STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on September 15, 2011

COMMISSIONERS PRESENT:

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

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

ORDER AUTHORIZING REALLOCATION OF UNENCUMBERED CUSTOMER-SITED TIER PROGRAM FUNDS THROUGH 2010 AND RESOLVING OTHER ISSUES

(Issued and Effective September 19, 2011)

BY THE COMMISSION:

INTRODUCTION

In this order, the Commission authorizes the New York State Energy Research and Development Authority (NYSERDA), to (a) re-allocate unencumbered 2010 Renewable Portfolio Standard (RPS) Customer-Sited-Tier program funds so that such unused funds remain available for additional projects for 2011 in the same technology category from which they originated, except for $900,000 in unencumbered solar thermal funds which are re-allocated to fund a solar thermal awareness and outreach campaign during 2011 through 2013; (b) exceed the $2 million cumulative monthly cap on incentive payments in the solar photovoltaic category in a manner that only funds reallocated from 2010 may be used in excess of the cap; (c) modify the equipment size cap for the small wind category from 600 kW per installation to 2 MW per installation; and (d) use accumulated unencumbered interest earnings and unencumbered administration funds to pay any New York State Cost Recovery Fee that exceeds the amount previously budgeted for such fee. The Commission also declines to authorize the use of Customer-Sited-Tier program funds to pay for quality assurance and quality control costs for 2011 and 2012.

BACKGROUND

In the April 2, 2010 RPS Order[1], the Commission authorized the 2010 through 2015 operating budgets for each eligible technology in the Customer-Sited Tier. In that Order, NYSERDA was given the following instruction:

> Within thirty days of the end of each calendar year 2010 through 2014, NYSERDA shall calculate the unencumbered balance in each category and shall make, in consultation with Staff, and file with the Commission a written proposal as to whether such unused funds by technology category should remain available for additional projects in that category or should be transferred to a different category to satisfy other demands.[2]

On January 31, 2011, NYSERDA filed its proposal for the 2010 program year in a petition that also requests the resolution of other matters. In the petition, NYSERDA proposes that all unencumbered funds be re-allocated in exact amounts back to the technology categories from which they originated except for $900,000 in unencumbered solar thermal funds which NYSERDA proposes be allocated to fund a solar thermal awareness and outreach campaign during 2011 through 2013. Regarding the

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[1] Case 03-E-0188, Retail Renewable Portfolio Standard (RPS), Order Authorizing Customer-Sited Tier Program Through 2015 and Resolving Geographic Balance and Other Issues Pertaining to the RPS Program (issued April 2, 2010).

[2] Ibid., pp. 20-21.

other matters raised in the petition, NYSERDA: (a) requests authorization to exceed the $2 million cumulative monthly cap on incentive payments in the solar photovoltaic technology category when there is sufficient demand and the amount in excess of the cap can be met using unencumbered 2010 funds; (b) requests clarification or modification of the maximum equipment size cap of 600 kW for small wind installations to provide that the cap limits the amount of incentives that NYSERDA can provide, but not the size of the equipment installed; (c) requests approval to reduce the Customer-Sited Tier 2011 program funds budgets by $2,397,692 and the 2012 program funds budgets by $1,998,888 and to transfer such funds into the administration budget to fund quality assurance and quality control ("QA/QC") activities in 2011 and 2012; (d) requests approval to use unencumbered 2010 Customer-Sited Tier and Main Tier administration funds to fund QA/QC activities in 2011 and 2012; (e) requests an increase of $34,192,488 in the amounts budgeted for payment of the New York State Cost Recovery Fee through 2024; (f) requests authorization to apply $3,188,166 in accumulated interest earned on RPS funds toward funding the requested Cost Recovery Fee budget increase; and (g) requests approval to reduce the Customer-Sited Tier 2012 through 2024 program funds budgets by $4,476,734, the Main Tier 2011 program funds budgets by $3,581,158 and the Main Tier 2012 through 2024 program funds budgets by $22,946,430, and to transfer such funds into the Cost Recovery Fee budget to fund the balance of the requested Cost Recovery Fee budget increase.

NOTICE OF PROPOSED RULEMAKING

A Notice of Proposed Rulemaking (Notice) concerning the reallocation of unencumbered CST funds and other modifications was published in the State Register on March 16, 2011 [SAPA 03-E-0188SP27]. The minimum period for the receipt of public comments pursuant to the State Administrative Procedure Act (SAPA) regarding the Notice expired on May 2, 2011. Eight parties submitted comments on the Notice[3]. The comments received are summarized below.

DISPOSITION

Reallocate Unencumbered 2010 Customer-Sited Tier Program Funds

The following table illustrates NYSERDA's request for Commission authorization to reallocate approximately $35.5 million of Customer-Sited Tier funds unencumbered as of December 31, 2010, to the respective technologies in the 2011 budgets, except for $900,000 in unencumbered solar thermal funds which NYSERDA proposes be allocated to fund a solar thermal awareness and outreach campaign during 2011 through 2013:

Recommendation for Reallocation of Customer-Sited Tier Funds

	Cumulative Unencumbered Program Funds Through 2010	2010 Funds Allocated to 2011 Program Budget	2011 Approved Program Budget	Revised 2011 Program Budget
Solar Photovoltaic	$8,975,134	$8,975,134	$24,000,000	$32,975,134
Anaerobic Digesters	18,520,229	18,520,229	13,300,000	31,820,229
Fuel Cells	3,679,710	3,679,710	3,600,000	7,279,710
Small Wind	1,069,902	1,069,902	2,800,000	3,869,902
Solar Thermal	3,225,000	2,325,000	4,300,000	6,625,000
Solar Thermal A&O	0	900,000	0	900,000
Total	$35,469,975	$35,469,975	$48,000,000	$83,469,975

NYSERDA asserts that it would be premature to consider redirecting funds from one technology to another at this point

[3] Hudson Valley Clean Energy and Adirondack Solar; Multiple Intervenors; Niagara Wind & Solar, Inc; New York Biomass Energy Alliance; and Sustainable Energy Development submitted comments. Joint comments were submitted by Alliance for Clean Energy New York, New York Solar Energy Industries Association, and the Distributed Wind Energy Association.

in time. As to the proposal to fund solar thermal awareness and outreach efforts, NYSERDA believes that the increased marketing of solar thermal technologies is necessary to grow the market. NYSERDA proposes to support an awareness and outreach initiative beginning in 2011 and continuing through 2013. Should Regional Greenhouse Gas Initiative (RGGI) proceeds become available for these efforts during this timeframe, NYSERDA proposes to disencumber the RPS funds and redirect their use back to customer incentives.

Comments

In their joint comment, Alliance for Clean Energy New York, New York Solar Energy Industries Association, and the Distributed Wind Energy Association (collectively, Joint Commenters) support NYSERDA's petition to reallocate program funds that were the unencumbered as of December 31, 2010, to the respective program budgets in 2011. However, the Joint Commenters suggest that the "the unallocated funds should be distributed over multiple months rather than making the entire rollover immediately available, and should be distributed by increasing the amount available to each eligible company."[4] Sustainable Energy Development (SED), Hudson Valley Clean Energy and Adirondack Solar (Hudson Valley) support the position of Joint Commenters.

Multiple Intervenors (MI) oppose NYSERDA's petition. Due to the large amount of funds that were unencumbered as of December 31, 2011, and because the petition does not present information indicating that demand will increase sufficiently in 2011 to absorb the reallocated funds, MI urges the Commission to reject the proposal and direct NYSERDA to refund the surplus money to ratepayers.

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[4] Comment at p. 3.

In its comments, the New York Biomass Energy Alliance (NYBEA) proposes a modification of NYSERDA's petition. NYBEA proposes that the Commission commit $5 to $7 million of the proposed reallocated funds to launch a biomass combined heat and power program.

Only the Joint Commenters offered an opinion on the creation of a solar thermal awareness and outreach program. The Joint Commenters support the program but indicate that the program must be developed and implemented with active participation of the solar industry, through an advisory board. They also noted that NYSERDA should be encouraged to find an alternative source of funds to develop the awareness and outreach program.

Discussion

We shall authorize NYSERDA to reallocate the unencumbered funds for use in 2011 as set forth in the table presented above, including $900,000 of unencumbered 2010 Solar Thermal program funds to conduct the solar thermal awareness and outreach program beginning in 2011 and continuing through 2013. NYSERDA is directed to work with Staff and members of the solar industry in crafting the awareness and outreach program. The $2 million cumulative monthly cap on incentive payments in the solar photovoltaic category would defeat the use of rollover funds in that category, so we shall allow NYSERDA to exceed the $2 million cumulative monthly cap on incentive payments in the solar photovoltaic category in a manner that only funds reallocated from 2010 may be used in excess of the cap. The excess funds originate from 2010, the first year after the 2009 review, and we agree with NYSERDA that it is early to be considering reallocations of the money for different purposes. We anticipate that NYSERDA will be in a better position, after consultation with Staff, to begin to present proposals to adjust to the overall Customer-Sited Tier funding mix, if necessary, beginning with the required January 2012 filing.

Having considered the comments of the parties, we do not disagree that it would be preferable to apportion the funds over several months rather than have all of the funds available at one time, but due to the proximity to year-end, we wish to provide NYSERDA with the flexibility necessary to use these funds during the current program year. By "use" we mean designate the funds for projects for which NYSERDA has received completed applications and accepted the projects for funding (the follow-on fully executed contracts need not be in-hand for the funds to be considered in use.

While we have made meaningful progress towards achieving our RPS objectives, we have not yet achieved the goal we set out to accomplish. As previously noted, 2010 was the first year following the 2009 review of the RPS program. Several of the technologies (including solar thermal, anaerobic digesters (ADG) and fuel cells) have had limited exposure, with programs that were operational for only a portion of the 2010 program year. While we are aware that these are stressful economic times, downsizing the Customer-Sited Tier by returning the unencumbered funds to ratepayers, as MI suggests in its comments, would be short-sighted. It would result in a quick but small rate benefit to customers, while misdirecting our focus from the long term goal of sustained interest and investment in renewable energy.

Likewise, the suggestion of NYBEA to divert approximately $5 million to $7 million to support a biomass combined heat and power (CHP) segment in the Customer-Sited Tier is inappropriate at this time. Currently, biomass CHP is a technology that is supported in the Main Tier of the RPS program and can compete with other eligible resources in competitive solicitations. NYBEA's presentation does not meet the criteria we established for evaluating whether to move a resource from one tier to another in the RPS program.[5]

Modify the Equipment Size Cap in the Small Wind Category

In its petition, NYSERDA requested that a provision of the April 2, 2010 RPS Order be modified or clarified to provide that the maximum equipment size cap of 600 kW per installation in the small wind category be modified so that the 600 kW cap would be applied not as a limit on the size of the equipment that could be installed with an incentive, but instead that an incentive be allowed for the first 600kW of any sized equipment that is installed. Project sizes would be limited by other NYSERDA requirements currently in place that the equipment output not exceed 110% of the site’s historic annual electricity consumption, and a cap on the value of incentives per application of $400,000.

SED and the Joint Commenters support modifying the 600 kW cap on the equipment size. Joint Commenters note that there is no sound basis for the 600 kW cap on the equipment size and unlike solar photovoltaic technology, wind technology is not readily “scalable”. According to Joint Commenters, arbitrarily restricting customer options to turbines sized at 600 kW or less will adversely impact the economics of many projects. Both Joint Commenters and SED state that a more appropriate cap would be 2 MW, to be consistent with the State’s net metering law.

[5] Case 03-E-0188, Retail Renewable Portfolio Standard, Order Approving Implementation Plan, Adopting Clarification, and Modifying Environmental Disclosure Program (issued April 14, 2005).

Discussion

The 600 kW cap was not set arbitrarily. Our institution of the 600 kW cap was in part driven by the size frequency of behind-the-meter units installed in neighboring jurisdictions, as well as our desire to provide adequate funds for smaller customer-sited units and to preserve markets for smaller equipment within the reach of residential or small business customers. However, we are troubled by the gap in support for small wind projects between 600 kW and one MW. We also recognize that an increased size of equipment eligible for incentives in the small wind program could result in an increase in program participation, and for projects that have reached the maximum funding cap, an increase in the size of equipment may result in the installation of larger-sized systems, which could result in higher amounts of RPS kWh at no additional cost to the ratepayers. As a result, we agree that increasing the equipment size limit to a two MW cap, to be consistent with the State’s net-metering laws, is appropriate. In order to alleviate the concern that these larger projects could divert much needed funds from smaller installations, we will require NYSERDA to continue to use a maximum incentive of $400,000 per installation/customer location and to work with Staff to establish appropriate mechanisms to ensure that the smallest-sized systems continue to have funding opportunities.

New York State Cost Recovery Fee

In the April 2, 2010 RPS Order, NYSERDA was given a budget of $992,000 per year for the years 2009 through 2022, and budgets of $744,000 and $496,000 for years 2023 and 2024 respectively, for the payment of the New York State Cost Recovery Fee through 2024. NYSERDA requests an increase of $34,192,488 in the amounts budgeted for payment of the New York State Cost Recovery Fee through 2024 based on NYSERDA's forecast that the actual fee will approximate 1.69% of the RPS funding. NYSERDA requests authorization to apply $3,188,166 in accumulated interest earned on RPS funds and letter of credit forfeitures toward funding the requested Cost Recovery Fee budget increase; and further requests approval to reduce the Customer-Sited Tier 2012 through 2024 program funds budgets by $4,476,734, the Main Tier 2011 program funds budgets by $3,581,158 and the Main Tier 2012 through 2024 program funds budgets by $22,946,430, and to transfer such funds into the Cost Recovery Fee budget to fund the balance of the requested Cost Recovery Fee budget increase.

Joint Commenters reluctantly support using RPS interest payments and letter of credit forfeitures to cover these fees, but have serious concerns over reallocating program funds for this purpose. According to Joint Commenters, reallocating funds previously committed to programs in order to pay fees does not build industry confidence and could result in the State being unable to meet its renewable energy goals.

MI recommends that NYSERDA’s proposal be denied. According to MI, the RPS program already is behind-target and over-budget and diverting money from achieving the RPS goal (i.e., subsidizing the development of renewable resources) to pay a State tax (i.e., the Cost Recovery Fee) further undermines progress toward the RPS goal. MI notes that the Commission established the Cost Recovery Fee budget on the basis of an assessment by Staff and noted that, in any event, NYSERDA would be allowed full recovery of its Cost Recovery Fee payments. MI argues that NYSERDA is apparently not claiming that the actual Cost Recovery Fee has exceeded the amount budgeted, consequently its request to increase the budget for this expense appears premature. MI also notes that it is possible that future changes in the overall level of the Cost Recovery Fee, or in the suite of programs administered by NYSERDA, may reduce the amount allocable to the RPS program, thereby potentially resulting in a future over-collection of this expense at the current budget level.

Discussion

As we noted in the April 2, 2010 RPS Order, we will continue to compensate NYSERDA for its actual costs of the payment by NYSERDA of the Cost Recovery Fee. The issue to consider here is what forecast of expense should be used in setting budgets, and what to do if actual expenses exceed the budgeted level. The amounts budgeted in the April 2, 2010 RPS Order started from the actual amounts reported by NYSERDA for the years 2006 through 2008, which were at a lower percentage rate than NYSERDA now forecasts, and assumed that the total Cost Recovery Fee paid by NYSERDA on all programs would remain capped despite total NYSERDA revenue increases. NYSERDA forecasts that the actual fee going forward will approximate 1.69% of the RPS funding, which assumes that the total Cost Recovery Fee paid by NYSERDA on all programs will not remain capped and will instead rise concurrent with total NYSERDA revenue increases. Whether the total Cost Recovery Fee paid by NYSERDA on all programs remains capped or increases with revenues will be determined in the annual New York State budget process.

NYSERDA's proposal to reflect its higher forecast in budgets going forward is understandable, but its proposal to reduce future program fund budgets to make up the shortfall is not desirable at this juncture as it may hamper our ability to achieve the goals of the RPS program. Instead of re-allocating budgets at this time, we will authorize NYSERDA to apply accumulated and uncommitted interest earned on RPS funds and letter of credit forfeitures toward the payment of any cost recovery fees that exceed the budgeted amounts in years 2011 through 2013. That should cover almost all of the difference between the amounts budgeted and the NYSERDA forecast for 2011 and 2012. If that proves insufficient, we shall also authorize NYSERDA to apply accumulated and uncommitted monies budgeted for administration and evaluation in years 2006 through 2009, and budgeted for administration in years 2010 through 2013, toward the payment of any cost recovery fees that exceed the budgeted amounts in years 2011 through 2013. During the 2013 Review of the RPS program we will revisit the budgets for the Cost Recovery Fee and adjust collections going forward if warranted to fund the necessary costs, including any remaining costs for 2011 through 2013 not covered by the authorizations described above.

Quality Assurance and Quality Control Costs

NYSERDA seeks authorization to use program administration funds that were budgeted for use through 2010 but that remain uncommitted to defray a portion of its projected Quality Assurance and Quality Control (QA/QC) costs for 2011 and 2012, and to use a portion of 2011 and 2012 Customer-Sited Tier program funds to fund the balance. In its petition, NYSERDA indicated that it has $1,821,777 of surplus administration funds available to address the 2011 and 2012 QA/QC costs. The following table illustrates NYSERDA's proposal and the impact the QA/QC cost will have on the respective Customer-Sited Tier programs:

NYSERDA's Proposal to Address QA/QC Costs

	Forecast of QA/QC Costs in 2011	Admin Funds Available to Offset 2011	Amounts Transferred from Programs to QA/QC in 2011	Forecast of QA/QC Costs in 2012	Admin Funds Available Offset 2012	Amounts Transferred from Programs to QA/QC in 2012
PV	$356,097	$178,815	$177,282	$666,000	$334,434	$331,566
ADG	1,424,000	165,173	1,258,827	1,023,500	118,718	904,782
Fuel Cell	79,500	46,192	33,308	53,000	30,794	22,206
Small Wind	284,750	15,426	269,324	337,000	18,257	318,743
Solar Thermal	701,010	42,059	658,951	448,500	26,909	421,591
Geo.						
Balancing	422,000	422,500	0	422,000	422,500	0
Total	$3,267,857	$870,165	$2,397,692	$2,950,500	$951,612	$1,998,888

In it petition, NYSERDA estimates that the QA/QC work will cost, on average, $3 million per year in excess of the $22.3 million provided for in the April 2010 Order for Customer-Sited Tier administrative costs.

Comments

The Joint Commenters support the QA/QC efforts, but find it to be detrimental to the program effectiveness to reduce the amount of money in each program. They suggest NYSERDA should "make every effort to streamline the QA/QC costs, including the use of in-house staff rather than consultants and reallocate funds only as a last resort."[6] If the decision is made to reallocate the funds, the Joint Commenters request that additional collections be authorized in order to make the programs whole to ensure the Customer-Sited Tier reaches its goal in 2015.

MI states that it generally agrees that NYSERDA should make sure that the funds provided under the Customer-Sited Tier

[6] Joint Commenters at p. 6.

are used to satisfy the obligation to provide the required amounts of renewable energy. However, MI notes that the petition fails to provide sufficient information to evaluate whether the funds previously provided are inadequate to support the QA/QC activities. MI states:

> [a]lthough NYSERDA asserts that it will need QA/QC funding in excess of what the Commission provided in its CST Order, NYSERDA does not assert that it has tried, but failed, to manage such costs within the approved budget, or attempted to optimize the administration of those programs. NYSERDA instead states that, in its approved CST operating plan, it committed only to fund QA/QC activities through the administrative budget to the extent that such funding is available. (Petition at 5.) Thus, notwithstanding the unequivocal language of the CST Order, NYSERDA now seeks authority to increase funding for an expense not yet incurred and without attempting to "manage its workload" within the approved budget.[7]

Discussion

In its petition, NYSERDA identified costs it anticipated could be incurred during the 2011 and 2012 program years in connection with its QA/QC activities and requested permission to segregate a portion of the Customer-Sited Tier program funds to finance those estimates. When forecasting the funds needed for the QA/QC costs, NYSERDA used an aggressive model to determine the number inspections it anticipated it would complete and the level of QA/QC work that would be required. This approach resulted in the projection of significant costs. Based on historical experience, it is unclear if NYSERDA can meet the ambitious schedule it has laid

[7] MI at p. 4.

out, and if it fails to do so, significant funds would have been needlessly removed from the program funding pipeline.

At this point in time there is sufficient uncertainty in NYSERDA's estimates and in the scope of effort required that we cannot determine what the proper level of QA/QC cost will be, nor can we determine if that level of cost, coupled with NYSERDA's internal costs, will exceed the level of funds provided. With this uncertainty, we are reluctant to set aside a significant portion of the program incentive funds into a separate account to fund QA/QC costs only.

In the April 2, 2010 RPS Order, we authorized $43.3 million to cover NYSERDA's Customer-Sited Tier and Main Tier administration costs. It was our intent that these authorizations would fund all administration costs for both NYSERDA staff and outside consultants, including those conducting QA/QC work. As we've previously stated, we expect NYSERDA to manage its workload within these budgets and optimize the administration of these programs to the best of their abilities. In that regard, NYSERDA should plan an annual scope of work intended to be conducted with the funds provided in the budgets.

In order to assist NYSERDA in managing its workload, we will clarify and/or authorize NYSERDA to treat the administration costs for the RPS program as readily transferrable between Main Tier and Customer-Sited Tier administrative functions. NYSERDA should use amounts not used in a particular year to offset costs in future program years, as needed. NYSERDA will have the flexibility to fund its Administration cost for the RPS program as a whole and not strictly on a category-by-category, or year-by-year basis. We will explore the adequacy of the Administration cost, in total, during the 2013 review.

We reiterate that we will compensate NYSERDA for its actual costs of administration and program evaluation, and that we expect NYSERDA to manage the RPS funds prudently and within the budgets authorized.

The Commission orders:

1. The New York State Energy Research and Development Authority (NYSERDA) is authorized to re-allocate $35,469,975 in Renewable Portfolio Standard (RPS) Customer-Sited Tier program funds unencumbered through 2010 in the manner discussed in the body of this order, including $900,000 of unencumbered 2010 Solar Thermal program funds to conduct a solar thermal awareness and outreach program beginning in 2011 and continuing through 2013.

2. NYSERDA is further authorized to exceed the $2 million cumulative monthly cap on incentive payments in the solar photovoltaic category in a manner that only funds reallocated from 2010 may be used in excess of the cap.

3. NYSERDA may provide incentives in the small wind program for equipment installations with a capacity of up to two MW in size, subject to a maximum incentive of $400,000 per installation/customer location in the manner discussed in the body of this order.

4. NYSERDA is authorized to apply accumulated and uncommitted interest earned on RPS funds and letter of credit forfeitures toward the payment of any cost recovery fees that exceed the budgeted amounts in years 2011 through 2013. NYSERDA is also authorized to apply accumulated and uncommitted monies budgeted for administration and evaluation in years 2006 through 2009, and budgeted for administration in years 2010 through 2013, toward the payment of any cost recovery fees that exceed the budgeted amounts in years 2011 through 2013.

5. NYSERDA is authorized to treat the administration costs for the RPS program as readily transferrable between Main Tier and Customer-Sited Tier administrative functions and may use amounts not used in a particular year to offset costs in future program years, as needed, such that NYSERDA has the flexibility to fund its administration cost for the RPS program as a whole and not strictly on a category-by-category, or year-by-year basis.

6. The reporting requirement of the April 2, 2010 RPS Order which reads "[w]ithin thirty days of the end of each calendar year 2010 through 2014, NYSERDA shall calculate the unencumbered balance in each category and shall make, in consultation with Staff, and file with the Commission a written proposal as to whether such unused funds by technology category should remain available for additional projects in that category or should be transferred to a different category to satisfy other demands" is clarified to note that for the purposes of this particular reporting requirement, the term "unencumbered" does not include funds designated by NYSERDA to fund projects for which NYSERDA has received completed applications and accepted the projects for funding but for which NYSERDA does not yet have in hand the follow-on fully executed contract needed for the funds to ordinarily be considered "encumbered" as NYSERDA ordinarily uses that term.

7. This proceeding is continued.

By the Commission,

Jaclyn A. Brilling
Digitally Signed by Secretary
New York Public Service Commission

JACLYN A. BRILLING
Secretary