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July 17, 2009

VIA HAND DELIVERY AND E-MAIL

Hon. Jaclyn A. Brilling, Secretary
New York State Public Service Commission
3 Emire State Plaza
Albany, New York 12223-1350

Re: ***Comments of Invenergy Wind North America LLC and Sheldon Energy LLC on SAPA 03-E-0188SP21***
Case 03-E-0133 Proceeding on Motion of the Commission Regarding a Retail Renewable Portfolio Standard

Dear Secretary Brilling:

Enclosed please find and original plus five copies of the comments of Invenergy Wind North America, LLC and Sheldon Energy LLC on SAPA Notice 03-E-0188SP21.

Thank you for your consideration in this matter.

Very truly yours,

Ruth E. Leistensnider

Ruth E. Leistensnider

/rel
enclosure
cc: Joseph Condo, Esq.
Eric Miller

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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 OF INVENERGY WIND NORTH AMERICA LLC
AND SHELDON ENERGY LLC
ON SAPA NOTICE 03-E-0188SP21:
RENEWABLE PORTFOLIO STANDARD MAIN TIER SOLICITATION**

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Dated: July 17, 2009

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

PROCEEDING ON MOTION OF THE COMMISSION REGARDING A RETAIL RENEWABLE PORTFOLIO STANDARD	**Case 03-E-0188**

COMMENTS OF INVENERGY WIND NORTH AMERICA LLC AND SHELDON ENERGY LLC ON SAPA NOTICE 03-E-0188SP21: RENEWABLE PORTFOLIO STANDARD MAIN TIER SOLICITATION

Invenergy Wind North America LLC and its subsidiary, Sheldon Energy LLC (collectively "Invenergy") respectfully submit the following comments in response to SAPA Notice 03-E-0188SP21, requesting comments on a proposed Main Tier solicitation under the Renewable Portfolio Standard ("RPS") program. Invenergy is a leading developer, owner and operator of large-scale wind energy generating facilities throughout North America and Europe. Sheldon Energy LLC ("Sheldon Energy") is an electric corporation within the meaning of New York's Public Service Law, and received a Certificate of Public Convenience and Necessity pursuant to Section 68 of the Public Service Law for the High Sheldon Wind Farm, a nominal 112.5 MW wind project located in the Town of Sheldon, Wyoming County.[1] The High Sheldon Wind Farm commenced

[1] Case 07-E-0213 *Petition of Sheldon Energy LLC*, Order Granting Certificate of Public Convenience and Necessity, and Providing for Lightened Regulation (Issued and Effective January 17, 2008).

commercial operation on March 12, 2009, and it is currently selling its energy output into NYISO wholesale markets.

Sheldon Energy LLC was not awarded a contract in any of the prior Main Tier solicitations undertaken by the New York State Energy Research and Development Authority ("NYSERDA"). Nonetheless, Invenergy determined to construct the High Sheldon Wind Farm based upon the reasonable expectation that further solicitations under the Main Tier program would be issued under terms consistent with recent PSC orders on the RPS and similar to those of previous solicitations.

SAPA Notice 03-E-0188SP21 outlines the proposed rules for a fourth Main Tier solicitation, which would be the first Main Tier solicitation conducted since the High Sheldon Wind Farm was built. The SAPA notice contains three significant changes to the standard rules of previous solicitations that appear to be designed explicitly to exclude Sheldon Energy, and one other wind project, from competing in the solicitation.

The three changes of concern in SAPA Notice 03-E-0188SP21 are:

1. The SAPA notice proposes to change the eligibility date for projects that can bid into the solicitation, i.e. the "vintage date." All previous solicitations allowed projects to compete, provided they had not commenced operation prior to January 1, 2003. The SAPA notice proposes to exclude from competition all projects that have commenced operation prior to the date on which the solicitation is announced, presumably sometime in Fall 2009.

2. The SAPA notice proposes to change the way that in-state economic benefits are evaluated. Previous solicitations considered all in-state benefits created by a project from its initial development. The SAPA notice proposes to change this so that no consideration is given to economic benefits unless they are "incremental due to the awarding of an RPS contract."
3. The SAPA notice proposes to introduce a new criterion for evaluating projects. In previous solicitations, there were two main criteria for awarding contracts: price and in-state economic benefits. The SAPA notice proposes to add a third criterion. It states "Those projects taking advantage of the ARRA grant funds will be given priority consideration."

Invenergy respectfully submits that the Commission should authorize NYSERDA to undertake a fourth Main Tier solicitation, but without the three changes above which Invenergy submits are contrary to the goals and objectives of the RPS. As more fully discussed below, if a fourth Main Tier solicitation proceeds with these changes in place, it will create market uncertainty that does not benefit New York's RPS program.

Invenergy joins in the comments of the Alliance for Clean Energy New York ("ACE NY") to the extent they are not inconsistent with Invenergy's comments.

THE PROPOSED CHANGES TO THE MAIN TIER SOLICITATION ARE CONTRARY TO THE GOALS AND OBJECTIVES OF THE RPS

In the RPS proceeding, considerable time was devoted to establishing the goals and objectives of the program. As will be more fully discussed below, the changes to the terms of the Main Tier solicitation proposed in the SAPA notice are contrary to the goals and objectives of the RPS. As a result, Invenergy respectfully submits that the proposed changes to the terms of the Main Tier solicitation, as proposed in the SAPA notice, should be rejected.

As set forth in the September 24, 2004 Order establishing the RPS[2], 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 within ten years."[3] The September 2004 Order further provided that "the general rule shall be that to be considered eligible, a facility must have first commenced commercial operation on or after January 1, 2003."[4] The exception to this general rule was for maintenance resources, *i.e.*, facilities in operation prior to that date that required RPS funds to remain financially viable.

In establishing the elements of the RPS design, the Commission set forth a statement of RPS objectives, in order to provide further guidance on the development of

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2 Case 03-E-0188, *supra*, Order Regarding Retail Renewable Portfolio Standard (Issued September 24, 2004) ("September 2004 Order")

3 *Id.* at 6.

4 *Id.* at 7.

the program, and to provide a reference point for implementation decisions. These seven objectives, in order of importance, are:

a. Renewable Resources: institute an RPS to increase New York State's supply of renewable resources with the ultimate aim of establishing a viable, self-sustaining competitive renewable generation market.

b. Generation Diversity for Security and Independence: diversity the generation resource mix of energy retailed in New York State to improve energy security and independence, while ensuring protection of system reliability;

c. Economic Benefits: develop renewable resources and advance renewable resource technologies in, and attract renewable resource generators, manufacturers, and installers to New York State;

d. New York's Environment: improve New York's environment by reducing air emissions, including greenhouse gas emissions, and other adverse environmental impacts on New York State, including upon underserved communities, of electricity generation;

e. Equity and Economic Efficiency: develop an economically efficient RPS requirement that minimizes adverse impact on energy costs, allocates costs equitable among ratepayers, and affords opportunities for recovery of utility investment;

f. Administrative Fairness and Efficiency: develop and RPS that is administratively transparent, efficient, and verifiable; and

g. Competitive Neutrality: develop an RPS compatible with competition in energy markets in New York State.[5]

Subsequent Orders of the Commission have expanded on these concepts. For instance, in its October 19, 2006 Order[6] authorizing economic benefits of a project to

[5] *Id.* at 23-24.

[6] Case 03-E-0188, *supra*, Order Authorizing Solicitation Methods and Consideration of Bid Evaluation Criteria and Denying Request for Clarification (Issued and Effective October 19, 2006).

account for 30% in the bid evaluation, the Commission reiterated its position that one of the prime considerations of the RPS program was that it had to be cost-effective, and that "successful participants in solicitations would be those that offered the lowest price[.]"[7] The Order went on to find that NYSERDA could take into account factors such as "creation of long-term jobs in New York, tax or PILOT payments to New York State and its municipalities, and royalties and compensation for fuels to New York residents and businesses[,]" but that these economic development benefits should account for no more than 30% of the total score in the evaluation and selection of proposals.[8] The Commission went on to state that while the economic benefits are important, they should not overwhelm "the consideration of price factors by allowing consideration of price as the major contributor to the evaluation process."[9]

The three proposed changes to the Main Tier Solicitation contained in the SAPA notice will not further the goals and objectives of the RPS, as set forth above. The effect of the change in vintage date will reduce competition and may not result in the lowest cost to ratepayers. In the case of existing facilities, such as High Sheldon, construction and development have been completed, and therefore, these facilities can submit bid prices that do not contain extra contingencies for these items. Allowing these facilities to bid could result in a lower overall price to the ratepayers.

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[7] *Id.* at 13.

[8] *Id.* at 17.

[9] *Id.* at 18.

Furthermore, changing the vintage date to exclude previously-eligible facilities counters the goal which suggests that there should be fairness and efficiency to the program, as well as a process which is transparent. In each of the three prior solicitations, any eligible facility, *i.e.,* one commencing operation after January 1, 2003, was allowed to bid. To suggest now that there be a different vintage date for a facility to be eligible is both contrary to the September 2004 Order, and contrary to elements of fundamental fairness and a transparent process. This is especially true as the funds which have been made available for this solicitation are as a result of previous winning bidders either (i) cancelling or delaying their projects; or (ii) not being able to provide the contracted-for energy for three consecutive years. Having this solicitation follow the same qualifying rules as the prior Main Tier solicitations would further fundamental fairness in the process.

Changing the vintage date will also reduce the amount of newly installed capacity that can be counted towards State's renewable energy goals. If facilities such as the High Sheldon Wind Farm are not allowed to compete in this or any future Main Tier solicitations, it would be inappropriate for the State to count these as new projects built as a result of the RPS.

Finally, if the vintage date change is not made, it would likely give the State greater certainty in meeting its RPS targets. By entering into RPS contracts with existing facilities NYSERDA would not be taking any development risk and it could be more certain that it would receive the renewable attributes for which it contracted. This is a level of certainty that has not been present in several of the contracts entered into to date.

With respect to the proposed change to the Main Tier solicitation contained in the SAPA Notice stating that priority consideration would be given to those projects taking advantage of the ARRA grant funds, Invenergy submits that this proposed change is impractical and would not further the stated Competitive Neutrality objectives of the RPS.[10] The Treasury Department just issued guidance on July 9, 2009 with respect to the ARRA program, indicating that projects placed in service in 2009 or 2010 cannot apply for ARRA grant funds until the projects are placed in service. That guidance further provides that for projects which were not placed in service in 2009 or 2010, but which commenced construction in 2009 or 2010, grant funds should be applied for after commencement of construction, but that their application will not be deemed complete until after further information is provided, submitted within 90 days after the date the projects are placed in service.[11]

Furthermore, many projects may find it more advantageous to take advantage of the Production Tax Credit instead of the grants provided for under the ARRA. In other words, projects cannot know whether they can be eligible for ARRA grant funds, or even if ARRA grant funds are the most appropriate way to proceed with a

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10 Because the High Sheldon Wind Farm was placed in service in 2009, it is likely that it could qualify for ARRA grant funds. However, Invenergy has already successfully financed the project and would probably not elect to apply for the grant funds for this project.

11 Program Guidance "Payments for Specified Energy Property in Lieu of Tax Credits under the American Recovery and Reinvestment Act of 2009", U.S. Treasury Department, Office of the Fiscal Assistant Secretary, July 2009, p. 3.

project, until the project is further along in the process, and in any event, cannot receive the funds until the projects are placed in service. Thus, NYSERDA would not be able to determine with certainty which projects would be leveraging these funds.

In any event, this element of the SAPA notice runs contrary to the Competitive Neutrality objective of the RPS and the competitive nature of the bidding process. The solicitation should count on developers to weigh whether they can or will obtain ARRA funds and factor this into their bids. If a developer thinks it can qualify for these funds, it will factor this into its bids and offer lower bid prices. Thus, by not making the proposed change to the Main Tier solicitation to give preference to projects taking advantage of ARRA funds, the State would, in fact, further the Competitive Neutrality goal of the RPS, and could potentially minimize the costs to ratepayers.

Similarly, ignoring economic benefits of a project which are not incremental to the award of an RPS contract would not further the Economic Benefits goals of the RPS. The October 2006 Order which established that economic development benefits would account for 30% of the bid score did not qualify that the only economic benefits to be considered should be those that were incremental to the award of a contract; rather, the Order stated that "the impacts of projects on economic development in New York localities that host a renewable energy facility should be considered in the bid evaluation process."[12] The existence of the RPS induces companies such as Invenergy to invest in New York. The RPS should be implemented in a way that

[12] Case 03-E-0188, *supra*, Order Authorizing Solicitation Methods and Consideration of Bid Evaluation Criteria and Denying Request for Clarification (Issued and Effective October 19, 2006), p. 16

recognizes the significant in-state economic benefits of projects such as the High Sheldon Wind Farm. To date (from 2002 when Invenergy first starting developing the High Sheldon Wind Farm up to the completion of construction in March 2009) the High Sheldon Wind Farm has created over $15 million in direct economic benefits to New York, and it is estimated that the project will provide approximately $2.3 million per year thereafter. To not allow these benefits to be counted in evaluating projects not only puts the High Sheldon Wind Farm at a competitive disadvantage, it also is inconsistent with the Economic Benefits goal of the original RPS Order and of the goals in the October 19, 2006 Order.

In sum, for the reasons set forth above, Invenergy respectfully submits that the proposed changes to the terms of Main Tier solicitation contained in the SAPA notice are contrary to the goals and objectives of the RPS program, and should be rejected.

THE PROPOSED CHANGES TO THE MAIN TIER SOLICITATION ARE INCONSISTENT WITH PRIOR SOLICITATIONS

In addition to not furthering the goals of the RPS, the three main changes to the proposed design details and methodologies also are wholly inconsistent with prior solicitations and actions under the RPS program, and therefore, should not be adopted.

To justify the vintage date change because of the level of commitment indicated by a developer without a NYSERDA contract would be arbitrary and inconsistent with prior solicitations. Two specific examples perhaps illustrate most clearly how in previous solicitations NYSERDA allowed projects to compete for RPS contracts even though the developers had already made substantial commitments to building in New York without a NYSERDA RPS award.

The first example is three RPS awards made to Noble Environmental as part of the second Main Tier solicitation (RFP 1037). Bids for this solicitation were accepted in January of 2007. At this time Noble Environmental Power had, upon information and belief, already taken delivery of 166 wind turbines and was storing these turbines in New York (delivery of these turbines was accepted in 2006). Yet, Noble was permitted to compete in this solicitation, and ultimately was awarded RPS contracts. In effect, it appears Noble had already committed approximately $250 million toward the Bliss, Ellenburg and Clinton projects by the time of the RFP, and yet Noble was permitted to compete.

The second example is the awarding of RPS contracts in the third Main Tier solicitation (RFP 1168) to First Wind for its Cohocton and Dutch Hill Wind Projects at a time when those projects were far into construction. As reported in NYSERDA's 2008 RPS Performance Report, bids for this solicitation were accepted in December 2007 and "the solicitation was completed in the first quarter of 2008."[13] This same report also lists Cohocton and Dutch Hill as projects that were awarded RPS contracts under RFP 1168.[14] Based upon the four month construction progress report filed with the Commission in Case 07-E-0138, attached hereto as Exhibit A, First Wind had commenced construction of the Cohocton and Dutch Hill Wind Projects in September,

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13 New York State Renewable Portfolio Standard, *Performance Report Program Period ending June 2008*, New York State Energy Research and Development Authority, September, 2008, p. 8.

14 *Id.*, at p. B-1

2007, and as of January 15, 2008 access roads were 99% complete, foundations were 90% complete, and 15 of the 50 turbines were partially or fully erected. Clearly for the third Main Tier solicitation, NYSERDA was able to consider and award contracts to projects where the developer was committed to the project either at the time of bid acceptance or contract execution.

Perhaps even more than the change of the vintage date, the proposed change with respect to how economic benefits will be evaluated as part of the bid is completely inconsistent with prior solicitations. The proposed change only allows economic benefits which are incremental to the award of an RPS contract to be taken into account. However, in prior solicitations, developers were allowed to include development costs already expended in their calculation of in-state benefits. As those development dollars had already been spent, those benefits were not dependent upon the awarding of an RPS contract. Further, on multiple occasions NYSERDA has accepted bids from facilities that were previously awarded contracts,[15] and there is no indication that those projects were required to pro-rate their economic development benefits on their second round of NYSERDA bids.

[15] The Cohocton and Dutch Hills projects were awarded RPS contracts in both the second and third Main Tier solicitations.

THE PROPOSED CHANGES TO THE MAIN TIER SOLICITATION WILL FOSTER MARKET UNCERTAINTY

Investors look to statements and orders from the State to assess the stability and future of the REC market in New York, and to compare its viability to other states where they may be considering other investments. Invenergy proceeded with development and construction of the High Sheldon Wind Farm expecting a near term solicitation consistent with past actions and statements by the State. Notably, in the documents issued in 2007 for the third solicitation (RFP 1168) it was specifically stated that NYSERDA expected that a fourth main tier solicitation would occur in 2008; however, that solicitation never occurred. Based upon this statement by NYSERDA, and all of the evidence set forth above, Invenergy justifiably expected that the High Sheldon Wind Farm would be able to participate in subsequent Main Tier solicitations.

Making such drastic changes to the design details and methodologies at this time will only lead to market uncertainty. The Commission's January 26, 2006 Order acknowledged that "uncertainty in the marketplace may retard the development of a renewable energy industry in New York State. Therefore, we will continue the overall funding levels and targets for the program. Staff and NYSERDA will recommend any appropriate changes as part of the 2009 review."[16] Invenergy invested in the High Sheldon Wind Farm knowing it was in New York and reasonably expecting that it would be able to compete for NYSERDA contracts. These types of rule changes are of

[16] Case 03-E-0188, *supra*, Order Authorizing Additional Main Tier Solicitations and Directing Program Modifications (Issued and Effective January 26, 2006), p. 6.

significant concern to investors and will hurt long term confidence and investment in the New York market.

Furthermore, according to NYSERDA's March 31, 2009 report, market uncertainty was a key issue raised by developers[17], and NYSERDA made recommendations to bring some certainty to the market.[18] The proposed changes to the design details and methodologies for a main tier solicitation as set forth in SAPA Notice 03-E-0188SP21 run counter to that recommendation. Simply put, failure to allow the High Sheldon Wind Farm to compete in this solicitation will mean that it will be stranded with no significant REC market available to sell its RECs. Future investors and developers will certainly not build projects in New York without NYSERDA contracts in hand because this proposal raises the spectre of constant changes in rules, and this, over the long term, will not help New York meet its goals or help to reduce prices for New York customers.

CONCLUSION

The stated purpose of the RPS is to encourage new renewables to be built in New York State. Invenergy has stepped forward and constructed a new renewable facility in New York at a time when the state was unable to provide the needed support. The High Sheldon Wind Farm should not be penalized for being proactive when the state could not be. Furthermore, restricting eligibility for projects mid-stream, such as is being proposed, would not achieve the goal of the RPS to have a viable renewable energy

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[17] *New York Renewable Portfolio Standard Program Evaluation Report (2009 Review)*, March 31, 2009, pp. 55-57.

[18] *Id.* p. 58.

sector in New York, as it will only bring regulatory uncertainty, and hence market uncertainty, to companies looking to develop new renewable energy capacity in New York. As a result, Invenergy respectfully submits that the proposed changes to the design details and methodologies in SAPA Notice 03-E-0188SP21 should be removed from the proposed solicitation, and projects such as the High Sheldon Wind Farm should be permitted to participate in this and any future Main Tier solicitations without being required to demonstrate that the economic benefits of the project are incremental to the award of an RPS contract.

Dated: July 17, 2009
Albany, New York

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