

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Proceeding on Motion of the Commission
Regarding a Retail Renewable Portfolio Standard

Case 03-E-0188

REPLY COMMENTS

PETITION FOR MODIFICATION
OF RPS MAIN TIER PROGRAM

Introduction

The New York State Energy Research and Development Authority (NYSERDA) respectfully submits the following Reply Comments in response to the Initial Comments filed on February 19, 2013 regarding NYSEDA's December 14, 2012 Petition for Modification of the RPS Main Tier Program. In the Petition, NYSEDA urged the Commission to limit Main Tier RPS eligibility to projects within the State in order to maximize the achievement of the objectives of the program and to bring the RPS effort more closely into alignment with the goals and recommendations of the 2012 New York Energy Highway Blueprint.

The Initial Comments raise various questions and concerns regarding the basis of NYSEDA's position and the ramifications of the change with respect to the goals and objectives of the RPS Program. NYSEDA's responses follow.

1. Economic Benefits Methodology.

Various parties claim that NYSEDA provided insufficient or no data or methodology as to the economic benefits claims made in the Petition.

Response. NYSEDA's RPS Main Tier contracts require each contractor to demonstrate, after three years of facility operations, that at least 85% of the economic benefits that were claimed in the contractor's Bid Proposal have actually accrued to New York. Failure to make that demonstration results in a proportionate reduction in the contract bid price for the remaining seven years of the contract term.¹ This requirement is based on the Commission Order that

¹ For example, if through the verification process a contractor demonstrates the accrual of 75% of the

authorized the 30% economic benefits evaluation criteria, which stated that “the economic benefits category shall be designed such that any project, regardless where located, would have the same opportunity to quantitatively demonstrate its likely – and verifiable – economic benefits to New York.”² NYSERDA recognizes the importance of the accurate, verifiable quantification of the fiscal benefits of projects receiving RPS Main Tier funding to the integrity of the 30% weighting. Bidders must know that inflated claims of economic benefits will result in severe penalties. The comprehensive process developed by NYSERDA to verify the accrual of economic benefits reflects this priority.

NYSERDA program staff is responsible for reviewing the documentation provided by contractors after the third year of operation, and, in consultation with NYSERDA legal staff, determining whether the actual direct economic benefits were consistent with those claimed in the RFP bid proposals. Records provided as demonstration of benefits differ by project, type of economic benefit claimed, and contractor, but to be acceptable all records must be third party verifiable. Examples of records provided for this purpose include but are not limited to:

- W-2 (Wage and Tax Statement);
- 1099 (Non-Employee Compensation);
- Invoices and accompanying records of payment;
- Payment-in-lieu of taxes (PILOT) or Host Community Agreements with accompanying records of payment;
- Subcontracts with supplier breakdown and associated documentation.

Regardless of the form of documentation, overarching factors considered by NYSERDA throughout this process include: the reasonableness of the claimed expenses, the presence of satisfactory demonstration that an expense was actually incurred, and assurance that expenses were not double counted.

Procedurally, the Economic Benefits verification process consists of 5 primary steps:

- 1) RPS program staff engages each contractor in advance of the report due date to discuss the obligation to demonstrate the actual accrual of economic benefits through the submission of verifiable, defensible documentation confirming the bid proposal claims. Eligible data sources are also reviewed with the contractor.

economic benefits claimed, the bid price payable will be reduced by 25%.

² Case 03-E-0188; Proceeding on Motion of the Commission Regarding a Retail Renewable Portfolio Standard; “Order Authorizing Solicitation Methods and Consideration of Bid Evaluation Criteria and Denying Request for Clarification,” issued and effective October 19, 2006, p. 16.

- 2) RPS program staff reviews the initial submission.
- 3) RPS program staff engages the contractor to review additional data needs; follow up ensues to ensure that NYSERDA is collecting the best and most complete data set available to substantiate economic benefit claims. Should the need arise, RPS program staff engages RPS legal staff for support. RPS program staff may also engage outside support from subcontractors, other state agencies, local taxing jurisdictions, etc. to assist with the independent verification of economic benefits.
- 4) Once a file is complete and thoroughly evaluated, a cover memo and summary report are prepared and circulated internally along with all supporting documentation for approval by NYSERDA legal and senior RPS program staff.
- 5) Contractors are notified of their compliance status in writing.

As of December 2012, 18 facilities have passed their three year anniversary of operations. These facilities include 8 wind farms, 2 biomass facilities and 8 hydroelectric facility upgrades, which are all located in New York. RPS staff has completed a thorough review of the documentation provided to substantiate the economic benefits claims made for each of these facilities. Through the process described above, over 30 thousand documents were received and examined by RPS staff.³ All 18 facilities were determined to be at or above their compliance obligation of 85% of the claimed New York benefits.

The referenced transactional data acquired through the verification process was provided to an economist specializing in economic impact evaluation through a consulting agreement with Sustainable Energy Advantage, LLC (SEA). SEA was tasked with assessing NYSERDA's methods of collecting and organizing economic benefits data in order to provide assurance that the quality and organization of the data was sufficient for future analysis. Once this assurance was obtained, the compiled and confirmed data was provided to SEA to conduct a comprehensive analysis of the direct spending data obtained through the verification process and to extrapolate these benefits through the life of each project.

The findings of the analysis described above corroborate and elaborate on the statements made in NYSERDA's December 2012 Petition relating to the significant direct economic impacts of the 18 RPS facilities with verified benefits. Key findings of this effort include the verification of over \$440 million already spent in New York through the first three years of commercial operation for these 18 facilities. Extrapolation of anticipated long term expenditures such as

³ Most of the referenced documents were submitted to NYSERDA under a claim of confidentiality under Public Officers' Law § 87(2)(d), as records submitted to an agency by a commercial enterprise.

salaries, payment-in-lieu-of-taxes agreements and host community payments, operations and maintenance expenses and payments for land use or fuel add over \$710 million in expenditures over the projected life of these projects. In total, these projects are anticipated to add over \$1.1 billion to the New York economy through their respective operating lives.⁴

As is outlined in Table 1 below, based on analysis of the extensive data collected for the 18 facilities with verified benefits, approximately \$29 in total direct benefits will occur as a result of project expenditures in New York for every MWh of renewable energy produced.⁵

	New York Benefit/MWh. Generated
Hydro	\$12/MWh
Wind	\$25/MWh
Biomass	\$53/MWh
Weighted Average	\$29/MWh

Table 1

The findings are consistent with the conclusions of the 2009 KEMA study, which estimated the anticipated economic impacts of the projects selected through the first three Main Tier Solicitations to be \$25/MWh.⁶

Job creation was also an important RPS objective for which results were quantified as a result of this effort. The analysis of jobs data for the 18 verified RPS facilities indicated that over 250 direct jobs were created at the facilities themselves through the first three years of commercial operation.

All told, over 1,000 in-state businesses benefited by the development, construction and operation of the referenced 18 facilities. These businesses provided materials, equipment and services

⁴ The total expenditures in this paragraph were calculated in nominal dollars.

⁵ The results listed in this table are based on the assumption that facilities will operate at their proposed capacity for the remainder of the facility life. Future generation may differ from this figure, particularly for biomass projects which face a greater level of future uncertainty than other renewable generation. However, NYSERDA's contract structure only allows for payment when generation occurs which, in the circumstance of underperforming generation, would result in a corresponding decrease in RPS contractual payments as well.

⁶ KEMA Study, 2009. Table 11 on pp. 4-2.

required for the projects and the scope of their efforts ranged from supplying gravel and cranes to engineering and legal support. Of additional significance is the fact that many of these businesses provided goods or services for multiple projects.

2. Value of Economic Benefits v. Potential for Lower Prices.

Various parties questioned the basis of NYSERDA's conclusion that no amount of reduction in the bid price for a ten-year NYSERDA contract from an out-of-state project can offset the loss of 20 years of economic benefits from a project built in New York. These parties contend that a restriction of the market to projects in New York would shrink the bidding pool, and that NYSERDA has not sufficiently demonstrated that any increase in economic benefits would not be offset by the higher bid prices that may result from the decrease in competition.

Response. The conclusion was based on the verified data and the fact that any program cost savings that may result from a lower bid from an out-of-state project are limited to the 10 year term of the RPS contract, while the economic benefits of a project located in New York last for the life of the project – typically 20 years or more. As is described in the previous section, the weighted average economic benefits amount to \$29/MWh.⁷ An out-of-state bid would therefore have to be \$58 lower than an in-state bid for the relative values to match. Stated differently, NYSERDA would have to be prepared to award an in-state bid of \$59 before any out-of-state bidder could approach parity with a New York project. NYSERDA has never awarded a bid that high and does not anticipate ever doing so.

3. Consistency Between the Goals and Objectives of the Program.

At least one commenter states that the proposal to limit eligibility to New York projects is improperly based on the “ancillary” environmental, economic and energy security benefits of the program, and would likely result in an increase in bid prices and program costs, an outcome that is inconsistent with the “primary” goal of a lowest-cost RPS Main Tier program.

Response. The characterization of the environmental, economic and security objectives of the program as “ancillary” is inaccurate. As the RPS orders make clear, the very reason the program was established was to create a vehicle to pursue those objectives; the acquisition of renewable energy credits (RECs) is nothing more than a mechanism to secure performance and a statistical tool to measure progress towards the “goal,” which represents the magnitude of the effort and expectations for overall results. As was stated by another Commenter, the economic value of each transaction must be evaluated based on a consideration of the expected return on

⁷ The benefits and costs in this analysis are presented in nominal dollars.

investment, and not merely on the purchase price.⁸ In NYSERDA's view any other approach would be in dereliction of the fiscal responsibility we accept on behalf of the State's ratepayers in accepting the RPS funds.

The suggestion that the proposed limitation is contrary to the goal of the RPS program also ignores that the Commission has explicitly endorsed the return on investment principle and acknowledged the disparity in value between in and out-of-state RECs. The Commission authorized the addition of the economic benefits to New York evaluation criteria in the competitive Main Tier RFPs in order to reflect the relative value of in versus out-of-state RECs towards the achievement of the ultimate objectives. The Commission authorized the current 30% weighting on its understanding that, based on information available at the time, in-state RPS projects offered a "relative value" of "perhaps as much as \$10/MWh." In declining to establish the percentage at 50%, which had been advocated by "many commentators," the Commission stated that employment of the 30% factor would provide the State with "experience in the use of economic development criteria."⁹

We now have years of experience with the use of the economic development criteria and a substantial set of verified financial data as to the relative economic benefits value of out-of state projects to New York. As is explained and described in the preceding section, recently verified information and data regarding the actual economic benefits that accrue to New York when projects are built within the State demonstrates that the benefits exceed the \$10/MWh estimate, on which the 2006 Order was based, by nearly three times. Given the Commission's acknowledgement of the primacy of the program's objectives as opposed to its statistical status, and the new information as to the magnitude of the difference between the \$10 forecasted estimate and the actual economic benefits, it is NYSERDA's position that a limitation of eligibility to projects constructed in New York would be in the public interest.

Finally, NYSERDA has, from the beginning, exercised fiscal prudence in all of its decisions regarding the finances of the RPS program, and remains as committed as any party to the concept of lowest cost, as determined with reference to the value of the product to be purchased. As of the end of 2012, NYSERDA's Main Tier MWh contractual commitments represent roughly 47% of the numerical 2015 goal; the funds committed under those contracts represent roughly 38% of the total funding.¹⁰ To the consternation of some, we have on several occasions

⁸ Comments of ACENY, p. 3.

⁹ October 19, 2006 Order, p. 17 (for wind projects).

¹⁰ 2015 Energy production associated with Main Tier facilities under contract is projected at 4.49 million MWh, or 47% of the Main Tier target. Contract commitments, inclusive of Maintenance Tier resources, total \$876.6 million, or 38% of the Main Tier budget.

declined to issue awards in response to bids that were, in the view of NYSERDA and Department of Public Service management, too high, even though those bids were technically eligible and the funds were available.

The record suggests that the Commission's initial understanding of the magnitude of the disparity between the economic benefits between in-state and out-of-state projects was understated by nearly three times. NYSERDA submitted the Petition to bring to the Commission its concern that continued employment of the 30% weighting criteria will lead to award decisions that are not in the financial interest of the New York ratepayers who support the program.¹¹

4. Consistency with the Energy Highway Blueprint.

One commenter stated that NYSERDA "extrapolated" the Energy Highway Blueprint's direction that NYSERDA issue an RFP for "New York" resources into one that permanently excludes out-of-state ones. Others claim that the restriction will contradict or conflict with the Blueprint's purpose, and that the change is not necessary to bring the program into alignment with the Blueprint.

Response.

As was stated in the Petition, the Blueprint recommends a comprehensive short, mid, and long-term strategic initiative to modernize the State's power generation and transmission system. The Blueprint makes clear New York's interest in developing upstate renewable generation for the purposes of meeting long term environmental goals,¹² and removing the transmission bottlenecks between upstate generation and downstate load centers. One of its most clear and immediate recommendations is that NYSERDA issue a competitive solicitation "for renewable energy resources in New York" by the end of 2012.¹³ Because the current RPS rules do not accommodate that restriction, NYSERDA issued an RFP for resources without geographic restrictions, while alerting all bidders that bids would be evaluated and awards would be made in accordance with the Commission's final determination on the Petition. NYSERDA's recommendation that the limitation to in-state resources be adopted as a permanent measure, while entirely consistent with the Blueprint, is based on NYSERDA's own observations regarding the advisability of the change, as expressed in the Petition and these reply comments.

¹¹ As was stated in the Petition, NYSERDA believes that the 30% criteria should stay in place, as it encourages purchases and expenditures in New York, whether the project is located in New York or elsewhere. Petition at p. 4.

¹² Blueprint at 61-63.

¹³ Blueprint at p. 61.

While the availability of affordable energy is recognized by the Blueprint as important to New York,¹⁴ the Blueprint recognized that the recommended actions will serve to lower wholesale energy prices in the downstate area, while reducing air emissions in the New York City area and promoting the construction of renewable energy projects and economic development upstate.¹⁵ Removal of the transmission constraints will also mitigate the contraction of the supply market that may result from the in-state limitation on RPS support. In NYSERDA's view, the recommended change in RPS Main Tier eligibility is entirely consistent with, and will bring the program into closer alignment with the recommendations of the Blueprint.

5. Retaliation; Need for the Change.

The comments included statements that limiting New York's RPS to in-state projects may encourage other states to discriminate against New York projects, that the limitation is unnecessary because, due to the 30% economic benefits weighting and the hourly delivery requirement, very few out-of-state projects have received awards, and that NYSERDA has not pointed to any changed circumstances that support the change.

Response. A few observations about the markets surrounding New York are relevant. First, nearly all of the renewable programs in the surrounding markets already exclude New York projects from participation. New York projects are currently ineligible to participate in Pennsylvania's Alternative Energy Portfolio Standard.¹⁶ New York projects are not eligible to participate in the Province of Quebec's feed-in tariff, or in any other renewable program in Quebec or Ontario.¹⁷ The Sustainably Priced Energy Enterprise Development (SPEED) Program in Vermont promotes renewable energy development located in Vermont.¹⁸ Massachusetts attempted to exclude New York projects in 2010, before withdrawing the restriction in the face of a legal challenge.¹⁹

¹⁴ Blueprint at p. 28.

¹⁵ Blueprint at pp. 39, 67.

¹⁶ PA Senate Bill 1030 states that energy derived only from alternative energy sources inside the geographical boundaries of this Commonwealth or within the service territory of any regional transmission organization that manages the transmission system in any part of this Commonwealth shall be eligible to meet the compliance requirements under Alternative Energy Portfolio Standard.

¹⁷ The Ontario Power Authority Feed-In Tariff Program promotes greater use of renewable energy sources including on-shore wind, waterpower, renewable biomass, biogas, landfill gas and solar (PV) for electricity generating projects in Ontario (http://fit.powerauthority.on.ca/sites/default/files/page/FIT_Rules_Version_2.1.pdf)

¹⁸ Vermont Public Service Board (Board) Rule 4.304 requires that SPEED projects shall be located within Vermont.

¹⁹ Unlike New York's program, the Massachusetts RPS operates by imposing renewable energy requirements on electric distribution companies within the state. See generally CESA Report at <http://lawofficesofcarolynelefant.com/renewables/shore/wp-content/uploads/2011/04/cegcommerceclause.pdf>.

As to the necessity of the restriction, while it is historically true that the vast majority of awards have been issued to New York projects, there is no guarantee that future results will be consistent. Pennsylvania's RPS program is saturated, and thus the New York market has become more attractive to projects in the PJM control area. Several application packages from out-of-state projects were received in response to RFP 2554. In any event, the position that New York should not adopt it merely because it is not absolutely necessary is not persuasive.

6. Incremental Energy.

The comments include questions regarding the importance of the delivery of incremental energy from external projects to achievement of the objectives of the program.

Response. As was stated in the Petition, the extent to which New York will gain any environmental or energy security benefits from an out-of-state facility is questionable, because those benefits are dependent on the delivery of incremental energy to New York, which is difficult if not impossible to verify.

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.

While NYSERDA recognizes that the Commission Orders may not specifically state the requirement that the delivered energy be incremental, the principle is inextricably tied to achievement of the environmental objectives.

7. Grid Integration.

At least one party states that the limitation of eligibility to projects in New York would harm the interconnectedness between markets.

Response. The RPS program does not, and will not if the in-state limitation is adopted, have any effect on the interconnectedness of energy markets. In fact, the RPS program was designed to minimize any interference with the energy markets. The RPS program does not place any restriction on the flow of energy of any type into the New York market. The ability of any party with the wherewithal to bid its energy, including its renewable energy into the New York wholesale market, or to engage in bilateral transactions with New York load will continue.

8. Legal Issues.

Several parties expressed concern that the exposure to legal challenge under the Commerce Clause is unwise and will create an uncertain investment environment and that NYSERDA's "conclusion" that the restriction is insulated from Commerce Clause challenge is "pure speculation," and unsupported by any legal analysis.

Response. The Commerce Clause provides that "Congress shall have the Power . . . to regulate commerce . . . among the several states."²⁰ Because the clause represents a positive grant of power to Congress it has been interpreted to contain an implied limitation on the power of the states. This "dormant," or "negative" aspect of the Commerce Clause prohibits states from engaging in regulation of interstate commerce. When presented with a dormant Commerce Clause challenge to a state action that is facially discriminatory, the initial inquiry involves a determination of whether the state action consists of regulation of the market, which will render the action virtually *per se* invalid, or participation in the market, in which case the action will be exempt from further Commerce Clause analysis. When the state enters the market as a "private actor," the dormant Commerce Clause does not govern its activities.

As was stated in the Petition, New York State, through central procurement by an entity created by the State legislature, directly participates in the market, using funds collected exclusively from New York ratepayers to incentivize an increase the amount of renewable energy used in the State for the benefit of the State's environment, energy security and economic health. The terms of the competitively-awarded contracts with suppliers relate directly and only to the delivery and purchase obligations of the parties during the duration of the RPS contract. The Program imposes no post-contract restrictions on any party, and does not prohibit or restrict the entry of

²⁰ U.S. Const. Art. 1, § 8, cl 3.

renewable energy or RECs into New York or otherwise regulate the marketplace. New York's RPS program operates through direct participation in the market, not regulation of the market, and therefore it does not violate the dormant Commerce Clause.

It should be noted that the Program does not and will not place any restriction or impose any requirement regarding the domicile, residence or origin of any applicant. Applicants need not have any New York presence; it is the facility that must be located in New York.

9. Procedural Issues; 2013 Review.

Several parties suggest that any decision on the Petition should be issued as a part of the 2013 Review process, or that the rulemaking procedure should be extended in some manner beyond the receipt of Reply Comments.

Response. NYSERDA points out that, by offering the parties the opportunity to file Reply Comments, the Commission has already exceeded the notice and comment requirements imposed by the State Administrative Procedures Act. Further, while the substance of the proposed change in the Main Tier rules is by any measure significant, the issues it presents are not, at their core, overly complex, and their consideration does not depend on factual information that has not been compiled.

Finally, any significant delay in the issuance of an order will threaten the loss of the value, to New York, of the federal production tax credit (PTC). The PTC, which is worth \$22/MWh (wind), was recently extended through December 31, 2013; prospects for further extension are at best uncertain. The standard contract for awards to be issued through the pending RFP 2554, for which we received bids on February 14, 2013 requires projects to be operational by that same date. A significant delay in the issuance of awards will jeopardize those projects' ability, should they receive an award, to meet the contractual deadline and to capitalize on the enormous value of the PTC. Moreover, the RFP rules required the bidders to guarantee their price bids for sixty days, or through April 18, 2013. Thus, a significant delay will threaten the viability of the projects from which we received bids to RFP 2554. Replacement of those same projects, in a non-PTC market, will come at enormous additional cost.²¹

²¹ The additional cost will far exceed \$22/MWh; incentive payments are taxable, while the value to a project of the PTC is not. Replacement of the value of a \$22 PTC with program incentives can be expected to cost $\$22 \div (1 - \text{Tax Rate})$.

Conclusion

Limiting eligibility to projects within the State will maximize achievement of the objectives of the program and will bring the RPS effort into alignment with the overall strategic initiative of the 2012 New York Energy Highway Blueprint. The record suggests that the Commission's initial understanding of the magnitude of the disparity between the economic benefits between in-state and out-of-state projects was understated by an order of magnitude. NYSERDA submitted the Petition to bring to the Commission its concern that continued employment of the 30% weighting criteria inadequately accounts for the demonstrated economic value that in-state resources bring to New York, and will lead to award decisions that are not fiscally prudent.

NYSERDA therefore respectfully requests that the Commission issue an order revising the rules of the Renewable Portfolio Standard Program Main Tier to limit eligibility to projects located in New York State, and making such rules applicable to all awards issued subsequent to the issuance of the order.

NYSERDA appreciates the opportunity to provide these Reply Comments.

Dated: March 6, 2013

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Peter R. Keane". The signature is stylized and written in a cursive-like font.

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