

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?

¹If 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

²77 Del . Laws ch. 451 (July 28, 2010).

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

⁴Sen. 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

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

⁶26 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

⁷Questions 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.

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

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

¹⁰26 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?

¹¹26 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.

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

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

Respectfully submitted,

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