STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on August 20, 2009

COMMISSIONERS PRESENT:

Garry A. Brown, Chairman
Patricia L. Acampora
Maureen F. Harris
James L. Larocca

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

ORDER AUTHORIZING ADDITIONAL MAIN TIER SOLICITATION AND SETTING SOLICITATION GUIDELINES

(Issued and Effective August 21, 2009)

BY THE COMMISSION:

INTRODUCTION

In this order, the Commission authorizes an additional Main Tier solicitation in the Renewable Portfolio Standard (RPS) program drawing on approximately $95 million in RPS funds available for this purpose. An additional solicitation at this time will enable generation facility developers to leverage funds temporarily available in federal grants under the American Recovery and Reinvestment Act of 2009 (ARRA). The Commission also provides guidance to the New York State Energy Research and Development Authority (NYSERDA), the RPS program administrator, on how the solicitation is to be conducted.

BACKGROUND

On September 24, 2004,[1] the Commission adopted a policy of increasing to at least 25 percent by 2013 the proportion of electricity used by retail consumers in New York State derived from renewable resources. The RPS Program was created to implement that policy and the New York State Energy Research and Development Authority (NYSERDA) was designated as the administrator of the program. Resources for the RPS program are procured in two "tiers". The first or “Main Tier” consists primarily of medium to large-scale electric generation facilities that deliver their electrical output into the wholesale power market administered by the New York Independent System Operator and are generally awarded contracts on a competitive basis. The second or “Customer-Sited Tier” consists of smaller, behind-the-meter resources that produce electricity for use on site and generally receive incentive payments upon application to NYSERDA. Under the current provisions of the RPS program,[2] the Commission gives specific authorization prior to issuance of competitive procurements for Main Tier resources.

Three Main Tier solicitations have been held to date. NYSERDA is currently administering 30 contracts for procured Main Tier RPS resources including wind, hydroelectric and biomass facilities associated with 2,849,840 MWhs of generation in 2013. That level of contractual achievement represents approximately 29% of the original Main Tier target towards the overall RPS goal. These contracts were awarded as a result of Request for Proposal (RFP), sealed, pay-as-bid solicitations

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

[2] Case 03-E-0188, supra, Order Approving Implementation Plan, Adopting Clarifications, and Modifying the Environmental Disclosure Program (issued April 14, 2005).

administered by NYSERDA. Each contract requires a security deposit based on the quantity of resources bid and also contains a provision for extending a project's in-service date with an additional security deposit.

NOTICE OF PROPOSED RULEMAKING

A Notice of Proposed Rulemaking (Notice) concerning the proposed additional Main Tier solicitation was published in the State Register on June 3, 2009 [SAPA 03-E-0188SP21]. The minimum period for the receipt of public comments pursuant to the State Administrative Procedure Act (SAPA) regarding the Notice expired on July 20, 2009. Substantive comments were received from eleven parties and are summarized below.

The Notice sought comments on a proposal to authorize a 2009 RPS program Main Tier procurement solicitation by NYSERDA utilizing up to $95 million of unencumbered RPS program funds that became available due to unexecuted contracts, forfeited security deposits, renewable energy generator underproduction and accumulated interest on ratepayer collections. In general, the 2009 solicitation is proposed to follow the design details and methodologies already established by the Commission in previous orders. However, in an effort to leverage funds available through the American Recovery and Reinvestment Act of 2009 (ARRA),[3] the Notice stated that the Commission would be

[3] ARRA allows project developers to apply for a grant from the Treasury Department in lieu of the Investment Tax Credit. The grant will be equal to 30% of costs of property that is part of a qualified facility, qualified fuel cell property, solar property, or qualified small wind property, and 10% of all other property. Grants are available to eligible property placed in service in 2009 or 2010, or placed in service by the specified credit termination date, if construction began in 2009 or 2010. Grant applications must be submitted by October 1, 2011.

considering certain design details and methodology changes, noted below, that differed from past solicitations.

Design Details and Methodologies Proposed in Notice

1. Proposal will be requested using a sealed, "pay-as-bid" auction procedure. A price will be determined above which bids will not be considered, but such price will not be revealed to bidders.

2. Contract awards for a ten year term, except that fuel-based bid facilities may bid any whole number of contract years from three to ten. A fuel-based bid facility receiving an RPS contract for less than ten years will be permitted to bid in subsequent RPS solicitations; however, the cumulative terms of RPS contracts for such fuel-based bid facility may not exceed ten years.

3. The selection of winning bids will primarily be based on a weighted combined score with price comprising 70% and projected incremental economic development benefits at 30%. No weight will be given to economic benefits that are not incremental due to the awarding of an RPS contract. Those projects taking advantage of the ARRA grant funds will be given priority consideration.

4. Only facilities that will be placed in service on or after the date of notice of the solicitation will be eligible to bid. Facilities that began operation prior to the date of notice of the solicitation will not be eligible to bid. Hydroelectric, Wind and all other facilities, with the exception of Biomass, will be required to be in service on or before January 1, 2011. Biomass and Biogas facilities will be required to be in service on or before January 1, 2012.

The Notice further stated that these proposed changes pertain only to this specific procurement and are not indicative of potential future procurement rules, which will be under further consideration later.

SUMMARY AND DISPOSITION OF COMMENTS

All of the parties submitting comments support the notion that NYSERDA should be authorized to undertake an additional RPS Main Tier resource solicitation. The comments primarily address the proposed design details and methodologies of an additional solicitation.

1. Setting Maximum Price

Independent Power Producers of New York, Inc. (IPPNY) and NextEra Energy Resources, LLC (NextEra) both objected to NYSERDA establishing a price above which bids would not be considered. They state that auctions operate most efficiently when disciplined by parties competing against each other, rather than by artificially establishing prices. They also state that NYSERDA retains the authority to reject bids, rendering it unnecessary to contrive an arbitrary number that may or may not reflect market realities.

Discussion

We want all developers to aggressively bid their best price for supplying renewable energy attributes. NYSERDA is operating under a finite budget and therefore should establish a maximum price it may accept based on a careful analysis of expected development costs and market prices tempered with budget realities. The fact that NYSERDA establishes a maximum price should not interfere with bidders offering their best price and adds an element of price discipline to the solicitation, for the benefit of ratepayers. By disclosing the fact that a maximum price will be set, the bidders are better informed of how their bids will be received and that added information should assist them as they plan their bidding strategy. This approach has been used in each of the last three solicitations and we hear no compelling reason not to include it in this solicitation. Therefore, NYSERDA will set an undisclosed price above which contracts will not be awarded.

2. Contract Length

IPPNY, NextEra and Pace Energy and Climate Center (Pace) agreed with the awarding of ten-year contracts. Pace also agreed with the flexibility afforded fuel-based renewable generators. However, IPPNY and AES-NY, LLC (AES) suggested all bidders be given the flexibility of entering into shorter-term contracts, and NextEra requested more information on the basis and ramifications of the flexibility afforded fuel-based facilities.

Discussion

The RPS program is structured to meet a goal of 25% of electricity consumed in New York State being generated by renewable resources by 2013. There is a preference for ten-year contracts to assure that renewable energy attributes acquired in a solicitation are available to meet that program goal in 2013. These ten-year contracts are also designed to elapse in a staggered fashion in that as the contract lengths are uniform, the spreading out of procurement solicitations over time naturally results in the spreading out or staggering of contract expiration dates over time. This staggering is purposeful so as to not flood the market in the future and to maximize the ability of the voluntary market to absorb additional resources as they become available by contract expiration. However, we have and continue to recognize that facilities that have to procure fuel (e.g., biomass facilities) have had difficulties securing long-term supply contracts for their fuel, thereby making it difficult for them to commit to fixed- price long-term contracts for their attributes. We want to continue to provide an opportunity for such resources. We will require all generators to commit to ten-year contracts to further the policies discussed above, but we will allow the fuel-based renewable energy generators to enter into ten-year contracts that have an escape clause every two and one-half years so that the generator may drop out of the program if it is unable to secure a continuous fuel supply at a price that supports its fixed- price long-term contract with NYSERDA for renewable attributes. We considered but reject an alternative approach that would allow fuel-based renewable energy generators to enter into shorter term contracts with the ability to bid in subsequent RPS solicitations subject to a ten-year cap on overall contract length. We are concerned that approach may run afoul of potential future vintage requirements, and we believe that the approach we are approving may promote a beneficial reduction in volatility in the price of the fuel to be supplied and will provide greater certainty to fuel-based renewable energy generators.

3. Economic Development Weighting

Alliance for Clean Energy NY (ACE-NY), Iberdrola Renewables, Inc. (Iberdrola Renewables), Invenergy Wind North America, LLC/Sheldon Energy LLC (Invenergy/Sheldon) and Pace object to giving no weight to economic development benefits that are not incremental to the awarding of an RPS contract. They state that developers make substantial investment during a project's development process, which benefits local communities. To the contrary, NorthWind and Power LLC (NorthWind) and NYSERDA agree that economic development credit should be reserved for projects not yet constructed. NYSERDA suggests that the Commission provide a date certain after which incremental economic development benefits will be given weight rather than on the date of awarding an RPS contract. It recommends that no economic benefits credit should be given to any project that was in commercial operation as of the effective date of this order.

Discussion

The purpose of the economic development weighting criteria is to recognize the beneficial economic impact of RPS renewable generation development in local communities as an offset to the RPS program costs to New York State ratepayers. It has been used as a means to rank bids not only on price, but also on the benefits accruing to local communities from development of projects receiving RPS contracts. The proposed refinement to the economic development weighting criteria described in the Notice is unnecessary at this time. For this particular procurement, we intend to change the eligibility date of commencement of commercial operation, as described later in this Order, which makes the notion of incremental economic benefits largely moot.

4. Federal ARRA Grant Preference

Many parties commented that the proposed preference to projects receiving ARRA grants should be eliminated. They explained that it is unclear to developers whether or not they will receive grants until after project completion. They also state that it is unclear how NYSERDA would evaluate bids should a project seeking ARRA grant funds bid higher than a project not seeking the grant. Iberdrola Renewables, NYSERDA and PACE further state that the fact the grant is being sought should be reflected through a lower bid price, so no preference is necessary to maximize value to ratepayers.

Discussion

As we shall discuss below, we are purposefully going forward with an additional RPS Main Tier solicitation at this particular time in the hope that project developers will be able to leverage ARRA grants to reduce the price of their bids. However, we can leverage the funds available through this limited Federal program through the vintage and commercial operation date criteria as explained below. We agree with Iberdrola Renewables, NYSERDA and PACE that no special ARRA scoring preference is necessary given that if an ARRA grant is being sought, it should be reflected through a lower bid price. Therefore, we will eliminate the proposed explicit ARRA preference.

5. Vintage

The order establishing the RPS program imposed a general requirement that renewable generation facilities that commenced commercial operation prior to January 1, 2003 are not eligible for RPS incentives. That "vintage" requirement was said to be consistent with the Commission's objective that the RPS program should increase New York State's supply of renewable resources with the ultimate aim of establishing a viable, self-sustaining renewable generation market.[4] For the purposes of the additional resource solicitation under consideration here, it was proposed that only projects placed in commercial operation on or after the date of the notice of the solicitation be eligible to bid for RPS incentives. There were many objections to the proposed particularized vintage date for this additional solicitation.

[4] Case 03-E-0188, supra, Order Regarding Retail Renewable Portfolio Standard (issued September 24, 2004), at pp. 31-32.

ACE-NY, First Wind, IPPNY, NextEra and the Office of State Comptroller (OSC)[5] state that investments of hundreds of millions of dollars have been made in New York based in large part on the commitments established in the Commission's initial September 2004 RPS Order. They contend that this is a mid-term change that takes effect after investments have been made and as such sends what in their view is yet another signal to the development community that New York is an uncertain market in which to invest and that it will only create further risk in a market that is already highly uncertain regarding project financing.

NYSERDA's preference is to use the availability of ARRA funding to leverage private investment in New York by making a change regarding economic benefits scoring rather than the change in vintage date. However, while NYSERDA opposes a change in the vintage date, it does suggest that if the vintage date is to be changed, it should be changed to the date this order becomes effective or some alternative date certain, rather than the date of notice of the solicitation since that date will be unknown at the time the order is issued.

Discussion

The fact that the procurement rules and in fact the entire RPS program will be subject to an overall review in 2009 is not new and should not come as a surprise to anyone. The

[5] The Office of the State Comptroller notes in comments that the New York State Common Retirement Fund has invested in the High Sheldon Wind Farm and states that because several of the changes now under consideration, including the change to the vintage date, are likely to negatively affect the financial performance of the project, the changes are not in the best interests of the State of New York. We do not find this argument germane to our responsibility of administering the RPS program in a manner that serves the State's and ratepayers broader interests.

September 24, 2004 Order creating the RPS program is replete with references to a comprehensive program review to be undertaken in 2009.[6] This is not that review.

The particular additional solicitation under consideration here utilizes a limited amount of funds that have become available primarily due to the disencumbrance of monies set aside in the first three procurements for projects that were not able to reach fruition. These limited funds would not ordinarily have been available for procurements at this time and would likely have been held until after the 2009 review (when issues like vintage date would be subject to change) but for the current opportunity to leverage additional Federal funds.[7]

We are interested in using these available funds to leverage as much time-sensitive Federal ARRA money as practicable. In that regard, we will set the vintage date for this particular procurement in a manner that we believe will encourage and maximize such leverage. If we had refined the economic development weighting criteria to exclude "sunk" benefits from the calculation, that itself would not go far enough to accomplish our goal. It would not assure that projects eligible to bring ARRA benefits to New York will be necessarily favored relative to existing projects that have

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[6] Case 03-E-0188, supra, Order Regarding Retail Renewable Portfolio Standard (issued September 24, 2004), pp. 7, 9, 10, 27, 51, 57, 81 & 82.

[7] We agree that the modification to the vintage requirement represents a change in the RPS program, but we think its limited application in this instance is reasonable, among other reasons, because the solicitation authorized by this order could not have been anticipated by bidders in the last solicitation and is only happening now because of unexecuted contracts, forfeited security deposits, renewable energy generator underproduction and accumulated interest on ratepayer collections, and our desire to move quickly to leverage Federal funds.

already been financed and will have every incentive to bid low to capture a supplemental revenue stream.

The change in the vintage date is necessary to address the unique facts and circumstances now before us. It should not be viewed as an indication that we have made a long-term change in policy. Issues related to the RPS program of the future, including vintage, will be under consideration shortly as part of the 2009 review. We note that large-scale investment in a renewable energy project is a matter that requires financial sophistication and such investors should understand that RPS incentives are not an entitlement and are subject to changing policies as we further refine our objectives in response to changing circumstances.

To add another element of certainty, we will adopt NYSERDA's alternative recommendation regarding establishing a date-certain such that for this additional solicitation renewable generation facilities that commenced commercial operation prior to the effective date of this order are not eligible for RPS incentives.

6. <u>In-Service Dates</u>

Several parties commented that the proposed in-service date deadlines of January 1, 2012 for Biomass and Biogas facilities, and January 1, 2011 for hydroelectric, wind and all other facilities, are unreasonably short given the likely date of the solicitation and the need to complete the NYSERDA contract process before commencing construction. ACE-NY stated that short deadlines seem to bias the procurement towards certain types of facilities and opined that the dates did not align well with ARRA because under ARRA, construction can be completed in 2012 if commenced prior to end of 2010. Iberdrola Renewables recommends that the general in-service date be extended to at least January 1, 2012 to allow a reasonable time for projects currently under development to secure final permitting and complete construction.

Discussion

We are interested in setting reasonable in-service dates and find the arguments of the parties to be compelling. However, we are also interested in procuring attributes that will be available as soon as practicable and in identifying any projects that will not proceed as quickly as possible. We note that the funds for this procurement are the result of underperforming facilities and cancelled contracts relating to attributes that were to be delivered to NYSERDA starting in 2006 for the first procurement, 2008 for the second procurement and 2009 for the last procurement. We do not want to allow an in-service date that is so long that it results in frivolous bids or RPS funds being held aside for long periods to service contracts that eventually get cancelled. In order to allow a reasonable timeframe for projects to be developed and secure attributes as soon as practicable, we will modify the in-service dates for this solicitation to be on or before July 1, 2011 for all facilities except biomass and biogas facilities which will be required to be in-service on or before July 1, 2012. NYSERDA has provided provisions for reasonable in-service date extensions in its prior contracts. We expect NYSERDA to continue to offer such provisions in its contracts.

Other Issues

There were other RPS policy issues not relevant to this procurement raised in the comments that are not addressed in this order. It is expected broader RPS policy issues will be addressed in the near future during an anticipated upcoming review of the RPS program.

SEQRA FINDINGS

Pursuant to our responsibilities under the State Environmental Quality Review Act (SEQRA), in conjunction with this order we find that the additional solicitation adopted here is within the overall action previously examined by us and will not result in any different environmental impact than that previously examined. In addition, the SEQRA findings of the September 24, 2004 Order are incorporated herein by reference and we certify that: (1) the requirements of SEQRA, as implemented by 6 NYCRR Part 617, have been met; and (2) consistent with social, economic, and other essential considerations, from among the reasonable alternatives available, the action being undertaken is one that avoids or minimizes adverse environmental impacts to the maximum extent practicable.

The Commission orders:

1. The New York State Energy Research and Development Authority (NYSERDA) is authorized to conduct a solicitation for Renewable Portfolio Standard (RPS) Main Tier resources utilizing the balance of funds available for that purpose unencumbered from contracted generator underproduction, cancelled contracts and security payments, the amount of such funds to be determined by NYSERDA prior to issuance of a Request for Proposals, said amount to serve as the budget for the procurement (currently estimated to be approximately $95 million), in the manner discussed in this order.

2. The additional solicitation shall be conducted in the manner of past solicitations, subject to the following design details and methodology changes:

(a) Proposals will be requested using a sealed, "pay-as-bid" auction procedure. A price will be determined above which bids will not be considered, but such price will not be revealed to bidders.

(b) Contract awards for a ten-year term. The ten-year contracts with fuel-based renewable energy generators shall have an escape clause actionable every two and one-half years so that the generator may drop out of the program if it is unable to secure a continuous fuel supply at a price that supports its contract with NYSERDA.

(c) The selection of winning bids will primarily be based on a weighted combined score with price comprising 70% and projected incremental economic development benefits at 30%.

(d) Only renewable generation facilities that commence commercial operation on or subsequent to the effective date of this order will be eligible to bid. Facilities that began operation before the effective date of this order will not be eligible to bid. The required in-service dates for this solicitation shall be on or before July 1, 2011 for all facilities except biomass and biogas facilities which will be required to be in-service on or before July 1, 2012.

3. This proceeding is continued.

By the Commission,

(SIGNED) JACLYN A. BRILLING
Secretary