

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on September 9, 2021

COMMISSIONERS PRESENT:

John B. Howard, Chair
Diane X. Burman, concurring
James S. Alesi
Tracey A. Edwards
David J. Valesky
John B. Maggiore
Rory M. Christian

CASE 15-E-0302 - Proceeding to Implement a Large-Scale Renewable
Program and a Clean Energy Standard.

ORDER APPROVING COMPETITIVE TIER 2
RE-SALE IMPLEMENTATION PLAN

(Issued and Effective September 9, 2021)

BY THE COMMISSION:

INTRODUCTION

In the Clean Energy Standard (CES) Modification Order, the Public Service Commission (Commission) authorized the New York State Energy Research and Development Authority (NYSERDA) to establish a Competitive Tier 2 Program under the CES which would provide financial support to eligible baseline renewable energy resources that are selected as part of an annual solicitation.¹ Each solicitation under the Competitive Tier 2 Program will procure Renewable Energy Certificates (RECs)

¹ Case 15-E-0302, Order Adopting Modification to the Clean Energy Standard (issued October 15, 2020) (CES Modification Order).

associated with eligible non-state-owned wind and run-of-river hydroelectric generating facilities that entered commercial operation prior to January 1, 2015. The Commission authorized NYSERDA to re-sell the RECs that it purchases from these generators to support the voluntary REC market where entities, such as energy service companies (ESCOs) and Community Choice Aggregation (CCA) Administrators, may seek to purchase these RECs to support renewable product offerings to customers. On May 1, 2021, NYSERDA filed its Tier 2 Re-Sale Implementation Plan Proposal (Implementation Plan) pursuant to a Commission directive in the CES Modification Order.

In this Order, the Commission approves NYSERDA's Implementation Plan. The Implementation Plan sets forth a reasonable set of proposals for maximizing the contributions of existing baseline resources towards achieving the State's clean energy goals, and is therefore adopted.

BACKGROUND

In the CES Modification Order, the Commission approved a Competitive Tier 2 Program to support non-state-owned wind and run-of-river hydroelectric generating facilities that entered commercial operation prior to January 1, 2015. The annual solicitations over a three-year period seek to procure RECs from the majority of eligible resources, leaving a margin of RECs available for the voluntary market.² Facilities selected in the solicitation receive a standard three-year REC contract from NYSERDA and receive payments equal to the number of Tier 2 RECs delivered to NYSERDA's New York Generation Attribute Tracking

² The Commission authorized NYSERDA to determine the specific level of generation that may participate in the overall program and to set a confidential bid price above which bids would be rejected.

System (NYGATS) account multiplied by the bid price. The Commission directed NYSERDA to issue the first Competitive Tier 2 solicitation within 120 days of the effective date of the CES Modification Order. The first Competitive Tier 2 solicitation was released in January 2021 with awards announced in May 2021. A second solicitation was announced in August 2021.³

The Commission capped the cost of the Competitive Tier 2 Program at \$200 million, roughly allocated evenly among the three proposed annual solicitations. The funding of the program is through a new Tier 2 REC obligation imposed on Load Serving Entities (LSEs). To determine each LSE's Tier 2 Monthly Obligation Payments, NYSERDA and Department of Public Service Staff (Staff) annually calculate a uniform per megawatt-hour (MWh) rate to be applied to each LSE's actual wholesale load. NYSERDA will reconcile the funds collected from the LSEs against NYSERDA's financial obligation relating to Tier 2 RECs to reflect the actual adjusted statewide load and NYSERDA's actual payments to Tier 2 facilities during the compliance year.⁴ NYSERDA also developed a standard agreement that would be used to govern Tier 2 REC transactions between NYSERDA and the LSEs.

The Commission authorized NYSERDA to re-sell the Tier 2 RECs it purchases from generators to voluntary purchasers, including ESCOs and CCAs. The Commission reasoned that this

³ <https://www.nyserda.ny.gov/All-Programs/Programs/Clean-Energy-Standard/Renewable-Generators-and-Developers/Tier-Two-Competitive-Program>.

⁴ The Commission noted that the timing of the CES Modification Order will require NYSERDA to modify the process for the first compliance year of the Competitive Tier 2 Program, which is intended to run on a calendar year basis. As a result, NYSERDA will need to adjust the timing of its collection and payment obligations to preserve the calendar year compliance period while allowing all parties to meet their Tier 2 obligations.

element of the program will keep downward pressure on Tier 2 REC prices and allow voluntary purchasers to take advantage of NYSERDA Tier 2 REC prices. NYSERDA was instructed to sell Tier 2 RECs at a price floor equal to its procurement costs, plus a Commission-approved administrative adder. However, the Commission noted that more information regarding the process to be undertaken by NYSERDA when re-selling Tier 2 RECs is necessary before such sales can occur. The Commission directed NYSERDA to file an implementation plan for stakeholder comment and ultimate Commission approval that included a description of the re-sale process, timing, and its interaction with the LSE obligations and reconciliation process. Only after approval by the Commission of the implementation plan can NYSERDA begin re-selling Tier 2 RECs. NYSERDA filed its Implementation Plan on May 1, 2021, as detailed below.

IMPLEMENTATION PLAN

Sale Frequency and Timing

NYSERDA proposes in the Implementation Plan to hold annual sales each February for Tier 2 RECs purchased through the previous year's Competitive Tier 2 procurement. The length of the sale period would be 14 days from the date of the announcement. NYSERDA would announce the quantity of Tier 2 RECs available for sale, the sale price, and a corresponding sale process no later than February 15 of each year until the end of the Competitive Tier 2 Program.

Re-Sale Inventory and Pricing

NYSERDA proposes that the re-sale inventory would consist of the number of Tier 2 RECs purchased and held by NYSERDA at the time of the sales announcement. NYSERDA notes that the Tier 2 Re-sale inventory may not reflect the total number of RECs ultimately to be purchased by NYSERDA due to

delays by Tier 2 generators invoicing and transferring Tier 2 RECs to NYSERDA. The Tier 2 REC price would be based on the net weighted-average cost of the available re-sale inventory, plus any Commission-approved administrative adder. NYSERDA states that the net weighted-average cost would be determined by the total overall costs it incurs for all selected Competitive Tier 2 projects, which is based upon the quantity of Tier 2 RECs invoiced to NYSERDA and their per REC bid price. NYSERDA would divide the total cost by the total REC inventory to arrive at the Tier 2 re-sale REC price.

Eligible Purchasers, Transferability, and Banking

NYSERDA proposes that only LSEs who serve load within New York who are required to comply with Commission regulations regarding renewable claims would be eligible to participate in the NYSERDA Tier 2 REC re-sale process. NYSERDA requests the ability to expand the pool of eligible purchasers in the future if LSEs do not provide sufficient demand during the sales process.

The Tier 2 RECs would qualify as non-Tier 1, Environmental Disclosure Program (EDP)-eligible RECs, and would have the same transferability options as other non-Tier 1, EDP-eligible RECs, as set by the NYGATS Operating Rules. The vintage year of an EDP-eligible REC determines the EDP reporting year in which it is included. Thus, the Tier 2 REC would have the same restrictive banking options as other non-Tier 1, EDP-eligible RECs, including no banking for use in a subsequent year's EDP label.

Sales Process

For the initial 2021 sale to be held in February 2022, NYSERDA would announce beforehand the following information to LSEs: (1) the sales period opening and closing date and time; (2) the total quantity of current compliance year Tier 2 RECs

available for sale; and (3) the sale price at which the Tier 2 RECs are to be offered. NYSERDA proposes to use an electronic submission form to collect bids from LSEs that desire to purchase Tier 2 RECs from NYSERDA. NYSERDA does not anticipate that all LSEs will desire to participate in this voluntary sale, so it proposes that rather than requiring all LSEs to execute a sale agreement with NYSERDA, participating LSEs would agree to the terms and conditions of the sale when a bid is submitted.

Allocation

NYSERDA proposes to not limit nor guarantee a minimum number of Tier 2 RECs to LSEs participating in the sales process, as is done with Tier 1 RECs under the Renewable Energy Standard. NYSERDA notes that the Tier 2 REC re-sale is a voluntary process, and the Tier 2 RECs are being purchased to back voluntary products. As proposed by NYSERDA, if the demand for Tier 2 RECs is below the Tier 2 NYSERDA re-sale inventory, each LSE would be allocated their requested quantity of RECs. However, if the total bid quantity is above the NYSERDA Tier 2 REC inventory, each LSE would receive a pro-rata share of Tier 2 RECs based upon their request.

Invoices and Transfers

NYSERDA proposes to manually create and distribute Tier 2 re-sale invoices via email within approximately seven business days from the end of the sales period. The LSE payment would be required within 15 days of invoicing. If the full funds have not been transferred to NYSERDA according to the payment terms, NYSERDA would reserve the right to cancel the LSE's order. NYSERDA proposes that Tier 2 REC transfers to an LSE's NYGATS account would occur after the Tier 2 REC re-sale invoice has been paid in full, with LSEs having 14 days to accept the pending transfer from NYSERDA per the NYGATS Operating Rules.

Reconciliation Process

The reconciliation process would occur after the Tier 2 compliance year ends on December 31st of each year. NYSERDA would reconcile its financial obligations to the Tier 2 contracted generators by first offsetting any Tier 2 re-sale revenue it received to determine the net LSE financial obligation. NYSERDA would reconcile the funds collected from each LSE to the net LSE financial obligations necessary to meet their obligation based on the Version 2 load data that is provided from the New York Independent System Operator, Inc. (NYISO) and recorded in NYGATS.⁵

NOTICE OF PROPOSED RULE MAKING

Pursuant to the State Administrative Procedure Act (SAPA) §202(1), a Notice of Proposed Rulemaking (Notice) was published in the State Register on May 26, 2021 [SAPA No. 15-E-0302SP46]. The time for submission of comments pursuant to the Notice expired on July 26, 2021. By Secretary's notice dated July 20, 2021, the time for submission of comments on the Implementation Plan was extended to August 9, 2021. Comments were received by the Alliance for Clean Energy New York (ACENY), Brookfield Renewables (Brookfield), Constellation NewEnergy (Constellation), and Multiple Intervenors (MI). The comments received are summarized and addressed below.

⁵ NYISO Version 2 load data is available in NYGATS approximately five months subsequent to the fiscal (calendar) year. Accordingly, final fiscal year load is typically available in mid-May for the previous fiscal year.

SUMMARY OF COMMENTS

ACENY

ACENY states that the Competitive Tier 2 Program only procures one-third of the available resources each year, which leaves a significant portion of baseline resources stranded and waiting to sell RECs to NYSERDA. ACENY argues that NYSERDA did not procure a sufficient number of RECs and is not meeting the program's goals. ACENY maintains that NYSERDA is not obligated to re-sell Tier 2 RECs and should only re-sell them if it procures 75% of the Tier 2 pool. ACENY believes that NYSERDA should allow any holder of the REC to bid and sell to NYSERDA, including a joint-venture or aggregator of Tier 2 RECs. Lastly, ACENY supports allowing a portion of a facility's RECs, rather than the entire amount, to be sold to NYSERDA.

Brookfield

Brookfield does not support NYSERDA's re-sale of Tier 2 RECs until NYSERDA executes the Competitive Tier 2 Program in a manner consistent with its stated intent, which is to provide tangible support to most of the State's renewable baseline resources. Brookfield notes that the CES Modification Order does not require NYSERDA to re-sell Tier 2 RECs it acquires, and proposes that NYSERDA should only be allowed to trigger its re-sale process once it has procured at least 50% of the identified eligible renewable baseline. Brookfield asserts that NYSERDA is not procuring enough Tier 2 RECs to make any meaningful difference in support of legacy renewable generators.

Brookfield adds that CCAs are having difficulty finding eligible RECs and notes that Staff is considering a CCA program modification that would benefit renewable resources outside the State. Should the modification be approved, Brookfield asserts that New York's renewable baseline resources

would find themselves in competition against both NYSERDA and non-New York renewable resources in the voluntary market.

Constellation

Constellation proposes that the LSEs' Tier 2 compliance rates should be posted ahead of the relevant obligation year, allowing LSEs to more accurately assess obligations and costs and offering more accurate pricing to ratepayers. Constellation also proposes that the LSE reconciliation process be more detailed on how the final Tier 2 rate will be communicated to LSEs.

MI

MI generally supports the Tier 2 re-sale plan because it would reduce compliance costs to ratepayers. MI believes that NYSERDA should be permitted to offer unsold Tier 2 RECs from prior compliance years. MI argues that the re-sale of Tier 2 RECs should not be limited to just ESCOs and CCAs and notes that corporate entities may seek to directly procure RECs to satisfy certain corporate goals. MI suggests that the Commission look at the Tier 4 REC re-sale program as a model whereby NYSERDA has the flexibility to contract and re-sell as it deems necessary. MI notes that the Commission could prioritize ESCOs and CCAs as appropriate.

LEGAL AUTHORITY

The Commission's authority derives from the New York State Public Service Law (PSL), through which numerous legislative powers are delegated to the Commission. Pursuant to PSL §5(1), the "jurisdiction, supervision, powers and duties" of the Commission extend to the "manufacture, conveying, transportation, sale or distribution of . . . electricity." PSL §5(2) requires the Commission to "encourage all persons and corporations subject to its jurisdiction to formulate and carry

out long-range programs, individually or cooperatively, for the performance of their public service responsibilities with economy, efficiency, and care for the public safety, the preservation of environmental values and the conservation of natural resources."

PSL §66(2) provides that the Commission shall "examine or investigate the methods employed by [] persons, corporations and municipalities in manufacturing, distributing and supplying . . . electricity . . . and have power to order such reasonable improvements as will best promote the public preserve the public health and protect those using such . . . electricity."

Further, PSL §65 provides the Commission with authority to ensure that "every electric corporation and every municipality shall furnish and provide such service, instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable." The Commission also has authority to prescribe the "safe, efficient and adequate property, equipment and appliances thereafter to be used, maintained and operated for the security and accommodation of the public" whenever the Commission determines that the utility's existing equipment is "unsafe, inefficient or inadequate."⁶ PSL §4(1) also expressly provides the Commission with "all powers necessary or proper to enable [the Commission] to carry out the purposes of [the PSL]" including, without limitation, a guarantee to the public of safe and adequate service at just and reasonable rates,⁷ environmental

⁶ PSL §66(5).

⁷ See International R. Co. v Public Service Com., 264 AD 506, 510 (1942).

stewardship, and the conservation of resources.⁸

DISCUSSION

The Implementation Plan sets forth a reasonable set of proposals for the re-sale of Tier 2 RECs, which may reduce LSE compliance costs associated with the Competitive Tier 2 Program, and is therefore adopted. NYSERDA's approach to the re-sale of Tier 2 RECs is in alignment with Commission guidance on appropriately supporting the sale of RECs in the voluntary market and the stated desire of CCAs and ESCOs to procure RECs to support renewable product offerings to their customers. This is in furtherance of the Commission's direction that the Tier 2 program be a complementary program to existing voluntary REC sales, and not supplant them, while providing stimulus to the voluntary market by placing downward pressure on voluntary REC prices.

Commenters had a number of suggestions aimed at improving the Tier 2 REC process, specifically related to purchaser eligibility, cost containment, and transparency. ACENY believes that NYSERDA should allow any holder of the REC to bid and sell to NYSERDA, including a joint-venture or aggregator of Tier 2 RECs. MI argues that corporate entities may seek to directly procure RECs to satisfy certain corporate goals.

While the commenters' suggestions to expand the scope of the process may be beneficial for certain interested entities, the Commission is not persuaded that such an expansion to NYSERDA's approach of allowing only LSEs to initially procure

⁸ PSL §5(2); see also Consolidated Edison Co. v Public Service Commission, 47 NY2d 94 (1979) (overturned on other grounds) (describing the broad delegation of authority to the Commission and the Legislature's unqualified recognition of the importance of environmental stewardship and resource conservation in amending the PSL to include §5).

these RECs is warranted or appropriate at this time. The three-year timeframe of the Competitive Tier 2 Program, along with the relatively limited number of Tier 2 RECs available for purchase and the voluntary nature of the program, justifies a limited approach. However, NYSERDA requests the option to expand eligibility to non-LSEs if demand is insufficient, and the Commission agrees that this approach will allow NYSERDA to appropriately broaden the eligibility of purchasers if market developments require it. NYSERDA is permitted, in its discretion and in consultation with Staff, to expand the eligibility to purchase Tier 2 RECs to non-LSEs in the event that a significant portion of the Tier 2 RECs provided for re-sale are not purchased by eligible LSEs.

Regarding cost containment, MI proposes allowing NYSERDA to offer unsold Tier 2 RECs from prior compliance years for sale. This proposal, however, is not workable under the Competitive Tier 2 Program and is thus rejected. Following each Tier 2 re-sale, the remaining unsold RECs will establish the LSE Tier 2 obligation and will be distributed among the LSEs. Thus, there will be no RECs "left over" from prior years. Additionally, given that LSEs must retire these RECs in the same year as the REC vintage in order to comply with the EDP rules, RECs from prior program years will have significantly reduced value on the voluntary market.

Constellation recommends increasing the transparency of the LSEs' Tier 2 obligation rate by posting it prior to the beginning of the program year. It argues that this would assist LSEs in assessing their upcoming obligations and costs and, accordingly, offer more accurate pricing to the CCA customers it supplies RECs to, as well as to its own green offering customers. The Commission notes that NYSERDA already provides the LSE Tier 2 obligation prior to the beginning of the program

year. In fact, for the 2021 program year, the Tier 2 rate was published 60 days prior to the first invoice being issued to LSEs. NYSERDA shall continue to provide the LSE Tier 2 obligation prior to the beginning of the program year.

Other commenters question the need for the Competitive Tier 2 Program in the first instance, and express dissatisfaction with the results of the first solicitation. Balanced with its longstanding emphasis on the careful stewardship of ratepayer funds, the Commission has been focused on baseline resources for years and the CES Modification Order explains in detail the need and justification for the program. Regarding the first solicitation, ACENY and Brookfield argue that NYSERDA did not procure a sufficient number of RECs and that NYSERDA should not re-sell RECs until the number of purchased RECs exceeds a defined percentage of those available. While the first Competitive Tier 2 solicitation did not procure the expected number of RECs, NYSERDA and the Commission have gained specific knowledge of the voluntary market and expect more robust solicitations in the future, and therefore this modification is rejected.

CONCLUSION

Accordingly, NYSERDA's Implementation Plan is approved. The re-sale process adopted here for RECs procured as part of the Competitive Tier 2 Program will not only keep downward pressure on Tier 2 REC prices for entities seeking to purchase EDP compliant RECs in support of renewable energy offerings to customers, but will also reduce the compliance costs to LSE, and ultimately ratepayers. NYSERDA may commence with the re-sale of Tier 2 RECs in February 2022, as proposed in the Implementation Plan.

The Commission orders:

1. The Tier 2 Re-sale Implementation Plan Proposal filed by the New York State Energy Research and Development Authority is approved, consistent with the discussion in the body of this Order.

2. The New York State Energy Research and Development Authority shall, within 30 days of the effective date of this Order, file a final Tier 2 Re-sale Implementation Plan consistent with the discussion in the body of this Order.

3. In the Secretary's sole discretion, the deadlines set forth in this Order may be extended. Any request for an extension must be in writing, must include a justification for the extension, and must be filed at least three days prior to the affected deadline.

4. This proceeding is continued.

By the Commission,

(SIGNED)

MICHELLE L. PHILLIPS
Secretary