

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Case No. 03-E-0188: Proceeding on Motion of the Commission)
Regarding a Retail Renewable Portfolio Standard)

BRIEF ON EXCEPTIONS OF ENERGY MANAGEMENT, INC.

I. Introduction.

Energy Management, Inc. (“EMI”) hereby submits its Brief on Exceptions in the above-referenced proceeding to establish retail renewable portfolio standards for the State of New York. EMI is one of the northeast’s leading independent energy development companies and has developed and operated approximately \$1 billion worth of energy facilities. EMI’s business activities now focus upon wind energy development. Accordingly, EMI strongly supports the Commission’s initiative to establish a workable renewable portfolio standard in New York (“NYRPS”) and commends the work that has been done in the past months. These reply comments focus, however, upon a single problem raised in the Recommended Decision of the Administrative Law Judge (“Recommended Decision”). As set forth below, EMI opposes the recommendation that the Commission allow NYRPS credit for renewable energy that is neither produced in nor delivered to New York, and which is thus never sold to or utilized by New York consumers. For the reasons set forth below, such a proposal undermines the essential objectives of the Commission and would provide no assurance that New York ratepayers would receive any actual benefit in return for their expenditures.

II. The Recommended Decision Would Improperly Give NYRPS Credit to Renewable Energy that is Neither Generated in nor Delivered into New York.

The Recommended Decision contains a single fundamental flaw, in that it fails to require that remotely produced renewable energy be delivered to New York. Rather, it would allow NYRPS renewable credit for (i) renewable energy that never enters New York and, even more troubling, (ii) non-renewable energy that does enter New York. By not requiring actual delivery of any renewable energy, the Recommended Decision would fail to meet the Commission’s basic public policy objectives and would base the NYRPS upon a regulatory fiction that would undermine public confidence and open the door to unending potential for “greenwashing” and other gaming of the markets.

Although Staff and other parties below supported a requirement for the actual delivery of renewable energy to New York (Recommended Decision at 75), the Administrative Law Judge (“ALJ”) would instead allow NYRPS renewable credit without requiring the actual delivery of any renewable energy into New York. Rather, the ALJ would give NYRPS renewable credit to a remotely located renewable generator that delivers no renewable energy to New York, so long as an “equivalent” or “associated amount is delivered to the New York Control Area in the same month.” Id., at 24, 78. The fundamental problem is that the “associated amount” that is actually delivered to New York need not be renewable energy and, in fact, could consist entirely of non-renewable, system, or even coal-fired energy. Thus, a remotely located renewable generator could make no renewable investment in New York, create no renewable jobs in New York, schedule no imports of renewable energy into New York, and deliver no renewable energy to New York, yet receive full NYRPS credit for renewable energy.

As set forth below, the Commission should reverse this one serious shortcoming of the Recommended Decision and provide that the NYRPS give renewable credits only for renewable energy that is either generated in, or actually delivered into, New York. To do otherwise would be to undermine the intended incentives towards developing a New York renewable industry and give no assurance that renewable energy would ever actually reach New York consumers.

III. The Recommended Decision is Inconsistent with the Well-Established NERC Protocols for Accounting for Actual Inter-Pool Transactions.

One major shortcoming of the Recommended Decision is its inconsistency with the clearly stated protocols of the North American Energy Reliability Council (“NERC”), the NYISO and the adjusted control areas for tracking and recording all actual inter-pool transactions. Every inter-pool import transaction into NYISO is carefully tracked and recorded on an hour-by-hour basis pursuant to the NERC electronic “tagging” system.¹ The fact is that, in each hour, renewable energy import transactions either occur or do not occur, and the NERC tagging system records every actual inter-pool transaction; there is simply no gray area as to what imports actually occur in any hour. In contrast, the recommended “relaxed delivery” standard would allow an external producer to actually deliver non-renewable energy (as confirmed by corresponding NERC tags for each transaction hour), yet elect to be treated for NYRPS purposes as if it had delivered renewable energy. The result would be a system based upon regulatory fiction at odds with the factual record of the imports that actually occurred, as confirmed by the NERC tagging system.

¹ See, e.g., Electronic Tagging – Functional Specifications, Version 1.7.095, approved for implementation on December 12, 2002, posted on website of the NERC, www.nerc.com (“Because of this [inter-pool knowledge] disconnect, the need to track deals from sink to source was born. Reliability authority was deemed impossible unless a full complete source to sink path could be known. Tagging became the vehicle through which this information was documented and communicated.” *Id.* at 10) NYISO Market Participant User’s Guide, § 7.6 (Rev.: 06/01/2001) (“A NERC Electronic tag (ETAG) is required for all transactions that enter or exit the New York Control Area (NYCA). “The NYISO and the neighboring areas recognize that the use of a transaction identifier, consistent and compliant with ETAG, is the most meaningful method of coordinating interchange transactions.” *Id.* at 7-56.)

Such an allowance would result in consumer confusion and open the door to endless opportunities for market manipulation. For example, “relaxed delivery” would allow an external wind producer to retroactively redesignate or “balance” its non-renewable import transactions at the end of a given month, with no requirement that any renewable energy actually entered the New York control area in any hour. One strategic option would be for an external wind producer to (i) run its unit on an unscheduled basis for an entire month, thereby making no actual imports of renewable energy to New York, and (ii) in the last hour of that month, import into New York a block of non-renewable (i.e., coal) energy equal to its aggregate monthly production of wind energy. Under the approach of the Recommended Decision, the external producer, who actually delivered only coal power into New York, would nonetheless be able to claim RPS “renewable credit” for the full delivered quantity of coal power by retroactively “balancing” volumes for the month (i.e., the so-called “fatboy green” strategy). Once the regulatory accounting system reflects other than the inter-pool transactions that actually occurred, the potential for such gaming opportunities is endless. The Commission should eliminate any such regulatory fiction and simply require that RPS credit be allowed only for renewable import transactions that actually occur, as confirmed by the well-established NERC tagging system.

IV. The Requirement of Actual Delivery of Renewable Energy is Essential to the Stated Objectives of the Commission.

The recommendation to allow NYRPS credit for renewable energy neither produced in nor delivered to New York is in direct conflict with the Commission’s stated objectives in this proceeding. In the Commission’s Order Instituting Proceeding (2/19/03), the Commission made it clear that the objective of this proceeding was to cause an increased use of renewable energy within New York State. Indeed, the Commission explained that the reason for undertaking this initiative was that “only about 17% of the electricity currently used in New York State” is provided by renewable resources. Id. at 2 (emphasis added). The Commission’s

objectives similarly include express references to the actual use of renewable energy within New York, including the objectives to “diversify the state’s electricity generation mix,” and to spur economic development opportunities in renewable industries in New York, “including the attraction of the renewable technology manufacturers and installers.” Id. The Commission went on to conclude that its intention is to establish an RPS “for electric energy retailed in New York State.” Id. Further, the Commission identified as a threshold issue “the appropriateness of including renewable resource energy procured from outside the state,” a clear indication that the Commission was intending to limit its program to renewable energy actually procured and delivered to New York.

The Status Report of May 2, 2003, of the ALJ in this proceeding similarly indicated objectives that can be assured only by renewable energy produced in or delivered to New York. Indeed, such report articulates the “working target” as to guarantee that at least 25% “of the electricity retailed in New York” will come from renewable resources. Obviously, renewable energy that is never delivered to New York cannot be “retailed” in New York. Said Memorandum goes on to list individual working targets which can only be met by renewable energy that is actually used in or delivered to New York, as follows:

1. New York’s environment: Improve New York’s environment, by reducing air emissions, including greenhouse gas emissions, and other adverse impacts on New York State of electricity generation.
2. Generation Diversity: Diversify New York State’s electricity generation mix and improve energy security and reliability.
3. Economic Development: Develop renewable resources and advance renewable resource technologies in, and attract renewable resource generators, manufacturers, and installers to New York State.

There can be no assurance that the foregoing objectives will be realized by allowing RPS credits for renewable energy that is neither produced in nor delivered to New York. First, in the absence of delivery, there is no way to assure that remotely-produced

renewable energy would have any actual environmental impact on New York State, nor any real-world effect on the actual dispatch of generation units within New York. Second, with regard to generation diversity, remotely-produced renewable energy that is never delivered would have absolutely no impact upon New York State's electricity generation mix, nor could it thereby improve New York's system security or reliability. Third, and perhaps most obviously, remotely-produced and non-delivered renewable energy would have absolutely no beneficial effect upon New York's economic development objectives, nor could it attract any renewable generators, manufacturers or installers to New York State.

V. **New York State's public interest advocates recognize that New York will not receive the intended benefits from renewable energy that is neither produced in nor delivered to New York.**

New York State's public interest advocates recognize that New York will not receive the intended benefits from renewable energy that is neither produced in nor delivered to New York. In particular, Initial Comments of the Staff of the Department of Public Service provide as follows:

Without a delivery requirement, electric ratepayers would incur the premium costs of renewable resources but would forego the considerable reductions in local air emissions, energy security, and wholesale prices that would result from the reduction of fossil fuel generation in New York displaced by the delivered energy. The other advantage of a delivery requirement is that for New York's RPS to win public support, its benefits must accrue to New York.

Id. at 25. The New York State Consumer Protection Board ("CPB") similarly recommended that "energy from all resources classified as renewable under eligibility criteria to be established in this proceeding be deemed eligible for New York's RPS as long as the energy is contractually delivered to the New York Control Area." The CPB goes on to explain that "the delivery requirement we recommend ensures that fossil fuel generation will actually be displaced, thereby providing environmental benefits anticipated under an RPS." Id. at 8, 9. EMI concurs with these disinterested statements of the public interest on this critical issue.

VI. The Adjacent Massachusetts RPS Carefully Considered the Issue and Decided to Afford Credit Only to Renewable Energy Produced or Delivered to New England.

All of the arguments now presented by those who would disregard the Commission's clear directives to limit the RPS to energy delivered to New York were carefully considered and rejected by the Massachusetts Division of Energy Resources ("MDOER") in establishing the neighboring Massachusetts RPS. In particular, the Massachusetts RPS is based upon the simple recognition that requiring an external producer to deliver its product to the designated market place is in no sense a "barrier" to free commerce, but is an essential aspect of doing business:

The Division believes that physical delivery of electricity to New England Control Area is consistent with the statutory requirement that renewable energy be delivered to Massachusetts End-Use Customers. Physical delivery of electricity to the New England Control Area, in conjunction with the NE-GIS, will assure market participants that imports fully and accurately qualify for eligibility under RPS. Units located outside of New England will incur costs to deliver New Renewable Generation Attributes to this region. The cost of transmitting electricity from a distant location is an inherent cost of doing business and not a barrier to entry.

MDOER Order of 2/6/02, p.8 (emphasis added). Further, in December of 2002, the MDOER examined the cost of inter-pool delivery of wind power and concluded that such costs were "not high enough to keep imports from contributing and mitigating [RPS] costs."² The Commission should take note of these careful considerations by its neighboring jurisdiction and adopt a similar requirement that would further the interest of free trade on equal and reciprocal terms. It defies all logic to implement a program for the express purpose of increasing the production and use of renewable energy within New York by affording credit to renewable energy that is neither produced in nor delivered into New York.

² See, Massachusetts RPS: 2002 Cost Analysis Update – Sensitivity Analysis prepared by Sustainable Energy Advantage (12/16/02) and posted on website of the MDOER.

VII. Limiting RPS Credit to Renewable Energy Produced in or Delivered Into New York Would Lower the RPS Compliance Cost to New York Consumers

The Commission should also limit RPS credit to renewable energy that is either produced in or delivered into New York in order to minimize the RPS compliance costs to New York's consumers. In addition to the more obvious economic development and environmental benefits resulting from renewable energy that is actually introduced into New York's dispatch mix, this requirement would also lower costs to New York consumers. The important point is that renewable resources, which typically have little or no fuel costs, will, if actually introduced into New York, displace the most expensive fossil units that would otherwise have run, thereby placing downward pressure on New York's electric clearing prices during every hour of system operation. Obviously, renewable energy that is not delivered into New York can have no such price-suppressing effect. The consumer savings that result from a simple delivery requirement were confirmed by the Cost Study Report prepared by the NYSDPS, NYSERDA, Sustainable Energy Advantage, and LaCapra Associates in this proceeding, dated July 28, 2003, which concludes as follows:

But since the [non-delivered renewable] energy would not be displacing resources in the New York Control Area, wholesale energy costs in New York would be approximately \$77.5 million higher than they would be with the delivery of the [renewable] energy. The net impact of this sensitivity [i.e., not requiring renewable energy to be delivered to New York] would be to increase the 2013 cost to achieve the 25% standard by approximately \$26.9 million.

Id. at 42. The NYRPS Cost Study Report II released by the same parties on March 9, 2004, reached the same conclusions. Id. at 4. The approach of this Recommended Decision, however, assures no such benefits, since it does not require that imports occur in the normal course of daily dispatch. Rather, as discussed in the following section, traders may deliver non-renewable energy at the hour or hours of their choosing, which may well be the less expensive overnight hours where little if any cost savings would accrue.

VIII. Giving New York RPS Credit for Renewable Energy Neither Generated in nor Delivered to New York Would Create Consumer Confusion and Conflict with any Rational Program of Accurate Consumer Disclosure.

The proponents of allowing New York credit for renewable energy never delivered to New York present no feasible way to reconcile such a regulatory fiction with the requirements of accurate consumer disclosure. In essence, such proponents would allow retail suppliers to sell non-renewable energy to consumers yet, for regulatory purposes, claim that certain amounts of the non-renewable energy were renewable energy. The simple fact remains that renewable energy that never enters the New York control area can never be delivered to New York ratepayers, and thus may not be reflected as renewable in any accurate reporting of the energy actually sold to the customer. Indeed, the proposal would wreak havoc on New York's environmental disclosure requirements, which today reflect the actual mix of the energy used in the New York Control Area. The result would be unprecedented consumer confusion and the potential for market manipulation and deceptive practices.

The National Association of Attorneys General ("NAAG"), in its Environmental Marketing Guidelines for Electricity, similarly recognizes the essential consumer nexus between geographic proximity of renewable generation and the resulting benefits, and requires specific disclaimers in the absence of such nexus. Indeed, the NAAG Guidelines specifically provide that "Consumers should be informed, by clear and prominent disclosure, if a claim states or implies an environmental attribute or benefit which actually occurs or exists outside the geographic area in which the environmental marketing claim is being made." *Id.* at 2(g). Said guidelines go on to explain that "The environmental effects of producing electricity are often, though not always, felt most acutely in the locality or region where the generation or related activity takes place." "This section seeks to ensure that marketers do not mislead consumers as to the beneficial impact of an electricity product or company on the environment in their

particular geographic area.” Because the remedy of express disclaimer of environmental benefits is not practical for an RPS, the only practical way to achieve the same public benefit is to exclude non-delivered external resources from RPS eligibility.

IX. The Commission Should Make Reference to the Recent Call for Renewable Tenders Made by Hydro-Quebec.

The Commission should take serious notice of the Call for Tenders issued by Hydro-Quebec Distribution on May 12, 2003, for a total of 1,000 megawatts of wind-generated installed electrical capacity. Notably, the issuers’ affiliate has participated in these proceedings and the control area’s policies are properly considered for purposes of reciprocal treatment. Said request for offers makes it clear that all 1,000 megawatts wind capacity must be physically located within Quebec, with no allowance for external generation of renewable energy, even if actually delivered into Quebec. Indeed, said Call specifies that, to be eligible, a wind farm must be “connected to Hydro-Quebec’s integrated network at a single delivery point located in the eligible region.” Id. at 7. Further, the Call also requires that each project must meet “regional content” requirements as to expenditures and investments that must be made within Quebec, as follows:

The nacelles shall originate from assembly facilities located in the eligible region [within Quebec]. In addition, to be eligible for the call for tenders, each wind farm project must be associated with expenses and investments in the eligible region [within Quebec] corresponding to [at least] forty percent of the project’s total costs. . . .

Id. at 1. Thus when viewed in context, the “actual delivery” proposal (i.e., that New York give RPS credit on an equal basis to all renewable energy that is either generated and/or delivered into New York) is by no means burdensome. Nor do we imply that the Hydro-Quebec approach is necessarily wrong; it simply reflects that region’s objective of assuring that its ratepayers, who will pay the premium, will in fact realize the benefits of renewable energy.

X. Conclusion.

For the foregoing reasons, the Commission should require that New York RPS (i) give renewable credit only to renewable energy that is either produced in or delivered into New York, and (ii) not give renewable credit to the non-renewable energy that is delivered to New York. Any other approach relies upon regulatory fiction and opens the door to customer confusion, consumer disclosure conflicts, and endless opportunities for market manipulation. Further, such a delivery requirement is consistent with the overwhelming majority of jurisdictions that have instituted successful RPS programs (including Texas, the United Kingdom, California, and Massachusetts) and would maintain appropriate assurances that New York ratepayers, in return for their premium dollars, realize the environmental, portfolio diversity, and economic development benefits intended by the RPS.

Respectfully submitted,



Dennis J. Duffy
Vice President
75 Arlington Street
Suite 704
Boston, MA 02116

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