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February 19, 2013

VIA ELECTRONIC FILING

Hon. Jeffrey C. Cohen
Acting Secretary
New York State Public Service Commission
Three Empire State Plaza
Albany, New York 12201-1350

Re: Case 03-E-0188 – Proceeding on Motion of the Commission Regarding a Retail Renewable Portfolio Standard

Dear Acting Secretary Cohen:

Multiple Intervenors hereby submits for filing in the above-referenced proceeding the annexed “Comments in Opposition.” The annexed Comments are submitted in response to a notice published in the January 2, 2013 issue of the *New York State Register* (I.D. No. PSC-01-13-00017-P), and to the *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 herein on January 4, 2013.

Respectfully submitted,

MULTIPLE INTERVENORS

S. Jay Goodman

S. Jay Goodman

SJG/dp

Attachment

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**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

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

Case 03-E-0188

**COMMENTS IN OPPOSITION
(I.D. No. PSC-01-13-00017-P)**

Dated: February 19, 2013

**MULTIPLE INTERVENORS
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PRELIMINARY STATEMENT

Multiple Intervenors, an unincorporated association of more than 55 large industrial, commercial and institutional energy consumers with manufacturing and other facilities located throughout New York State, hereby submits its *Comments in Opposition* to the *Petition for Modification of RPS Main Tier Program* (“Petition”) filed by the New York State Energy Research and Development Authority (“NYSERDA”) on December 14, 2012 in Case 03-E-0188.¹ Multiple Intervenors’ Comments respond to the notice soliciting comments on the Petition published by the New York State Public Service Commission (“Commission”) in the January 2, 2013 edition of the *New York State Register* (I.D. No. PSC 01-13-00017-P), and the *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 herein on January 4, 2013.

In its Petition, NYSEDA requests that the Commission respond to the New York Energy Highway Initiative announced by Governor Cuomo by modifying the Renewable Portfolio Standard (“RPS”) Main Tier Program to exclude renewable energy projects that are located outside New York State from participating therein. (Petition at 1.)² According to NYSEDA, the RPS program is a “key element” of the Blueprint, which “specifically recommends and depends upon the development of in-State renewable resources.” (Petition at

¹ Case 03-E-0188, *Proceeding on Motion of the Commission Regarding a Retail Renewable Portfolio Standard*.

² The Energy Highway Task Force issued a report that contains numerous recommendations and advances many goals, some of which may conflict from time to time. *New York Energy Highway Blueprint*, New York Energy Highway Task Force (dated October 22, 2012) at 10 (hereinafter, the “Blueprint”), available at <http://www.nyenergyhighway.com/Blueprint.html>.

5.) NYSERDA notes that the Blueprint recommends a competitive solicitation for in-State renewable resources that should be conducted under the RPS. (*Id.* at 6.)³ Based on this recommendation, NYSERDA extrapolates from the Blueprint a conclusion that the RPS Main Tier hereinafter should be restricted to renewable energy projects located in New York State. NYSERDA argues that narrowing the Main Tier eligibility requirements to exclude all out-of-State renewable projects also would promote the ancillary RPS Program objectives of: (a) improving the environment; (b) promoting energy security; and (c) securing economic benefits for New York State. (*Id.* at 1.)

Initially, Multiple Intervenors does not object to the unsubsidized development of merchant renewable energy projects. For the reasons detailed herein, however, Multiple Intervenors is concerned that approval of the relief sought by NYSERDA would establish detrimental precedent for the RPS program and result in increased costs to customers (incremental to existing, significant RPS collection levels). Accordingly, the positions advocated herein by Multiple Intervenors are focused on the precedent, and potential financial harm to customers, that likely would result if the Commission grants the relief requested in NYSERDA's Petition. Moreover, to the extent that the Commission may choose to consider the Petition notwithstanding Multiple Intervenors' arguments in opposition thereto, such consideration should be deferred to the comprehensive RPS program review that the Commission is scheduled to undertake later this year.⁴

³ See also Blueprint at 62-63.

⁴ Case 03-E-0188, *supra*, Order Establishing New RPS Goal and Resolving Main Tier Issues (issued January 8, 2010) at 26-27 (stating that the Commission will review the status of the RPS, Energy Efficiency Portfolio Standard and System Benefits Charge in 2013).

ARGUMENT

POINT I

THE COMMISSION SHOULD DENY NYSERDA'S PETITION

The primary goal of the RPS is to increase to 30 percent the amount of renewable energy sold at retail in New York State.⁵ Thus, the primary goal is focused on the amount of renewable energy sold at retail, not where the facilities generating such energy happen to be located. Ancillary to this primary goal, the Commission also adopted for the RPS program a set of program objectives that would provide “useful guidance on the development of the program” while serving as a “reference point for implementation decisions.”⁶ Those ancillary objectives include environmental improvement, energy security, and economic development.⁷

NYSERDA asserts that its proposal to exclude out-of-State facilities from the Main Tier would improve the alignment of the RPS program with the Energy Highway Initiative. (Petition at 1.) In attempting to justify the purported need for this change, NYSERDA (i) ignores that the primary goal of the RPS is to increase the penetration of renewable energy sold at retail in New York (*i.e.*, regardless of where a particular facility may be located), and (ii) does not explain how the existing RPS purportedly is inconsistent with either the Energy Highway Initiative or the Blueprint. NYSERDA instead focuses on promoting the ancillary RPS

⁵ Case 03-E-0188, *supra*, Order Establishing New RPS Goal and Resolving Main Tier Issues (issued January 8, 2010) at 10. *See also* Case 03-E-0188, *supra*, Order Regarding Retail Renewable Portfolio Standard (issued September 24, 2004) at 6 (stating that the “objective in instituting the RPS proceeding was to develop a plan to ensure that a substantially greater proportion of energy retailed in New York State comes from renewable resources...”) (hereinafter, the “RPS Order”).

⁶ RPS Order at 23.

⁷ Id.

objectives (i.e., economic development, environmental improvement, and energy security), arguing that, although Main Tier projects should maximize such benefits, out-of-State renewable energy projects make negligible contributions to same, as compared to in-State projects. For this reason, and because the Main Tier purportedly is not consistent with the Blueprint, NYSERDA argues that the Main Tier should be limited to in-State projects.

NYSERDA's Petition should be denied. Its proposal is unnecessary, contrary to existing Commission policy, and would limit the pool of eligible renewable energy projects, thereby potentially excluding lower-cost facilities that otherwise would tend to moderate the overall cost to achieve the RPS goal. The RPS program, as implemented currently, already is consistent with the Blueprint and Commission precedent, and does not require modifications to support the implementation of Blueprint recommendations.

A. NYSERDA's Proposal Would Increase the Cost to Achieve the RPS Goal

NYSERDA concedes that its proposal to exclude out-of-State projects from the RPS Main Tier would increase the overall cost of the RPS to customers. NYSERDA states that "...it has been recognized that the lower bid prices expected from out-of-State projects have an economic value to New York in the form of lower program costs." (Petition at 3.) NYSERDA attempts to trivialize this benefit by arguing that out-of-State renewable energy projects yield less ancillary benefits (*i.e.*, energy security, environmental improvement, economic development) than in-State projects and, therefore, such projects nevertheless should be excluded from the Main Tier. (*Id.* at 2-6.)

In so arguing, however, NYSERDA does not address clear Commission precedent stating that the Main Tier intentionally was structured to procure the vast majority of renewable

energy necessary to achieve the RPS goal *at the lowest cost*. The Main Tier was designed to procure renewable energy via a competitive process that heavily weights the level of subsidy required for project development and operation. To this end, bid price is the primary consideration used when prospective projects are evaluated for selection to participate in the Main Tier.⁸ The Main Tier was not intended to focus on the ancillary objectives also adopted for the RPS, or on the geography of electric generation.

The Commission repeatedly has affirmed this point: “[T]he [Main Tier] structure purposefully rewards technologies that are lower in cost than others. ... Technologies and projects are reached in the Main Tier based on where their costs/bids fall on a supply curve of all the competing technologies in relation to the RPS demand.”⁹ Thus, the RPS was founded – and has been administered to date – on a principle that the program primarily responsible for procuring renewable energy would distinguish between projects on the basis of cost, not geography.

Unfortunately, however, the cost of the RPS program already is exorbitant, with a total estimated cost to achieve the renewable penetration goal of approximately \$3 billion.¹⁰

⁸ Case 03-E-0188, *supra*, Order Authorizing Additional Main Tier Solicitation and Setting Future Solicitation Guidelines (issued December 3, 2010) at 16 (holding that projects will be evaluated on the basis of a “weighted combined score with price comprising 70% and economic benefits at 30%”). The inclusion of economic benefits in project evaluation already builds into the Main Tier a significant bias for in-State projects, given that such projects arguably yield greater direct economic benefits than out-of-State projects. (*See* Petition at 3.) Thus, NYSERDA’s statement that the RPS Program “does not currently employ any geographic limitations” (*id.* at 2) is not entirely accurate.

⁹ Case 03-E-0188, *supra*, Order Resolving Main Tier Issues (issued April 2, 2010) at 5-6.

¹⁰ *The New York State Renewable Portfolio Standard Performance Report Through December 31, 2011*, NYSERDA (dated March 23, 2012) at Appendix C, p. 2 (hereinafter, “2012

This bloated price tag may increase. The most-recent Main Tier solicitation awarded contracts with the highest per-unit subsidies since the RPS was established.¹¹ Thus, at a time when RPS subsidies already are spiraling ever-upward, NYSERDA acknowledges that, if adopted, its proposal to exclude out-of-State projects would increase the cost of the Main Tier and, ultimately, the cost to achieve the RPS goal. (Petition at 3.) In that respect, NYSERDA’s proposal clearly is inconsistent with the Blueprint’s stated goal of reducing, not increasing, energy costs.¹²

Multiple Intervenors respectfully urges the Commission to bear in mind that customers in New York State already pay the second-highest electricity prices in the continental United States – paying over 54 percent more than the national average price for electricity.¹³ Businesses throughout New York State face significant concerns regarding the ability of their respective in-State facilities to remain competitive and viable given the multiple competitive pressures facing them internally, nationally, and globally. The Commission should be examining the RPS for opportunities to reduce the total cost to customers, not considering program

RPS Report’). In fact, the Main Tier budget comprises approximately 79 percent (\$2.4 billion) of the estimated cost to achieve the RPS goal. (*Id.*)

¹¹ 2012 RPS Report at 15 and Figure 3. In fact, the most-recent RPS subsidy of \$28.70 per MWh exceeded the average subsidy from the first six competitive Main Tier solicitations (*i.e.*, \$19.07 per MWh) by approximately 50.5 percent. This trend needs to be examined. This proceeding was commenced approximately one decade ago. After billions of dollars of customer-financed subsidies, there is little to no evidence that renewable energy technologies even are close to becoming economic vis-à-vis other technologies.

¹² Blueprint at 10 (stating that the Blueprint’s recommendations intend, in part, to “achieve vital ... affordability ... goals on behalf of all New Yorkers”). *See also id.* at 28 (stating that the “Energy Highway initiative recognizes and responds to the following challenges: ... competitively-priced energy is essential for quality of life and economic growth ...”).

¹³ U.S. Energy Information Administration, *Electric Power Monthly – November 2012* (December 2012) at Table 5.6.B.

modifications – such as that proposed by NYSERDA – that would increase the cost to achieve the RPS goal.¹⁴

NYSERDA's Petition fails to provide a meaningful justification for its proposal. The Commission previously has recognized that out-of-State renewable generation projects contribute to the ancillary RPS objectives that NYSERDA now claims must be promoted by increasing reliance on in-State resources. The Main Tier already is consistent with the Blueprint as well as Commission policy. (*See* Point I.B., *infra.*) For the foregoing reasons, the Commission should reject the geographic restriction proposed by NYSERDA.

B. Allowing Out-of-State Projects to Compete for RPS Subsidies Is Consistent with the Blueprint as well as Commission Policy and Precedent

NYSERDA claims that excluding out-of-State projects from the RPS Main Tier is necessary to align the RPS with the Blueprint, as well as to promote ancillary objectives of the RPS program. (Petition at 1.) Neither assertion is correct. The basic premise of NYSERDA's

¹⁴ The undisputable impact of NYSERDA's proposal, if adopted, is higher RPS collections from customers. For instance, NYSERDA's proposal would have no impact on (i) New York projects that would have won RPS solicitations regardless of competition from out-of-State facilities, or (ii) out-of-State projects that would have lost RPS solicitations to in-State facilities. In both cases, the outcome is the same regardless of whether NYSERDA's proposed modification of the RPS is adopted. The only circumstance where NYSERDA's proposal would change the outcome is where an out-of-State facility would have won an RPS solicitation. Thus, if, *arguendo*, an out-of-State project responds to an RPS solicitation with a lower requested subsidy than competing in-State projects, and that cost savings is sufficient to overcome the existing 30% economic development weighting that biases the bidding process in favor of in-State projects, adoption of NYSERDA's proposal would render such beneficial out-of-State project ineligible to participate in the RPS, notwithstanding compliance with the Commission's existing deliverability requirements and the cost savings to customers. Such an outcome is not in the public interest.

argument that the modification it proposes is necessary to promote the development of in-State renewable facilities is misplaced and inconsistent with Commission policy.

The Commission clearly has stated that out-of-State renewable energy projects can and should contribute to the primary RPS goal, and that they also contribute to the ancillary RPS program objectives cited by NYSERDA. Its focus with respect to out-of-State renewable generation facilities has centered on ensuring that the renewable energy they generate is delivered to New York State, thereby contributing to the RPS and capturing for New York customers the perceived benefits associated with such supply. To this end, the Commission adopted a “matching” requirement to ensure that renewable energy generated by an out-of-State facility participating in the Main Tier actually delivers its supply to New York State.¹⁵ The Commission explained that including imported renewable energy in the Main Tier, subject to the matching requirement, would benefit customers:

We adopt the recommendation to impose a delivery requirement with a monthly matching component. As stated in the RD and as argued by many of the parties, imposition of such a requirement is consistent with and in furtherance of our stated goals of increasing the amount of renewable energy retailed in the State, improving energy security, diversifying the State’s electricity generation mix, reducing local air emissions and protecting against oil and natural gas price spikes or possible supply disruptions.¹⁶

The Commission subsequently affirmed the important contribution that out-of-State projects may provide to the RPS program. For instance, the Commission tightened the matching requirement for deliveries of out-of-State renewable energy, explaining, in part, that such change would be necessary to reflect the State’s interest in “establishing a level playing field for in-State and out-

¹⁵ RPS Order at 61-62.

¹⁶ *Id.*

of-State renewable generators....”¹⁷ NYSERDA’s proposal, if adopted, would eliminate the “level playing field” established by the Commission, thereby shielding in-State projects from any price competition whatsoever from out-of-State projects.

Importantly, there is no compelling need to modify the RPS program to shelter in-State proposals against competition from out-of-State resources. As of December 31, 2011, NYSERDA reported that:

Through these seven [Main Tier] solicitations, NYSERDA has entered into contracts or has pending contracts to procure RPS Attributes from 56 large-scale electricity generation projects, facility upgrades or facility repowering. ... Three projects are located out of state ... and the remaining projects are in New York. When all of the projects reach commercial operation, approximately 1,841 MW of new renewable capacity will be added, of which 1,794 MW will be located in New York.¹⁸

Thus, the most-recent report on RPS performance indicated that in-State facilities account for 94.7 percent of all Main Tier projects, and 97.4 percent of renewable energy procured under the RPS Main Tier. These numbers demonstrate that there is no need whatsoever for program modifications intended to promote the participation of in-State facilities in the Main Tier.¹⁹

With respect to the Blueprint, NYSERDA notes that it (i) recognized the RPS as a “key element” of its goals and recommendations, and (ii) recommended that the State conduct a

¹⁷ Case 03-E-0188, *supra*, Order on Delivery Requirements for Imports from Intermittent Generators (issued June 28, 200) at 11-12.

¹⁸ 2012 RPS Report at 10.

¹⁹ They also demonstrate that in at least three instances, out-of-State projects submitted bids seeking lower subsidies than in-State proposals, thereby saving customers money versus in-State alternatives. (It may have happened more frequently but the weighting of non-price factors such as projected economic development benefits may have biased the outcome against the awarding of more contracts to lower-priced, out-of-State projects.) Additionally, the inclusion of out-of-State resources in the Main Tier solicitations may have caused in-State projects to bid more competitively, an outcome that would be lost if the Petition is granted.

competitive RPS solicitation for in-State renewable generation facilities. (Petition at 6.) Based on this, NYSERDA concludes – without any real evidence or justification – that out-of-State renewable generation facilities should be excluded from the Main Tier program. However, it is noteworthy that NYSERDA does not claim its proposal was recommended by either the Blueprint or Governor Cuomo. The Blueprint presumably would have recommended explicitly that the RPS be modified to exclude out-of-State projects from future solicitations had either Governor Cuomo or the Energy Highway Task Force intended such result.

A recommendation to conduct an RPS solicitation for in-State resources is not the same as a recommendation to exclude out-of-State resources from the RPS. In any event, the Blueprint’s recommendation likely would be satisfied by the next Main Tier solicitation, assuming no substantive changes to the Main Tier, given that in-State facilities historically have dominated the competitive solicitations. NYSERDA does not claim that changed circumstances may yield a different result now. Moreover, the Blueprint also recognizes the importance of affordable energy, stating that “...competitively-priced energy is essential for quality of life and economic growth...”²⁰ Thus, maintaining the competitiveness of RPS solicitations by continuing to include out-of-State resources – which NYERDA acknowledges may offer a lower bid price – also is consistent with the Blueprint.

For the foregoing reasons, the Commission should deny the Petition.

²⁰ Blueprint at 28. Notwithstanding its decision to transfer billions of dollars from customers to generators in order to subsidize indefinitely the RPS, the Commission also adopted as an objective of the RPS program minimizing the “adverse impact on energy costs.” (RPS Order at 24.)

POINT II

THE COMMISSION SHOULD REFRAIN FROM MODIFYING THE RPS IN A MANNER LIKELY TO LEAD TO CONSTITUTIONAL CHALLENGES THERETO

NYSERDA includes in its Petition a brief paragraph noting that state RPS programs with geographic restrictions are unlawful because they violate the “dormant” Commerce Clause of the U.S. Constitution. (Petition at 6.) NYSERDA, however, asserts that the geographic restriction it proposes may not violate the Dormant Commerce Clause because NYSERDA participates in the market as the central procurement administrator of the RPS program, and does not regulate the market. (*Id.*) According to NYSERDA, this may allow the State to take advantage of the “market participant” exception to the Dormant Commerce Clause. (*Id.*)

NYSERDA supports this theory with a single reference to a report prepared by the Clean Energy States Alliance (“CESA”). (Petition at 6.)²¹ The CESA Report theorizes that the organization of New York’s RPS program under a central procurement model may enable it to satisfy the market participant exception to the Dormant Commerce Clause.²² Significantly, however, the CESA Report also states that this theory is unproven and may not be accurate:

Though reliance on the market participant exception doctrine is a possibility, it is difficult to predict how courts will rule since application of the market participant exception in the context of energy cases presents a matter of first impression. States are on far stronger grounds if they can create a non-facially discriminatory

²¹ *The Commerce Clause and Implications for State Renewable Portfolio Standard Programs*, Clean Energy States Alliance (dated March 2011) at 10 (hereinafter, “CESA Report”).

²² *Id.*

program, which is a more accepted and traditional basis for avoiding a Commerce Clause challenge.²³

NYSERDA's unqualified statement that the geographic restriction it proposes "does not violate the dormant commerce clause" is pure speculation that is without any supporting legal analysis. The Petition also fails to present discussion of the extensive and complicated precedent pertaining to the market participant exception to the Dormant Commerce Clause. Although there may be limited exceptions to the prohibition against State action that burdens interstate commerce, those exceptions are narrow, and may require that there be no other, non-discriminatory alternative.²⁴ Here, the existing RPS structure has resulted in a Main Tier program dominated by in-State facilities. In light of this, it cannot be argued that a discriminatory policy that indisputably burdens interstate commerce (*i.e.*, by precluding participation of out-of-State projects even if they could satisfy the existing deliverability requirement) is necessary to promote the development of in-State renewable energy facilities.

The Commission previously declined to adopt similar RPS modifications that "could be viewed as economic protectionism."²⁵ It also has recognized that the RPS "*promotes* interstate commerce by allowing imports on the same terms as electricity generated within the State."²⁶ In contrast, NYSERDA's proposal, if adopted, would discriminate against out-of-State

²³ *Id.* Clearly, modifying the RPS to expressly exclude out-of-State projects from eligibility therein would raise concerns that the RPS is a facially-discriminatory program.

²⁴ Ferrey, Steven, *Threading the Constitutional Needle With Care: The Commerce Clause Threat to the New Infrastructure of Renewable Power*, TEXAS JOURNAL OF OIL, GAS, AND ENERGY LAW, Vol. 7 at 90-91 (citations omitted).

²⁵ Case 03-E-0188, *supra*, Order Authorizing Additional Main Tier Solicitations and Directing Program Modifications at 35.

²⁶ RPS Order at 62 (emphasis added).

electric generation facilities and may create an unconstitutional burden on interstate commerce.²⁷

The Commission should refrain from modifying the RPS in a manner likely to lead to constitutional challenges thereto.

CONCLUSION

For all the foregoing reasons, Multiple Intervenors respectfully urges the Commission to deny NYSERDA's Petition.

Dated: February 19, 2013
Albany, New York

Respectfully submitted,

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²⁷ If New York were to adopt modifications to its RPS expressly precluding participation by out-of-State resources, other, neighboring states may do likewise, thereby impeding the development of renewable resources within the region.