

**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard))	Case 15-E-0302
))	
In the Matter of Offshore Wind Energy))	Case 18-E-0071

**JOINT UTILITIES' COMMENTS IN RESPONSE TO PETITIONS FOR CONTRACT
AMENDMENTS**

I. Introduction

The Alliance for Clean Energy New York (ACE-NY),¹ Sunrise Wind LLC (Sunrise Wind),² and Empire Offshore Wind LLC and Beacon Wind LLC (Empire/Beacon Wind)³ each filed petitions on June 7, 2023 in this proceeding requesting that the New York Public Service Commission (Commission) authorize financial relief to renewable energy generators that have entered into Clean Energy Standard (CES) Tier 1 Renewable Energy Certificate (REC) and/or Offshore Wind Renewable Energy Credit (OREC) contracts with the New York State Energy Research and Development Authority (NYSERDA). One week later, Clean Path New York

¹ Case 15-E-0302, *Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard* (CES Proceeding), Petition of The Alliance for Clean Energy New York to Address Post Covid-19 Impacts on Renewable Development Economics and Contract Considerations (filed June 7, 2023) (ACE-NY Petition).

² CES Proceeding, Verified Petition of Sunrise Wind LLC for an Order Authorizing the New York State Energy Research and Development Authority to Amend the Offshore Wind Renewable Energy Certificate Purchase and Sale Agreement (filed June 7, 2023) (Sunrise Wind Petition).

³ CES Proceeding, Verified Petition for Expedited Approval of Enhanced Offshore Renewable Energy Credits (filed June 7, 2023) (Empire/Beacon Wind Petition).

LLC (CPNY) filed a similar petition,⁴ seeking relief for the generation component of its Tier 4 contract with NYSERDA.

The Joint Utilities⁵ provide these comments in response to issues raised in the various Petitions.⁶ The Petitioners are sophisticated market participants with extensive experience in the development of renewable generation facilities and should have factored economic risks into their bid prices in the event of unforeseen circumstances. These Petitions, if approved without modification, would create a perverse incentive and weaken the effectiveness of future NYSERDA REC contracting cycles and create unnecessary costs for customers throughout New York State. The project developers among the Petitioners have had business remedies available to them to manage their project costs and instead are seeking to modify the terms of competitively awarded NYSERDA contracts. The requested relief would entail billions of dollars in additional costs to customers over the life of the contracts, in spite of the fact that Petitioners executed the contracts fully aware of associated risks.⁷ For these reasons, the Joint

⁴ CES Proceeding, Petition of Clean Path New York LLC to Address Post-Covid Impacts and Associated Considerations Concerning the Tier 1 Eligible Generation Component of Its Clean Energy Standard Tier 4 Renewable Energy Certificate Contract (filed June 14, 2023) (CPNY Petition).

⁵ The Joint Utilities are Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation d/b/a National Grid, Orange & Rockland Utilities, Inc. and Rochester Gas and Electric Corporation.

⁶ The Joint Utilities refer to the ACE-NY Petition, Sunrise Wind Petition, Empire/Beacon Petition, and CPNY Petition collectively as the Petitions. In addition, the Joint Utilities refer to ACE-NY, Sunrise Wind, Empire/Beacon Wind, and CPNY collectively as the Petitioners, but recognize that ACE-NY represents the interests of clean energy development but is not itself a developer. For simplicity, the Joint Utilities generally use the term Petitioners both when discussing issues that apply to all of the parties to the Petitions and when discussing matters that apply specifically to market participants that have direct interests in the relevant REC and OREC contracts.

⁷ The contracts for which the Petitioners seek financial relief were executed as long ago as 2017. It is reasonable to assume that commercial strategies for the development and construction of these projects would have resulted in contracts for raw materials that would provide protection to the project developers among the Petitioners by the time the pandemic-related cost impacts began to materialize, well in advance of 2023.

Utilities recommend that the Commission deny the relief sought in the Petitions and, to the extent that projects default on the contracts, direct NYSERDA to conduct new procurements.

In the alternative, if after a thorough review of other options the Commission determines that rejecting the Petitions and rebidding the contracts would be more expensive for customers, the Joint Utilities urge the Commission to direct NYSERDA to provide limited contract adjustments to the Petitioners only upon a project-by-project examination of actual incurred costs.

II. Summary of Petitions and Position

The Petitions request that the Commission authorize NYSERDA to modify the terms of existing and effective contracts that were executed following conventional competitive procurement processes. Each Petition requests a one-time inflation adjustment mechanism as compensation for the effects of inflation and unexpected levels of competition for raw materials and equipment manufacturing capacity that the Petitioners claim have rendered contracted clean energy project developments economically infeasible. The Empire/Beacon Wind Petition and Sunrise Wind Petition also request incremental interconnection cost adjustments, and Empire/Beacon Wind further requests a Consumer Price Index (CPI) adjustment and extension of its contract term from 25 to 30 years. All Petitions request that these cost adjustments be reflected in increases to the REC or OREC strike prices.

The total cost of the Petitions is unclear due to the redaction of significant financial details,⁸ but the ACE-NY Petition alone projects average incremental ratepayer costs of \$486

⁸ See, e.g., CES Proceeding, Empire/Beacon Wind Petition, pp. 10, 16-21.

million annually from 2024-2045, for a total of \$10.69 billion (or a net present value (NPV) of \$5.8 billion using the Department of Public Service Staff (DPS Staff) White Paper's discount rate of 6.14%).⁹ Costs from the Sunrise Wind Petition, the Empire/Beacon Wind Petition, and the CPNY Petition are incremental to the costs noted in the ACE-NY Petition and will themselves be massive. These billions of additional dollars will be funded by utility customers through the purchase of RECs and ORECs, whose costs would be increased if the proposed inflation adjustment mechanisms are approved.

NYSERDA awarded the Tier 1 REC, Tier 4 REC, and OREC contracts to the project developers among the Petitioners at the conclusion of competitive processes conducted between 2017 and 2022.¹⁰ Allowing post-solicitation changes to contract prices gives an unfair advantage to the winning bidder(s) that did not adequately factor in economic and market risks. There is no record of the terms offered by other bidders that were not awarded such contracts. It is certainly possible—if not likely—that those bidders more appropriately priced economic and business risks that the Petitioners claim were unforeseeable, which may have led to the properly constructed bids being assessed as too costly when compared to the bids that were ultimately selected. However, it is certain that the losing bidders submitted bids based on their assessment of the market conditions and assumptions that existed at the time and lost. The unsuccessful

⁹ CES Proceeding, ACE-NY Petition, Attachment A - Affidavit of Mark Repsher and Ashish Chaudhari in Support of Alliance for a Clean Energy New York, Inc.'s Petition to Address Post-Covid Impacts on Renewable Development Economics and Contract Considerations, (PA Consulting Affidavit), p. 32, (citing CES Proceeding, New York State Energy Research and Development Authority and New York State Department of Public Service Staff White Paper on Clean Energy Standard Procurements to Implement New York's Climate Leadership and Community Protection Act (filed June 18, 2020) (DPS Staff White Paper)).

¹⁰ The Petitioners seek relief for projects that are contracted under a variety of NYSERDA CES procurements. *E.g.*, the PA Consulting Affidavit discussed in and attached to the ACE-NY Petition applies to CES procurements between 2017 and 2021. For details on the projects and solicitations to which the Petitions apply, please refer to each separate petition.

bidders were not given the chance at a “do over” to improve their market positions, which is effectively what the Petitioners are requesting here. While there are some developers in other states that are choosing not to move forward with renewable energy projects,¹¹ there are developers that are proceeding with development despite the risks that the Petitioners are seeking to be insulated from here.¹²

The Commission should reject the Petitions. Granting the requested relief would cause significant cost increases for customers and would set a damaging precedent for all future NYSERDA procurements. It would also encourage clean energy developers to discount the inherent economic and business risks that apply to development projects that use a market-based contracting model. In Massachusetts, the DPU recently approved contracts without modifications despite a similar request from developers.¹³

If the Commission believes modifying these contracts will be less expensive for customers than conducting new solicitations, additional oversight is appropriate. Any projects that wish to adjust their pricing should open their books to NYSERDA and DPS Staff (or an

¹¹ *E.g.*, the Commonwealth Offshore Wind Project has agreed to pay a \$48 million penalty to terminate a Power Purchase Agreement (PPA) with utilities in Massachusetts. *See* S&P Market Intelligence, *Avangrid Agrees to Pay \$48 Million to Terminate Mass. Offshore Wind Supply Contracts*, (July 18, 2023). *See also* Massachusetts (MA) Department of Public Utilities (DPU) Docket Nos. 22-70/22-71/22-72.

¹² *E.g.*, a joint venture of Copenhagen Infrastructure Partners and Avangrid Renewables, LLC is continuing to develop the Vineyard Wind 1 offshore wind farm, for which it entered into PPAs in 2018. Construction of the Vineyard Wind 1 project began in 2021. *See* MA DPU Docket Nos. 18-76/18-77/18-78. In addition, the Long Island Power Authority (LIPA) entered into a PPA with Orsted and Eversource for energy from the South Fork Wind Farm, a 138 MW offshore wind facility off the coast of Easthampton, New York. Construction on the South Fork Wind Farm began in 2022 and the resource is expected to enter commercial service by the end of 2023. *See* <http://southforkwind.com> for more information.

¹³ Of note, Massachusetts regulators recently denied attempts by developers to revise contracts based on similar claims of rising costs. Specifically, the Massachusetts DPU noted that procurement processes had been fair and competitive, and that the contracts were not accountable for guaranteeing project financing. *See* MA DPU Docket Nos. 22-70/22-71/22-72.

authorized consultant working for NYSERDA or DPS Staff) to determine project-specific facts and circumstances that demonstrate the need for additional support.

The Joint Utilities recommend that the Commission reject the Petitions and instead direct NYSERDA to issue a new procurement to replace the capacity of projects that exercise termination clauses in the Tier 1/Tier 4/OREC contracts due to financial hardship. Any projects that determine completion under existing contract terms is no longer viable today may re-bid their projects with insight into prevailing market conditions along with other bidders that were not initially awarded contracts. This would provide a fair opportunity for all developers and would prevent an incentive to bid based on an incomplete set of risk considerations.

More broadly, the Joint Utilities recommend that the Commission direct NYSERDA to assess whether the scale of penalties in NYSERDA contracts is consistent with other states/regions. If they are not appropriately calibrated, NYSERDA should increase the magnitude of contract termination provisions to motivate the preparation of bids that properly reflect the economic and business risks that developers face.

III. Approving the Petitions Would Result in Significant Cost Increases for Ratepayers and Create an Incentive to Underestimate Project Risks

The ACE-NY Petition is supported by an analysis from PA Consulting, which quantifies the cost impact of ACE-NY's proposed REC contract adjustment mechanism. The PA Consulting analysis suggests that the adjustment mechanism would entail a price increase for RECs awarded under procurements conducted between 2017 and 2021 of no less than 43%, and up to 73%.¹⁴ PA Consulting concludes that "authorizing the Adjustment Mechanism would

¹⁴ CES Proceeding, ACE-NY Petition, PA Consulting Affidavit, p. 33.

result in a 1.7% increase in consumer bills, all else equal.”¹⁵ As discussed in Section II above, this will amount to \$10.69 billion of cost impact over the term of the contracts that would be amended. This does not include the relief sought by the Sunrise Wind, Empire/Beacon Wind, and CPNY Petitions, which could add billions of dollars of additional impact, but which is difficult to assess due to significant redaction.¹⁶ It is likely that the cumulative increase of all of the Petitioners’ requests would be far greater than the 1.7% cited by PA Consulting for the Tier 1 RECs.

Commission approval of the Petitions would transfer financial risks and costs from market participants to customers and is not what was envisioned when the request for proposal (RFP) bidding process was identified as the best approach for procuring wind and solar resources. Approval would fundamentally change features of the CES procurements from a market-based pricing model to more of a cost-of-service based model without including the protections inherent in cost-of-service regulation. If the Commission was originally inclined to apply cost-of-service principles to achieve the State’s policy objectives, it would have directed the RFP to contain those terms and features. As these and other contract revisions de-risk new generation development, the Commission should consider an appropriate rate of return that trends towards a regulated return as opposed to a full risk return. The Commission should also consider other options that present the greatest potential advantage to customers, including utility ownership, as part of a robust approach to plan for and to achieve State policy objectives, enhance resilience and reliability, and maximize the value of renewable resources that will be

¹⁵ *Id.*, p. 32.

¹⁶ *Supra*, note 8.

deployed to meet the Climate Leadership and Community Protection Act (CLCPA)¹⁷ mandates most cost effectively.

IV. Approval of the Petitions Would Set a Damaging Precedent for Future NYSERDA Procurements

Bidders in a competitive solicitation evaluate the risks of completing a project and price these terms into their respective bids. To have an effective development market, these developers must thoroughly evaluate expenses and project feasibility before submitting bids in response to a competitive solicitation. The Petitioners seek to upend this process.

The Petitions seek financial relief in the form of a modification to contract terms agreed to and executed by NYSERDA and the developers among the Petitioners at the conclusion of competitive solicitation processes. Unmodified approval of the Petitions would grant a unique privilege to a subset of the market: the relief the Petitioners seek would be unavailable to market participants that were not awarded NYSERDA contracts, but that may have more properly reflected business risks, including inflation, in their bids. This would send a signal to the market that developers should not price their bids to reflect the full set of risks that apply to their projects. Rather, developers will understand that they should price their project proposals at a level that will secure a NYSERDA contract regardless of whether the financial terms make a project viable.

One example that illustrates the acceptance of these risks is the Empire/Beacon Wind Petition, which requests an annual CPI adjustment to the OREC strike price for Empire Wind 2 and Beacon Wind 1 during the operational period—a request incremental to the inflation

¹⁷ The CLCPA is available at <https://www.nysenate.gov/legislation/bills/2019/s6599>

adjustment mechanism. Empire/Beacon Wind note the annual adjustment would not apply to Empire Wind 1 (awarded in ORECRFP-1) because that contract's pricing schedule already included an annual escalation. This indicates that they considered and accepted inflation risk while bidding for Empire Wind 2 and Beacon Wind 1, which were awarded in ORECRFP-2.¹⁸ However, because upfront capital costs represent the vast majority of project costs for offshore wind projects, an ongoing indexed escalation over the life of the contract is wholly unjustified. Granting the relief sought in the Empire/Beacon Wind Petition would set the precedent that developers can seek adjustment to contract terms outside of the competitive process after a contract is awarded.

This principle also applies to the Empire/Beacon Wind Petition's request to extend contract terms from 25-year to 30-year terms. Granting such an extension effectively increases the total cost of Empire/Beacon Wind's initial bids. It would be inappropriate to extend this financial benefit to developers that have been awarded contracts without extending the same opportunity to other market participants who participated but were not selected in the NYSERDA solicitation and whose bids may have been more competitive with this proposed change.

V. The Commission Should Reject Petitioners' Requested Relief

As discussed above, the Commission should reject the Petitions as approval of the Petitions will significantly raise customer costs and weaken the NYSERDA solicitation process by undermining the State's preferred, market-based approach. Existing NYSERDA REC

¹⁸ CES Proceeding, Empire/Beacon Wind Petition, Exhibit A, pp. 4-5.

contracts contain provisions to address situations in which projects are terminated due to financial hardships or other unexpected conditions. Developers would forfeit the contract security payments they have made under contract. The Joint Utilities urge the Commission to direct NYSERDA to allow these provisions to motivate strong performance by developers with viable projects, and to guide the termination of contracts for projects that lack sufficient financial support to complete development and enter service. If developers choose to exercise their termination options, the Joint Utilities recommend that the Commission direct NYSERDA to create a new procurement cycle to replace displaced capacity in the case attrition rates among contracted projects exceed expectations. Such a new procurement cycle would present a fair opportunity for all developers to prepare competitive bids that reflect a comprehensive understanding of market conditions, properly manage associated business risks, and provide the greatest opportunity to secure clean generation resources cost-effectively.

VI. Alternative Solution to Rejecting Petitions

Should the Commission decline to reject the Petitions outright because it believes conducting new solicitations to replace canceled contracts will be more costly to customers, the Joint Utilities urge the Commission to reject the Petitioners' proposed adjustment mechanisms. Instead, contract adjustments should be more limited to protect the interests of customers and maintain the integrity of NYSERDA's market-based REC solicitations. For the Petitioners' proposed inflation adjustment mechanisms, the Joint Utilities recommend the Commission direct NYSERDA to institute a process that modifies contracts based on the actual incurred commodity and component costs of each of the Petitioners' projects. The Joint Utilities emphasize that any adjustment should continue to place appropriate business and financial risks on developers and

not shift any resulting costs to customers. Enhanced regulatory oversight and cost transparency is appropriate given the Petitioners' desire to seek an additional risk protection mechanism.

Indeed, PA Consulting acknowledges a project-by-project adjustment would potentially produce the most exact realignment of costs.¹⁹ Although the adjustments will be more cumbersome to administer, determining project-by-project costs is a reasonable request and expense because the proposed adjustments amount to well over ten billion dollars. The opportunity to save customers millions or even billions of dollars over the term of these contracts necessitates a detailed review. NYSERDA could make use of its existing balance of customer funds to undertake this review.

Using the inflation adjustment mechanism in NYSERDA's most recent solicitations, as proposed by the Petitioners, is an inappropriate remedy because the Petitioners are not concurrently offering to revise downward their implicit rate of return or to reduce or eliminate any embedded project contingency costs despite the de-risking of their projects. Instead, the Joint Utilities propose that NYSERDA and DPS Staff (or an authorized consultant working for NYSERDA or DPS Staff) examine the Petitioners' financial assumptions and project proforma to determine project-specific facts and prices that demonstrate the need for additional support along with a process to reconcile with actual construction costs. Based on the review of commodity and component costs, NYSERDA, with DPS Staff input, should impose a one-time adjustment to the REC or OREC strike price, with the Petition's requested relief representing the ceiling for any inflation adjustment. Any such inflation adjustment should also be structured to

¹⁹ CES Proceeding, ACE-NY Petition, PA Consulting Affidavit, p. 25.

include downward revisions if actual component or construction costs are lower than the current assumptions. This process will address the Petitioners' inflation concerns without relying on blanket adjustments,²⁰ while protecting customers from unwarranted cost increases. No adjustment to the current contract terms should provide developers with a perfect hedge for market risks; the developers should be required to have "skin in the game" to motivate successful and timely development. In addition, any inflation adjustments should be limited to overnight capital costs²¹ and should exclude any compensation for financing costs. The value of any federal tax incentives, including Investment Tax Credits and Production Tax Credits from the Inflation Reduction Act, should be used to offset any adjustment made pursuant to the Commission's disposition of the Petitions.

Regardless of the Commission's action on the inflation adjustment mechanisms, the Joint Utilities maintain strong opposition to the Empire/Beacon Wind proposed annual CPI adjustment and contract extension from 25 to 30 years for the reasons discussed above.

Maintaining the integrity of NYSERDA's REC procurement process is essential. NYSERDA should significantly raise termination fees for any contracts modified with the Petitioners as discussed below. Furthermore, the Joint Utilities recommend the Commission state in an ordering clause that no future contract modifications from the Petitioners will be considered. Such changes, accompanied by a broader raising of termination fees, will mitigate the threat of additional impediments to the State's clean energy transition.

²⁰ See, e.g., ACE-NY Petition, PA Consulting Affidavit, Tables 12, 15, 16 (pp. 19, 26, 27).

²¹ The term "overnight capital cost" represents project costs excluding the cost of debt and equity used to finance the projects. It is used to convey the cost to construct a project as if it could be completed overnight.

VII. Recommendations to Improve Future Solicitations

To strengthen the State's bargaining position in future procurement processes, the Joint Utilities recommend that the Commission direct NYSERDA to assess whether the penalty provisions in existing OREC, Tier 1 REC, and Tier 4 REC contracts pertaining to project termination are consistent with those that apply in other states/regions. These terms are intended to incentivize efficient project development, to appropriately reflect risks in bid prices, and to prevent the need for petitions to address financial strains. The Joint Utilities note that the termination fee for the Empire Wind project would total approximately \$6 million.²² As of January 1, 2024, those fees will quadruple. Even \$24 million is a de minimis proportion of the capital these projects will require for development. The termination fees in the contracts were apparently not sufficient to encourage winning bidders to firm up supply costs and proceed with project development. Were the contracts to require a stronger commitment from NYSERDA's counterparties, developers could be motivated to act in a more comprehensive and timely manner in mitigating business risks that apply to project development. NYSERDA and DPS Staff should look to the most recent Massachusetts Offshore Wind RFP (MA OSW RFP) filed for approval with the Massachusetts DPU in May 2023 for examples of this. Selected projects in this RFP will be required to provide development period security in the amount of \$80,000 per MW, with additional security requirements if the bidder or its affiliate previously defaulted on or terminated a PPA prior to commercial operation. Additionally, the MA OSW RFP includes provisions in the qualitative scoring process when evaluating bidder experience and project viability

²² The termination fee (\$5,000/MW) is specified in Section 15.01 of the Beacon Wind contract, *available at* <https://www.nyserderda.ny.gov/-/media/Project/Nyserda/Files/Programs/Offshore-Wind/Empire-Offshore-Wind--executed.PDF>

provisions that could result in negative scoring impacts for developers if they or their affiliates previously defaulted on or terminated PPAs. The Commission should direct NYSERDA to assess whether its current renewable solicitations and existing contract terms provide an adequate price signal to clean energy developer counterparties to prepare robust bids that appropriately reflect the risks that apply to many development projects today.

VIII. Conclusion

The Joint Utilities recommend that the Commission reject the Petitions for the reasons discussed above. The financial relief requested in the Petitions would lead to substantial incremental customer costs and would diminish the effectiveness of future NYSERDA procurements. In the case that the Commission determines termination of the contracts will lead to even greater customer impacts, the Joint Utilities recommend project-by-project contract adjustments based on observed need and other measures to protect customers from exposure to asymmetric market-based risks.

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Respectfully submitted,

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