

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on March 16, 2022

COMMISSIONERS PRESENT:

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

CASE 15-E-0302 - Proceeding on Motion of the Commission to
Implement a Large-Scale Renewable Program and a
Clean Energy Standard.

ORDER MODIFYING CLEAN ENERGY STANDARD LOAD SERVING ENTITY
OBLIGATIONS AND ESTABLISHING THE 2024 OBLIGATION

(Issued and Effective March 16, 2022)

BY THE COMMISSION:

INTRODUCTION

In the Clean Energy Standard (CES) Framework Order, the Public Service Commission (Commission) established a Tier 1 program, as a component of the Renewable Energy Standard (RES), which requires each Load Serving Entity (LSE) to procure Renewable Energy Certificates (RECs), expressed as a percentage of its load, or to make Alternative Compliance Payments (ACPs).¹ The CES Framework order also directed Department of Public Service Staff (Staff) to perform an annual "divergence test" to

¹ Case 15-E-0302, et al., Order Adopting a Clean Energy Standard (issued August 1, 2016) (CES Framework Order), p. 117.

correct for significant disparities between the demand and supply of Tier 1 RECs, which is largely a product of the New York State Energy Research and Development Authority's (NYSERDA) procurements from eligible facilities. The divergence test is intended to safeguard against an oversupply or undersupply of Tier 1 RECs.

On November 29, 2021, NYSERDA and Staff submitted the annual CES divergence test (2021 Divergence Test), which includes an analysis of whether there is an oversupply or undersupply of Tier 1 RECs, along with proposed modifications to the LSE obligations. In this Order, the Commission adopts the proposals contained in the 2021 Divergence Test, with modifications. The Commission adopts a modification to the LSE obligation for 2022, as NYSERDA suggested in its comments, to lower the currently established LSE obligation from 5.61% to 3.25%. This will better reflect the anticipated shortage of Tier 1 RECs during the 2022 RES compliance year resulting from pandemic-related siting and interconnection delays, supply chain shortfalls, and labor shortages. As proposed in the 2021 Divergence Test, the 2023 LSE obligation will be reduced from 8.2% to 6.16%, while the 2024 obligation will be set at 6.45%. These levels will better reflect the projected availability of Tier 1 RECs and will mitigate ratepayer impacts resulting from the use of more expensive ACPs.

BACKGROUND

The Tier 1 program operates through a demand obligation on each LSE, which must either procure RECs produced by eligible Tier 1 facilities to serve a specified percentage of its load or make up any shortfall in compliance obligations by making ACPs. The annual LSE obligation is determined based on projections of the sum of: (1) the expected available volume of

Tier 1-eligible RECs to be purchased through NYSERDA contracts; and (2) the expected Tier 1-eligible RECs conveyed to investor-owned utilities (IOUs) from projects compensated under the Value of Distributed Energy Resources (VDER) Value Stack.² The Commission's CES Modification Order set LSE obligation percentages through 2023.³

The divergence test is required to evaluate the two previous RES compliance years, and consists of three considerations: (1) whether current Tier 1 REC supply and demand conditions trigger concern; (2) whether a course-correction is needed; and (3) the establishment of a course-correcting action if mitigation appears necessary.⁴ If supply and demand are on diverging paths and these conditions are unlikely to self-correct given forecasted market conditions, mitigation is warranted. A potentially problematic undersupply exists if the volume of ACPs made by LSEs: (1) exceeds ten percent of the total Tier 1 obligation in the first compliance year; and (2) is at least 20 percent of the total Tier 1 obligation in the second compliance year. The identification of a potentially problematic oversupply is triggered if banking of

² Case 15-E-0302, Final Phase 3 Implementation Plan (filed January 11, 2019). Eligible facilities that receive compensation for the environmental component of the Value Stack are required to assign the RECs generated by such facilities to the interconnecting utility. The utility may then use such RECs to satisfy their Tier 1 obligation. See also, Case 15-E-0751 et al., In the Matter of the Value of Distributed Energy Resources, Order on Net Energy Metering Transition, Phase One of Value of Distributed Energy Resources, and Related Matters (issued March 9, 2017).

³ Case 15-E-0302, Order Adopting Modifications to the Clean Energy Standard (issued October 15, 2020) (CES Modification Order), p. 40.

⁴ Case 15-E-0302, Order Approving Phase 2 Implementation Plan (issued November 17, 2017) (Phase 2 Implementation Order), p. 5.

Tier 1 RECs by NYSERDA: (1) exceeds ten percent of the total Tier 1 obligation in the first compliance year; and (2) is at least 20 percent of the total Tier 1 obligation in the second compliance year.

SUMMARY OF 2021 DIVERGENCE TEST

The 2021 Divergence Test determined that a Tier 1 REC undersupply condition exists, which resulted in ACP payments constituting 32% and 60% of Tier 1 obligations for 2019 and 2020, respectively. These percentages surpassed the limits set by divergence test criteria, and, consequently, Staff and NYSERDA conducted a forward-looking evaluation to assess whether any course-correction measures were advisable. This evaluation determined that the imbalances in 2019 and 2020 are sufficiently problematic to require appropriate mitigation measures. Unlike in the 2019 Divergence Test where the RES obligation was relatively new and the program was just ramping up,⁵ Staff and NYSERDA determined that two additional compliance years of high ACP percentages constitute a persistent REC undersupply situation and therefore warrant recommended mitigation measures to protect ratepayers from excessive reliance on more expensive ACPs, which are priced at the forecasted REC price for that compliance year, plus 10%.⁶

Currently, LSEs may fulfill their obligation using three different methods, including: (1) purchasing RECs from NYSERDA; (2) self-supplying RECs by purchasing qualified RECs from other sources; or (3) making ACPs to NYSERDA.⁷ According to

⁵ Case 15-E-0302, 2019 Divergence Test and Target Setting Filing (filed September 30, 2019).

⁶ Case 15-E-0302, Order Approving Phase 4 Implementation Plan (issued August 13, 2020).

⁷ CES Framework Order, p. 16.

the 2021 Divergence Test, delay in the commercial operation of Tier 1 contracted facilities has lowered REC quantities available under option (1), and the self-supply option is either limited or unavailable to the majority of LSEs. The resulting reliance on ACPs thus places an additional burden on ratepayers. All other CES programs except the Maintenance Tier determine LSE requirements based on load share, with no resort to market-based purchases or ACPs.

Based on this analysis, the 2021 Divergence Test recommended that the previously approved LSE obligations for 2021 and 2022 remain the same at 2.04% and 5.61%, respectively. It also recommended that the previously set 2023 obligation of 8.2% be adjusted to 6.16%, and that the 2024 obligation be set at 6.45% for 2024. The 2021 Divergence Test noted that these LSE obligation percentages were developed consistent with Commission directives, and were derived based on: (1) the sum of Tier 1 RECs expected to be generated in each year from projects under contract under Renewable Portfolio Standard (RPS) Main Tier solicitations conducted through 2016, plus expected Tier 1 RECs procured through RES solicitations by NYSERDA as they become operational, plus those Tier 1 RECs under VDER; (2) divided by the forecasted aggregate statewide Commission jurisdictional load.⁸

The 2021 Divergence Test also noted that Staff and NYSERDA are interested in exploring a different approach to the Tier 1 RES method of allocating costs of the program to LSEs.

⁸ Forecasted jurisdictional load is based on the load forecast developed by the New York Independent System Operator, Inc. (NYISO) in its Load and Capacity Data Report, minus a projection of additional energy efficiency (beyond those contemplated by the NYISO in its forecast), and minus Long Island Power Authority and New York Power Authority allocated load.

Staff and NYSERDA are currently evaluating whether it would be in the State's interest to move the Tier 1 program from the current market-based collection of funds from LSEs as a cost recovery method to one based on LSE load share similar to other CES tiers. Staff and NYSERDA plan to file a more thorough proposal for consideration if such a modification presents potential benefits.

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 December 29, 2021 [SAPA No. 15-E-0302SP53]. The time for submission of comments pursuant to the Notice expired on February 28, 2022. Comments were submitted by NYSERDA, the Joint Utilities,⁹ Multiple Intervenors (MI), and the New York Municipal Power Agency (NYMPA), and are addressed below.

COMMENTS

NYSERDA

NYSERDA explains that a significant shortage of Tier 1 RECs during the 2022 RES compliance year is expected, based upon further review and feedback from Tier 1 generation developers with projects under contract with NYSERDA. NYSERDA indicates that, in addition to siting and interconnection delays, supply chain shortfalls as well as labor shortages due to the COVID-19 pandemic are expected to delay the construction, interconnection, and commissioning of Tier 1 generation projects

⁹ The Joint Utilities include Consolidated Edison Company of New York, Inc., Orange and Rockland Utilities, Inc., New York State Electric & Gas Corporation, Rochester Gas and Electric Corporation, Central Hudson Gas & Electric Corporation, and Niagara Mohawk Power Corporation d/b/a National Grid.

in 2022. Based on updated forecasts, a modified LSE obligation of 3.25% is suggested for the 2022 RES compliance year, which represents a reduction from the already established 5.61%.

Joint Utilities

The Joint Utilities assert that there has been a significant mismatch between the quantity of RECs needed for compliance purposes and the quantity of RECs available for purchase, and therefore request that the Commission make certain changes to the program and allow for utility-owned renewable generation to increase the supply of RECs. The Joint Utilities request a re-examination of the VDER REC trading restrictions among LSEs, noting that utility Tier 1 RECs from VDER projects in their service territory that exceed its annual obligation cannot offset a statewide shortage and are limited to a degree from being used in subsequent years.

The Joint Utilities urge the Commission to direct NYSERDA to reduce the proposed increase in the 2022 ACP price, noting that it is a material increase from previous ACPs and is not warranted since only a limited number of Fixed to Index REC contract conversions will occur in 2022. The Joint Utilities also note that electricity prices are projected to remain high for at least most of 2022, which should result in reduced REC prices. Further, the Joint Utilities recommend that the Commission direct NYSERDA to put all ACP proceeds to productive use for customers, including to support clean energy programs. The Joint Utilities support a change from the existing market-based compliance method to a load share approach for Tier 1 REC obligations, but note that many implementation issues would need to be resolved first.

MI

MI argues that there have not been enough RECs available for LSEs to satisfy the annual Tier 1 obligations

imposed by the Commission and therefore the recommendation to lower the LSE obligations, including for 2022, should be adopted. MI suggests that the Commission consider additional measures that would reduce Tier 1 compliance costs for customers. MI asserts that the 2022 ACP price is much larger than the 10 percent premium required by the Commission, and therefore customers are paying a premium for RECs that are not even available for purchase in the marketplace.

NYMPA

NYMPA agrees that there has been an undersupply of RECs available in the marketplace and a significant shortfall is expected to continue. NYMPA believes there is no justification for charging LSEs any amount above what NYSERDA spends to purchase RECs from developers since ACPs produce no tangible benefits and ratepayers are merely being penalized for the shortage of RECs. NYMPA recommends that LSE obligations should be adjusted to the number of RECs actually available for sale. NYMPA recommends that the Commission adopt the recommendations in the divergence test, as amended by NYSERDA's comments.

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 carryout 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 well as promote the public interest, preserve the public health and protect those using such gas or electricity. . ."

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,¹⁰ environmental stewardship, and the conservation of resources.¹¹ 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."¹² In addition to the PSL, the New

¹⁰ See International R. Co. v. Public Service Com., 264 AD 506, 510 (1942).

¹¹ PSL §5(2); see also, Consolidated Edison Co. v. Public Service Commission, 47 N.Y.2d 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).

¹² PSL §66(5).

York State Energy Law §6-104(5)(b) requires that “[a]ny energy-related action or decision of a state agency, board, commission or authority shall be reasonably consistent with the forecasts and the policies and long-range energy planning objectives and strategies contained in the plan, including its most recent update.”

DISCUSSION AND CONCLUSION

After the 2021 Divergence Test was filed, NYSERDA continued to analyze Tier 1 project development. Based on the most current feedback it received from Tier 1 generation developers under contract with NYSERDA, a change to the 2022 LSE obligation is recommended. This change is warranted because NYSERDA anticipates a more significant shortage of Tier 1 RECs during the 2022 compliance year, which would, in turn, result in LSEs purchasing a sizeable number of ACPs. NYSERDA indicated in their comments that documents shared with it by a developer confirm the complete suspension of operations by an overseas solar panel manufacturer due to the global COVID-19 pandemic. That developer was told that its 2021 equipment order would not be timely honored. Delays of this sort will reduce the number of Tier 1 RECs minted during 2022 and will likely result in a significant number of ACPs being purchased by LSEs for compliance purposes. Therefore, NYSERDA, in consultation with Staff, recommends that the 2022 LSE obligation be lowered from 5.61% to 3.25%. The other commenters are also in agreement that such a change should be adopted.

The Commission recognizes that updating the 2022 LSE obligation percentage at this point in time is not optimal, but is confident it will not materially disadvantage any LSEs in terms of competitiveness or with RES compliance. Most importantly, it will significantly reduce the number of ACPs

that will have to be collected from ratepayers. The approach for calculating these obligations utilized by NYSERDA and Staff in the 2021 Divergence Test is consistent with the CES Framework Order, the November 2016 Clarification Order,¹³ and the CES Modification Order, and is therefore adopted.

The Commission also agrees that it is appropriate to adjust the current 2023 LSE obligation from 8.2% to 6.16% and that the 2024 obligation be set at 6.45% for 2024, to reflect the expected level of available Tier 1 RECs in the short term. Revision of the current LSE obligations is appropriate in light of present circumstances, including ongoing siting and interconnection delays, supply chain shortfalls and labor shortages due to the COVID-19 pandemic. The comments filed support this adjustment. The Commission still anticipates that the actions taken pursuant to the Accelerated Renewable Energy Growth and Community Benefit Act (Accelerated Renewables Act) will significantly alleviate permitting delays, but other variables such as supply-chain and staffing challenges are still delaying expected project completion timelines.

The Table below provides the LSE Tier 1 obligations for the next three years.

Year	LSE Obligation
2022	3.25%
2023	6.16%
2024	6.45%

The Commission is also supportive of NYSERDA and Staff exploring a different approach to the Tier 1 RES method of allocating costs of the program to LSEs. Staff and NYSERDA will

¹³ Case 15-E-0302, Order Providing Clarification (issued November 17, 2016) (November 2016 Clarification Order).

seek informal feedback from stakeholders to determine whether it would be advisable to move the cost recovery approach under the Tier 1 program from the current market-based collection of funds from LSEs to one based on LSE's load share, as suggested by the Joint Utilities. Both NYMPA and MI also support changes to the Tier 1 compliance method. The Commission emphasizes that market activity related to Tier 1 RECs and any transitional effects must be sufficiently evaluated before any change to the current practice is considered. Outreach by Staff and NYSERDA will be important in evaluating many of these issues. The Commission expects Staff and NYSERDA to file a more thorough proposal for such a modification if compelling benefits to such an approach are identified.

With respect to the cost of ACPs, NYSERDA should closely monitor the level of payments received and propose a method for crediting ratepayers where warranted. As the Joint Utilities, MI, and NYMPA note, the 2022 ACP price has increased significantly and therefore suggest that the price should be reduced to avoid adverse ratepayer impacts. While the 2021 Divergence Test did not address the 2022 ACP, which was filed by NYSERDA on January 31, 2022,¹⁴ the Commission notes that 2022 is the first year that Indexed RECs are included in the determination of the ACP price, and the new methodology for arriving at an effective ACP price involves the consideration and analysis of multiple factors, including future wholesale market prices, as well as potential REC price volatility and its

¹⁴ Case 15-E-0302, NYSERDA Filing Regarding Renewable Energy Standard 2022 Alternative Compliance Payment (ACP) Price (filed January 31, 2022).

potential effects on cashflow, ratepayers, and the Tier 1 program itself.¹⁵

The Joint Utilities recommend that the Commission direct NYSERDA to put all ACP proceeds to productive use for customers, including to support clean energy programs. As the Commission already determined in the Phase 2 Implementation Order, it is most prudent to allocate the ACP funds toward offsetting the cost of achieving the RES goals. The Commission also directed NYSERDA to report, on an annual basis, RES program revenues (including but not limited to net proceeds from the sale of RECs, ACP payments received, and interest earnings) and program expenses, to identify any surplus or shortfall for the year, and on a cumulative basis. If any cumulative surplus is more than 25% of NYSERDA's contractual Tier 1 REC payment obligation to generators for the current year, as part of its annual filing, NYSERDA shall propose a use for the excess portion (i.e., amount above 25%) that is in the ratepayers' interest. For example, NYSERDA may propose to use these surplus funds to reduce the REC price for subsequent quarterly REC sales.¹⁶ The Commission finds that this requirement to address excess collections will ensure that ACP payments will not lead to adverse ratepayer impacts.

The Commission orders:

1. The proposed modifications to the 2022 and 2023 Clean Energy Standard Load Serving Entity obligations, and the proposed establishment of the 2024 obligation are adopted, consistent with the discussion in the body of this Order.

¹⁵ Case 15-E-0302, NYSERDA Request for Extension (filed December 28, 2021).

¹⁶ Phase 2 Implementation Order, pp. 19-20.

2. This proceeding is continued.

By the Commission,

(SIGNED)

MICHELLE L. PHILLIPS
Secretary