

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

At a session of the Public Service  
Commission held in the City of  
Albany on May 16, 2013

COMMISSIONERS PRESENT:

Garry A. Brown, Chairman  
Patricia L. Acampora  
Maureen F. Harris, abstained  
James L. Larocca  
Gregg C. Sayre

CASE 03-E-0188 - Proceeding on Motion of the Commission  
Regarding a Retail Renewable Portfolio  
Standard.

ORDER MODIFYING RENEWABLE PORTFOLIO STANDARD PROGRAM  
ELIGIBILITY REQUIREMENTS

(Issued and Effective May 22, 2013)

BY THE COMMISSION:

INTRODUCTION

In 2004, the Commission adopted the Renewable Portfolio Standard (RPS) with the goal of increasing the proportion of electricity consumed in the state that is produced by renewable resources. The Commission authorized the New York State Energy Research and Development Authority (NYSERDA) to procure the renewable attributes associated with such renewable energy - "renewable energy credits," or "RECs." The source of funding for the procurement is the System Benefits Charge, paid by New York ratepayers.

The bulk of the RECs needed to meet the Commission's goal is obtained through competitive solicitations in the Main Tier of the RPS Program. These solicitations have been administered by NYSERDA as request for proposals (RFP), sealed, pay-as-bid auctions. NYSERDA pays a production incentive to

renewable generators selected through the competitive solicitations in exchange for all rights and claims to the RECs associated with each megawatt-hour (MWh) of renewable electricity generated. To date, both in-state and out-of-state projects have been eligible to bid into the Main Tier auctions, provided that all program rules are followed.

NYSERDA employs a scoring system for each solicitation comprised of two evaluation components totaling 100 points: bid price (70 points), and expected economic benefits to New York State (30 points). The Commission first authorized the use of these evaluation criteria in 2006 to ensure that economic benefits to New York State were given appropriate value.<sup>1</sup> It noted that providing economic benefits to the State was one of the formal objectives adopted when the Commission originally established the RPS Program in 2004.<sup>2</sup> The Commission emphasized that, since New York ratepayers fund the RPS Program, the economic development impacts of renewable projects for those New York localities that host facilities should be considered in the evaluation of bids. The Commission found that a 70/30 split was reasonable to balance minimization of program costs with the economic development benefits derived from in-state resources.

The bid evaluation criteria were again addressed as part of a mid-course review of the RPS Program in 2009. The Commission, at that time, found no compelling reason to eliminate or adjust the 30% economic benefits factor in the bid evaluation process. The seven RPS solicitations conducted to

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<sup>1</sup> Case 03-E-0188, Retail Renewable Portfolio Standard (RPS), Order Authorizing Solicitation Methods and Consideration of Bid Evaluation Criteria and Denying Request for Clarification (issued October 19, 2006).

<sup>2</sup> Economic benefits typically consist of job creation; tax payments to the State and local municipalities; royalties and/or payments for fuel and resource access; and in-state purchases or consumption of goods and services.

date have resulted in NYSERDA contracting to purchase RECS from 54 large-scale renewable energy generators. Three of these REC contracts support facilities located outside New York State.

NYSERDA's Petition

On December 14, 2012, NYSERDA filed a petition requesting that the Commission issue an order revising the program rules to limit its solicitation and procurement of RPS attributes from Main Tier renewable energy projects to those located within New York State. NYSERDA states that making this change will better promote three principal objectives of the RPS Program: environmental improvement; energy security; and economic benefits to New York.

In its petition, NYSERDA asserts that energy security and direct economic benefits are realized by New York State only when renewable projects are developed, constructed, and operated in the State. It notes an analysis conducted as part of the 2009 RPS mid-course review that concluded that Main Tier projects will produce approximately \$6 billion in direct economic benefits if the current Mwh target is achieved.<sup>3</sup> NYSERDA further underscores this point with results from data collected from 18 RPS-funded projects now in operation in New York that have documented their direct economic benefits. These results, NYSERDA states, are substantial and in-line with the findings of the 2009 mid-course review.<sup>4</sup>

NYSERDA further opines that while out-of-state projects enlarge the pool of potential bidders and thereby tend

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<sup>3</sup> The current Main Tier target is 10.4 million MWs.

<sup>4</sup> An electronic link to the mid-course Evaluation Report can be found at <http://www.nyserda.ny.gov/Energy-Data-and-Prices-Planning-and-Policy/Program-Planning/Renewable-Portfolio-Standard/History.aspx>.

to minimize program costs, the resulting program savings are limited to the term of the 10 year contract. In contrast, NYSERDA asserts, most of the verified economic benefits of a project located in the State are retained for the life of the project - typically 20 years or more. NYSERDA notes that the verified average benefits of a wind project over 20 years is approximately \$24/Mwh and states that no amount of reduction in the bid price for a 10 year contract from an out-of-state project can offset the loss of 20 years of economic benefits from a project located in New York.

NYSERDA further states that its right to the environmental attributes associated with a renewable facility expires with the facility's contract. At that point, the out of state producer is free to sell its energy. While an in-state producer benefits from the same flexibility at the end of the contract term, the facility continues to provide RPS program benefits to New York by virtue of its location and interconnection to the transmission grid. NYSERDA claims that if RPS program goals are to be sustained into the future, all of the energy sold into the New York market from out-of-state projects will have to be replaced upon expiration of the REC contracts, by energy from new projects, at additional expense to New York ratepayer.

NYSERDA also questions the extent of environmental or energy security benefits from out-of-state projects. It states that, even with the energy deliverability requirement of the RPS Program, it is difficult to verify that any "incremental" electricity is being imported to NY as a result of an out-of-state project receiving an RPS contract. It states that energy security is enhanced by resource diversification and the development of an indigenous infrastructure. NYSERDA points out that development of in-state energy infrastructure, including

renewable resources, is among the recommendations in New York's Energy Highway Blueprint.

Finally, NYSERDA comments on the application of the "dormant" commerce clause of the United States Constitution. It states that New York directly participates in the market through procuring renewable attributes, using funds collected exclusively from New York ratepayers to purchase those attributes for the benefit of the State's environment, energy security, and economy and does not restrict or prohibit the entry of renewable energy projects into New York or otherwise regulate the market.

NOTICE OF PROPOSED RULEMAKING

In conformance with State Administrative Procedure Act (SAPA) §202(1), notice of NYSERDA's petition was published in the State Register on January 1, 2013 (03-E-0188SP36). The SAPA §202(1)(a) period for submitting comments in response to the notice expired on February 19, 2012. Timely comments in response to the notice were filed by The Alliance for Clean Energy New York (ACE NY); Sierra Club; Brookfield Renewable Energy Group (Brookfield); Consolidated Edison Company of New York, Inc. and Orange and Rockland Utilities, Inc. (Con Edison/O&R); H.Q. Energy Services [U.S.] Inc. (HQ); Iberdrola Renewables, LLC (Iberdrola); Independent Power Producers of New York, Inc. (IPPNY); Multiple Intervenors, (MI); and Ridgeline Energy LLC (Ridgeline) Reply comments were submitted by NYSERDA; Alliance for Clean Energy New York; Sierra Club and Multiple Intervenors.

SUMMARY OF COMMENTS AND REPLIES

Comments

Petition Supporters

ACE NY and the Sierra Club support NYSERDA's petition. Both organizations believe that the proposal to restrict RPS eligibility to in-state projects will maximize the program's benefits to New York State and the State's environment.

ACE NY

ACE NY recognizes that interconnections with out-of-state transmission systems provide clear energy security and price benefits. However, according to it, because other system operators would seek to restrict or prohibit exports during their own demand crisis, a diversified in-state generation portfolio provides increased energy security.

ACE NY states that although clean power generation provides important public health, environmental, and energy security benefits, the economic benefits are crucial and substantial. Clean power projects stabilize prices, local/state tax/pilot payments; utilize local goods and services. ACE NY also indicates that the original intent of the RPS program included an emphasis on the economic development component, stating the "Commission reiterated its concern with ensuring that economic benefits flow to ratepayers in its imposition of a delivery requirement."<sup>5</sup> ACE NY suggests that acquisition of the least costly renewable resources for the RPS Program is unsound public policy, and that the 30% weighing related to economic benefits accruing in New York does not go far enough to ensure that the long term benefits of in-state projects are achieved.

ACE NY cites the RPS evaluation reports prepared by

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<sup>5</sup> Case 03-E-0188, supra, ACE NY Comments, dated February 19, 2013, p. 2.

KEMA and Summit Blue indicating that RPS projects could produce \$6 billion in direct economic benefits in support of the economic benefits claim. According to ACE NY, the only reasonable alternative to the relief sought in NYSERDA's Petition is a regional strategy with an agreement among states, where all participating states would contribute funds, and procure new project development.

The Sierra Club

The Sierra Club states that limiting RPS Program eligibility to in-state projects will provide economic, environmental and energy security benefits to New York because in-state projects create New York jobs, generate tax and payments in lieu of taxes; and produce multiplier effects on local economies. According to the organization, out-of-state projects provide little economic benefit to New York and do not ensure the long term availability of renewable energy credits in New York. Finally, the Sierra Club urges the Commission to be careful to approve NYSERDA's petition in such a way that only affects the State acting as a market participant in order to avoid a conflict with the dormant Commerce Clause.

Petition Opponents

Brookfield, Con Edison/O&R, HQ, Iberdrola, IPPNY, MI, and Ridgeline oppose NYSERDA's petition. Generally, these parties believe that limiting eligibility will increase program costs and will not significantly improve the environmental, economic, or energy security benefits.

Brookfield Renewable Energy Group

Brookfield states that market principles indicate a reduction in supply will increase costs and therefore, limiting

the RPS Program to in-state facilities will increase the cost of procuring renewable energy. Brookfield disputes NYSERDA's claim that any increase in costs related to decreasing eligibility would be outweighed by the economic benefits accruing to New York State. Brookfield argues that NYSERDA's claim ignores value chain economic benefits that tend to accrue to the entire region including New York State. Brookfield also claims that supporting the most cost-effective renewable generation sources, regardless of location, provides for development of the most efficient sources which in turn provides greater economic benefit to the region and to New York State.

Brookfield claims that the current 30% weighting of demonstrable in-state economic benefits sufficiently encourages in-state spending regardless of the location of a participating facility. Brookfield states that instituting a geographical restriction would provide no incremental economic benefit pointing to the low level of out-of-state participation in the RPS Program to-date. Brookfield states that restricting eligibility as NYSERDA proposes raises potential Constitutional issues that place undue risk on the program with no corresponding economic benefit.

Brookfield further claims that NYSERDA's proposal, by increasing costs, would decrease the environmental benefits of the program, by limiting the amount of renewable generation development that takes place. Brookfield also states that increasing the cost of acquiring renewable generation will detract from funds available for other environmental initiatives including energy efficiency. Highlighting the tendency of air pollution to cross state borders, Brookfield states that reducing emissions related to fossil fuels, whether such reductions originate in New York or elsewhere, provides environmental benefits to New York and that NYSERDA's proposal

will ultimately decrease such benefits. Brookfield also states that there are less restrictive means of ensuring that renewable energy procured through the RPS Program is incremental including the program's hourly matching requirement and the statutorily required tracking mechanism.<sup>6</sup>

Further, Brookfield claims that prohibiting out-of-state participation in the RPS Program would impair rather than enhance New York's long-term energy security. Brookfield argues that energy security is enhanced through interconnections and interstate commerce. Brookfield believes that balkanization of various planning jurisdiction results in sub-optimal energy solutions and increased costs. Brookfield states that the New York System Independent Operator (NYISO) and other control area operators recognize the energy security benefits provided by interties between control areas and suggests that NYSERDA's proposal would discourage such interconnectivity and reduce New York's energy security. Finally, Brookfield suggests that the current policy of excluding existing in-state renewable generation sources from the RPS Program encourages those sources to export their power in an effort to obtain renewable credits from other jurisdictions, thereby stunting the program's stated objective of increasing in-state consumption of renewable energy.

Consolidated Edison Company of New York, Inc. and  
Orange and Rockland Utilities, Inc .

Con Edison/O&R do not support NSERDA's proposal and suggest that the eligibility issue should be considered within the scheduled 2013 review of the RPS Program. Con Edison/O&R state that the principal purpose of the RPS is to increase the

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<sup>6</sup> See Public Authorities Law §1854(19).

quantity of renewable energy consumed in New York. The companies state that limiting geographical eligibility will affect the cost and availability of resources and the amount of time to reach the RPS goal. Con Edison/O&R caution that the potential impacts should be carefully considered as part of the planned 2013 review.

Con Edison/O&R claim that out-of-state renewable resources have contributed significantly to the delivery of cost effective and cleaner energy to New York. They suggest more effective ways to further the goals of the program including the provision of pre-competitive support to in-state projects or the reduction of in-state construction costs and barriers. The companies suggest that enhance resources studies and the tax code as more effective tools than the RPS Program eligibility. Con Edison/O&R also state that ratepayer funds should not be used to encourage economic development.

Con Edison/O&R express doubt concerning NYSERDA's economic benefits analysis, indicating that it understates the negative impacts on the cost to acquire sufficient renewable resources to meet program goals. The companies also suggest that NYSERDA's analysis improperly ignores ratepayers' lost business/investment opportunities associated with higher energy cost. Con Edison/O&R also reject NYSERDA's argument concerning increased energy security resulting from an in-state limitation. Finally, Con Edison/O&R state that the location and timing delivery requirements are sufficient to ensure conventional generation is being displaced by renewable generation and that previous results demonstrate that some out-of-state resources could have more favorable environmental impacts for non-attainment areas within New York based on their location downwind and proximity to such areas including New York City.

Hydro Quebec Energy Services (U.S.), Inc.

HQ opposes NYSERDA's petition and states that the Commission should conduct a thorough and comprehensive hearing addressing the RPS and the Energy Highway jointly. HQ states that the Commission should proceed carefully because market limitations may violate the U.S. Constitution's dormant Commerce Clause resulting in lengthy and costly litigation that could seriously disrupt the program. HQ notes that courts have found it permissible for states to expend their own funds in the market in order to benefit their citizens but also notes that NYSERDA does not expend state tax revenues.

HQ rejects NYSERDA's claim that it is impossible to determine whether out-of-state projects are incremental in a nature and questions why an increment requirement would only be applied to out-of-state projects. HQ also rejects NYSERDA's claims concerning energy security, stating that outages and system disruption can affect generation regardless of whether it is located within New York. HQ also notes that in the past, out-of-state resources were instrumental in assisting New York through previous energy difficulties, specifically noting that Quebec supplied energy to New York during the 2003 Northeast Blackout. Lastly, HQ states that NYSERDA's proposal contradicts the goals of Governor Cuomo's "Energy Highway Blueprint" because it would discourage, rather than stimulate, the development of cost-effective transmission infrastructure within New York.

Iberdrola Renewables

Iberdrola states that the current design of the program already provides in-state projects with a significant advantage over out-of-state projects. According to Iberdrola, the deliverability and hourly matching requirements set an incredibly high bar for out-of-state projects. Iberdrola states

that regional procurement of REC's could help New York meet its RPS requirements and states that the program should allow imports. Iberdrola also states that a long-term contract approach would encourage more market participants and lower prices. Further, Iberdrola states that 10 year contracts are insufficient to encourage sufficient renewable energy investment to meet the State's Main Tier RPS goals.

Independent Power Producers of New York, Inc.

IPPNY opposes NYSERDA's petition, and urges the Commission to consider carefully the implications of excluding out-of-state resources. IPPNY notes that NYSERDA has awarded RPS funds to very few out-of-state projects since program inception. IPPNY also believes that NYSERDA's proposal could lead to other states imposing similar restriction on New York generators, harming New York economy and renewable energy development in general.

IPPNY notes that an attempt in Massachusetts to impose geographical restrictions led to litigation. IPPNY acknowledges that NYSERDA's centralized procurement mechanism is different than the approach taken in Massachusetts but expresses doubts that such distinctions are legally significant. IPPNY also suggests that the Commission should review a change of this magnitude and with such implications within the planned 2013 RPS review.

Multiple Intervenors,

MI opposes NYSERDA's proposal because it believes the proposal would lead to increased costs to customers. According to MI, New Yorkers already pay the second-highest electricity prices in the continental United States—over 54% more than the national average. MI believes the Commission should defer

consideration of the petition until the comprehensive 2013 RPS Program review is complete. MI further states that the existing RPS structure already results in a program that is dominated by in-state projects, and that NYSERDA's proposal would improperly discriminate against out-of-state electric generation facilities and may create an unconstitutional burden on interstate commerce. MI also claims that NYSERDA provides no legal analysis to support its statement that the proposal does not violate federal Commerce Clause principles. MI also states that NYSERDA fails to explain its claim that the existing RPS is inconsistent with the Energy Highway Blueprint.

Ridgeline Energy, LLC

Ridgeline does not support the Petition. Ridgeline believes that longer-term contracts (20 years as opposed to the current 10) should be granted to help avoid increased costs, regardless of where a generator is located.

Reply Comments

NYSERDA

A number of commentators questioned NYSERDA's claim that its proposal would amplify the RPS Program's economic benefits to New York. In response, NYSERDA indicates that currently RPS Main Tier contracts require each facility to demonstrate, after three years of operation, that at least 85% of the economic benefits projected in the facility's RPS bid proposal have been achieved. NYSERDA states that it conducts a comprehensive evaluation for each Main Tier facility in order to confirm that the 85% threshold has been met. First, NYSERDA program staff engages each project contractor to discuss the obligation to demonstrate the economic benefit to New York and

the types of acceptable data. NYSERDA indicates that only documents verifiable by a third party, including official tax documents, invoices and records of payments, are accepted as support for economic benefits claims. NYSERDA staff reviews the initial submission and engages the contractor and other data sources, including subcontractors and state and local governmental entities, in an effort to maximize the quality of the benefit data. Once a file is complete, a summary report and the supporting documentation are circulated to NYSERDA legal and senior RPS Program staff for approval. NYSERDA provides the results of the compliance evaluation process to contractors in writing.

NYSERDA states that it has completed an analysis for 18 RPS facilities that have reached their three year anniversary including 8 wind farms, 2 biomass facilities and 8 hydroelectric facility upgrades. The facilities are located in New York. NYSERDA indicates that it reviewed over 30,000 documents during the verification process for these facilities. NYSERDA states that all of the projects met the 85% of claimed benefits threshold the 85% of claimed benefits threshold.

NYSERDA further states that its consultant Sustainable Energy Advantage, LLC assessed NYSERDA's data collection and organizing methods and assured the authority that the data was sufficient to develop a forecast of the projects' future economic benefits. The consultant then analyzed the data and extrapolated the likely benefits of each project over its expected useful life.

The consultant's key findings include the determination that the facilities' first three years of operation have resulted in expenditures of approximately \$440 million in New York, and a projection for long-term expenditures of over \$710 million. NYSERDA reports that the analysis

indicates that every MWh of renewable energy produced in New York will result in approximately \$29 in direct benefits to the State, and that the figure is consistent with the \$26/MWh conclusions of an earlier study of the program.<sup>7</sup> NYSERDA's figure is based on an assumption that the facilities will operate at their proposed capacity for the remainder of their expected life; however, NYSERDA's contract payment obligation is based on the actual generation of the facility.

A number of commentators took issue with NYSERDA's claim that the increase in economic benefits associated with in-state projects will outweigh the increase in bid prices that might occur if eligibility were limited. NYSERDA responds that its conclusion was based on verified data and that savings resulting from a lower cost out-of-state project can only be considered for the 10 year term of the RPS contract, while benefits from in-state projects are expected to accrue for the life of the project (typically 20 years or more). NYSERDA reasons that the life-expectancy associated with the benefits of an in-state project would require an out-of-state project to bid \$58/MWh lower than an in-state project to provide equivalent economic benefits. NYSERDA states that experience indicates this is unreasonable.

NYSERDA also rejects the notion, raised by several commentators, that its proposal is inconsistent with the goals of the RPS program. NYSERDA states that the very purpose of the RPS program was the creation of a vehicle to pursue a combination of environmental, economic, and security objectives; "the acquisition of renewable energy credits (RECs) is nothing

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<sup>7</sup> KEMA, New York Main Tier RPS Impact and Process Evaluation (March 2009) and Summit Blue, New York Renewable Portfolio Standard Market Conditions Assessment (February 2009).

more than a mechanism to secure performance and a statistical tool to measure progress towards the "goal."<sup>8</sup> NYSERDA argues that the results of the program should be evaluated in terms of return on investment, and not solely on the purchase price of RECs.

NYSERDA also states that the Commission has acknowledged a value differential for in-state projects, arguing that the Commission's adoption of a 30% weighting factor for in-state economic benefits acknowledges the "the disparity of value between in and out-of-state RECs."<sup>9</sup> NYSERDA argues that based on the accumulation of information and experience since the Commission's initial determination to recognize economic benefits in the selection process indicates that limiting the RPS Program to in-state projects is in the public interest. NYSERDA also points to its record of fiscal responsibility and discretion in awarding RPS contracts as a hedge against undue price increases.

A number of commentators indicated that NYSERDA's proposal either contradicted the Energy Highway Blueprint or was not necessary to align the RPS Program with the Blueprint. NYSERDA responds that Blueprint clarifies New York's interest in (i) developing upstate renewable generation in order to meet environmental goals and (ii) eliminating congestion issues associated with limited transmission capacity between existing upstate renewable generation resources and downstate load

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<sup>8</sup> NYSERDA Reply Comments, p. 5.

<sup>9</sup> The Commission recognized the value of economic benefits accruing to New York but required the economic benefit weighting to be "designed such that any project, regardless where located, would have the same opportunity to demonstrate quantitatively its likely - and verifiable - economic benefits to New York." See Case 03-E-0188, supra, Order Authorizing Solicitation Methods and Consideration of Bid Evaluation Criteria (issued October 19, 2006) pp. 16-17.

centers.

NYSERDA also responds to comments regarding retaliatory actions by other states if the proposal is approved and the overall necessity of the proposal. NYSERDA states that a vast majority of the renewable energy programs in surrounding markets already exclude New York projects, including programs in Pennsylvania, Quebec, Ontario, and Vermont. NYSERDA acknowledges that to date it has awarded very few out-of-state RPS contracts, but that prior experience may not indicate future trends. Specifically, NYSERDA points out that Pennsylvania's RPS Program is saturated, increasing the appeal of New York's program for projects in the PJM control area, and that it received several applications from out-of-state projects in response to its most recent solicitation. NYSERDA also responds that the issue of whether the limitation is absolutely necessary should not be dispositive.

NYSERDA responds to the parties' concerns and doubts regarding the importance of incremental renewable energy in obtaining environmental or energy security benefits from the RPS Program. Specifically, NYSERDA states that the extent of those benefits from out-of-state facilities depends on the delivery of incremental energy to New York, which is difficult or impossible to verify. NYSERDA explains that

The environmental benefits of renewable energy are not intrinsic to its creation. Rather, the benefits accrue when renewable energy displaces a less environmentally benign source. If a renewable generator in an external control area creates a MWh of energy, the environmental benefits of that MWh will accrue, most specifically, to the locality of the, presumably, dirtier resource that is backed off, or displaced.

When that renewable MWh is generated in an external control area under a New York RPS contract, the rules require that a MWh be

delivered into New York, in order that the displacement of generation, and the environmental benefits, will occur in New York. If the MWh delivered to New York is not incremental to the quantity of energy that would otherwise have been delivered, no generation displacement and no environmental benefits are realized by New York. Stated differently; if the resources serving the New York electric load are not affected by the generation in the external region, New York does not benefit.<sup>10</sup>

NYSERDA challenges assertions made in the comments that NYSERDA's proposal would harm New York's interconnectedness with other energy markets. NYSERDA claims that the RPS Program does not restrict the flow of any type of energy into the New York market, and that sellers' ability to bid into the New York wholesale market or to engage in bilateral transactions with New York load will not be impacted.

Finally, NYSERDA answers comments asserting that the exclusion of out-of-state bidders violates the Commerce Clause by arguing that NYSERDA's role in the RPS Program is that of a market participant, rendering the "dormant Commerce Clause" inapplicable. NYSERDA states that it participates in the market through expending ratepayer funds to incentivize the consumption of renewable energy in New York and for the associated benefits to the State's environment, energy security, and economic health. NYSERDA adds that the RPS contract terms only govern the delivery and purchase obligations of the parties during the term of the contract and do not impose post-contract restrictions. According to NYSERDA, the RPS Program neither prohibits nor restricts entry of renewable energy or RECs into New York and does not otherwise regulate the marketplace.

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<sup>10</sup> NYSERDA Reply Comments p. 9.

NYSERDA also note that applications would not be required to have a presence in New York - other than the facility being proposed.

NYSERDA opposes suggestions for additional administrative process concerning its proposal, including parties' requests that the Commission delay responding to the petition until the scheduled 2013 RPS Program review. NYSERDA points out that the Commission has already afforded parties more than the minimum notice and comments requirements of the State Administrative Procedure Act. NYSERDA also claims that, although the proposal represents a significant change to the program, the issues it raises are not overly complex, and the factual record already compiled is sufficient for our consideration.

Finally, NYSERDA claims that a significant delay in issuing the Commission's response to the petition risks loss of the federal production tax credit, which has been extended until December 31, 2013 and is worth approximately \$22/MWh for wind generation. NYSERDA indicates that replacing that value through incentive payments would cost the PRS program significantly more than \$22/MWh due to the different tax implications for developers of cash incentive payments and tax credits.

ACE NY'S REPLY

ACE New York also submitted reply comments. ACE NY states that NYSERDA's request is consistent with the multiple goals of the RPS and overall state energy policy. ACE NY claims that the proposal is also in the best interest of ratepayers. ACE NY states that NYSERDA correctly identifies the primary goals of RPS, environmental improvement, economic development and energy security on the first page of its petition. ACE NY also disputes the importance of whether the RPS requires

modification in order to properly support the Energy Highway Blueprint. Rather, ACE NY states, the Energy Highway and the RPS are two segments of a comprehensive state energy policy that are supportive of one another.

ACE NY also challenges the logic supporting the argument, made by a number of commentators, that Commission action is not needed because past experience indicates that only very few out-of-state projects are awarded contracts under the current eligibility requirement. ACE NY argues that past experience does not guarantee the future. ACE NY further argues that even if conditions remain fairly constant, because only a limited number of out-of-state projects would be burdened, the restriction would not have an adverse impact.

ACE NY also claims that if the restriction does result in increased acquisition costs, NYSERDA retains the option of not rewarding RPS contracts. ACE NY also argues that if NYSERDA's petition is approved, developers that have forsaken New York in recent years may return.

ACE NY believes that only incremental renewable energy generation should receive RPS contracts and sees no reason to support existing facilities outside of New York. ACE NY sees no reason to revisit the issue of incremental energy and states that sound reasons support restricting eligibility to truly sustainable, renewable resources.

Finally, ACE NY requests that if it denies NYSERDA's petition, the Commission seek to ensure that out-of-state projects receiving an RPS contracts be new projects that deliver incremental renewable energy to the grid. ACE NY repeats the suggestion contained in its comments that a regional strategy among states, where all participating states would contribute funds and procure new project development, would be a reasonable less restrictive alternative to NYSERDA's proposal.

Additionally, ACE NY suggests that the incremental nature of RPS supported renewable energy could also be ensured by limiting eligibility to new projects regardless of geographical location. ACE NY cautions that a change to the eligible vintage date should be made with care in order to avoid disappointing a developer who, in anticipation of receiving an RPS contract through a future procurement, begins construction prior to actually winning the RPS contract, in order to prevail itself of the advantages of the federal tax credit.

Sierra Club's Reply

The Sierra Club reiterates that limiting Main Tier RPS eligibility to in-state projects would provide economic, environmental, and energy security benefits to New York. The Sierra Club rests its conclusion on the premise that benefits from out-of-state projects are not guaranteed beyond the ten years of the RPS contract. The Sierra Club also challenges the notion that limiting the bid pool to in-state projects will significantly increase program costs arguing that the high number of RPS contract awards to in-state projects (95%) suggests that in-state projects have been cost-competitive. Similar to ACE NY, the Sierra Club offers the less restrictive alternative of limiting eligibility to new projects as a means of securing incremental renewable energy.

MI's Reply

MI opposes the suggestion made by some parties that the Commission should increase the duration of RPS contracts from 10 years to 20 years. MI argues that such action was not properly noticed. Specifically, MI states that neither the January 2, 2013 Notice of Proposed Rule Making nor the January 4, 2013 Notice issued in these proceedings, provide legally

sufficient notice that the Commission could take such action. MI also argues that the extending the RPS contract term is not supported by the record, continues an uneconomic subsidy, and will generally increase program costs.

#### DISCUSSION

We have determined to accept NYSERDA's proposal to exclude bidders proposing to meet their RPS obligations with renewable resource energy procured from outside the State from the Main Tier procurement process. We recognize that this marks a change in RPS policy, but we believe it to be warranted at this time based on experience with the program and the evolution of economic circumstances since we initially established our RPS policy.

As described in detail below, the structure we established for the Main Tier has evolved from the inception of the RPS Program and has been subject to refinements over time in response to changing circumstances. We have noted several times in the past, and reiterate now, that large-scale investment of public funds in a renewable energy projects is a matter that requires careful deliberation and frequent re-evaluation as circumstances change, and investors should understand that RPS incentives are subject to changing policies as we refine our approach to meeting program objectives.<sup>11</sup>

As early as the Order Instituting Proceeding in 2003, we identified as a threshold issue the need to consider whether it would be appropriate to include renewable resource energy

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<sup>11</sup> Case 03-E-0188, Retail Renewable Portfolio Standard (RPS), Order Authorizing Additional Main Tier Solicitation and Setting Solicitation Guidelines (issued August 21, 2009), p. 12; Order Resolving Main Tier Issues (issued April 2, 2010), p. 8.

procured from outside the State to achieve the RPS goal.<sup>12</sup> Upon establishing the RPS Program in 2004, we recognized that:

As long as the cost of new electric generation from renewable resources continues to be higher than the cost of generation from other resources, our adoption of the RPS will necessarily increase the direct cost of electricity supplied to New York consumers. Since we are likely mandating an increase in costs, it is important that we structure the RPS in a manner that maximizes the benefits that can accrue to New York from an RPS, consistent with all applicable laws and treaties.<sup>13</sup>

At that time, we determined that there was "the need to rely on imports to meet our goals", but that the need was to be balanced with the need to provide flexibility to accommodate the difficulties of scheduling intermittent renewable generation and the need to preserve our ability to verify delivery of renewable electricity from renewable resources.<sup>14</sup> Accordingly, at that time we adopted eligibility requirements for imports including:

that the electrical output of the generation facility ...was contractually delivered into New York State, and was sold to consumers in New York State in a retail sale;

and:

Intermittent renewable generation that is difficult to schedule may be sold into the spot market of the control area it is located in as it is generated without simultaneous transmission into the New York Control Area, so long as an equal quantity of energy is transmitted out of

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<sup>12</sup> Case 03-E-0188, supra, Order Instituting Proceeding (issued February 19, 2003), p. 3.

<sup>13</sup> Case 03-E-0188, supra, Order Regarding Retail Renewable Portfolio Standard (issued September 24, 2004), pp. 60-61.

<sup>14</sup> Ibid., p. 61.

the affected spot market into the New York Control Area during the same calendar month (monthly matching). In addition, if the control area of origin has an attributes accounting and tracking system, or an environmental disclosure program, such system and/or program must be able to recognize monthly matched transactions without the double counting of attributes in any jurisdiction.<sup>15</sup>

We found that the in-State delivery requirement did not create an unnecessary burden on interstate commerce or potential violation of the Commerce Clause, promoted interstate commerce by allowing imports on the same terms as electricity generated within the State, and served important State interests including supply security, supply diversity, and environmental benefits.<sup>16</sup>

Increases in the supply in a market tend to have a lowering effect on prices as more sellers compete for the same quantity of purchases to be made by buyers. Therefore, RPS energy delivered in-State increases the supply of energy in the in-State market, which tends to have a lowering effect on in-State wholesale electric prices. These "delivery" requirements were imposed, among other reasons, to help ensure that the RPS costs to New York State ratepayers will be minimized as shown by the RPS cost studies; allowing energy generated outside the State to be eligible for RPS financial support without a delivery requirement would "significantly raise the expected cost of an RPS for ratepayers" by foregoing offsetting impacts on wholesale electric prices.<sup>17</sup> The "monthly matching" aspect of the delivery requirement was to provide intermittent resources with some scheduling flexibility while maintaining the ability

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<sup>15</sup> Ibid., Appendix C, p. 1.

<sup>16</sup> Ibid., pp. 62-63.

<sup>17</sup> Ibid., p. 61.

to provide verification.

Regarding imports from jurisdictions without a reciprocal RPS and delivery requirement, we declined at that time to adopt a reciprocity requirement because we were concerned then that a "reciprocity requirement would create a cumbersome barrier against imports, particularly from Canada, which would diminish New York's ability to acquire resources sufficient to meet our goals at least cost."<sup>18</sup>

We also declined at that time to impose a "regional" energy delivery requirement instead of the "in-State" energy delivery requirement. A regional delivery requirement would require delivery either into New York or an area served by a neighboring/interconnected bulk electric system that has compatible capabilities for tracking generation and sales transactions. We noted that necessary compatible attribute accounting and tracking systems are not in place throughout the region from which New York draws its electricity, but that adoption of an RPS in the New York market would position us to work with other jurisdictions to achieve regional compatibility in the future.<sup>19</sup>

In 2006, less than two years after establishing the in-State delivery requirement, we were asked to reconsider our decision declining to impose a reciprocal RPS and delivery requirement, to consider bid adjustments that would favor the building of generation projects in New York State, and, conversely, to consider imposing a stricter delivery requirement because of concerns that our monthly matching requirements favored out-of-State developers over in-State developers. We declined to act at that time because we were concerned that the purposes asserted could be viewed as economic protectionism, but

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<sup>18</sup> Ibid., p. 62.

<sup>19</sup> Ibid., p. 63.

we directed Staff and NYSERDA to evaluate issues regarding economic benefits of the RPS Program,<sup>20</sup> and we also directed Staff to conduct an expedited review of the delivery issue and report its findings to us.<sup>21</sup>

Later in 2006, as a result of the Staff report on the delivery issue, we replaced the monthly matching delivery requirement with an hourly matching delivery requirement because we found that monthly matching unfairly advantaged out-of-State intermittent resources by providing them with an opportunity to avoid most of the costs of congestion on their delivery of power into the New York Control Area, costs that in-State generators could not avoid.<sup>22</sup> We noted that Massachusetts had adopted an even stricter "source to sink" approach as a delivery requirement for out-of-state resources, and Pennsylvania had adopted a location requirement requiring the generator to be located inside the geographic boundaries of Pennsylvania or within the service territory of any regional transmission organization that manages the transmission system in any part of Pennsylvania; we found that there was no compelling need at that time to adopt such approaches.<sup>23</sup>

Still later in 2006, we gave further consideration to the role of economic benefits in the RPS program. We determined that NYSERDA could take into consideration the economic benefits that a project can be expected to bring to the State, given that New York ratepayers provide the RPS Program funding, and our evaluation of the potential economic benefits showed they were

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<sup>20</sup> Case 03-E-0188, supra, Order Authorizing Additional Main Tier Solicitations and Directing Program Modifications (issued January 26, 2006), p, 34-35.

<sup>21</sup> Ibid., p. 37.

<sup>22</sup> Case 03-E-0188, supra, Order On Delivery Requirements For Imports from Intermittent Generators (issued June 28, 2006), pp. 10-13.

<sup>23</sup> Id.

substantial, perhaps as much as \$10/MWh for in-State wind projects.<sup>24</sup>

We authorized NYSERDA to incorporate both bid price and economic benefits criteria into its bid evaluations, scoring economic benefits at up to 30% of the overall score. We required the economic benefits category to be designed such that any project, regardless of location, would have the same opportunity to demonstrate quantitatively its likely and verifiable economic benefits to New York. Factors such as creation of long-term jobs in New York, tax or PILOT payments to New York State and its municipalities, and royalties and compensation for fuels to New York residents and businesses were to be included in the criteria. We also found at the time that the employment of up to a 30% factor will allow the State to achieve some experience with the use of economic benefits criteria and the 30% percentage weighing struck a reasonable balance regarding the value of the economic benefits to the State resulting from the project without overwhelming the consideration of price factors by allowing consideration of price as the major contributor to the evaluation process.<sup>25</sup>

As a result of an overall review of the program commenced in 2009, we again considered issues related to the

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<sup>24</sup> Case 03-E-0188, supra, Order Authorizing Solicitation Methods and Consideration of Bid Evaluation Criteria and Denying Request for Clarification (issued October 19, 2006), pp. 16-18.

<sup>25</sup> In the same order, we also adopted a new performance requirement that non-performance would allow NYSERDA to terminate the contract, so that both in-State and out-of-State generators would not be encouraged to view their contracts as put options. A put option would allow generators to sell their attributes to NYSERDA at a certain strike price, but would not obligate the generators to complete the sale. Ibid., pp. 20-22.

offsetting effects of economic benefits in a 2010 decision.<sup>26</sup> We concluded that there was merit in continuing the economic benefits bid evaluation weighting at 30%. We found that all the solicitations to date had been robust; a diversity of in-State renewable resources had been awarded contracts with NYSERDA; and the average weighted price of winning bids had been relatively low compared to prices in neighboring states. In addition, we noted that an analysis of the results of the latest solicitation showed that the claimed economic benefits exceeded the cost of the incremental premiums expected to be paid for new RPS projects. We concluded that retaining this criterion would maximize the economic and energy price benefits that together can help offset the cost of the RPS Program.<sup>27</sup> We also determined at that time that the economic development bid evaluation scoring in Main Tier solicitations should be free of any requirement that the economic benefits be "incremental," so as to not penalize developers that prefer to get an early start on a project.

More than two years have passed since we last addressed the cost impacts of the RPS Program in our RPS design and implementation deliberations. In that time, there have been two important developments that fundamentally affect the economics of the RPS Program.

The first development is that it is now apparent that the price of natural gas has dropped significantly and on a

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<sup>26</sup> Case 03-E-0188, supra, Order Authorizing Additional Main Tier Solicitation and Setting Future Solicitation Guidelines (issued December 3, 2010).

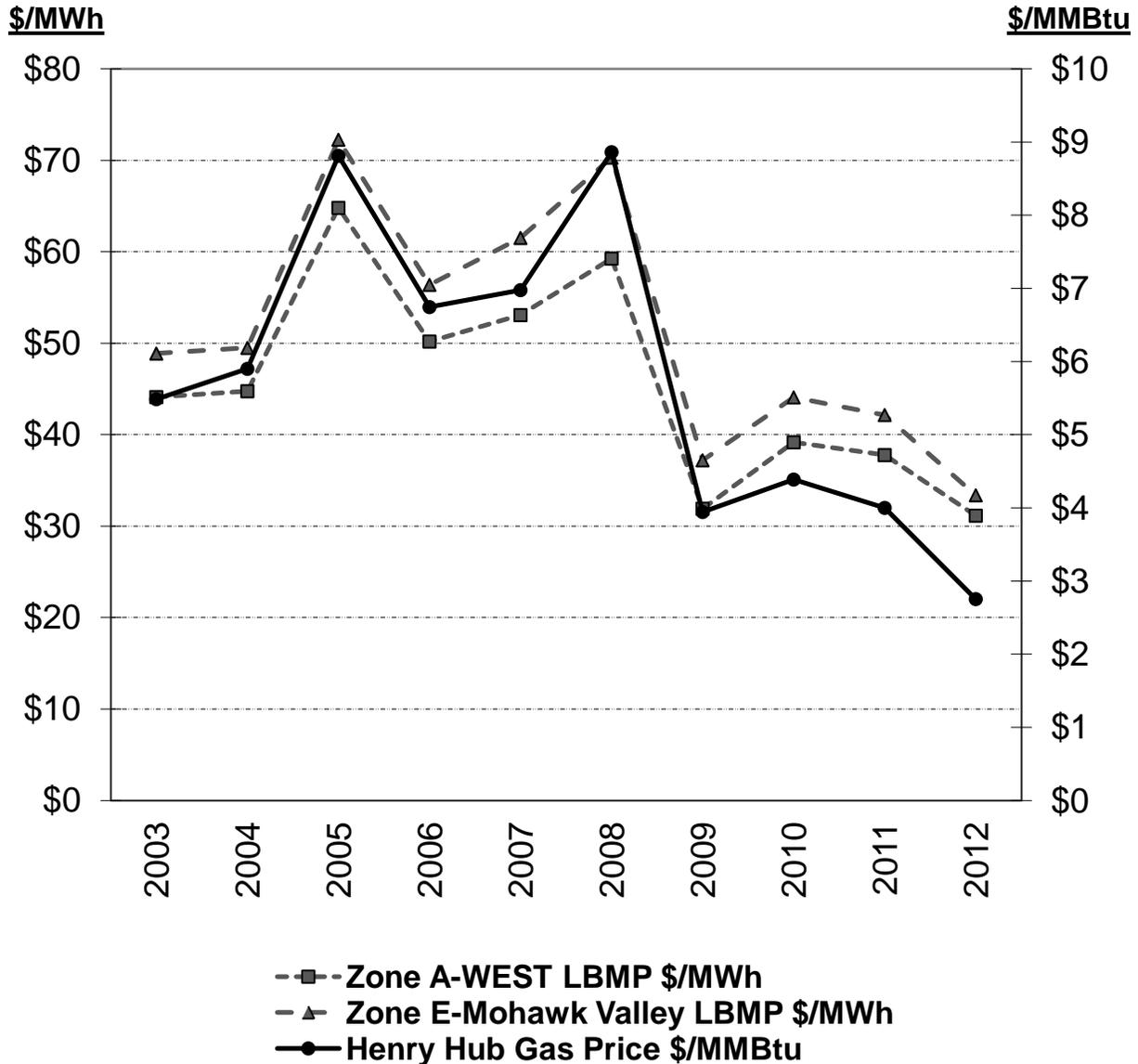
<sup>27</sup> We also noted that NYSERDA contractually requires all winning bidders to submit a report including documentation demonstrating that actual economic benefits have resulted from construction and operation of the RPS facility and requires that failure to show demonstrated benefits will result in non-payment.

sustained basis, with the result that the price of electricity is projected to remain low relative to historical prices. The chart below demonstrates the high correlation between natural gas prices and the prices paid for electricity in Upstate New York, where the Main Tier RPS resources are predominantly located. The second development is that, despite late action in Congress at the end of 2012, the future availability of the federal Production Tax Credit (PTC) is uncertain; the one-year extension recently enacted is insufficient to accommodate the multi-year time-frame needed for the planning and certification of new renewable generation facilities.<sup>28</sup> Both of these factors are likely to increase the cost of the premium necessary to induce a developer to undertake an RPS project.

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<sup>28</sup> The PTC had been in effect for a nearly four-year period, but Congress let it expire on December 31, 2012. On January 2, 2013, Congress temporarily extended the PTC for wind as part of the so-called "fiscal cliff" bill.

## Annual NYISO Day-Ahead Electricity Prices Compared to Henry Hub Natural Gas Prices



These circumstances are important to our analysis because the wholesale electricity price, the Production Tax Credit, and the RPS premium have constituted the primary sources of revenue for RPS projects.<sup>29</sup> For a project commenced in 2008,

<sup>29</sup> The purpose of the Production Tax Credit (PTC) is to support renewable energy based upon the environmental, economic, and (continued ...)

an RPS generator would have received revenues of approximately \$65/MWh from the sale of electricity, \$20/MWh in PTC credits, and an RPS premium of approximately \$15/MWh,<sup>30</sup> amounting to total combined revenues of approximately \$100/MWh. In 2012, the same RPS generator would have received revenues of approximately \$32/MWh from the sale of electricity (a reduction of approximately 50%) making total combined revenues approximately \$67/MWh. That represents a 33% drop in overall revenues.

If we assume a new project requires the same overall level of revenues as the 2008 project, we anticipate that these factors - lower wholesale electricity prices and uncertain availability of the PTC -- will put significant upwards price pressure on the RPS premium factor in the total revenue equation. If natural gas prices remain at the 2012 level for the foreseeable future, a new project that enters construction in 2013 may require an RPS premium of approximately \$45-\$50/MWh to offset the decline in energy revenues. In addition, if the PTC is not renewed beyond 2013, a new project that starts construction in 2014 would not be able to anticipate any PTC credits and thus would require an RPS premium of approximately \$68/MWh to achieve total combined revenues of approximately \$100/MWh.

While these calculations are based on simplified assumptions, they starkly demonstrate a real and significant change in the economic realities of the RPS Program. The

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energy security benefits that renewable energy resources can provide. Instead of the PTC, some wind developers may find it advantageous to opt to receive in place of the PTC an Investment Tax Credit (ITC) equal to 30% of their investment expenditures. The PTC available to non-wind developers may be different or have different eligibility expiration dates.

<sup>30</sup> Case 03-E-0188, supra, New York State Renewable Portfolio Standard Performance Report, April 1, 2013, fig. 3, p. 18.

significant and sustained drop in the price paid for electricity and the inability of developers to rely on any consistency in federal support puts more pressure on the State program than at any time to date.

Given our certainty that the cost of the RPS program under a "business as usual" scenario will rise, we believe it is appropriate and necessary to maximize the value of the potential offsetting benefits that the program can achieve. Our best opportunity to do that at this juncture is to redesign the solicitation to forego RPS financial support for projects that do not provide the same level of offsetting economic benefits to New York as are provided by in-State projects. NYSERDA has shown that the economic benefits provided by in-State projects are substantial in relation to the cost of the RPS premiums needed to induce the projects. Given the expected higher RPS premium costs going forward, we cannot afford at this juncture to expend limited ratepayer funds on projects that do not maximize all of the resulting benefits - in terms of economics as well as energy security and environmental benefits.

In response to the parties who expressed concern for the effect of limiting the bidding pool to in-state bidders, we recognize that this adjustment may have a slight effect on the price paid for RECs. However, we believe that NYSERDA's solicitations will continue to produce a competitively determined price based on the high level of interest expressed by in-State developers since the program's inception. Experience to date shows that the quantity of in-State projects responding to solicitations is sufficiently robust that the elimination of out-of-State bids is not likely to significantly affect the price of awarded contracts or to impair our ability to meet our RPS goals at a reasonable cost. The alternative - permitting out-of-state bids - may only marginally soften the

much greater price impacts of the loss of the PTC and the decreased energy revenues, while foregoing the higher level of benefits provided by an in-State project. This result represents an overall higher cost to New Yorkers than the cost of a program that excludes out-of-state projects. Further, we agree with NYSERDA's statement that the in-state restriction aligns well with the objectives and goals of Governor Cuomo's Energy Highway, particularly the Highway's focus on supporting clean energy.<sup>31</sup>

While we have determined here to change our policy regarding the eligibility of out-of-State projects, it remains within our long-standing goal of structuring the RPS program to maximize the benefits that accrue to New York and to serve important State interests, including supply security, supply diversity, and economic and environmental well-being.

#### POTENTIAL FEDERAL ISSUES

Several parties questioned the legality of NYSERDA's proposed limitation of the bid pool under federal constitutional law. Those entities assert that the exclusion of out of state projects amounts to discrimination against interstate commerce in violation of the "dormant" Commerce Clause. We further understand that NYSERDA takes the view that its actions are protected from such a challenge pursuant to judicially-created principles referred to as the "market participant exception" to the Commerce Clause.

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<sup>31</sup> See New York Energy Highway Blueprint and New York Energy Highway Blueprint Update, both available at <http://www.nyenergyhighway.com/Blueprint.html>. In fact, the Blueprint Update specifically references NYSERDA's pending request for proposals in this proceeding, as well as the petition addressed here.

We are not persuaded that the policy change we are making with this order infringes on any federal Constitutional right or any pre-emptive Congressional power. The record in this matter does not clearly define the interstate commerce interest that the objecting parties believe is impacted by our action. We have not imposed any undue burden on sales of electricity, which are conducted on the federally-regulated interstate markets and are open equally to in-state and out of state producers. The RPS program authorizes NYSEDA to purchase and hold the RECs generated by RPS suppliers. Thus, there is no "market" as that concept is normally understood for Main Tier RECS; NYSEDA is the one and only buyer. No party has suggested that any part of the ratepayer investment represented by those RECs has value in any functional market.

In our view, an RPS contract award amounts to a subsidy directed at encouraging the addition of renewable resources to the State's electricity supply portfolio. The fact that the level of the subsidy is determined through a market mechanism - the competitive auction - does not transform a REC into an article of interstate commerce. It remains at its essence an incentive payment intended to induce private actors to assist us in achieving certain State policy goals. Those policy goals fundamentally represent choices about the characteristics of the electric system infrastructure that will serve the State and its citizens for years to come. We understand that the federal courts have suggested that such state subsidies are outside the purview of the "dormant" Commerce Clause.<sup>32</sup> We also understand that no federal court has

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<sup>32</sup> See Camps Newfound/Owatonna v Town of Harrison, 520 US 564, 589-91 (1997)(noting the legal and practical distinctions between unconstitutional discriminatory taxing schemes and direct subsidies but pointedly not addressing the issues of

(continued ...)

yet ruled on the constitutionality of any state RPS incentive program. We find that the RPS, as a subsidy directed at achieving State objectives, does not impinge upon the dormant Commerce Clause.

Finally, we note that the record shows that developers of projects in other states have access to similar subsidies offered in those jurisdictions; in fact, some 29 of the 50 states have established RPS programs.<sup>33</sup> New York's ratepayers do not have any obligation to subsidize the costs of renewable energy generation beyond New York State borders, and we do not believe the courts would construe the Commerce Clause to create one.

#### SEQRA FINDINGS

Pursuant to our responsibilities under the State Environmental Quality Review Act (SEQRA), in conjunction with this order we find that additional solicitation design details adopted here are within the overall action previously examined by us and will not result in any different environmental impact than that previously examined. In addition, the SEQRA findings of the September 24, 2004 Order are incorporated herein by reference and we certify that: (1) the requirements of SEQRA, as implemented by 6 NYCRR Part 617, have been met; and (2) consistent with social, economic, and other essential considerations, from among the reasonable alternatives available, the action being undertaken is one that avoids or minimizes adverse environmental impacts to the maximum extent practicable.

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subsidies).

<sup>33</sup> Congressional efforts to enact a federal RPS have failed, which further supports our view that we are not dealing with a traditional interstate market here.

The Commission orders:

1. The New York State Energy Research and Development Authority (NYSERDA) is authorized to limit Main Tier bids and Main Tier contracts to bidders proposing to meet their RPS obligations with renewable resource energy generated inside the State or through an offshore generating facility directly interconnected to New York's electrical grid.

2. This proceeding is continued.

By the Commission,

(SIGNED)

JEFFREY C. COHEN  
Acting Secretary

## DELIVERY & RELATED REQUIREMENTS

### 1. Retail Sale Requirement

For electricity to be eligible, it must be demonstrated to the satisfaction of the Commission or its designee that the electrical output of the generation facility either originated in New York State or was contractually delivered into New York State, and was sold to consumers in New York State in a retail sale.

### 2. Delivery Requirement

For electricity to be eligible, it must be demonstrated to the satisfaction of the Commission or its designee that the electrical output of the generation facility was scheduled into a market administered by the New York Independent System Operator, Inc. (NYISO), not by bilateral energy contract (commonly called a "physical" bilateral) wherein the right to the energy is directly transferred to a particular load serving entity, and the energy is generated in accordance with such schedule, and is subject to confirmation. The type of bilateral energy contracts excluded from eligibility does not include financial "hedge" contracts where the right to the energy is not directly transferred to a particular load serving entity but instead is determined in a market administered by the NYISO. Intermittent renewable generation that is difficult to schedule may be sold into the spot market of the control area it is located in as it is generated without simultaneous transmission into the New York Control Area, so long as an equal quantity of energy is transmitted out of the affected spot market into the New York Control Area during the same calendar month (monthly matching). In addition, if the control area of origin has an attributes accounting and tracking system, or an environmental disclosure program, such system and/or program must be able to recognize monthly matched transactions without the double counting of attributes in any jurisdiction.

### 3. System Contract Requirement

Electricity scheduled by way of a system contract - guaranteeing a quantity of energy from any one of a number of generation facilities rather than from a particular generation facility - shall not be eligible unless the quantity of output of each generation facility that actually provided energy generated in accordance with such schedule can be demonstrated to the satisfaction of the Commission or its designee. In addition, if the control area of origin is not the New York Control Area and has an attributes accounting and tracking system, or an environmental disclosure program, such system and/or program must be compatible with the recognition of the quantity of output of each generation facility that actually provided energy generated without the double counting of attributes in any jurisdiction.

### 4. Net Metering

Assuming the quantity of energy is sufficient to be scheduled into a market administered by the New York Independent System Operator, Inc. (NYISO), net electricity produced from Customer-Sited generation facilities (that amount produced above the amount used by the customer) is eligible so long as such net electricity is not sold to the local distribution utility under a mandatory net-metering regime.

### 5. Locational Requirement

Eligibility is limited under the Main Tier to projects located within the State of New York including offshore projects directly interconnected to the New York electrical grid.