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To: Tom Noyes

From: Jeremy Firestone

Date: October 19, 2012

RE: Pre-Rulemaking Comments (Corrected) of Jeremy Firestone, Professor, College of Earth, Ocean and Environment, and Director, Center for Carbon-free Power Integration on Renewable Portfolio Standards Cost Considerations

I thank the Delaware Department of Natural Resources and Environmental Control (DNREC) and Mr. Tom Noyes for the opportunity to participate in pre-rulemaking workshops and to submit these comments.

In June 2010, the General Assembly enacted SS1 for SB 119, which amended Delaware's Renewable Portfolio Standards (RPS) and the requirements regarding Renewable Energy Credits (RECs). In pertinent part, the new amendments "further strengthen" the RPS increased the minimum required percentage of RECs and Solar RECs (SRECs) to 25% and 3.5% and extended the compliance period until 2025. Bill Synopsis, available at http://www.legis.delaware.gov/LIS/LIS145.NSF/b51f4b5053c30a5c852574480048057a/a189cc0072f4019985257713006600 55?OpenDocument. At the same time, the bill included "consumer protections" to guard against REC and SREC rate impacts. The REC consumer protection provision is codified at 26 Del Code. § 354(j) and provides that:

> (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 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.

A similar provision is provided for SRECs, with the trigger set at 1% rather than 3%. See 26 Del Code. § 354(i).

Mr. Gary Myers filed a petition for rulemaking with the Delaware State Energy Coordinator and the State Energy Office (hereinafter jointly referred to as DNREC) regarding how the duties specified in § 354(i-j) will be carried out. Mr. Tom Noyes, of DNREC, has convened several workshops in advance of rulemaking and has requested the submission of comments. These comments are responsive to that request. For the purposes of simplicity these comments use § 354(j) as a template, but apply equally, *mutatis mutandis* to § 354(i).

These comments address three issues: (1) Whether DNREC has discretion to enact a freeze in the event thresholds are reached, with the answer being unquestionably yes; (2) Which criteria should DNREC consider in determining, in consultation with the Commission, whether to enact a freeze; and (3) Which costs DNREC should compare REC costs to (the question of the denominator) to determine whether it has jurisdiction to consider a freeze.

1. **Provided the 3% threshold is reached, DNREC unquestionably may exercise its discretion when determining whether or not to enact a freeze**

A review of case law and the statute and related provisions makes clear that DNREC has such jurisdiction. Indeed, the 3% threshold is simply a grant of jurisdiction—that is, it is jurisdictional. If and only if the threshold is reached, did the General Assembly grant DNREC authority to consider enacting a freeze.

When it set forth DNREC's consideration of a freeze, the General Assembly used the permissive "may" freeze rather than "shall" indicating discretion. Nevertheless, it is true that "may" can in some very limited circumstances be mandatory, Bartley v. Davis, Del. Supr., 519 A.2d 662 (1986). In the limited number of cases when the issue is raised, the touchstone at the end of the day is "legislative intent," which is determined by a review of the "statutory context and purpose" on a "case-by-case basis." Id. Here, the context and purpose unambiguously support a finding that "may" in the statute is "permissive."

To being with, if "may" were mandatory, there would be no reason for the General Assembly to direct DNREC to consult with Commission before imposing a freeze. Indeed, a mandatory construction would render the "in consultation with the Commission" language surplusage as they two agencies would have nothing to discuss. Second, on one hand, the General Assembly gave DNREC exclusive authority to determine whether the threshold was reached, but on the other hand required DNREC to consult with the Commission in determining whether to implement a freeze.[1] The General Assembly would not have created

[1] The General Assembly required DNREC to consult with the Commission on whether REC costs can "reasonably be expected" to be under the threshold prior to lifting any freeze earlier put into place. The use of "be expected" suggests that the freeze must be lifted prior to the costs actually being under the threshold if they can "reasonably be expected" to be in the future. This is in contrast to the imposition of the freeze, which can only occur if REC costs exceed thresholds in fact and DNREC on its own subsequently so exercises it discretion. Given the differences between costs in fact and projections (of both retail and REC costs), it makes sense that the General Assembly would require DNREC to consult with the Commission on the latter.

two decisionmaking mechanisms (one exclusive; the other requiring consultation) if it had intended a freeze to automatically be put into place upon the threshold being reached.

Third, construing "may" as mandatory would require a court to conclude that the General Assembly authorized the implied impairment of Delmarva's contracts; contracts that it either authorized (e.g., the land-based wind contracts) or mandated (e.g., the 30% procurement contracts) and that were approved by a state agency, the Public Service Commission. Such a conclusion begs credulity. Although under certain circumstances, legislation that affects private contracts can pass muster under the contract clause of the United States Constitution, Art. 1, § 10, cl. 1., Energy Reserves Group, Inc. v. Kansas Power and Light Co., 459 U.S. 400 (1983), there would be heighten scrutiny in present case given the requirement that Delmarva Power enter into such contracts and the subsequent state approval of those contracts, and it simply begs credulity to assert the General Assembly intended to implied impair contracts. Indeed, whenever the Legislature enacts a provision it is presumed to have had in mind the previous statutes relating to the same subject matter and ... in construing a statute the Court's objective is to render a sensible and practical meaning, not an absurd or unreasonable result. Getty Refining and Marketing Co. v. Leavy, 438 A.2d 1236, 1238 (Del. Super. 1981). In order to avoid an absurd result, one only has to give the word "may" is ordinary, permissive meaning.

Fourth, later in the same provision, when discussing the criteria for lifting the freeze, the General Assembly states that DNREC, in consultation with the Commission, "shall" lift the freeze provided "total cost of compliance can reasonably be expected to be under the 3% threshold. As explained by the Court in Nti v. Hall, 2007 Del. C.P. Lexis 55 (Court of Common Pleas 2007), the fact that section 354 (j) includes both "may" and "shall" suggests that the primary meaning of "may" (permissive) was intended by the General Assembly.

> The presumption that the word "shall" indicates a mandatory requirement is further supported by the use of the word "may" within the language of the same Rule. "The use of both 'may' and 'shall' in the same provision may afford a very forcible indication of the intention. Thus the use of the words that are plainly compulsory in one aspect, and the use of others, which clearly are permissive in another, necessarily leads to an inference that the primary meaning is to be retained.

See also Delaware Citizens for Clean Air v. Water and Air Resources Commission, 303 A.2d 666; 1973 Del. Super. LEXIS 149.

Fifth, elsewhere in the legislation, the General Assembly provided explicit caps for municipal electric companies and rural electric cooperatives. 26 Del Code. § 363(f-g). Thus, for those entities, the "total cost of complying with eligible energy resources shall not exceed 3% of the purchased power of the utility for any calendar year," and solar "shall not exceed 1%." Id. Thus, it is clear that the General Assembly knew how to provide a hard cap—using the phrase "shall not exceed" in § 363 rather than the phrase "may ... freeze", which it used in § 354. Indeed, the use of different language in § 363 and § 354 is indicative of different intent. Given that the General Assembly gave DNREC a role in 26 Del Code. § 354 in consumer protection, it makes little sense for that the role to be purely ministerial, as

suggested by Mr. Myers. Rather, as indicated here—and in the legislation itself—DNREC is to exercise discretion.

In sum, the language and context lead to only one conclusion, that "may" is permissive.[2]

Despite this clarity, Mr. Myers interjects two reasons why he believes that DNREC should nonetheless interpret "may" as mandatory. First, he suggests that interpreting "may" to mean "shall" is supported by statements on the floor of the Senate and House of the General Assembly. As an initial matter, courts should be cautious of attributing the statements of individuals as being representative of the General Assembly as a whole. See e.g., Zedher v. United States, 547 U.S. 489 (2006) (Scalia, J. Concurring). This is particularly true in the present case, given that the statements in the two chambers conflict with each other and, depending on how one reconciles those statements' ambiguities they may conflict with the statute itself.[3]

Starting first in the Senate, Senator Harris McDowell, in explaining the bill to his colleagues, repeatedly described the consumer protection provisions as providing utilities on a utility-by-utility basis with the option or right to freeze the RPS if the thresholds were reached. Although Senator McDowell correctly notes that there is an option to freeze the RPS if the thresholds are exceeded, the option or discretion as noted above under § 354 it is given to DNREC, and not to entities such as Delmarva Power. If DNREC were to adopt Mr. Myers's suggestion and follow Senator McDowell's lead, it would have to abdicate the General Assembly's directive that it protect consumers to Delmarva Power under § 354. Thus, perhaps more logically, Senator McDowell was referring to the Munis and Delaware Electrical Cooperative under § 363. Although that section states that the renewables obligation "shall not exceed" thresholds, suggesting that a freeze is mandatory, it may well be that the intent was to allow those entities an escape clause should they find the renewables obligation was having an adverse effect on ratepayers. Indeed, it is a bit incongruous for the

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[2] It is worth noting that Dupont v. Mills, 39 Del. 42; 196 A. 168 (SUP. CT. DE 1937), which Mr. Myers relies on, does not suggest a contrary outcome. In that case, the Court was called upon to construe the meaning of "may" in the following sentence.

> "Any or all of said Bonds may be redeemed at the option of the Board of School Trustees at par and accrued interest at any interest period after the expiration of five (5) years from the date of said Bonds."

Importantly, the question presented to the Court was not whether the Legislature through the use of the word "may" granted the Board discretion, but how much discretion did I grant. More specifically, the Court was not considering whether the Board could exercise its discretion regarding the time and manner to redeem "redeemable" bonds (those which the issuer can repurchase before maturity)—which it noted it dicta that it could, but rather, whether the Board could issue a different type of bond—those that are "non-redeemable" (that is, they can be held to maturity or traded, but not redeemed) in addition to redeemable bonds. The court simply held that the use of "may" could not be interpreted as a grant to the Board to issue non-redeemable bonds.

[3] I thank Mr. Gary Myers for his kind gesture in sharing CDs containing the House and Floor debates with me. I do not know whether these are official or unofficial transcripts.

General Assembly in the same legislation that it sought to encourage those entities to support renewables that it would require that they not take on more renewables than they desire.

In the House, Secretary Collin O'Mara, when referring to the solar threshold, indicated that if the solar RPS exceeded that 1% threshold, the RPS would be frozen. This is a true and accurate statement regarding § 363, and its application to the Munis and Delaware Electric Cooperative, as noted above. The Secretary also indicated that the consumer protection provisions were included in the legislation to ensure there would not be adverse impacts from the legislation. This suggests that the intent was not to protect consumers from price effects associated with the existing RPS, but only price effects that might be caused by that portion of the RPS that was added by the 2010 legislation. Thus, any statement suggesting that the caps would come into place automatically has to be considered in light of (a) §§ 354 and 363, (b) the post-2019 focus of the Delmarva Power consumer protection provisions, and the purpose of the provisions—namely, to protect against adverse impacts. For Delmarva Power customers, this can best be done in the context of DNREC discretion, consistent with the natural reading of the word "may" and in a manner consistent with the criteria developed below.

In sum, given the conflicting and unreliable record in the General Assembly, the far better approach is for DNREC to disregard the statement on the floor and rely on statutory construction set forth above.

Second, Mr. Myers suggests that to give effect to the ordinary, common sense meaning of "may" would raise the specter of an improper, standardless delegation of statutory authority. If assuming arguendo that Mr. Myers is correct (which he is not), the result would be that a court would be required to strike down the consumer protection provisions in their entirety because as developed above, construing "may" as mandatory is manifestly inconsistent with statutory intent.

The Delaware courts however have made clear that no such nondelegation doctrine issue arises in the present context. Cannon v State of Delaware, 807 A.2d 556; 55 ERC (BNA) 1504 (DE S.CT. 2002); Hall v. Casson, 1990 Del. Super. LEXIS 130 (Del Sup. 1990); Atlantis 1 Condominium Association v. Bryson, 403 A.2d 711; 9 ELR 20798 (DE S.CT 1979).

In Cannon, the Delaware Supreme Court noted that it is not always "feasible for the General Assembly to set precise guidelines." In such circumstances, "the presence of administrative procedural safeguards may compensate for the lack of precise statutory standards." This is a long-standing rule as the Atlantis 1 Condominium Court held that when a nondelegation doctrine challenge is made, the focus turns toward the totality of protections against administrative arbitrariness, including safeguards and standard, *regardless whether those protections are set forth in the legislation itself or in the procedures used by the administrative agency to execute the legislation.* (citations omitted, emphasis added). In other words, DNREC through rulemaking can itself ensure that concerns over due process are addressed.

More specifically, the Hall court noted that a "delegation of legislative authority may be cast in general terms when the administrative agency is charged with protecting public

health and safety...." (citing among other cases, In Re Appeal of Dept. of Natural Resources and Environmental Control, 401 A.2d 93, 95 (1978). As the RPS has as its charge the development of clean, non-polluting, healthy renewable energy sources, such a grant may be general. Moreover, "the authority granted to an administrative agency should be construed so as to permit the fullest accomplishment of the legislative intent or policy. An expressed legislative grant of power or authority to an administrative agency includes the grant of power to do all that is reasonably necessary to execute that power or authority. Atlantis 1 Condominium Court, citing Kreshtool v. Delmarva Power and Light Co., Del.Super., 310 A.2d 649 (1973).

2. **DNREC should promulgate a rule that requires it to consider each of the following criteria when deciding whether or not to enact a freeze.**

   a. **Whether action would result in the impairment of any existing contracts for the procurement of RECs.** For contracts entered into before June 2010, this criterion should act as an absolute bar to any impairment, as there is nothing to suggest the General Assembly intended DNREC to have power to impair existing contracts. For those contracts entered into after June 2010 but prior to consideration of a specified freeze, it should be at least a consideration and perhaps an outright bar. The reason to consider an absolute bar is that if it is only a consideration, entities such as Delmarva will have to pay more for RECs in future contracts because the purchase of them would be contingent.

   b. **The absolute dollar change in average consumer bills adjusted for inflation since June 2010.** As noted above, because the provision was added as a consumer protection, the baseline cost of energy at the time of enactment, as adjusted by inflation is relevant. A review of two documents, Boston Pacific, Inc., *Final Report of the Technical Consultant on Delmarva's 2009-2010 Request for Proposals*, http://depsc.delaware.gov/documents/Technical%20Consultant%20Final%20Report%2002_17_10.pdf, (Feb. 2010) and Vantage Energy Consulting, LLC, *Final Report of the Technical Consultant on Delmarva's 2011-2012 Request for Proposals*, http://depsc.delaware.gov/documents/Technical%20Consultant%20Final%20Report%2003_06_12.pdf, (March 2012) as well as the consumer price index (CPI), ftp://ftp.bls.gov/pub/special.requests/cpi/cpiai.txt is instructive.

      Looking at the CPI, inflation over the past two years has been approximately 5%.[4] The Table below (which uses a 5% inflation rate over the past two years) shows that the baseline consumer bill in 2010 was approximately $136/month. Adjusted for inflation, that is equivalent to a customer paying almost $143/month today. In fact, however, customers are paying closer to

[4] Inflation has been 5.0% from date of the first report, February 2010 to Feb 2012 and 5.3%; from date of legislation, June 2010 to June 2012. It has been 6.3% from February 2010 to August 2012.

$126/month, or $17 less. Similar effects are seen in average procurement costs. To the extent the retail costs are below 2010 costs adjusted for inflation, customers are not in need of protection. To the extent they are above, that would be a judgment call to balanced with the other criteria.

Table 1

	2010	2012	2012-2010	
			Absolute Difference	% Difference
Average Wining Bid	$89.95/MWh	$83.02/MWh		
Average Procurement Cost	$101.11/MWh	$86.31/MWh		
Average Retail Cost	$135.90	$126.10		
Ave. Procurement Cost Adj. CPI	$106.17/MWh	$86.31/MWh	$14.80/MWh	-18.7%
Average Retail Cost Adj. CPI	$142.70	$126.10	$16.60	-11.6%

The percentage dollar change in average consumer bill adjusted for inflation since June 2010. This follows the same logic as b. above. As documented in Table 1, real retail costs to consumers have decreased by 11.6% over a two-year period from February 2010 to February 2012, suggesting that consumer are not in need of immediate protection regardless of the size of the REC fraction of the costs.

c. **The percentage of RECs held.** From a cost-benefit perspective, there is a vast difference between consumers paying 3% of retail costs for RECs for renewable energy resources equal to 5% of load and that same percentage for renewable energy resources equal to 25% of load.

d. **The absolute cost of RECs in the year in question as a percentage of total retail costs.** The cost of RECs to consumers at a given moment in time is relevant. Thus, with a jurisdictional threshold of 3%, it is relevant whether the percentage, for example is 3.1% or 10%.

e. **The incremental (year to year increase) cost of RECs.** From a consumer standpoint, consumers may be most concerned about year--to-year price increases because price spikes create difficulties for consumers to plan. Thus, it is relevant whether REC costs increased by $1 or $5.

f. **The cumulative cost of RECs as a percentage of total retail costs since inception of the program.** When the PSC considers long-term contracts, it considers long-term effects on consumers. This is particularly important for renewable energy contacts because one of their attributes is long-term price stability. For example, the Delmarva Power – Bluewater Wind PPA was projected to cost consumers more than continuation of the status quo in the early years, but cost consumers more in the later years. From a consumer protection standpoint, the to date effect on consumer wallets is relevant.

g. **The reason why REC costs increased as a percentage of total retail costs.** REC costs can increase as a percentage of total retail costs because REC costs have increased or other costs have decreased or both. DNREC should be more willing to implement a freeze if the reason REC costs exceeded the threshold was because REC costs increased than because other costs have decreased since the purpose of the provision was to guard against consumer paying too much for RECs.

h. **The amount of avoided costs attributable to procurement of renewables over the thresholds (1% or 3%, as appropriate), including factors such as health externalities, reduced risk of sea level rise, locational benefits in terms of reducing congestion charges, etc**. As the Supreme Court of Delaware has noted in Crosby v. State, 824 A.2d 894 (2003), we must read all state laws *in pari materia* to accomplish the intentions of the General Assembly. This includes the requirement that every two years that Delmarva Power prepare a 10-year Integrated Resources Plan, Del Code. Title 26, $ 1007. Given that General Assembly direction, the Commission promulgated IRP rules, Title 26, Part 3010, rules, which were in effect at the time the General Assembly amended the RPS.

Rule 6.14 requires Delmarva Power to "include a current evaluation, detailing and giving consideration to environmental benefits and externalities associated with the utilization of specific methods of energy production." Rule 2.0 defines "Externalities" are defined to include the "social, health, environmental and/or welfare costs or benefits of energy which result from the production, delivery or reduction in use through efficiency improvements, and which are external to the transaction between the supplier (including the supplier of efficiency improvements) and the wholesale or retail customer." Given that the General Assembly was motivated by the desire to protect consumers, it is appropriate for DNREC to consider the extent to which consumers are being benefited in exchange for any direct costs they are paying for RECs.

In California Public Utilities Commission, 133 FERC ¶61,059 (2010) (noting the appropriateness of adders or bonuses in transmission-constrained areas), FERC clarified its previous rulings holding that under certain circumstances environmental externalities can be considered in calculating the avoided cost for PURPA qualifying facilities (QF). Given that environmental externalities can be taken into account when calculating the appropriate compensation of a QF owner by a utility, it makes sense to take the much smaller step here and consider those same externalities in the context of the decision of whether or not to implement a freeze.

3. **DNREC should promulgate a rule clarifying that retail costs in Section 354 (i-j) refer to costs borne by retail customers.**

The General Assembly injected confusion into which costs REC costs are to be compared to in order to determine whether REC costs exceed a specified threshold. The statute indicates the REC costs should be compared to "the total retail cost of electricity for retail electricity suppliers...." The problem is that "end-use customers" pay retail, while "retail electricity suppliers" pay wholesale. Thus, the statutory language is ambiguous as to what the General Assembly meant by the phrase "retail cost." Given that this section was added as a "consumer protection" measure (see bill synopsis), the intent of the General Assembly is nonetheless clear. As the bill is to protect consumers, and consumers pay retail, the REC comparator should be retail costs. For the same reason, and because the statute use the word "total," the retail costs in question should be the full retail cost paid by consumers (including supply and REC costs, distribution, Green Energy costs, and mandatory base charges) and not be limited to only supply and REC costs. In any event, such interpretations are reasonable constructions of the statute, and if adopted by DNREC, would be entitled to deference. Further, given that the General Assembly used the term "retail cost" in §354, but not in §363, suggests the General Assembly was focused on end use consumers in §354.