

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., dissenting
James L. Larocca

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

ORDER AUTHORIZING ADDITIONAL MAIN TIER SOLICITATION
AND SETTING FUTURE SOLICITATION GUIDELINES

(Issued and Effective December 3, 2010)

BY THE COMMISSION:

INTRODUCTION

In this order, the Commission authorizes the New York State Energy Research and Development Authority (NYSERDA), in consultation with Staff, to conduct future Main Tier solicitations in the Renewable Portfolio Standard (RPS) program without further or individual authorizations by the Commission. The Commission also provides guidance to NYSERDA, the RPS program administrator, on how future solicitations are to be conducted.

BACKGROUND

In 2004, the Commission adopted the Renewable Portfolio Standard (RPS) to achieve a goal of increasing the proportion of electricity consumed in the state produced by renewable resources. The bulk of the attributes from renewable

energy resources needed to meet that goal is obtained from competitive solicitations through the Main Tier of the RPS program. These solicitations have been administered by NYSERDA as request for proposals (RFP), sealed, pay-as-bid solicitations. Contracts for the attributes of renewable generators that win awards are for a 10 year term. Currently, only renewable facilities that commenced commercial operation on or after January 1, 2003 are eligible to bid. For each solicitation held, two categories are incorporated into a bid evaluation: bid price and economic benefits.

By an order dated January 8, 2010, the Commission adopted a new RPS goal and largely addressed issues involving the Main Tier of the program, including NYSERDA's administration of Main Tier solicitations. The January 8, 2010 Order stated:

NYSERDA should be authorized to conduct no less than one solicitation per calendar year. This approach provides greater predictability but also allows NYSERDA to conduct, after consultation with Staff, as many solicitations per calendar year as are deemed necessary to obtain attributes in the most cost effective manner consistent with our target, cost estimates and collection schedule. In all instances, Staff should be given at least 30 days notice before any RFP is issued.¹

However, in that same order, the Commission only authorized a single \$200 million solicitation, the Fifth Main Tier Solicitation, to be held early in 2010. For that solicitation, the Commission directed NYSERDA to clarify its economic benefits bid evaluation criteria to specify that operating projects receive no credit for non-incremental

¹ Case 03-E-0188, Renewable Portfolio Standard (RPS), Order Establishing New RPS Goal and Resolving Main Tier Issues (issued January 8, 2010) p. 19.

economic benefits.² The Commission also stated that it intended to reexamine, among other things, the vintage (including the economic benefits component of bid evaluations) following the results of the solicitation.³

Shortly thereafter, NYSERDA issued an RFP for the Fifth Solicitation including the following language:

Bidders offering RPS Attributes from Bid Facilities that entered Commercial Operation on or before January 8, 2010 will not be awarded points for economic benefits unless such benefits are clearly and demonstrably incremental; incremental economic benefits for such projects are those that a Bidder can demonstrate: (1) will accrue subsequent to an award under RFP 1851, and (2) would not have accrued but for the award of a contract under RFP 1851.

Subsequent to the results of the Fifth Solicitation, the Commission issued an order on April 2, 2010 and determined, among other things, that it was appropriate to leave the January 1, 2003 vintage date in place at this time.⁴ The order, however, was not dispositive about how to address economic benefits in bid evaluations in future Main Tier solicitations.

NOTICE OF PROPOSED RULEMAKING

A Notice of Proposed Rulemaking (Notice) concerning the administration of future Main Tier solicitations was published in the State Register on September 1, 2010 [SAPA 03-E-0188SP25]. The minimum period for the receipt of public comments pursuant to the State Administrative Procedure Act (SAPA) regarding the Notice expired on October 18, 2010.

² Ibid., p. 24.

³ Id.

⁴ Case 03-E-0188, supra, Order Resolving Main Tier Issues (issued April 2, 2010) p. 8.

The Notice sought comments on two main issues. First, whether NYSERDA should be authorized to conduct no less than one solicitation per calendar year, which authorization would allow NYSERDA to conduct as many solicitations per calendar year as NYSERDA deems necessary to implement the RPS Main Tier program without further or individual authorization by the Commission. Second, the Notice sought comments on bid evaluation design criteria, specifically as it relates to the treatment of economic benefits in bid evaluations. For this issue, the Notice stated that the options to be considered by the Commission include:

1. Whether the economic benefits category for bid evaluation should be continued or eliminated;
2. Whether the 30% percentage value established for the economic benefits evaluation approach is effective and reasonable, or whether some other percentage value should be used;
3. Whether the requirement that "non-incremental" economic benefits not be counted for facilities already in commercial operation should be continued or eliminated;
4. Whether "incremental" economic benefits should be measured:
 - (a) As of the date of the particular solicitation;
 - (b) As of the date of the particular contract award;
 - (c) Fixed as of the date (January 8, 2010) of the order setting the requirement that non-incremental economic benefits shall not be counted; or
 - (d) A date certain in advance of the date of the particular solicitation, such as one or two years prior to the date of the particular solicitation.
5. Whether other changes regarding bid solicitation eligibility or bid evaluation design details and methodologies should be made.

SUMMARY AND DISPOSITION OF COMMENTS

Eight parties submitted comments in response to the Notice: Alliance for Clean Energy New York (ACENY); Consolidated Edison Company of New York, Inc. and Orange and Rockland Utilities (Con Edison); EverPower Wind Holdings (EverPower); Multiple Intervenors (MI); NYSERDA; Iberdrola Renewables, Inc. (Iberdrola); Invenergy LLC, (Invenergy); and Pace Energy and Climate Center (PACE). The vast majority of comments supported authorizing NYSERDA to undertake additional RPS Main Tier solicitations. The bulk of the comments primarily address the matter of economic benefits criteria in bid evaluations for future solicitations.

Authorization for Future Solicitations

All but one party, MI, supported giving NYSERDA authority to conduct future Main Tier solicitations without having to get specific approval by the Commission each time. ACENY, EverPower, Iberdrola, Invenergy and Pace all agree that it is critical for NYSERDA to have ongoing authority to schedule solicitations for renewable resources to help meet the State's clean energy goals without having to repeatedly return to the Commission for approval. All opine that more regularly scheduled solicitations will provide the regulatory certainty that developers need to help create a more robust renewable energy market in New York State. ACENY urges the Commission to act swiftly on the matter and calls on NYSERDA to schedule a new procurement immediately. It also requests that a defined schedule be set for the next three years. Iberdrola also supports the requirement of a published solicitation schedule while Invenergy requests that NYSERDA be authorized to conduct solicitations every six months at pre-determined dates. NYSERDA believes that it should be expressly authorized to conduct Main Tier solicitations at least annually through 2015 and more

frequently, in consultation with DPS Staff. MI urges the Commission to refrain from granting NYSERDA "essentially unfettered authority" to conduct Main Tier solicitations throughout the calendar year. Instead, it requests that the Commission and Staff retain sufficient oversight of the RPS program to ensure that the RPS goal is achieved at the lowest-possible cost and modified if deemed uneconomic and/or too costly.

Discussion

We re-affirm our position in the January 8, 2010 Order that NYSERDA should be authorized to conduct annual Main Tier solicitations, with flexibility to conduct more if deemed appropriate given changing circumstances, without seeking our approval for each solicitation of resources. We recognize, as we did back in January, that greater predictability has value to developers that make long-term investment decisions about whether or not to invest and locate projects in New York State.

We are also sensitive to MI's concerns about achieving the RPS goal in the most cost-effective manner and ensuring that there is proper oversight of the administration of the RPS program by Staff and the Commission. We believe that by allowing NYSERDA the flexibility to act more quickly, we will be better positioned to take advantage of favorable market conditions that will help us attain renewable resources in the most cost effective manner. Also, we will continue to monitor the results of each solicitation and take necessary actions to ensure that the RPS program continues to be administered in the most efficient and beneficial manner to protect the ratepayers of New York. Moreover, we will require NYSERDA to consult with Staff for each solicitation, and for each solicitation Staff must approve NYSERDA's decision to go forward consistent with the criteria that there is sufficient funding based on the

schedule of collections; that market conditions appear favorable to obtain resources in the most efficient and cost-effective manner; and that the parameters of the solicitations are within the overall program goals. Provided however that NYSERDA and Staff at a minimum shall ensure that one solicitation per year shall be conducted.

Continuation of Economic Benefits in Bid Evaluations at the Existing 30% Weighting Factor

ACENY, EverPower, Iberdrola, Invenergy, NYSERDA and Pace support continuation of the economic benefit category in bid evaluations of Main Tier solicitations. Each of those commentors note that economic benefits to New York State was one of the major objectives identified by the Commission when it established the RPS program in 2004 and that the weighting of economic benefits in bid evaluations helps to fulfill that purpose. Also, NYSERDA opines that elimination of the economic benefits bid evaluation criteria could reduce electric price suppression. It states that transmission is already constrained in high-cost load zones and any increase in RPS imports that could occur due to the elimination of economic benefits weighting in bid evaluations would not be incremental to commodity imports that otherwise would occur.

The majority of commenting parties support retaining the 30% weighting factor for economic benefits in bid evaluations. EverPower believes a case can be made to increase that weighting, stating that economic value provides a "bang for the buck" that should be a major consideration. It notes that many of the projects supported with RPS subsidies have helped to stimulate the economies of rural upstate communities. NYSERDA and ACENY both note a report prepared for NYSERDA in 2009 by its consultants that demonstrated both substantial direct and

indirect economic benefits that, on a per MWh basis, exceeded the average RPS premiums for the program.⁵

MI states that bids should be evaluated solely on price. It urges the Commission to eliminate the economic benefits criteria altogether, but if it elects not to, then the weighting should be substantially reduced. MI argues that including economic benefits leads to the selection of higher-cost projects and discourages application by out-of-state projects. Ibedrola believes the Commission should consider using the economic benefits weighting criteria solely to break a tie between in-state and out-of-state projects in cases where the bid price for the two are the same. This, it claims, will ensure that lower-cost out-of-state projects are still chosen, but gives in-state projects an edge when prices are similar. It recommends a lower percentage, perhaps 10%, to achieve this result.

Con Edison recommends eliminating the economic benefit criteria and, instead, substituting it with energy market benefits. It asserts that this criterion would better align expenditures of RPS funds more closely with benefits to customers. It states that the goal of the RPS program is enhancing the sustainability of the electric energy system, not enhancing the State's economy.

Discussion

Providing economic benefits to New York State was one of the formal objectives adopted when the Commission first established the RPS Program in 2004.⁶ To support that objective,

⁵ KEMA, New York Main Tier RPS Impact and Process Evaluation (March 2009) and Summit Blue, New York Renewable Portfolio Standard Market Conditions Assessment (February 2009).

⁶ Case 03-E-0188, supra, Order Regarding Retail Renewable Portfolio Standard (issued September 24, 2004) pp. 31-32.

the Commission, in a 2006 order, decided that it was reasonable to take into consideration the economic benefits that a given project can be expected to bring to the State.⁷ It noted that since New York ratepayers are funding the RPS Program, the impacts of renewable projects on economic development in New York localities that host facilities (perhaps as much as \$10/MWh for in-state wind projects) should be considered in the evaluation of bids. At that time, many parties argued for fully one-half of the value of bids for economic benefits weighting, but the Commission rejected this percentage, stating that this appeared to give too much weight to this factor, which is, after all, only one among several goals of the RPS program. It set 30% as the limit of the total bid score to be considered for economic benefits, stating that "this percentage result from a balancing of evaluation factors relating to program costs and desirability of weighing the need for participation by interstate energy producers against the economic development benefits in the State derived from in-state renewable facilities". It required that the economic benefits category be designed such that any project, regardless where located, would have the same opportunity to demonstrate quantitatively its likely, and verifiable, economic benefits to New York. Consequently, beginning with the second Main Tier solicitation, NYSERDA was authorized to score bids basing 70% of the score on bid price and 30% of the score on economic benefits to New York State.

We believe that there is merit in continuing the economic benefits bid evaluation weighting at 30% for the same reasons the Commission was compelled to do so in 2006. To date,

⁷ Case 03-E-0188, supra, Order Authorizing Solicitation Methods and Consideration of Bid Evaluation Criteria and Denying Request for Clarification (issued October 19, 2006) pp. 16-18.

we find that all the solicitations have been robust; a diversity of in-state renewable resources have been awarded contracts with NYSERDA; and the average weighted price of winning bids has been relatively low compared to neighboring states. In addition, Staff performed an analysis of the results of the last solicitation and found that claimed economic benefits exceeded the cost of the incremental premiums expected to be paid for new RPS projects. By retaining this criterion, we believe that New York will maximize the economic and energy price benefits that together can help offset the cost of the RPS program. We are also reminded by Staff that NYSERDA contractually requires all winning bidders to submit a report including documentation demonstrating that actual economic benefit have resulted from construction and operation of the RPS facility and that failure to show demonstrated benefits will result in non-payment.

With respect to Con Edison's request to substitute economic benefits with "electric market benefits" we believe that those benefits are already inherently factored in the bid price and by the nature of the location of the project. Building projects in zones where the energy is worth more yields higher energy revenues for developers. That is an appropriate price signal. We are also not convinced by other arguments to raise or reduce the weighting percentage.

At this time, we find no compelling reason to eliminate or adjust the economic benefits weighting criteria in the bid evaluation process. We will, therefore, require NYSERDA to continue weighting at 30% in bid scores in future Main Tier solicitations.

"Incremental" Economic Benefits

ACENY, NYSERDA, Ibedrola and Invenergy, all oppose the "incremental" economic benefit criteria in bid evaluations and believe it should be eliminated. They point out that developers

and/or their investors must invest considerable sums of financial capital at high risk over the course of several years prior to committing to the larger risk of ordering equipment and finally building a project.

ACENY opines that only allowing "incremental" economic benefits to count in the weighting of bid evaluations penalizes companies who take the risk of starting development and/or construction prior to an RPS contract award. NYSERDA states that changing procurement rules, which has been done in several of the past solicitations, sends a warning signal to project developers that they should not make any project investment or progress unless or until they have an RPS contract. NYSERDA further opines that investors and developers may take a risk to enter the marketplace at lower near-term return in exchange for the opportunity to compete for a longer term contract with NYSERDA as part of the RPS program.

On the other hand, MI believes that if economic benefits are used in the weighting of bids, then those benefits should be measured to ensure they are incremental and attributable to the award of an RPS contract. PACE agrees that projects should not be awarded points for economic development unless such benefits are clearly and demonstrably incremental to the award of an RPS contract.

EverPower opines that economic benefits should be incremental and measured as a date certain at least one year in advance of each solicitation (with a firm solicitation schedule provided to developers with at least two solicitations per year).

Discussion

In our effort to reduce RPS program costs and encourage new projects, we have previously refined and revised our position on the eligibility of renewable projects already in

commercial operation versus those yet to be constructed. This, we believed, would allow us to capture benefits in the marketplace that would help stimulate renewable development in the State at the same time protecting ratepayers against unnecessary program cost increases. For example, in the fourth Main Tier solicitation, we required the use of a one-time revised vintage date of August 21, 2009, the date of the order authorizing that solicitation, to maximize the leverage of federal stimulus money that would only be available to more immediate projects.⁸ In that same order, we considered but rejected a proposed rule that would have limited credit for economic benefits unless they were "incremental due to the awarding of an RPS contract."⁹ We noted that the change in eligibility date of commencement of commercial operation for that solicitation (changed from January 1, 2003 to August 21, 2009) made the notion of incremental economic benefits largely moot.¹⁰

We then returned to using the January 1, 2003 date as an eligibility requirement for the fifth solicitation, but directed NYSERDA to revise economic development bid evaluation criterion for scoring purposes to explicitly require a showing of incremental economic benefits associated with a given bid, we noted that these rules would allow us to maximize the number of MWh available for the program while showing continued preference for new projects.¹¹ We also stated:

⁸ Case 03-E-0188, supra, Order Authorizing Additional Main Tier Solicitation and Setting Solicitation Guidelines (issued August 21, 2009) pp. 9-12.

⁹ Ibid, p. 4.

¹⁰ Ibid. p. 8.

¹¹ Case 03-E-0188, supra, Order Establishing New RPS Goal and Resolving Main Tier Issues (issued January 8, 2010) p. 24.

Large-scale investment in a renewable energy project is a matter that requires financial sophistication. As such, investors should understand that RPS incentives will likely continually evolve and are, therefore, subject to changing policies as we further refine our objectives in response to changing circumstances. Thus, we must reserve the right to revise the vintage date in the future based upon our objectives as well as the facts and circumstances at that time.

We are persuaded by the arguments in the majority of comments that the economic development bid evaluation scoring in Main Tier solicitations should be free of any requirement that the economic benefits be incremental, or that it occur particularly close in time to the date of each solicitation. While such a requirement has the advantage of giving a preference to newer projects, it appears to also have negative implications for renewable resource developers considering investments in New York State. More specifically, we are concerned that it would penalize developers that prefer to get an early start on a project. This is because, under an incremental economic development requirement, projects that are started early may later fail to qualify for the points awarded by a vintaged incremental economic development requirement.¹² An RPS procurement process that is free of such requirements allows developers to start their projects anytime they want, knowing that they will not get penalized for doing so. By maximizing the flexibility afforded, developers are encouraged to consider investing in New York at the time that is most convenient for them given their many non-New York State alternatives. Overall, the relaxation of this requirement should, in turn, benefit the public by maximizing the number of MWhs that are available for participation in the RPS program.

It is also important to recognize that a number of modifications have been made to the RPS during the last two solicitations. While these changes were needed given the unique facts and circumstances of those two processes, it is now our intention to establish an RPS process that is not only flexible and sustainable but also able to attract the most MWhs of renewable resources at the lowest reasonable cost to the public. The changes made in this order accomplish these goals by opening the RPS process to more MWhs and establishing an unambiguous procurement process that is uncluttered by incremental economic development requirements whose vintage dates will change with each solicitation. With this decision, we will apply only a single vintage date, the original 2003 date. The RPS rules should be kept as simple and stable as possible, except where compelling reasons dictate an exception, as noted above. We recognize that developers of renewable generation projects face a myriad of risks, and we find that it is in the public interest to minimize the regulatory risk and regulatory complexity that they face. We will require NYSERDA to incorporate the single vintage date of January 1, 2003 in future solicitations.

Other Issues

There were other RPS policy issues not relevant to bid solicitation eligibility or bid evaluation design details raised in the comments that are not addressed in this order. It is expected that broader RPS policy issues will be addressed during the next review of the RPS program in 2013.

¹² An early start can prove to be important for a project to qualify for federal tax incentives, for example.

SEQRA FINDINGS

Pursuant to our responsibilities under the State Environmental Quality Review Act (SEQRA), in conjunction with this order we find that additional solicitations and design 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 New York State Energy Research and Development Authority (NYSERDA) is authorized to conduct future Main Tier solicitations, without Commission approval, for Renewable Portfolio Standard (RPS) Main Tier resources, after consultation with Staff and approval by the Director of the Office of Energy Efficiency and the Environment of the Department of Public Service (OEEE Director) prior to each solicitation consistent with the criteria that NYSERDA can demonstrate sufficient funding availability; that resources will be obtained in the most efficient and cost-effective manner; and that the parameters of the solicitations are within the overall program goals. Such consultation and approval shall allow NYSERDA to conduct as many solicitations per year as NYSERDA and the OEEE Director deem necessary to implement the RPS Program, provided that NYSERDA and the OEEE Director at a minimum shall ensure

that one solicitation per year shall be conducted.

2. Future solicitations shall be conducted in the manner of past solicitations, as noted below (and as discussed in greater detail in past orders), subject to the design details discussed in the body of this order.

- (a) Proposals shall be requested using a sealed, "pay-as-bid" auction procedure. A price shall be determined above which bids shall not be considered, but such price shall not be revealed to bidders.
- (b) Contract awards shall be for a ten-year term. The ten-year contracts with fuel-based renewable energy generators shall have an escape clause actionable every two and one-half years so that the generator may drop out of the program if it is unable to secure a continuous fuel supply at a price that supports its contract with NYSERDA.
- (c) The selection of winning bids shall be based on a weighted combined score with price comprising 70% and economic benefits at 30%.
- (d) Only renewable generation facilities that commence commercial operation on or after January 1, 2003 shall be eligible to bid.

3. This proceeding is continued.

By the Commission,

(SIGNED)

JACLYN A. BRILLING
Secretary

Robert E. Curry, Commissioner, dissenting:

I agree with much of what the Commission has decided today; adoption of this order increases the efficiency of our program of encouraging renewable generation. The RPS plays an important role in New York State's energy policy and is a reasonable means of reaching the State's ambitious goals.

I dissent only because the problems with the program identified in my January 2010 dissent in this case¹ have not been resolved. Therefore it is not clear to me that the program as currently structured is in the public interest.

In this order, the Commission has properly resolved one of the issues noted in the January dissent. Other concerns about this expensive (\$561 million of direct costs in 2010 alone) program remain:

- The impact of the program on suppressing electricity prices (a benefit claimed by advocates of the program) has not been evaluated.
- RPS costs have exceeded original projections, the original goals have not been met, and the program's administration remains substantially unchanged. With this history, it is difficult to see how the expansion of the RPS will timely achieve the results desired.
- The geographic inequity of the program being skewed to upstate wind largely remains.
- The costs associated with transmission and substation additions and improvements needed for effective deployment of renewables should be quantified and included in our analyses of the costs of the RPS program.

¹ Case 03-E-0188, Retail Renewable Portfolio Standard, Order Establishing New RPS Goal and Resolving Main Tier Issues (issued January 8, 2010).

- Further consideration should be given to changing the definition of "renewables" to include waste-to-energy. Serious questions about the definition of that term were raised over eighteen months ago and not addressed.

The Commission should complete its review of all the issues that it is deferring. For all these reasons, I respectfully dissent from the Commission's decision.