STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of New York on December 15, 2004

COMMISSIONERS PRESENT:

William M. Flynn, Chairman
Thomas J. Dunleavy
Leonard A. Weiss
Neal N. Galvin

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

ORDER REGARDING PETITIONS FOR CLARIFICATION AND RECONSIDERATION

(Issued and Effective December 15, 2004)

BY THE COMMISSION:

BACKGROUND

By Order issued September 24, 2004,[1] the Public Service Commission of the State of New York (Commission, PSC) adopted a policy of increasing the percentage of electricity retailed in New York State that is derived from renewable resources. Consistent with this policy, the Commission also adopted a renewable portfolio standard (RPS) program and a voluntary target for competitive "green" markets designed to achieve, by the end of 2013, the goal that at least 25 percent of the electricity retailed in New York State is provided by renewable resources. As part of this program, the Commission, *inter alia*, established two tiers of eligible renewable resources; set annual, incremental MWh renewable energy targets for the years

[1] Case 03-E-0188, Proceeding on Motion of the Commission Regarding a Retail Renewable Portfolio Standard, Order Regarding Retail Renewable Portfolio Standard (issued September 24, 2004)(September 24th Order).

2006-2013; required the use of financial incentives to encourage the development and maintenance of eligible renewable generation facilities; directed that the revenue necessary to support the program would be raised via a non-bypassable wires charge on certain delivery customers of each of the State's investor-owned utilities; and adopted a central procurement model to be administered by the New York State Energy Research and Development Authority (NYSERDA). The Commission stated that, in 2009, there would be a comprehensive review of the RPS program.

On October 25, 2004, NYSERDA and the Small Hydro Group (SHG) filed petitions for clarification and clarification and/or reconsideration, respectively, of the September 24th Order. Ridgewood Renewable Power, L.L.C. (Ridgewood) also filed a petition seeking reconsideration.[2] By letter dated November 5, 2004, Ridgewood supplemented its petition seeking reconsideration. Replies were filed by the Business Council of New York State (Business Council), Multiple Intervenors (MI), Nucor Steel Auburn, Inc. (Nucor), Renewable Energy Technology and Environment Coalition (RETEC) and the New York Power Authority (NYPA). SHG submitted a sur-reply letter dated November 15, 2004. The following day, MI moved to strike RETEC's response to the petitions for clarification and reconsideration.

NYSERDA'S PETITION

NYSERDA notes that, pursuant to the Commission's September 24th Order, "the identified delivery utilities are directed to 'enter into such contracts or agreements with NYSERDA as are necessary for NYSERDA to be able to administer the central procurement component of the RPS program and all associated funds, including the establishment of a schedule of transfer payments of the RPS program funds and associated administrative fees which shall be made to NYSERDA no less

[2] Ridgewood's petition apparently was served electronically on the parties to Case 03-E-0188 on October 25, 2004, but was filed in the Office of the (PSC) Secretary on October 26, 2004.

frequent than quarterly.'" It states that "the RPS program is structured such that program costs for the Main Tier are based on long-term incentive contracts that will likely extend well beyond Year 2013…." NYSERDA expresses its expectation that, in 2005, it "may be entering incentive contracts with developers that will extend beyond the Year 2013 date."

NYSERDA opines that, by identifying estimated RPS costs only out to 2013, the September 24th Order creates the potential for misunderstandings with respect to whether post-2013 collections will be collected in delivery rates and transferred to NYSERDA as necessary to fulfill long-term RPS program contracts. NYSERDA therefore requests clarification that the contracts or agreements to be entered into by NYSERDA and the delivery utilities "shall not only provide for transfer payments through Year 2013 (for program and administrative costs), but shall also expressly require the delivery utilities to continue making transfer payments beyond Year 2013 as are necessary to fulfill, until the completion of their term, such long-term RPS program contracts as are entered into by NYSERDA, as well as to fund NYSERDA's related administration costs beyond Year 2013."

Filings in Response

RETEC fully supports NYSERDA's petition. It opines that providing the clarification to assure the authority of continued collection of the RPS contract costs and NYSERDA's associated administrative fees "will assure that all parties to the subject agreement understand the term-lengths of their responsibilities." RETEC continues that a program with guaranteed financial support only through 2013 will not produce sufficient investor confidence, but a commitment to long-term support of renewable energy development will "ensure that New Yorkers receive at least 25 percent of their retail electric supply from renewable sources from 2013 and forward."

No party filed replies opposing NYSERDA's proposed clarification.

Discussion

Our September 24th Order plainly envisions that revenue collections could continue beyond 2013, as necessary, to achieve the stated policy and RPS program goals. We expressly stated that the "record in this proceeding demonstrates that, at this time, potential developers of [renewable] resources likely will need long-term contracts if they are to obtain financing."[3] We further stated that "the experts who created the supply curve model used in Cost Study II opined that the unit cost of renewable resources is considerably lower when a long-term contract is offered."[4] We noted that by "adopting a central procurement model, we will maximize the ease with which such contracts can be secured."[5]

Cost Study II assumed long-term contracts ending in the post-2013 time frame.[6] Thus, by relying upon the Cost Study II methodology in our September 24th Order's Cost Analysis,[7] we too recognized, for example, that even contracts signed in 2005 would likely have end dates beyond 2013. This reliance, coupled with our stated desire to "maximize the ease with which such contracts can be secured," demonstrates our understanding that the RPS program would entail the use of long-term contracts, and the possible collection of associated costs, extending beyond 2013.[8] We also note our express statement that any facility awarded long-term contracts by NYSERDA would not lose such incentives based on our 2009 review.[9]

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[3] September 24th Order at 51.

[4] Id.

[5] Id.

[6] See, e.g., Cost Study II, Volume A Report, Appendix A; Transcript of Technical Conference held March 17, 2004, at 332, 431-433.

[7] September 24th Order, Appendix D.

[8] The level of costs beyond 2013 is difficult to predict at this time as it may depend on post-2013 market prices for fuel and electricity and the incentive pricing structure of the long-term contracts.

[9] September 24th Order, p. 7.

The foregoing reflects our acknowledgment that long-term contracts would likely be a procurement tool used by NYSERDA and therefore might entail post-2013 revenue collections. Still, to the extent it may be helpful, we clarify that our September 24th Order requires the delivery utilities identified in ordering clause 6 of that Order to continue collecting an RPS surcharge, for as long as needed, and directs said utilities to enter into contracts or agreements with NYSERDA that allow for the transfer of such payments for as long as needed to fulfill long-term RPS program contracts as well as to fund NYSERDA's related, post-2013 administration costs. The amount of any post-2013 collections will not be set by the Commission until the RPS program is well underway and actual costs are better known.

SHG'S PETITION

SHG requests clarification and what amounts to rehearing of several portions of the September 24, 2004 Order. SHG contends that the RPS policy adopted by the Commission in the September 24th Order unduly discriminates against existing small hydroelectric facilities because: 1) such facilities simultaneously will not be compensated for their green power benefits and will be forced to pay a wires charge for the renewable program; 2) imposition of the wires charge will impose additional cost that will act as a disincentive to existing small hydropower producers; and 3) large industrial customers will benefit at the expense of existing small hydroelectric producers. SHG asserts that the Commission "deferred too much for subsequent proceedings" thereby hindering the possibility of RPS assistance for existing facilities until the criteria for financial need is developed. SHG also advocates the adoption of an externalities credit, claiming its adoption would eliminate ambiguity in the RPS program's design. In addition, SHG alleges the September 24th Order fails to provide guidance to renewable power producers concerning, among other things, how long they will be paid under the program and what will happen when the 25 percent goal is achieved. SHG also alleges that the RPS program

is designed essentially to be a subsidy for large industrial customers and is a "hidden tax" on residential customers that probably won't end. Finally, SHG contends that "the costs to be incurred by existing hydroelectric facilities and the protracted and speculative nature of the yet to be finalized resulting program to be administered by NYSERDA gives an incentive for developers and owners of existing facilities" to sell their power and/or attributes out of state.

Filings in Response

The Business Council, MI, Nucor, NYPA, and RETEC filed replies to SHG's petition. The Business Council opposes SHG's objection to large industrial customers' exemption from payment of the RPS wires charge. It notes that New York is losing its competitive advantage as a manufacturing and commercial powerhouse due in part to the higher costs of electricity, costs it states are, as of 1999, 40 percent above the national average. The Business Council cites the importance of manufacturing jobs to New York State's economy, observing that they "import wealth from around the country and the world." The Business Council concurs with comments filed prior to the September 24th Order which described the legislative intent of the NYPA's economic development program as ensuring that customers purchase electricity at rates lower than the utility tariff rates. The Business Council argues that imposing an RPS surcharge on NYPA customers (and flex-rate customers) would be inconsistent with state policy and "may have adverse consequences disproportionate to the benefits." It therefore urges the rejection of SHG's proposed amendments.

MI also asks the Commission to deny SHG's request to eliminate the RPS surcharge exemption for large industrial customers. MI characterizes SHG's request as procedurally and substantively defective.

With respect to the procedural defects, MI states that SHG fails to specify which portions of the order it seeks to have either clarified or reconsidered and fails to specify the relief it seeks. MI also states that while SHG includes

statements pertaining to the exemption of large industrial customers from the RPS surcharge, SHG does not specifically request elimination of the exemption. Moreover, MI notes that SHG fails to demonstrate that the Commission's determination is affected by an error of law or fact. Finally, MI argues that by failing to raise this issue, either in briefs on or opposing exceptions, SHG has waived its objection as to this issue.

MI points out that the Administrative Law Judge (ALJ) specifically recommended designing the RPS so as to exclude the payment of RPS premiums by NYPA customers. It notes that in its brief on exceptions, SHG "concur[red] with many of the conclusions in the RD" and did not mention, nor except to, the recommendation to exclude NYPA customers. Further, MI observes that, SHG's brief opposing exceptions also did not mention the issue, even though MI's brief on exceptions, expressly supported the exemption for NYPA and flex-rate customers. MI argues that Commission regulations (16 NYCRR § 4.10(d)(2)) and case law (see MI reply at 6) prohibit SHG from raising the issue of NYPA customer exemptions on rehearing.

With respect to SHG's assertion that all customers should support the statewide RPS goal, MI notes that both the ALJ and the Commission rejected this argument. MI argues that SHG fails to demonstrate that the Commission committed an error of law or fact or that there are new circumstances that warrant a different determination. MI observes that SHG is merely rehashing an unsuccessful argument and in so doing, it does not even mention, let alone refute, the Commission's supporting rationale. MI posits that, due to the failure to allege any error of law or fact or to demonstrate any new circumstance in support of its position, SHG has not established the grounds for rehearing.

As to substantive defects, MI asserts that the Commission harmonized the RPS with the State’s economic development policies. MI notes the State Energy Plan's recognition of the importance of reducing energy costs to attract, retain, and expand business in New York, and the importance, to businesses, of the price of electricity in

determining where to locate or expand. MI also cites to the State Energy Plan regarding the importance of economic development programs that have been developed in the State to attract and retain business, in particular, the NYPA programs and the Commission's flex-rate contract program. MI concludes that "New York's success in working with businesses that could relocate to other states frequently depends on the availability of discounted, low-cost energy and incentives offered through various State and local government and utility-sponsored programs. . . [E]ffective energy-related economic development programs for businesses will continue to be necessary to help preserve and expand the State's economic base." MI asserts that the Commission properly harmonized its policies with these economic development goals, had record support for so doing (at Tr. 546, 548), and therefore correctly held that NYPA economic development program customers should be exempt from the RPS surcharge.

MI continues that the Commission also correctly exempted other industrial customers from the RPS surcharge, noting that the grounds for this exemption was the same as for exempting NYPA customers (i.e., they participate in economic development programs intended to retain and attract business). Given the Commission's recognition that "flex rate contracts remain a valuable tool for promoting economic development through the retention and attraction of business customers" and that increasing the cost of doing business in New York State is antithetical to the State's economic development goals, MI asserts that the Commission correctly exempted flex-rate contract customers that do not pay the SBC from paying an RPS surcharge. MI accordingly requests that the PSC deny SHG's request for reconsideration of the determination that customers who do not currently pay the system benefits charge should be exempt from the RPS surcharge.

Nucor states that since "SHG does not specifically articulate an alleged error of law or fact, or changed circumstances, as is required for a petition for rehearing (see 16 NYCRR, part 3.7(b))," its letter-petition is deficient. It

argues that, due to SHG's failure to contest the Commission's finding that it would be "counterproductive to economic development goals" to assign RPS premium costs to customers that require electricity "at reduced prices to achieve economic development objectives such as sustaining or creating jobs (Order at 55)" and to even "address the balancing of economic development and renewable objectives that are discussed in the Order," there is no basis for granting SHG's petition.

Nucor then argues that "the solution crafted in the RPS Order (exempting from RPS premiums economic development and municipal customers that are exempt from SBC surcharges) does not accomplish the purpose that is articulated in the Order." It states that "[a]ll economic development power supply arrangements do not provide relief from SBC charges…." Nucor continues that, in such cases, "the parties attempt to establish flex rate terms that will achieve a net 'pricing objective' that is considered necessary to attract or retain load." Nucor asserts that "to address economic development considerations adequately as the RPS order intends, existing flex rate customers should be RPS exempt," and the Commission to clarify the RPS order in that regard.

NYPA states that SHG's Petition should be denied for two principal reasons. The first is that "the electric 'station service' small hydro facilities require for their operations generally is quite small and, therefore, the RPS premium costs that SHG's members actually would pay would be de minimis." The second reason offered by NYPA is that "SHG simply has failed to show that the Commission's decision … is erroneous or unfair in any way." Citing to the Recommended Decision (at 69-71), NYPA notes the ALJ's determination that "NYPA's customers should be excluded from payment of RPS premiums because, among other things, it would be counter-productive to add cost burdens to NYPA's economic development customers; excluding NYPA's customers would have an insignificant impact on remaining ratepayers; and NYPA's customers have financed the hydroelectric generation resources of NYPA which account for over 50% of all renewable energy consumed in New York State."

NYPA argues that it, along with its customers, "have expended and will expend hundreds of millions of dollars to ensure that NYPA's hydroelectric resources continue to be available, thereby making achievement of the Statewide 25% RPS goal possible." NYPA also points to the PSC's endorsement of the RD's analysis and the PSC's specific determination that customers such as NYPA's economic development customers are "provided electricity at reduced prices to achieve economic development objectives such as sustaining or creating jobs" and that "requiring such customers to pay for the objectives of the RPS would be counterproductive to economic development goals." NYPA concludes that "since the Commission's findings and determination on this issue clearly are accurate and reasonable (and SHG does not make any showing to the contrary), SHG's Petition relating to this issue must be denied. See 16 NYCRR 3.7(b) ('Rehearing may be sought only on the grounds that the [C]ommission committed an error of law or fact or that new circumstances warrant a different determination')."

RETEC agrees with SHG that large electricity customers currently receiving low cost power should not be exempt from participating in the RPS. It argues that such "consumers are, by definition, receiving low cost power and should contribute their fair share of the programs from which they too will receive energy security and environmental benefits and … have for many years been the beneficiaries of low-cost power at subsidized rates well below the otherwise applicable utility tariff."

In response to SHG's argument that "they will receive no recognition of their environmental attributes," RETEC submits that "the development and use of a generation attributes tracking and trading system whereby energy and generation attributes can be unbundled and contracted for separately would rectify this situation." It asserts that the PSC can "adjust the environmental disclosure label program as necessary to ensure accurate and reliable information is provided to consumers based on data from the attribute tracking system." RETECT asserts that the issue of compensation for attributes is

a separate issue from recognition and tracking of such attributes. It contends that the RPS does not, as currently described in the September 24th Order, include existing hydro power as automatically eligible for the RPS since the objective of the RPS is to stimulate the development of new renewable energy generation. Finally, RETEC argues that SHG's concerns that they are paying for the RPS via a wires charge appear to be based on a misinterpretation of the Commission's Order. RETEC states that retail customers, not generators, will pay the wires charge. RETEC further states that, to the extent that SHG members must pay for station power, they may be subject to a small wires charge. RETEC concludes that the issue of retail rate charges for station power, though controversial, is not a proper subject for the RPS proceeding.

Discussion

SHG's petition does not allege or demonstrate that the Commission committed an error of law or fact, or that new circumstances warrant a different determination. Thus, the petition will be denied for failure to meet the requirements of the Commission's Rules and Regulations regarding rehearings.[10]

We note, however, that SHG's assertion that the September 24th Order unduly discriminates against existing small hydroelectric power facilities is unfounded. To the contrary, we established a maintenance tier that will permit such facilities the opportunity to demonstrate the need for RPS incentives. Moreover, as noted in the replies of NYPA and RETEC, to the extent any SHG members are assessed an RPS charge, such charges are likely to be de minimis because the amount of station power used by such entities typically is small. Such usage, therefore, is not comparable to the usage of the large industrial customers who employ electricity in their primary manufacturing or other processes.

SHG's assertion the Commission "deferred too much for subsequent proceedings" is similarly without merit; we

[10] See 16 NYCRR § 3.7(b).

established broad parameters for the RPS program within which an implementation phase can and will be expeditiously conducted. The implementation plan currently under development will provide further detail regarding specific elements and requirements of the RPS program. That plan, along with the clarification provided earlier in this Order, should adequately respond to SHG's claims regarding the need to provide additional guidance to renewable power producers.

With respect to SHG's request for adoption of an externalities credit, it appears that this issue was not raised by SHG in its briefs on or opposing exceptions and therefore is improperly raised by SHG at this time.[11]

Finally, though SHG articulates very generalized claims regarding costs to ratepayers and hydroelectric facilities and the possible impact of the central procurement model, its claims are not only speculative and unsupported, but they are devoid of proposals for how the asserted claims could or should be addressed.

With respect to Nucor's request for clarification that the September 24th Order is intended to exempt existing flex-rate customers from the RPS charge, we reiterate that the RPS exemption set forth in our September 24th Order extends to any customer who currently receives an SBC charge exemption. In other words, customers who have economic development power supply arrangements that do not provide relief from SBC charges, will be assessed an RPS charge; conversely, those customers who have arrangements that provide relief from the SBC charge will not be assessed an RPS charge.

When we established the RPS exemption, we were balancing multiple objectives.[12] One objective was to minimize adverse impacts on energy costs.[13] Another was to develop an RPS that is administratively transparent, efficient and verifiable.[14]

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[11] 16 NYCRR § 4.10(d)(2)

[12] See, e.g., September 24th Order at 23-24, 55.

[13] September 24th Order at 24.

[14] September 24th Order at 24, 55, 83.

Adopting an RPS exemption that follows the existing scope and collection methodology applicable to SBC exemptions meets these (and other objectives) by, *inter alia*, minimizing the scope of the exemption in a verifiable manner and allowing affected delivery utilities to utilize existing bill formats for purposes of identifying and collecting the RPS surcharge. Since we intend the treatment of the SBC and RPS charges to be consistent, any requests for modifications as to the treatment of either of these surcharges should hereafter be raised and considered in the context of our SBC proceeding.

RIDGEWOOD'S PETITION

Ridgewood seeks reconsideration of the decision to require monthly matching of energy deliveries and asks instead for hourly matching. Ridgewood claims that the FERC's recent approval of applications filed by the New England Power Pool (NEPOOL) and the New York Independent System Operator (NYISO) to eliminate through-and-out transmission charges (export charges) "have made it easier for generators to schedule exports on an hourly basis, even if those generators rely on intermittent sources." Ridgewood claims, as a result of this recent change, "as of December 1, 2004, any generator may schedule transmission for every hour of the month without incurring additional costs if its deliveries do not match the scheduled load." It therefore concludes that "intermittent resources incur the same costs, and receive the same benefits, as any other generator on the system."

Ridgewood also asserts that moving from a monthly matching requirement to a strict delivery requirement will eliminate, not just limit, gaming.

Filings in Response

RETEC takes "strong" exception to Ridgewood's assertion that recent actions by NEPOOL and NYISO to reduce and eliminate “seams” between the two regions makes a monthly matching protocol for imports unnecessary. RETEC contends that the recent changes address only the elimination of export fees

and so-called “rate-pancaking.” RETEC argues that the rationale for monthly matching for imports from renewable generation is based on the imposition of scheduling requirements for cross-border transactions and that the referenced FERC-approved changes to tariffs in NEPOOL and NYISO do not impact scheduling requirements. RETEC asserts that the use of monthly matching for cross-border delivery of renewable energy is not only appropriate but essential. RETEC contends that Ridgewood's claim that renewable energy generators are treated no differently than other generators is incorrect; rather, many renewable energy generators are different. Specifically, RETEC notes that variable, or intermittent, generators have difficulty scheduling their output with complete accuracy and are at a significant economic disadvantage when faced with scheduling requirements they cannot meet.

RETEC also asserts that market rules for scheduling are established both for smooth operations and for the maintenance of competitive and fair markets – that is, they have been established to prevent gaming by resources that can and do control their output. RETEC contends that "allowing monthly matching for renewable energy imports does not adversely impact operation of the grid in any way, and variable generators can not 'game' the system by changing their output at will the way fossil fuel generators can." For these reasons, RETEC concludes that the monthly matching regime adopted by the Commission in its September 24th Order should be maintained.

Discussion

Ridgewood's petition was emailed to the parties on October 25, 2004 but apparently was not filed with the PSC Secretary within the time frame set forth in our Rules and Regulations.[15] On that basis alone, it need not be considered. In any event, the petition is substantively deficient because, as RETEC correctly observes, the recent FERC-approved changes address only the elimination of export fees and so-called "rate-

[15] See 16 NYCRR § 3.7(c).

pancaking." Moreover, even if Ridgewood's arguments were correct, they fail to address scheduling barriers between New York and areas controlled by entities other than NEPOOL, areas to which the monthly matching provision also applies.

ADDITIONAL PROCEDURAL ISSUES

By letter dated November 15, 2004, SHG submitted a letter "responding to the replies to SHG's request for clarification and/or reconsideration" of the September 24th Order. Our rules clearly state that replies to responses will not be entertained except in extraordinary circumstances. No such circumstances are established here. SHG merely reiterates arguments it has or could have raised earlier. Moreover, SHG's purported reliance upon two notices published on November 10, 2004 in the New York State Register is misplaced. The subject of those notices is the RPS implementation plan, not the petitions for clarification and/or reconsideration.

By letter dated November 16, 2004, MI moves to strike RETEC's response to the petitions for clarification and/or reconsideration insofar as the RETEC response sought rehearing the exemption from the RPS exemption. In light of our denial of the petitions seeking reconsideration of the RPS surcharge exemption, we find that the motion has been rendered moot and therefore need not be further addressed.

CONCLUSION

The petition for clarification filed by the New York State Energy Research and Development Authority is granted as provided in the foregoing discussion. Except as clarified herein, the petitions for clarification and/or reconsideration filed by the Small Hydro Group and Ridgewood Renewable Power, L.L.C. are denied.

The Commission orders:

1. The petition for clarification filed by the New York State Energy Research and Development Authority is granted as provided in the foregoing discussion.

2. The petitions for clarification and/or reconsideration filed by the Small Hydro Group and Ridgewood Renewable Power, L.L.C. are denied except insofar as clarification is provided in the foregoing discussion.

3. This proceeding is continued.

By the Commission,

(SIGNED) JACLYN A. BRILLING
Secretary