STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

In the Matter of the Value of Distributed Energy Resources **Case 15-E-0751**

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)

Pursuant to New York Public Service Law § 22 and Section 3.7 of the Commissions rules and regulations, 16 NYCRR § 3.7, the Coalition of On-Site Renewable Energy Users and Developers ("CORE"), jointly and severally,[1] files the instant motion for rehearing and/or reconsideration of the NY PSC's March 9, 2017 Order in the above captioned proceeding (the "Order").

I. Summary

The Order establishes a confusing, conflicting and irrational set of rules governing the rights of private renewable project owners and customers to trade or sell their project's environmental attributes or Renewable Energy Certificates ("RECs"), in the marketplace. Even a project that foregoes any payment for the value of its environmental attributes under the DER's Value Stack formula does not have the right to receive tradable RECs in NYGATs or in the bilateral or voluntary markets. The same holds true for pre-existing and Phase I project owners/users under net energy metering ("NEM") – none has the right to trade or sell its

[1] CORE is an *ad-hoc* group of New York on-site renewable energy developers and users. Its members jointly and severally submit these comments, which include Bausch & Lomb, Cornell University, Distributed Sun, Dynamic Energy USA, EnterSolar, LLC, Gallagher Bus Service Corp, Hobart & William Smith Colleges, Rochester Institute of Technology and SUNY Cortland University. CORE's comments are supported by Tompkins County, New York, City of Ithaca, New York and University of Buffalo, among others.

project's RECs, even in the voluntary REC trading markets. Moreover, based on the Commission's August, 2016 Clean Energy Standards ("CES") Order, it appears that the value of a voluntary project's RECs may be credited toward the utilities' RES compliance obligations to reduce their REC purchase obligations. The Order introduces extraordinary complexity that masks a discriminatory approach to ratemaking. The scheme in the Order may run afoul of U.S. Federal Trade Commission, Environmental Protection Agency, RGGI and other rules and protocols governing additionality and regulatory surplus. By depriving project owners and users of the value of their RECs, the scheme is unreasonable, arbitrary and capricious and unduly discriminatory. The Commission should reconsider these aspects of the Order and adopt the simple principle that one MWH of renewable generation creates one REC certificate that can be sold, traded or retired in the REC owner's discretion.

II. Specified Errors of Law and Fact

The Order contains the following errors of law or fact or other circumstances that warrant rehearing, reconsideration or clarification:

1. The Order contravenes the legal rights of voluntary on-site generators to control and receive the value of their environmental attributes. Specifically, the Order appears to:

    a. Disqualify generators who forego receiving the value of E from selling their RECs into the RES Tier 1 auction, bilaterally to load-serving entities (LSEs), into the voluntary REC marketplace, or any other market;

    b. Deny behind the meter project owners the rights to claim, register or trade RECs associated with energy that is consumed on site and not exported to the system; and

    c. Prohibit pre-existing projects under NEM from selling their RECs into the RES Tier I auction, bilaterally to the LSEs, or into the voluntary marketplace.

2. The Order improperly restricts REC Owners to either selling their RECs for twenty years or retiring their RECs.

3. The Commission should clarify that its specific carve-outs from the general REC sale restriction apply any sales or transfers of RECs that are undertaken as part of a project development and financing transaction.

4. The Commission should reconsider and clarify its requirement that CDG projects must make a "one time irrevocable decision" on a "whole project basis" as to whether they wish to retain or sell their project's RECs.

III. Discussion

A. The Commission Erred in Restricting The Rights of Pre-Existing and Phase I NEM Renewable Energy Projects From Selling their RECs.

As part of the transition to a new compensation system for distributed renewable energy resources (DER), the Commission correctly grandfathers projects that went into operation prior to its March 9, 2017 Order and finds that these projects should have the right to continue under the pre-existing net energy metering (NEM) regime.

The Commission also correctly recognizes that behind the meter generation produces environmental value equal to at least the Social Cost of Carbon (SCC), and that that value may be more fully reflected in the price of Renewable Energy Certificates (RECs) in New York. The Commission therefore allows pre-existing NEM projects to register their projects with NYGATs and bid their RECs into the Tier 1 auction. CORE fully supports these holdings.

At the same time, however, the Commission limits otherwise qualifying project owners/users from selling RECs into the Tier 1 auction, and arguably the bilateral and voluntary markets, if the project has received grant funding under NYSERDA's New York-Sun and Customer-Sited Tier (CST) programs. The Commission states that:

> All pre-existing NEM projects that are eligible to bid into RES Tier 1 solicitations will be subject to a previous RPS Main Tier contract rule that prohibited simultaneous collections of both New York RPS incentive payments and

production-based incentives from any other state or local source, including CST, NY-Sun, and CEF program incentives.[2]

CORE respectfully requests rehearing, reconsideration and/or clarification regarding this limitation. By its exception for CST projects, the rule effectively disqualifies the bulk of renewable energy projects in New York from selling their RECs in the marketplace.

1. <u>A Project's Environmental Attributes are the Property of the Project Owner/User.</u>

Under federal and state law, a property owner possesses and has the right to enjoy all of the right, title and interest in and to its property.[3] In the case of a privately-owned renewable energy project, this includes the value of the environmental attributes of the project, which constitute property interests.[4] A project owner thus has the right to freely and lawfully use and dispose of its project's environmental attributes at its discretion, including through sale, transfer or retirement.

In the case of privately- built qualifying renewable energy projects having environmental attributes, New York corporations and educational institutions have invested close to $1 billion to date in building these projects in New York, driven by their expectations and interests in their rights to the project's environmental attributes. To deprive these owners of the right to trade their RECs in NYGATs would have a substantial economic impact on the value of their projects, depriving them of the value of their property. It would amount to undue discrimination, and

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[2] Order, p. 64, fn.28.

[3] The Fifth Amendment to the U.S. Constitution requires just compensation be provided a property owner when regulation infringes upon its rights. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922); *Penn. Cent. Transp. Co. v. New York City*, 438 U.S. 104, 107 (1978).

[4] The term "interest" is a broad description of property rights including any degree of interest or claim which might not fall within any of the subdivisions of estates. *Mayor of New York v. Stone, 20 Wen*d. 139 (N.Y. 1838). *See also*, Black's Law Dictionary.

would constitute a taking of property without just compensation in violation of federal and State law.[5] There is no reasonable basis for imposing a restriction on the ability of the project owner/customer to freely trade its project's RECs.

2. The Main Tier Contract Restrictions Do Not Apply to CST Contracts.

The Commission states that its restriction on the ability of private project owners to sell their REC's is based on a "Main Tier Contract" restriction that prohibits projects "simultaneously" receiving CST/NY-Sun funding from bidding their environmental attributes into the Tier I auction. CORE agrees that, during the applicable contract period with NYSERDA, Main Tier projects are prohibited from bidding their project's RECs into the market. Under the Main Tier program, the project owner, in exchange for funding, expressly "sells, assigns, conveys and delivers to NYSERDA…all right, title and interest in the [Environmental] Attributes" associated with the output of the facility over a specified term in the contract.[6] However, no similar restriction exists in the Customer-Sited Tier program.

NYSERDA's Main Tier program by its terms was designed to provide project developers with substantial funding for medium and large-scale renewable projects in exchange for the project owner agreeing to transfer and assign the project's renewable attributes to NYSERDA.[7]

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[5] To determine whether a taking has occurred, the Courts will consider the economic impact of the regulation and the extent to which the regulation has interfered with the investment-backed expectations of the property owner and balance it against the character of the governmental action. *Penn. Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123 (1978)

[6] *See, e.g.*, NYSERDA Standard Form Main Tier Contract in RFP 2554, Article II, Sections 2.01 and 2.02.

[7] See Main Tier Solicitations, NYSERDA, https://www.nyserda.ny.gov/All-Programs/Programs/Main-Tier/Main-Tier-Solicitations (last visited September 29, 2016).

The CST program, in contrast, is a different program designed for smaller projects that receive significantly lesser grants and give up no such rights to their project's environmental attributes. Funding under the CST program is made available because these "smaller facilities using emerging technologies…cannot compete economically with the larger projects."

3. <u>There is no Economic Relationship Between CST Grant Amounts and REC Values</u>.

There is no correlation whatever between the smaller grant amounts made available under the CST program and the project's REC values. CST funding as of March 9, 2017 under the Megawatt Block program, for example, was $0.22/W and falls to $0.01/W in successive blocks. For a 1 MW project, this equates to grants of approximately $220,000 and $10,000, respectively. By comparison, the monetary value of the RECs for this same size project would be approximately $1,200,000 in nominal dollars.[8]

The lack of any rational relationship between CST grants and the prohibition on the sale of the project's RECs further is borne out by the amount of CST funding as a percentage of the total capital invested in a renewable energy project.

Based on NYSERDA's Annual Reports, New York corporations, universities and other commercial users through 2015 invested close to $1 billion in solar PV projects alone. Over this same period, NYSERDA reported that it had expended roughly $36 million on CST projects, and committed another $163 million for which it had not yet expended funds. The relationship between these historical numbers is magnified dramatically by the substantially diminished CST grant amounts currently being awarded under the Megawatt Block program, which was $0.22/W

[8] See Attachment A hereto for calculation and assumptions.

as of March 9, 2017 decreasing to $0.01/W under subsequent blocks.[9] As a percentage of project costs, these grants equate to less than ten percent to *less than one-half of one percent* of the total capital costs of a solar project.[10] There is therefore no relationship between the grant amounts and the value of the reductions in carbon and other GHG emissions provided by these privately-funded projects. Nor does the Order take into consideration the adverse impact this ruling will have on renewable energy development in New York, along with the associated employment, tax and other economic benefits of in-state renewable energy project development.

The Commission's error may be further compounded by passing along to LSEs the value of the voluntary generator's RECs by reducing the LSE's RES compliance obligations in an amount equal to the quantity of RECs generated by the private project owner.[11] This would be akin to an economic transfer of the project's RECs to the utilities, who instead receive the economic value of the RECs through avoided cost savings. Aside from running afoul of FTC and other rules governing additionality and regulatory surplus,[12] the arrangement would have the potential effect of depressing demand for new renewable energy projects in New York by

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[9] *See* *https://www.nyserda.ny.gov/All-Programs/Programs/NY-Sun/Project-Developers/Commercial-Industrial-MW-Block*.

[10] See Attachment A for assumptions.

[11] See, e.g., Order, p. 64:

> The generation attributes of all renewable resource generation consumed by customers in New York State will however contribute towards the Statewide 50% by 2030 renewable resources goal, which relies on both mandatory and voluntary contributions for its ends to be achieved.

[12] See Section V, *infra.*

reducing the demand for Tier 1 RECs otherwise needed to satisfy the LSE's renewable obligations.[13]

4. <u>There Is No Prohibition in the CST Contracts from Participating in the REC Marketplace</u>.

Unlike Main Tier contracts, CST Participants do not contractually transfer or assign their RECs to NYSERDA. Nor is there any contractual prohibition on the right of CST projects to sell or dispose of their environmental attributes so long as they remain in the State. NYSERDA has referred to the following provision contained in the NYSERDA/CST Participation Agreement as its "reservation of rights" clause:

> <u>Renewable Portfolio Standard (RPS) Attributes</u>: Orders issued by the Public Service Commission provide that the RPS Program will support and promote an increase, to 30%, of the percentage of the energy consumed in New York State that comes from renewable sources. When assessing and reporting on progress towards that goal, or on the composition of the energy generated and/or consumed in NYS, NYSERDA and the NYS Department of Public Service will include all electrical energy created by any project receiving funds through the NYS RPS Customer-Sited Tier Program, regardless of the percentage of the project capacity included on the Bid Application Form, for the life of such projects, and the environmental attributes associated with such energy, whether metered or projected, as a part of any report, evaluation, or review of the RPS Program, whenever any such report, evaluation, or review may be conducted or issued, as renewable energy consumed in NYS. No party, including but not limited to owners, lessees/lessors, operators, and/or associated contractors shall agree to or enter any transaction that would or may be intended to result in the exportation or transmittal of any electrical energy created by any project receiving funds through the NYS RPS Customer-Sited Tier Program to any party or system outside of New York State.

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[13] It should be noted that many if not most on-site generators will not seek to monetize the value of their RECs by selling them into the Tier 1 auction. Based on progressively expanding commitments of commercial and industrial customers and educational institutions to a net carbon zero footprint, and the need to retain the RECs in order to satisfy these carbon claims, these companies will retain their RECs. Some, however, may seek to arbitrage their RECs in the market for like-kind allowances that would provide them with additional funding for new renewable energy projects.

The above provision plainly does not contain similar restrictions on the sale or transfer of a project's environmental attributes such as those contained in Main Tier contracts.[14] The only CST project restriction is contained in the last sentence of the paragraph where the project owner agrees not to export its electricity out of state.[15] This restriction presumably is based on the fact that the environmental attributes of the project remained with the project owner, bundled with the electricity, and therefore NYSERDA wished to ensure that the electricity would be sold only within the State so that the environmental attributes could be counted toward the State's clean energy goals.[16]

CORE has no objections if the intent of the Commission's Order is to ensure that project owners refrain from selling their project REC's out of State during the applicable period. The Commission however should narrowly tailor its Order to clarify that project owners may sell or transfer their RECs, so long as the RECs remain in the state during the applicable period.

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[14] CST Projects satisfy their reporting requirements by providing regular monitoring reports to NYSERDA. See, e.g., http://chp.nyserda.ny.gov/reports/monitoredreport.cfm.

[15] The remainder of the paragraph is simply a statement by NYSERDA of its intent to use information about the projects in "reports, evaluations and reviews" it prepares with respect to either: (1) the State's progress toward the 30% RPS goal, or (2) the composition of energy generated and/or consumed in New York State. It does not require CST owners to do anything. NYSERDA's intent to prepare reports regarding the amount of "renewable energy consumed in NYS" does not support NYSERDA's claim to ownership of the RECs. It is certainly not a "plain reading" of the contract, to say the least.

[16] Under FTC and EPA rules, the CST project owner/user cannot claim consumption of green power from facilities where the RECs have been sold or transferred. Instead, upon a sale of the environmental attributes, the project's power would be deemed to be "null" power with system mix attributes and a positive emissions profile.

5. <u>Ownership of The Environmental Attributes by the Project Owner/User Was Contemporaneously Confirmed by NYSERDA</u>.

A number of CST project owners requested confirmation from NYSERDA that they owned their project's environmental attributes and had the right to make claims and representations regarding their ownership of such attributes. NYSERDA assured the CST owners that this was the case. It "confirmed" that NYSERDA "does not and will not object to any claim or representation by [a CST project owner] as to its *investment in or use of* the energy produced by the project, or to the environmental characteristics of that energy."

The DPS Staff confirmed this right to the environmental attributes in its Straw Proposal on VDER. The Staff stated:

> DER technologies eligible for the Phase One tariff may also be eligible for a number of other incentives, including incentives offered by NYSERDA and federal and state tax incentives. The receipt of any of these incentives will not impact their eligibility for or compensation under NEM or the Phase One tariff. These incentives were designed to meet a variety of policy goals and were instituted while NEM compensation was applicable to eligible generating facilities. The designers of those programs therefore clearly intended them to supplement, rather than replace, NEM.[17]

The rights of project owners to their environmental attributes were also confirmed by the Commission in the Order. Among other things, the Order states that:

> Effective immediately, NYSERDA shall relinquish all rights to any environmental claims, certificates, attributes or other embodiments or memorializations of those claims for energy produced by any system to which it provided financial incentives under the CST and NY-Sun programs. This directive to relinquish rights applies both to Certificates minted in NYGATS and

[17] Case 15-E-0751, Staff Report and Recommendations in the Value of Distributed Energy Resources Proceeding, submitted October 26, 2016 (Staff Report).

to all environmental claims, attributes or other embodiments or memorializations of those claims prior to the commencement of NYGATS tracking. [18]

B. **Assuming the "Simultaneous Collection" Limitation Applies, the Commission should Clarify that it is Applicable (a) Solely During the CST Funding Period and (b) Only to the *Pro Rata* Percentage of Project RECs funded through CST Funding**.

Although the language below is not contained in the CST Participation Agreement, NYSERDA's 2012-2015 "RPS CST Program Goals and Funding Plan" proposed the following:

> RENEWABLE ENERGY CREDITS AND ENVIRONMENTAL ATTRIBUTES
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> NYSERDA will seek to ensure that the environmental benefits, including the environmental attributes, associated with the CST program accrue, where possible, to the ratepayers of New York. The definition of RPS-eligible environmental attributes will follow the requirements outlined in NYSERDA's solicitations for the Main Tier of the RPS. *NYSERDA will control the rights and all claims to the environmental attributes created by the portion of the electric generation systems installed with CST funding for the duration of the performance payments or three years, whichever is greater, starting with the date the system is commissioned to NYSERDA's satisfaction.*
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> To provide flexibility and to foster voluntary green energy markets, *NYSERDA will allow customers who participate in kWh performance-based programs (i.e., those receiving $/kWh incentives only) to terminate CST performance-based incentives and move to a green energy market in New York State with the attributes.*[19] (Emphasis Supplied)

The above language appears to mirror the limitation contained in the Commission's Order prohibiting the *simultaneous* collection of incentive payments while bidding into the RES Tier 1 solicitation. The above language was not included in the CST Participation Agreements, nor was it included in NYSERDA's 2012-15 Operating Plan, (although similar language was

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[18] Order, p. 70.

[19] See RPS CST Program Goals and Funding Plan 2012-2015, http://www3.dps.ny.gov/W/PSCWeb.nsf/96f0fec0b45a3c6485257688006a701a/1008ed2f934294ae85257687006f38bd/$FILE/nyserda%20CST%20operating%20plan.pdf.

contained in the 2007 Operating Plan). The restriction should not be applicable to CST projects entering into Participation Agreements over the 2012-2015 period.[20] Moreover, as noted above, the Commission's Order expressly states that:

> Effective immediately, NYSERDA shall relinquish all rights to any environmental claims, certificates, attributes or other embodiments or memorializations of those claims for energy produced by any system to which it provided financial incentives under the CST and NY-Sun programs. This directive to relinquish rights applies both to Certificates minted in NYGATS and to all environmental claims, attributes or other embodiments or memorializations of those claims prior to the commencement of NYGATS tracking.[21]

Thus, even were the planning report language applicable to CST projects, the Order eviscerates any residual rights NYSERDA might have had to a CST project's environmental attributes "effective immediately". The restriction should therefore be removed on the right of pre-existing NEM project owners to bid their RECs into the Tier I auction.

If the Commission declines to remove the restriction, CORE requests that the Commission at a minimum clarify that the restriction, consistent with the language contained in the Planning Report, applies only for the approximately 3 year period during which the NYSERDA grant funding is paid, or shorter period if the CST project terminates the CST payments at which point the renewable project is free to sell its RECs in the markets.

The Commission should additionally clarify that the bidding restriction only applies to "*the environmental attributes created by the portion of the electric generation systems installed*

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[20] The Participation Agreement was drafted solely by NYSERDA. It has long been the rule that ambiguities in a contractual instrument will be resolved against the party that prepared it, and that it should be strictly construed in a light most favorable to the nondrafting party. *Natt v. White Sands Condominium*, 943 N.Y.S.2d 231 (NY. App. Div., 2012).

[21] Order, p. 70.

with CST funding." This qualifying language presumably was intended to reflect the fact that different projects received different levels of grant funding and therefore that the restriction on RECs should correlate to the amount of CST funding contributed to the project's total costs. Thus, if the restriction is not removed, CORE asks that the Commission clarify that the limitation applies to a percentage of the Project's RECs equal to the ratio of the amount of CST funding to the total capital costs of the project. Applying this ratio would appropriately reflect NYSERDA's funding contribution to the project.

C. **Net Metering Does not Include Any Subsidy Payment For a Project's Environmental Attributes**.

Under New York Public Service Law § 66-j, net energy metering is priced equal to the customer's applicable rates for service under the service classification it would take under if it did not generate electricity onsite. These Service Classifications contain demand, energy and customer charges. They do not include any payments associated with the environmental attributes. Accordingly, there is no utility payment for a project's environmental attributes in the NEM formula.

Section 66-j further provides that:

> (d) An electric corporation shall impose no other charge or fee, including back-up, stand by and demand charges, for the provision of net energy metering to a customer-generator, except as provided in paragraph (d) of subdivision four of this section.

Net metering payments thus do not include any payment for a project's environmental attributes. Nor can the Commission deprive projects of the value of their environmental attributes under 66-J as an additional "charge or fee" for net metering. Accordingly, the Order should permit pre-existing project owners to sell their RECs into the compliance, bilateral, or voluntary markets.

D. **A Subsequent Declaration by NYSERDA Cannot be Retroactively Applied.**

In August, 2016, NYSERDA purported to file an addendum to its NY-Sun Operating Plan and referenced Participation Agreement requiring participants to additionally agree to language stating that:

> "NYSERDA will register all PV Systems that receive NY-Sun incentives in the New York Generation Tracking System (NYGATS) and will route any certificates created by the NYGATS for the PV Systems into a NYSERDA account."[22]

Presumably this addendum was written for prospective applicants and not for projects that had already financed or commenced construction of their projects in reliance on the existing Participation Agreements. It should be noted that the above proposed addendum was not filed with the Commission and noticed for comment. Nor was it approved by the Commission. In any event the amendment, assuming it is appropriate, cannot be applied retrospectively.

IV. The Order Unfairly Prohibits Voluntary Projects From Selling their RECs into the Bilateral and Voluntary REC markets.

In addition to restricting project owners/users from selling their RECs into the Tier I RES auction, the Order prohibits even those projects that are free to sell their RECs from selling RECs in the bilateral or voluntary marketplaces. Even where a project taking under the Value Stack foregoes the right to receive the value of E, *i.e.*, the Customer-Retention-Option, it still is not permitted to sell its RECs into the marketplace.

The Tier I auction is structured only to allow projects to bid their RECs for a twenty-year period at a fixed, non-escalating price initially set by the Commission. However, many projects have excess RECs that only are available for a shorter tenor. Conversely, LSEs will have short-

[22] NYSERDA NY-Sun Operating Plan, 03-00188. Proceeding on Motion of the Commission Regarding a Retail Renewable Portfolio Standard (August 2, 2016).

term shortfalls in the number of RECs required to meet their milestones. For example, an LSE may have committed to purchase project RECs from a renewable project coming on line in 2021, but will need a three-year REC contract to satisfy its obligations in the interim.

NYSERDA's auctions presumably are intended to mirror the requirements of the LSEs under the RES compliance program. Solely establishing a program under which NYSERDA can only purchase, and renewable project owners can only sell, 20-year REC contracts, and that does not permit NYSERDA or the LSEs to match their demand in the short-tenored market will create inefficiencies and distortions in the marketplace, place an undue burden on ratepayers (who will be forced to underwrite more expensive 20-year contracts) and force developers/users to sell shorter-term and excess RECs in out-of-state markets such as New Jersey and Connecticut that have greater flexibility and liquidity.

Likewise, the development of the voluntary REC markets may be stifled if different sized and tenored REC products are not made available to consumers. Ratepayers and other REC purchasers may desire only to purchase RECs or sign up under green energy programs for three or five years when their long-term plans are uncertain or they, e.g., wish to preserve the option to install their own solar generation. The Commission's "one size fits all" approach will fail to create a dynamic, liquid market to capture this demand, or allow generators and aggregators to create attractive products that respond to the marketplace.

The restrictions will also have a negative impact on the construction of new renewable projects in New York. Project developers and their customers are driven both by the economic and environmental attractiveness of the State market. Many corporations have options as to where they might site and expand their operations in which they take into account the ability of a project to satisfy the environmental and electrical needs of multiple locations through contracts

for differences (CFDs) and other financial arrangements. The illiquidity of the New York REC market will discourage project developers and their customers from developing projects in New York where they are limited in how they can trade or monetize their RECs. This in turn would result in the loss to New York of attendant jobs and other economic benefits in New York, not to mention the diminished physical presence of renewable generation in the State.

V. The Commission Erred By Failing to Properly Account for Voluntary Renewable DER Generation Separate and Apart From The RES Compliance Obligation.

The Order creates the potential for double-counting of DER RECs by failing to establish a RES minimum compliance contribution as part of the State's 50 by 30 goal.

The Commission, in its Order, correctly observes that the State's 50 by 30 goal will be achieved by a combination of the LSE mandatory obligations under the RES compliance program and voluntary renewable projects.[23] CORE supports and applauds the Commission's efforts to establish rules to encourage voluntary participation in the development of green energy projects and markets. The Commission in its August, 2016 Order Adopting a Clean Energy Standard,[24] however, suggests that it plans to reduce the LSE RES compliance obligations in an amount equal to the amount of renewable power to be built by voluntary (private) projects. The Commission's CES Order states:

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[23] See, e.g., Order, p. 64:

> The generation attributes of all renewable resource generation consumed by customers in New York State will however contribute towards the Statewide 50% by 2030 renewable resources goal, which relies on both mandatory and voluntary contributions for its ends to be achieved.

[24] Case 15-E-0302, "Order Adopting a Clean Energy Standard, issued August 1, 2016 (the "CES Order").

> **Triennial review process**: The targets established in triennial reviews will also reflect the development of voluntary activity and the portion of the RES attainment wedge to be represented by voluntary activity in the subsequent procurement period.[25]

CORE asks that the Commission reconsider and/or clarify its position. Under existing FTC, EPA, RGGI and other non-governmental organization (NGO) protocols, voluntary customer-retained RECs should not be counted against RES compliance obligations nor used to reduce the LSE regulatory mandates. Accounting for voluntary RECs in this manner may negate the "additionality" character of the RECs created in the voluntary markets and undermine a project's renewable energy and carbon reduction claims**.**

The Commission has acknowledged the importance of separating compliance programs from voluntary programs to ensure that compliance programs do not conflict with protocols for customer claims for voluntary and additional renewable energy generation and greenhouse gas emissions reductions. As elsewhere stated by the Commission in its CES Order:

> The Commission notes that for these products to be real and avoid market place confusion, they must offer environmental value that is greater than the level of renewable resources that can be acquired as part of normal default load. Thus, in defining a green product, the minimum content should be in excess of annual mandatory target.
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> Many consumers will want to claim that their participation is voluntary or additional to the State's program. When a purchase of renewable resources is made in the absence of a government mandate, or if it is not counted toward compliance with a government mandate, it is typically described as "voluntary" or "additional" to any compliance obligation. Over the years, well-established national and international protocols have been developed to ensure that any commercial claims of voluntary or additional activity conform to guidelines and are not misleading to the public.

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[25] CES Order, p. 118.

> In the context of the RES, for example, if a customer served by an LSE chooses 100% renewable energy, the customer may want to claim "additionality" and require the LSE to retire RECs associated with more than 50% of the served load. This action prevents the LSE from reducing the amount of RECs it would otherwise require to meet its minimal compliance obligation. In this way, the customer is increasing the amount of incremental renewable resources.

By reducing the amount of renewable resources required by LSEs under the mandatory program by the amount developed in the voluntary market, the Commission will blur the distinction since the amount of voluntary generation is effectively being counted under the compliance program, thereby raising questions as to whether the voluntary generation is truly "additional" and "regulatory surplus."[26]

To avoid this problem, CORE recommends that the Commission establish an absolute minimum renewable power obligation to be achieved by LSEs, irrespective of the amount of additional generation voluntarily developed in the State.

VI. Generators Electing to Forego Payment of The Value of E Should Have Unfettered Ability to Sell their RECs into The Markets.

The VDER Order provides that where a renewable generator taking under the Value Stack elects to forego being paid for its project's environmental attributes, i.e., foregoes

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[26] Similarly, the New York State RGGI voluntary set-aside program, 6 CRR-NY 242-1.2(b)(79) defines a "Voluntary renewable energy purchase" as a purchase of electricity from renewable energy generation or renewable energy attribute credits by a retail electricity customer on a voluntary basis." The regulations provide that "The renewable energy generation or renewable energy attribute credits related to such purchases may not be used by the generator or purchaser to meet any regulatory mandate, such as a renewable portfolio standard." Retirement of CO2 emission allowances through the NYS RGGI voluntary set-aside program are required by the Green-e Energy National Standard for renewable electricity http://www.green-e.org/docs/energy/Green-eEnergyNationalStandard.pdf (page 20), for making claims of GHG emission reductions or offsets under EPA, https://www.epa.gov/greenpower/making-environmental-claims and under the protocols of the Federal Trade Commission Green Guides https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-issues-revised-green-guides/greenguides.pdf requirements. Thus, if customer retained RECs from voluntary DER projects can potentially be used to reduce the mandated RES obligation of the LSEs, they may not be considered eligible for RGGI voluntary renewable energy purchases, and may not be considered "additional."

receiving the Value of E, the "Customer-Retention-Option," the generator is nevertheless prohibited from selling its RECs to a third party, in whole or in part. Thus, the Commission in its Order, page 64, with respect to the Customer-Retention-Option, directs NYSERDA to authorize NYGATS to "mint nontransferable Certificates for deposit and retirement in these customers' accounts" for the generation attributes ascribed to them.

The Commission should rehear or reconsider this prohibition. If a project foregoes any utility payment for its project's environmental attributes, the project continues to own the attributes and should be permitted to sell them into any market, whether through the RES Tier I auction, through bilateral sales to the utilities, or through the voluntary market. There is no rational basis for prohibiting a privately owned project from selling its environmental attributes into the marketplace, whether through NYGATs or any other means. Project owners own the rights to their project's attributes. Allowing them to be traded through RECs in NYGATs would promote market liquidity and foster an orderly REC market in New York. Failure to do so will discourage companies from installing projects in New York. Alternatively, it will cause generators seeking to monetize the value of the environmental attributes to sell them out of State. CORE therefore urges the Commission to reverse its finding and allow RECs associated with voluntary markets to be traded in New York.

VII. The Commission Should Clarify the Parameters of the Voluntary REC Market.

The Commission should also clarify the parameters of the voluntary REC market. The existence of voluntary REC trading markets is and will continue to be an important incentive for renewable energy developers and corporate and institutional users of green energy. Voluntary projects also will continue to make an important contribution toward meeting the State's 50-by-

30 goal. A clear and flexible legal framework that supports the market value of voluntary RECs will be critically important to achieving the State's broader policy goals.

The Order is vague as to how the voluntary REC market will operate, including how REC's will be priced in the voluntary REC markets. Given the fact that the environmental value of voluntary projects equally contributes toward the State's 50 by 30 renewable goal, CORE recommends that the value of environmental attributes in the voluntary markets be set at a percentage of the value established in the RES compliance market for RECs, at least until a liquid voluntary market exists that can establish a true market price. By establishing pricing guidelines for the voluntary market, the Commission will provide encouragement to the voluntary market in recognition of their contribution toward the States clean energy objectives

In so doing, New York will join the numerous states have enacted renewable energy standards that allow on-site and other voluntary renewable generators to participate in REC programs, including California, Minnesota, Colorado, Massachusetts, New Jersey, Pennsylvania, Maryland and Illinois.

VIII. The Commission Should Clarify its Exceptions to its General REC Sale Restriction.

The Order correctly recognizes that a voluntary project's environmental attributes represent an important project asset that is used to finance the project, including as collateral security, to secure timely repayment of loans from project lenders. RECs are often assigned, sold or transferred in transactions by way of sale/leaseback arrangements, real estate lease arrangement and other transactions between and among project sponsors, developers, lessors, credit providers and customers as a way of allocating the costs, benefits, performance obligations and risks of a project.

In recognition of this fact the Order enumerates certain exceptions to its general prohibition on the sale of the RECs. However, given the complexity of project transactions the examples provided may not cover all arrangements between and among project participants.

CORE respectfully requests that the Commission clarify, under the exception to its general rule, that a project owner may sell or assign its RECs to another project participant so long as such sale or assignment is a part of the project transaction.

IX. The Commission Should Reconsider Its Requirements that CDG Projects Make a "One Time Irrevocable Decision" on a "Whole Project Basis" as to Whether They Wish to Retain or Sell the RECs.

For the reasons previously stated, the Commission should provide CDG projects with greater flexibility on whether and to what degree such projects can transfer their RECs to their customers, or sell their project's RECs in the market. The Order's one time, all or nothing inflexibility is particularly onerous for CDG project developers. By definition, CDG projects involve multiple subscribers. Some of these may be commercial service customers, although the bulk of them will be residential customers. It is not realistic or practical to require all subscribers to a CDG project, which could be in the hundreds or thousands, to be of a single voice as to whether they wish to irrevocably own their RECs.

The effect of requiring all subscribers, including the commercial host user, to reach a single, irrevocable, unanimous decision with regard to RECs will add a significant financial burden on CDG projects and grind the CDG market to a halt. The single largest cost, and critical path item, to successfully developing a CDG project is to acquire subscribers that have sufficient creditworthiness to allow the project to be financially feasible. Adding to this critical path the requirement that all project customers must unanimously agree on ownership of RECs is akin to requiring that all subscribers have the exact same pitch on their rooftops. It is a sufficiently

onerous requirement that it will add significant additional upfront time and resources to deter developers from undertaking CDG projects in the State. The Commission should therefore reconsider and modify its one-time, all or nothing irrevocable requirement for CDG projects to provide them with greater options and flexibility.

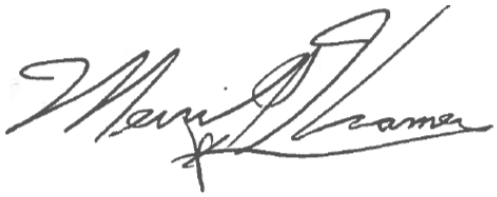
X. The Commission Should Ensure that Projects Selling into the Voluntary REC Markets are not Discriminated Against.

As discussed above, where an on-site generator taking under Value Stack elects not to receive the Value of E, there is no valid reason to impair its discretion to sell the RECs into the bilateral or voluntary markets, or to trade or retire them, in the owner's sole discretion. Having foregone the Value of E there is no rational basis for precluding the generator/user from trading those RECs in the voluntary market. Through the generator reporting requirements or NYGATs the State will be able to accurately track the REC transfer and associated renewable energy generated for assessing the State's progress toward achieving its 50-by-30 renewables target under the Clean Energy Standards.

XI. CONCLUSION

For the reasons stated herein, the Commission should grant rehearing, reconsideration and/or clarification of its Order.

Respectfully submitted,



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ATTORNEYS FOR THE COALITION OF ON-SITE RENEWABLE ENERGY USERS (CORE)

Dated: April 10, 2017
Washington, D.C.

Inputs	
PPA Duration/Life of Facility (Years)	30
Hypothetical REC Price per kWh	$0.0242
Hypothetical REC Price per kWh	$0.03

REC Value Calculation

Project	Assumed Project Cost	Project Size/Installed Capacity (kW)	Megawatt Block Payment per W	CST Funding Amount $*	CST Funding as Pct. Of Total Funding	Total Project Cost / W	Projected Output/yr (kWh)	NYSERDA Agreement Duration (Years)	PPA Term or Facility Life (Years)	Scenario 1 Monetary Value of RECS/MWH at	Scenario 2 Monetary Value of RECS/MWH at
										$24.20	$30.00
Project #1 - Current MW Block Payment	$2,300,000.00	1000.00	0.22	$ 220,000.00	9.6%	$2.30	1,664,400.00	3	30	$1,208,354.40	$1,497,960.00
Project #1-Declining Megawatt Block Payment	$2,300,000.00	1000.00	0.01	$ 10,000.00	0.43%	$2.30	1,664,400.00	3	30	$1,208,354.40	$1,497,960.00

Capacity Factor	Potential kWh	Actual kWh
Project #1	8,760,000.00	19%

*Developer pays taxes on CST payment. Typical payment period is Three Years.