

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on October 18, 2006

COMMISSIONERS PRESENT:

William M. Flynn, Chairman
Patricia L. Acampora
Maureen F. Harris
Cheryl A. Buley

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)

BY THE COMMISSION:

INTRODUCTION

By Order issued September 24, 2004,¹ the Public Service Commission of the State of New York (Commission) adopted a policy of increasing to at least 25 percent the percentage of electricity used by retail consumers in New York State that is derived from renewable resources.² Consistent with this policy, the Commission also adopted the Renewable Portfolio Standard (RPS) Program. In adopting the RPS Program, the Commission, *inter alia*: established two tiers of eligible renewable resources (Main Tier and Customer-sited Tier); set annual, incremental MWh renewable energy targets for the years 2006-

¹ Case 03-E-0188, supra, Order Regarding Retail Renewable Portfolio Standard (issued September 24, 2004) (September 2004 Order).

² Achievement of this goal requires implementation of a complementary program on the part of the Long Island Power Authority.

2013; required the use of financial incentives to encourage the development and operation of eligible renewable generation facilities; and adopted a central procurement model to be administered by the New York State Energy Research and Development Authority (NYSERDA).

In January of this year, we approved the descending clock auction method for use in 2006 and 2007 solicitations.³ We further stated that if the Department of Public Service Staff (Staff) concluded that the auction method was not ready for use in the next scheduled solicitation or was not appropriate for existing market conditions, Staff should request our approval for use of another solicitation method. Staff made such a request on August 21, 2006.⁴ In another recent Order, the Commission replaced the monthly match delivery requirement with an hourly match delivery requirement to eliminate undue advantages enjoyed by out-of-state intermittent resources.⁵

In this Order, we authorize NYSERDA, with Staff's concurrence, to use its discretion in determining whether to employ the sealed bid, Request For Proposals (RFP) method (with pay-as-bid pricing), standard offer method (with NYSERDA-set-price pricing) for small-scale solicitations, or descending clock auction method (with market-clearing-price pricing) in solicitations conducted during 2006 and 2007. This Order also authorizes use of evaluation criteria to ensure that economic benefits to New York are given appropriate value. In addition, the Order amends the definition of "delivery" applicable to out-

³ Case 03-E-0188, supra, Order Authorizing Additional Main Tier Solicitations and Directing Program Modifications (issued January 26, 2006) (January 2006 Order).

⁴ Staff's request is posted on the Department of Public Service Web site.

⁵ Case 03-E-0188, supra, Order On Delivery Requirements For Imports From Intermittent Generators (issued June 28, 2006) (June 2006 Order).

of-state intermittent resources to ensure that these resources provide the benefits for which New York ratepayers have paid and is more consistent with the purpose of the RPS Program.

PUBLIC COMMENT

Notice of the proposal to request use of the RFP method was published in the State Register on July 19, 2006. The Notice indicated that: development work on a clearing price auction model with a declining clock format was not far enough along for use in the next solicitation; consideration was being given to authorizing NYSERDA to use its discretion to determine, for solicitations in 2006 and 2007, whether to use a sealed bid RFP approach or a descending clock auction approach; and, we were also considering authorizing NYSERDA to use a standard offer approach for small-scale solicitations, if needed to ensure that all eligible technologies have an opportunity to participate in the RPS Program.

Although the 45-day comment period prescribed by State Administrative Procedure Act (SAPA) §202(1) ended on September 2, 2006, the Commission's Secretary issued a Notice Seeking Comment on September 1, 2006 that extended the deadline for comments to September 11, 2006, and offered an opportunity for reply comments filed by September 15, 2006. The Secretary's Notice advised that "parties will be able to comment on the criteria that NYSERDA should use to evaluate responses to the solicitation."

Eleven parties submitted comments by the September 11, 2006 deadline. These included Alliance for Clean Energy New York (ACE), filing initial comments on its own and joint supplemental comments with Natural Resources Defense Council (NRDC); Brookfield Power New York (Brookfield); Community Energy, Inc. (Community), filing initial and supplemental comments; Environmental Advocates of New York (EA); Horizon Wind

Energy (Horizon); Multiple Intervenors (MI); New York Farm Bureau (Farm Bureau); Noble Environmental Power (Noble); the Public Utility Law Project of New York, Inc. (PULP); and the US Renewables Group (Renewables Group). ACE and NRDC (jointly), Airtricity, Inc. (Airtricity), Horizon, and the New York State Attorney General (AG) filed reply comments on September 15, 2006.⁶

DISCUSSION

Solicitation Methods and Scope of Offering

Comments

Each of the Commenting Parties supported the proposal that the Commission authorize use of a sealed bid RFP in solicitations during 2006 and 2007. ACE states that using the RFP approach would have a number of benefits, such as ease of administration and likely cost efficient outcomes. Horizon notes that NYSERDA has extensive experience with RFPs.

Unanimity among the commentators, however, does not exist on several issues, including: pay-as-bid or market clearing as the payment method; use of the standard offer model for small-scale offerings; authority for NYSERDA, in its discretion, to use a variety of solicitation methods; and, extension of Commission authorization relating to solicitation methods beyond 2007.

Noting NYSERDA's expertise, ACE, the AG and Horizon support NYSERDA authority to use its discretion in determining the appropriate mechanisms for a particular solicitation. ACE also urges the Commission to extend this authorization beyond 2007 because the parties have had many opportunities to comment on the various solicitation methods. In contrast, PULP objects

⁶ The parties are collectively referred to as "Commenting Parties."

to authorizing use of the auction method because, it states, recent studies show that auction pricing of goods, such as electricity or environmental attributes, is highly susceptible to market manipulation and overcharging, and the method has not been adequately scrutinized by the parties. The AG agrees with PULP.

Noble objects to allowing projects with an in-service date beyond January 1, 2008 to participate in the next solicitation. It states that such extension would encourage participation and selection of riskier projects that are speculative or in the very early stages of development. In contrast, Horizon recommends that the next solicitation include projects that will be in service anytime in 2008 because restricting the solicitation to 2007 projects could discourage projects from participating or provide an incentive for them to propose unrealistic milestones. It warns that curtailing eligibility could result in increased prices through reduced competition or in the awarding of contracts to projects that may not be able to complete the various local, state and federal permitting processes or the interconnection and facility studies.

Brookfield insists that we require market-clearing pricing with the RFP because RPS Program attributes are fungible and should have the same value. Brookfield states that it was frustrated in the previous solicitation because there was discrimination among the fuel sources, with the result that it was "retained for only one year on two offers that were at least 50% cheaper than other offers that were retained for 10 years."

MI argues that we should authorize only the RFP method with pay-as-bid pricing because that combination would result in the lowest cost attributes. It states that it is not reasonable for every resource to receive the price paid the most expensive resource because that would result in windfalls to less

expensive resources. MI also asserts that use of a standard offer would require NYSERDA to forecast the price of electricity, which more likely than not would result in overpayments.

Analysis

Throughout this proceeding, we thoroughly examined various types of solicitation methods and pricing mechanisms. We disagree with PULP and the AG that more analysis is needed before we authorize use of the descending clock auction method. We also disagree with MI that use of the standard offer method would necessarily result in overpayments; however, the standard offer method should only be applied in small-scale solicitations. We concluded previously that each solicitation method has merit and NYSERDA could appropriately use any one approach or a combination of approaches in solicitations depending on the circumstances. We confirm that judgment in this Order.

Regarding pricing mechanisms, while comments on this issue were not requested, we have analyzed parties' comments in light of our conclusions in previous Orders that pay-as-bid pricing is compatible with the sealed bid, RFP method and that market clearing price pricing is compatible with the auction method. None of the comments have persuaded us to change our decision.

Horizon urges us to extend participation in the next solicitation to projects that expect to be in service by the end of 2008, rather than the end of 2007. This, it explains, would have two consequences: first, the solicitation would be more competitive; and second, developers, whose projects are not that far along, will not be tempted to rush through design and construction or state unrealistic milestones. In contrast, Noble is concerned that extending the in-service date to the end

of 2008 would encourage participation of speculative projects that may not come to fruition.

Pertinent to the resolution of this issue is the fact that at this time there are 52 proposed wind projects, accounting for 5,917 MW, in the interconnection queue maintained by the New York Independent System Operator, Inc. (NYISO). As of the end of September 2006, there were 19 wind projects in the queue (accounting for 1,945.5 MW) with a completed System Reliability Impact Study (SRIS) and that are now waiting to complete or have completed their Facilities Study.⁷ We believe that because there appear to be sufficient projects eligible for the bidding process, the solicitation should be limited to facilities that have achieved key milestones such that NYSDERDA reasonably expects them to be in commercial operation before the end of 2007.

While comments were not specifically requested on the in-service date issue, we conclude that limiting participation to projects that satisfy the Main Tier eligibility requirements established in our September 2004 Order (that is, in commercial operation after January 1, 2003)⁸ and, in this case, are expected to come on-line by the end of 2007 will result in adequate competition. Accordingly, we will not change our prior decision on this matter.

Solicitation Design, Conditions and Criteria

Comments

Community asserts that the Commission should require NYSDERDA to allow projects to offer their eligible output in

⁷ Completion of an SRIS is a strong indication of investors' commitment to a project.

⁸ In Case 03-E-0188, Renewable Portfolio Standard - Lyonsdale, Order Approving Request For RPS Program Funding As A Maintenance Resource (issued August 31, 2005), we determined that Lyonsdale Biomass, LLC should be included in the maintenance category of the Main Tier and is eligible to participate in subsequent Main Tier solicitations.

multiple blocks of energy produced (tranches) and varying prices per tranche and allow NYSERDA to select any combination of tranches offered from the project. It argues that this proposal would maximize use of ratepayer funds by allowing the possibility that a project would be built with only a portion of its output supported by RPS Program funds.⁹

ACE, Airtricity, Horizon, Noble, NRDC, and Renewables Group argue that NYSERDA should not rely upon evaluation criteria that have the effect of disadvantaging in-state New York projects. Airtricity, for example, states that the Commission's primary concern should be to ensure fairness in competition among the bids submitted in response to an RFP. ACE and NRDC explain that RPS Program design "should ensure a level playing field among bidders by accounting for obvious disparities in subsidies, tax treatment and environmental review standards and enforcing New York's environmental review process." For example, they state, in contrast to New York, Pennsylvania does not subject wind energy generating equipment to real property taxes. These parties also note that the RPS Program's delivery requirement does not require that an out-of-state generator actually deliver energy into New York in real time.

ACE and NRDC argue that out-of-state projects should comply with an environmental review process comparable in scope and at least as comprehensive as the State Environmental Quality Review Act (SEQRA), which is required for certain actions involving approvals or funding by a state agency and ensures the

⁹ Community explains that if a New York wind farm could offer 50% of its output at one price per kWh and the remaining 45% of its output at a lower price per kWh, NYSERDA would be able to select: i.) all 95% of the output at an average price (50% times first block price plus 45% times second block price); ii.) only the 45% tranche at the lower price per kWh; or iii.) neither of the tranches.

protection of the environment and involves substantial expenditures by project developers. The AG is not in total agreement with this point; rather, it states:

To the extent that ACE NY and NRDC are urging out-of-State application of SEQRA, the AG has serious reservations. Yet, by entering into a contract with a participating developer, whether in State or out-of-State, NYSERDA will trigger SEQRA and is required by law to perform an environmental assessment of the potential impacts to New York. NYSERDA should ensure that it complies with SEQRA as it implements the RPS.

The AG notes that the assessment for out-of-state projects would not require an assessment of impacts on the other state's local host community.

Referring to possible project milestones, Noble urges NYSERDA to take development risk into consideration when evaluating bids. It suggests that points be assigned based upon the project's status regarding the following milestones: a) turbine supply agreement; b) Draft Environmental Impact Statement (DEIS) (or equivalent) that has been deemed complete; c) Final Environmental Impact Statement (FEIS) (or equivalent) that has been approved; d) SRIS (or equivalent interconnection study); e) Interconnection Agreement; f) construction permits from the local authority or authorities; and, g) major state and federal permits.

Noble asserts that demonstrating achievement of these milestones is straightforward, so verification would not be burdensome to NYSERDA. It argues that the criteria provide a framework for weighing a given bidder's likelihood of coming on-line by the Commercial Operation Date set by the RFP. Projects that have achieved more milestones should be ranked ahead of those that have achieved fewer milestones.

Horizon states that criteria that are too stringent might deprive the RPS Program of good projects located within

New York as well as in neighboring states. Horizon disagrees that a turbine supply contract, FEIS, construction permits, major state and federal permits, and an interconnection agreement should be part of the evaluation criteria. These could screen out good projects that would increase the competitiveness of the solicitation, it says. According to Horizon, requiring such permits as part of the bid package may result in poorly planned projects as developers rush through the planning and development process and undue pressure is placed upon local, state, and federal decision-makers to issue permits. ACE and NRDC urge the Commission to strike a balance between promoting participation in solicitations and ensuring that those participating have realistic chances of succeeding in fulfilling their RPS Program contract obligations.

Regarding bid security criteria, Noble recommends the following:

- a. Pre-construction: Collateral provided directly or a Letter of Credit provided by the bidder equal to \$20 per MWh times one year's contract quantity.
- b. Pre-commercial operation: \$10 per MWh times one year's contract quantity (*i.e.*, return of one-half of its initial collateral when project starts construction).
- c. Extension fee: A bidder would forfeit 50% of its pre-construction security (equal to \$10 per MWh times one year's contract quantity) if it wished to extend its commercial operation date six months past the specified in-service deadline.

Horizon states that NYSERDA should require bidders to post a "significant" security deposit (such as a letter of credit), refundable if full commercial operation commences within the proposed time frame or if the bid is not accepted. It also recommends that NYSERDA have the authority to terminate

a contract if a successful bidder fails to be in commercial operation within the procurement timeframe or if the project fails to meet the permitting, equipment delivery, or interconnection milestones such that it is clear it will not make the bid commercial operation date. Noble asserts that the term provided in the first procurement contract that enabled projects to cancel the contract prior to the in-service date, at the cost of 50% of the security deposit, should be continued.

Renewables Group states that NYSERDA should prioritize base-load resources such as biomass, geothermal, and landfill methane power plants, though perhaps more costly, as they are more predictable and dependable than wind facilities. It recommends that the RPS Program design require NYSERDA not to contract for more than a set percentage from any one renewable generation type, unless there were insufficient qualified proposals for the other types of generation.

Analysis

In the January 2006 Order, we stated that allowing companies to participate in solicitations by aggregating output from more than one facility in a system bid would result in lower price bids. Community's comment, that using tranches would maximize ratepayer funds by encouraging construction of a project with funding other than exclusively from RPS Program funding, has merit. NYSERDA shall have the authority to use this technique, and we expect it will be included in the next solicitation.

We share the Commenting Parties' concern that states other than New York may provide greater advantages and incentives for renewable energy projects than are available in New York. States may differ significantly in the way property is taxed and projects are reviewed; wages vary as well. It is difficult and impractical, however, to evaluate, estimate, and

attempt to quantify these perceived differences.¹⁰ The RPS Program is stronger, more successful, and enjoys public support to the degree that it is administered objectively. Accordingly, the RFP should not impose application hurdles on out-of-state projects that are different from those placed on New York projects (filing or reporting requirements, for example).

As the AG recommended, we reject the ACE/NRDC request to require out-of-state projects to comply with an environmental review process comparable to the SEQRA process. It is neither practical nor within the purview of a New York State agency to mandate such evaluation. We concur with the AG that NYSERDA must implement a process to ensure that potential environmental impacts of out-of-state projects on New York are evaluated before the letting of contracts.¹¹

Several parties discussed milestones and bid security criteria. We have discussed these issues in previous orders and find that the comments do not compel a deviation from our prior Orders. The milestones and bid criteria NYSERDA used in the previous solicitation were reasonable; we authorize NYSERDA to make adjustments based on its experience to achieve a balance between promoting participation in solicitations and in ensuring that the projects proposed by successful bidders are viable and actually produce and deliver into New York energy and attributes.

We appreciate the comment of the Renewables Group regarding the dependability of base-load resources, but we remind

¹⁰ Indeed, some of these factors may vary across regions of New York yet no party urges us to ensure equity within the State.

¹¹ The Final GEIS we adopted in this proceeding concluded that renewable energy produced outside New York could improve New York's air quality by causing the backing down of fossil fuel plants in New York. Case 03-E-0188, supra, Order Adopting and Approving Issuance of Final Generic Impact Statement (issued August 26, 2004).

this party that a prime consideration expressed in the September 2004 Order when we authorized the RPS Program was that the program had to be cost-effective. Thus, we decided that successful participants in solicitations would be those who offered the lowest price, regardless of renewable technology.

Economic Development

Comments

With the exception of MI and PULP, which did not address the issue, and Brookfield, which proposed an MWh cap on out-of-state resources, the Commenting Parties advocated the use of economic development criteria as part of the bid evaluation process. Brookfield urges the Commission to cap out-of-state resources at a maximum of 20% of the total renewable energy supply to help further the development of in-state renewable energy generation and the retention of the associated economic development benefits in New York.

ACE, NRDC, and the AG state that economic development benefits to New York should account for at least one-half of the bid evaluation criteria. These parties, along with Community, Environmental Advocates, and the Farm Bureau, assert that, in contrast to out-of-state projects, in-state projects help support local businesses, assist rural landowners in maintaining farms and open space, and provide much-needed tax or payment-in-lieu-of-taxes (PILOT) financial support to towns, counties, and school districts. Horizon argues that its wind projects have resulted in significant economic benefits (more than \$10/MWh) within a defined region of the State from the payment of land royalties, new construction and operating jobs, PILOT payments and the purchase of local goods and services. In addition, the commentators agree, these benefits may extend beyond the RPS Program contract term, unlike the in-state benefits derived from out-of-state projects, which would likely provide little energy,

economic or environmental benefits to New York after the end of the contract term.

ACE and NRDC claim that, if only 20 of the 40 new proposed wind projects begin construction, approximately \$4.5 billion of private capital would be invested in the projects. They point to the experience of the Maple Ridge Wind Farm, which they claim resulted in the creation of more than 50 new jobs, salaries in excess of \$7 million and payments to subcontractors totaling more than \$16 million. They assert that Maple Ridge also spent millions of dollars purchasing local goods, including construction aggregate and fuel. Horizon agrees, noting that during the first phase of construction, over 470,000 man-hours of employment were created and 90% of the people working on this phase were New York residents. In addition, 65,000 cubic yards of concrete, 9,400,000 pounds of reinforcement, and 60 miles of silt fencing were procured in New York for the first phase of the project.

Airtricity and the Farm Bureau acknowledge that the initial cost of some New York renewable projects may appear higher in the short-term than some out-of-state projects; but, they say, in the long-term, the local economic benefits to a group of New York ratepayers by in-state projects in the form of lower taxes, increased local employment and land leases would help eliminate any differences and strengthen New York's communities. In addition, these parties, along with Horizon and Renewables Group, state that in-state resources contribute to

fuel diversity and the availability of sources of stable priced power in New York.¹²

Community adds that State support of in-state wind projects can create incentives for manufacturers to locate large facilities in state. These facilities, according to Community, focus the economic benefits of the resulting generation within the region, and ameliorate increased prices for turbines, which, it asserts, were a significant reason for the high prices seen in the previous RPS Program solicitation.

The AG states that economic development benefits to New York can be quantified. It appears to favor Horizon's recommendation that all bidders, both in-state and out-of-state, should include in their proposals the following information on a quantified basis: expected payments to New York landowners and taxing jurisdictions; purchases from suppliers of materials and services in New York; and the estimated quantity of jobs to be created for New York residents.

¹² Environmental Advocates also asserts that in-state projects benefit New York environmentally more than out-of-state projects. New York communities, it explains, realize the benefits of cleaner air from investment in renewable energy in that every MW of wind power helps displace five tons of sulfur dioxide, two tons of nitrogen oxide, and 1,367 tons of carbon dioxide annually. This party does not provide similar figures showing the effect on New York communities of out-of-state projects.

Analysis

Providing economic benefits to New York State was one of the formal objectives adopted when we established the RPS Program in September 2004.¹³ We agree with the Commenting Parties addressing this issue that because New York ratepayers are funding the RPS Program, the impacts of projects on economic development in New York localities that host a renewable energy facility should be considered in the bid evaluation process. We reject the MW cap urged by Brookfield. There is value to ratepayers in preserving the breadth of the pool of potentially eligible projects, some of which may not be located in New York, because the participation of more bidders is likely to decrease the cost of attributes and allow NYSERDA to purchase more attributes with a given amount of funds. In addition, moreover, the importance of our responsibility to minimize the cost of the RPS Program has been in the forefront of our design and implementation deliberations.

Based on evaluation of the potential benefits (perhaps as much as \$10/MWh for in-state wind projects) and in recognition of New York ratepayers' contribution to RPS Program funding, it is reasonable to take into consideration the economic benefits that a given project can be expected to bring to the State. We, therefore, authorize NYSERDA to incorporate into the RFP two evaluation categories: bid price and economic benefits. The economic benefits category shall be designed such that any project, regardless where located, would have the same opportunity to demonstrate quantitatively its likely – and

¹³ See, September 2004 Order.

verifiable – economic benefits to New York.¹⁴ 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 should be included in the criteria.

Many commentators assert that fully one-half of the value of bids should be subject to the economic benefits analysis. This appears to give too much weight to this factor, which is, after all, only one among several goals of the RPS Program. To account for a reasonable and equitable acknowledgement of the potential economic benefits created by projects, while continuing to minimize the cost of the RPS Program, the economic benefits category should be weighted at no more than 30 percent of the total score in the evaluation and selection of proposals.

This percentage results from a balancing of evaluation factors relating to program costs and desirability of weighing the need for participation by interstate energy producers against the economic development benefits in the State derived from in-state renewable facilities. It is also recognized that the percentages offered by the proponents of use of economic development criteria to evaluate projects do not provide an irrefutable argument for their use. In addition, the employment of up to a 30% factor will allow the State to achieve some experience with use of economic development criteria and authorize NYSERDA to adjust the percentage as needed.

We find that this percentage strikes a reasonable balance between the value of the economic benefits to the State resulting from the project and the need to consider price in

¹⁴ Unlike price information, which carries a strong presumption of trade secret confidentiality, it is likely that much of the information about economic benefits to New York could be disclosed without causing competitive harm or advantage.

evaluating the proposals submitted by the respondents to NYSERDA's solicitation. Price is important to attainment of the other objectives, in addition to economic benefits, of the RPS program. The use of no more than this percentage recognizes the importance of economic benefits without overwhelming the consideration of price factors by allowing consideration of price as the major contributor to the evaluation process. As a check on the effectiveness and reasonableness of this percentage, this evaluation approach shall be carefully analyzed and re-evaluated during the 2009 Review.

Delivery Matters

The June 2006 Order modified the definition of delivery requirement that appears in Section 2 of Appendix C of the September 2004 Order to require hourly matching instead of monthly matching for out-of-state intermittent resources.

Comments

On July 25, 2006, Ridgewood Power Management, LLC (Ridgewood) filed a letter seeking reconsideration of the revised language. Ridgewood states that it is not clear from the language: (1) which, if any, out-of-state renewable generators are not subject to the second sentence of the new paragraph or Section 3, System Contract Requirement, of Appendix C; or (2) whether any renewable energy must be delivered into New York for an out-of-state renewable generator to have the attributes associated with renewable energy it produces outside New York, but does not deliver into New York, to be recognized by the RPS Program. To remedy this concern, Ridgewood proposes that deliveries associated with an out-of-state generator shall be recognized in each hour as the lesser of the renewable generator's actual hourly metered energy production or actual hourly energy delivered to the New York Control Area (NYCA) for end-use during the same hour as generation is produced (hourly matching).

In its comments, Noble states that out-of-state bidders should be held to the same delivery requirements as in-

state bidders. Failure to do so, it asserts, would create an incentive for bidders to take advantage of the disparate treatment. It claims that the delivery requirement promulgated in our June 2006 Order is consistent with its approach. According to Noble, the June Order should be interpreted as follows:

- a. The bidder can point to the flow of energy from the spot market of an adjacent power pool into the NYISO spot market, and claim delivery of a quantity of MWh equivalent to the production of the facility during that hour;¹⁵ or,
- b. The bidder can point to contractual energy deliveries scheduled by the bidder from an adjacent power pool into the NYISO, and claim delivery of a quantity of MWh equivalent to the production of the facility during that hour.¹⁶

Noble argues that while a bidder could choose either option, it must make a choice of options when it signs the contract with NYSERDA, which would be used exclusively for the duration of the contract. Noble further asserts that the inability or unwillingness of an out-of-state bidder to deliver energy to the NYISO should not be a permissible reason for under-delivery.

Noble states that penalties for non-delivery should be severe so that bidders are not essentially allowed a free put

¹⁵ Noble states that any MWh produced when the net flow of spot market energy is zero or when there is a net flow of spot market energy out of the NYISO into the corresponding adjacent power pool may not be deemed as "delivered."

¹⁶ Noble states that any MWh produced during an hour when the bidder cannot point to a contractual energy delivery scheduled by the bidder from an adjacent power pool into the NYISO may not be deemed as "delivered."

option. It argues that, if the MWh are generated, then the bidder should be required to deliver the contract quantity or face stiff penalties and sanctions, including contract termination. In the absence of severe penalties, Noble says, bidders can "put" as much of their output as they like to NYSERDA by setting an unrealistically high annual volume, and then, if awarded a contract, just "deliver" what they are able to produce or is convenient for them.

Noble proposes the following penalties:

a. Damages on a per-MWh basis for "small" shortfalls in delivery of generated energy (0.5% to 2.99% of contract quantity) could be \$20 times the number of MWh the delivery was short, assessed on an annual basis.

b. Failure to deliver 3% or more of the contract quantity would result in contract termination due to non-delivery, plus a financial penalty that is the greater of either:

- i. \$5 per MWh times the volume remaining on the contract, or
- ii. The contract price times the volume remaining on the contract.

Noble asserts that requiring the greater of the two penalties offers protection against failure to deliver later on in contract term when the remaining volume is relatively small.

Analysis

We adopted the hourly delivery requirement in an effort to place in-state and out-of-state renewable generators on a more equal footing in regard to the cost of delivering energy into the NYCA. Many parties urged us to adopt a "strict delivery" standard that would have included a requirement for firm transmission contracts from source to sink. We chose not to require a rigid contract requirement and instead allowed out-of-state generators to make their own arrangements for the

delivery of electricity into the NYCA as long as they can demonstrate to the Commission or its designee that the generator is responsible for the transportation of energy into the NYCA and the energy will not be double counted.

We agree with Noble that out-of-state renewable generators should not be allowed to view a procurement contract as a put option. If this were to occur, it could leave the RPS Program short of its procurement targets. Rather than setting a specific penalty rate for non-performance, we prefer that NYSERDA include in the solicitation documents a condition that non-performance will allow NYSERDA to terminate the contract. The percentage of delivery shortfall that would trigger termination shall be established by NYSERDA as part of the RFP and contract. This condition, however, should treat both in-state and out-of-state generators equally so that in-state generators also are not encouraged to view their contracts as put options.

The proposal advanced by Ridgewood does not address the delivery requirement problems it claims and thus is rejected. Notwithstanding, a clarification of the delivery requirement is appropriate, which should address Ridgewood's concerns. We make the following changes to clarify that: (1) going forward, intermittent renewable generators must meet a more stringent hourly matching delivery requirement; (2) non-intermittent generators shall still deliver their energy into the NYCA; (3) no out-of-state generator may have its energy and/or attributes recognized in two jurisdictions simultaneously; and (4) the Commission will not dictate contract methods for energy deliveries as long as the out-of-state generator can demonstrate to the satisfaction of the Commission or its designee that the electrical output was sold to end-use consumers in New York State in a retail sale. Accordingly, we

revise the delivery requirement language that appeared in the June 2006 Order as follows:

Out-of-state ~~intermittent~~ renewable generators that participate in Renewable Portfolio Standard Program Main Tier solicitations may sell and transmit energy as it is generated into the spot market of the control area of its location ~~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 for end-use during the same hour as the renewable generation is produced (hourly matching). **(Those generators entering contracts before June 26, 2006 will be held to a standard of monthly matching.)** The renewable generator must demonstrate to the satisfaction of the Commission or its designee that it is financially responsible for the transmission of the electricity from its spot market to the NYCA. ~~Contractual~~ Deliveries associated with the out-of-state resource shall be recognized in each hour as the lesser of actual hourly metered energy production by the renewable generator or actual hourly energy delivered to the electric energy purchaser in the New York Control Area for end-use. In addition, if the control area of origin has an attributes accounting and tracking system or an environmental disclosure program, it is required that such system and/or program recognize hourly matched transactions without double counting the attributes in any jurisdiction. **The renewable generator must report the export of its electricity to the attributes accounting and tracking system and an environmental disclosure program operating both in its location and in New York.**¹⁷

Attachment I to this Order amends Appendix C of our Prior September 24, 2004 Order to reflect this revision. The solicitation documents should also incorporate this revised requirement.

CONCLUSION

This Order provides authorization and guidance to NYSERDA and Staff for the issuance of solicitations for RPS Program attributes in 2006 and 2007, associated with Main Tier

¹⁷ New language is in bold and deleted language is crossed out.

renewable generating facilities that are reasonably expected to be in commercial operation by the end of 2007, and allows use of evaluation criteria to ensure that economic benefits to New York are given appropriate value. In addition, the Order clarifies the RPS Program's delivery requirement applicable to out-of-state intermittent resources to ensure that these resources provide the benefits for which New York ratepayers have paid and is more consistent with the purpose of the RPS Program.

The Commission orders:

1. Additional solicitations in 2006 and 2007 are authorized for Main Tier Resources in the RPS Program, subject to the discussion in the body of this Order.
2. The RPS Program's delivery requirement is modified as described in the discussion in the body of this Order and in Attachment I.
3. This proceeding is continued.

By the Commission,

(SIGNED)

JACLYN A. BRILLING
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

- Out-of-state renewable generators that participate in Renewable Portfolio Standard Program Main Tier solicitations may sell and transmit energy as it is generated into the spot market of the control area of its location so long as an equal quantity of energy is transmitted out of the affected spot market into the New York Control Area for end-use during the same hour as the renewable generation is produced (hourly matching). (Those generators entering contracts before June 26, 2006 will be held to a standard of monthly matching.) The renewable generator must demonstrate to the satisfaction of the Commission or its designee that it is financially responsible for the transmission of the electricity from its spot market to the NYCA. Deliveries associated with the out-of-state resource shall be recognized in each hour as the lesser of actual hourly metered energy production by the renewable generator or actual hourly energy delivered to the electric energy purchaser in the New York Control Area for end-use. In addition, if the control area of origin has an attributes accounting and tracking system or an environmental disclosure program, it is required that such system and/or program recognize hourly matched transactions without double counting the attributes in any jurisdiction. The renewable generator must report the export of its electricity to the attributes accounting and tracking system and an environmental disclosure program operating both in its location and in New York.

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.