

## Addressing Climate Change Through Energy Law

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February 25, 2016 by Christine A. Fazio and Ethan I. Strell

Given the energy sector's sizable contribution to greenhouse gas (GHG) emissions, it is not surprising that programs to address GHG emissions are increasingly being addressed by energy lawyers, policy analysts, engineers, and economists through public utility commissions, rather than by traditional environmental regulatory agencies such as the U.S. Environmental Protection Agency (EPA) or New York State Department of Environmental Conservation. Moreover, given congressional gridlock and the legal difficulties in addressing climate change on the federal level through existing laws—as demonstrated by the Supreme Court's recent surprising and unprecedented grant of a stay of the Obama administration's rules to reduce the GHG emissions of existing power plants<sup>[1]</sup>—the development of programs through state energy laws might continue to be the most sound solution to reducing GHG emissions in the United States.

In his 2016 State of the State address, Governor Andrew Cuomo outlined New York State's aggressive plan to reduce GHG emissions through the adoption of a Clean Energy Standard, a \$5 billion Clean Energy Fund, and the advancement in the installation of solar and wind energy through programs to be adopted by the New York Public Service Commission (PSC). Also, the governor, along with a bipartisan group of governors of 16 other states, recently signed the "Governors' Accord for a New Energy Future," an aspirational agreement that seeks to have the states diversify energy supply, expand clean energy and transportation, modernize energy infrastructure, and work cooperatively among states to implement these changes.<sup>[2]</sup>

This article addresses some of the recent programs and proposals that are being developed by and for the energy sector to reduce GHG emissions and encourage the development of a clean and modern energy market.

### State Energy Plan

The 2015 New York State Energy Plan incorporates the PSC's Reforming the Energy Vision (REV) initiative that is focused on stimulating the private sector to provide clean energy to communities and individual customers throughout New York State. REV is a revolutionary proceeding being conducted by the PSC to fundamentally reinvent New York's energy distribution, production, and pricing systems to identify and eliminate regulatory, economic, and technical barriers to clean energy sources and facilitate and encourage their implementation reliably, securely, and cost-effectively.<sup>[3]</sup>

Examples of clean energy solutions contemplated in the REV include large-scale and on-site renewable energy sources (such as offshore wind farms or solar photovoltaic panels on homes), energy efficiency (such as purchasing Energy Star appliances that use less energy), energy storage (such as large grid-and smaller home-based batteries to store wind, solar, and other intermittent energy for use during periods of peak demand), smart grids (including computerized two-way communication systems, sensors, and other technology on the grid to efficiently price and distribute power), demand response programs (for instance, businesses' agreeing to reduce air conditioning and lighting usage during heat waves or other periods of peak electricity demand), distributed generation (such as a combined heat and power system that serves a

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commercial development), thermal technology (such as solar thermal technology that uses sun energy to heat water), and other low carbon technologies.

The State Energy Plan sets forth the following clean energy goals to be achieved by 2030: (1) 40 percent reduction in GHG emissions from 1990 levels; (2) 50 percent of electricity coming from renewable energy sources (the “50 by 30” goal); and (3) 23 percent decrease in energy consumption in buildings from 2012 levels.<sup>[4]</sup>

### **Clean Energy Standard**

In 2014, approximately 26 percent of New York’s energy came from renewable sources, or a total of 41,300 gigawatt-hours (GWh, or 1,000 megawatt-hours). As discussed above, the State Energy Plan sets a new goal that renewable energy will comprise 50 percent of energy consumption in New York State by 2030. This also is referred to as the “clean energy standard.” To achieve this goal, in January, the Department of Public Service (DPS) released a white paper on the Clean Energy Standard for public comment.<sup>[5]</sup> DPS estimates that 33,700 GWh of renewable energy must be added to the state’s energy portfolio to meet the 50 percent by 2030 mandate.<sup>[6]</sup>

To meet this goal, the DPS recommended the establishment of interim targets, with the first target to be developed in 2017 followed by new interim targets to be established every three years thereafter (for instance, the 2017 goal would require renewables to represent 26.8 percent of the state’s energy consumption and the 2020 interim goal would increase this to 29.5 percent).<sup>[7]</sup> Further, DPS recommended that all electric retail load serving entities (i.e., utilities and energy service companies that provide electricity) share the obligation to meet the new standards in proportion to their annual retail electricity sales, including electrical providers not under the PSC’s jurisdiction, such as the New York Power Authority and Long Island Power Authority.

DPS further proposed that the clean energy standard should be a market-based program that would allow compliance through the trading of renewable energy credits (RECs). One REC would be created for each clean energy standard-eligible megawatt-hour generated. The load serving entities could then purchase tradable RECs or pay an alternative compliance payment to meet their compliance obligations. In other words, when the supply of RECs is short, a load serving entity could pay the alternative compliance payment to save customer costs rather than purchasing RECs on the market.

Further, DPS recommended providing additional flexibility by allowing load serving entities to bank RECs that exceed the entity’s compliance goals that could then be used in a subsequent year (such as two to three years later). Another option for increased flexibility on which DPS seeks comment is whether a load serving entity could also borrow RECs.<sup>[8]</sup>

DPS also proposed establishing three tiers with specific targets. Tier 1 would include new eligible energy facilities that began commercial operation after Jan. 1, 2015. Tier 2 would include existing renewable sources. Tier 3 would include nuclear energy.<sup>[9]</sup> As DPS explained, in 2014, nuclear generation, which is a zero-emission source of electricity, accounted for approximately 30 percent of New York’s consumed electricity. The low cost of natural gas and low electric wholesale energy market prices have led to lower revenues for all generators and particularly nuclear power plants. Thus, several upstate nuclear power plants are proposing to close due to uneconomic operating conditions. If these plants close, then electricity to make up this difference would likely be generated from fossil fuels, increasing GHG emissions.

DPS thus recommended creating a nuclear zero emissions credit (ZEC) to provide financial assistance to nuclear generating facilities upstate which have all authorizations and permits in effect (excluding the more controversial Indian Point Energy Center in Westchester County from the ZECs subsidy).<sup>[10]</sup> DPS further recommended that utilities, when purchasing RECs, also procure a long-term contract for the purchase of the electricity to support the development of large-scale renewable energy by the private sector.<sup>[11]</sup>

The comment period on DPS's white paper is ongoing and the PSC intends to issue a final decision establishing the clean energy standard this summer.

### **Clean Energy Fund**

To support the initiatives in the State Energy Plan, the Public Service Commission adopted on Jan. 21, 2016, a 10-year Clean Energy Fund of \$5.322 billion to be managed by the New York State Energy Research and Development Agency (NYSERDA) under the PSC's supervision pursuant to its Jan. 21, 2016, Order Authorizing the Clean Energy Fund Framework.

Pursuant to the order, NYSERDA must manage the Clean Energy Fund to meet the following four state objectives: a reduction in GHG emissions; assurance of affordable energy as measured by customer energy bills; a statewide increase in energy efficiency savings and renewable energy generation; and growth in the state's clean energy economy by the private sector.<sup>[12]</sup> In the order, PSC established 10-year minimum goals to meet these objectives, including: a reduction of 133 million tons of carbon dioxide equivalent in New York State; customer savings of \$39 billion; establishment of 88 million megawatt-hours of renewable energy, and \$29 billion in clean energy investments by the private sector.<sup>[13]</sup> In other words, the \$5 billion Clean Energy Fund is expected to spur the private sector to spend \$29 billion on clean energy infrastructure and solutions while saving New York ratepayers \$39 billion over the next 10 years.

In its order, the PSC explains that traditional clean energy program approaches had been oriented toward direct rebates to encourage customers or suppliers to employ more efficient equipment and systems (e.g., rebates for Energy Star appliances). While the rebate-type of program did result in significant energy savings, it also had an unintended consequence of consumers and businesses relying on government-directed payments as opposed to increased reliance on markets and entrepreneurial innovations.<sup>[14]</sup> The Clean Energy Fund is envisioned to be a transition to spur market-based initiatives so businesses and consumers will recognize the value of clean energy resources and they will become cost effective, ultimately supporting the sustainable growth of the clean energy industry in New York without the reliance on government subsidies.

To that end, NYSERDA's Clean Energy Fund will support four distinct portfolios. First, the Market Development portfolio will address barriers to clean energy solutions, including energy efficiency, distributed generation, thermal energy, energy storage, and large-scale renewables. Second, the Innovation and Research portfolio will support energy-related environmental research and business and innovation programs including smart grid systems, renewables and distributed energy resource integration, building innovations, transportation, and business development.

Third, the NY-Sun program, which is an existing program to encourage the expansion of the solar electric industry, would continue with the goal to make solar more affordable and accessible to residents and businesses while also growing the solar industry and the solar job market. Finally, the New York Green Bank, which is an existing state-sponsored specialty finance entity that partners with the private sector to address financing gaps in the current clean energy financing markets, will continue to be funded under the Clean Energy Fund.<sup>[15]</sup>

NYSERDA will file an annual investment plan to analyze most clean energy initiatives (NYSERDA currently has 117 initiatives that it intends to evaluate which will need to be prioritized pursuant to the order); such analysis will include detailed descriptive and metric information, including whether the initiative contributes to the Clean Energy Fund's long-term goals of GHG emission reductions, customer bill savings, energy efficiency and renewable energy generation, and increased private sector investment.

NYSERDA will need to track expenditures and commitments against their prospective budgets and the key performance metrics and schedules. The metric reports will include for each initiative megawatt-hour savings, energy savings, carbon dioxide reductions, rate payer bill savings, private investment leveraged, and the leverage ratio of public to private dollars.<sup>[16]</sup>

The Clean Energy Fund will also establish a ratepayer collections cap that is below 2015 levels with a declining collection level thereafter of \$1.5 billion over the period 2016 to 2025 to reduce ratepayer subsidies for clean energy.<sup>[17]</sup>

## Conclusion

The Public Service Commission, with the support of the governor's office, NYSEDA and other state agencies, has developed a conceptual framework with substantial funding to support the development of clean energy by the private sector and consumers. The framework includes various goals and analyses to track the success or lack of success of the many initiatives that will be reviewed by NYSEDA. Though only time will tell if New York will truly be a leader in the development of a clean energy market that is cost effective to consumers and is inspired by private entrepreneurs without the need for continued long-term subsidies by the government and ratepayers, the recent energy programs and proceedings are comprehensive and encouraging attempts to address the complex legal, technical, and economic barriers to the widespread use of clean energy.

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## Endnotes

[1] On Feb. 9, 2016, just four days before the unexpected death of Justice Antonin Scalia, the U.S. Supreme Court stayed the implementation of a new regulation by the EPA to reduce carbon dioxide emissions from existing power plants, which was a key component of the U.S. commitment in Paris to reduce GHG emissions. *Chamber of Commerce v. EPA*, 577 U.S. \_\_\_\_ (U.S., Feb. 9, 2016).

[2] "Governors' Accord for a New Energy Future," Feb. 16, 2016. Parties to the accord are the governors of the states of California, Connecticut, Delaware, Hawaii, Iowa, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington. Available at <http://www.governorsnewenergyfuture.org>.

[3] See, e.g., New York State Public Service Commission, Order Adopting Regulatory Policy Framework and Implementation Plan, Feb. 26, 2015, Case 14-M-0101, Proceeding on Motion of the Commission in Regard to Reforming the Energy Vision.

[4] New York State Energy Planning Board, "The Energy to Lead," New York State Energy Plan, Vol. 1, available at <http://energyplan.ny.gov/Plans/2015> at 45.

[5] Department of Public Service, Staff White Paper on Clean Energy Standard, Case 15-E-0302, Jan. 25, 2016 (documents are available on the Public Service Commission website at <http://www3.dps.ny.gov/W/PSCWeb.nsf/All/CC4F2EFA3A23551585257DEA007DCFE2?OpenDocument>).

[6] *Id.* at 7.

[7] *Id.* at 9.

[8] *Id.* at 13 – 18.

[9] *Id.* at 19.

[10] Id. at 27 – 33.

[11] Id. at 38.

[12] State of New York Public Service Commission, Order Authorizing the Clean Energy Fund Framework, Case 14-M-0094 et al., Issued and Effective Jan. 21, 2016.

[13] Id. at 47 – 48.

[14] Id. at 3 – 4.

[15] Id. at 19-20.

[16] Id. at 40.

[17] Id. at 15.