost of the purchased power of the utility").

(e) Are the 1% and 3% thresholds to be determined based on the costs of electricity plus REC and SREC expenditures or are they determined by the costs of electricity exclusive of REC and SREC expenditures?

(f) What costs are encompassed by the phrases "total cost of complying" and "total cost of compliance" in subsections 354(i) & (j)? Do those phrases include the mandatory Green Energy Fund payments required of customers under 26 Del. C. § 1014(a) as a "ratepayer funded solar rebate program" or "ratepayer funded state renewable energy rebate program"?[13]

(g) Will the ratepayer surcharge payments made by DP&L customers to Bloom Energy for its fuel cell project be included in the "total cost to compliance" under subsections 354(i) & (j) given that "energy produced by such projects shall fulfill the commission-regulated electric company's state-mandated REC and SREC requirements set forth in § 354."[14]

D. CONCLUSION

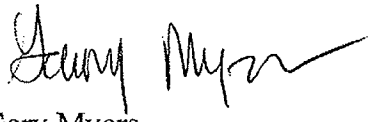
Clearly, by enacting subsections 354(i) & (j), the General Assembly and Governor wished to cap the amount that "regulated utilities" and their ratepayers would pay for all environmental attributes linked to their electric services: the costs of renewable energy portfolio compliance could not exceed 1% or 3% of the "total retail cost of electricity for retail suppliers." The State Energy Coordinator and State Energy Office – both specifically charged with enforcing the statutory caps - owe it to ratepayers to have in place now regulations defining the parameters of those protections. Without regulations resolving the ambiguities in the statutory text and providing specifics for administering the freeze, the statutory cap will likely become illusory.

---

13 *See* 29 Del. C. § 8057(d)(1)-(2) (grants and loans from Green Energy fund for solar and other renewable projects).

14 26 Del. C. § 353(d), *as added by* 78 Del. Laws ch. 99, § 2 (2011).

Respectfully submitted,



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

PROPOSED RULES TO IMPLEMENT 26 Del. C. § 354(i) & (j)

1.0 PURPOSE

These rules govern how the State Energy Coordinator and the State Energy Office will administer their obligations under 26 Del. C. § 354(i) & (j). Those statutory subsections direct the State Energy Coordinator to impose a "freeze" on the applicable percentages for solar and renewable energy credits (26 Del. C. § 354(a)) for any compliance year when, for the same compliance year, the costs of complying with the solar energy or renewable energy percentages exceed 3% (renewable) or 1% (solar) of retail suppliers' total costs of electric supply.

2.0 APPLICATION

2.1 These rules shall govern only in the case of retail electric supply delivered over the distribution facilities of an electric distribution utility regulated by the Public Service Commission. These regulations shall not apply to electric supply provided by either (a) an exempted municipal electric company or a municipal utility (as set forth in 26 Del. C. § 363) or (b) an exempted rural electric cooperative (as set forth in 26 Del. C. § 363).

2.2 These rules will be applied beginning in compliance year 2011, as defined in 26 Del. C. §§ 352(3) and 354(a).

3.0 DEFINITIONS

As used in these rules:

3.1 "Alternative compliance payment amounts" mean the dollar amounts expended for alternative compliance payments (as defined and set by 26 Del. C. §§ 352(1) and 358(d)).

3.2 "Average QFCP offset cost" means the dollar amount to be attributed to the cost of a Mwh of output from a QFCP during a compliance year. The average QFCP offset cost will be calculated under section 7.0 of these rules.

3.3 "Compliance year" has the same meaning as described and set by 26 Del. C. §§ 352(3) and 354(a) & (h).

3.4 "DP&L" means Delmarva Power & Light Company.

3.5 "End-use customer" means a person or entity to whom electrical energy at retail prices is delivered over the distribution facilities of an electric distribution utility regulated by the PSC.

3.6 "PJM" or "PJM interconnection" means the regional transmission organization (RTO) that coordinates the movement of wholesale electricity in

the PJM region, or its successors at law.

3.7 "PSC" means the Public Service Commission.

3.8 "Qualified fuel cell project" or "QFCP" shall mean an entity defined by 26 Del. C. § 352(17) and authorized to receive surcharge payments paid by customers of DP&L under 26 Del. C. § 364(d)(1)f., g., j., & k. and a tariff approved by the PSC.

3.9 "REC costs of compliance" or "RECcosts" means the total costs expended by retail electric suppliers or electric distribution utilities to achieve the applicable RPS percentage standards for RECs during a particular compliance year. The RECcosts and total RECcosts shall be calculated in accord with section 6.0 of these rules.

3.10 "REC offset hours" and "SREC offset hours" mean the Mwh of output from a QFCP that is utilized under 26 Del. C. § 353(d) to offset or fulfill the number of RECs and SRECs that might otherwise be required to be surrendered to meet REC and SREC percentage requirements in a compliance year.

3.11 "REC percentage requirements" and "SREC percentage requirements" mean the renewable energy portfolio requirements for each compliance year as set forth in 26 Del. C. § 354(a).

3.12 "Renewable Energy Credit" or "REC" means the instrument defined by 26 Del. C. § 352(18) utilized to demonstrate compliance with the percentage requirements set forth in 26 Del. C. § 354(a).

3.13 "Renewable Energy Credit payment amounts" or "REC payment amounts" means the dollar amounts expended to produce or procure RECs that are utilized to meet REC percentage requirements in a particular compliance year.

3.14 "Retail electricity supplier" means a person or entity that sells electrical energy to end-use customers delivered over the distribution facilities of an electric distribution utility regulated by the PSC. The term includes non-regulated power producers and electric utility distribution utilities companies supplying standard offer or similar default electric supply service.

3.15 "RPS load" means the total volume of electricity sold or delivered during a compliance year, excluding sales or deliveries made to any industrial customer (as designated by the PSC) with a peak demand in excess of 1,500 kilowatts.

3.16 "Solar alternative compliance payment amounts" mean the dollar amounts expended for alternative solar compliance payments (as defined and set by 26 Del. C. §§ 352(24) and 358(e)).

3.17 "Solar Renewable Energy Credit" or "SREC" means the instrument defined by 26 Del. C. § 352(25) utilized to demonstrate compliance with the percentage

requirements set forth in 26 Del. C. § 354(a).

3.18 "Solar Renewable Energy Credit amounts" or "SREC payment amounts" mean the dollar amounts expended to produce or procure SRECs that are utilized to meet SREC percentage requirements in a particular compliance year.

3.19 "SREC costs of compliance" or "SRECcosts" means the total costs expended by retail electric suppliers or electric distribution utilities to achieve the applicable RPS percentage standards for SRECs during a particular compliance year. The SRECcost and total SRECcosts shall be calculated in accord with section 5.0 of these rules.

3.20 "Surcharge payments" means the dollar amounts (whether positive or negative) paid to, or received by, customers of DP&L from a QFCP and DP&L under 26 Del. C. § 364(d)(1) and an implementing tariff approved by the PSC.

3.21 "Total Retail Costs of Electricity" or "TCElec" means the total costs expended by retail electric suppliers to produce or purchase wholesale energy to serve the RPS load during a particular compliance year. The TRElec shall be calculated in accord with section 4.0 of these rules.

4.0 TOTAL RETAIL COSTS OF ELECTRICITY ("TCElec")

4.1 "Total Retail Costs of Electricity" will be computed by aggregating the total costs expended by all retail suppliers to produce or purchase, at wholesale, electric energy or power to serve the aggregated RPS load during a particular compliance year. Such costs shall include:

a) the costs incurred for the production or procurement (by contract or by purchase in any wholesale market) of wholesale energy that is then used to serve RPS load;

b) the costs of any capacity, or similar, charges imposed on wholesale transactions by PJM interconnection related to serving the RPS load; and

c) any transmission costs for delivery of the wholesale energy used to serve the RPS load.

4.2 The following costs shall *not* be included in TCElec:

a) retail distribution or administrative costs or charges;

b) any costs expended to procure or acquire RECs or SRECs for the RPS load incurred in conjunction with the acquisition of wholesale energy;

c) any costs expended to procure RECs or SRECs as stand-alone products; and

d) any surcharge payments related to a QFCP.

5.0 SREC COSTS OF COMPLIANCE ("SRECcosts")

5.1 "SREC costs of Compliance" are the dollar amounts expended by a retail electric supplier or an electric distribution utility to achieve the applicable SREC percentage requirements for a particular compliance year. The costs of compliance shall include:

a) all amounts paid by end-use customers during the compliance year to the Green Energy Fund under the provisions of 26 Del. C. § 1014(a);

b) all amounts expended for producing or acquiring SRECS that were retired to meet the compliance year's SREC percentage requirements;

c) all solar alternative compliance payment amounts paid in order to meet the compliance year's SREC percentage requirements; and

d) the dollar amount derived from multiplying the average QFCP offset cost amount for the compliance year (as calculated under section 7.1) by the total number of SREC offset hours used to offset or fulfill the SREC percentage requirements in the compliance year.

5.2 The "total SREC costs of compliance" will be computed by aggregating the SREC costs of compliance of all retail suppliers and electric distribution utilities for a particular compliance year.

6.0 REC COSTS OF COMPLIANCE ("RECcosts")

6.1 "REC costs of Compliance" are the dollar amounts expended by a retail electric supplier or an electric distribution utility to achieve the applicable REC percentage requirements for a particular compliance year. The costs of compliance shall include:

a) all amounts paid by end-user customers during the compliance year to the Green Energy Fund under the provisions of 26 Del. C. § 1014(a);

b) all amounts expended for producing or acquiring SRECS and RECs that were retired to meet the compliance year's SREC and REC percentage requirements;

c) all solar alternative compliance payment amounts and alternative compliance payment amounts paid in order to meet the compliance year's SREC and REC percentage requirements; and

d) the dollar amount derived from multiplying the average QFCP offset cost amount for the compliance year (as calculated under section 7.1) by the total number of SREC and REC offset hours used to offset or fulfill the SREC and REC percentage requirements in the compliance year.

6.2 The "total REC costs of compliance" will be computed by aggregating the REC costs of compliance of all retail suppliers and electric distribution utilities for a particular

compliance year.

7.0 QFCP OUTPUT CALCULATIONS

7.1 The "average QFCP offset cost" will be calculated under the following formula:

total surcharge payments made by DP&L customers in the compliance year

divided by

total number of Mwh of output by QFCP (either actual or deemed under 26 Del. C. § 364(d)(1)m. and any implementing tariff) during the compliance year.

7.2 To calculate costs for SRECcosts, the average QFCP offset cost shall be multiplied by the number of Mwh of QFCP output utilized as SREC offset hours during the compliance year.

7.3 To calculate costs for RECcosts, the average QFCP offset cost shall be multiplied by the number of Mwh of QFCP output utilized as as REC and SREC offset hours during the compliance year.

8.0 THRESHOLDS

8.1 The SREC threshold under 26 Del. C. § 354(i) will be computed as follows:

SREC threshold (in dollars) = .01 x Total Retail Costs of Electricity (in dollars).

8.2 The REC threshold under 26 Del. C. § 354(j) will be computed as follows:

REC threshold (in dollars) = .03 x Total Retail Costs of Electricity (in dollars).

9.0 FREEZES

9.1 **SREC.** If for the compliance year, the total SREC compliance costs are greater than the SREC threshold, then a freeze of the SREC percentage requirements shall be imposed for the succeeding compliance year.

9.2 **REC.** If for the compliance year, the total REC compliance costs are greater than the REC threshold, then a freeze of the REC percentage requirements shall be imposed for the succeeding compliance year.

9.3 If a freeze is imposed under sections 9.1 or 9.2 above, then the SREC or REC percentage requirement for the compliance year shall apply in the following compliance year. In any succeeding compliance year, the freeze shall be lifted if:

a) the total SREC compliance costs in that succeeding compliance year are equal

to or below the SREC threshold for that succeeding compliance year; or

b) the total REC compliance costs in that succeeding compliance year are equal to or below exceed the REC threshold for that succeeding compliance year.

9.4 If the freeze is lifted in any succeeding year, then in the next succeeding year the SREC or REC percentage requirements shall revert to the requirements for that compliance year as set forth in 26 Del. C. § 354(a).

10.0 ADMINISTRATION

10.1 Within 120 days after the end of each compliance year, each retail supplier and electric distribution company shall submit to the State Energy Office in writing and electronically the following information for the applicable compliance year:

a) the RECcosts for that retail supplier or electric distribution utility for that compliance year;

b) the SREC costs for that retail supplier or electric distribution company for that compliance year; and

c) the retail costs of electricity for that retail supplier or electric distribution company for that compliance year.

10.2 Within 90 days after the end of each compliance year, DP&L shall provide to the State Energy Office in writing and electronically the following information for the compliance year:

a) the total Mwh of output (either actual or deemed) produced by the QFCP during the compliance year;

b) the total amount of surcharge payments paid by DP&L customers during the compliance year;

c) DP&L's calculation of the average QFCP offset cost for the the compliance year under section 7.0; and

d) the number of output hours that DP&L would allocate to SREC and REC offset hours for the compliance year.

10.3 If a freeze is required under section 9.0, the State Energy Coordinator will promptly declare the freeze and notify, electronically and by mail, all retail electric suppliers and electric distribution utilities that filed reports under section 10.1 and 10.2 above. The Coordinator will also (a) provide notice of the freeze to the PSC and (b) publish notice of such freeze in the next appropriate issue of the Delaware Register of Regulations. In the case of a freeze being lifted, the State Energy Coordinator will provide similar notice.

STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES
& ENVIRONMENTAL CONTROL
DELAWARE ENERGY OFFICE
1203 COLLEGE PARK DRIVE, SUITE 101
DOVER, DELAWARE 19904

OFFICE OF THE
SECRETARY

TELEPHONE: (302) 735-3480
FAX: (302) 739-1840

November 18, 2011

Mr. Gary Myers
217 New Castle Street
Rehoboth Beach, DE 19771

Re: Petition for Rule-making

Dear Mr. Myers:

We have received your Petition for Rule-making directed to Carolyn Snyder, Director of the Division of Energy & Climate. Dr. Snyder has referred the matter to me for review.

Please direct all future correspondence to my attention. Also, please send me an electronic copy (a PDF would be fine) of your Petition. My e-mail address is thomas.noyes@state.de.us.

I will be in contact with you as we review this matter.

Sincerely,

Thomas Noyes
Principal Planner for Energy Policy
Division of Energy & Climate

cc: Carolyn Snyder

Delaware's Clean Energy Future Depends On You!

STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES
& ENVIRONMENTAL CONTROL
DELAWARE ENERGY OFFICE
1203 COLLEGE PARK DRIVE, SUITE 101
DOVER, DELAWARE 19904

OFFICE OF THE
SECRETARY

TELEPHONE: (302) 735-3480
FAX: (302) 739-1840

January 18, 2012

Mr. Gary Myers
217 New Castle Street
Rehoboth Beach, DE 19771

Re: Petition for Rule-making

Dear Mr. Myers:

I write to update you on DNREC's response to your Petition for Rule-making.

We intend to initiate a formal process for considering your Petition. The proposed rules you drafted will be considered as part of this process along with the issues you presented for resolution. We fully intend to give you a chance to discuss your Petition with us as part of a thorough and public review of the issues involved.

We will keep you informed as we proceed with this matter. If you have any questions, please feel free to contact me.

Sincerely,

Thomas Noyes
Principal Planner for Energy Policy
Division of Energy & Climate

cc: Carolyn Snyder, Director, Division of Energy & Climate
Kevin Maloney, Department of Justice

Delaware's Clean Energy Future Depends On You!

217 New Castle Street
Rehoboth Beach, DE 19971
April 7, 2012

Thomas Noyes
Principal Planner for Energy Policy
Division of Energy & Climate
Department of Natural Resources and Environmental Control
State of Delaware
1203 College Park Drive, Suite 101
Dover, DE 19904

Re: *Petition for Rule-making to Implement 26 Del. C. § 354(i) & (j)*

Dear Mr. Noyes:

Once more, I write about the status of my petition for rule-making filed with the Energy Office last November. In that submission I asked the Energy Office to promulgate rules to outline and define its enforcement responsibilities under the "cost caps/freeze" provisions set forth in 26 Del. C. § 354(i) & (j). In a letter dated January 18, 2012, you indicated that your Office had chosen to start a formal process to consider my petition and that such would be part of a thorough and public review of the issues raised in that filing.

I have now had a chance to review the April, 2012 issue of the Delaware Register of Regulations. I cannot find any notice in it about a rule-making process launched by the Energy Office or DNREC to implement and enforce § 354(i) & (j). Similarly, I have checked the Energy Office's and DNREC's websites. Neither site alludes to any ongoing public process to consider how the Energy Office will supervise and implement the REPSA "cost cap/freeze" directives.

Under the petition process of 29 Del. C. § 10114, the Office had the statutory option of either rejecting the petition (while providing reasons) or granting the petition and beginning the requested rule-making. While your letter suggests that the Energy Office chose the latter course, no rule-making has been proposed after almost 6 months have passed since the filing, and 4 months from your letter. I think section 10114 requires the agency to move forward with more promptness than that.

Now perhaps your Office has actual figures and information about the "total costs of complying [with REPSA]" versus the "total cost of electricity for retail electricity suppliers" during the same compliance year. I do not have access to such information from any public source. And perhaps based on such information, your Office has predicted that in the short and medium terms - under any possible interpretation of the language of § 354(i) & (j) - the cost caps will not be triggered. If that is so, then perhaps the appropriate resolution is to now reject my petition while providing the cost figures used and explaining their application to all

possible statutory interpretations. But short of that sort of "no conceivable trigger" conclusion, I think it is necessary for your Office to start a rule-making to define exactly how the Energy Office will gather the relevant information and what formulas it will use to judge the cost cap thresholds.

I filed the petition last year because of two bits of information that surfaced in the PSC's Bloom Energy tariff proceeding last year. First, the consultant hired by DP&L testified:

> The total cost to consumers of RECs and SRECs required to purchase from the market reflects roughly 3% of the required energy, capacity, REC and SREC purchase costs in the case under which the Project is considered, or roughly 4% of the combined total costs when the Project is not considered.[1]

This seems to suggest that REC and SREC costs will approach, if not exceed, the cost cap thresholds.

Second, apparently, the consultants hired by the PSC staff made inquiries to the Secretary about whether the § 354(i) & (j) cost caps might be implicated due to the Bloom Energy surcharges. In a response, the Secretary apparently said that DNREC had tested those scenarios and had found that the cost caps would not be breached at any time during the term of he Bloom Energy project. *However,* the Staff consultant, from his reading of the Secretary's response, was not sure of exactly what reading the Secretary had given the § 354(i) & (j) text to reach his conclusion.[2] The Secretary, in his written rebuttal testimony, did not respond to

---

1 PSC Dckt. No. 11-362, Application for New Tariffs for Qualified Fuel Cell Providers – Renewable Capable, Direct Testimony of M. Scheller at pg. 28 (filed Aug. 19, 2011).

2 PSC Dckt. No. 11-362, Rpt. on Delmarva Power's Application for Approval of a New Electric Tariff Applicable to Proposed Bloom Energy Fuel Cell Project at pg. 43 (New Energy Opportunities, Inc., *et al.*) (filed Oct. 3, 2011).

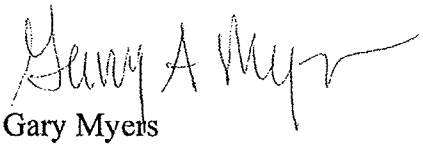
In citing to the Staff consultant's report, I do not endorse some of their legal interpretations. For example, the consultants suggest that the Bloom Energy surcharge amounts paid by DP&L customers should not included in the costs comparison required by section 354(i) & (j). This conclusion is partly premised on the assumption, shared by DP&L, that the Bloom Energy output equivalencies "lower" the RESPA compliance levels for a given year. That misreads the statutory text and the resulting statutory scheme. Under § 353(d), energy output from the Bloom Energy project is used to "fulfill" - not lower - the State mandated REC and SREC requirements set forth in section 354. In turn, section 354(i) & (j) speak in terms of the total cost of complying with the REC and SREC requirements. Because Bloom Energy surcharge amounts represent costs of compliance – as they are used to "fulfill" those requirements - they necessarily are included in the cost cap formula figures.

clarify the Staff's inquiry about how the caps language had been applied.[3]

My goal in filing the rule-making request was to make sure the costs caps were not being ignored and their application would proceed in a transparent process. I think that with upcoming events, it is important that a rule-making under § 354(i) & (j) go forward promptly. DP&L now reports that Bloom Energy surcharges will begin in the May or June customer billing cycles. DP&L's obligation to procure RECs and SRECs begins June 1. And the pilot program to guarantee SREC pricing levels is now in full swing. Unless your Office can say with accuracy that under any and all interpretations of § 354(i) & (j) the caps will not threatened within the next few years, then I think it is incumbent on your Office to promptly move forward to implement the cost cap/freeze structure.[4]

Can you please either advise me of the date your Office will initiate the formal rule-making process in response to my petition or provide a rejection letter explaining why the office has now decided not to issue regulations surrounding how it will fulfill its responsibilities under § 354(i) & (j)?

Sincerely yours,



Gary Myers
(302) 227-2775
<garyamyers@yahoo.com>

3 The transcripts of the oral hearing testimony of Secretary O'Mara are not available on line. I thus do not know if he set forth his interpretation of section 354(i) & (j) in such testimony. In any event, any such testimonial explanation could not substitute for a reasoned decision made after a formal rule-making process.

4 Finally, I would note that the use of the term "may" in section 354(i) & (j) to describe the Energy Coordinator's authority does not allow her to forego a freeze even if the cost cap criteria have been met. Instead, the word "may" in this context is used in its historical sense: a grant of permission to the Coordinator to ignore the otherwise applicable statutory REPSA standards if the legislatively prescribed conditions are met. *duPont v. Mills*, 196 A. 168, 173 (Del. *en banc* 1937). The term does not allow the Coordinator the unfettered discretion to not act even if she finds the criteria for action are operative.

STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES
& ENVIRONMENTAL CONTROL
DELAWARE ENERGY OFFICE
1203 COLLEGE PARK DRIVE, SUITE 101
DOVER, DELAWARE 19904

OFFICE OF THE
SECRETARY

TELEPHONE: (302) 735-3480
FAX: (302) 739-1840

April 16, 2012

Mr. Gary Myers
217 New Castle Street
Rehoboth Beach, DE 19771

Re: Petition for Rule-making to implement 26 Del. C. § 354(i) & (j)

Dear Mr. Myers:

I write in response to letter of April 7 on your Petition for Rule-making to implement 26 Del. C. § 354(i) & (j).

DNREC intends to initiate the formal rule-making process in response to your petition. The required Start Action Notice has been filed, and has been signed by DNREC Secretary Collin O'Mara. The anticipated regulatory adoption will address how DNREC will fulfill its responsibility under 26 Del. C. § 354(i) & (j).

We will keep you informed as we proceed with this matter. If you have any questions, please feel free to contact me.

Sincerely,

Thomas Noyes
Principal Planner for Energy Policy
DNREC Division of Energy & Climate

cc: Collin P. O'Mara, Secretary, DNREC
Carolyn Snyder, Director, DNREC Division of Energy & Climate
Kevin Maloney, Department of Justice

Delaware's Clean Energy Future Depends On You!

217 New Castle Street
Rehoboth Beach, DE 19971
September 26, 2012

By e-mail only

Thomas Noyes
Principal Planner for Energy Policy
Division of Energy & Climate
Department of Natural Resources and Environmental Control
State of Delaware
1203 College Park Drive, Suite 101
Dover, DE 19904

Re: *Comments on Use of the Word "May" in 26 Del. C. § 354(i) & (j)*

Dear Mr. Noyes:

It might be too early to call in the lawyers. But even so, I thought I would lay out my legal views about one of the issues that surround implementing the "cost cap/freeze" provisions of 26 Del. C. § 354(i) & (j). Some suggest that even if the statutory "cost cap" percentage thresholds are breached, the Energy Coordinator (now Climate Division Director) need not impose the freeze on renewable percentage increases. Instead, she may – in her discretion – choose to allow the statutory progression to remain controlling. To support this view of discretionary authority to ignore imposing any freeze, these folks look to identical language in both subsections: "[t]he State Energy Coordinator in consultation with the Commission, *may* freeze the minimum cumulative . . . requirements if . . . . " (emphasis added). They say it's the use of the word "may," rather than "shall," in describing the freeze power, that vests this final discretion about a freeze in your office.

Let me suggest that the word "may" can reflect both "permission" with "obligation," rather than permissive discretion. As the Delaware judges, sitting en banc, said years ago:

> But the word, "may," ordinarily permissive in quality, is frequently given a mandatory meaning, and is given that meaning where a public body or officer is clothed by statute with power to do an act which concerns the public interest, or the rights of third persons. In such cases, what they are empowered to do for the sake of justice, or the public welfare, the law requires shall be done. The language, although permissive in form, is, in fact, peremptory.

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

interpretive guide has a common sense underpinning: if the legislature in its enactment either authorizes specific acts by public officials for public welfare purposes, or to implement rights and protections flowing to third-party, non-governmental persons, then the public officer *must* – in the exercise of the permitted authority - perform the act. If the officer has the discretion to ignore the directive, even if it might have come couched in "may" terms, then the legislative choices become illusory. Only by reading "may" to mean "must" can the legislature's public welfare choice or its conferral of rights or benefits on third parties be protected.[1]

Here the use of the word "may" in subsections § 354(i) & (j) fits comfortably within the peremptory meaning articulated in *Mills*. First, those subsections were added to the RESPA in 2010 to "provide consumer protection[] by limiting any rate impacts."[2] In fact, both Secretary O'Mara and sponsoring Senator McDowell told legislators that these provisions were key components to the 2010 changes: that they brought rate protections to customers that were previously missing from the REPSA. And in the two subsections, the General Assembly (followed by the Governor) laid out when a freeze was to be had. The criteria were outlined to protect rate-paying consumers. If that is so, then it would seem illogical for the General Assembly to then turn around and allow an executive officer (your Division) to ignore the protections granted to consumers by decreeing "no freeze" even if the statutorily-described thresholds have been met. The consumer protection provisions so highly touted in 2010 would then be nothing more than promises easy to be ignored or evaded.

Of course, context is crucial in order to tilt the term "may" either to permissive discretion or peremptory obligation. *See State ex rel. Foulger v. Layton*, 194 A. 886, 889 (Del. Super. 1937). And it is true that the 354(i) & (j) subsections use both "may" and "shall" in their consumer protection dictates. The Coordinator "may freeze" the REPSA percentage requirements if her Office determines the thresholds have been met and then any such freeze "shall be lifted" if compliance costs can reasonably be expected to again go sub-threshold. Often, such use of "may" and "shall" in the same provision can suggest an intentional legislative intent to differentiate the permissive from the obligatory. *Foulger*, 194 A. at 889. *Cf. U.S. ex rel. Siegel v. Thoman*, 156 U.S. 353, 359-60 (1895). But in the context of *these* subsections, that rule is hardly iron tight. In fact, the use of the differing words reflects the differing nature of the Coordinator's called-for actions. The REPSA statute sets forth

1 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.

2 Senate Substitute 1 for Senate Bill 119, 145th General Assembly, 2d Session, Synopsis.

escalating statutory renewable percentage requirements for each successive year. Subsections 354(i) & (j) allow the Coordinator to decree a stop to the escalator if certain statutory described criterial have been met. In that case, she "may" decree a stop to the escalator. The "may" power is simply a grant of *permission* to go outside the otherwise applicable statutory framework once the described criteria have been found to exist. It is not a grant of discretion, but simply a grant of power to put a stop to the otherwise called-for percentage change. In that context, "may" is just as imperative as "shall." In contrast, the later reference to the freeze "shall be lifted" is of course obligatory. It is a call for a return to the normal statutory scheme if the cost thresholds will likely not be breached. In this context - where power is granted to make a deviation from the otherwise governing statutory scheme - the use of "may" and "shall" both impose obligatory duties. [3]

Finally, if "may" is construed to give the Coordinator discretion to ignore a freeze once the cost thresholds have been reached, then where is the legislative guidance about how this penultimate discretionary power is to be exercised. The subsections are silent as to any principles or guides for when the Coordinator can refuse a freeze although the statutory criteria call for one. Such a grant of *unbridled* discretion to an executive officer allowing her to ignore applicable statutory commands should not be read into any statute. *Cf. In the Matter of an Appeal of the Dept. of Natural Resources and Environmental Control*, 401 A.2d 93, 96 (Del. Super. 1978) (Walsh, J.) (agency cannot alter statutory permit scheme by imposing blanket prohibition rather than following statute's criteria for permit).

In the context of subsections 354(i) & (j), the Coordinator's duty is clear: once the statutory cost cap thresholds have been met, it is her duty to freeze the percentage requirements. She should consult with the PSC about the mechanics of such a freeze, but she lacks the power go further, override the consumer protections which are at the heart of the two subsections, and refuse to impose the freeze.

---

3 In addition, it is doubtful that a discretionary grant can be divined because the subsections call upon the "State Energy Coordinator *in consultation with the [PSC]*" to impose a freeze once the Energy Office finds the thresholds satisfied. The problem with seeing discretion being granted by these requirements for agency "consultation" is that the exact same phrase is used later in the same subsections when outlining when the Energy Coordinator is to to lift a previously imposed freeze. In the latter context, there is also a requirement for the Coordinator to consult, but the command to the Coordinator in this scenario is not "may," but "shall." Instead of granting discretion to the Coordinator in either scenario, the repeated requirements for PSC consultation in both contexts are simply obligations to work with the PSC about the mechanics for the Coordinator's decision. They are not dictates for the Coordinator to confer with the PSC about whether a freeze should be imposed, or later lifted, despite the statutory criteria being fulfilled.

Respectfully submitted,

Gary A. Myers
(302) 227-2775
<garyamyers@yahoo.com>