STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on December 19, 2013

COMMISSIONERS PRESENT:

Audrey Zibelman, Chair
Patricia L. Acampora
Garry A. Brown
Gregg C. Sayre
Diane X. Burman

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

ORDER GRANTING IN PART AND DENYING IN PART A PETITION FOR REHEARING

(Issued and Effective December 23, 2013)

BY THE COMMISSION:

## INTRODUCTION

On May 22, 2013, the Commission authorized the New York State Energy Research and Development Authority (NYSERDA) to limit Renewable Portfolio Standard (RPS) Main Tier bids and Main Tier contracts to bidders proposing to meet their RPS obligations with renewable resource energy generated within the State or through offshore generating facilities directly connected to New York's electrical grid.[1] On June 21, 2013, HQ Energy Services (U.S.) Inc. (HQ), alleging various legal and factual errors, requested rehearing of the May 22, 2013 Order.

[1] Case 08-E-0188, Retail Renewable Portfolio Standard (RPS), Order Modifying Renewable Portfolio Standard Program Eligibility Requirements, issued May 22, 2013 (May 2013 Order).

HQ'S PETITION FOR REHEARING

HQ argues that the Commission acted arbitrarily by relying on factors or information that were not addressed in NYSERDA's petition requesting the eligibility limitations, or in any comments related to the petition. Specifically, HQ claims that the Commission improperly relied on factors related to (i) changed economic circumstances involving sustained low natural gas prices and an expiring Federal Production Tax Credit and (ii) a characterization of Main Tier RPS contracts as a state-provided subsidy.

Regarding natural gas prices, HQ states that the Commission failed to support its reasoning that natural gas prices are expected to remain comparatively low and that this would result in relatively low prices for electricity. In support of its assertions, HQ provides a chart of annual average Henry Hub spot natural gas prices, including projected prices through 2040, from the United States Energy Information Administration (USEIA) and argues that projected rise in the price of natural gas refutes the electric price expectations relied on by the Commission. HQ further claims that the Commission failed to support its reasoning that relatively low electric prices would put upward pressure on the RPS price premium required to induce development of clean energy facilities.

In further support of its argument that the Commission's expectation regarding the relationship of gas prices and RPS Main Tier bid prices is unreasonable, HQ points out that in 2010, the Commission did not prohibit out-of-state projects, despite a strong correlation between the large reduction in gas prices during 2008-2010 and a more than 40% increase in the average RPS Main Tier award price between the November 2007 and March 2010 RPS Main Tier solicitations.

Alternatively, HQ argues that, assuming the Commission is correct regarding the relationship between electricity prices and RPS Main Tier bid prices, all developers will likely increase RPS Main Tier bids in one manner or another, raising the prospect that out-of-state developers could provide "comparatively superior" benefits.[2]

Similarly, HQ argues that the Commission improperly speculated regarding the federal Production Tax Credit (PTC). HQ states that termination of the PTC is not certain and that numerous and influential entities are likely to lobby Congress to extend the PTC. HQ states that if the PTC terminates, developers can avail themselves of other government incentives to compensate for the PTC and may not require additional RPS funds. HQ also states that loss of the PTC will impact in-state and out-of-state developers equally and higher RPS Main Tier award prices are not sufficient reason to disallow out-of-state projects because more bidders increase the chance of tempering price increases. HQ further argues that the PTC acts as an advantage to domestically located development because projects located on foreign soil are not eligible for the federal subsidy. HQ notes that the May 2013 Order may violate trade pacts and agreements between Canada and the United States including the North American Free Agreement. HQ notes that the Commission did not change the 30% evaluation allocation to economic benefits as an additional measure to ensure that in-state benefits are maximized among in-state developers.

HQ presumes that the Commission would have increased the 30% evaluation if it was truly concerned with rising RPS costs and enhancing in-state benefits. HQ claims that absence

[2] Petition for Rehearing of H.Q. Energy Services (U.S.) Inc., June 21, 2013, p. 11.

of such further change reveals the Commission's intentions as economic protectionism.

HQ also alleges that there was no basis for the Commission's finding that the economic benefits provided by in-State RPS projects are substantial in relation to the cost of necessary premiums, and that the finding is therefore unreasonable. Alternatively, HQ states that even if the Commission's finding is correct, the relationship between the economic benefits of in-state projects and the cost of the RPS premiums is irrelevant to the question of what projects are eligible for RPS Main Tier solicitations. HQ argues that all projects should be allowed to demonstrate superiority and substantial value. HQ also claims that the Commission's finding that out-of-state projects will not maximize the economic, environmental, and energy security benefits to New York lacks a record basis. HQ also alleges that the Commission implicitly recognizes the price moderating effects of out-of-state bids when it notes that eliminating these bids will not significantly affect Main Tier award prices, and that the Commission failed to connect the prohibition against out of state projects with the goal of maximizing the benefits that accrue to New York.

HQ alleges the Commission committed an error of law by concluding the in-state requirement does not violate the dormant Commerce Clause of the United States Constitution. HQ argues that NYSERDA's activities do not fall within the market participant exception to the dormant Commerce Clause. HQ argues that the generators creating RPS eligible attributes are not analogous to the state-owned and operated waste management facility found by the Supreme Court to be a market participant in United Haulers Assoc. Inc. v Oneida-Herkimer Solid Waste

Management Authority.[3] HQ also disputes the Commission's findings regarding energy attribute markets and NYSERDA's role in that market; HQ explains that NYSERDA and RPS participating developers enter into a contractual relationship evidenced by the consideration the parties exchange under the RPS contracts. Specifically, HQ notes that NYSERDA provides a monetary payment in exchange for the environmental attributes of certain electrical generation – attributes that – even in the absence of the RPS program or a NYSERDA contract – have commercial value in the open market. In HQ's view, NYSERDA's monetary payment is not a subsidy but rather a purchase of a marketable commodity.

## NOTICE OF PROPOSED RULEMAKING

In conformance with State Administrative Procedure Act (SAPA) §202(1), notice of HQ's petition for rehearing was published in the State Register on July 24, 2013 (03-E-0188SP36). The SAPA §202(1)(a) period for submitting comments in response to the notice expired on September 9, 2013. Comments supporting HQ's request for rehearing were filed by Multiple Intervenors, (MI) and Brookfield Renewable Energy Group (Brookfield). The Alliance for Clean Energy New York (ACE NY) and NYSERDA filed comments opposing HQ's petition.

## SUMMARY OF COMMENTS

### Multiple Intervenors

MI states that limiting eligibility to in-state projects is likely to worsen cost increases related to the price of electricity and termination of the PTC. MI notes that the Commission's order estimates that if gas prices remain at 2012 levels, a RPS premium of $45-50/MWh may be necessary to offset a

[3] 550 U.S. 330 (2007).

reduction in revenue associated with the sale of wholesale electricity and the premium could further increase to approximately $68/MWh for projects unable to rely on the PTC. MI complains that the Commission failed to analyze the impacts of the potential increases on the overall cost to achieve the RPS goal or whether the goal should be modified. MI also states that the Commission failed to consider a NYSERDA statement, contained in the recently filed Renewable Portfolio Standard Main Tier 2013 Program Review Final Report (2013 RPS Review),[4] that renewable generation projects may avoid high-cost tax equity financing if the PTC expires, which would reduce the annual carrying charge required by such projects. MI suggests that in light of the Commission's expressed concerns regarding the cost of the RPS program, it should reconsider the RPS program and its current goal, rather than exclude bidders that have the potential to reduce costs. MI states that the Commission should defer consideration of eligibility issues until the comprehensive review of the RPS program that the Commission has indicated it would conduct in 2013.

Brookfield

Brookfield supports HQ's petition for rehearing and claims that the Commission's May 22 Order ignores the improved energy security and environmental benefits that accrue to New York from out of state resources. Brookfield argues that NYSERDA's economic analysis regarding out-of-state projects is based on the March 2009 Impact and Process Evaluation performed

[4] Filed in this proceeding on September 5, 2013.

by KEMA[5] and that such analysis is significantly deficient because a footnote in the report regarding a lack of economic benefits resulting from out-of-state RPS facilities is unsubstantiated. Brookfield states that based on intuition that it is almost certain that the footnote is incorrect and that value chain economic benefits will accrue to the entire Northeast Region of the United States including New York. Brookfield criticizes NYSERDA's comparison of the economic benefits of in-state projects with the potential cost increase related to excluding out-of-state projects from the RPS program claiming that a detailed evaluation of such costs needs to be conducted and considered before the Commission can decide the geographical eligibility issues.

Brookfield also states that the Commission failed to adequately address comments regarding energy security and how increasing costs may decrease the amount of renewable generation the RPS program can support. Brookfield adds that a lack of sufficient transmission structure discourages the development of renewable generation and that the geographical limitation is likely to discourage the development of such infrastructure.

Alliance for Clean Energy New York

ACE NY encourages the Commission to reject HQ's request for rehearing and uphold the eligibility limitation because believes the limitation is consistent with the multiple goals of the RPS and the overall state energy plan. ACE NY raises NYSERDA's 2013 RPS Review which it believes demonstrates the RPS Main Tier program has a substantial positive impact on

[5] KEMA, New York Main Tier RPS Impact and Process Evaluation (March 2009) available at http://www.nyserda.ny.gov/Publications/Program-Planning-Status-and-Evaluation-Reports/Renewable-Portfolio-Standard-Reports.aspx.

New York's economy and that the in-state requirement will further enhance that impact.

New York State Energy Research and Development Authority

In its comments, NYSERDA takes the position that the Commission should deny the HQ's petition because HQ fails to raise an error of law or fact. According to NYSERDA, the factors and information relied on by the Commission in making its determination are supported by the record and were subject to stakeholder comments. NYSERDA also posits that HQ's arguments are based on misinterpretation or mischaracterization of the Commission's order and that the evidence presented by HQ is supportive of the order rather than contradictory. Finally, NYSERDA argues that the Commission's statement regarding the Commerce Clause is not an error of law.

NYSERDA argues that the Commission's expectation of relatively low future natural gas prices and its finding that such low prices, in conjunction with uncertainty regarding the PTC, are likely to increase the RPS Main Tier premium are reasonable and supported by the record. Further, NYSERDA claims that the USEIA data presented in HQ's rehearing petition actually supports the Commission's determination. According to NYSERDA, the graph demonstrates that the USEIA does not expect the price of natural gas to equal 2008 prices until 2040, corroborating the Commission's premise for at least the next 27 years.

NYSERDA also states that HQ's claim that Commission reliance on the uncertainty regarding the PTC amounts to improper speculation is itself only supported by HQ's own speculation. NYSERDA notes that even if the PTC is ultimately renewed, the uncertainty created by last minute and short term

renewals increases financial risk for developers leading to upward pressure on RPS Main Tier bid prices.

NYSERDA contests HQ's claim that reliance on PTC uncertainty and low natural gas and electricity prices as a basis for the Commission's determination was improper because the issues were not raised in NYSERDA's petition. NYSERDA notes that energy prices in the Northeast and the federal tax benefits for renewable energy projects are topics of numerous comments and discussions in previous Commission proceedings over the course of several years. NYSERDA adds that the Commission may take administrative notice of public information and may consider its own informed expectations regarding the likelihood of future federal regulatory action and its impact on Commission authorized programs.

NYSERDA does not contest the view stated in the Commission's order that RPS Main Tier payments amount to a direct subsidy to a domestic industry. However, NYSERDA also proffers additional explanation and context for its position, first explained in its petition, that authorization and administration of the RPS Main Tier awards are direct participation in the market for energy attributes, and are therefore outside the purview of the Commerce Clause. .

NYSERDA explains that energy attributes consist of environmental and other characteristics of power generation, the market for which is separate from the wholesale commodity market for electricity. NYSERDA further distinguishes between RPS-eligible Attributes and RPS Attributes.[6] According to NYSERDA, the RPS Main Tier program is only in the market to purchase certain types of energy attributes based on Commission authorized parameters. NYSERDA refers to these energy

[6] Case 03-E-0188, supra, NYSERDA Comments, September 9, 2013.

attributes as "RPS-eligible Attributes." NYSERDA further explains that the RPS Main Tier program is only authorized to contract for purchase up to 95% of the attributes created by RPS Main Tier program participants; the remaining 5% are available to support and foster a broader voluntary market. NYSERDA points out that other market participants, including energy service companies, utilities, public authorities, and other entities purchased the attributes equivalent to 395,212 MWh of renewable energy or "RPS-eligible Attributes" in 2010. NYSERDA points out that three RPS-eligible generators under contract with NYSERDA for RPS Attributes have exercised the option under their contracts to suspend delivery of energy attributes to NYSERDA in order to sell them to the other buyers. NYSERDA also notes that generation facilities currently under contract with the RPS Main Tier program have sold and continue to sell energy attributes otherwise eligible for the RPS Main Tier to buyers other than NYSERDA, including entities involved in other states' renewable energy programs. NYSERDA concludes that both the form of the RPS transactions and the existence of similar transactions for the same and similar products clearly demonstrate the existence of an energy attribute market in which NYSERDA, through the RPS Main Tier program and contracts, is a participant.

## DISCUSSION

For the reasons explained below, we grant HQ's petition for rehearing, in part, for the limited purpose of considering the additional information and arguments presented regarding the role of the RPS Main Tier in the market for energy generation attributes. We otherwise deny HQ's petition for rehearing and affirm the determination of our May 2013 Order.

Our rules provide that a rehearing may be sought only on the grounds that the Commission committed an error of law or fact or that new circumstances warrant a different determination. A petitioner requesting rehearing must separately identify and specifically explain and support each alleged error or new circumstance for which it seeks rehearing (16 NYCRR 3.7[b]).

HQ asserts that the Commission erred in its May 2013 Order by rejecting NYSERDA's market participation claim and for characterizing the RPS Main Tier program as a subsidy. HQ argues that the RPS Main Tier program cannot be considered a subsidy because the RPS contract payments are being exchanged for all rights to renewable energy attributes and the fact that the developer could sell the attributes on the open market clearly demonstrates that the attributes represent "real, valuable consideration" in exchange for a monetary payment. HQ's rather concise explanation of the "RPS Main Tier transaction," has caused us to reconsider our findings regarding the market participant theory.

The Commerce Clause of the United State Constitution states that "Congress shall have the Power . . . [t]o regulate Commerce with foreign Nations, and among the several States and with the Indian tribes."[7] Although the terms of the Constitution themselves do not in limit the power of States to regulate, the Supreme Court has consistently interpreted the Commerce Clause as an implicit restraint on state authority, even in the absence of a conflicting federal statute.[8] Commonly referred to as the "negative Commerce clause," the concept limits the power of States to discriminate against interstate commerce and prohibits

[7] U.S. Const. Art. I, §8, cl. 3.

[8] United Haulers Association, Inc. v Oneida-Herkimer Solid Waste Mgmt Auth., 550 US 330, 338 (2007).

discriminatory measures that benefit in-state economic interests by burdening out-of-state competitors.[9] The "foreign" Commerce Clause also restrains states from acting to burden or impede foreign commerce.[10]

In analyzing whether a state rule or regulation violates the dormant Commerce Clause, courts consider first whether it discriminates on its face against interstate commerce.[11] Discrimination in this context "means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter[,]" regardless of the purpose of, or justification for, the law.[12]

Non-discriminatory measures are subject to a balancing test (Pike balancing) and are generally upheld unless the burden imposed on interstate commerce is clearly excessive in comparison to the supposed local benefits.[13] Measures that facially discriminate between in-state and out-of-state economic interests are subject to stricter review.[14]

An exception to the dormant commerce clause, known as the "market participant" doctrine, differentiates between state regulatory activity and a state's acting as a participant in a market.[15] This doctrine rests on the proposition that the Commerce Clause does not prohibit a state "from participating in

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[9] New Energy Co. v. Limbach, 486 U.S. 269, 273 (1988).

[10] Japan Line, LTD., et al. v County of Los Angeles et al., 441 US 434, 445-456 (1979). Indeed, "the power conferred [upon the federal government] under the Foreign is greater than the power conferred by the Interstate Commerce Clause" Odebrecht Constr., Inc. v Prasad, 876 F. Supp. 2d 1305, 1318.

[11] Ore. Waste Sys. v. Dep't of Envtl. Quality, 511 U.S. 93, 99 (1994).

[12] Id.

[13] Pike v Bruce Church, Inc., 397 US 137, 142 (1970).

[14] Dep't of Revenue v. Davis, 553 U.S. 328, 338 (2008), see also Maine v Taylor, 447 U.S. 131, 138 (1986).

[15] New Energy Co., 486 U.S. at 277.

the market and exercising the right to favor its own citizens over others."[16] State action constituting market participation is not subject to the constraints of the Commerce Clause.[17]

The exception is narrowly defined and "only permits a State to influence a discrete, identifiable class of economic activity in which [it] is a major participant. And the market must be relatively narrowly defined, lest the market participant doctrine swallow[] up the rule that States may not impose substantial burdens on interstate commerce."[18] The determination of whether a state action constitutes market participation is fact-specific.[19]

Upon reconsideration of the issues related to the dormant Commerce Clause, including HQ's petition for rehearing and the party comments received in response, we affirm our determination that the in-state eligibility requirement does not infringe on any federal right or pre-emptive Congressional power. We continue to recognize the RPS Main Tier payments as a lawful State subsidy. However, based on HQ's reframing of the issue and NYSERDA's additional information regarding the broader market for energy attributes, we now recognize the existence of a market for clean energy attributes and we find that NYSERDA's activities that the RPS Main Tier constitute participation in that market. Therefore, continue to find that the RPS program is not restricted from favoring in-state projects over others by the dormant Commerce Clause.[20]

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[16] Selevan v. N.Y. Thruway Auth., 584 F.3d 82, 93 (2d Cir. N.Y. 2009).

[17] White v Mass. Council of Const. Emplrs, 460 US 204, 208-209 (1994).

[18] Cohen v. R.I. Tpk. & Bridge Auth., 775 F. Supp. 2d 439, 444 (2011) (internal quotes and citations omitted).

[19] Selevan v. N.Y. Thruway Auth., 584 F.3d 82, 93 (2d Cir. N.Y. 2009).

[20] Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 810 (1976).

HQ's citation to United Haulers Assoc. v Oneida-Herkimer Solid Waste Management Authority is inapposite.[21] In United Haulers, the Supreme Court did not analyze the applicability of the market participant theory. Rather, having held that the flow control ordinances requiring all solid waste created within the counties be delivered to government owned facilities did not discriminate between in-state and out-of-state business interests, the Court applied the Pike balancing test.[22]

In our view, NYSERDA's role in the RPS Main Tier program amounts to market participation similar to Maryland's role in the program addressed by Hughes v Alexandria Scrap Corp.[23] In Hughes, Maryland sought to remedy the problem of a glut of abandoned cars and decided to pay a bounty to encourage the processing of abandoned cars. The complicated set of rules regulating what was required in order for a processor to be eligible for a bounty treated out-of-state and in-state processors differently. Although the Court explicitly recognized that the program burdened the interstate flow of processed cars, the program was not subject to the dormant Commerce Clause because rather than seeking to prohibit the flow of processed cars or regulate the conditions under which it may occur, Maryland had entered into the market itself to bid up the price paid for the processing.

Similarly, the RPS Main Tier program is designed to meet legitimate state interests including an improved environment, energy security, and economic development. NYSERDA, through the RPS Main Tier, participates in the market for clean energy attributes by transacting for particular types

[21] 550 US 330 [2007].
[22] Id., at 345.
[23] See Hughes v Alexandria Scrap Corp. 426 US 794 [1976].

of attributes – RPS-eligible attributes. Moreover, the eligibility rule does not prevent any clean energy project, or anyone else, from transacting for energy attributes in interstate commerce. Rather, the rule represents a permissible discretion of the State to favor its own citizens over others.[24]

Finally, as was the case for the state administered program in Hughes, the RPS Main Tier program is actually creating much of the commerce related to energy attributes in New York. It seems illogical to invalidate a state subsidy program based on its "burden" on interstate commerce, when the commerce at issue is almost entirely the result of the State acting as a purchaser, and terminating the program would increase the burden on commerce – likely to the point of stopping it all together.[25]

In any event, nothing raised by HQ's petition for rehearing or the comments submitted in response convinces us the in-state restriction is improper.[26] Therefore, we conclude, as we did in the May 2013 Order, that the in-state requirement does not infringe on any federal Constitutional right or any pre-emptive Congressional power.[27]

HQ's petition for rehearing alleges a number of legal and factual errors. However, many of the objections HQ raises to the May 2013 Order amount to policy arguments that we have previously considered. In any event, as explained below, the

[24] Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 810 (1976).
[25] See Id., at 810, n. 18.
[26] HQ also alludes to a recent United States Court of Appeals case Ill. Commerce Comm'n v FERC, 721 F3d 764 [7d Cir. 2013] to support its argument regarding the dormant Commerc Clause. The citation is inapposite. As HQ notes, the case holding did not involve constitutionality of a state renewable program. More importantly, Michigan's RPS is significantly different than our RPS program in that it requires specific purchases of power by regulated but privately owned utilities.
[27] See May 2013 Order, p. 34.

petition fails to raise any additional legal or factual errors or new circumstances that warrant rehearing.

HQ claims that it was legal error to rely on changed economic circumstances (sustained low natural gas prices and more uncertain Federal Production Tax Credit) because NYSERDA did not raise the topics in its petition. It also claims that the May 2013 Order fails to provide sufficient support or justification of the changed circumstances. Because our reliance on data or recommendations other than those presented by the parties is proper, HQ's claim fails to identify an error of law warranting rehearing.[28] To the extent HQ argues that our reliance on previous experience is an error of law, the argument fails to raise an issue warranting rehearing as we are entitled to rely on our experience regarding the economics of energy production and clean energy attributes - matters within our expertise.[29]

HQ's argument that the May 2013 Order fails to provide a legally sufficient basis for the RPS Main Tier eligibility determination also fails to raise an error of law warranting rehearing. The Order provides an extensive account of previous Commission orders considering economic benefits and bid price in RPS Main Tier program design. The Order explains that in the face of long-term projections of relatively low electric prices and increased uncertainty of the PTC, we have authorize NYSERDA to exclude energy attributes created outside the State from its RPS Main Tier purchases.[30] The May 2013 Order explains the relationship between natural gas prices, wholesale electricity prices, availability/reliability of the PTC, and RPS attribute

[28] KeySpan Energy Servs. v PSC, 295 AD2d 859, 863 [3d Dept, 2002].
[29] Matter of City of New York v PSC, 29 AD3d 1152, 1156 [AD3d 2013], lv denied 7 NY3d 709 [2013].
[30] May 2013 Order, pp 22-33.

bid prices and why these factors are important to the RPS program as well as our decision to exclude out-of-state projects.[31]

HQ asserts an error of fact by alleging that the May 2013 Order fails to consider the impact of factors other than the PTC and wholesale electricity revenue on the price of building renewable energy projects. The argument does not raise an error of fact. Instead it suggests, at most that the Commission should have considered other factors, and given such factors greater weight. Reliance on changed economic circumstances is proper and the May 2013 Order provides sufficient justification and explanation for such reliance.

HQ argues that the findings of sustained lower wholesale electricity and PTC uncertainty are insufficiently supported and are factually incorrect. HQ supports the argument by presenting various information that it claims contradicts the findings of the May 2013 Order. Neither HQ's argument nor the information it presents in support raise an error of fact or law warranting rehearing. As noted by NYSERDA, the USEIA natural gas price data upon which HQ relies, actually support the findings in the May 2013 Order regarding natural gas prices.[32]

HQ also argues that if the RPS Main Tier eligibility determination is reasonable now, it should have been implemented three years earlier when natural gas prices first dropped

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[31] See Graph: Annual NYISO Day-Ahead Electricity Prices Compared to Henry Hub Natural Gas Prices, May 2013 Order, p 30. See textual explanation that the sale of electricity at wholesale, the PTC and the revenue related RPS attributes are the primary sources of revenue for RPS projects.

[32] Petition for Rehearing, p. 9. The graph indicates that the price of natural gas is not expected to reach 2011 prices until approximately 2020 and any price increase is expected to be gradual through the projection period with the 2040 projection remaining below $8 per million Btu.

significantly. HQ's claim that the PSC should have acted sooner does not meet the threshold for granting rehearing. The argument does not raise an error of fact or law warranting rehearing. Rather, the point bolsters the finding that natural gas prices have dropped on a sustained basis.

HQ argues that the May 2013 Order fails to recognize that lower wholesale energy prices and PTC uncertainty will have a similar impact on all renewable attributes projects and that therefore, it is improper to distinguish between in-state and out-of-state energy attributes. The argument is without merit and does not warrant rehearing. As is explained in the Order, our decision to only consider bids related to in-state energy attributes is based on the incremental benefits provided by those projects. The Order recognizes that changed economic conditions will factor into the RPS Main Tier energy attribute bids from all potential sources and even acknowledges that excluding out-of-state may have a small negative impact on bids. Thus, this argument proceeds from a false premise. Moreover, our decision is rational because, as explained in the May 2013 Order, the incremental benefits from in-state projects over out-of-state projects are expected to more than offset any price impacts related to a smaller bid pool.[33]

HQ argues that the May 2013 Order placed improper importance on the termination of the PTC. The argument fails to raise an error of fact or law warranting rehearing. As the May 2013 Order explains, the uncertainty regarding the PTC, which HQ's petition acknowledges,[34] may be sufficient to increase bid RPS Main Tier bid prices because a developer that is unable to

[33] May 2013 Order, pp 32-33.

[34] Petition for Rehearing, p. 11, "As Congress has demonstrated, the termination of the PTC is never assured until it is terminated."

anticipate a PTC will have to adjust its bid accordingly. Moreover, it is appropriate for us to take note of, and consider, the impacts of regulatory uncertainty, a widely recognized phenomenon in the utility field, as well as other fields.

As to HQ's claim that there is no basis for the finding that the economic benefits of in-state projects are substantial, the 2009 RPS mid-course review indicates that the RPS program has the potential for $6 billion in direct economic benefit to New York. A separate analysis on data collected from 18 RPS-funded projects currently operating in New York produces results in-line with the mid-course review. The May 2013 Order explained this.[35]

Although we intend to conduct a comprehensive review of the RPS Main Tier program, and we believe the impact of the May 2013 Order should be part of that review, we continue to believe that the potential incremental benefits of the in-state restriction far outweigh any detrimental effects. Moreover, it is proper to implement changes to the RPS incrementally,[36] and if this change results in undue RPS Main Tier price increases, NYSERDA, like other market buyers, has the discretion to reject all bids received in future solicitations and to petition for further changes. Similarly, if the expected incremental benefits do not accrue over time, stakeholders may petition for (or we may, on our own motion, direct) further modifications to the eligibility rules.

[35] May 2013 Order, p. 3-4.
[36] Rochester Gas & Electric Corp. v Public Service Com., 117 AD2d 156, 160 (3d Dept. 1986).

The Commission orders:

1. The petition for rehearing of HQ Energy Services (U.S.) Inc. is granted in part, to the extent discussed in the body of this Order, and is otherwise denied.

2. This proceeding is continued.

By the Commission

*Kathleen H. Burgess*

Digitally Signed by Secretary
New York Public Service Commission

KATHLEEN H. BURGESS
Secretary