



STATE OF NEW YORK
EXECUTIVE DEPARTMENT
STATE CONSUMER PROTECTION BOARD

George E. Pataki
Governor

Teresa A. Santiago
Chairperson and Executive Director

March 28, 2003

BY HAND DELIVERY

Secretary Janet Deixler
New York State Department of Public Service
Three Empire State Plaza
Albany, New York 12223

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

Dear Secretary Deixler:

Pursuant to the March 6, 2003 Ruling Revising Schedule by Administrative Law Judge Eleanor Stein, please find enclosed herewith three copies of the New York State Consumer Protection Board's Comments on Selected Legal and Policy Issues Concerning a Retail Renewable Portfolio Standard. This document is being served on all active parties in the above captioned case.

Very truly yours,

John Walters
Intervenor Attorney

cc: All Active parties

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 THE
NEW YORK STATE CONSUMER PROTECTION BOARD
ON SELECTED LEGAL AND POLICY ISSUES CONCERNING
A RETAIL RENEWABLE PORTFOLIO STANDARD

Teresa A. Santiago
Chairperson and Executive Director

Douglas W. Elfner
Director, Strategic Programs

John Walters
Intervenor Attorney

Dated: March 28, 2003
Albany, New York

NYS CONSUMER PROTECTION BOARD
SUITE 2101
5 EMPIRE STATE PLAZA
ALBANY, NEW YORK, 12223-1556
<http://www.consumer.state.ny.us>

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

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

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The New York State Energy Plan identifies several broad policy objectives, including “increasing energy diversity in all sectors of the State’s economy through greater use of energy efficiency technologies, and alternative resources, including renewable-based energy.”¹ In his 2003 State of the State Message, Governor George E. Pataki directed the Public Service Commission (“PSC” or “Commission”) to implement a renewable portfolio standard (“RPS”) to ensure that within the next 10 years, at least 25% of the energy bought in New York State will come from renewable energy sources. With this background, the PSC convened this proceeding to “develop and implement an RPS for electric energy retailed in New York State.”² Consistent with procedural rulings issued by Administrative Law Judge Eleanor Stein,³ the New York State Consumer Protection Board submits these comments on overall policy and legal

¹ New York State Energy Plan and Final Environmental Impact Statement, New York State Energy Planning Board, June 2002 (“State Energy Plan”), at 1-18.

² Case 03-E-0188, Proceeding on Motion of the Commission Regarding a Retail Renewable Portfolio Standard, Order Instituting Proceeding, February 19, 2003 (“Order Instituting Proceeding”), at 2.

³ Case 03-E-0188, Ruling Concerning Procedure and Schedule, February 20, 2003 (“February 20, 2003 Procedural Ruling”); Case 03-E-0188, Ruling Revising Schedule, March 6, 2003.

issues regarding an RPS, as well as some specific threshold issues identified in the Order Instituting Proceeding.

I. Overall Benefits Expected From A Renewable Portfolio Standard

If properly designed and implemented, the RPS is expected to provide a large number of consumer, environmental and economic development benefits. Currently, approximately 82% of the state's electricity is derived from non-renewable sources such as natural gas, coal, oil and nuclear.⁴ The RPS will increase the diversity and security of New York's energy supply and help satisfy the state's increasing demand for electricity. As a result, it will enhance the reliability of the electric power system for all New Yorkers. In addition, it will reduce the magnitude and duration of energy price increases due to natural gas and oil price increases, thereby reducing upward pressure on energy bills. Insofar as it results in on-site generation, the RPS will help avoid the need for expenditures to build and maintain electricity transmission and distribution infrastructure. The RPS will also benefit consumers to the extent that it provides increased choice for supply options available to consumers.

In addition, the environmental benefits from the RPS are considerable. Nationally, fossil-fueled electric generation plants are responsible for one-third of total nitrogen oxide emissions, two-thirds of sulfur dioxide emissions and one-quarter of carbon dioxide emissions.⁵ Use of renewable energy resources would avoid some of these emissions, thereby helping improve the environment and public health.

⁴ Case 03-E-0188, Baseline Electric Generation Sources, letter from Paul Agresta, DPS Assistant Counsel to Administrative Law Judge Stein, March 17, 2003 ("March 17, 2003 Baseline Electric Generation Sources Letter"), p. 4.

⁵ State Energy Plan, at 3-40, 41.

Further, the RPS could benefit the state's economy. The vast majority of the commodities used to produce electricity in New York are derived from out-of-state resources. As a result, a large portion of New York's annual expenditures on electricity flow out of the state. Increased investment and jobs associated with manufacturing, installation and maintenance of renewable energy equipment in New York would help strengthen the state's economy, thereby benefiting all New Yorkers.

The CPB intends to participate actively in this proceeding to help ensure that these expected benefits are realized.

II. Overview of Issues to be Considered in This Proceeding

The Order Instituting Proceeding identified several threshold issues on which comments were specifically requested.⁶ The Administrative Law Judge also invited parties to comment on the overall policy and legal issues in this proceeding.⁷ Before addressing certain of the threshold issues identified in the Order Instituting Proceeding, the CPB provides the following summary of issues that we recommend be considered explicitly in this proceeding.

A. Impact of the RPS on the Price of Energy

Energy costs have a direct bearing on the discretionary income of New Yorkers as well as the state's ability to attract, retain and expand businesses and to create and maintain jobs. By directly affecting New Yorkers' discretionary income, energy costs influence the State's economic activity and the quality of life. In addition, energy costs

⁶ Order Instituting Proceeding, at 3 - 5.

⁷ February 20, 2003 Procedural Ruling, at 2.

also affect the number of jobs in New York.⁸ According to data in the State Energy Plan, although the differential has been narrowing in recent years for some customers, retail electricity prices in New York are generally higher than the national average.⁹ Currently, electricity is generally more expensive to produce from renewable technology, other than hydro, than from fossil fuels. It is therefore imperative that the RPS be introduced in a manner that minimizes upward pressure on energy prices.

The CPB has several recommendations to address this concern. First, implementation of the RPS should explicitly recognize that approximately 18.35% of New York's electricity use is currently derived from renewable sources.¹⁰ That fact conclusively demonstrates that higher energy prices, additional subsidies or incremental incentives are currently not necessary for those sources. Such additional compensation to those suppliers would amount to a windfall, and would harm consumers and the State's economy. Additional subsidies or incremental incentives associated with implementation of the RPS should be applicable to only the incremental 6.65%¹¹ of New York's electricity use that needs to be met from renewable sources by 2013. Similarly, the RPS should be implemented so that any higher energy prices associated with the incremental 6.65% of electricity use necessary from renewable sources, are limited to that energy, and do not affect the price of the remaining energy sold in New York.

⁸ State Energy Plan, at 2-24.

⁹ State Energy Plan, at 2-25 – 2-30.

¹⁰ March 17, 2003 Baseline Electric Generation Sources Letter, p. 4. See also the CPB's response to Question 1, *infra*. This calculation is based on data for the period April 2001 – March 2002. Accordingly, it likely understates that amount of energy used in New York that is currently produced from renewable sources.

¹¹ This calculation should be updated to reflect more recent data. It should be calculated as the difference between the 25% target and the actual percentage of energy used in New York that is produced from renewable sources in January 2003, the time the RPS target was announced.

Second, the RPS should be implemented in a manner that secures the lowest overall prices for energy from renewable sources, including administrative costs, which are consistent with reliability. Several alternatives should be evaluated in this proceeding, including those under which energy from renewable sources would be purchased by a centralized procurement entity, and those under which such energy would be procured by each load-serving entity (“LSE”). Centralized procurement may result in lower prices for incremental renewables since demand for all LSEs would be aggregated by the procurement entity. Centralized procurement may also impose fewer burdens on the industry, especially small ESCOs, and may result in lower overall costs associated with implementation, monitoring, oversight and enforcement. Conversely, disaggregated procurement places greater reliance on market incentives and may lead LSEs to develop innovative approaches to take advantage of market opportunities that result in low and stable prices for consumers. Regardless of how the incremental renewable energy is procured, oversight and certain enforcement tools are necessary to ensure that the RPS is implemented in a manner that maximizes overall consumer benefits.

Third, the RPS should be implemented in a manner that maintains flexibility to respond to unanticipated circumstances, such as technological advances which reduce the cost of energy from renewable sources. Instead of locking in the vast majority of incremental renewable energy in long-term contracts, the RPS should preserve the opportunity for consumers to benefit from reduced prices resulting from such technological advances.

B. Impact of the RPS on Competition

Competitive energy markets can provide consumer benefits in the form of lower prices, improved service quality and innovative new services. The RPS should be implemented in a manner that facilitates the development of competition in all markets, including wholesale and retail electricity markets for both renewable and non-renewable sources. As found preliminarily by NYSERDA, the RPS can be implemented “in a manner that is consistent with and supports the State’s existing wholesale market and emerging retail market for electricity.”¹² Such markets will help ensure that renewable electricity capacity is built in the most economic and efficient manner, thereby benefiting consumers.

C. Impact of the RPS on Reliability

Implementation of the RPS should enhance reliability of the electric power system. The increase in the use of energy from renewable sources will diversify the State’s generation, which will necessarily lead to greater reliability. However, care should also be taken to ensure that these new sources of electric generation meet the same reliability standards that are applicable to current generation. For example, tests to determine the availability of energy from current generation sources should not be relaxed for renewable energy sources. In addition, renewable energy sources should be encouraged to locate in areas of the state where generation is most needed. Not only will this satisfy demand where it is required, but it will reduce the need for new transmission infrastructure and enhance the reliability of the electric power system, especially in capacity-scarce areas such as New York City and Long Island.

¹² Preliminary Investigation into Establishing a Renewable Portfolio Standard in New York, letter from Peter Smith, Acting President of NYSERDA, to Members of the NYS Energy Planning Board, February 14, 2003, at 1.

D. Importance of Outreach and Education

One of the common barriers to the development and widespread use of energy from renewable sources is the lack of customer familiarity with, and acceptance of, renewable energy resources.¹³ Increased customer education about the benefits and safety of renewable energy technology will help increase the public's acceptance of such sources. It will also help facilitate the development of the market for renewable energy products. Accordingly, this proceeding should consider measures to increase the public's awareness and understanding of renewable energy.

E. Oversight to Prevent Deceptive Marketing

The PSC is the Administrator of environmental disclosure requirements for LSEs doing business in New York.¹⁴ The PSC now requires "all suppliers of electricity to provide their customers with periodic environmental disclosure statements. These statements, called environmental disclosure 'labels,' provide plain language information on what fuel the suppliers use to generate electricity..."¹⁵ In addition, these disclosures provide information on air emissions resulting from the associated generation.

Consumers must continue to be provided accurate information regarding the environmental impact of electricity generation. Current PSC guidelines should be applied and enforced as part of implementation of the RPS. Any modification or refinement of environmental disclosure provisions that may be required as a result of

¹³ State Energy Plan, at 3-42.

¹⁴ Case 94-E-0952, In the Matter of Competitive Opportunities Regarding Electric Service, Opinion No. 98-19, Opinion and Order Adopting Environmental Disclosure Requirements and Establishing a Tracking Mechanism, December 15, 1998.

¹⁵ See PSC Website www.dps.state.ny.us/EDLbrochure.htm, Environmental Disclosure, A Consumer Guide, at 1.

decisions in this proceeding should be minimal, and should recognize the continuing need for consumers to be provided accurate information regarding the environmental impact of electricity generation. Existing federal and state laws regarding false advertising and fraud continue to provide additional tools to enforce those requirements.

III. CPB Response to Selected Specific Questions

The CPB's position on several of the questions contained in the Order Instituting Proceeding is explained in this section. Our recommendations on several other questions are explained in Point II, and are not repeated here.

Q1. The types of resources that should be considered as “renewable” for the purposes of a renewable portfolio standard.

For purposes of the RPS, the definition of “renewable” resources should include energy from biomass, fuel cells, hydro, solar, tidal and wind generation sources. That classification is the first definition included in the March 17, 2003 Baseline Electric Generation Sources letter from Staff of the Department of Public Service. Energy from such sources produced by the customer through co-generation and distributed generation should also be included in this definition.

The second definition in the March 17, 2003 Baseline Electric Generation Sources letter, which includes energy from solid waste such as municipal solid waste, tire waste, and construction and demolition waste, should not be included in the definition of “renewable” resources for purposes of the RPS. In general, using current technology, energy produced from such sources would not provide the environmental benefits that should be associated with the RPS.

Q2. The appropriateness of including renewable resource energy procured from outside the state, such as hydropower from Canada or wind energy from New England.

The CPB recommends that renewable resource energy procured from outside the state be considered for purposes of the RPS. Such energy includes, but is not limited to, wind energy from New England and low-cost hydropower from Canada. Inclusion of such energy in New York's RPS would provide the anticipated environmental and other benefits of the RPS to New Yorkers and is consistent with the law and current public policy objectives.

Including renewable energy from out-of-state sources in New York's RPS would not necessarily diminish any of the benefits from the RPS that would otherwise occur. Renewable generation would still replace fossil fuel usage, thereby providing considerable environmental benefits, improving the diversity of energy resources serving New Yorkers and contributing to the stabilization of prices within the state. Incentives to locate such generation in New York to provide economic development benefits could be provided outside of the RPS per se.

In addition, the Commerce Clause of the United States Constitution¹⁶ prohibits discrimination by individual states against foreign (actually foreign or interstate) commercial interests based solely on the state of origin. The fact that certain renewable energies do not originate in New York State does not allow New York to proscribe their usage in New York State as part of the RPS.

Including renewable energy produced outside of New York in the state's RPS is also consistent with public policy objectives to remove historical barriers to the

¹⁶ U.S Const. Art I, §8, Clause 3.

transmission of energy across state and country boundaries. Both federal and state regulators are working to eliminate such barriers and create larger, open markets for electricity. Excluding such energy from New York's RPS would be antithetical to that objective.

The CPB recognizes that including out-of-state generation in New York's RPS would likely require mechanisms to appropriately identify, track and account for such power. Suppliers of such energy must be able to demonstrate that the energy they are providing to end users is actually being consumed in New York State. Mechanisms to accomplish this objective should be administratively efficient.

Q3. The retail suppliers that should be required to sell energy from renewable resources.

As explained above, implementation of the RPS should not interfere with the development of retail competition. Design of the RPS should recognize that some LSEs specialize in marketing energy from renewable sources and do so efficiently. Other retail suppliers do not. Therefore, a key element of RPS implementation will be the development of a tradable system under which all LSEs comply with the requirement that 25% of their sales originate from renewable sources. Individual LSEs could either sell energy from renewable sources, or purchase renewable credits for such energy at a market price.

Any mechanism to implement the RPS must be accompanied by adequate enforcement tools. Penalties for non-compliance with the RPS should be financial in nature and of sufficient magnitude to ensure that LSEs cannot make an economic decision to forego compliance with the RPS by absorbing costs associated with the

penalty mechanism while remaining a viable market participant. Such penalties applicable to regulated utilities should not be recoverable in regulated rates.

Q5. The best methods for retail suppliers to procure renewable resources (e.g., construction and ownership versus purchases).

As explained in Point II, determination of the best methods for procurement of renewable resources requires a careful analysis of the costs and benefits of various options, including centralized procurement. Whether procurement is centralized or decentralized, the market should generally determine the extent to which long term contracts with renewable suppliers are required. Such contracts could reduce risks to suppliers, thereby facilitating achievement of the RPS. However, reliance on such contracts should be limited, so that consumers can benefit from future technological advances that reduce the cost of renewable energy.

Conclusion

A Renewable Portfolio Standard holds the promise of providing significant benefits to consumers, the environment and the state's economy. The Consumer Protection Board expects to participate as an active party throughout this proceeding to help secure these benefits for New Yorkers. We urge the Administrative Law Judge, and the Public Service Commission to consider these comments in their deliberations regarding these issues.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Teresa A. Santiago". The signature is fluid and cursive, with the first name "Teresa" being the most prominent.

Teresa A. Santiago
Chairperson and Executive Director

Douglas W. Elfner
Director, Strategic Programs

John M. Walters
Intervenor Attorney

Dated: March 28, 2003
Albany, New York