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January 8, 2017

Honorable Secretary Kathleen H. Burgess
Public Service Commission
Three Empire State Plaza
Albany, NY 12223-1350
*via electronic delivery

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

RE: Request for Clarification Regarding Treatment of Renewable Energy Certificates from Independent Baseline Resources

Dear Secretary,

Please find below a thorough description of the voluntary REC market for inclusion in this proceeding, and a Request for Clarification on the treatment of RECs from independent merchant generators.

This Request is submitted on behalf of Azure mountain Power and Borax Hydro Operations, Inc.

Respectfully Submitted,

/s/
Emmett V. Smith, Azure Mountain Power

/s/
Erik Bergman, Manager, Boralex Hydro Operations

On August 31, 2016 the New York Public Service Commission (NY-PSC) issued the Order adopting a Clean Energy Standard (CES), establishing the target that 50% of the electricity consumed in New York State be derived from renewable resources by 2030 (the "50 by 30" goal). The Order established procurement obligations for Load Serving Entities to contribute to the "50 by 30" goal by purchasing Renewable Energy Certificates from new Large-Scale Renewable resources (LSRs) through NYSERDA. Significantly, these procurement obligations apply only to new resources, referred to as "Tier 1". In the CES, the State announced its intention to count the production of all pre-existing "Renewable Baseline" resources towards the 50 by 30 goal without compensation for the generators and without establishing any similar legal claim to the Renewable Energy Certificates they produce[1]. Since that time, there has been a persistent lack of clarity about which legacy resources the Commission intends to count towards the "Baseline" and how.

The "Renewable Baseline" consists of a mix of former utility hydro plants, independently developed hydro plants with current or expired PURPA contracts, and independently developed solar, wind, and biomass plants with current or expired RPS contracts. With the exception of power plants with current RPS contracts, no entity has a claim to the attributes from these facilities unless specified by a contract. It is these independently-owned unsecured RECs with which this Request is concerned. A recent report filed in this proceeding by Synapse Energy Economics on behalf of Alliance for Clean Energy New York estimates an annual generation from this sector of 10TWh[2].

There is a danger that the attribution of these resources towards the 50 by 30 goal will interfere with the voluntary REC market. Many legacy hydro and wind generators rely on voluntary market REC sales —as distinct from state portfolio REC sales— to supplement depressed wholesale rates. This market precedes NYGATS and precedes the CES. By counting these resources towards New York State's clean energy goals, the PSC could take regulatory action which interrupts existing contracts and adversely affects marketability of attributes in the future. This would destroy value and effect an unconstitutional taking of private property for public benefit with demonstrable financial impacts on New York generators.

Two recent agency actions have led to growing concern about this possibility. On September 18, The Commission issued an Order denying a Petition for Rehearing[3] submitted by the Coalition of On-Site Energy Users (CORE)[4] (Denial of the CORE Petition) in the Value of Distributed Energy Resources proceeding. In this Order the Commission made very broad statements about the rights of the Commission to control the tradability of RECs. On October 19, Staff released

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[1] "ORDER ADOPTING A CLEAN ENERGY STANDARD" New York Public Service Commission, August 25 2016 Case 15-E-0302

[2] "Policies to Cost-Effectively Retain Existing Renewables in New York" Hopkins, Asa S., PhD; Fields, Spencer; Vitolo, Thomas, PhD, Synapse Energy Economics, December 22, 2017, Filed in Case 15-E-0302, p 1

[3] "ORDER DENYING PETITION FOR REHEARING" Issued and effective September 18, 2017 Case 15-E-0751

[4] "PETITION FOR REHEARING/RECONSIDERATION AND CLARIFICATION OF COMMISSION'S MARCH 9, 2017 ORDER OF THE COALITION OF ON-SITE RENEWABLE ENERGY USERS AND DEVELOPERS (CORE)" April 11,2017, Case 15-E-0751

the "Report Regarding Retention of Existing Baseline Renewable Resources Under Tier 2 of the Renewable Energy Standard Program"[5] (Staff Report) in the Clean Energy Standard proceeding. In a reversal of the CES Staff White Paper, the Staff Report maintained the position taken in the CES Order and recommended that existing resources be counted towards the 50 by 30 goal without any means of securing the RECs. In constructing the basis for this and describing potential accounting methods, the Staff Report made seemingly contradictory statements regarding the treatment of unsecured RECs.

RENEWABLE ATTRIBUTES

Carbon dioxide emissions have a global impact, and once they enter the atmosphere they cannot be tracked or distinguished. The purpose of Renewable Energy Certificates is to create a tradable mechanism for energy consumers to mitigate their climate impact that reflects the nature of the carbon emissions themselves. If you avoid the emissions of carbon in one place, this can compensate for emissions you may trigger somewhere else, and the relative geography in between is irrelevant to climate effects. In order to be effective as a mechanism, REC trading must adhere to two important principles: 1) RECs may be freely traded across geographic boundaries without restriction, 2) RECs may only be counted once.

There are two principle markets for RECs: portfolio compliance and voluntary compliance. The former refers to utilities who are required to purchase RECs to demonstrate compliance with State renewable portfolio standards. The voluntary compliance market includes retail choice customers who wish to consume green energy, and businesses who want to offset their energy use for the purpose of green marketing. A significant distinction between the two is that, in general, Portfolio Compliance RECs must be delivered into the relevant Regional Trade Organization bundled along with the energy. This places New York generators in a unique situation, as our RTO, NYISO, serves only one state. Therefore in order to serve the Compliance Market, electricity must be delivered to adjacent RTO, adding expense and complexity. The Voluntary Market, generally consists of unbundled RECs which may be freely traded across such boundaries. Throughout this proceeding, it appears that the Staff and the PSC have failed to appreciate the significance of this latter market to "Renewable Baseline" generators.

The Federal Trade Commission has established that the consumer who retires a REC, or on whose behalf a REC is retired, has the exclusive right to claim the consumption of the renewable energy associated with it[6] [7]. This is the basis for a voluntary renewable claim, such as "made with

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[5] "STAFF REPORT REGARDING RETENTION OF EXISTING BASELINE RESOURCES UNDER TIER 2 OF THE RENEWABLE ENERGY STANDARD PROGRAM" October 19, 2017, Case 15-E-0302

[6] "*It is deceptive to make an unqualified 'made with renewable energy' claim unless all, or virtually all, of the significant manufacturing processes involved in making the product or package are powered with renewable energy or non-renewable energy matched by renewable energy certificates.*" Federal Trade Commission "Green Guides" § 260.15 (c) "Renewable Energy Claims"

[7] "*If a marketer generates renewable electricity but sells renewable energy certificates for all of that electricity, it would be deceptive for the marketer to represent, directly or by implication, that it uses renewable energy.*" Federal Trade Commission "Green Guides" § 260.15 (d) "Renewable Energy Claims"

100% renewable energy." The validity of the claim does not rest on the method of transfer or the type of contract, whether by GIS, bilateral agreement, third-party verification, or attestation. It does not even require that the REC be transferred between parties, only that it be retired on behalf of the customer. The only requirement for the validity of a claim is its exclusivity: no other party or group of parties may claim to have consumed that renewable energy.

DENIAL OF THE CORE PETITION

The Coalition of On-site Renewable Energy (CORE) Petition for Rehearing of the March 9, 2017 Order in the Value of Distributed Energy Resources proceeding[8] asserted that developers of CST solar projects under the RPS should be able to retain the right to fully tradable RECs. These projects received state funding but preceded NYGATS, and the contracts did not specify the disposition of RECs. NY-PSC denied the Petition, allowing CST project owners to retain the RECs but not to trade them. The interest of the PSC in this case was to make the RECs available to contribute to the 50 by 30 goal, and this was the effect of the Denial. Significantly, in denying the Petition the PSC referred not to the use of state funds as a basis for the Commission's control of the attributes, but rather to sole discretion over the tradability of RECs in NYGATS regardless of their source. The Order denying the CORE Petition contains this exchange:

> *"CORE asserts that owners of renewable energy projects have a constitutional property right in the value of the environmental attributes of their project and that the March 9, 2017 Order, by not awarding tradable RECs to certain projects, deprives the owners of their property."* [9]
>
> *"Certificates are minted by the New York Generation Attribute Tracking System (NYGATS) only at the discretion of the Commission. There is no inherent constitutional right to receive a NYGATS certificate, or a tradable NYGATS certificate…"* [10]

The assertion that participation in the new state-created exchange forfeits constitutional property rights in the product to be traded is somewhat startling. Given that the NY-PSC appears dedicated to claiming independently produced clean power towards the 50 by 30 goal without paying for it, and that both the legal basis for and method of accounting for these RECs remains obscure, this assertion of unqualified authority over the tradability of RECs in NYGATS is very concerning to generators, and forms the basis for many of the clarifications requested here.

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[8] "PETITION FOR REHEARING/RECONSIDERATION AND CLARIFICATION OF COMMISSION'S MARCH 9, 2017 ORDER OF THE COALITION OF ON-SITE RENEWABLE ENERGY USERS AND DEVELOPERS (CORE)" April 11, 2017 Case 15-E-0751

[9] "ORDER DENYING PETITION FOR REHEARING" Issued and effective September 18, 2017 Case 15-E-0751 p.3

[10] ibid p.6

INDEPENDENT RENEWABLE GENERATORS HAVE A HISTORY OF UNBUNDLED REC TRADING TRADING AND PRE-EXISTING PROPERTY RIGHTS IN THE VALUE OF THIER ENVIRONMENTAL ATTRIBUTES

Significantly, the response of the PSC in the Denial of the CORE Petition does not specifically refute CORE's claim that renewable producers have rights "in the value of the environmental attributes of their project", only that there are no such rights to RECs *in NYGATS*. Renewable Energy Certificates are not exclusively minted by NYGATS, nor is an exchange of minted RECs the exclusive way to trade environmental attributes for voluntary claim. Indeed, New York generators have been profitably trading RECs for many years prior to the development of NYGATS.

The very purpose of RECs is to allow renewable attributes to be "unbundled" and traded separately from the energy, to make these transactions simpler and cheaper than the market for electricity. Voluntary market REC consumers are primarily interested in being able to make marketing claims about their energy source, such as "made with renewable energy". As specified in the Federal Trade Commission's "Green Guides"[11], all that is required for an energy consumer to make such a claim is a contract pathway to a producer of renewable energy which names the consumer as the owner of the attributes. Following the direction of the FTC, a robust marketplace for voluntary compliance RECs has grown, consisting not only of producers and consumers, but brokers, traders, and third-party verifiers. Most independent New York generators have been participating in this market, often transacting with out-of-state buyers or with brokers who may ultimately sell the RECs to a third party. Though the prices in this market are currently very low and somewhat volatile, nearly all the RECs are sold, as any price is better than nothing. Even at an unbundled REC price of only $5, the value of the attributes produced by independent un-contracted renewable generators is approximately $50,000,000 per year[12]. (This does not include approximately 980GWh exported to MA and CT for RPS compliance purposes.) An independent generator with a history of REC trading has ownership in her product and valid expectations of basic property rights.

The FERC has ruled in multiple cases that avoided-cost contracts under PURPA do not permit utilities or other entities to claim RECs associated with that production.[13] [14] In *Morgantown Energy Associates*, FERC found that action on the part of the Public Service Commission of West Virginia to claim Renewable Energy Certificates from PURPA power plants at its discretion was inconsistent with PURPA,[15] in effect holding that the attributes must be separately contracted for

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[11] Federal Trade Commission 16 CFR Part 260 - Guides for the Use of Environmental Marketing Claims

[12] Accepting the estimate from the Synapse Report of 10 TWh/yr, "Policies to Cost-Effectively Retain Existing Renewables in New York" Hopkins, Asa S., PhD; Fields, Spencer; Vitolo, Thomas, PhD, Synapse Energy Economics, December 22, 2017, Filed in Case 15-E-0302, p 2

[13] California Public Utilities Commission (CPUC) 133 FERC ¶ 61,059 (2010), reh'g denied, 134 FERC ¶ 61,044 (2011)

[14] *American Ref-Fuel Company* 105 FERC ¶ 61,004, at P 18

[15] *Morgantown Energy Associates*, 139 FERC ¶ 61,066

or specifically taken under state law if they are to be claimed on behalf of ratepayers. Neither of these has occurred with regard to unsecured RECs from "renewable baseline" resources in New York. NY-PSC has been creative in counting the baseline for the purpose of government claims without making them part of the Utility procurement obligation. But it is not logical to presume that a state Commission can effect an end-run around *Morgantown* by simply counting production using outdated methods and declining to even track the attributes that form the basis for such claims where they exist, in the hands of the generators or in the voluntary market.

FERC has also declined to regulate the sale of unbundled RECs, and even referred to these products as "State Created"[16]. However, the proper interpretation of FERC's reticence to regulate unbundled REC sales is not that they exist at the sole discretion of state Public Service Commissions, but rather that such sales do not truly concern energy at all. RECs are more properly considered a marketing tool, or a compliance mechanism, rather than an energy product. They are more akin to carbon offsets than MWhs. Like carbon offsets, they may be freely traded and purchased by individuals, corporations, or governments. Each market must respect the others and uphold the basic principle that no attribute may be counted twice. In practice, the voluntary REC market does not rely on State created attribute systems and the Commission did not create the first New York REC with the development of NYGATS. The independent interstate marketplace for this product has already generated millions of dollars in revenue for New York facilities, and benefitted New York ratepayers by providing critical supplementary revenue to in-state hydro plants. A regulatory action which strips a generator of a legal preexisting revenue stream for the purpose of a state portfolio claim would be an unconstitutional taking of private value for public benefit.

The Commission appears to respect the ability of generators to export RECs from NYGATS, but does not appear to respect existing or future exports which do not utilize NYGATS. In combination with the Denial of the CORE Petition, this creates a double-bind for generators: in order to have their export rights respected, they must enroll in a tracking system wherein, the NY-PSC claims, they have no constitutional property rights at all. This is untenable. If the Commission intends to create an exchange in which participants forfeit these rights, it must also respect the pre-existing marketplace in which those rights are retained.

WE REQUEST CLARIFICATION THAT INDEPENDENT GENERATORS RETAIN FULL RIGHTS TO TRADE RECS PROPAGATED IN NYGATS, TO CUSTOMERS BOTH INSIDE AND OUTSIDE OF THE NEW YORK CONTROL AREA

Participation in NYGATS is not mandatory. Many independent facilities are currently deciding whether to enroll, in the hope that it will open up a new market for them. Some independent generators which currently utilize costly third-party verifiers for unbundled REC sales are considering enrolling in NYGATS instead. Given the assertion in the Denial of the CORE Petition, the decision seems much more significant than previously thought, particularly to generators with a history of REC trading. It is important to know what rights may be forfeit. We

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[16] *WSPP Inc.*, 139 FERC ¶ 61,061 p. 8

therefore seek clarification that the following rights of such generators to freely trade RECs within NYGATS, to export them, or to retire them will not be infringed by the Commission:

Participation in NYGATS is not mandatory

Presumably the Commission does not assert authority to compel participation in an exchange which would destroy pre-existing property rights. However the CES directs Utilities to enroll DERs within their territory into NYGATS and some generators have received letters from utilities directing them to enroll. We request clarification that participation in NYGATS is not mandatory for renewable resources interconnected prior to 2003, absent a Maintenance Tier or other contract which specifies it.

Trading of RECs to New York consumers within NYGATS

Independent generators must be able to sell or trade RECs to consumers within NYGATS at any time. This would not affect accounting of the 50 by 30 goal.

Export of RECs to NEPOOL-GIS, MRETS or other Attribute Tracking Systems

Independent generators must be able to export RECs to the GAT systems of adjacent control areas, along with delivered energy as specified by those systems. Such exported RECs may not be counted toward the "50 by 30" goal.

Withdrawal of RECs from NYGATS for bilateral sale

Independent generators must be able to withdraw RECs from NYGATS at their discretion to make a direct sale of the attribute to a customer, either within or outside of New York State, without utilizing another GIS / GAT system. Such RECs may not be counted toward the "50 by 30" goal unless the customer is within New York State.

Banking of RECs for up to three years

Independent generators often hold RECs and sell them when prices are favorable, often one or two years after they are created. If such RECs are propagated in NYGATS and counted towards the 50 by 30 goal before they have been sold, this may render them unmarketable, particularly to customers outside New York. We request that independent unsecured RECs not be counted toward the 50 by 30 goal until at least three years after they are created.

ANY PRESUMPTION THAT RENEWABLE GENERATION NOT ASSOCIATED WITH RECS IN NYGATS IS AVAILABLE FOR CLAIM BY THE COMMISSION ON BEHALF OF NEW YORK RATEPAYERS IS INVALID

There remains a lack of clarity about what reporting procedures will be developed to account for the baseline, and multiple parties have requested clarity on this point. However, a clearer picture is emerging. The method of accounting for the "Renewable Baseline" in the CES relied on

Utility reports from the Environmental Disclosure Process (EDP)[17] [18]. Both the CES and the recent Staff Report acknowledge that RECs propagated in NYGATS and exported to other GIS systems will not be counted toward the baseline[19] [20]. Staff have also stated publicly that going forward renewable generators who do not enroll in NYGATS will be identified in the EDP, counted towards the residual energy mix, and thus towards the 50 by 30 goal[21].

The Staff Report contains the following footnote:

> *"The development of the NYGATS platform allows for the tracking of certificate retirements and exports. Staff and NYSERDA will develop reporting procedures that will allow Staff to monitor and, as necessary, report back to the Commission on REC activities which may be detrimental to the "50 by 30" goal."*[22]

It appears that the Commission intends to utilize NYGATS as the first method of accounting, and turn to the EDP process for any generators who do not register their production with NYGATS. If so, this is based on a flawed premise: that NYGATS is the exclusive platform for the REC market. NYGATS, NEPOOL-GIS, MRETS and other generation attribute tracking systems are one way to trade RECs, but not the only way. As stated above, a robust interstate REC market already exists and unbundled RECs are exported from New York every day without using NYGATS or any other GIS system. In such cases, only the contract parties and, sometimes, a broker or third-party verifier are in a position to know about the transfer. The NYGATS platform is therefore insufficient to track all REC exports, and no assumptions can be made about the disposition of attributes from generators who are not enrolled in NYGATS. In fact, if a generator chooses not to enroll in NYGATS, it may be specifically because there is a pre-existing contract for the RECs with a customer.

The EDP process is also not sufficient. Identification of the fuel mix by Utilities is not valid for the purpose of identifying the consumption of energy, it can only identify its source. Put simply, now that the REC product can be traded separately from energy, by watching the generator you can tell who makes the product, but you cannot tell who consumes it. The current accounting of

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[17] "*Staff used the Environmental Disclosure Program (EDP) data to determine the amount of electricity used in the State by fuel type.*" Staff White Paper on Clean Energy Standard, Appendix B p 3, January 25, 2016

[18] "*The Commission will accept Staff's estimate of 41,296,000 MWh and assumes that all of these resources will remain operational*" Order Adopting a Clean Energy Standard, New York Public Service Commission, August 25 2016, p 84

[19] *"If any renewable resources currently counted in the baseline sell RECs into other markets at some point in the future, the Commission may adjust the baseline accordingly."* NY-PSC Case 15-E-0302 CES Part VII § A-2

[20] "STAFF REPORT REGARDING RETENTION OF EXISTING BASELINE RESOURCES UNDER TIER 2 OF THE RENEWABLE ENERGY STANDARD PROGRAM" October 19, 2017, Case 15-E-0302 footnote on p 24

[21] Doreen Harris, NYSERDA speaking at the Alliance for Clean Energy Conference 2017.

[22] "STAFF REPORT REGARDING RETENTION OF EXISTING BASELINE RESOURCES UNDER TIER 2 OF THE RENEWABLE ENERGY STANDARD PROGRAM" October 19, 2017, Case 15-E-0302 p 24

the "renewable baseline" already includes an unknown amount of production associated with RECs previously exported from New York.

To the extent that NYGATS is adopted by independent generators, it will provide tracking information for some portion of the REC market. But the extent to which generators choose to utilize it will depend on its competitiveness with third-party verification, and most importantly on whether NY-PSC respects basic property rights of commerce within the system. If the principles above are adopted, there would be no reason for a generator who wishes to trade RECs within New York not to use NYGATS. It is likely that some portion of exports for the voluntary market will continue to happen outside the NYGATS system regardless, given the greater convenience of unbundled transfers.

Throughout the CES Proceeding and most recently in the Staff Report on existing resources, the Commission and Staff attempt to distinguish between generators that have "export opportunities" and those that do not, as in the proposal for sub-tiers 2a and 2b in the CES White Paper[23]. Staff appear to be focused on exports to serve RPS compliance markets, which require deliverability, and the basis of the distinction is that generators below a certain size cannot efficiently transact across GIS boundaries. However, as shown, this boundary exists only for energy, not for RECs, and voluntary customers do not have the same requirements as portfolio compliance customers. This further suggests that the Commission does not appreciate the distinction.

COUNTING ENERGY ASSOCIATED WITH UNBUNDLED REC EXPORTS TOWARD THE 50 BY 30 GOAL WOULD CONSTITUTE DOUBLE-COUNTING, INVALIDATE EXISTING CONTRACTS, AND DESTROY THE MARKETABILITY OF SUCH RECS

As stated above under "Renewable Attributes", the only requirement for the validity of a renewable energy consumption claim is its exclusivity: no other party or group of parties may claim to have consumed that renewable energy.

The Order Adopting a Clean Energy Standard:

> *"In this Order the Commission adopts a goal that 50% of electricity consumed in New York by 2030 will be generated from renewable sources."* [24]

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[23] "*Staff proposes that Tier 2 be subdivided into sub tiers, described below as Tier 2A and Tier 2B, to account for market dynamics; opportunity costs/alternatives and market values; and REC ownership. Subdividing this tier is intended to result in lower cost to ratepayers than combining all of these resources in a single tier, where pricing necessary to attract RECs from supply that has other potential markets (subject to competition) would otherwise result in over-paying for supply that does not require such payments.*" STAFF WHITE PAPER ON CLEAN ENERGY STANDARD, CASE 15-E-0302, JANUARY 25, 2016 p.22

[24] Order Adopting a Clean Energy Standard, New York Public Service Commission, August 25 2016, p. 12.

The language of the "50 by 30" goal is very specific in that it relates to consumption of electricity[25]. A renewable attribute which forms the basis for a legal voluntary claim by an out-of-state consumer is not also available for claim on behalf of any or all New York electricity consumers. If New York makes a claim such as the one above based on generation associated with RECs already claimed by an out-of-state consumer, those attributes will have been counted twice: one REC attempting to offset 2MWh of electricity consumption[26]. The out-of-state customer may be found in violation of FTC guidelines and may in turn find the generator in breach of contract. For this reason

The Order Adopting a Clean Energy Standard also contains this statement:

> *"In the event that significant out-of-state sales occur to the detriment of the RES program, the Commission will reconsider the need to compete for these resources in one of the triennial reviews prior to 2030."*[27]

It is imperative that unbundled REC sales be included in the above-referenced accounting of "out-of-state sales" prior to the first Triennial Review. To avoid double-counting, the State must either positively identify the final disposition of all RECs associated with energy claimed as part of the "50 by 30" goal, or adjust the language of the goal itself.

SIMILAR FLAWED POLICY IN VERMONT DREW ATTENTION FROM THE FEDERAL TRADE COMMISSION AND CAUSED VERMONT RECS TO BE DECERTIFIED BY REC BROKERS AND CONNECTICUT STATE GOVERNMENT

In 2015, Green Mountain Power (GMP) was reprimanded by the Federal Trade Commission for making claims about its renewable portfolio that included production from generators which were exporting RECs to other states. These generators had been developed by GMP, a vertically-integrated utility, at the direction of the Vermont Public Service Board (VT-PSB) as part of the Vermont SPEED program[28]. SPEED was a standard-offer program which required utilities to develop new renewable energy resources to increase the state's renewable portfolio. However, the VT-PSB did not require GMP to retain the RECs from these projects, and many were exported to other New England states. Despite the exported RECs, Vermont and GMP continued to claim incremental increases in the amount of renewables in its energy mix, based on environmental disclosure. A study by the Environmental and Natural Resources Law Clinic at Vermont Law School found that these claims were invalid, and performed an analysis which demonstrated that the SPEED program and the exportation of RECs actually led to a decrease in Vermont's

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[25] "The RES consists of a Tier 1 obligation on LSEs to invest in new renewable generation resources to serve their retail customers" Order Adopting a Clean Energy Standard, p. 65

[26] A form of double counting may be permissible if the customer is in New York. Attributes associated with energy generated in New York or delivered into the NYCA which are claimed by New York customers may also be identified by the NY-PSC as "consumed in New York". This is similar to the functioning of the E-Value in VDER, and consistent with the Denial of the CORE Petition.

[27] Order Adopting a Clean Energy Standard, New York Public Service Commission, August 25 2016, p. 12.

[28] Vermont Energy Act of 2012; Act 170 May 18, 2012

renewable fuel mix[29]. A letter from the FTC to GMP and VT-PSB in response to the VLS analysis reads in part:

> *"…GMP sells RECs for many of its renewable facilities and thus has forfeited its right to characterize the power delivered from those facilities as renewable, in any way. If we identify concerns in the future, we reserve the right to take further action."* [30]

Prior to the involvement of the FTC, effective January 1, 2014 the Connecticut Public Utilities Regulatory Authority invalidated Vermont RECs for the purpose of CT utility portfolio compliance claims[31], citing double-counting.

There were effects in the voluntary market as well. The REC trading firm NextERA announced that it would no longer broker trades of Vermont RECs in May of 2014, noting "It is a fundamental principle of all renewable energy market sales that the environmental characteristics associated with the electric energy generated cannot be counted or claimed twice."[32]

Subsequent to this, the SPEED program was retired and replaced by a Renewable Portfolio Standard which requires GMP and other utilities to secure and retire RECs for *all* elements of portfolio claims[33].

SUGGESTED REMEDIES

There are measures which could be taken to avoid interference between voluntary REC market exports and the accounting of the "Renewable Baseline". Measures could also be taken to encourage in-state trading of the RECs from baseline resources, allowing generators to monetize their attributes without export.

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[29] "Petition Regarding Deceptive Marketing Practices Of Green Mountain Power in the Marketing of Renewable Energy to Vermont Consumers" Environmental and Natural Resources Law Clinic, Vermont Law School, on behalf of Vermont Citizens, Federal Trade Commission, September 15, 2014

[30] Kohn, James A, Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission; in a letter to R. Jeffrey Behm, Esq. Sheehey Furlong & Behm P.C. Attorneys for Green Mountain Power, February 5, 2015

[31] "DECLARATORY RULING REGARDING CONN. GEN. STAT. §16-1(a)(20), AS AMENDED BY PA 13-303, CONCERNING THE POSSIBLE DOUBLE COUNTING OF RECS" DOCKET NO. 15-01-0, Public Utilities Regulatory Authority, State of Connecticut, March 11, 2015

[32] "Vermont SPEED Program and Renewable Energy Credits Purchases Notice to NEPOOL REC Sellers" May 15, 2014 (via email)

[33] "*Tiers 1 and 2 of the Renewable Energy Standard requires utilities to hold Renewable Energy Certificates (RECs) to satisfy their requirements, as do all five other New England states. RECs, which are each equivalent to 1MWh generated from a renewable resource, are created when a renewable unit generates electricity. RECs can be sold separately from the electricity generated by the unit. For example, a solar facility could sell electricity to a utility and RECs to another utility or to a private party.*" Vermont Renewable Energy Standard and Standard Offer Program Report: A Biennial Report to the Vermont General Assembly Prepared by the Department of Public Service, March 1, 2017

1) Establish and adhere to the principals listed above regarding treatment of RECs in NYGATS
2) Establish a Tier 2 Procurement which secures RECs from baseline generators
3) Make NYGATS the exclusive method of accounting for the Baseline, cease using the EDP
4) Alternatively, continue using the EDP along with NYGATS, but in addition request an annual accounting from each generator on the disposition of RECs from that year[34]
5) Support the voluntary REC market within New York and encourage the use of NYGATS
6) Support and encourage independent generators to create CDGs and participate in VDER
7) Encourage green CCAs to procure RECs from New York generators
8) Encourage ESCOs serving New York customers to source RECs from New York generators

CLOSING

The development of the REC marketplace has been an important driver of the shift towards cleaner resources in the last two decades. It is vital that all participants in this market, whether government, generator, or consumer, respect the basic principles that underlie it. Creation of the REC marketplace has permanently decoupled "brown power" from renewable attributes, and the genie cannot be put back in the bottle. We must address this new clean energy economy consistently and fairly. New York is also an importer of unbundled RECs, and under NY-PSC's own regulations, an Energy Services Company which sells "renewable power", "wind power", or "solar power" to a consumer must also secure and retire RECs from a viable facility on behalf of that customer. It is equally important that the power which forms the basis of those claims is not also counted by consumers in the state where the generator is located. The same consumer protection principles should apply to New York voters who choose renewable energy at the ballot box.

New York State is an important leader in the transition to renewable energy. However, if a broad and durable social change toward climate responsibility is to take place, the most important shift must come from individuals and businesses. The Commission must be careful not to take regulatory action which strips citizens and businesses of the ability to address their own climate impact in favor of government goals. Principles such as additionality and exclusivity must be respected. Tradable units such as RECs serve an important purpose, in providing a coherent market mechanism for consumer choice. If we do not use these mechanisms consistently, they will not work.

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[34] It may not always be possible for a generator to provide this information. RECs are often sold to traders who may ultimately sell them to a third party. If the RECs are not retired on behalf of the customer, the generator will not be able to attest to their final disposition. RECs may also be sold in successive years after their production.