Earn $ome Green by Going Green

By Joel L. Shain
League Energy Deregulation Counsel

New Jersey, a recognized leader in the development of renewable energy sources wants local governments to "go green." It pays to do so. Through policies and procedures advanced by the New Jersey Board of Public Utilities ("BPU") and its Office of Clean Energy ("OCE"), the State implemented the most progressive rebate program in the country – funding up to 70 percent of the installation costs for renewable energy systems. These rebates applied to renewable energy technologies such as solar and wind power, as well as energy created through biomass (organic matter) and fuel cells (electric energy converted by means of chemical reaction). Although that program is currently suspended, the state's commitment to reward energy creativity is reflected in the ability of a government entity to trade Renewable Energy Certificates ("RECs") and/or sell excess energy.

The CORE Program The Customer Onsite Renewable Energy (CORE) rebate program, begun in 2001, was an unqualified success. According to OCE, over 47,000 KW (Kilowatts) of energy has been funded through the program, with a total of over $200,000,000 in rebates. Approximately 85 percent of this amount relates to solar generation.

Under the CORE program, a total of 2,731 projects were approved for funding through 2007, with over 1,000 of these projects funded in 2006 alone. Last year, however, funding levels dropped and the number of projects correspondingly declined to 832. The decline was directly attributable to the suspension of the CORE rebate program by the BPU. The program had proved to be so popular that it became oversubscribed, and the funding available was insufficient to support it.

Nevertheless, the state, taking a different tack, has continued in the forefront of encouraging the development of renewable energy sources. Recently, the Governor's office released its draft energy master plan. The Plan noted that the state's energy demand is outpacing supply, resulting in a projection that the price of electricity will increase by 60 percent over 2005 prices by the year 2020. To meet the state's needs and curb increasing demand, the Plan calls for reducing consumption by 20 percent by the year 2020, and, at the same time, having over 22 percent of the state's electrical needs generated by renewable sources such as wind, solar and biomass. To achieve these goals, the Plan specifically recognizes that counties, municipalities and local school boards must lead the way in both energy conservation and the simultaneous development of even more renewable energy generation sources.

> As renewable energy technology continues to advance, its generation becomes more practical and investment in its sources, more economically rewarding.

After the suspension of CORE, are the goals of the Governor's draft master energy plan a mere pipedream? Not necessarily. Through a combination of creative policy-making and legislation, New Jersey has developed additional alternative means of funding programs for renewable energy sources. Indeed, in the face of the ever increasing price of fossil fuels, these incentives may eventually become even more successful than the CORE rebate program. Let's explore them.

Renewable Energy Certificates ("RECs") Aside from the obvious benefit to municipalities from producing their own electricity through on-site renewable energy systems, the development of such systems allows municipalities to qualify for RECs, which can turn out to be a significant source of revenue. RECs, commonly known as "Green Tags," are tradable certificates, with considerable economic value. The certificates attest that one MW (Megawatt) hour of electricity was generated through the use of certain renewable energy sources such as solar, wind or biomass. Each REC represents reduced greenhouse gas emissions resulting from the production of electricity by these "green," environmentally friendly processes.

The RECs have value because utility companies, third party suppliers and other parties who purchase them can use RECs to help meet certain voluntary and/or mandated environmental goals under the New Jersey Renewable Energy Portfolio Standards, the Clean Air Act and the Kyoto Protocols. In that way, the market for RECs can produce a secondary recurring revenue stream for participating municipalities, which can significantly offset the cost of installing renewable energy systems.

Procedures Relating to RECs To obtain RECs in New Jersey, the renewable energy generation facility must be registered with, and approved by OCE. The registration process requires submitting a form, available through OCE's website, attesting to the method of generation, and an inspection of the facility by OCE. Once the approved facility is registered, the amount of energy generated is metered and reported to OCE each month. The OCE then issues RECs for each verifiable MW hour generated by the facility. The RECs may then either be kept or sold in the open market. The OCE keeps account of the certificates generated and/or owned. It also provides a web-based public bulletin board for the sale of RECs. Thus, a municipality that owns RECs can try to sell those RECs through the website or contract with third party consultants or aggregators who, for a fee or percentage of the sale price, will coordinate the monthly metering, reporting, certification, and the sale of the RECs for the best available price.

Since RECs arise from the generation of electricity and are not incidental to real property, their sale is governed by the provisions of the Local Government Contracts Law relating to the sale of personal property.[1] N.J.S.A. 40A:11-36. Under one section of this Statute, municipalities may, by resolution, authorize the sale of personal property by private sale without advertising for bids if the estimated fair market value of the property being sold in any one sale is less than the applicable bid threshold. N.J.S.A. 40A:11-36(6). Currently, the bid threshold for municipalities with a Qualified Purchasing Agent (QPA) is $29,000 and for municipalities without a QPA, the threshold is $21,500.

But, another section of this Statute, N.J.S.A. 40A:11-36(1), is inconsistent with section 6. It requires the public sale of personal property, via sealed bid or auction, when the estimated fair market value of personal property to be sold in one sale exceeds 15 percent of the bid threshold. Thus, this section of the Statute requires that the sale of personal property valued above $4,350[2] be conducted publicly, while section 6 allows for the private sale of personal property up to the bid threshold. How to proceed? Your guess is as good as mine. Hopefully, the Legislature will cure this discrepancy or the Division of Local Government Services will issue a guidance.

Meanwhile, a prudent municipality seeking to sell RECs with a value above $4,350.00 in a single transaction (or $3,225.00 if there is no QPA) should do so by way of a public sale to the highest bidder, either by sealed bid or at public auction. Such sale must be advertised in an official newspaper and the sale must occur between 7 and 14 days after the latest publication of the notice, in accordance with N.J.S.A. 40A:11-36(3). The municipality can either use the OCE's web-based public bulletin board or authorize a third party consultant, or aggregator,[3] to make such sales on its behalf, so long as it complies with the publication requirements.

Regardless of the manner in which a municipality seeks to sell its RECs, its governing body must pass a resolution authorizing such sale. Accordingly, the resolution should be specific as to each sale, the estimated fair market value and the method by which the municipality is selling its RECs. Where a municipality engages a third party consultant or aggregator, the aggregator's services would fall under the category of professional services and would therefore be subject to N.J.S.A. 40A:11-5(1)(a)(i).

The Pricing of RECs In the past six months, the average trading value of RECs has been reported to be between $197 and $233 per MW hour with solar RECs as high as $300 per MW hour. These prices, however, are expected to rise significantly as a result of certain actions recently taken by the BPU which increased the default cost and extended the marketable life of certain RECs.

As alluded to above, one of the attractions of RECs is that they enable utilities to comply with certain environmental standards that they would not otherwise meet. The way this comes about is as follows. If a utility fails to comply with the Renewable Energy Portfolio Standards, it is required to pay a default cost to the BPU for any shortfalls in the required electricity from renewable sources; this default cost is currently set at $300 per MW hour. In an attempt to raise the value of RECs, however, the BPU recently voted to increase the default cost to $711 per MW hour, beginning on June 1, 2008. This increase is expected to put upward pressure on the trading price for RECs, thereby offsetting some, if not all, of the CORE rebate dollars that have been eliminated.

To further enhance their value, OCE recently extended the marketable life of RECs generated after May 2008, from one year to two years. But, this extension is prospective only. So, municipalities owning RECs which were generated between June 2007, and May 2008, will still face the one year expiration date and should proceed accordingly.

Produce Excess Electricity - Earn Dollars To bolster the economics relating to renewable energy systems, recent legislation was passed in New Jersey allowing for customers who have on-site generator systems that produce excess energy to be compensated for providing that energy to the grid. N.J.S.A. 48:3-87e(1). When the amount of excess energy credits exceeds the annual electrical usage of a facility, the energy provider must make payment for the excess energy created. Thus, municipalities who go solar now have the ability to sell the excess electricity generated by their systems back to the utility at real-time rates.

The significance of providing real-time credit or market rates for solar energy cannot be overstated. According to Laurie Wiegand-Jackson, President of North American Power Partners, "this change in legislation creates a real incentive for municipalities and private companies to invest in solar electrical generation systems. This is an important, groundbreaking legislative incentive to increase solar electrical generation in New Jersey by allowing the solar electric production to be valued at its true market rate." Before this change in the law, utilities paid for excess generation at an average fixed rate instead of the "true" hourly market-based rates during the peak daytime hours when the solar cells are actually generating electricity. As Ms. Wiegand-Jackson, who was instrumental in helping draft the legislation, explains, "solar photovoltaic cells generate the most electricity during daylight

hours, when market rates typically are the highest per KW hour rates. The solar cells produce no electricity at night when the rates for electricity are lower. By requiring utility companies to pay real-time rates, the revenue realized by a solar generation facility is maximized." Thus, as indicated above, the Legislature has created an opportunity for the customer-generator (in our case a municipality) not only to reduce its electricity costs, but to actually generate additional revenue dollars when the solar generation exceeds the facility's electrical use.

Unlike the sale of RECs, the sale of electricity is not subject to the Local Government Contracts Law, but governed by a different Statute. N.J.S.A. 40A:11-5(1)(w) provides that contracts related to "[t]he purchase of electricity or administrative, or dispatching services directly related to transmission of such purchased electricity" are exempt from public bidding requirements. Therefore, municipalities that invest in solar electrical generation will not only be benefiting the environment, but will also be able to offset the cost of their investment more quickly by selling off excess generation in the open market.

As renewable energy technology continues to advance, its generation becomes more practical and investment in its sources, more economically rewarding. The by-product of these advances is the conservation of fossil fuels and reduction of greenhouse gases. New Jersey remains in the forefront of encouraging investment in renewable energy generation, and those municipalities that have already made such investments will see even greater returns in the future. Clearly, now is the time for all municipalities to seriously consider installing renewable energy generation facilities. ▲

Joel L. Shain, Esq. is a principal in the Bernardsville law firm of Shain, Schaffer, & Rafanello, P.C. **The author wishes to acknowledge the assistance of Gregory P. Pasquale, Esq. in the preparation of this article.**

1 A Personal Property@ is broadly defined under N.J.S.A. 1:1-2 to include everything except real property, unless otherwise more specifically defined within an applicable statute.
2 15 percent of $29,000.00. For municipalities without a QPA, this amount would be $3,225.00.
3 The economic sense of using an aggregator will depend on the amount of energy generated by the facility. Aggregators are able to get the best price for the RECs by selling in bulk and thereby reducing the purchaser's transactional costs.