STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Proceeding on Motion of the Commission to Implement a Large-scale Renewable Program and Clean Energy Standard	**Case 15-E-0302**

COMMENTS OF MULTIPLE INTERVENORS ON THE STAFF TIER 2 REPORT

Dated: January 8, 2018

MULTIPLE INTERVENORS
540 BROADWAY, P.O. BOX 22222
ALBANY, NEW YORK 12201-2222
(518) 426-4600

PRELIMINARY STATEMENT

In response to the Notice Soliciting Comments ("Notice") issued by the New York State Public Service Commission ("Commission") on October 20, 2017 in Case 15-E-0302, Multiple Intervenors, an unincorporated association of approximately 60 large industrial, commercial and institutional energy consumers with manufacturing and other facilities located throughout New York State, hereby submits these Comments on the *Staff Report Regarding Retention of Existing Baseline Resources Under Tier 2 of the Renewable Energy Standard Program* (the "Report"), issued by New York State Department of Public Service Staff ("Staff") on October 19, 2017.[1]

In the Report, Staff proposes, *inter alia*, revised eligibility requirements for technologies to receive maintenance payments under Tier 2 of the Clean Energy Standard ("CES"), and revisions to Staff's processes for determining whether customer-funded maintenance payments are appropriate for certain projects and, if so, the magnitude of such payments. Multiple Intervenors has made clear throughout this proceeding that it is extremely concerned about the cost impacts of the CES, and has urged the Commission to take care that, in establishing and implementing policies in furtherance of the State's clean energy goals, customers (and, in particular, price-sensitive, energy-intensive customers) are not burdened unduly with excessive and/or unnecessary costs. Based on its evaluation of the Report, Multiple Intervenors has concerns regarding: (1) Staff's proposed expansion of the Tier 2 eligibility requirements to allow projects that previously received customer-funded subsidies to enter into Tier 2 maintenance contracts for

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[1] Case 15-E-0302, *Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard*.

another round of customer-funded financial assistance; and (2) the proposed modifications to Staff's calculation of "to-go costs" used to determine how much maintenance support a facility needs to continue operating safely and reliably. Each of these issues is discussed in turn below.[2]

BACKGROUND

Pursuant to a Commission order expanding the scope of this proceeding to encompass the development of the CES, Staff filed a *Staff White Paper on Clean Energy Standard* ("Staff White Paper") on January 25, 2016, in which Staff proposed, *inter alia*, establishing a Tier 2 to support the substantial fleet of non-State owned or contracted renewable energy generators already in operation and available to meet New York's CES targets.[3] Specifically, Staff proposed dividing Tier 2 in to two sub-tiers, Tier 2A and Tier 2B, whereby Tier 2A would attract renewable generation supply for which New York must compete with other states, and Tier 2B would provide sufficient revenue to maintain New York's renewable baseline which is not eligible to sell their renewable energy credits in other states, such as small hydro facilities.[4]

On April 22, 2016, Multiple Intervenors filed Comments on the Staff White Paper (1) questioning the need for, and the proposed structure of, Tier 2; (2) recommending that renewable generation facilities only be eligible for Tier 2 subsidies if they could demonstrate a need for such subsidies in order to maintain operations; and (3) arguing that there is no need for customers to subsidize renewable generation facilities that already were, or currently are being,

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[2] Staff also proposes a number of other revisions to Tier 2 (*e.g.*, contract terms, different review tracks, *etc.*) upon which Multiple Intervenors advocates no position here. Multiple Intervenors' decision to focus its Comments on the two issues discussed below should not be construed as support for or agreement with Staff proposals not addressed explicitly herein.

[3] Case 15-E-0302, *supra*, Staff White Paper on Clean Energy Standard (issued January 25, 2016) ("Staff White Paper").

[4] Staff White Paper at 23-24.

subsidized under the Renewable Portfolio Standard ("RPS") program administered by the New York State Energy Research & Development Authority ("NYSERDA").[5] Multiple Intervenors also recommended in its White Paper Comments that the cost of any subsidies provided to renewable generation facilities under Tier 2 must be less than other options available to New York to meet CES objectives, and that the Commission should focus on minimizing the cost of the CES to customers.[6]

On August 1, 2016, the Commission issued an Order formally adopting the CES.[7] Notably, in the CES Order, the Commission declined to adopt Staff's proposed Tier 2 structure. Specifically, the Commission noted that the facilities that would be eligible for Tier 2A payments primarily were wind facilities that likely already recovered all or most of their initial capital costs (and, therefore, should be profitable even with low market prices for energy and capacity), and there was no imminent risk of losing the emissions attributes associated with these facilities to other States.[8] In apparent recognition that many potential Tier 2 facilities previously received customer-funded subsidies for a decade (or longer) under the RPS, the Commission also concluded that there was no need to provide such facilities "with additional New York consumer support" for their emission attributes.[9] Finally, the Commission ruled that there was no need for a Tier 2B sub-tier except for the concern that "the clean energy attributes of these facilities may be at risk because

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5 Case 15-E-0302, *supra*, Multiple Intervenors' Initial Comments on White Paper (filed April 22, 2016) at 28-29 ("White Paper Comments").

6 White Paper Comments at 28.

7 Case 15-E-0302, *supra*, Order Adopting a Clean Energy Standard (issued August 1, 2016) ("CES Order").

8 CES Order at 116.

9 *Id.*

they may fail financially and retire for the lack of sufficient overall revenues due to the failure of the markets to fully internalize the value of their clean energy and fuel diversity benefits."[10]

Instead, the Commission generally renewed the RPS maintenance program in a new Tier 2, whereby eligibility for maintenance support has been limited to run-of-river hydroelectric facilities of 5 MW or less, wind facilities, and biomass direct combustion facilities that were in commercial operation any time prior to January 1, 2003 and originally were included in New York's baseline of renewable resources calculated when the RPS program was first adopted.[11] In order for an eligible generation facility to receive a maintenance contract under Tier 2, it initially must demonstrate that, but for financial assistance, the facility would cease operations. Importantly, under the existing maintenance program, customers only are required to provide financial assistance to a level adequate to allow a facility to cover its future operating costs and any necessary future capital costs (referred to as "to-go costs"), but such assistance need not cover all sunk costs.[12]

Thereafter, Staff filed the Report on October 19, 2017, seeking modifications to Tier 2. As summarized above, Staff proposes in the Report to, *inter alia*: (i) modify the threshold vintage requirement for eligibility for Tier 2 maintenance payments from January 1, 2003 to January 1, 2015, and allow generators that previously received RPS payments or other subsidies to be eligible for a Tier 2 maintenance contract; and (ii) modify the to-go costs calculation to include a risk contingency component of a maintenance award equal to 5% of the forecasted

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[10] *Id.*

[11] *Id.* at 117.

[12] *See* Case 03-E-0188, *Proceeding on Motion of the Commission Regarding a Retail Renewable Portfolio Standard*, Order Approving Modifications to Maintenance Resource Category (issued October 31, 2005) at 3.

operations and maintenance ("O&M") costs, as well as a return on capital for new capital expenditures required to maintain the safe, efficient operation of facilities. With respect to the latter, Staff proposes in the Report that "new capital expenditures must be installed after the Tier 2 application process is initiated and any return on these investments will be subject to a showing that the investment was needed in order to maintain safe and reliable operation … [e]xisting, or "sunk", capital costs will not be subject to a return as they are not considered to-go costs."[13]

Multiple Intervenors advocates no position as to whether the threshold vintage requirement for eligibility for Tier 2 maintenance payments should be modified from January 1, 2003 to January 1, 2015, as proposed by Staff. Importantly, however, as detailed herein, Multiple Intervenors opposes Staff's proposal that facilities that previously were subsidized by customers under the RPS – typically pursuant to contracts that are or were ten years or longer in duration – should be made eligible for additional customer-funded payments under Tier 2 of the CES. At some point, customers' obligations to subsidize facilities that otherwise are uneconomic must cease. Additionally, Multiple Intervenors is concerned that the level of compensation proposed by Staff under Tier 2 may be excessive and warrants modification.

[13] Report at 15.

COMMENTS

POINT I

RENEWABLE PROJECTS THAT PREVIOUSLY RECEIVED CUSTOMER-FUNDED SUBSIDIES SHOULD NOT BE ELIGIBLE FOR TIER 2 MAINTENANCE PAYMENTS

Currently, in order to be eligible for Tier 2 maintenance payments, facilities must have begun commercial operation prior to January 1, 2003 (*i.e.*, were included in New York's baseline of renewable resources when the RPS program first was adopted). In the Report, Staff recommends that this vintage requirement be revised such that facilities would be eligible for Tier 2 maintenance payments if they were in commercial operation prior to January 1, 2015. According to the Report, such expanded eligibility would include "facilities that have previously received an RPS Main Tier or maintenance contract if the contract has expired and the facility can demonstrate and meet the financial need criteria…."[14] Multiple Intervenors advocates no position as to whether the threshold vintage requirement for eligibility for Tier 2 maintenance payments should be modified from January 1, 2003 to January 1, 2015, but it strongly opposes the proposed expanded eligibility of facilities that already have received customer-funded subsidies under the RPS.

From Multiple Intervenors' perspective, modifying the existing vintage requirement from January 1, 2003 to January 1, 2015, in and of itself, is neither particularly compelling nor particularly objectionable. Rather, the critical aspect of the Report that Multiple Intervenors opposes is Staff's proposal that facilities previously receiving customer-funded

[14] *Id.* at 10. Staff explains that the revised vintage proposal reflects the fact that the CES uses a different baseline (*i.e.*, calendar year 2014) to determine the mix of renewable resources in New York State, and to set annual renewable procurement targets toward the CES goal that 50 percent of New York's electric generation come from renewable sources by 2030. Such explanation disregards that, with respect to the State's reliance on renewable generation, the CES really is just a further extension of the RPS as opposed to some unique initiative.

subsidies under the RPS would become eligible to receive even more financial assistance from captive customers. The Commission has an obligation to protect customers, and forcing them to subsidize the same facility repeatedly and/or indefinitely is contrary to the public interest.

Pursuant to the RPS, customers were required to pay substantial surcharges to subsidize renewable generation facilities that otherwise would not have been economic. Such subsidies were intended to be temporary, however, and not endure in perpetuity. Indeed, when the Commission first established the RPS in 2004, it recognized the need to promote a sustainable, competitive market for renewables, otherwise its initiative "*could result in an industry that is perpetually dependent upon government-mandated subsidies*."[15] Pursuant to the RPS, numerous facilities were provided with substantial and long-term financial assistance, at the expense of captive customers who had no say in the matter, pursuant to contracts that are or were ten years or longer in duration. At some point, the perceived "need" for customers to continue subsidizing the same facilities year after year has to end. In fact, the Commission never intended customer obligations under the RPS to be indefinite. Rather, it stated in 2004 that: "We believe an important objective of the RPS program is to stimulate and complement voluntary/competitive renewable energy sales and purchases (or 'green markets') so that these competitive markets, *not government mandates*, sustain renewable activity *after the RPS program ends*."[16]

Ironically, when the Commission first embraced competition in electric generation, one of the anticipated benefits was that the risks of developing and operating generation projects, including the risks associated with market prices and compensation, would be shifted away from

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[15] Case 03-E-0188, *supra*, Order Regarding Retail Renewable Portfolio Standard (issued September 24, 2004) at 12 (emphasis added).

[16] *Id.* at 4 (emphasis added). Now, 14 years later, the Commission continues to rely on government mandates and the RPS program has yet to end; it simply has been renamed.

utility customers and onto developers that voluntarily assumed such risks. Under Staff's proposal, however, customers would remain responsible for certain renewable generation facilities long after subsidizing their development and operation over an extended period of time under the RPS.

Multiple Intervenors contends that Staff's proposal to allow facilities that previously were subsidized under the RPS to receive additional subsidies under Tier 2 of the CES would result in customers paying twice for the same thing. Pursuant to the RPS, customers paid billions of dollars in surcharges to subsidize the development and the operation of renewable generation facilities. While the Commission chose the ten-year contract duration that was used widely under the RPS, renewable owners and developers were responsible for determining how much financial assistance would be required (in the form of bids submitted) to ensure that their facilities thereafter would be self-sustaining. It is reasonable to assume that the voluntarily-submitted bids reflected the financial compensation necessary to render proposed projects economic and profitable over the long-term. The Commission, via NYSERDA, administered the RPS, and owners and developers of facilities chose willingly to proceed with their projects under long-term RPS contracts with no assurance or reasonable expectation of additional, post-contract financial support from customers. Given the substantial financial support provided under the RPS, it is highly objectionable that the same facilities that were built and operated on the backs of captive customers should get another bite at the apple in the form of a new round of financial subsidies under a revised Tier 2.

It bears emphasizing that while NYSERDA did not accept every RPS bid submitted, the ones that were accepted were prepared voluntarily by interested owners and developers of renewable projects. Those owners and developers chose (i) to submit bids in response to NYSERDA solicitations, (ii) the amount of financial assistance to be sought from

customers, (iii) whether to execute an RPS contract, and (iv) whether to develop and operate their projects in exchange for RPS subsidies of a specific magnitude and duration. While customers became responsible for the considerable cost of those subsidies, the owners and/or developers of the facilities assumed all other business risks associated with their projects, including, but not limited to, future operating costs, future capital costs, and future wholesale (or retail) market revenues. Pursuant to Staff's proposal to modify Tier 2 eligibility criteria to include previously-subsidized facilities, those business risks would be shifted, inequitably, onto captive customers.

It also bears noting that the financial subsidies provided by customers under the RPS typically were without condition or potential recoupment. For instance, when wholesale market prices were much higher (as they were for many years during the RPS), owners and developers were under no obligation to return any "excessive" profits to customers. Rather, if market prices were higher than anticipated, or needed, RPS facilities still retained all RPS contract amounts paid for by customers. Thus, it seems extraordinarily inequitable that while customers were without resort when market prices were higher (and, in some years, much-higher), they would be required under Staff's proposal to bail out previously-subsidized facilities now that market prices are lower.

Moreover, Staff's proposal to expand the Tier 2 eligibility criteria apparently includes no review of how previously-subsidized facilities handled their finances. For instance, when market prices were higher, and certain facilities were being subsidized by customers under the RPS for ten years or longer, those facilities presumably had opportunities to reinvest in their facilities, implement necessary capital projects, and retain profits for use when market prices were lower. As Multiple Intervenors understands Staff's proposal, it would not matter how a facility's owner previously utilized its customer-funded RPS payments. For instance, if, hypothetically, a

renewable generation owner neglected to reinvest in its facility or take any actions to lower future operating costs or improve the facility's long-term economics, it would not be precluded from pleading financial hardship now and seeking additional customer-funded subsidies under the threat of deactivation.

For the foregoing reasons, while Multiple Intervenors advocates no position on Staff's proposal to modify the existing Tier 2 vintage requirement from January 1, 2003 to January 1, 2015, it strongly opposes that aspect of the proposal which would render facilities previously subsidized by customers under the RPS, typically for ten years or longer, eligible for additional subsidies under Tier 2 of the CES. The Commission should reject that aspect of Staff's proposal and protect customers from the obligation to fund repetitive and inequitable subsidies of the very same facilities.

POINT II

THE CALCULATION OF TO-GO COSTS ONLY SHOULD ENSURE THAT A FACILITY HAS ENOUGH FUNDING TO OPERATE SAFELY AND RELIABLY

With respect to how much maintenance support an applicant facility should receive, Staff proposes including in its calculation of the facility's to-go costs: (1) a risk contingency equal to 5% of forecasted O&M costs; and (2) a return on capital for new capital expenditures required to maintain safe, efficient operation of the facility. Multiple Intervenors recommends the following modifications to Staff's proposal to ensure that any Tier 2 maintenance contract awarded to an eligible renewable generation facility provides only the necessary funding to meet the shortfall between the facility's projected future revenues and projected future to-go costs, and allow the facility to continue operating safely and reliably, consistent with the stated purpose of Tier 2.

First, with respect to the 5% risk contingency, Multiple Intervenors notes that Staff's proposal is predicated on a perceived risk that using forecasted revenues and forecasted expenses to determine a payment amount may not incent a developer to continue operations, because the maintenance payment may turn out to be insufficient to actually cover future costs. Importantly, however, the opposite also is a possibility. That is, providing an additional 5% on top of forecasted O&M costs could result in *overpayments* to eligible facilities.[17] To guard against unnecessary overpayments (by customers), Multiple Intervenors recommends that, once a facility's maintenance contract expires, it should be required to submit a detailed accounting of its revenues earned over the lifetime of the maintenance contract (including the amount of subsidies received) compared to operating costs. If the maintenance payments were higher than necessary to cover its costs, the facility should be required to return the excess funds to customers. Such provision would protect customers in the event Staff's proposed 5% "adder" is unnecessary. Alternatively, the proposed 5% adder should be rejected.

Second, regarding Staff's proposal to include within the definition of to-go costs a return on capital for new capital expenditures, Multiple Intervenors recommends that an eligible developer applying for a Tier 2 maintenance contract should be required to include, as part of its application, (i) a detailed explanation of the capital expenditures that will be made at the facility over the term of the maintenance contract, (ii) a proposed timeline of when such investments will be made, and (iii) a demonstration that such capital expenditures are necessary for the facility to continue operating safely and reliably. Each maintenance contract also should provide that any approved return of and on capital only would be paid to the facility once it has been demonstrated

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[17] Staff proposes that maintenance contracts be awarded on a three-year standard contract term. However, if the Commission approves a contract term longer than three years, Multiple Intervenors' concerns about overpayments may be exacerbated.

that those capital investments actually have been made. This requirement would ensure that customers are paying only for investments actually made, as opposed to paying for prospective investments.[18]

For the foregoing reasons, Multiple Intervenors urges the Commission to adopt the recommendations set forth herein in order to ensure that to-go costs are calculated in such a manner that does not result in customers being required to fund maintenance payments in excess of what truly is needed by eligible and qualifying facilities.

[18] Moreover, if customers are going to fund new capital improvements necessary to allow certain facilities to continue operating, then some or all of the customer-provided funds should be subject to clawback if market prices rise unexpectedly and subsidized facilities realize "excess" profits. But for the customer-funded subsidies, these facilities otherwise purportedly would have been deactivated. Similar provisions have been utilized in multi-year utility rate plans.

CONCLUSION

For all the foregoing reasons, Multiple Intervenors urges the Commission to: (1) reject Staff's proposal that facilities that previously received customer-funded subsidies under the RPS be rendered eligible for additional payments under Tier 2 of the CES; and (2) adopt Multiple Intervenors' recommendations regarding the calculation of to-go costs to ensure that maintenance payments cover only those costs necessary to ensure the continued safe and reliable operation of the subject facilities.

Dated: January 8, 2018
Albany, New York

Respectfully submitted,

Justin J. Fung

Justin J. Fung, Esq.
Michael B. Mager, Esq.
Counsel to Multiple Intervenors
540 Broadway, P.O. Box 22222
Albany, New York 12201-2222
(518) 320-3409

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