NEPGA
NEW ENGLAND POWER GENERATORS ASSOCIATION, INC.

141 Tremont St., Boston, MA 02111
(t) 617-902-2354 (f) 617-902-2349
www.nepga.org

October 1, 2008

VIA ELECTRONIC MAIL: Green.Communities@MassMail.State.MA.US

Mr. Philip Giudice
Commissioner
Massachusetts Department of Energy Resources
100 Cambridge Street
Boston, MA 02114

RE: Section 105 of chapter 169 of Acts of 2008; *Green Communities Act.*

Dear Commissioner Giudice:

Pursuant to the request for comments issued by the Massachusetts Department of Energy Resources ("DOER") at the Stakeholder Forum on the RPS Import issue held on Tuesday, September 23, 2008, and in furtherance of the requirements contained in the above referenced section of the Green Communities Act, the New England Power Generators Association, Inc. ("NEPGA") hereby respectfully files these comments.[1] NEPGA represents sixteen companies and approximately 25,000 megawatts (or over 80 percent) of the generation in New England, and approximately 12,000 megawatts in Massachusetts.

As a part of the Green Communities Act, signed into law by Governor Patrick on July 2, 2008, the DOER must complete a study and provide recommendations to the legislature by November 1, 2008, assessing the feasibility of instituting §§ 105 (c) and (e). Section 105 (c) places a capacity requirement on electricity imported into the ISO-New England (ISO-NE) control area from renewable generators located in control areas outside of and adjacent to ISO-NE. Section 105 (e) deals with whether and how such imports can be netted against certain exports of electrical energy. If the DOER finds that the Act's capacity commitment and netting requirements are *"feasible"* to implement as conditions on the RPS eligibility of imports from adjacent control areas, then DOER must propose regulations for their implementation.[2] If DOER finds that their implementation is not feasible, they will not go into effect.

---

[1] The views expressed in these comments do not necessarily represent the positions of each of NEPGA's members. In addition, nothing in these comments should be deemed to waive any rights that NEPGA or any of its members may have to challenge the administrative, procedural or substantive validity of the proposed regulations.

[2] The department shall assess the feasibility of implementing subsections (c) and (e) and report its findings along with proposed regulations for implementing these subsections in accordance with section 12 of chapter 25A, on or before November 1, 2008.

I. Comments of NEPGA

NEPGA understands the legislative intent behind §§ 105 (c) and (e) is to maintain the purity of the Massachusetts RPS by eliminating practices that result in consumers paying for renewably generated electricity that is actually produced by conventional sources. This practice has been referred to as the "green washing" of electricity. NEPGA supports the goals of the legislature to that end; however, NEPGA opposes the DOER's implementation of §§ 105 (c) and (e) as they are inconsistent with the goals of the Commonwealth's renewable portfolio standard, will have unintended consequences in the administration of the New England bulk power system and, accordingly, are not feasible.

In anticipation of DOER's preparation of the study NEPGA has provided the following answers to the questions presented:

A. How should "feasible" be defined and why?

For the purposes of determining the feasibility of instituting §§ 105 (c) and (e), feasible should be defined as *the ability to implement §§ 105 (c) and (e) with a reasonable assurance of success in a manner that is consistent with the intent of Massachusetts Renewable Portfolio Standard and Massachusetts' overall energy policy.*

Black's Law Dictionary uses a two-part definition of feasible that contains "capable of being done, executed, affected or accomplished" in the first part, and a "reasonable assurance of success" in the second part.[3] Certainly, by the broad definition of part one, both subsections (c) and (e) are *capable of being done* and, therefore, feasible, as most things are. Accordingly, if the definition of feasible was so limited, as was put forth by the proponents of these subsections, that would be the end of the discussion. But everything that can be done should not be done for a litany of reasons that do not need to be explained. Such a perverse interpretation is a dangerous precedent to set in the implementation of public policy.

The second part of the Black's Law Dictionary's definition requires a "reasonable assurance of success." Resultantly, the implementation of §§ 105 (c) and (e) must be in a manner that reasonably assures the success of the goals of the Green Communities Act which are "to provide forthwith for renewable and alternative energy and energy efficiency in the commonwealth."[4]

B. Are implementation of subsections (c) and (e) of Section 105 of the Act feasible now? If not now, when and why?

---

[3] Black's Law Dictionary 609 (6th ed. 1990).

[4] Chapter 169 of the Acts of 2008.

The implementation of §§ 105 (c) and (e) are not now feasible because they will generally frustrate the purposes of the Green Communities Act by not providing sound policy for the use of renewable energy in the commonwealth. The markets for renewable energy have historically been motivated by regionally policy efforts and it is important to remain consistent in the ongoing implementation of the RPS to ensure its success. The fundamental purpose of the renewable portfolio standards has been to increase the amount of renewable energy supply into the region so as to promote regional environmental goals.[5] While the various state RPS have not been administered in any comprehensive manner, the various state programs have been remarkably consistent in the goal of removing market barriers to the generation and transmission of renewable energy so as to increase the ability of compliance. A successful RPS requires a coordinated regional effort that is implemented in an economically efficient manner so as not to compromise the integrity of the competitive energy markets or the economy in New England.

The RPS both anticipates and needs external resources to be successfully implemented. If successfully filled, the regional requirements of RPS would more than double the amount of electricity from renewable resources from 5.6% in 2007 to 14% by 2016. The number of renewable projects currently proposed in New England represents less than half of the required 13,000 gigawatt-hours to fulfill this regional RPS requirement. If Massachusetts is committed to achieving its renewable goals, it is prudent to implement policies that do not discriminate against external renewable resources. The provisions in §§ 105 (c) and (e) represent market barriers to the import of renewable energy by discriminating against the imports of renewable energy resources.

Section 105 (c) extends the requirement from the various states RPS to deliver renewable energy into the control area to become a committed resource eligible in the forward capacity market in order to for REC payments as follows:

> (c) The delivery of renewable energy into the ISO -NE control area, as described in subsection (b), shall not qualify under the renewable portfolio standard, notwithstanding such delivery into the ISO -NE control area, unless the generator of such renewable energy: … (3) **commits the renewable generating source as a committed capacity resource for the applicable annual period**. (*emphasis added*)

The requirement for a capacity commitment contained in 105 (c) is inconsistent with purposes of the forward capacity market ("FCM") and merely serves to impose a regulatory obstacle to the importation of renewable energy. The FCM evolved from the requirement placed by the Federal Energy Regulatory Commission on ISO-NE to develop a new market that

---

[5] An RPS is a requirement placed upon utilities and competitive suppliers to obtain specified percentages of the electricity they provide to customers from renewable sources. Massachusetts' RPS requirement increases from 3% in 2007 to 4% in 2009 and then by an additional 1% each year until the state suspends the annual increase. G.L.c 25A §11F.

contained a locational element to enable load serving entities to enter into commitments for capacity, either bilaterally or through an auction conducted by ISO-NE. [6] The market was designed to be a physical, rather than a financial market, with tangible assets backing load obligations.[7] The capacity market was also intended to be locational so as to provide appropriate price signals to create incentives for resource investments in specific locations in capacity zones where new capacity investment should take place.[8] The capacity commitment requirement contained in § 105 (c) provides little benefit to system reliability within the Massachusetts zones and ultimately distorts the capacity market by forcing intermittent external resources to bid into the capacity markets. Interference with the New England capacity markets will only frustrate the development of resource investments that actually further the intent of the FCM.

Furthermore, the capacity obligation requirement is inconsistent with RPS rules that allow internal resources to be eligible for REC payments even if they commit their resources outside of ISO-NE and, accordingly, is discriminatory on its face.[9] Such a provision is likely to be found unconstitutional if challenged. The existing requirement to deliver electricity into the region is sufficient to ensure the transfer of benefits coincident with the REC payment and has not met any similar constitutional challenge.

Section 105 (e) seeks to eliminate practices that result in consumers paying for renewably generated electricity that is actually produced by conventional sources by inserting a netting requirement on electricity transactions as follows:

> (e) The renewable portfolio standard credit .. **shall be reduced by any exports of energy** from the ISO-NE control area made by the person seeking renewable portfolio credit for such renewable energy or **any affiliate** of such person, or **any other person under contract** with such person to export energy from the ISO - NE control area and deliver such energy directly or indirectly to such person. (*emphasis added*)

As previously indicated, NEPGA does not endorse transactions that misrepresent the environmental attributes of imported electricity. However, as was noted at the stakeholder session on September 23rd, there is no indication that these activities are

---

[6] The Product is a megawatt of deliverable capacity with a future supply commitment in a Power Year three years in advance. Explanatory Statement In Support of Settlement Agreement of the Settling Parties and Request for Expedited Consideration and Settlement Agreement Resolving All Issues, Devon Power LLC, et al., Docket Nos. ER03-563-000, -030, and -055. at 22.

[7] *See,* Informational Filing for Qualification in the Forward Capacity Market, ISO New England Inc., Docket No. ER08- 190-000, Page .3

[8] A Capacity Zone is the geographic sub-region in the New England Control Area that is determined by the ISO based on an identification of transmission limits that may bind in the FCA.

[9] *See*, U.S. Const. art. I. § 8, cl.3.

occurring. NEPGA recognizes the potential and motivation for such transactions and, as such, would support narrowly tailored protections against manipulations of the RPS.

However, NEPGA has genuine concerns that the language contained in §105 (e) is overly broad and vague and, therefore, is not feasible to implement. Specifically, the language nets transaction based upon a very lose association of market participants by affiliation and contract. The complexity and frequency of transaction required to operate New England's bulk power system make this provision impossible to implement. To put this into perspective, in 2007, more than 340 buyers and sellers in the New England marketplace completed in excess of $10 billion of wholesale electricity transactions. In order to properly implement the requirements set forth in §105 (e) every transaction would need to be analyzed to determine the source, destination, attributes and contracting parties, as well as affiliates of contracting parties, throughout the transactional chain.

The requirements of §105 (e) are overly broad because it does not properly limit collateral transactions and places no limitation on the timing of the netting provision. The strict interpretation of this language penalizes market participants based upon the electricity transactions of their counterparties, affiliates and counterparties of affiliates for an unlimited amount of time. The ultimate affect would be to discourage participation by renewable energy providers in the Massachusetts RPS thereby not providing renewable energy in the commonwealth, in contravention to the purpose of the Green Communities Act. Ultimately, less renewable energy in the commonwealth only serves to increase the cost of RPS compliance for consumers and further endangers the likelihood of success.

C. If feasible, what mechanisms either are in place, or can and must be established to monitor and verify compliance of each subsection?

If possible, the feasibility of §105 (e) would be contingent upon the successful implementation of standards to ensure an appropriate level of accuracy and/or the appropriate recordings of transactions of external resources for audit purposes in a manner that is consistent with internal resources.

NEPGA appreciates this opportunity and requests that the DOER consider its comments as submitted herein. Please contact me at the information provided above if I can provide any further information.

Sincerely,

DRAFT

Christopher P. Sherman
General Counsel