

ROBINSON & COLE_{LLP}

JOEY LEE MIRANDA

280 Trumbull Street
Hartford, CT 06103-3597
Main (860) 275-8200
Fax (860) 275-8299
jmiranda@rc.com
Direct (860) 275-8227

Also admitted in District of
Columbia and Massachusetts

Via Electronic Mail (DOER.SREC@state.ma.us)

March 25, 2013

Michael Judge
Department of Energy Resources
100 Cambridge Street, Suite 1020
Boston, MA 02114

**Re: 225 CMR 14 - Renewable Energy Portfolio Standard -
Class I - Proposed Amendments**

Dear Mr. Judge:

Enclosed are the Comments of Retail Energy Supply Association in connection with the above-referenced proceeding.

Please feel free to contact me if you have any questions or require additional information. Thank you.

Sincerely,



Joey Lee Miranda

Enclosure

Law Offices

BOSTON

PROVIDENCE

HARTFORD

NEW LONDON

STAMFORD

WHITE PLAINS

NEW YORK CITY

ALBANY

SARASOTA

www.rc.com

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF ENERGY RESOURCES

225 CMR 14 - RENEWABLE ENERGY
PORTFOLIO STANDARD - CLASS I -
PROPOSED AMENDMENTS

:
:
: March 25, 2013
:
:

**COMMENTS OF
RETAIL ENERGY SUPPLY ASSOCIATION**

The Retail Energy Supply Association (“RESA”)¹ hereby submits its comments in response to the Department of Energy Resources’ (“Department”) Notice of Public Comment and Hearing (“Notice”) regarding proposed amendments to the Class I Renewable Portfolio Standard (“Class I RPS”). RESA appreciates the opportunity to comment on this important matter.

INTRODUCTION

RESA is a non-profit organization and trade association that represents the interests of its members in regulatory proceedings in the Mid-Atlantic, Great Lakes, New York and New England regions. RESA members are active participants in the retail competitive markets for electricity, including the Massachusetts retail electric market. Several RESA member companies are licensed by the Department of Public Utilities to serve residential, commercial and industrial customers in Massachusetts and are presently providing electricity service to customers in the

¹ RESA’s members include: Champion Energy Services, LLC; ConEdison *Solutions*; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; GDF SUEZ Energy Resources NA, Inc.; Hess Corporation; Integrys Energy Services, Inc.; Just Energy; Liberty Power; MC Squared Energy Services, LLC; Mint Energy, LLC; NextEra Energy Services; Noble Americas Energy Solutions LLC; NRG, Inc.; PPL EnergyPlus, LLC; Stream Energy; TransCanada Power Marketing Ltd. and TriEagle Energy, L.P.. The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of RESA.

State. As such, RESA and its members have an interest in ensuring that proposed changes to the Class I RPS do not have an adverse effect on RESA members, their customers or the continued success of the retail electric market in Massachusetts.

BACKGROUND

Pursuant to the Green Communities Act, Retail Electricity Suppliers² must provide a specified percentage of electricity generation from renewable energy sources, including solar photovoltaic. In accordance with this requirement, the Department issued final regulations in June 2010 that, among other things, specified appropriate technologies, the minimum standard, and an Alternative Compliance Payment (“ACP”) for the RPS Class I Solar Carve-Out Program (“Program”).

Pursuant to the Department’s existing regulations, the Solar Carve-Out Minimum Standard (“Minimum Standard”) is currently calculated as follows:³

$$\begin{aligned} \text{Total Compliance Obligation}_{CY} = & \text{Total Compliance Obligation}_{CY-1} + \\ & [\text{Total SRECs Generated (projected)}_{CY-1} - \text{SRECs Generated (actual)}_{CY-2}] \\ & \times 1.3 - \text{ACP Volume}_{CY-2} + \text{Banked Volume}_{CY-2} + \text{Auction Volume}_{CY-2} \end{aligned}$$

The Minimum Standard is announced by August 30 of the preceding Compliance Year.⁴

The proposed amendments to the Class I RPS regulations (“Proposed Amendments”) would change the Minimum Standard formula to remove the term that subtracts the ACP volume

² Capitalized terms used but not defined herein have the meaning provided in 225 CMR 14.02.

³ 225 CMR 14.07(2)(d).

⁴ 225 CMR 14.07(2)(a).

from the Compliance Year two years prior (i.e., ACP Volume_{CY-2}) and apply this change beginning in Compliance Year 2013.⁵

However, as discussed more fully below, a change to the Minimum Standard is unwarranted and will have a negative effect on customers. Moreover, to the extent any change in the Minimum Standard is made, it should be applied prospectively. Accordingly, RESA urges the Department to forego making any changes to the Minimum Standard and, to the extent such changes are made, to ensure that those changes only apply to contracts entered into or extended after the Proposed Amendments are ultimately promulgated.

I. NO CHANGE TO THE MINIMUM STANDARD IS WARRANTED

The Department adopted the current Minimum Standard formula just a little over two (2) years ago. At the time the Department adopted this Minimum Standard formula, it highlighted the importance of the component of the formula that it now wishes to change because, without that component, it was expected the market would react with considerable volatility.⁶ A change in the Minimum Standard formula to remove that component now could increase market

⁵ See Proposed Amendments at 225 CMR 14.07(2)(a)(1) (“Notwithstanding 225 CMR 14.07(2)(a), *for the Compliance Year 2013*, the Department shall recalculate the Solar Carve-Out compliance obligation and Minimum Standard announced by the Department on August 29, 2012 and announce the recalculated compliance obligation and Minimum Standard no later than two weeks from the effective date of this section to reflect revisions in the compliance obligation formula in 225 CMR 14.07(2)(d).”) (emphasis added).

⁶ “The Department determined the stability of the market dynamics could be much improved by changing the formula to account for the past growth rate not by the difference in the Total Compliance Obligation over the past two years, but instead by the difference in the SRECs Generated over the past two years.” See “Historical Development of the Solar Carve-Out” available at: <http://www.mass.gov/eea/energy-utilities-clean-tech/renewable-energy/solar/rps-solar-carve-out/historical-development-of-the-rps-solar-carve-out.html>.

volatility in contravention of the careful analysis the Department performed just over two years ago when it created the Program.

The current formula, if given an opportunity to work, will automatically adjust the Minimum Standard to keep pace with changes in supply and demand as the Department intended.⁷ The Minimum Standard is already adjusted each year by the Solar Renewable Energy Credit (“SREC”) market oversupply or shortage experienced in the previous Compliance Year.⁸ Specifically, the current Minimum Standard formula provides for a 30% growth rate each year and is increased in any given year by the excess amount of SRECs from the previous year (in the case when there is an auction) or decreased by the amount equal to the volume on which ACPs were paid, rather than by percentages.⁹ The Department has already determined that this growth

⁷ Prior to issuing the Proposed Amendments, the Department issued an announcement indicating its intent to make targeted changes to the Program in response to a period of oversupply and to “avoid *sustained years* of over or under supply.” See “DOER Announces Intention to Begin Rulemaking and Solicit Comments” available at: <http://www.mass.gov/eea/energy-utilities-clean-tech/renewable-energy/solar/rps-solar-carve-out/current-status-of-the-rps-solar-carve-out-program.html> (emphasis added). However, any potential oversupply has only existed for a short period of time. Indeed, in 2011, there was an undersupply. See “Solar Credit Clearinghouse Auction Account Closes with No SRECs Deposited” available at: <http://www.mass.gov/eea/energy-utilities-clean-tech/renewable-energy/solar/rps-solar-carve-out/current-status-of-the-rps-solar-carve-out-program.html> (indicating that the Solar Credit Clearinghouse Auction Account for Compliance Year 2011 closed with no SRECs deposited reflecting the shortage of SRECs available to meet the 2011 solar compliance obligation).

⁸ Solar RPS Carve-Out, Overview of the Program Presentation, June 2010, available at: <http://www.mass.gov/eea/docs/doer/renewables/solar/solar-webinar-2009dec18.pdf> (“Program Overview”), at 10.

⁹ 225 CMR 14.07(2).

rate “provides a *robust market* demand growth for the solar industry”¹⁰ and that the “adjustment maintains *market balance*.”¹¹

Since the current Minimum Standard approach already allows for large changes in the Minimum Standard year over year, self-adjusting depending on the pace of solar growth, and results in a more stable market by dampening the fluctuations in the Minimum Standard, RESA urges the Department to show discipline and patience with its own design and to allow the market to self-correct, rather than making course corrections so early in the development of the Program.

II. ANY CHANGE TO THE MINIMUM STANDARD WILL NEGATIVELY IMPACT CUSTOMERS

When it adopted the Program, the Department specifically indicated that one of its goals was to minimize ratepayer impacts and reduce costs to ratepayers.¹² However, the proposed change to the Minimum Standard formula will negatively impact customers and increase costs. In Massachusetts, nearly all load is served, directly or indirectly, by competitive suppliers, who either provide wholesale service to distribution companies and municipalities or who provide retail

¹⁰ See “Minimum Standard: Base Growth Rate” available at: <http://www.mass.gov/eea/energy-utilities-clean-tech/renewable-energy/solar/rps-solar-carve-out/adjusted-mechanics-to-the-minimum-standard.html> (emphasis added).

¹¹ See “Minimum Standard: Market Balance Adjustments” available at: <http://www.mass.gov/eea/energy-utilities-clean-tech/renewable-energy/solar/rps-solar-carve-out/adjusted-mechanics-to-the-minimum-standard.html> (emphasis added).

¹² See Solar RPS Carve-Out Straw Proposal Presentation, Public Stakeholder Meeting, Boston, MA, August 26, 2009, available at: <http://www.mass.gov/eea/docs/doer/renewables/solar/solar-rps-carve-out-program-straw-proposal-stakeholder-mtg-corrected-090409-doer.pdf> (“Straw Proposal”), at 3, 5.

service directly to end-use customers. To meet the Program's RPS obligations, these suppliers enter into contracts for SRECs.

In deciding what SREC purchases to make, Retail Electricity Suppliers face several risks. If the price of SRECs goes up and no hedges have been purchased, then the suppliers are stuck having to cover compliance obligations in a high price market. It would, therefore, seem prudent to cover at today's SREC prices with a forward purchase and to bundle the cost of those SRECs into the sales price to the customer. Indeed, the Department anticipated that the Minimum Standard would create such a market demand.¹³ Balanced against this, however, is the risk associated with unexpected changes to SREC requirements such as the one currently proposed by the Department. If the RPS percentage is increased unexpectedly, suppliers will have to procure more SRECs at a time when there is increased demand in the marketplace and, as a result, presumably higher prices.

In serving their customers, Retail Electricity Suppliers have made contracting decisions in reliance on the Minimum Standard formula set forth in the regulations. While the formula does not provide absolute quantity certainty, it does allow these providers to approximate their obligations and, based on that, to make appropriate business decisions. For instance, based on the formula, Retail Electricity Suppliers determine the cost that they will include in the price that they charge consumers for RPS compliance. When the compliance obligation changes, it impacts existing contracts that were priced based on the prior obligation and may have a term of service that extends over multiple years. While Retail Electricity Suppliers may have contractual

¹³ Straw Proposal at 8.

and legal means to address change of law circumstances, these mechanisms will have a direct and immediate financial impact to customers, especially residential, governmental and institutional customers, who have contracted for a fixed price and will now be subject to new and unanticipated charges that are not within their budgets. In RESA's view, these unanticipated and retroactively applied charges place customers in an untenable position. Moreover, they undermine the customers underlying confidence that the competitive electricity market can provide and deliver the type of pricing products they desire and have contracted to meet their energy needs.

Furthermore, the fact that the Department is already seeking to modify the Minimum Standard when the Program has only been in existence for just over two years creates an environment of regulatory uncertainty that could further negatively impact the costs that customers incur on going forward basis. Faced with an uncertain and continuously changing regulatory environment, Retail Electricity Suppliers will seek to manage the regulatory risk that the Department will continue to make modifications to the Minimum Standard in one of several ways. First, by shortening the length of their retail load serving contracts, perhaps to 12 months or less, Retail Electricity Suppliers and their customers can re-price and re-negotiate at the time of annual renewal; thereby, shifting the risk associated with changes in RPS requirements to customers. Alternatively, Retail Electricity Suppliers can offer longer term contracts for electricity with a pass-through for RPS compliance costs. This shifts the regulatory risk from the Retail Electricity Suppliers to the customer but also undercuts the Retail Electricity Suppliers incentive for REC hedging for that customer. As a third option, Retail Electricity Suppliers

could build a significant risk premium into the cost associated with RPS compliance to ensure that future regulatory changes do not create potentially uneconomic contracts. This risk premium will then be reflected in the prices paid by consumers. By contrast, by setting quantity requirements for a period of years, the Department can send a message to Retail Electricity Suppliers that it is safe to continue to enter into forward contract arrangements within Massachusetts and avoid potential negative impacts to customers.

III. ANY CHANGE IN THE MINIMUM STANDARD SHOULD ONLY APPLY PROSPECTIVELY AND SHOULD REMAIN IN EFFECT UNTIL ANY EXISTING CONTRACTS EXPIRE

In an apparent attempt to reduce the immediate financial impact to customers, the Proposed Amendments provide that:

The *Compliance Year 2013* Solar Carve-Out Minimum Standard applied to competitive Retail Electric Suppliers shall remain at 0.1630% (sic)¹⁴ for that portion of electrical energy sales that were subject to a contract executed or extended *prior to August 30, 2012*, provided the Retail Electric Supplier provides documentation, satisfactory to the Department, identifying the terms of such contracts including but not limited to, the execution and expiration dates of the contract and the annual volume of electrical energy supplied.¹⁵

While RESA appreciates the Department's effort, the Proposed Amendments would only protect a limited number of customers as the changes to the Minimum Standard would still be applied retroactively and would only fully protect customers who have entered into contracts that expire in 2013.

¹⁴ The 2013 Minimum Standard is actually 0.2744%. See "Determination of CY 2013 Total Compliance Obligation" available at: <http://www.mass.gov/eea/docs/doer/rps/ma-rps-solar-carve-out-determination-of-cy2013-min-std-doer-082412.pdf>.

¹⁵ See Proposed Amendments at 225 CMR 14.07(2)(a)(2) (emphasis added).

Pursuant to the Proposed Amendments, the revised Minimum Standard would apply to any contracts entered into on or after August 30, 2012. Although the Department announced that it was considering changing the Minimum Standard prior to that date, the revised Minimum Standard was not in effect by August 30, 2012. In fact, the revised Minimum Standard is still not in effect today (more than six months after the potential change was originally announced). Moreover, the revised Minimum Standard will likely not be in effect for several months yet to come as the Department reviews the comments it receives on the Proposed Amendments, makes changes to the Proposed Amendments based on those comments, submits the Proposed Amendments to the Massachusetts Legislature for its review and comment, and finalizes and publishes the revised regulations. Accordingly, any change in the Minimum Standard that applies prior to the date on which the Proposed Amendments are actually promulgated would, by its very nature, have a retroactive application.

“Principles governing statutory construction and application also apply to regulations.”¹⁶ Accordingly, “a regulatory change affecting substantive rights generally only applies prospectively.”¹⁷ In particular, “[a] new policy may *not* be retroactively applied where a prior agency policy existed, unless the existing policy was plainly contrary to the enabling statute.”¹⁸ In fact, regulatory changes may only operate retroactively “(1) where legislative intent expressly

¹⁶ *BioGen IDEC MA, Inc. v. Treasurer and Receiver General*, 454 Mass. 174, 190 (2009) (citing *Hellman v. Board of Registration in Med.*, 404 Mass. 800, 803 (1989)).

¹⁷ *Id.* (citing *Hanscom v. Malden & Melrose Gas Light Co.*, 330 Mass. 1, 3 (1914); *Figueroa v. Director of the Dep’t of Labor & Workforce Dev.*, 54 Mass. App. Ct. 64, 70-71 (2002)).

¹⁸ *Id.* (citing *Commissioner of Revenue v. BayBank Middlesex*, 421 Mass. 736, 741-42 (1996)) (emphasis added).

or impliedly indicates retroactive application is desirable; (2) where the statute is ameliorative or curative in nature; or (3) where fulfillment of the parties' reasonable expectations may require the statute's retroactive application."¹⁹ None of these apply to the proposed changes to the Minimum Standard formula.

In this case, a prior Department policy already exists and that policy is not “plainly contrary to the enabling legislation.” Moreover, legislative intent does not indicate that the Proposed Amendments should be applied retroactively, the Proposed Amendments are not “ameliorative or curative in nature” and the fulfillment of the parties' reasonable expectations does not require retroactive application. In fact, in this case, the fulfillment of the parties' reasonable expectations requires *prospective* application of the Proposed Amendments.

Retail Electricity Suppliers do not take market positions or enter into agreement terms with customers based simply on the *announcement* that a regulatory change may occur or even based on the release of *proposed* regulatory revisions. Rather, since announced or even proposed regulatory revisions are subject to change based on legislative considerations as well as the regulatory input process, Retail Electricity Suppliers take market positions or enter into agreements based only on actual regulatory requirements officially promulgated by the governing regulatory authority. In this way, customers are not exposed to unnecessary price increases and/or pricing volatility as a result of speculative regulatory changes that may never be adopted or that may be significantly modified through the regulatory process before such changes ultimately become effective. Accordingly, Retail Electricity Suppliers have entered into

¹⁹ *Id.*

and continue to enter into agreements with customers based on the Department's existing Minimum Standard formula.

Indeed, it is possible that, through this proposed rulemaking process, based on input from interested stakeholders or the legislature, the final Proposed Amendments will be refined over time as occurred when the Program was originally enacted²⁰ and that, as a result, the Minimum Standard formula will be further revised before it ultimately becomes effective. Thus, only once the Department promulgates the Proposed Amendments will Retail Electricity Suppliers modify their market positions and/or the terms of their agreements with customers to account for any new or modified regulatory requirements. Accordingly, RESA requests that the Department modify the exemption from the revised Minimum Standard requirement such that, subject to Retail Electric Suppliers providing appropriate documentation, the Minimum Standard remains as it was prior to the proposed revisions with respect to any portion of electric energy sales that were subject to a contract executed or extended *prior to the effective date the revised Minimum Standard formula is officially promulgated by the Department*.

In addition, because Retail Electricity Suppliers enter into multi-year agreements, even if the Department changes the Minimum Standard so that it only applies prospectively, under the Proposed Amendments, customers in multi-year, fixed price arrangements will still be faced with unexpected price increases to account for the increased Minimum Standard obligation in the later compliance years (i.e., beyond the 2013 Compliance Year) of those multi-year agreements.

²⁰ See "Historical Development of the Solar Carve-Out," which sets forth the changes to the initial Program from the Straw Proposal phase through to the Final Regulations as a result of the public input process, available at: <http://www.mass.gov/eea/energy-utilities-clean-tech/renewable-energy/solar/rps-solar-carve-out/historical-development-of-the-rps-solar-carve-out.html>.

Accordingly, similar to when the Program was originally instituted,²¹ RESA requests that the Department create a compliance exemption, subject to Retail Electric Suppliers providing appropriate documentation, from the new Minimum Standard formula until the expiration of any contracts existing as of the effective date such revised formula.

While RESA recognizes that this exemption will require the Department to continue to calculate what the Minimum Standard would have been under the current formula as well as to calculate what the Minimum Standard will be under the revised formula and to then determine the difference between the two, this increased administrative burden will protect customers, including residential, governmental and institutional customers that are subject to a fixed budget, from unexpected price increases. In RESA's view, the financial and public policy benefits of reducing costs and other market impacts to ratepayers will far outweigh the increased administrative burden. Accordingly, to the extent the Department changes the Minimum Standard formula, RESA requests that the Department revise the Proposed Amendments to ensure that the revised Minimum Standard exempts contracts that were entered into or extended prior to the effective date of the Proposed Amendments and that such an exemption extends until the expiration of all such contracts.

CONCLUSION

For all of the foregoing reason, RESA urges the Department to allow the market to adjust itself and properly function rather than intervening and making a untimely regulatory change to

²¹ See 220 CMR 14.08(3)(B)(3) (setting the ACP Rate for that portion of a Retail Electricity Supplier's Solar Renewable Energy Credit obligations that were contractually committed or renewed prior to January 1, 2010 to the RPS Class I ACP Rate for the applicable Compliance Year).

the Minimum Standard formula when one may not be warranted especially when such a change will have potential negative impacts on the customers who ultimately bear the costs of the Program. Moreover, to the extent the Department changes the Minimum Standard formula, RESA requests that the Department revise the Proposed Amendments to ensure that the revised Minimum Standard exempts contracts that were entered into or extended prior to the effective date of the Proposed Amendments and that such an exemption extends until the expiration of all such contracts.

Respectfully submitted,
RETAIL ENERGY SUPPLY
ASSOCIATION

A handwritten signature in black ink, appearing to read "Joey Lee Miranda". The signature is fluid and cursive, with the first name "Joey" being more prominent and stylized.

By _____
Joey Lee Miranda
Robinson & Cole LLP
280 Trumbull Street
Hartford, CT 06103
Phone: (860) 275-8200
Fax: (860) 275-8299
E-mail: jmiranda@rc.com