

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Proceeding on Motion of the Commission
Regarding a Retail Renewable Portfolio Standard

Case 03-E-0188

**INITIAL COMMENTS OF H.Q. ENERGY SERVICES (U.S.) INC. IN RESPONSE TO
NYSERDA'S PETITION FOR MODIFICATION OF RPS MAIN TIER PROGRAM**

H.Q. Energy Services (U.S.) Inc. ("HQUS") hereby submits initial comments in response to the New York Public Service Commission's (the "Commission's" or "NYPSC's") *Notice Establishing Comment and Reply Schedule on the New York State Energy Research and Development Authority's Request for Modifications to the Renewable Portfolio Standard (RPS)*, issued on January 4, 2013 in Case 03-E-0188 (the "Notice"). The Notice requests comments from interested parties in response to the petition of the New York State Energy Research and Development Authority ("NYSERDA") filed in the above proceeding on December 14, 2012 (the "Petition"). In the Petition, NYSEDA requests that the NYPSC modify the RPS Main Tier Program (the "RPS Program") to disqualify all renewable energy projects not located within the geographic boundaries of New York for participation.

For the reasons set forth below, HQUS maintains that consideration of NYSEDA's proposal is unwarranted and, hence, HQUS respectfully requests that the Commission deny the Petition. If the Commission concludes that consideration of the Petition warrants further consideration (a conclusion that HQUS opposes), then HQUS respectfully requests that the Commission commence a thorough and comprehensive hearing procedure to investigate

NYSERDA's proposal and the ramifications of that proposal for attaining New York's RPS Program and New York Energy Highway Blueprint ("Blueprint") objectives.¹

Introduction

HQUS is the power marketing subsidiary of Hydro-Québec Production, the generation division of Hydro-Québec, in the United States. HQUS has market-based rate authority from the Federal Energy Regulatory Commission to engage in wholesale sales of power and related services, and has been an active market participant in the New York Independent System Operator, Inc. ("NYISO") energy and capacity markets since their inception in 1999. In addition, prior to the opening of New York's wholesale energy markets, Hydro-Québec was a major seller of power to the New York Power Pool for almost two decades, notably under long term contracts with the New York Power Authority and the Consolidated Edison Company of New York. HQUS is an important participant in the market for Renewable Energy Certificates ("RECs") in other states of the Northeast and intends to participate in New York's RPS Program in the near future.

Summary of Initial Comments

The Petition suffers from fundamental procedural and policy flaws. For example, NYSERDA's Petition, which requests that the Commission materially revise the RPS Program on the basis of comments and an order, is procedurally inadequate. The NYPSC cannot and should not rewrite the rules of the RPS Program in a manner that would negatively impact an entire class of projects and their sponsors, and the ratepayers of New York, without first conducting a comprehensive review and analysis of the limitation proposed by NYSERDA. Before embarking on rule changes that would have wide-ranging economic and environmental

¹ New York Energy Highway Task Force, New York Energy Highway Blueprint (2012).

impacts, the NYPSC should establish a hearing before an Administrative Law Judge (“ALJ”) in order to facilitate the creation of a solid factual record upon which the Commission can make a reasoned decision that will not unduly burden New York ratepayers and project developers outside of New York.

Despite NYSERDA’s claims to the contrary, the approval of the NYSERDA proposal could result in protracted legal challenges premised on the Commerce Clause of the U.S. Constitution. NYSERDA’s attempt to anticipate and dismiss such challenges based on NYSERDA’s direct purchase of RECs (i.e., NYSERDA’s participation in the market) is misplaced and ignores numerous distinguishing factors that render inapplicable the recognized “market participant” case law exception to Commerce Clause review. Should the Commission find that consideration of the Petition is warranted, the Commission should proceed carefully and permit these issues to be vetted before approving a market limitation that could violate the U.S. Constitution’s Commerce Clause and engender (as it has in other states) lengthy and costly litigation.

NYSERDA also fails to consider fully the benefits that external resources who participate in NYSERDA’s RPS Program provide to New York, such as those benefits resulting from lower RPS Program costs, which are essential (as the Commission has recognized) to the attainment of all RPS Program objectives.

NYSERDA also states, without any support, that a downfall of allowing the participation of external resources in the RPS Program is that the incremental renewable energy resulting from the program cannot be determined. There is no requirement that projects participating in the RPS Program be incremental (i.e., renewable power that would not otherwise be sold into the New York market) and no explanation why such a test would apply only to out-of-state projects.

On this issue of energy security, NYSERDA argues without analysis or justification that, while external resources may add to resource diversity, that benefit is diminished because the delivery of energy from external projects is subject to system failures and/or disruptions. This conclusory statement fails (a) to acknowledge that in-state resources also face system failure and disruption risks, and (b) to demonstrate why such risk may be incrementally greater for external resources.

Lastly, while it states that its proposal to exclude external resources will bring the RPS Program into alignment with the Blueprint, NYSERDA fails to cite to any provision of the Blueprint endorsing the proposed limitation. Moreover, the proposed limitation would actually thwart the Blueprint's objective of stimulating the construction of transmission infrastructure to deliver lower-cost renewable power to load centers. Additionally, NYSERDA's proposal contradicts Governor Cuomo's renewable energy initiatives which include developing transmission capacity to transport lower cost renewable energy from northern New York and Québec to high demand centers located downstate.

The Commission should deny the Petition outright on the procedural and policy grounds set forth in these initial comments. If the Commission finds that the Petition warrants further consideration (which, in HQUS's view, it does not), then HQUS requests that the NYPSC commence a thorough and comprehensive hearing procedure, with the creation of an adequate record, to investigate NYSERDA's proposal in light of the procedural and policy concerns raised these initial comments.

Initial Comments

NYSERDA fails to cite any new facts or arguments in the Petition related to economic, environmental and energy security benefits, that were not considered before the Commission when it explicitly decided, based on stakeholder consensus, to allow external resources to

participate in the RPS Program.² HQUS respectfully submits that to reopen such long standing Commission findings, NYSERDA, or any other party supporting the Petition, should have a high burden of persuasion. The Petition resurrects past arguments and makes unsubstantiated statements without any new evidence or new testimony to support them, which simply does not constitute a sufficient record to justify the Commission reopening its earlier findings.

I. Procedural

a. A Well-Settled Commission Policy Should Not Be Modified on the Basis of the Deficient Process Offered by NYSERDA

In 2003, the Commission initiated a hearing for the creation of the RPS Program and directed an ALJ to consider certain threshold issues including the “appropriateness of including renewable resource energy procedure from outside the state...”³ The ALJ established a working group that, among other issues, explored the very question of imports. As evidenced by the ALJ’s Recommended Decision (“RD”), the working group concluded that imports should be eligible to participate in the RPS Program.⁴ This recommendation was affirmed by the ALJ and approved by the Commission along with a deliverability requirement for external resources that would bring economic benefits to ratepayers in addition to other “important State interests including supply security and diversity, and environmental benefits.”⁵ As the ALJ noted in the RD, the deliverability requirement “draws a rational limiting line around New York State.”⁶ Although repeatedly challenged, the NYPSC has consistently upheld this policy. For example,

² Case 03-E-0188, Retail Renewable Portfolio Standard, Order Regarding Retail Renewable Portfolio Standard at p 63 (Sept. 24, 2004) (“September 2004 Order”).

³ Case 03-E-0188, Retail Renewable Portfolio Standard, Order Instituting Proceeding at p 3 (issued February 19, 2003).

⁴ Case 03-E-0188, Retail Renewable Portfolio Standard, RD at p 49 (issued June 3, 2004).

⁵ September 2004 Order at p 63.

⁶ RD at p 76, fn 109.

in one 2006 Order, the NYPSC rejected stakeholder proposals that would favor in-state generators calling the proposal “economic protectionism.”⁷

In the Petition, NYSERDA asks the NYPSC to reverse years of well-settled law and policy by simply soliciting comments and issuing an order. HQUS believes that a Commission order accepting NYSERDA’s proposal and completely reversing its policy, without any further hearing or investigation, would not only be flawed policy, it would be improper rulemaking. The Commission must afford potentially affected parties and ratepayers the opportunity to examine and probe NYSERDA’s currently unsupported claims and provide a forum to submit evidence in support of rejecting the limitation. One reasonable approach the Commission could take is to follow the example set in 2003 and direct an ALJ to reconsider the continued participation of external resources. The ALJ could once again assemble a working group tasked with investigating NYSERDA’s proposal. While the Commission has previously made changes to the RPS Program without a hearing,⁸ those modifications did not involve complex legal issues and were not projected to have the far reaching economic and environmental impacts that NYSERDA’s proposal would trigger. If the Commission is disposed to consider the Petition, then the Commission must establish a comprehensive rulemaking process that will ensure that any new RPS Program policy regarding external resources will not unduly burden ratepayers and discriminate against private enterprises located outside of New York.⁹

⁷ Case 03-E-0188, Retail Renewable Portfolio Standard, Order Authorizing Additional Main Tier Solicitations and Directing Program Modifications at p 35 (Jan. 26, 2006).

⁸ See, e.g., Case 03-E-0188, Retail Renewable Portfolio Standard, Order Authorizing the Expansion of the Solar Photovoltaic and Geographic Balance Programs From 2012 Through 2015 and the Reallocation of Main-Tier Unencumbered Funds (April 24, 2012).

⁹ As noted, we strongly urge the Commission to undertake a thorough hearing to evaluate the impact of implementing NYSERDA’s proposal to exclude external resources from participating in the RPS Program. HQUS would like to note that NYSERDA’s filing was made only a few weeks after HQUS submitted a non-binding Notice of Intent to Bid, in which HQUS sought to initiate the qualification process for one of its affiliated hydropower facilities. While HQUS does not believe that the Petition was prepared and filed to target HQUS, the timing of the filing still gives HQUS cause for concern.

b. NYSERDA's Proposal Raises Constitutional Issues

The Commerce Clause of the U.S. Constitution empowers Congress to regulate interstate commerce.¹⁰ In granting Congress this authority, the Constitution has also necessarily restricted states from engaging in economic protectionism, that is, enacting laws designed to benefit in-state economic interests by burdening out-of-state competitors. Thus, absent a compelling local interest, state statutes (or related state actions) that discriminate against out-of-state competitors on their face violate the U.S. Constitution's Commerce Clause.

NYSERDA's proposal, if enacted, would explicitly discriminate against out-of-state renewable generators by excluding them from the RPS Program. NYSERDA has not asserted a compelling interest, however, that would justify such a discriminating policy. Instead, NYSERDA submits that its proposal would pass constitutional muster because NYSERDA would qualify for a case-law established doctrine known as the "market participant" exception to "dormant" Commerce Clause restrictions. Under this doctrine, courts have found that when states enter into a market as a participant, the state would not be subject to Commerce Clause restrictions on discriminatory laws.

Despite NYSERDA's confident belief that its proposal is constitutional, a cursory review of "market participant" case law reveals numerous legal distinctions that call NYSERDA's proposal into question. For example, the "market participant" exception has applied to states and local governments. NYSERDA is a public benefit corporation and an independent authority that is *not* funded by state taxes. Further "market participant" case law has found that the state is considered a market participant when it owns or funds the enterprise that receives the benefit of the discriminatory law. NYSERDA, of course, neither owns nor funds the privately-owned in-

¹⁰ U.S. Constitution, Art. I, § 8, cl. 3.

state generators that would benefit from its proposal. In other words, NYSERDA’s proposal does not provide preferential treatment to a state-sponsored entity while providing equal treatment of all private entities, regardless of whether such entities are located in-state or out-of-state. Under the NYSERDA proposal, private in-state project developers would benefit and out-of-state private developers would be harmed. Finally, “market participant” case law has found that states may use their funds to participate in the market in order to benefit its citizens. Here, NYSERDA is not using state funds that are lawfully collected through taxes. Instead, NYSERDA is proposing to spend funds contributed by ratepayers of public utilities to benefit privately-owned in-state developers. In other words, NYSERDA is simply a conduit between ratepayers of public utilities and privately-owned developers. Surely, this is not what the courts had in mind when crafting the “market participant” doctrine for state entities.

It is unclear whether the NYSERDA proposal, if enacted, would survive constitutional review. What is sufficiently clear is that there are legitimate questions as to the legality of NYSERDA’s proposal to give the Commission pause. If the Commission declines to reject the Petition then, as part of the rulemaking process requested by HQUS, the Commission should invite and review legal opinions on this central issue. Such a process would inform the Commission’s disposition of the Petition, and would help mitigate the prospect of prolonged legal challenges and litigation that have plagued the RPS programs of other states.

II. Policy

a. NYSERDA’s Petition Completely Fails to Consider the Important Role Played By External Resources in Reducing RPS Program Costs

The Petition focuses solely on the “direct economic benefits” of in-state projects and ignores the potential benefits that can be derived from external resources participating in the RPS

Program. Moreover, the only supporting analysis cited by NYSERDA does not even assess the benefits (e.g. lower RPS Program Costs) that the participation of external resources can help achieve.¹¹ The fundamental point largely ignored by NYSERDA is that the participation of external resources can help reduce the overall cost (and enhance the success) of the RPS Program. As the Commission noted, “[price] is important to attainment of the other objectives, in addition to economic benefits, of the RPS Program.”¹² By denying external resources the ability to compete in solicitations, NYSERDA would be depriving the state and its ratepayers of the possibility of realizing lower RPS Program costs. Such lower costs would then permit NYSERDA to stimulate more renewable energy development from the same pool of dollars collected from ratepayers, thereby enhancing economic benefits and the state’s ability to meet its RPS goals.¹³ The Commission needs to thoroughly analyze how excluding external resources from participating in the RPS Program solicitations will impact the state economically through a consideration of all factors, including RPS Program costs.

b. External Resources Provide Environmental and Energy Security Benefits to New York

Without any supporting evidence, NYSERDA asserts that out-of-state projects provide little to no environmental and energy security benefits. NYSERDA dismisses all associated environmental benefits associated with external renewable resources, claiming that there is

¹¹ KEMA, Inc., New York Main Tier, Impact and Process Evaluation at p 5-4 (March 2009).

¹² Case 03-E-0188, Retail Renewable Portfolio Standard, Order Authorizing Solicitation Methods and Consideration of Bid Evaluation Criteria and Denying Request for Clarification, issued and effective October 19, 2006 at 18.

¹³ Indeed, lower RPS Program costs could also lead to the reduction or elimination of RPS-related charges on customer bills, thereby reducing energy costs for all ratepayers and stimulating additional economic benefits. For this and for other reasons (such as ensuring the attainment of the RPS Program goals), HQUS in fact believes that the Petition initiated the wrong debate. In HQUS’ view, the debate should not be whether external resources should be allowed to participate at all; the debate should be about how to *increase* the participation of external resources in the broader public interest and for the benefit of New York’s ratepayers. HQUS respectfully suggests that the Commission take the opportunity offered by the upcoming RPS Program review to revise the RPS Program so to significantly bolster the response of external resources to future NYSERDA solicitations.

uncertainty to whether any incremental renewable energy is being imported into the state as a result of the RPS Program. NYSERDA's focus on the "incremental" amount of energy (i.e., energy that would not otherwise be sold into the New York market) is misplaced. The RPS Program does not require, and the NYPSC has not directed, that energy from eligible, selected resources has to be incremental. In fact, if the Commission required external resources to only be selling "incremental" power into the New York market, that incremental power would need to be evidenced by long-term power purchase agreements with such resources – none of which are currently in place with respect to the New York market. In its Petition, NYSERDA appears to be creating a new unjustified eligibility requirement, i.e., projects must generate energy that would not otherwise be sold into the New York market, for which it has no authority.

HQUS recognizes that the environmental benefits of the RPS Program to New York State are incredibly important. Renewable resources located out-of-state that export energy into New York displace energy generated from non-renewable resources, thereby providing significant environmental benefits to the state at a lower cost to ratepayers.

External resources also add to the diversity of renewable resources and NYSERDA significantly downplays that benefit by asserting that such benefit is dependent on delivery of that power into New York.¹⁴ NYSERDA fails to mention, however, that in-state resources are also subject to interconnection and reliability risks and NYSERDA certainly does not prove that external resources are more at risk than in-state projects for such interconnection and reliability

¹⁴ NYSERDA's concern that external resources will not be delivered into New York effectively reopens issues pertaining to the "matching" requirement, which ensures that an external resource is delivering energy to New York that "matches" that resource's energy output on an hourly basis. Case 03-E-0188, Retail Renewable Portfolio Standard, Order on Delivery Requirements for Imports from Intermittent Generators (June 28, 2006). The Commission noted, in its order requiring external resources to engage in hourly matching instead of monthly matching, that hourly matching "provide[s] more assurance that the output of the generator will have a more direct effect on transmission and commodity within the New York electric system." Id. at p 12. The Petition fails to note that the hourly matching requirement places demanding performance standards on external resources (e.g., a failure to satisfy such standards may result in NYSERDA terminating its contract with that resource).

disruptions. In fact, external resources in other Northeast Power Coordinating Council, Inc. control areas (e.g., New England and Québec) are subject to substantially the same (NERC-enforced) reliability standards as in-state (New York) resources. Further, to the extent that external resources sell capacity into the New York market, such resources are required to respond, as are in-state resources, to any capacity call by the NYISO. As an example, resources in Québec supplied energy to New York during the 2003 Northeast Blackout. Accordingly, the Commission should dismiss NYSERDA's unsubstantiated, faulty assertions that external resources do not provide environmental and energy security benefits to New York.

c. NYSERDA's Proposed Limitation is Not Supported By, And May in Fact Thwart, the Blueprint

NYSERDA maintains that its proposed limitation is supported by the Blueprint, but it offers no citation to that document. The policy objective behind the Blueprint is to stimulate the construction of the infrastructure needed to transport lower cost power, including renewable power, to high demand centers in order to lower energy costs for New Yorkers. NYSERDA's proposed limitation thwarts the Blueprint's objectives by eliminating from participation in the market the very entities (external resources) that would utilize this infrastructure.

Additionally, NYSERDA's proposal directly contradicts Governor Cuomo's renewable energy goals, as stated in his Building a New NY...With You, released in conjunction with his 2012 State-of-the-State address:

“We [New Yorkers] have an excess of generation capacity and tremendous wind power potential in Upstate and Western New York and north of the border in Quebec. We have tremendous energy needs Downstate. Just as we built the New York State Thruway to unite distant parts of the state, we will develop an “Energy Highway” system that will bring excess fossil-fuel energy from Western New York downstate, and also tap into Upstate's potential for renewable energy, like wind power. Just like we built

the Northway, we will develop an energy expressway down from Quebec. This will preserve Western New York's current allocation of low cost hydropower and at the same time help address the energy needs of Downstate."¹⁵

The NYSERDA external resource limitation should be rejected, if for no other reason, because it will impede the attainment of the important renewable resource and infrastructure objectives of the Blueprint in direct contradiction to Governor Cuomo.

Conclusion

For the foregoing reasons, HQUS respectfully requests that the NYPSC reject the Petition and decline to issue a proposed rule excluding external resources from participation in the RPS Program. The NYSERDA proposal simply does not warrant consideration. If the Commission decides to give the Petition further consideration, then HQUS respectfully requests that the NYPSC commence a thorough and comprehensive hearing procedure, with the creation of an adequate record, to investigate NYSERDA's proposal in light of the procedural and policy concerns raised in these initial comments.

Respectfully submitted,

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¹⁵ See Building a New NY...With You at p 12 (2012) (available at <http://www.governor.ny.gov/assets/documents/Building-a-New-New-York-Book.pdf>) (emphasis added).