

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on November 18, 2010

COMMISSIONERS PRESENT:

Garry A. Brown, Chairman
Patricia L. Acampora
Maureen F. Harris
Robert E. Curry, Jr.
James L. Larocca

CASE 10-E-0195 - Petition of Catalyst Renewables, LLC for a modification to the Renewable Portfolio Standard (RPS) Main Tier Eligibility Rules to allow Behind-the-Meter Bilateral Contracts to qualify on a Case-Specific Basis; and for a determination that its Onondaga Project is eligible to receive RPS funding on that basis in an RPS Main Tier Solicitation that pre-dated the proposed rule change.

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

ORDER ALLOWING MAIN TIER "BEHIND THE METER" CONTRACTS AND
WHOLESALE DELIVERY TO UTILITY/MUNICIPAL UTILITY/PUBLIC AUTHORITY
ENTITIES, APPLICABLE TO FUTURE SOLICITATIONS ONLY

(Issued and Effective November 24, 2010)

BY THE COMMISSION:

INTRODUCTION

In this order, in response to a petition submitted by Catalyst Renewables, LLC (Catalyst), the Commission modifies the Renewable Portfolio Standard (RPS) Main Tier eligibility rules to allow certain "behind-the-meter" bilateral energy contracts or installations to qualify for RPS incentives, and to allow the energy in previously allowed bilateral contracts to be delivered through a wholesale meter under the control of a utility, public

authority or municipal electric company such that it can be measured, and such that consumption within New York State can be tracked and verified by one of those entities instead of the New York Independent System Operator (NYISO), or along with the NYISO. These modifications are accommodated subject to certain requirements regarding measurement and verification to be conducted in a manner that does not increase the administrative costs paid by ratepayers. These modifications are prospective only and shall apply only to RPS Main Tier incentive contracts entered into as a result of future solicitations conducted after the effective date of this order.

BACKGROUND

Catalyst, through an affiliated company, wanted to build a dedicated biomass (wood-burning) generation facility in the Town of Geddes, Onondaga County (Onondaga Project). The Onondaga Project was proposed to be supported by a federal Treasury Tax Grant (U.S. stimulus funds), incentive payments from the Main Tier of the RPS program and a wholesale power purchase agreement from the New York Power Authority (NYPA). According to Catalyst, all three supports were necessary to make the project financially feasible. The Onondaga Project was chosen as a winning bid in the RPS Fourth Main Tier Solicitation (October 2009) by the New York State Energy Research and Development Authority (NYSERDA) and was offered a ten-year RPS incentive contract.

Catalyst has characterized its Onondaga Project as one that involves "behind-the-meter" energy transactions. By a petition dated April 23, 2010, Catalyst seeks a modification of the RPS Main Tier eligibility rules to allow "behind-the-meter" bilateral contracts to qualify on a case-specific basis, and for a determination that its affiliate's Onondaga Project is

eligible to receive RPS funding on that basis in an RPS Main Tier solicitation that pre-dates this proposed rule change. Catalyst asserts that biomass projects are an important component of the RPS program that should be encouraged; that it has conducted a transmission study that showed it would be more beneficial from an electric system perspective to interconnect the Onondaga Project to the sub-transmission system operated by the Village of Solvay Electric Department instead of the bulk transmission system operated by the NYISO; and that such a direct interconnection would facilitate the securing of the necessary power purchase agreement from NYPA.

The Commission has previously ruled that "behind-the-meter" energy transactions cannot qualify for Main Tier RPS program benefits like electricity sold into wholesale electricity markets in New York State because behind-the-meter sales do not make the same contribution to the Commission's overall objective of obtaining a percentage of New York's electricity requirements from renewable resources as other bilateral transactions and because behind-the-meter transactions are different in that there is no independent, verifiable, or automated mechanism to measure such transactions.¹

Catalyst's proposed Onondaga Project will not go forward because Catalyst was not awarded a power purchase agreement by NYPA as it had hoped. Catalyst's affiliate did not enter into the RPS contract it was offered by NYSERDA because its plans for the power purchase agreement by NYPA fell through and Catalyst was unwilling to commit to NYSERDA that it would go forward with the project without the power purchase agreement.

¹ Case 08-E-0909, Catalyst Renewables, LLC, Declaratory Ruling that "Behind-the-Meter" Sales Are Not Eligible for Participation in the RPS Main Tier Programs (issued June 26, 2009).

NOTICE OF PROPOSED RULE MAKING

A Notice of Proposed Rulemaking concerning the request made by Catalyst Renewables, LLC under consideration here was published in the State Register on May 19, 2010 [SAPA 10-E-0195SP1]. The minimum time period for the receipt of comments pursuant to the State Administrative Procedure Act (SAPA) regarding this notice expired on July 6, 2010. No comments were received.

DISCUSSION AND CONCLUSION

A "behind-the-meter" transaction is one where the energy is generated on the premises of the customer and is supplied directly to the customer and consumed on the customer's premises without ever passing through a utility/municipal utility company/public authority transmission or distribution system. The proposed Onondaga Project would not have involved a "behind the meter" transaction. The generation facility was not to be located on the premises of a customer that would be consuming the energy on the premises. Instead, the energy was to pass through a wholesale meter and be delivered pursuant to a NYPA contract directly to the Village of Solvay Electric Department, a municipal utility company, for resale by it to its approximately 5,300 retail customers in the Village of Solvay and the Lakeland neighborhood of the Town of Geddes.

However, two issues are raised by the Catalyst petition that we shall resolve as they are recurring ones that have been causing consternation for at least some of the potential developers of RPS projects.² While the RPS rules are

² The concern is primarily from potential biomass developers that may need additional revenues to be viable to compete against wind developers at this time. A developer of only one or two wind turbines might share the concern, but there has not been much interest in such small projects for the Main Tier to date.

unambiguous and are not inherently confusing, the entrepreneurial nature of project developers is such that many of them are not satisfied that they can obtain sufficient revenue and profits (to take the risk to develop their projects) from competitive but fixed-price RPS incentives coupled with competitive but variable-priced energy payments from the New York spot market. They view the variable-priced nature of the spot market as too risky, and they also may view the current lower prices yielded in the spot market driven by current lower natural gas prices as unattractive. We previously addressed this issue by changing the RPS rules to allow RPS generators to sell their energy in "physical" bilateral contracts (power purchase agreements generally with a load-serving entity)³ rather than just allowing the sale of the energy into the variably-priced spot market. A physical bilateral contract allows the generator to secure a fixed price for a substantial portion or all of the energy produced, thereby reducing or eliminating its revenue risk as to energy prices. That solution has not had many, if any, takers, not because the generators are not willing to enter into such contracts, they clearly are, but because the load-serving entities have no interest in committing to long-term fixed prices and have generally refused to offer such contracts. Other Commission policies have also discouraged investor-owned utility companies from entering into such long-term power purchase agreements. The only contracts that have been available are generally those offered by governmental entities (e.g., NYPA). Some generators have been able to "hedge" the risk of variable energy prices by entering into "financial" bilateral contracts, essentially a financial instrument that transfers the risk of price differences to a

³ That solution created a tracking problem which will be discussed below.

financial investor for a premium. During the 2009 Review of the RPS program, there was some evidence that the access to such financial arrangements in private markets had been curtailed and we considered offering a contract-for-differences approach to pricing RPS incentive contracts to eliminate the price risk in the spot market, but ultimately such approach was not adopted when it appeared that the financial markets were loosening up again and little interest for such an approach was expressed by developers, many of whom wanted to preserve the upside potential to make additional profits in the event spot market prices rise substantially in the future. Being unable to obtain long-term power purchase agreements from the investor-owned utility companies, some entrepreneurial developers are seeking to obtain such agreements from municipal electric companies or directly from large customers. The RPS program was not originally designed with either of those options for fixed-priced revenues in mind.

Energy Not Delivered to a NYISO Market

The petition nominally seeks a rule allowing "behind the meter" transactions, but uses that term incorrectly and instead describes a different kind of transaction where the energy is to be sold and delivered outside of the NYISO-administered markets and outside of the bulk transmission system operated by the NYISO.⁴ Physical bilateral energy transactions are already eligible in RPS Main Tier solicitations so long as the electric energy is consumed in New York State. The current RPS rules require that the energy be delivered to a market administered by the NYISO so the energy can be easily measured, and so that consumption within New York State can be tracked and verified. The current rule minimizes administration costs and

⁴ It is not completely clear that the transaction would not be scheduled through the NYISO.

makes it possible for the Environmental Disclosure labels provided to retail customers that pay an RPS charge to reflect the energy from Main Tier renewable resources that the customers have paid for. If the delivery is instead made through a wholesale meter under the control of a utility, public authority or municipal electric company such that it can be measured, and such that consumption within New York State can be tracked and verified by one of those entities instead of the NYISO, or along with the NYISO, then such delivery would be sufficient and by this order the RPS rules shall be amended to allow that situation. However, to be eligible, the bid documents and contracts must demonstrate that arrangements have been made by the developer with the utility, municipal utility company, or public authority accepting such delivery to provide the measurement, verification and tracking function to the satisfaction of NYSERDA and Staff as the Administrator of the Environmental Disclosure program at the expense of the developer. There should be no added administrative cost to NYSERDA or Staff that is not compensated by the developer and the price bid by the developer should reflect that the developer is bearing such costs.

Behind-the-Meter Transactions

The Commission has previously ruled that behind-the-meter energy transactions cannot qualify for Main Tier RPS program benefits like electricity sold into wholesale electricity markets in New York State because (a) behind-the-meter sales do not make the same contribution to the Commission's overall objective of obtaining a percentage of New York's electricity requirements from renewable resources as other bilateral transactions and (b) because behind-the-meter transactions are different in that there is no independent, verifiable, or automated mechanism to measure such transactions.

As stated before, a "behind-the-meter" transaction is one where the energy is generated on the premises of the customer and is supplied directly to the customer and consumed on the customer's premises without ever passing through a utility/municipal utility company/public authority transmission or distribution system.

(a) Contribution to the Objective

If the customer currently obtains its electricity from the grid, that electricity usage was part of the "baseline" of electric sales from which the RPS goals and targets were calculated, therefore if the customer now switches to on-site renewable resources, that customer will reduce its requirements from the grid and will instead satisfy its requirements from renewable resources, which could be counted towards the objective. That is correct so long as the customer's premises are not located within the service territory of the Long Island Power Authority (LIPA), regardless of supplier, and so long as the customer is currently served by the grid and does not currently self-generate its electricity "behind-the-meter". No usage in the LIPA service territory was counted in the base that was used to calculate the RPS targets because LIPA did not participate in the RPS program. No "behind-the-meter" self-generation of electricity was counted in the base that was used to calculate the RPS targets because the utilities that would be collecting the RPS charge did not make deliveries of such power. We shall amend the RPS rules to allow the Main Tier energy to be consumed by customers "behind-the-meter", excluding customers in the LIPA service territory and current self-generation customers, subject to the measurement, verification and tracking provisions discussed below. Given the large scale of most Main Tier projects in relation to "behind-the-meter" customer usage, we do not expect that many, if any, projects will take advantage

of this opportunity for some or all of the energy to be consumed on-site, but the change in RPS rules will settle the matter. Projects that are small enough in scale to use a net-metering regime would be eligible for both opportunities.

(b) Measurement, Verification and Tracking

For behind-the-meter energy consumption, the NYISO will be unable to measure the quantity or verify its source, and there will be no way for the NYISO to track the energy to consumption by payers of the RPS charge to reflect it for Environmental Disclosure purposes since the energy will be consumed by the on-site customer. Energy generated as a result of incentives funded in the Customer-Sited Tier is not reflected on the Environmental Disclosure labels. Main Tier generation that is consumed "behind-the-meter" would similarly not be capable of reflection. While this change will diminish customer feedback on where RPS dollars are spent, considering the overall size of the Main Tier, it is not expected that the quantity of energy that could not be reflected would be significant.

A single meter operating on a net-metering basis will be incapable of measuring the amount of energy generated and eligible for RPS premiums. A second meter dedicated to the generation unit will be necessary and required. It will also be necessary for NYSERDA or an independent third party to periodically read the generation unit meter. Whether consumption occurred within New York State will not be an issue as only sites within the State will be eligible for this rule. However, to be eligible, the bid documents and contracts must demonstrate that arrangements have been made by the developer with NYSERDA or its designee to periodically read a dedicated generation unit meter and such other measurement and verification measures necessary to satisfy NYSERDA, at the expense of the developer. There should be no added

administrative cost to NYSERDA that is not compensated by the developer and the price bid by the developer should reflect that the developer is bearing such costs.

Application of the Rule Changes

There is no reason for there to be a formal "case by case" eligibility determination as requested by Catalyst. The solicitation process will weed out projects that do not qualify. The changes in rules discussed in this order shall apply only to future solicitations. The existing RPS contracts were awarded in competitive solicitations and to protect the integrity of the solicitation process the bid awards and contracts should not be abrogated by allowing rules that were not in place at the time the bids were prepared.

SEQRA FINDINGS

Pursuant to our responsibilities under the State Environmental Quality Review Act (SEQRA), in conjunction with this order we find that the eligibility details adopted here are 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 Renewable Portfolio Standard (RPS) Main Tier eligibility rules are modified to allow certain "behind-the-

meter" bilateral energy contracts or installations to qualify for RPS incentives, and to allow the energy in bilateral contracts to be delivered through a wholesale meter under the control of a utility, public authority or municipal electric company, in the manner discussed in the body of this order. These modifications are prospective only and shall apply only to RPS Main Tier incentive contracts entered into as a result of future solicitations conducted after the effective date of this order.

2. The proceeding designated Case 10-E-0195 is closed. The proceeding designated Case 03-E-0188 is continued.

By the Commission,

JACLYN A. BRILLING
Secretary