

**STATE OF CONNECTICUT
DEPARTMENT OF PUBLIC UTILITY CONTROL**

DPUC Promulgation of Regulations : Docket No. 08-09-01
for Banking Renewable Energy Credits : March 10, 2009

COMMENTS OF RETAIL ENERGY SUPPLY ASSOCIATION

The Department of Public Utility Control ("Department") instituted this rulemaking proceeding to promulgate regulations that would permit Connecticut's load serving entities ("LSEs") to bank renewable energy certificates ("RECs") in order to satisfy their future Renewable Portfolio Standard ("RPS") obligations. On February 11, 2009, the Department requested that the Office of Policy and Management comment on the proposed regulations by March 13, 2009 so that they can be published promptly in the Connecticut Law Journal.¹ The Retail Energy Supply Association ("RESA") respectfully requests that the Department revise the proposed regulations before publication to eliminate the requirement that an LSE must have historically satisfied its RPS obligations exclusively through the purchase of RECs to be eligible to participate in the Connecticut REC banking program. This restriction is not present in the laws of other New England states and is contrary to the stated goals of the proposed regulations.

RESA is a trade association that represents the interests of its members in regulatory proceedings throughout the country. RESA's members include providers of competitive supply products to electricity and gas consumers in the five New England states that have restructured their electric markets.² The RESA companies sell

¹ Transmittal Letter from Kimberley J. Santopietro to Sherrill Jacobson (Feb. 11, 2009), Docket No. 08-09-01.

² RESA's members include Commerce Energy, Inc; Consolidated Edison Solutions, Inc; Direct Energy Services, LLC; Gexa Energy; Hess Corporation; Integrys Energy Services, Inc.; Liberty Power Corp.; Reliant Energy Retail Services, LLC; Sempra Energy Solutions LLC; SUEZ Energy Resources NA, Inc. and US Energy Savings Corp. The comments

thousands of megawatts of electricity to Connecticut consumers each year and have a strong interest in the proposed regulations as REC banking, if structured properly, would afford them greater flexibility to contract for RECs in an orderly and cost-effective fashion.

The proposed regulations allow the banking of RECs for two years, subject to the following restrictions: (1) an electric distribution company (“EDC”) or electric supplier may not bank RECs if it has ever made an Alternative Compliance Payment (“ACP”) in a prior compliance year; (2) a qualifying EDC or supplier must have excess RECs beyond its compliance needs; and (3) a qualifying EDC or electric supplier may not use banked RECs to satisfy more than 30% of its RPS obligation in any given year. The Statement of Purpose for the proposed regulations maintains that Massachusetts, Rhode Island and Maine all have adopted the same restrictions.³ RESA concurs with that statement to the extent that it applies to the second and third restrictions summarized above.

However, none of these states have adopted the first restriction to prohibit an LSE from banking RECs if they have ever made an ACP. At most, they bar REC banking by LSEs that have avoided their renewable energy obligations altogether by failing to either procure RECs or pay the ACP. Thus, the proposed regulations do not achieve their stated purpose of establishing “uniform REC provisions throughout New England, [which will] promote investment in renewable energy generation by ameliorating REC price fluctuations.”⁴

Even if achieving uniformity across state lines was not paramount, the proposed regulations will fail to fulfill their purpose in Connecticut because The United

expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of RESA.

³ Statement of Purpose, Conn. Agencies Regs. § 16-245a-1(e), as proposed (2009).

⁴ *Id.*

Illuminating Company (“UI”), The Connecticut Light and Power Company (“CL&P”), and several electric suppliers doing business in the state all have made ACPs in the past. This number likely will grow in the future in light of the anticipated shortage in renewable resources available to meet the region-wide Class I standards and other factors discussed herein. Thus, unless the ACP restriction is removed from the proposed regulations, they will do little to stabilize REC prices and foster renewable energy development in Connecticut or the region at large.

Finally, there is no good policy reason to penalize LSEs that have satisfied their RPS obligations by making ACPs from time to time. The ACP is a perfectly acceptable and legal compliance mechanism that is both useful and necessary during periods of inadequate REC supply or high REC prices. Unlike the proposed regulations, the Connecticut General Statutes properly treat the ACP as a legitimate means for LSEs to discharge their renewable energy obligations and do not characterize such payment as a penalty. RESA notes, furthermore, that prohibiting REC banking for LSEs that have paid ACPs prior to 2009 when they had no knowledge that such action would disadvantage them later departs from fundamental principles of notice that traditionally underlie the Department’s rulemaking proceedings.

For all of these reasons, the Department should modify the restriction to reach only those LSEs that have failed to satisfy their renewable obligations through purchasing RECs or paying the ACP, consistent with the laws of other New England states.

I. MAINE, MASSACHUSETTS AND RHODE ISLAND DO NOT PROHIBIT SUPPLIERS FROM BANKING RECS BECAUSE THEY HAVE PAID THE ACP.

As discussed above, the Statement of Purpose that accompanies the proposed regulations posits that the new rules “would establish the same banking provisions, including the same restrictions, as used in other New England states,” namely, Maine,

Massachusetts and Rhode Island.⁵ A close reading of the REC banking laws of these states reveals that Maine's regulations are silent on the issue of compliance, while the eligibility criteria in the Massachusetts and Rhode Island regulations simply require an LSE to have complied with the RPS, either through procuring RECs or by paying the ACP for each prior compliance year. A survey of these laws follows.

A. Maine

Maine's REC banking regulations are embodied in paragraph 7(B) of Section 65-407-311 of the Code of Maine Rules, which states in its entirety:

A competitive electricity provider may satisfy up to one-third of the portfolio requirements of this Chapter in any year through eligible GIS certificates for service in the ISO-NE control area and ownership or entitlement to energy from eligible resources or new resources for service in the NMISA area associated with electricity production in the prior year. GIS certificates or energy used for compliance pursuant to this provision must be in excess of the prior year requirements and have not been previously used to satisfy a portfolio requirement in another jurisdiction.

Thus, Maine does not tie its REC banking eligibility to historical RPS compliance in any fashion.

B. Massachusetts

The Commonwealth's RPS appears in Chapter 14.00 of Title 225 of the Code of Massachusetts Regulations ("225 CMR 14.00"). The REC banking provisions are encompassed in 225 CMR 14.08 and state in pertinent part:

A Retail Electricity Supplier may use New Renewable Generation Attributes produced in one Compliance Year for compliance in either or both of the two subsequent Compliance Years, subject to the limitations in 225 CMR 14.08(2) and provided *that the Retail Electricity Supplier is in compliance with 225 CMR 14.00 for all previous Compliance Years.* (Emphasis added)

225 CMR 14.08 provides suppliers with two options to comply with the RPS obligations set forth in 225 CMR 14.07. They can either procure RECs and report such purchases

⁵ *Id.*

to the Department of Public Utilities pursuant to 225 CMR 14.09 or pay the ACP as permitted by 225 CMR 14.08(3). This latter provision states:

A Retail Electric Supplier may discharge its obligations under 225 CMR 14.07 (in whole or in part) for any Compliance Year by making an Alternative Compliance Payment (ACP) to the Massachusetts Technology Corporation, established by M.G.L. c. 40J.

Under Massachusetts law, therefore, making the ACP is a form of compliance with the RPS that does not disqualify an electric supplier from banking RECs. Only those suppliers that fail to either purchase RECs or make the ACP are barred from participating in the Commonwealth's REC banking program.

C. Rhode Island

Rhode Island's Renewable Energy Standard ("RES") regulations are included in Section 90-060-015 of the Code of Rhode Island Rules ("CRIR 90-060-015") and are similar to the Massachusetts regulations discussed above. With regard to REC banking, Section 7.8 of CRIR 90-060-015 provides in pertinent part:

For meeting the required percentage from New Renewable Energy Resources in any Compliance Year, an Obligated Entity may use NEPOOL GIS Certificates associated with production during one Compliance Year for compliance in either or both of the two subsequent Compliance Years, subject to the limitations set forth herein and *provided that the Obligated Entity is in compliance with the Renewable Energy Standard for all previous Compliance Years.* (Emphasis added).

The RES is specified in Section 4.0 of CRIR 90-060-015, while Section 7.0 of that regulation governs demonstration of compliance. Like Massachusetts, Sections 7.2 and 7.3, respectively, allow suppliers to either procure REC certificates or make an ACP to comply with their RES obligations. With regard to the APS, the regulations state:

In lieu of providing NEPOOL GIS Certificates, an Obligated Entity may also discharge all or any portion of its compliance obligations by making an Alternative Compliance Payment to the Renewable Energy Development Fund ("REDF").⁶

⁶ 90-060-015 R.I. Code R., at § 7.3.

In summary, Rhode Island, like Massachusetts, views payment of the ACP as a permissible means to comply with the state's renewable standards and does not prohibit a supplier who has paid the ACP in a prior compliance year from banking RECs.

D. Connecticut's RPS Statutes

RESA recognizes that the Connecticut General Statutes as they pertain to the state's RPS are structured differently from the laws of Maine, Massachusetts and Rhode Island. In, particular, Connecticut limits compliance with the RPS to REC purchases and considers the ACP to be an alternative payment in lieu of compliance. With that said, a review of the pertinent statutes makes it clear that payment of the ACP is not a penalty under Connecticut law, nor should it be treated as such in the proposed regulations.

Connecticut's RPS is set forth in Conn. Gen. Stat. § 16-245a(a)(1). Subsection (b) thereof states that "[a]n electric supplier or electric distribution company may satisfy the requirements of this section (1) by purchasing certificates issued by the New England Power Pool Generation Information System" In addition, Conn. Gen. Stat. 16-245 (g)(11) requires suppliers to comply with the RPS, as a condition of continued licensure, while Conn. Gen. Stat. § 16-245(k) addresses supplier sanctions in the broader sense and the ACP. The latter states:

Any licensee who fails to comply with a license condition or who violates any provision of this section, except for the renewable portfolio standards contained in subsection (g) of this section, shall be subject to civil penalties by the Department of Public Utility Control in accordance with section 16-41, or the suspension or revocation of such license or a prohibition on accepting new customers [T]he Department shall require a payment by a licensee that fails to comply with the renewable portfolio standards in accordance with subdivision (4) of subsection (g) of this section in the amount of five and one-half cents per kilowatt hour. The department shall allocate such payment to the Renewable Energy Investment Fund for the development of Class I renewable energy sources. (Emphasis added)

This passage illuminates the intent of the Legislature with regard to the payment of the ACP. It simply provides suppliers with an alternate means to discharge their renewable

energy obligations in lieu of complying with the RPS, which, in Connecticut, is limited to purchasing RECs. A supplier is not subject to any civil penalties or sanctions for choosing this option. By contrast, the proposed regulations treat the payment of the ACP as an act to be punished, which finds no support in the statutory scheme discussed above.

II. THE ACP RESTRICTION WILL PREVENT THE STATE FROM ACHIEVING THE BENEFITS OF REC BANKING AND FAILS TO RECOGNIZE THE REALITIES OF THE REC MARKETPLACE.

RESA performed a cursory review of RPS compliance reports that were filed with the Department for years 2004 through 2007. UI, CL&P and one electric supplier all paid the ACP for the 2006 compliance year,⁷ as did three additional electric suppliers for the 2007 compliance year.⁸ Although the compliance results for 2008 have not yet been reported, it is possible that additional electric suppliers will have made an ACP for that year given the continued growth in Connecticut's retail electricity market and the limited availability of Class I RECs.

RESA further notes that the 2009 Integrated Resource Plan prepared by The Brattle Group on behalf of CL&P and UI (the "IRP") continues to express substantial uncertainty as to whether there will be sufficient renewable resources developed to meet the region-wide demand for Class I renewables over the longer term.⁹ The IRP also observes that the ACPs in most New England states escalate annually and can eventually exceed the Connecticut ACP by 50% or more because the latter is fixed by

⁷ See DPUC Decision (April 2, 2008), Table 1, Docket No. 07-09-14, DPUC Investigation Into Renewable Portfolio Standards Compliance for 2006.

⁸ See Responses to Interrogatory EL-4 in Docket No. 08-09-15 that were filed by Integryx and Suez, and October 15, 2008 Letter from Glacial Energy to DPUC accompanying Glacial's 2007 RPS Report.

⁹ Integrated Resource Plan for Connecticut (Jan. 1, 2009), Prepared by The Brattle Group on behalf of CL&P and UI (hereinafter the "2009 IRP"), p. ES-2.

statute.¹⁰ Thus, there is a potential for market REC prices to far exceed Connecticut's ACP, thereby making the ACP compliance mechanism a preferred choice. Although the 2010 IRP will recommend corrective actions to mitigate these conditions, the fact remains that the Class I REC supply and REC pricing is highly uncertain, suggesting that ACPs may be a far more common means of compliance in the future.

The Statement of Purpose of the proposed regulations recognizes that banking can stabilize REC prices and foster renewable energy development. That is because banking facilitates bilateral contracting, which smoothes out the volatility of REC prices when the market supply is overabundant or deficient. A stable price, in turn, promotes renewable energy development as it provides a more predictable revenue stream to support the project. The ACP restriction contained in the proposed regulations will prevent Connecticut and the region from realizing these benefits in any substantial way because it excludes CL&P, UI and several electric suppliers from the state's REC banking rules and likely will bar even more suppliers in the future.

Finally, the ACP restriction fails to recognize the realities of the retail electricity marketplace. As discussed above, suppliers are sometimes forced to make the ACP through no fault of their own because there is an insufficient supply of RECs in the market or the REC prices are abnormally high. Suppliers should not be penalized for responding to these market conditions. The ACP restriction is particularly harsh with respect to suppliers who made an ACP before the regulations were promulgated because they had no notice that future adverse consequences would flow from that payment. This approach runs counter to the traditional notions of fairness, including ample notice, that have long characterized the Department's rulemaking proceedings.

¹⁰ 2009 IRP, p. 3-20.

III. THE DEPARTMENT SHOULD REVISE THE PROPOSED REGULATIONS TO ELIMINATE THE ACP RESTRICTION.

For all of the reasons discussed above, the ACP restriction contained in the proposed regulations is not supported by any sound legal or policy basis and, consequently, it should be eliminated. RESA recognizes that it is reasonable to exclude from the REC banking provisions LSEs that have failed to either procure RECs or make the ACP as Massachusetts and Rhode Island have done. RESA therefore respectfully requests that the restrictions embodied in the proposed regulations be modified to achieve substantive uniformity with these states and offers specific language to achieve that objective on Exhibit A attached hereto.

Conclusion

RESA hopes that the Department finds these comments helpful and looks forward to reviewing a modified version of the proposed regulations in the Connecticut Law Journal.

Respectfully submitted,

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