

To: Members of the SEU Oversight Board

From: Francis J. Murphy, Esq.

Re: Continuity of Service of SEU Oversight Board until Appointment of New Board

Date: May 27, 2008

### **Question Presented**

Are the SEU Oversight Board and its members empowered to serve as the governing Board of the Sustainable Energy Utility ("SEU"), even though the provisions of Section 8059(e)(1) authorize the General Assembly to appoint a replacement Board to serve after January 31, 2008?

### **Conclusion**

Yes. Under Section 8059 of Title 29, the SEU Board and its members continue to serve as the governing Board of the SEU until a replacement Board has been appointed by the General Assembly, or the General Assembly enacts legislation which terminates the authority of the existing Oversight Board and its members.

### **Discussion**

The SEU Oversight Board was created by the General Assembly. The enabling legislation is found at Section 8059 of Title 29 of the Delaware Code. Section 8059(e)(1) provides:

**There is hereby created the SEU Oversight Board which shall, from the passage of this Act until January 31, 2008, consist of all members of the Sustainable Energy Utility Task Force ("Task Force") appointed pursuant to Senate Concurrent Resolution 45 from the 143<sup>rd</sup> General Assembly and Senate Concurrent Resolution 6 from the 144<sup>th</sup> General Assembly. By December 31, 2007 the Task Force shall recommend to the General Assembly the composition of the Board to serve after January 31, 2008. (Emphasis added.)**

The General Assembly has not yet enacted legislation appointing a successor Board for the current SEU Oversight Board. I have been asked to advise the Board whether the first sentence of Section 8059(e)(1) should be read literally to mean that the Board and its members were authorized to serve only until January 31, 2008, and therefore ceased to function as such, by operation of law, thereafter. This is a matter of statutory interpretation. I have concluded that the Board does indeed continue to exist, and its members continue to serve in their capacities as members of the Board.

While the General Assembly has not enacted legislation to appoint a replacement Board, it recently considered such legislation. On April 22, 2008, the Delaware State Senate voted on Senate Bill No. 228, which was prepared with the approval of the SEU Oversight Board, in an effort to comply with Section 8059(e)(1). Sections 1 and 2 of Senate Bill No. 228 would amend the SEU legislation to make the SEU itself a nonprofit entity and allow the Contract Administrator for the SEU programs to be an entity or person, as opposed to a nonprofit corporation. Section 3 of the Bill contained a provision which would have put in place a process whereby the current Board would select the members of the replacement Board. However, the Senate amended the Bill to delete Section 3 (and also Sections 4, 5, and 6), passed the amended Bill consisting of Sections 1 and 2 only, and sent it to the House of Representatives for consideration. On May 19, 2008, the House reported the amended Senate Bill No. 228 out of Committee.

Under Delaware law, there are certain principles of statutory construction that should be applied to the question posed by the Board. In general, the goal of statutory interpretation is to ascertain and give effect to the intent of the legislature as expressed in the statute itself. *Rubick v. Security Instrument Corp.*, 766 A.2d 15 (Del. 2000); *Keys v. State*, 337 A.2d 18 (Del. 1975). The primary object in the interpretation of a statute is to reach a result in conformity with the policy thereof, and once policy is determined, the result need only be tested by rules of reasonableness and conformity with policy. *E. I. Du Pont De Nemours & Co. v. Clark*, 88 A.2d 436 (Del. 1952). When construing a statute, one must give a sensible and practical meaning to the statute as a whole. *Green v. Sussex County*, 668 A.2d 770 (Del. Super. 1995), *aff'd*, 667 A.2d 770 (Del. 1995). To determine the significance of a clause in a statute, one must look into the purpose and intention of the legislature and ascertain its meaning from an examination of every section of the statute which in any way deals with the question raised. *Application of Penny Hill Corp.*, 154 A.2d 888 (Del. 1959). The intent of the statute must prevail, even though the Delaware Supreme Court, in giving effect to the intent of the statute, would be required to give an interpretation that is not consistent with the strict letter of the statute. *Mayor and Council of Wilmington v. Dukes*, 157 A.2d 789 (Del. 1960).

Section 8059 of Title 29 created the Sustainable Energy Utility, whose purpose is to coordinate and promote the use of sustainable sources of energy in Delaware. The intent of the SEU legislation is expressed in Section 8059(b), which provides:

The Delaware General Assembly finds that there remain in Delaware significant, cost-effective opportunities to acquire end-user energy efficiency savings that can lower customers' bills and reduce the environmental impacts of energy production, delivery, and use. Delaware has an opportunity to create new markets for customer-sited renewable energy generation that will help build jobs in the State of Delaware, improve our national security, keep value within the local economy, improve energy reliability,

and protect Delawareans from the damaging effects of recurrent energy price spikes.

This statement establishes that the General Assembly considers the SEU legislation to represent a significant step toward addressing major problems confronting Delaware and the nation. These include degradation of the environment caused by the production and use of energy, for example, pollution and climate change. In addition, the legislation is intended to help protect Delawareans from the rapidly escalating costs of oil, gasoline, electricity, and natural gas. The scope of the problems that the legislation is designed to tackle are enormous, and it is apparent that the General Assembly intended that the SEU undertake its mission promptly.

It is also apparent from the face of the legislation that the SEU Oversight Board is an integral part of the legislative scheme. By law, the Board has been given primary responsibility for overseeing the SEU. For example, the Board is obligated to monitor and evaluate the Contract Administrator and Fiscal Agent who will carry out the day-to-day functions of the SEU. Without the Board, oversight of the SEU will be seriously lacking.

To further evaluate the critical nature of the Board's involvement, it helps to consider specific provisions of the legislation. Under Section 8059(e)(7), the Board is charged with reviewing and approving the form of the Requests for Proposals ("RFP") developed by the Delaware Energy Office for the contracts for the SEU Contract Administrator and Fiscal Agent. Under the legislation, the Contract Administrator and the Fiscal Agent will have responsibility for programs involving tens of millions of dollars raised through the issuance of bonds to private investors, some of whom are likely to be Delaware residents. Without a functioning Board, the most important level of oversight for the Contract Administrator and the Fiscal Agent will no longer exist. As a direct consequence, large sums of investor money, within and outside of Delaware, may be at risk, to the detriment of the SEU, the State, and its citizens.

Similarly, under Section 8059, the SEU legislation requires the Board to review and approve SEU performance targets, review and approve modification of the targets, contract with an independent professional agency to monitor and verify the results reported by the Contract Administrator, and make recommendations to the Energy Office regarding the management of the SEU. It is readily apparent that these obligations are critical to the proper functioning of the SEU. For example, without a Board to contract with an independent agency to audit the performance of the Contract Administrator, two levels of oversight mandated by the SEU legislation, namely the Board and the independent auditor, would be eliminated, without an act of the General Assembly. The substantial risks to the SEU and its programs, which are intended to serve Delaware residents and taxpayers, are self-evident. At a minimum, the performance of the SEU would be greatly hampered.

According to Section 8059(e)(8), the SEU is required to set aside a budget for the Board at the beginning of the fiscal year. Among other things, the Board's budget is used

to pay the independent consultant charged with reviewing, analyzing, and auditing the performance of the Contract Administrator. Without a Board in place to receive the funds, the independent consultant cannot be retained or paid. These and other important oversight functions cannot be implemented without a functioning Board. Without an audit of the Contract Administrator's performance, it will not be possible to carefully evaluate the effectiveness of the SEU's programs or improve them. *See also* the provisions of Section 8059 (g)(2)f, (g)(3), (h)(1), and (i)(1) for additional duties imposed upon the Board.

Considering the SEU legislation as a whole, the General Assembly intended the SEU Oversight Board to be an essential component of the statutory framework. The General Assembly has mandated that the Board be responsible for the oversight of the programs and performance of the SEU. It is not reasonable to conclude that the General Assembly has decided to allow the SEU to operate without the substantial oversight provided by the Board, simply because it has thus far failed to appoint a replacement Board. It is more in keeping with the intent, policy, and spirit of the SEU legislation to conclude that the General Assembly intended that the current Board continue to serve until the General Assembly enacts legislation to create a replacement Board.

The recent action on Senate Bill No. 228 by the Senate and the House supports the conclusion that the current Board continues to serve. The Senate decided to amend Senate Bill No. 228 to remove the provision that would have set in motion the process to appoint a new Board. However, the Senate left intact all of the provisions of the law which impose substantial obligations upon the Board. This course signifies an intention to have current Board continue to serve. The alternative explanation would be that the Senate wished to retain lengthy passages in the law imposing duties upon the Oversight Board, but intended that the SEU operate without it. The latter interpretation is not reasonable. If the General Assembly did not intend for the Board to continue to serve, one would have expected the Senate to amend the SEU legislation to delete any provisions about the Board's role, or, at a minimum, to affirmatively say in Senate Bill No. 228 that the current Board was terminated.

Looking, then, at the plain and unambiguous provisions of the SEU legislation itself and the policy behind the legislation, it is reasonable to conclude that the legislature intended that the Oversight Board continue to serve until a successor Board is formed. It would violate basic principles of statutory construction to give a literal interpretation to a single passage in the law, and by doing so, frustrate the meaning and intent of the law as a whole.

One might advance the erroneous argument that the provisions of the SEU law are ambiguous on the subject of the continued service of the Board. However, even if one assumes that the law is ambiguous (and it surely is not), my opinion that the current Board continues to serve until replaced would not change. Where a statute is ambiguous but the intent of legislature is clear, literal construction of the statute should be avoided. *Halifax Chick Express v. Young*, 137 A.2d 743 (Del. 1958). Statutory language should be construed in a way that will promote its apparent purpose. *Eliason v. Englehart*, 733

A.2d 944 (Del. 1999). Allowing the SEU to function without the benefit of Board oversight would not promote the purposes of the law.

Where there is a dispute over the meaning or effect of a statutory provision, a court may conduct a search for legislative intent. *Alfieri v. Martelli*, 647 A.2d 52 (Del. 1994). The Synopsis attached to a bill is a proper source from which to glean legislative intent. *Carper v. New Castle County Board of Education*, 432 A.2d 1202 (Del. 1981). According to the Synopsis of Senate Bill No. 228, the SEU is a groundbreaking program designed to use competitive markets and leverage private financing to deliver cost-effective end-use energy services that allow Delawareans to save 30% of their annual energy usage. The SEU is intended to coordinate programs that target residential, commercial, industrial, and transportation energy end-users in all markets, with the goals of reducing energy consumption and promoting the use of green energy. The legislation authorizes the SEU to issue bonds with a total value capped at \$30 million between 2007 and 2015 to implement the SEU's programs. According to Section 8059(j), the SEU has the opportunity to coordinate with existing State programs being conducted under the auspices of the Delaware Energy Office through the Green Energy Fund. In short, the SEU is an ambitious undertaking designed to help Delaware citizens and businesses implement energy saving practices, and engage in the use of sustainable energy resources. Given these facts, it would not be reasonable to assume that the General Assembly intends the SEU to function without the protections afforded by the Oversight Board. Therefore, the Oversight Board must continue to meet and fulfill its obligations under the SEU law and thereby advance the goals of the SEU.

Respectfully submitted,



Francis J. Murphy