

PAUL V. NOLAN, Esq.

5515 North 17th Street
Arlington, Virginia 22205
Admitted D.C. Bar
Energy Practice Limited to State
And Federal Agencies

Work: (703) 534-5509
Fax: (703) 538-5257
E-mail: pvnvvn@aol.com

June 23, 2004

Hon. Jaclyn Brillong
Secretary
Public Service Commission
Three Empire State Plaza
Albany, New York 12223

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

Dear Secretary Brillong:

Pursuant to the Commission's Notice of Schedule for Filing Exceptions, issued June 3, 2004, the Small Hydro Group¹ submits an original and twenty-five (25) copies of the enclosed Brief on Exceptions.

Copies of this brief have been served all parties and ALJ Stein via electronic mail pursuant to the Notice.

Respectfully submitted this 23rd of June 2004.

/s/
Paul V. Nolan, Esq.

cc: ALJ Eleanor Stein
Active Party List via List Server

¹ The Small Hydro Group consists of the following companies: Tannery Island Power Corporation, Hydro Power, Inc., Energy Enterprises, Inc., Mercer Asset Management Corp., Chittenden Falls Hydro Power, Inc., and Seneca Falls Power Corporation.

**State of New York
Public Service Commission**

-----X
Proceeding on Motion of the Commission |
Regarding a Retail Renewable Portfolio |
Standard. |
-----X

Case No. 03-E-0188

**Brief on Exceptions of Tannery Island Power Corporation,
Hydro Power, Inc., Energy Enterprises, Inc., Mercer Asset Management Corp.,
Chittenden Falls Hydro Power, Inc. and Seneca Falls Power Corporation**

The Commission’s June 3, 2004 Notice of Schedule for Filing Exceptions in this proceeding calls for briefs on exceptions to Administrative Law Judge (“ALJ”) Eleanor Stein’s Recommended Decision (“RD”) on the implementation of a renewable portfolio standard (“RPS”) in New York State to be filed June 23, 2004. Tannery Island Power Corporation, Hydro Power, Inc., Energy Enterprises, Inc., Mercer Asset Management Corp., Chittenden Falls Hydro Power, Inc., and Seneca Falls Power Corporation, (hereinafter, “the Small Hydro Group” or “SHG”) hereby submit the following brief on exceptions to ALJ Stein’s RD. The Small Hydro Group generally supports the conclusions of ALJ Stein regarding small hydro issues and the proposed limited exemption for the inclusion of “certain very small hydropower facilities.” RD at 23.

The SHG is concerned that the RD may serve as the basis for challenges over the ownership of green renewable attributes. RD at 82. Further, the SHG believes that the RD, though highlighting some of the barriers to small renewables in securing long-term power purchase agreements and interconnection agreements without protracted and costly negotiations, should have set, at a minimum, a timeframe for resolution of these issues in order to facilitate the RPS's timetable.

GENERATORS OWN RENEWABLE ATTRIBUTES

At a minimum, though the RD recommended an RPS policy, ALJ Stein should have acknowledged more strenuously the immediate need for that policy to include resolution of the renewable attributes issue and the contracting and marketing barriers to small renewable producers. Not "to dos", but a recommendation to the Commission that it address these issues immediately. Without early resolution of these issues, small renewable generators could be left at the station platform because of disputes involving these issues.

The RD states "the record is . . . sufficient to develop a generation attribute accounting/tracking system to register generation attributes and track their sale into various markets." RD at 30. The SHG believes clarification is required to ensure that the owner of the generation attribute is the owner/developer/operator of the renewable resource and not the entity purchasing the renewable energy. If this is not done, then the renewable generators will

become the Little Red Hens of New York generators. They do all the work and produce the renewable power, only to see the government, markets, and utilities claim the benefit of their labor by an assertion that the attributes flow automatically, even in the absence of contract language, to the purchaser of the kWh. The RD states, “traditionally the purchaser of the megawatt hour of electricity from renewable sources has also purchased the renewable attribute.” RD at 82. The SHG maintains, however, that this remains an open issue. The Commission should follow the FERC's decision that these are not automatically sold under a PURPA agreement in the absence of express language to the contrary. This decision is now on appeal before the Courts.¹

STANDARD INTERCONNECTION AGREEMENT FOR 10 MW OR LESS

The Commission is concurrently reviewing the RPS and the Commission's standardized interconnection requirements in Case No. 02-E-1282. Obviously, the Commission is aware of the barriers interconnection disputes can raise to small generators and the development of a robust competitive market. The issues in that proceeding and the need to ensure the continued viability of existing small renewable generators cannot be ignored. Staff proposed in the December 2003 Standardized Interconnection Requirements and Application Process draft in Case No. 02-E-1282 that the applicability requirement for new distributed generation be revised upward from 300 kV to 2 MW or less. The

¹ See American Ref-Fuel Company, et al., Order Granting Petition for Declaratory Order, 105 FERC ¶ 61,004 (October 1, 2003), Order Denying Rehearing, 107 FERC ¶ 61,016

Commission is clearly aware of the difficulties faced by small DG in obtaining interconnection agreements with the transmission owners in New York State. The RD in the RPS proceeding made this issue clear with the recommendation that exceptions be granted to hydroelectric generators of 10 MW or less. The Commission should consider making the standardized interconnection requirements applicable to these small hydropower facilities as well in order to preclude one form of generation being given a “leg up” over another.

MARKET BARRIERS NEED TO BE ADDRESSED

ALJ Stein acknowledged in the RD that, “by itself, the market has not created, and is unlikely to create, significant new renewable generation capacity in New York.” RD at 4. The truth in this statement needs to be remembered when the Commission considers adoption of a Policy Statement and during the implementation phase of any policy. Although New York has attempted to impose competition in the electric market and to give lip service to the development of renewable generation resources, the State must remain mindful of the economic impediments to the maintenance of existing small renewable generators and to the construction of new renewable resources. ALJ Stein, correctly, noted

The Instituting Order can best be read to assume that today's existing or baseline renewable resources need not, generally, be offered further ratepayer price support to succeed. An RPS is necessary, in fact, to promote the development of *additional* renewable resources for New York's retail energy portfolio. Accordingly, the recommendation is that

(April 15, 2004), Petition for Review filed on June 14, 2004 with the United States Court of Appeals for the District of Columbia Circuit.

only new resources developed after January 1, 2003, will be eligible for the RPS. The exception to this general rule is for certain very small hydropower facilities, 10 MWs per facility or less, with above-market costs and expiring above-market energy price contracts. RPS eligibility appears necessary to ensure these facilities continue to operate and preserve these renewable resources for New York's use.

RD at 23. Existing small hydropower facilities are a necessary, integral piece of any RPS Policy Statement that the Commission may adopt. It is imperative that the Commission, and by extension the State, enable these facilities to continue operation and be able to finance any upgrades or maintenance necessary to maintain their viability. The RD recommends an exception to the eligibility criteria for resources, including

a maintenance adjustment to the baseline and incremental targets to protect very small hydropower projects. This adjustment would add 22,006 MWh per year to the incremental RPS target to offset the attrition of very small hydropower (no more than 10 MWs per facility) that would likely otherwise be retired due to expiring above-market priced contracts. Because this adjustment is intended to offset attrition of the baseline, it does not add incrementally to the satisfaction of the 25 percent target.

RD at 20-21.

It is evident that ALJ Stein recognizes the necessity of assisting the owners and operators of small hydropower facilities in maintaining their renewable generation resources. The need to maintain this existing, indigenous resource is fundamental to the success of implementing a RPS in New York State. In furtherance of this, a central issue to the design and implementation of New York's RPS is the development of a generation attribute trading system.

NEED FOR LONG TERM STANDARD CONTRACTS

The SHG believes the Commission, in reviewing implementation of a RPS in New York, must consider the use of long-term contracts to ensure the ability of renewable generators to compete in New York's market. The Commission has previously adopted exceptions for small generators in obtaining long-term contracts. In Opinion No. 91-2, the Commission set out the length of energy-only contracts and the pricing options available to small generators. The overall contract term adopted was a 20-year format. The Commission determined that this would not disadvantage ratepayers because rates were set at actual tariff avoided costs.² Opinion No. 91-2 was applicable to small facilities under 2 MW. The RD's view that the exception in the RPS should be applicable to small hydropower facilities sized at 10 MW or less is not inconsistent with the Commission's previous policies. As noted in the RD

The current and projected cost of electricity from renewable resources will remain at costs above the market cost of conventional generation resources through the time period studied. The record in this proceeding demonstrates that potential developers of such resources will need long-term contracts if they are to obtain financing.

RD at 75. Existing small hydropower facilities, in order to remain viable, seek long-term contracts.

The SHG does not argue against the RD's recommendation that

² Case Nos. 90-E-0675 and 27824, Opinion No. 91-2, "Opinion and Order Establishing Power Purchase Contract Policies and Procedures," issued February 25, 1991.

the Commission should establish that if utilities enter into prudent and competitively obtained long-term contracts, particularly contracts-for-differences, for renewable resources to comply with the RPS, they will have the opportunity for cost recovery.

RD at 75. Utilities must be directed, however, to negotiate with eligible RPS generators in good faith in order to enhance the opportunity to maintain viable renewable resources by receiving a fair and reasonable price for their output. As ALJ Stein noted in her RD, “some, although not all, developer parties, particularly wind developers, asserted the necessity of long-term contracts to obtain financing.” RD at 87. The necessity of ensuring financing capability cannot be stressed too strongly in the development of the RPS. The SHG believes that the good faith negotiation of long-term contracts and the prudence review concerns of the utilities, as well as of the producer, could be alleviated by having a single standard agreement that could be modified by the parties. The SHG supports a dispute resolution procedure that would provide that if the parties failed to timely resolve issues, the proposed contract could be filed, unaltered, for approval by the Commission, resulting in an order that the utility and developer execute the agreement.

MIGRATION MUST BE ADDRESSED

The SHG is also concerned about the issue of migration. If New York’s RPS is not designed similarly to those adopted in neighboring states, it is likely that the producers of renewable power in New York State could shop their power to a state where the pricing is better. ALJ Stein notes in the RD that “requiring

actual delivery of energy into New York appears to be required by the terms of the Instituting Order, which establishes ‘a renewable portfolio standard for *electric energy retailed in New York State.*’³ RD at 24. A deliverability requirement, while addressing one aspect of migration, does not address the concern of price disparity between the RPS’s adopted in neighboring states.

TIERS ARE NOT NEEDED

The creation of tiers, as recommended in the RD, creates an implied subsidy for one type of resource over another. The RD recommends “for simplicity of implementation and verification, it appears most appropriate to consider the bulk of eligible resources in one main tier.” RD at 67. The SHG concurs with this conclusion. The RD, however, goes on to say that “the creation of an SBC-like tier to ensure continued and accelerated development of emerging technologies such as solar and fuel cells, is essential.” RD at 67. The SHG believes that this recommendation has the potential to create an unlevel playing field for small renewable resources by favoring one technology over another. Many of the emerging technologies already receive publicly supported incentives in the form of various tax credits and funding assistance at the state and federal levels. There is not a need for an additional layer of public policy incentives. There is certainly not a need for such support in the absence of a short term period wherein the continuation of such extra incentives could be reassessed, say after

³ Case 03-E-0188, Instituting Order (issued February 19, 2003), p. 2, emphasis supplied.

four years of implementation of the RPS, and expire upon a set date, say upon expiration of the fifth year of implementation of a RPS policy.

The SHG concurs with ALJ Stein's recommendation "that the Commission institute an implementation proceeding to bring its Policy Statement to life." RD at 107. The Commission must, however, remain cognizant of the many issues that remain to be addressed in the next phase of the proceeding in order to avoid impeding the continued viability of existing small hydropower resources in New York State.

Conclusion

The Small Hydro Group concurs with many of the conclusions in the RD, the SHG urges caution regarding implementation issues, which remain to be addressed. Primarily, the SHG believes the issues of contracts, parity with neighboring states' RPS programs, use of a "tiered" system that promotes one technology over another, and certification requirements for small hydropower facilities beyond those already required under FERC licenses or DEC regulations need to be carefully considered in order to avoid what ALJ Stein and the Staff recognize: "that absent RPS support, approximately seven megawatts of small hydroelectric resources would be lost each year, suggesting additional expenditure to retain these small hydropower facilities." RD at 49. The recommendations by ALJ Stein in the RD are a significant first step in the development of a RPS in

SMALL HYDRO GROUP

Paul C. Montgomery, Esq.
Mercer Asset Management Corp.
Three E-Comm Square
Albany, NY 12207

Scott Goodwin
General Manger
Seneca Falls Power Corporation
1233 Alpine Rd Ste 202
Walnut Creek, CA 94596-4403

Adrian Phillips
Hydro Power, Inc.
1502 N 17th Ave
Phoenix, AZ 85007-1846

Sarah Miller
Tannery Island Power Company
5373 Eugene St
Lowville, NY 13367-1204

Mr. Charles Hirschey
Tannery Island Power Company
33410 Lamb Road
Carthage, N.Y. 13619

Paul Eckhoff
Chittenden Falls Hydro Power, Inc.
P.O. Box 158
Stuyvesant Falls, NY 12174