

217 New Castle Street
Rehoboth Beach, DE 19971
December 4, 2013oarde

Lisa Vest
Public Hearing Officer
Delaware Department of Natural Resources
and Environmental Control
89 Kings Highway
Dover, DE 19901

by US mail and e-mail

Re: *DNREC Notice of Proposed Rule-Making:*
Implementation of Renewable Energy Cost Cap Provisions,
17 DE Register of Regs. 600 (Dec. 1, 2013)
Request that Hearing Officer direct DNREC to Prepare Transcript
of Legislative Debates on REPSA Cost Cap Provisions

Dear Hearing Examiner Vest:

I understand from the December edition of the Register of Regulations that you are the assigned Hearing Officer for the above rule-making proceeding. The rules speak to the Division of Energy and Climate's responsibilities under the 2010 renewable energy "cost cap/freeze" provisions set forth in 26 Del. C. § 354(i) & (j). I have been participating in the informal workshops conducted by Mr. Noyes since this proposed rule was initially contemplated two years ago. I will be submitting comments and other materials in response to the notice and might also request witness' testimonies at the January public hearing.

The Legal Dispute Issues

The formal rule-making process is going to carry forward several "legal" debates that arose during the informal workshops. One involves the meaning of the terms "total retail cost of electricity for retail electricity suppliers" utilized in both subsections 354(i) and (j). The other – and similarly heavily contested – focuses on the use of the word "may" in the first sentences of subsections 354(i) and (j). The Division claims that such words grant the Director "discretion," and hence allow the Director to forego an otherwise-called-for "freeze" triggered by the percentage caps in the subsections. The Division has codified its view in section 5.0 of its the proposed rules by listing the factors it will presumably use to cabin its discretion to ignore a freeze otherwise triggered by the cost cap numbers.

I, on the other hand, have argued that the subsections do not grant such discretion to the Director once the cap thresholds have been breached, and that the terms "may" in both subsections are used in the traditional common law understanding of "may" being a "mandatory" direction to public officers. *See duPont v. Mills*, 196 A. 168, 173 (Del. Court *en banc* 1937). *Cf. Supervisors of Rock Island County. v. U.S.*, 71 U.S. (4 Wall) 435, 444-47 (1866) (outlining prior cases and applying principle); *Wilson v. U.S.*, 135 F.2d 1005, 1009 (3d

Cir. 1943) (citing Delaware and federal case law). In my reading, once the thresholds have been breached, the “circuit breaker” is tripped and the freeze comes into play without any further discretion granted to the Director.

To buttress my arguments that “may” was understood to be obligatory, not discretionary, in this context, I intend to cite to statements made by Secretary O'Mara, Senator McDowell, Representative Williams, and others during the legislative floor debates on the cost cap provisions. *See* Senate Substitute 1 for Sen. Bill No. 119, 145th Gen. Assembly, *enacted as* 77 Del. Laws ch. 45 (July 28, 2010). I have attached to this letter several of the excerpts that I intend to cite to bolster my statutory interpretation position.

The Audio Recordings of the Legislative Debates

I have procured from each legislative chamber audio recordings of the floor debates on Senate Substitute , And, as I said above, I intend to cite to specific statements within such debates. I also will submit the audio recordings (CDs) for inclusion in the record here. In the end, both the Secretary and you are going to be called upon to resolve a legal issue of statutory interpretation about the mechanics of subsections 354(i) and (j). In this State, such questions of statutory interpretation and construction can involve not only textual analysis but also appraisal of legislative materials, including floor debates. *Compare In the Matter of Krafft-Murphy Co., Inc.*, No. 85, 2013, slip opinion at 23-24 (Nov. 26, 2013) (*en banc*).

Need for Transcript of Legislative Debates

The problem is going to be how to make the floor debate materials easily usable by participants and decision-makers. Citations to CDs, by use of expired time references, are very cumbersome. And the use of audio recordings forces everyone to procure CD discs to listen to. And, more significantly, the decision-maker, if he or she is true to the charge to consider the entire record, is going to have to sit down and listen to several CDs, a time consuming process.

My request is that I submit the CDs of the legislative debates promptly for the record and that you then direct DNREC to prepare (or cause to be prepared) transcripts of the CDs. That way, with a written transcript, everyone can cite to various legislative debate statements easily, with common page references. In addition, then there will be no need to make further CD copies for others or hear protracted arguments about what was said exactly or what was the “context” surrounding any quoted statements. A written transcript of the debates is just much easier to handle than audio CDs.

I think it is quite appropriate to assign to DNREC the costs of preparing the transcripts. After all, the primary duty of DNREC in this situation is to conform its actions to the power delegated to it by Senate Substitute 1. And here there is a significant debate about what is the scope of such delegated power. It is important to have in the record, in an easily manageable format, exactly what the Secretary and legislators announced would be the mechanics of the “cost cap/freeze” consumer protections. DNREC can argue that the debates are irrelevant, or that they support its section 5 view. But only with an available transcript can those things be

adequately scrutinized and resolved. In addition, I would think in this case of debates over what the legislature said, DNREC would welcome to have a full record of what its Secretary (and the supporting legislators said) about how the cost caps would work.

I had previously asked Mr. Noyes if DNREC would transcribe the debates so all the participants would have a single reference source for their interpretative arguments. He said he would check up the line with DNREC. However, I have never heard back with a final response.

Here, the interests of a complete record, as well as overall fairness, point toward you directing DNREC to provide a transcript of the legislative debates. I can provide the CDs. Or if DNREC does not trust me, it can easily procure CDs of the debates directly from the General Assembly. What is needed, before the hearing, is a single source – easily usable – reflecting what was said about the cost cap during the enactment process.

I would suggest you schedule a tele-conference to discuss my request. There other interested persons can provide or elaborate on their views. I can be reached at (302) 227-2775.

Sincerely yours,

Gary Myers

Attachment (floor debate excerpts)

cc: Thomas Noyes (DNREC) (by e-mail only)
Prof. Jeremy Firestone (Univ. of Delaware) (by e-mail only)

Excerpts from Legislative Debates on Sen. Substitute 1 for Sen. Bill 119, 145th General Assembly (emphasis added)

Senate Floor Debate (June 22, 2010)

Sen. H. McDowell:

“provides for rate payer protection against cost impact. Any time the cost impact of the photovoltaic goes up by 1%, the utility involved can push – we like to call it 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”

“also built safety valves into this bill – I told you about the circuit breaker the we have put in where any utility who can show that its rates are or would go up by 1% in a year in the case of solar or 3% in the overall, they can push the circuit breaker and suspend participation in program for one year. This is a very important serious ratepayer protection.”

House Floor Debate (June 29, 2010)

Rep. D. E. Williams:

“very importantly, what it adds that the prior version did not have is ratepayer protection by adding limits of cost impacts on this”

Secretary C. O'Mara, DNREC (granted privilege of floor):

“most importantly, by having a circuit breaker – if you will – an actual price control whereby if the ratepayer impact exceeds a certain amount the entire program freezes in place, we can insure ratepayers that there won't be any adverse impact from this legislation”

*“under legislation, **as soon** as 1% impact from solar portion of the bill, the target level freezes in place for that entire calendar year and thus starts up again afterwards. **You will never have more than a 1% impact in any given year for the solar portion requirements as written in the legislation**”*

217 New Castle Street
Rehoboth Beach, DE 19971
December 11, 2013

Lisa Vest
Public Hearing Officer
Delaware Department of Natural Resources
and Environmental Control
89 Kings Highway
Dover, DE 19901

Re: NPRM, *102 Implementation of Renewable Energy Portfolio Standards Cost Cap Provisions*, 17 Del. Register 600 (Dec. 1, 2013)
Submission of Data related to Legislative History of
26 Del. C. § 354(i) & (j)

Dear Hearing Officer Vest:

I am enclosing a "burned" CD which includes two electronic audio files capturing the 2010 legislative floor debates for Senate Substitute 1 for Senate Bill No. 119 of the 145th General Assembly. That bill eventually became 77 Del. Laws ch. 451 (2010), an enactment which includes the two "cost cap/freeze" provisions which are the focus of this rule-making.

The Senate floor deliberations were on June 22, 2010. The audio file on the CD is in .wma format. The House debate was held on June 29, 2013. That audio file is in .mp3 format. I have preserved the differing formats because the House and Senate staff supplied me with the copy of the debates in those formats. The files reflect when I received the materials from the Clerk of the House and the Secretary of the Senate.

I ask that the CD, or the audio files, be made part of the record in this rule-making. If they would be posted on a website of exhibits they would then be available to all commenters. I renew my request to you that you direct DNREC to make a transcript of the debates.

Of course, I also plan to submit substantive comments at a later time. I might also later ask that subpoenas be issued for Secretary O'Mara and Senator McDowell to appear at the January 8 public hearing and offer testimony. See 29 Del. C. § 10117(1)a. Both of these individuals offered support for SS 1 on the legislative floor on the basis that the "cost caps" were "circuit breakers" that would kick in if the statutory formula percentages were exceeded. I might possibly want to ask them to provide additional testimony about what other discussions were held with legislators on the issue of how much leeway DNREC was to have to override the "cost caps"

formula provisions. If I decide to include such testimony, I will make a formal request at a later time.

Sincerely yours,

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

Attachment (audio CD)

cc: Thomas Noyes, DNREC (w/o enc.) (by Internet e-mail only)



STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES
AND ENVIRONMENTAL CONTROL
89 KINGS HIGHWAY
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Office of the
Secretary

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January 6, 2014

Via E-Mail and U.S. Mail
Email: garyamyers@yahoo.com

Mr. Gary Myers
217 New Castle Street
Rehoboth Beach, DE 19971

RE: **Proposed Regulations to Implement RPS Cost Cap under 26 Del.C. §354(i) & (j)**
Date of Hearing: Wednesday, January 8, 2014

Dear Mr. Myers:

This will acknowledge receipt of your letter dated December 4, 2013 concerning the above-referenced upcoming public hearing. Your requests, as set forth in that correspondence, were taken under advisement. This letter will now provide you with my formal response to the same.

The public hearing scheduled to take place on Wednesday, January 8th, is but one of the many steps that DNREC takes as part of the agency's standard promulgation process with regard to such proposed regulations. In its present state, this proposed regulation represents the current draft product of an extensive vetting process of public input, review, and consideration that has been given this matter by the Department's Division of Energy & Climate over the past several months.

The sole purpose of Wednesday's public hearing is to provide an opportunity for the public to offer DNREC comment on this proposed regulation, and for the Department to receive such comment. This hearing is held pursuant to the State of Delaware's Administrative Procedures Act. It is not an adversary hearing. Those attending the hearing that wish to offer comment for the record being developed in this matter are not testifying as witnesses, and therefore they will not be placed under oath. They are, however, asked to identify themselves for the record, and to state any pertinent affiliation. All comments received by the Department (whether verbal or written) are then incorporated into the record and reviewed by the agency prior to the proposed regulations being promulgated in final form.

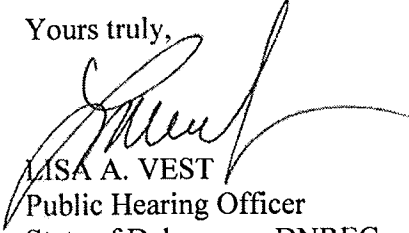
Mr. Myers
Jan. 6, 2014
Page Two

It should be noted that, at the conclusion of the Department's presentation at Wednesday night's hearing, the floor will then be open for the exclusive purpose of receiving public comment on the proposed regulation. There will be no calling (or cross-examination) of witnesses, no questioning of agency representatives, or any engaging of policy debates between Department staff and/or hearing attendees. The public hearing on January 8th is not the proper venue for legal challenges, or to provide oral arguments pertaining to the scope of authority granted by the General Assembly. Rather, this hearing will be limited solely to its APA purpose, to wit: to enable the Department to receive public comment offered for the record generated in this matter.

The legal arguments that are set forth in your letter of December 4th, as well as any supplemental written comment that you wish to submit to the Department concerning this proposed regulation, will be incorporated into the record, along with all other public comment received by the Department in this matter. All comment, whether it is received during the pre-hearing phase, post-hearing phase, or at the time of the hearing itself, all bears equal weight, and will be thoroughly reviewed by the agency prior to these regulations being finalized. Pursuant to current Delaware law, the record will remain open to receive additional public comment for at least fifteen (15) days subsequent to the hearing date. Thus, the public will be afforded the opportunity to supplement the record in writing through close of business on Tuesday, January 21, 2014.

Thank you for your prompt attention and anticipated cooperation regarding the above matters.

Yours truly,



LISA A. VEST
Public Hearing Officer
State of Delaware – DNREC

cc: Ralph K. Durstein, III, Esq.
David S. Small, Deputy Secretary, DNREC
Robert Underwood, Program Admin., Energy Programs, Div. of Energy & Climate