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September 26, 2003

VIA HAND DELIVERY & E-MAIL

Honorable Jaclyn A. Brilling
Acting Secretary
New York State Public Service Commission
Three Empire State Plaza
14th Floor
Albany, New York 12223

Re: Case 03-E-0188 – Proceeding on Motion of the Commission Regarding a Retail Renewable Portfolio Standard

Dear Acting Secretary Brilling:

In accordance with the filing deadline established in the "Further Ruling Concerning Schedule and Procedure" issued by Administrative Law Judge Eleanor Stein on September 19, 2003, Multiple Intervenors hereby files an original and 5 copies of its Initial Comments in the above-referenced proceedings. Also, in accordance with the September 19, 2003 ruling, Multiple Intervenors hereby responds in its cover letter to the proposal of the Joint Utilities requesting that the collaborative process be reconvened. Multiple Intervenors supports the request filed by the Joint Utilities on September 15, 2003.

As set forth in more detail in Multiple Intervenors' Initial Comments, which are enclosed herewith, further examination of reliability and cost issues is essential. This proceeding involves a public policy initiative that would cost consumers in New York billions of dollars and would substantially increase the amount of intermittent generation in the State. A rush to judgment in this case can have severe consequences to the economic well-being of the State and the reliability of the bulk power system.

Throughout this proceeding, Multiple Intervenors has urged consideration of the potential cost of a Renewable Portfolio Standard ("RPS"), the rate impacts of such a program, and the impact of a RPS on reliability before the Commission issues a policy statement. The adoption of the Joint Utilities' proposal will provide additional information to the stakeholders and the Commission to ensure that the design and timetable for a RPS is

consistent with minimizing the adverse impact of a RPS on energy prices and enhancing the reliability of the New York State bulk power system.

Very truly yours,

COUCH WHITE, LLP

Barbara S. Brenner

BSB/sem
Enclosures
cc: ALJ Eleanor Stein (via email w/enc.)
RPS Contact List (via email w/enc.)
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STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Proceeding on Motion of the Commission Regarding a Retail Renewable Portfolio Standard **Case 03-E-0188**

COMMENTS
OF
MULTIPLE INTERVENORS

Dated: September 26, 2003

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Preliminary Statement

Multiple Intervenors, an unincorporated association of approximately 55 large commercial and industrial energy consumers with manufacturing and other facilities located throughout New York State, hereby submits its Comments in accordance with the amended schedule established on September 17, 2003 by Administrative Law Judge Eleanor Stein. Although Multiple Intervenors' Comments are organized in accordance with the "Outline for Comments" ("Outline") issued by Judge Stein on June 10, 2003, Multiple Intervenors does not address all of the issues identified in the Outline in these Comments. Nor are these Comments limited to issues that were included in Judge Stein's Outline. The sections that have been added have the designation "[ADDED]" in the Table of Contents.

These Comments include additional subsections pertaining to the New York's lagging economy (Section II.B.3.a), the high cost of doing business in New York (Section II.B.3.b), and the high price of electricity in New York (Section II.B.3.c). In the "Other Issues" section of these Comments, there are two additional subsections, one addressing procedural issues (Section IX.A) and one setting forth Multiple Intervenors' primary recommendation that the State rely on market-based programs for the development of renewable resources (Section IX.B). Reliability issues are addressed in Section II.B.2. The cost/benefit studies filed on July 28, 2003 and the rate impacts of a Renewable Portfolio Standard ("RPS") are addressed in Section VIII.

I. Summary of Comment

The question that must be addressed in this proceeding is whether implementing a RPS *at this time* is good public policy for New York State. As demonstrated, *infra*, a RPS should not be implemented at this time. To do so would be inconsistent with the goals articulated by the State of New York Public Service Commission ("Commission") in Opinion No. 96-12, namely to reduce energy prices and foster the development of competitive electricity markets.

Simply stated, the cost of electricity in New York State is too high. (Section II.B.3.c.) Increasing the price of electricity by providing subsidies to select generators would exacerbate the problem. Although a RPS almost certainly would result in rate increases between now and 2013 exceeding $1 billion, and probably cost consumers more than $2 billion, there is no evidentiary record in this proceeding. There has been no sworn testimony or opportunity to cross-examine witnesses under oath. Thus, the claims that have been asserted by the proponents of a RPS have not been tested.

Moreover, a RPS would be detrimental to the continued development of competitive electricity markets in the State. (Section II.B.5.) If a RPS is implemented, the "level playing field" that is essential to competitive markets would be replaced by a system in which some generators receive subsidies to ensure that they can recover all their capital costs, but other generators will not, thereby being disadvantaged. And, the New York State Reliability Council ("NYSRC") has indicated that a RPS may have a detrimental effect on the reliability of the bulk power system.

Nonetheless, if, *arguendo*, the Commission determines that implementation of a RPS is an appropriate public policy at this time, then it is essential that the cost of the RPS be minimized. The cost to consumers must be the threshold criterion used in the selection of renewable resources and the design of a RPS. In determining the cost, it is essential that all costs, including additional transmission facilities and New York Independent System Operator, Inc. ("NYISO") costs, are considered. There must not be any "set asides" for expensive technologies. And, to ensure that RPS subsidies are not any greater than absolutely necessary, the cost recovery must be limited to the difference between each individual renewable resource's cost of service and the locational-based marginal price ("LBMP") that the generator receives from the NYISO-administered markets. The cost of service must be subject to periodic review by the Commission in order to ensure that there is no over-recovery by generators. Moreover, such subsidies must not be paid to any renewable resources that do not require RPS subsidies in order to be developed. (Section IV.A.)

In addition, the rate recovery must be harmonized with the State's economic development policies. (Sections II.B.3; II.B.4.) In order to ensure that the State's economic development goals are not thwarted, consumers that participate in economic development programs that are intended to reduce the price of electricity must not be required to pay a RPS surcharge. To impose a RPS surcharge on these businesses would undermine the State's economic development initiatives by increasing their price of electricity.

Instead of implementing a RPS now, the State should rely on voluntary market-based programs. (Section IX.B.) The Commission should revisit the issue of implementing a mandatory RPS in a few years.

II. Comment on the Revised Working Objectives

On June 19, 2003, Judge Stein issued a ruling that revised the Working Objectives for this proceeding.[1] As set forth below, the Revised Working Objectives should be further modified. The Working Objectives in this proceeding must be consistent with the Commission's policies of fostering competitive electricity markets and reducing the price of electricity, especially for industrial consumers, as articulated by the Commission in Opinion No. 96-12.

A. Working Target

The June 19, 2003 Revised Working Objectives state that the Working Target is that "[b]y the year 2013, at least 25% of the electricity retailed in New York will be derived from renewable resources."[2] The Working Target should be revised to read that:

> The goal is to have 25% of the electricity retailed in New York State provided by renewable resources.

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[1] *See* Case 03-E-0188, *Proceeding on Motion of the Commission Regarding a Retail Renewable Portfolio Standard*, Ruling Establishing Comment Procedures (June 19, 2003) ("June 19 Ruling"). The purpose of the Working Objectives in this proceeding has not been established. Multiple Intervenors has assumed in these Comments that each proposed RPS design element will be examined to determine whether the RPS would be consistent with the Working Objectives.

[2] *Id.* at 3.

In the "Order Instituting Proceeding," the Commission stated that "[a] return to the 25 percent number figure [for renewable resources used in New York State] would be in the public interest." The Commission established this as a goal. It did not use the phrase "at least" and it did not establish a deadline for achieving the 25 percent goal. This Working Target's assumption that 10 years is the timeframe in which to accomplish this goal is based neither on the Commission's "Order Instituting Proceeding," nor on the State Energy Plan.[3]

If a specific time period for achieving the goal of 25 percent is established in this proceeding, consideration should be given to a more extended timeframe. If a year is established for achieving the goal, Multiple Intervenors urges the Commission to select the year 2020. New York has many serious energy issues that need to be addressed in the near-term. The August 14, 2003 blackout has made it clear that the reliability of the New York State bulk power system must be studied and addressed. Given the complexities of designing, operating and maintaining a reliable bulk power transmission system, it is essential that any upgrades or modifications that are needed in the bulk power system be addressed prior to adding a significant amount of intermittent resources in the State. The costs of these upgrades must be established before the State implements a RPS.

Indeed, even before the August 14th blackout, it was clear that New York State requires additional transmission facilities. Congestion has cost consumers almost $2.75

[3] The 2013 timeframe appears to have been selected because of a statement in the State of the State message. The Commission, however, must establish a timeframe that is consistent with its statutory obligation to set just and reasonable rates.

billion in the first two and a half years of the NYISO's operation.[4] The addition of renewable resources west of the Central-East interface could add to that congestion.

Moreover, the cost of renewable resources is likely to decrease over time. In 1991, the National Association of Regulatory Utility Commissioners found that the cost of wind and solar technologies had dropped between 65 percent and 85 percent over the previous ten years and that project costs would decline further in the next five to ten years as technologies were refined.[5] Indeed, the cost of wind energy has been going down since 1980. The levelized cost in 1979 was 40 per cents kWh.[6] The State Energy Plan points out that the life cycle cost of wind power has decreased from more than 25 cents per kWh ten years ago to the current range of 4-6 cents per kWh.[7] The projected cost in the year 2010 is 2.5 cents per kWh because of increased turbine size, R&D advances, and manufacturing improvements.[8]

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[4] *See* Power Alert III New York's Energy Future (May 22, 2003) (presentation by William J. Museler at the Times Square Hilton, New York City).

[5] *See* New York State Energy and Research and Development Authority ("NYSERDA"), *Wind Technology Assessment*, at 1 (July 1991).

[6] *See Wind Energy: New York's Future*, The Times Union (Albany), September 23, 2003, at 8.

[7] New York State Energy Plan and Final Environmental Impact Statement, June 2002 ("State Energy Plan"), at 3-58-3-59 (June 2002).

[8] *Id.* At that cost, there is no apparent need for wind power projects to be subsidized.

A June, 2003 study performed by Navigant Consulting found that the capital costs of wind and photovoltaics are expected to be reduced by about 5 percent annually.[9] One of the study's key findings is that photovoltaics are expected to be competitive by 2013.[10]

Because renewable resources will have lower costs in the future and should be technologically superior, it is good public policy to delay the implementation of a RPS. Moreover, delaying the implementation of a RPS will give New York State an opportunity to learn from the experience of other states that have implemented RPSs. New York State would benefit from not implementing a RPS at this time. This is an instance in which the tortoise, not the hare, will reap the long-term benefits at the lowest cost.

B. Revised Working Objectives

1. New York's Environment

This Working Objective, which is to improve New York's environment, can be accomplished by means other than implementation of a costly RPS. For example, reductions in NO_x and SO_x can be accomplished by promoting the development of new fossil fuel generation, particularly in the downstate area. The MAPS analysis for a new 750 megawatt fossil fuel facility in Rockland County indicated that the operation of that facility would

[9] *See* Navigant Consulting *The Changing Face of Renewable Energy,* at 5 (June 18, 2003).

[10] *Id.* at 12.

reduce NO_x emissions in New York State by 3400 tons by 2010 and that SO_x would be reduced by more than 8400 tons.[11]

Moreover, the State Energy Plan cautions that "the emission reductions [from wind power] may not be as significant as one might anticipate."[12] During the peak period - summer - the wind capacity will be at its lowest availability. Thus, less efficient, higher emission rate generators will be used.[13]

2. Generation Diversity

This Working Objective should be re-titled "Reliability." The Working Objective should be revised to read:

> Reliability: Diversify New York State's electricity generation mix in a manner that will improve energy security and reliability.

Generation diversity historically has been considered an important goal because it should improve the energy security and reliability of the New York State's electricity supply. Generation diversity is a means to the end; it is not the goal. Reliability should be the goal.

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[11] *See* Case 99-F-1164, *Application by Mirant Bowline L.L.C. (formerly Southern Energy Bowline, L.L.C.) for a Certificate of Environmental Compatibility and Public Need to Construct and Operate Bowline Unit 3, a 750 Megawatt Generating Facility in the Town of Haverstraw, Rockland County*, Article IX Application, at 17-6 (March 20, 2000).

[12] State Energy Plan at 3-137.

[13] *Id.*

Moreover, generation diversity contributes to reliability only if the generating capacity is available at system peak and where the electricity is needed. If a diversified electricity supply is not available when and where it is needed, it will not contribute to reliability.[14] Consumers still may be vulnerable to price spikes and possible supply disruptions. Moreover, as discussed below, because a RPS will have a negative impact on the development of fully competitive electricity markets, it may have an even greater negative impact on energy security and system reliability. (*See* Section II.B.5.)

Navigant Consulting states as one of its key findings in its study of renewable energy that renewable energy "variability can have greater impact where transmission is congested …."[15] The report identifies as key grid integration issues associated with utility-scale, commercial renewable energy resources, *inter alia*, voltage fluctuations and frequency excursions, as well as unintended schedule deviation.[16]

The NYSRC has recognized that there are reliability impacts depending on the RPS design and implementation. The NYSRC has urged the Commission to ensure that the design adopted is consistent with, and preferably enhances, the continued reliability of the

[14] For example, in 2002, electricity production was at its lowest point in August, which is when the State experiences is peak electricity demand. *See* NYSERDA, *New York Energy Smart Program Evaluation and Status Report* (2003).

[15] *See The Changing Face of Renewable Energy*, *supra* note 9, at 19.

[16] *See id.*, at 20.

New York State bulk power system.[17] Likewise, the NYISO has recognized that there are potential reliability impacts from the development of intermittent resources. The NYISO has recommended that:

> Due to the specific nature of windpower, in particular, and of intermittent sources of energy in general …
>
> - A process of assessing the impact of intermittent power sources on the reliability of the grid should be pursued. If necessary, rules, procedures and criteria regarding the operation of these types of generation sources should be developed.
>
> - Power flow and dynamics models should be developed for each type of the wind machines.[18]

As the Commission has stated, "…ensuring an adequate and reliable supply of electricity continues to be of critical and major importance."[19] In this proceeding, Judge Stein noted "[t]here is no dissension among the parties that discussion and analysis of reliability implications are an important dimension of an RPS."[20] Yet, unless this Working

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[17] *See* Letter from Kenneth Haase, NYSRC Chairman, to ALJ Eleanor Stein (August 20, 2003).

[18] *See* New York Independent System Operator, Inc., *Review of System Reliability Impact Study for the 230 kV Interconnection of the Flat Rock 240 MW Windpower Plant*, at 8 (June 26, 2003).

[19] Case 03-E-0614, *Proceeding on Motion of the Commission Regarding Expedited Implementation of Mandatory Hourly Pricing for Commodity Service*, Order Instituting Proceeding, at 4 (April 30, 2003).

[20] Case 03-E-0188, *Proceeding on Motion of the Commission Regarding a Retail Renewable Portfolio Standard*, Ruling on Motion to Amend Comment Schedule and Convene Reliability Impact Meeting, at 4 (June 13, 2003).

Objective addresses the issue, there is no Working Objective that relates to generation reliability.

3. Economic Benefits

The April 11, 2003 Working Objectives included the goal of "Economic Development."[21] That Working Objective should be revised to read:

> Economic Development: develop renewable resources in a manner that benefits the State's economy as a whole, consistent with the State's economic development policies and initiatives.

The scope of the Working Objective must be broadened. It should not be limited to the attraction of renewable resource investors, generators, manufacturers, and installers to New York State. The Working Objective, as currently drafted, ignores all segments of the New York economy, except for renewable resource generation, manufacturing and installation.

However, the economic development goals of the State are not limited to attracting only one type of industry, particularly where it would be harmful to other industries. To the contrary, it is the State's policy to retain existing businesses and to attract a wide variety of new businesses, not just renewable resources-related employment. The Working Objective must focus on the State's broad-based economic development goals.

In determining whether the development of renewable resources will result in beneficial economic development, the Commission must consider the economic development impact of increasing the price of electricity. The 1998 New York State Energy Plan stated

[21] The title was changed to "Economic Benefits" in the June 19, 2003 Revised Working Objectives.

that for each $100 million increase in electricity costs to consumers, employment in New York State is reduced by 1100 to 1600 jobs.[22] And, a RPS as contemplated by some parties would cost consumers at least $1 billion, and probably more than $2 billion in the next 10 years -- that is a lot of jobs. Thus, based on the State Energy Plan, a RPS could result in the loss of 11,000 to 16,000 jobs if the cost is $1 billion and, if the cost of the RPS exceeds that, then the job losses will be even greater. This Commission deregulated the State's electricity markets primarily to close the gap between electricity prices in New York and the rest of the country, in large part to enable New York businesses to be more competitive. The Commission stated explicitly that its vision for the future of the electric industry includes "reduced prices resulting in improved economic development for the State as a whole."[23]

And, New York State cannot afford to lose jobs. As demonstrated below, New York's economy is lagging behind the rest of the nation. The cost of doing business in the State far exceeds the national average, and the high price of electricity has a negative impact on economic development. Thus, the Working Objective must reflect the State's economic development objectives as a whole and address the impact of a RPS on the entire State economy. It should not focus exclusively on the renewable resources industry.[24]

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[22] *See* 25 N.Y. St. Reg. 18, at 9 (May 7, 2003).

[23] Case 94-E-0952, *In the Matter of Competitive Opportunities Regarding Electric Service*, Opinion No. 96-12, Opinion and Order Regarding Competitive Opportunities for Electric Service, at 25 (May 20, 1996).

[24] As demonstrated, *infra*, there has not been any analysis relating to the number of jobs that might be created in New York State if a RPS were implemented. (*See* Section VIII.)

a. New York's Lagging Economy [ADDED]

All available socioeconomic data demonstrate that New York's economy lags behind the rest of the country. New York recently ranked 43rd among all states in terms of population growth, and "last among all states in migration from one state to another, both in raw numbers and as a percentage of population."[25] The Division of Budget reports that the State budget shortfall will be between $5 billion and $6 billion in 2004, and between $6 billion and $8 billion the following year.[26] In May 2003, Standard & Poor's downgraded New York's credit outlook from stable to negative because of S&P's uneasiness about the State's expected future budget deficits.

The economic climate is particularly difficult for New York's manufacturing sector. In upstate New York, "one in every two jobs depends directly or indirectly on manufacturing."[27] In 2000, manufacturing jobs accounted directly for 20.5 percent of all jobs in Binghamton and Rochester; 15.5 percent in the Buffalo-Niagara region; 14.4 percent in Utica; and 14.1 percent in Syracuse.[28] But, by 2002, upstate New York had lost 32 percent

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[25] Business Council of New York State, Inc., *New York's Population Growth Still Lags, Census Data Show* (January 23, 2003).

[26] *See* James M. Odato, *Report Forecasts Billions in Deficits*, Times Union (Albany), (August 1, 2003) at B2.

[27] Public Policy Institute of New York State, Inc., *The Key to the Upstate Economy? Manufacturing – Still*, at 1 (September 2002).

[28] *See* Public Policy Institute of New York State, Inc., *The Power to Grow*, at 7 (January 2002).

of its manufacturing jobs, compared to only a 4 percent loss nationally.[29] Moreover, upstate continues to lose manufacturing jobs. Statistics from May 2002 to May 2003 confirm that the loss of manufacturing jobs is significant, ranging from 4.5 percent in the Buffalo/Niagara Falls area to 10.8 percent in Binghamton.[30]

The State needs to stem the loss of jobs, particularly in upstate New York. Increasing the price of electricity will not help the State retain jobs.

b. Cost of Doing Business in New York [ADDED]

The cost of doing business in New York significantly exceeds the national average. New York State ranks 44th nationally as a favorable tax venue for businesses.[31] In 2000, property taxes per capita in New York were about 50 percent above the national average.[32] In addition, New York State school districts are raising local property taxes by an average of 7.4 percent with their newly approved budgets.[33] Indeed, New York City property

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[29] *Id.* at 8.

[30] *See* New York State Department of Labor, Labor Market Information, *available at* http://www.labor.state.ny.us.

[31] *See Taxing State*, The Crain's Insider, July 23, 2003.

[32] *See* Public Policy Institute of New York State, Inc., *Budget Watch '03: Our Local Taxes Are Far Too High – And More State Aid Won't Fix The Problem* (December 3, 2003).

[33] *See* Greg Winter, *94% Of School Budgets Pass, Most Of Them More Expensive*, N.Y. Times, June 5, 2003, at B1.

taxes have increased 18.5 percent.[34] A subsidy for renewable resources is simply another increase in the already very high cost of doing business in New York State.

c. The Price of Electricity [ADDED]

The price of electricity is a matter of particular importance to businesses. The State Energy Plan reports that:

> In a national survey of businesses that primarily included manufacturers, 81% of the respondents considered energy cost and availability to be either an important or very important site-selection factor. Given the relative cost of energy in New York, manufacturers in the State regard energy costs as being even more significant than is indicated by the national survey.[35]

As indicated, *supra*, this Commission deregulated the State's electricity markets primarily to close the gap between electricity prices in New York and the rest of the country, in large part to enable New York businesses to be more competitive. The average price of electricity in New York State has been, and unfortunately remains, well above the national average.[36] The State Energy Plan compared New York's 2000 electricity prices to prices in 11 states "that compete with New York in attracting business."[37] New York's

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[34] *See* Anthony DePalma, *Hard Times: Early Warnings In Queens*, N.Y. Times, June 2, 2003, at A1.

[35] State Energy Plan, *supra*, at 2-16 (footnote omitted).

[36] *See, e.g.*, State Energy Plan at 2-25 – 2-26.

[37] *Id*. at 2-26.

electricity prices were higher than the prices in all 11 states examined.[38] According to the Edison Electric Institute, during the Summer, 2002, electricity prices paid by New York consumers not only exceeded the national average by a significant amount, they also exceeded prices paid in neighboring states.[39] The average electricity prices paid by high demand/high load factor customers, namely industrial customers, in New York State were 74 percent above the national average.[40] In contrast, electricity prices paid by comparable customers in neighboring Pennsylvania only were 1 percent above the national average.[41]

And, the price of electricity in the State continues to increase. Moreover, the Department of Environmental Conservation already has indicated that the price of electricity in New York State will increase even further as a result of the recently-enacted acid deposition reduction trading program. Based on the MAPS model for 2008, compliance with

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[38] *See id*. at 2-27.

[39] *See Typical Bills and Average Rates Report*, Edison Electric Institute, at 82, 113 (Summer 2002).

[40] *See id*.

[41] *See id*. at 84, 114. New York's average residential and large commercial electricity prices also exceeded the national average by substantial amounts. New York's average residential electricity bill of $125.79 was 42 percent higher than the national average of $88.66. *Id*. at 7, 36. New York's average large commercial electricity bill of $18,822.00 was 47 percent higher than the national average of $12,836.00. *Id*. at 44, 74.

the new regulations will result in the wholesale electricity prices in New York State increasing by 9% in the Rochester area and 16% on Long Island.[42]

High energy costs routinely are cited as one of the primary reasons for the decline in New York's manufacturing sector.[43] Indeed, the State Energy Plan recognizes that "energy prices tend to be important factors in business location and expansion decisions, particularly for energy-intensive businesses."[44]

The State has several programs to provide lower cost electricity to industry to enhance economic development in the State of New York. The Power Authority sells Niagara Project hydropower to industrial consumers within 30 miles of the Niagara Project switchyard. One category of industrial hydropower is Replacement Power. In 1957, the United Stated Congress enacted the Niagara Redevelopment Act ("NRA"), 16 USC § 836(a). The NRA provides that the Power Authority shall contract to sell 445 megawatts of Niagara Project power, known as Replacement Power, to industries that are located in the Buffalo/Niagara area. This power has been sold to industrial customers for more than 40 years.

In addition, 250 megawatts of power generated at the Power Authority's Niagara Project, known as Expansion Power, is sold to industries on the Niagara Frontier for economic development. This power has been sold to industrial customers since the early

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[42] *See* 25 N.Y. St. Reg. 18, at 5 (May 7, 2003).

[43] *See, e.g.*, State Energy Plan at 2-16; "*The Key to the Upstate Economy? Manufacturing – Still*," *supra* note 27, at 8.

[44] State Energy Plan at 2-16.

1960s. In 1987, the New York State Legislature amended Section 1005 of the New York Public Authorities Law to codify the preexisting contractual Expansion Power program. *See* N.Y. Econ. Dev. Law §§ 182 *et seq*. (McKinney 1988 & Supp. 2003); N.Y. Pub. Auth. Law §1005 (McKinney 1988 & Supp. 2003). In enacting the Expansion Power Program, the New York Legislature found that:

> Expansion power contracts have been a proper and essential part of The Power Authority's plan for marketing Niagara project power and energy. The legislature further found that the economy of the Niagara region ... has become critically dependent on these allocations and the businesses which require them to be competitive.

1987 N.Y. Laws, Ch. 32, at § 1.

When the Legislature amended Section 1005 of the New York Public Authorities Law to codify the Expansion Power Program, it also created another lower cost category of power, Economic Power Development. The New York State Legislature created this program to encourage job development and industrial investment in New York State. *See* 1987 N.Y. Laws, Ch. 32, at § 1.

In 1997, the Legislature also created the Power For Jobs ("PFJ") program. The Legislature enacted the PFJ program because New York State businesses "pay well above the national average for electricity and are compelled to compete in a national and global economy with other enterprises that pay less for electricity." 1997 N.Y. Laws, Ch. 316, at § 1. The PFJ program makes a lower cost form of power available to New York businesses for job retention and economic development purposes. *See* N.Y. Econ. Dev. Law § 189 (McKinney Supp. 2003).

In enacting the PFJ Program, the Legislature expressly determined that "the cost of electricity has a significant effect on economic development, employment levels and decisions to retain, attract or expand businesses in New York." 1997 N.Y. Laws, Ch. 316, at § 1. The Legislature determined that in the absence of the opportunity to avail themselves of a lower cost form of power in the future, "New York enterprises may not make the investments and commitments to maintain and expand facilities in New York State." *Id*.

Thus, the PFJ program was enacted to "provide electricity at the least cost" to New York State businesses and thereby "strongly advance the economic interests of New York State by improving economic opportunities, enhancing its competitive position, and making possible the retention of existing jobs and the expansion of job opportunities." Bill Jacket, 1997 N.Y. Laws, Ch. 316, Governor George E. Pataki's Program Bill No. 96 at 2. Lauded by Governor George Pataki as "yet another example of [New York State's] aggressive and innovative strategy to encourage business growth and expansion," this program also has been heralded by members of the New York State Senate and the Assembly as "important and historic legislation" that will "help New York compete with other states which have lower energy costs."[45]

Earlier, in 1983, the New York Legislature added Section 66(12-b)(a) to the Public Service Law. That law authorizes the Commission to designate as economic incentive areas, specific areas in which reduced economic activity and unemployment "…justifies the

[45] Press Release, State of New York Executive Chamber, *Governor Pataki Signs Historic "Power For Jobs" Legislation -- Law Will Provide Low-Cost Electricity to Save, Create Jobs* (August 6, 1997).

approval of reduced incentive for utility services…." N.Y. Pub. Serv. Law § 66(12-b)(a)(1). The statute also authorizes the Commission to designate classes of customers as appropriate for special rates or tariffs, "…in order to prevent loss of such customers, or to attract new customers…." *Id.* In his Memorandum of Support for Section 66(12-b)(a), the New York State Senate sponsor of the bill, Senator Dale M. Volker, stated that the purpose of the legislation was "[t]o retain and attract businesses." 1983 N.Y. Laws Ch. 626 (Memorandum in Support of Senator Dale M. Volker at 1.)

The Governor, the Legislature and the Commission have recognized that electricity prices are too high in New York. Indeed, it is State policy that "[e]nergy prices need to be brought more in-line with other states to compete more effectively for economic opportunities."[46] Requiring a RPS, at this time, would increase the price of electricity, thereby increasing the disparity between New York's electricity prices and the prices available to businesses located in other states.

4. Equity and Economic Efficiency

The Revised Working Objectives, issued on June 19, 2003, include the minimization of the adverse impact of a RPS on energy costs, the allocation of costs "equitably among ratepayers," and affording opportunities for recovery of utility investment. These objectives are discussed below.

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[46] State Energy Plan at 2-37.

a. Minimization of Adverse Impact on Energy Costs [ADDED]

The adoption and implementation of a RPS requirement that mandates that consumers subsidize renewable resources means that the price of electricity in New York State will increase. In order to minimize the adverse impact on energy costs of a RPS, it is essential that only the least cost renewable resources be included in the RPS. The cost to consumers should be the threshold eligibility criterion. The analysis of the costs to consumers of any RPS must include not only the subsidies paid to the developers, but also any required transmission upgrades and increases in NYISO charges.

As demonstrated in Section VIII, *infra*, none of the studies presented in this proceeding have quantified those costs. In its September 8, 2003 letter, the NYSRC outlined several categories of costs that need to be considered. These include the need for higher reserve margins, different operating reserve requirements, and the possible impact on regulation service.[47] The cost of additional transmission facilities, as well as the impact on congestion, need to be considered. And, the potential increase in out-of-merit dispatch resulting from an increase in intermittent resources must not be ignored. These are costs of a RPS that consumers will be required to pay.

Moreover, to minimize the cost of a RPS, there should not be any tiers that favor certain technologies. Any "set asides" would increase the cost of a RPS. In the "New

[47] *See* letter from Kenneth Haase, NYSRC Chairman, to ALJ Stein (September 8, 2003).

York Renewable Portfolio Standard Cost Study Report," sponsored by the New York State Department of Public Service ("DPS") and the New York State Energy Research and Development Authority ("NYSERDA"), one of the assumptions is that there would be an SBC-like tier. The SBC-like tier would account for the development of an incremental 167,551 MWh with a cost premium of over $74 million between 2006 and 2013. This is a premium of over $440 per MWh. The DPS/NYSERDA other, or main, tier would have a cost premium of $60 per MWh. A SBC-like tier increases the cost of a RPS significantly. Thus, a RPS, if implemented, must not include a SBC-type tier. It would unnecessarily increase the cost to consumers.

In addition, in order to minimize the adverse impact on energy costs, the Commission should reject any proposal that would require all renewable resources in any given year to be paid the market clearing price. A RPS is a subsided program, not a competitive market. Thus, each subsidy should be limited to the minimum amount necessary for the project to be built.

In order to minimize the cost to consumers, the RPS subsidy payments to each renewable resource generator must be based on the cost of service of that generator. The payment should be the difference between the NYISO revenues that the generator will receive and each generator's specific, individual cost of service. In responding to a renewables RFP, the developer/generator would be required to provide specific cost information on each renewable operating facility. The information would include capital

costs, operation and maintenance costs, as well as a proposed rate of return on equity.[48] The developer would include the anticipated capacity factor for the facility and the revenue per kilowatthour that would be required to construct and operate the plant. Each project would have a different revenue requirement, depending on its cost structure.[49]

Then, the resources would be selected on a least cost basis. Renewable resources that are selected to participate in the RPS would each receive a customized subsidy. The subsidy would be the difference between the payments received by the facility from the NYISO for energy, capacity and ancillary services and the facility's cost of service. Those revenues plus the subsidy would be the ceiling price for that unit. Thus, if the payments from the NYISO exceed the subsidized price on an annual basis, then the consumers that are funding the RPS would receive a credit. Because the risk of low market (LBMP) prices would be shifted to consumers, the developer should not be paid any more than his cost of service. To give the developer a subsidy that is larger than the amount that is needed to construct and operate the project would provide the developer with a windfall and unnecessarily increase the cost of RPS to consumers.

The virtue of a cost-based premium is that it does not permit the renewable resource provider to earn anything more than a fair profit based on its cost structure. Any

[48] The Commission could establish a generic rate of return on equity for the RPS on an annual basis.

[49] Any proposal to pay developers a so-called "market clearing price" must be rejected. For instance, if one developer needs a total payment of 5 cents per kWh to construct a project, and another developer needs 6 cents per kWh, the first developer should be paid no more than 5 cents per kWh. Any higher payment only would increase the price to consumers without providing any additional benefits.

subsidy payment that would be greater than a developer's cost of service would provide excessive profits to renewable resource providers and result in consumers incurring excessive costs.[50] In addition, the total expenditure in any one year should be subject to a cap. As demonstrated, *infra*, in Section VIII, the estimates of the cost of a RPS vary substantially. Without an annual cap, there will be no protection for consumers.

Likewise, as discussed in Section IV.A., *infra*, new renewable resources that do not require any subsidies should not receive a subsidy. There are renewable resources that will be developed in New York State without a RPS. It is clear that these resources currently are being developed by the Power Authority and others. There are facilities that already have contracts that enable them to obtain financing and do not require a RPS subsidy to be built. In addition, without a RPS, additional renewable energy will be delivered to State agencies in accordance with Executive Order No. 111. And, some customers are electing to support renewable resources without a RPS through "Green Marketing" programs. These resources will be developed even if the State does not implement a RPS. The purpose of a RPS is to create new incentives for renewable power and not to provide additional compensation to renewable resources that already have been constructed or will be developed without a RPS.

[50] Renewable resource developers that seek to participate in a RPS should not "have it both ways" – they should not be permitted to reap market-based profits while receiving subsidies from captive consumers. If developers want to be subsidized through a RPS, they should be required to submit to cost of service regulation to ensure that customer-funded subsidies are no greater than what is necessary for the project to be developed.

b. Ratepayer Equity and Economic Efficiency [ADDED]

As demonstrated, *supra*, it is New York State policy to encourage economic development by, *inter alia*, lowering the price of electricity for specific industrial customers. These include the industrial customers that purchase Niagara and/or St. Lawrence hydroelectric power, Economic Development Power, Power For Jobs, or are located in an Economic Development Zone, as well as customers purchasing electricity pursuant to flex-rate contracts.[51] In order to participate in these economic development programs, the industrial customers must demonstrate that the lower cost power is necessary in order to retain existing jobs or attract new jobs. To increase the price paid by these consumers to fund a RPS subsidy would be contrary to the legislative intent of the programs. These customers should not be required to pay a RPS surcharge.

As the Commission held in Case 01-E-1628, the price certainty provided by a flex-rate contract is central to a customer's decision to site facilities in New York.[52] Significantly, as the Commission recognized, customers have relied upon the pricing terms of their special contracts as justification for conducting new or maintaining existing operations within New York State. In many instances, those investments exceed tens, or even hundreds, of millions of dollars.

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[51] *See* Case 94-E-0952, *In the Matter of Competitive Opportunities Regarding Electric Service*, *supra*, note 23, at 23.

[52] *See* Case 01-E-1628, *In the Matter of Electric Service at a Potential Manufacturing Facility to be Constructed in New York by Corning Incorporated*, Order on Flex Rate Contract Negotiations, at 2-3 (issued October 31, 2001).

Moreover, it would be patently unfair to impose a RPS surcharge on the Power Authority's customers. The Power Authority funds all of its activities from revenues that it receives from its customers or the NYISO. Its customers are paying for the upgrades at the St. Lawrence and Niagara hydroelectric projects, as well as the Power Authority's other renewable ventures. These customers should not be required to subsidize other renewable resources.

And, the rate design that is utilized in collecting the RPS costs also is important to achieving equity and economic efficiency. The costs that are at issue in this proceeding are primarily, if not exclusively, capacity-related. Capital costs should not be recovered through the energy rate. If they are recovered on an energy basis, the price signals to customers will be distorted. Any RPS surcharge should be collected through a customer or demand charge stated explicitly on customers' bills.

c. Opportunities for Recovery of Utility Investment [ADDED]

Although the design of the RPS may not make the utilities responsible for investing in renewable resources, there will have to be a mechanism for the collection of the costs of the RPS. As set forth above, these costs should not be collected through a volumetric surcharge. Rather, the costs should be collected as a demand or customer charge, which is stated explicitly on customers' bills.

Additionally, the RPS surcharge should not be collected through the NYISO's uplift charge. The uplift charge is utilized, generally, to collect costs related to market

imperfections in the wholesale electricity markets administered by the NYISO. In contrast, the RPS surcharge would stem from a retail program instituted by the Commission and, thus, the costs of the RPS should be collected by the utilities that have the legal responsibility to provide retail service to end-use customers.

Pursuant to the NYISO's Operating Agreement, the NYISO's primary responsibilities are to maintain the safe and reliable operation of New York's bulk power system and to administer wholesale electricity markets in accordance with tariffs approved and regulated by the Federal Energy Regulatory Commission ("FERC"). (*See, e.g.*, NYISO Operating Agreement at ¶¶ 2.01, 5.08, 6.01-6.03.) The NYISO's billing and settlement procedures, which govern, *inter alia*, uplift, are governed by FERC-approved tariffs. (*Id.* at ¶ 6.01.) It would be wholly inappropriate, and beyond the Commission's jurisdiction, to direct that the costs of a retail RPS program be collected through modification of the NYISO's procedures for calculating and recovering uplift.[53]

[53] The Operating Agreement also provides that the NYISO will carry out its functions and responsibilities to market participants impartially and on a non-discriminatory basis. (*See id.* at ¶¶ 5.08, 6.01.) To the extent the NYISO attempts to collect through uplift surcharges to benefit only certain renewable resource generators, it arguably would be in violation of the Operating Agreement's requirements that it act in an impartial and non-discriminatory manner.

5. Competitive Neutrality

It is State policy to promote effective competition for the provision of electric service.[54] Consistent with State policy, the Working Objective recognizes that a RPS must be "compatible with competition in energy markets in New York State." However, there is no evidence in this proceeding that a RPS would be, or even could be, compatible with competition in energy markets.

Prima facie, providing subsidies for some generators, *i.e.* renewable resources, but not others is not compatible with the development of competitive electricity markets. By providing financial incentives to a limited class of generators, competition in the wholesale electric market will be affected negatively. Non-renewable generators will not receive RPS subsidies, and, thus, must recover all of their costs by participating in the wholesale markets. However, RPS renewable resources would not be required to recover their capital costs in the markets. Thus, there would not be a "level playing field." This could create a disincentive for non-RPS generators to construct facilities in New York and/or compete in the State's markets.

The State Energy Plan required NYSERDA to examine and report on the feasibility of establishing a statewide RPS for electricity generation.[55] Importantly, NYSERDA was required to "determine whether and how a RPS might be harmonized with a

[54] *See* State Energy Plan at 2-1.

[55] *See* State Energy Plan at 1-39.

restructured and competitive electricity market…."[56] Although the NYSERDA Report distributed in this proceeding concluded that a RPS can be implemented in a competitive market,[57] the Report does not explain the basis for that conclusion or demonstrate why or how a RPS could be implemented without negatively impacting competitive electricity markets. This assessment is crucial. And, although the NYSERDA Report conceded that, "additional research is necessary into the design and operation of [a] RPS…,"[58] in the months since this proceeding was instituted, NYSERDA has not provided any additional research or analysis on this issue to the parties in this proceeding.

III. The RETEC Straw Proposal

To the extent the RETEC Straw proposal is inconsistent with these Comments, Multiple Intervenors urges the Commission not to adopt it.

IV. Eligibility

A. The Baseline

By letter dated March 17, 2003, DPS Staff, in consultation with NYSERDA, provided to the parties in this proceeding "a working baseline estimate of what percentage of

[56] *Id.*

[57] NYSERDA, *Preliminary Investigation into Establishing a Renewable Portfolio Standard in New York*, at 7 (February 14, 2003) ("NYSERDA Report").

[58] *Id.*

the electric energy purchased in the State is derived from renewable resources." ("Staff Baseline Estimate"). The Staff Baseline Estimate indicates that renewable resources currently provide 19.34 percent of all electricity consumed in New York on an energy basis (18.35 percent if waste-to-energy generation is excluded). (Staff Baseline Estimate at 5.)

Staff proposed, in its March 17, 2003 letter, that the baseline should be a number that includes half of the waste-to-energy resources. That approach was intended to advance the collaborative and reach a consensus on the baseline. However, the stakeholders did not reach a consensus. The Staff proposal should be rejected. The baseline should include all waste-to-energy resources. They are renewable resources. The baseline that is utilized as the starting point in this proceeding should be 19.34 percent.

But, the baseline should not be considered a static number. Rather, the baseline should be adjusted annually to reflect the addition of renewable resources that do not require a RPS subsidy. The goal articulated by the Commission is that 25 percent of the energy used in New York State be generated by renewable resources. The Commission did not state that all renewable resources developed in the future should receive a RPS subsidy. If, as set forth below, additional renewable resources do not need a RPS subsidy in order to obtain financing, that does not mean that their output should be ignored. The kilowatthours generated will be renewable energy and should be included in any calculation of renewable energy delivered in New York. The baseline should be increased annually to include all of the renewable resource energy that is delivered in New York State that does not require a RPS subsidy, such as additional energy from the Power Authority hydroelectric facilities,

renewable energy from "Green Marketing" programs, facilities that receive SBC funding or already have financing, and renewable energy purchased pursuant to Executive Order No. 111.

These resources will increase the amount of renewable resources energy delivered in the State and, thus, should be counted for the purpose of determining whether the State is meeting its target. However, consumers should not be required to pay a subsidy to developers for renewable resources that will be developed without the payment of a RPS subsidy. The goal should be to achieve the target of 25 percent at the least cost to consumers.

1. New York Power Authority Hydroelectric Facilities [ADDED]

The New York Power Authority's St. Lawrence and Niagara Projects may have increased output in the next 10 years. The increased energy generated at the Power Authority's hydroelectric projects and delivered in New York State should be included in the baseline, as it is adjusted on an annual basis. In 1990, the Power Authority began a program designed to upgrade the units at the Robert Moses Niagara Power Plant.[59]

The new turbines will operate with improved efficiency and with increased peak capacity, but will not use more water.[60] The Power Authority reports that as a result of

[59] *See* New York State Power Authority, *Draft Scoping Document 1 for the Relicensing of the Niagara Power Project (FERC No. 2216)*, at 2-2 (July 2003).

[60] *See id*.

the upgrades, the peak capacity of the Niagara Project will be increased. For the St. Lawrence-FDR Project, the Power Authority also began a life extension and modernization program in 1998. It will continue until 2013.[61] The efficiency improvements being made at the Niagara and St. Lawrence projects are estimated to result in an additional 60 megawatts of capacity.[62]

The increased output of the Niagara Project should be included in the baseline as the additional output is delivered into New York State's electricity market. These improvements are on-going and are not dependent on a RPS. The Power Authority recovers its "capital costs including upgrades and life extension and modernization costs" from the customers that purchase the Power Authority's hydroelectric power.[63]

Moreover, for the past several years, the Power Authority's hydropower production has been lower than normal.[64] The low water conditions of the Great Lakes and St. Lawrence drainage basin have resulted in the hydroelectric power being delivered to retail

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[61] *See* New York Power Authority, *New York Power Authority January 2003 Report on Hydroelectric Production Rates, Rate Modification Plan, Appendix B*, at 9 (April 2003).

[62] *See* State Energy Plan at 3-133.

[63] New York Power Authority Trustees' Meeting Minutes, Hydroelectric Preference Rates, Item 6 (April 29, 2003).

[64] *See id*.

customers in New York State for the last two years being below the historic amounts.[65] According to NYSERDA, during the past three years, hydroelectric production in New York State has been "relatively low."[66] It has ranged from 5 percent to 10 percent below normal.[67] Consequently, the baseline megawatthours of hydroelectric power generated by the Power Authority and other existing hydroelectric power plants may increase substantially if, during the next ten years, there are normal or high water levels.

Thus, the Commission will need to determine whether it will adjust the baseline each year to reflect the actual output of the hydroelectric facilities that is delivered in New York or use the historic long-term average in determining the level of Power Authority hydroelectric power to include in the baseline. If the historic long-term average is used in determining the baseline, then the additional generation from the upgrades will have to be taken into account separately.

2. Renewable Resources Developed Without a RPS [ADDED]

Renewable resources are being developed in New York State without a RPS subsidy. These resources should be included in the annually revised baseline, but should not

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[65] *See* FERC Docket No. P-2000-036, *Power Authority of the State of New York St. Lawrence – FDR Power Project*, Comments of the Public Power Association of New Jersey on the Draft Environmental Impact Statement (August 11, 2003).

[66] NYSERDA, *Patterns and Trends New York State Energy Profiles 1987-2001*, at 3b (December 2002).

[67] The current baseline is comprised primarily of energy generated by hydroelectric facilities.

be eligible to receive a RPS subsidy. The proposed Flat Rock Wind project, for instance, will have a potential generating capacity of 240 megawatts and intends to be in commercial operation before the end of 2003.[68] Inasmuch as this project intends to be in commercial operation with or without a RPS, the output from this facility should be included in the baseline when it commences commercial operation. It should not, however, be eligible to receive a RPS subsidy, which is not needed for the project to become operational. Moreover, approximately $46 million of SBC funding already has been allocated to the development of the renewable energy market in New York State.[69] Projects receiving SBC funding should not receive an additional RPS subsidy.[70]

The Power Authority has agreed to buy electricity from two wind projects planned in Chautauqua County and Steuben County.[71] The Power Authority will purchase 50 megawatts of electricity, or about half the output of the projects, beginning in January 2005 and continuing for 10 years. The Power Authority has indicated that it will sell the electricity to State government agencies in southeastern New York and may offer some of

[68] *See* New York Independent System Operator, Inc., *supra* note 18, at 2.

[69] *See* New York Energy Smart S & V Action Plan, at 56 (August 13, 2003) (Submitted by NEXANT, Inc. to NYSERDA).

[70] If, *arguendo*, the Commission were to determine that renewable resources could receive both SBC funding and a RPS subsidy, the SBC funding must be considered in the calculation of the RPS subsidy. The developer should not have an opportunity to over-recover.

[71] *See State Will Buy Steuben Wind Power*, Star-Gazette, June 27, 2003.

the power to other customers interested in renewable energy. The rest of the power generated by both projects will be sold to private-sector customers.

In addition, the Power Authority's plans for 2002-2004 include projects involving the following renewable resource technologies: anaerobic digester gas fuel cells; other fuel cells and microturbines; landfill gas-to-electricity; photovoltaics; and wind power.[72] These projects do not require a RPS subsidy.

B. Target Levels

Multiple Intervenors urges the adoption of target levels that are flexible, and which should be revisited every two or three years to determine if changed circumstances necessitate a modification to the interim targets. This would not affect the validity of executed contracts. But, it would give the Commission an opportunity to revise the target levels as circumstances warrant.

1. Forecast

Load forecasts are, by their very nature, always going to be incorrect. There should be a procedure for adjusting the forecasts every two years.

[72] *See* State Energy Plan at 3-55.

2. Start Date

The start date of a RPS, if one is implemented, should not be any sooner than 2009. Before a RPS should be implemented, the State needs to determine what transmission upgrades and additions are needed in order to insure reliable electric service in New York State. It also needs to address the issue of the cost of the upgrades. The first priority of the State should be to address its transmission needs. Until the transmission upgrade needs and cost of those upgrades are determined, a RPS start date should not be established. If the price of delivered electricity is going to increase because of necessary transmission upgrades, that increase needs to be taken into consideration in determining a start date for a RPS. It is necessary to look at the impact that those expenditures will have on the price of electricity before increasing the price of electricity even higher to fund RPS subsidies.

Moreover, as indicated in Section II.A., *supra*, the cost of renewable resources is expected to decrease in the future. Consequently, implementing a RPS sooner rather than later will not benefit the State. A later start date will mean that the State will acquire technologically superior renewable resources at a lower cost.

3. Interim targets

Any interim targets must be flexible. In addition to the need to adjust forecasts of load, it is important that the interim targets are designed to accommodate unforeseen circumstances. There may be unforeseen obstacles to the development of renewable resources in any given year. For example, there may be delays in obtaining permits or delays

in construction due to bad weather. These can delay the in-service date for facilities and may necessitate modifications of interim targets. Moreover, production will depend, in large part, on water levels and the amount of wind in various parts of the State. There should be a procedure established to review the interim targets every two years and determine whether they need to be adjusted.[73]

C. Target Resource Eligibility

In its Initial Comments, dated March 28, 2003, Multiple Intervenors urged the adoption of an inclusive definition of renewable resources that includes all of the renewable resources identified in the State Energy Plan, Department of Environmental Conservation regulations, and Executive Order No. 111. (*See* MI Initial Comments at 22-24.) For the reasons set forth, therein, none of these technologies should be excluded from the baseline calculation or the definition of renewable resources utilized in any proposed RPS.

C. Tiers

1. No tiers

There should be no tiers. As stated, *supra*, cost should be the only selection criterion. As the DPS/NYSERDA Report indicates, a SBC-like tier significantly increases the cost of consumers of a RPS. (DPS/NYSERDA Report at 12; *see also* Section II.B.4.a.)

[73] For example, the United States Army Corps of Engineers will take at least a year longer than it first expected to review the application by Cape Wind Associates for a wind farm off of Cape Cod. *See Measuring Twice*, Vineyard Gazette (Martha's Vineyard) at 6.

The RPS should be designed and implemented with the goal of ensuring that the lowest cost renewable resources are procured.

2. Emerging Technology Tier

There should be no emerging technology tier. It would increase the cost of a RPS.

3. High Value Location Tier

There should be no high value location tier. If, as Multiple Intervenors proposes, all costs of a renewable resource are considered, including the cost of additional transmission upgrades, NYISO costs, *etc.*, then renewable resources in high value locations should be able to compete on the basis of cost. Obviously, only the subsidy paid to the developer would be recovered in the RPS surcharge, but the determination of the winning bids should be based on total costs.

4. Resource Criteria Tier

There should be no emerging technology tier. It would increase the cost of a RPS.

5. Maintenance Tier

There should be no maintenance tier. Existing renewable resources already compete in the market, without a RPS subsidy.

V. Overall RPS Structure

B. Individual Compliance

5. Enforcement Mechanism

It is Multiple Intervenors' position that a RPS, if adopted in New York, should not include an enforcement mechanism in the form of penalties. Automatic penalty provisions will increase the price of electricity in New York State unnecessarily. Consumers have no control over whether the goals of a RPS are met. They are merely the funding mechanism. Thus, an automatic penalty provision, if it is collected from consumers as part of the RPS surcharge, penalizes consumers, but does not penalize or affect the actions of the entities responsible for procuring renewable resources. Twenty-five percent reliance on renewable resources could be a goal or target, but consumers should not incur higher costs if the goal can not be attained by a certain date. There may be difficulty in siting renewable resources, or other unforeseen events that limit the availability renewable resources to meet the goal.

6. Cost Recovery for Delivery Utility Compliance

The costs of a RPS that are imposed on consumers should be added to the delivery utilities' bills as a separate line item. Consumers are entitled to know what they are paying as a subsidy for renewable resources. As set forth in Section II.B.4.c., *supra*, any

RPS charge not should be imposed by the NYISO and should not be a volumetric surcharge. In addition, as demonstrated in Section II.B.4.b, industrial customers who purchase electricity pursuant to economic development programs, including flex-rate contracts, should not be required to pay a RPS surcharge.

C. Central Procurement

2. The ISO Procurement Model

As set forth in Section II.B.4.c, *supra*, the NYISO's legal responsibilities are limited to wholesale transactions. A RPS subsidy would be a retail, not a wholesale, program. Moreover, as indicated, *supra*, the RPS subsidy should not be buried in the NYISO Schedule 1 charge. It should be separately stated on the utilities' bills so consumers know the cost of the RPS.

VI. Credit Trading

B. The Deliverability Requirement

Any system of credit trading based on the renewable character or fuel source of generation must not separate the credits from the energy. If the credit can be sold separately from the energy, it would remove the very renewable characteristics of the energy delivered.

VII. Contracting Standards

C. Features of Bilateral Contracts

3. Fixed Premium or Contract for Differences Pricing

Any proponent of a fixed premium should consider "the lessons learned" from New York State's Six-Cent Law. Prior to its repeal, the Six-Cent Law required the State's electric utilities to purchase electricity from qualifying non-utility generators at $0.06 kWh or the utility's avoided costs, whichever was greater. This resulted in the purchase of electricity at a cost well in excess of avoided costs, at a cost to consumers in the billions of dollars. A fixed premium, determined today, based on forecasts of LBMP could have the same result.

As Multiple Intervenors has proposed in Section II.B.4.a, *supra*, contract for differences pricing should be utilized if a RPS is implemented. Each contract for differences should be customized based on the cost of development for each renewable resource project. And, the contract for differences pricing must insure that the developer does not receive more of a subsidy than is absolutely necessary for each project to be constructed and operated. Any revenues received by the project in excess of the amount needed to cover the developer's cost of service and a reasonable rate of return on equity must be returned to consumers.

VIII. Cost and Benefit Considerations

In Section II.B.4.a, as well as Section II.B.3, *supra*, Multiple Intervenors has demonstrated the importance of minimizing the cost of a RPS. The design features that will minimize the cost of a RPS are detailed in Section II.B.4.a, *supra*. In order to determine the cost to consumers of a RPS, it is essential that *all* of the costs of the RPS, including transmission and NYISO costs, be included in the analysis. It will be essential to determine the impacts on the cost of ancillary services, operating reserve requirements, the day ahead market and out-of-merit dispatch. These additional costs have not been studied.

Moreover, there has been no analysis of the costs that will be imposed on consumers after 2013 as the result of implementing a RPS. If, as has been discussed during the collaborative meetings, some, or all, of the contracts with developers will require a subsidy from consumers after 2013, then the cost that will be imposed on consumers after 2013 must be part of the analysis.

Although this proceeding is not a "rate case," there can be no doubt that a RPS will increase the price of electricity in New York.[74] It is well established that it is the obligation of the Commission to set rates to consumers at just and reasonable levels. N.Y. Public Service Law § 66. The New York Court of Appeals has observed that "…the specific function of the rate-making power is to protect the utility's ratepayers…" *Niagara Mohawk Power Corp. v. Public Serv. Comm'n*, 69 N.Y. 2d, 365, 369 (1987). It is incumbent on the

[74] Indeed, the increased costs being debated in this proceeding exceed the combined amounts in disputes from scores of utility rate cases.

Commission to determine whether the rates resulting from the implementation of a RPS will be, in fact, just and reasonable as the law requires. As demonstrated, *infra*, the rate impact - either short-term or long-term - of a RPS is unknown, but almost certainly substantial by any measure.

Prior to implementing a RPS, it is essential that there be a record on the rate impacts of such a plan. The collaborative meeting on August 13, 2003, at which the studies sponsored by RETEC, DPS/NYSERDA, and the Joint Utilities were discussed, was not an adequate substitute for evidentiary hearings. It did not provide the parties with an opportunity to test the key assumptions and outputs of the studies. As demonstrated below, these studies raise many significant issues. Consequently, prior to adoption of a RPS, the Commission should order hearings at which experts can be cross-examined. And, indeed, the costs must be scrutinized. It should not be assumed that the benefits of a RPS – which also have not been scrutinized adequately – will outweigh the costs.

a. RETEC Report

RETEC sponsored a report entitled "Cleaner Air, Fuel Diversity and High-Quality Jobs: Reviewing Selected Potential Benefits of an RPS in New York State." At the meeting on August 13, 2003, an attorney on behalf of RETEC answered questions posed by the stakeholders. He indicated that the report does not include any "primary analysis" and characterized it merely as a "review of existing literature." Consequently, the report should not be accorded any weight by the Commission.

First, the entire report is hearsay. In an evidentiary proceeding, it is likely that the report would not be admitted into evidence. But, even if it were, cross-examination of the witness who prepared the report would demonstrate it does not inform the debate on the costs or benefits of implementing a RPS in New York State. The report is not based on a RPS specific to New York.

Moreover, the report is internally inconsistent, apparently as a result of the assumptions used by the underlying studies. For example, Table 9 of the RETEC report indicates that a 50 megawatt power project in New York would result in 96 construction jobs. These numbers are inconsistent with the numbers in Table 10, which, scaled to a 50 megawatt wind project, would mean that, based on the Nebraska project, there would be 4 construction jobs; the Oregon project, 8 construction jobs; and the Texas project less than 50 jobs. The number of permanent jobs in these two tables also are inconsistent. Again, scaled for a 50 megawatt project, during the operation period in Minnesota, there would be 15 employees; in Oregon, 12 employees; and less than 20 employees in Texas.

Thus, the information included in the RETEC report is not a basis for determining the "economic benefits of attracting new energy companies to New York."

b. DPS/NYSERDA Report [ADDED]

A review of the DPS/NYSERDA study indicates that it systematically understates the cost of a RPS to consumers. The key assumptions utilized in the study differ dramatically from the assumptions utilized by the DPS in its May 6, 2003 "RPS Premium

Input Table." The Input Table was developed by the DPS only two months before the DPS/NYSERDA report was prepared. The DPS Staff stated at the collaborative meeting at which the Input Table was discussed that it was based on the State Energy Plan. The DPS Staff also stated that although the Input Table percentages are "illustrative," they considered them to be "reasonable."

The DPS/NYSERDA report states that the model selected the resources based on least cost. (DPS/NYSERDA Report at 3.) But, then, why was so much wind power included? Wood biomass, biomass co-firing, landfill gas, sewage gas, manure digestion, reservoir hydro, run-of river hydro and tidal all would have required a smaller premium than wind power. (Input Table) In fact, the premium for wind power is expected to be 3 times ($0.0150) the premium for these other resources. Inasmuch as the resource mix is one of the major drivers of the DPS/NYSERDA cost estimates, this affects the validity of the entire report. As discussed below, these assumptions relate to the energy sources that would be developed. DPS/NYSERDA have included far larger quantities of high capacity factor/low premium cost resources in the report than DPS included in its May 6, 2003 Table.[75]

However, the fundamental problem with the DPS/NYSERDA study is that it does not accomplish its goal, namely "… to provide an estimate of the potential direct ratepayer costs." (See DPS/NYSERDA Report at 1.) As demonstrated, *supra*, the so-called direct costs are not the only costs that consumers will pay if a RPS is implemented. But,

[75] The effect of this radical change in assumptions is to minimize – and understate significantly – the likely costs of a RPS.

even if, *arguendo*, they were the only costs, the DPS/NYSERDA study does not reflect the direct cost impact to consumers.

In the study, the only bill impact considered was "the peak year net bill impact of the RPS." According to the report, this will be approximately $53.6 million in year 2009." The $53.6 million in year 2009, utilized by DPS/NYSERDA to determine the net bill impact, assumes a $64.3 million reduction in wholesale electricity costs in the same year as the result of implementing a RPS. (DPS/NYSERDA Report at 13.) That is not a correct analysis. First, the analysis should look at the bill impact of the RPS premium costs. The analysis should show the difference in consumers' bills with and without a RPS.

Looking at these costs, in 2009, consumers will not be paying an additional $53.6 million for the RPS. They will be paying an additional $117.9 million. (*Id*. at 12.) And, in 2013, they will be paying twice that amount. There is an incremental increase in consumers' costs every year from 2006 through 2013. The bill impact, looking at the direct cost premiums based on the DPS/NYSERDA Report, would be $1.1 billion through 2013. (*Id*. at 12.) Obviously, if RPS subsidies are paid after 2013, the cost will be greater. Thus, the DPS/NYSERDA Report's analysis of the bill impact does not reflect the cost of a RPS.

If, the analysis is intended to be an analysis of "net bill impacts" and projected reductions in wholesale electricity prices are going to be considered as an offset to the RPS

premiums, then the additional NYISO costs, congestion costs and transmission upgrades also should be included in the analysis.[76]

The additional costs may exceed the wholesale energy cost reductions. DPS/NYSERDA has not quantified, *inter alia*, the increase in the amount of regulation required by the NYISO, or increased costs associated with the transmission upgrades, out-of-merit dispatch, congestion costs, *etc.* Although the analysis includes an adder for upstream transmission system upgrades, at the August 13, 2003 collaborative meeting, DPS acknowledged that there was no basis for the number that was used.

If the bill impact is meant to assesses the direct ratepayer costs, it should include all of them. Only then should the wholesale suppression effect by considered. The DPS and NYSERDA analysis improperly includes wholesale energy price suppression effects, but not the other costs that will be imposed on consumers. It also improperly looks at only one year's impact. It is the total multi-year amount that will impact consumers' bills. DPS/NYSERDA's bill impact analysis underestimates the cost of a RPS to consumers.

Not only does the analysis understate the cost to consumers of a RPS, it also is inaccurate. The DPS/NYSERDA Report contains a section entitled "Energy Price Bill Impacts," and an appendix that purports to demonstrate the average monthly bill impact in the year 2009. For example, the "average monthly bill impacts for Niagara Mohawk Power Corporation Customers" indicates that the S.C. 4 customers pay 14 cents per kWh ($31,986

[76] It is important to note that the NYPA hydroelectric power customers will not benefit from any reduction in wholesale energy prices. The price that these customers pay for energy is established in bilateral contracts.

divided by 227,340 kWh). These numbers do not conform with Niagara Mohawk's tariffs. These customers pay a much lower rate. Thus, the bill impact statements, even though described in the report as "illustrative," should not be considered by the Commission in determining the best public policy for the state.

c. Joint Utilities Report [ADDED]

The Joint Utilities Report states that the net present value of the New York State electric system's production costs will increase between 5 percent and 10 percent, by 2013, depending on the RPS assumptions. (Joint Utilities Report at 34.) The costs for the period 2006-2013 range from $1.2 billion to $2.2 billion. Even if fuel cost savings are considered, the costs are $1 billion to $2.1 billion. The Joint Utilities Report demonstrates that the estimates of the cost of a RPS depend, to a great extent, on the key assumptions used in the analysis. The Commission should not implement a RPS until there are refined cost studies and the stakeholders have had an opportunity to test the assumptions used in the studies.

IX. Other issues

A. Procedural/Legal Issues [ADDED]

In the "Ruling Establishing Comment Procedures," issued on June 19, 2003, the parties were informed that they could annex to their initial comments "substantive factual

submissions."[77] Multiple Intervenors believes that if substantive factual submissions are going to be considered in this proceeding, the parties should have an opportunity to cross-examine the experts making the factual assertions. Untested statements should not be considered as a basis for a decision in this proceeding. A program that may cost consumers in excess of $2 billion over the next ten years should not be adopted without a substantial evidentiary record to support the policy.

B. Market-Based Approach [ADDED]

In its Initial Comments, dated March 28, 2003, Multiple Intervenors urged the Commission to adopt a market-based approach to the acquisition of renewable resources. (MI Initial Comments at 15-22.) The Commission previously has stated that it "expect[s] to see market-based solutions to public policy issues rather than regulatory mandates."[78] A voluntary approach is consistent with the principle of promoting customer choice and is preferable to the imposition of costly mandates. If a market-based approach is successful, it should not increase electricity prices for the general body of New York consumers. Thus, it would not further weaken the economy or negatively impact the State's competitive electricity markets.

Multiple Intervenors recommends that the Commission let the markets work and maintain customer choice by seeking initially to satisfy the RPS goals established

[77] Case 03-E-0188, *supra*, note 1, at 3.

[78] Case 94-E-0952, *supra* note 23, at 30.

through voluntary programs. In New York, numerous initiatives already have been implemented to promote the voluntary purchase of electricity generated by renewable resources. (*See* MI Initial Comments at 17-22.) There are ongoing efforts, both public and private, to increase New York State's reliance on renewable resources without implementing a RPS. New York now hosts three operating windfarms and NYSERDA has current or pending contracts for the development of five new projects that will total more than 500 megawatts. NYSERDA's New York Energy Smart Green Marketing Program subsidizes five marketing efforts intended to sell 275 megawatts of new energy and capacity to consumers within five years. The Village of Croton now is purchasing wind power for 25 percent of its municipal electricity needs. The United States Environmental Protection Agency ("EPA") intends to power its downtown Manhattan offices with wind energy. The EPA plans to buy 6.2 million kilowatthours of electricity from Community Energy, a firm that runs wind farms outside Syracuse.[79]

The Long Island Power Authority ("LIPA") is seeking bids for up to 140 MW of offshore wind power, and reportedly sees potential for up to 5,200 MW of wind power.[80] Community Energy, Inc. has created the consumer demand in the Northeast for over 140 megawatts of new wind generation. The new wind generation is funded by "customers who are willing to pay a small premium."[81] New Wind Energy is available to customers of

[79] *See Wind Energy for EPA*, The Crain's Insider, April 23, 2003.

[80] *See id*.

[81] *See id*.

Niagara Mohawk, NYSEG, Con Edison and Orange & Rockland. LIPA also is administering a program designed to increase photovoltaic power on Long Island.[82] Niagara Mohawk has agreed to develop up to 220 MW of transmission capacity that will help wind generators get their power to market.[83]

Moreover, Niagara Mohawk's voluntary renewable energy program has been a success. More than 7,700 Niagara Mohawk customers have chosen to participate in the utility's renewable energy program - GreenUp - during its first year. According to William F. Edwards, President of Niagara Mohawk, a National Grid company, the first year of GreenUp is an example of how increased renewable power "…can be driven by consumer demand."[84] The Niagara Mohawk program offers wind, hydroelectric power and bioenergy.[85] The GreenUp surcharges range from 1.0 cents per kWh to 2.0 cents per kWh, depending on the option selected by the customer.[86]

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[82] *See* State Energy Plan at 3-53.

[83] *See id*.

[84] *See* National Grid News Release, *Niagara Mohawk's Customers Choosing Renewable Energy* (September 17, 2003).

[85] *See id*. at 3.

[86] *See id*.

Indeed, renewable resources are among the world's fastest growing energy sources.[87] Between 2000 and 2003, BP is committed to spend $500 million on its photovoltaics business. Shell will invest $1.5 billion between 2002 and 2007.[88] Shell's wind and solar businesses are growing by more than 20 percent a year. And, General Electric entered the wind power business in 2002, by purchasing Enron's wind power business for $180 million. GE Wind expects more than $1 billion in sales in 2003 "with solid profitability" and expects the business to pay for itself in two years.[89]

There also are other groups supporting a market-based approach to renewable resources. The Green Power Market Development Group has stated that its goal is to create market demands for a 1,000 megawatts of renewable electricity by 2010. As of the June 2002, the group had launched projects encompassing 50 different corporate facilities in 12 states generating a total of 15 megawatts of green power.[90] Members of the group include Alcoa, Dupont, General Motors and IBM. Dupont has a goal of deriving 10% of its energy from "cost-competitive renewable resources" by 2010, up from 2% in 2002. Its focus is mainly on biomass and wind power.[91]

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[87] *See* Douglas G. Cogan, CERES & Investor Responsibility Research Center, *Corporate Governance and Climate Change: Making the Connection*, at 52 (June 2003). *See also* www.thegreenpowergroup.org/aboutus.

[88] *See id*.

[89] *See id*. at 53.

[90] *See id*. at 52.

[91] *Id*. at 53.

Given the State's current use of renewable resources, as evidenced by the Staff Baseline Estimate, and the voluntary initiatives of NYSERDA, the Power Authority, LIPA and other entities, New York should not mandate a RPS. A market-based approach to the acquisition of renewable resources in New York State will be an effective public policy initiative.

C. Lessons Learned – the Six-Cent Law [ADDED]

The Six-Cent Law demonstrated the danger of assuming that speculative long-term benefits ultimately will justify the payments of subsidies. Con Edison's argument in opposition to the enactment of the Six-Cent law proved to be correct. As Con Edison stated:

> It is *unfair to utility ratepayers, and economically unsound* to require a utility to pay six cents for a kilowatthour of power generated by a cogenerator. If the utility could have produced the same power for a lesser amount, and most can, it means the utility's customers will be subsidizing the cogenerator, … *Ironically, the Public Service Law requires that the PSC to establish rates that are just and economically reasonable to utility ratepayers* … Mandated payment of six cents per kilowatthour virtually guarantees that utility ratepayers will be unfairly subsidizing cogenerators and alternate power producers.[92]

Like the Six-Cent Law, a RPS would require consumers to pay a premium price as a subsidy. Statements made by the utilities about the Six-Cent Law also are equally applicable to a RPS. In Case 92-E-1187, the utilities asserted that: "[e]xperience with the

[92] 1981 Legislative Memorandum submitted on behalf of Con Edison in Opposition to Senate Bill 1701-c (Six-Cent Law), at 3.

Six-Cent Law and pre-1992 LRACs indicates that the effect of such distortions persists over many years."[93] The President of the Energy Association, on behalf of the utilities, testified at hearings before the Senate Standing Committee on Energy ten years ago that:

> In recent years significant costs have been imposed unnecessarily on New York State ratepayers by the so-called "6 cent law." This law effectively required our electric company members to buy power at an artificially inflated price.[94]

The lesson to be learned from the Six-Cent Law is clear. As the utilities have stated:

> Distortion of the market place caused by the resultant subsidization of selected resources is undermining utility efforts to reduce electric rates...[95]

Implementation of a RPS will have the same results. It will result in the "subsidization of selected resources" and payments for supply-side resources well in excess of current avoided cost estimates.

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[93] Case 92-E-1187, *Proceeding on Motion of the Commission to Determine Whether to Incorporate Environmental Costs Into the Long-Run Avoided Costs for the State's Electric Utilities and Whether and in What Context Estimates of the Value of Externalities Should be Utilized*, Position Paper of the Member Systems in Response to the Commission's Track II Issues and the Position Papers of the Externality Proponents, at 69-70.

[94] Testimony of Howard Shapiro, President, The Energy Association of New York State, before the Senate Standing Committee on Energy, Senator James L. Seward, Chairman (October 28, 1993), at 6.

[95] July 1 NYPP Report, Vol. 1, p. 4.

X. Conclusion

As demonstrated herein, it would not be good public policy for New York State to implement a Renewable Portfolio Standard at this time. To do so would be inconsistent with the goals of reducing energy prices in New York State and fostering the development of competitive electricity markets as articulated by the Commission in Opinion No. 96-12. New York's economy is lagging behind the national economy and the cost of doing business in the State, including electricity prices, is far above the national average. Moreover, a renewable resources industry is developing without a New York State renewable portfolio standard. Expensive subsidies should not be imposed on consumers before market-based initiatives are accorded an opportunity to work in New York State.

If, *arguendo*, the Commission does implement a renewable portfolio standard, it is imperative that the standard be designed to minimize the cost to consumers. The following guidelines should be incorporated into the design of a RPS:

1. the start date should be no sooner than 2009;
2. 2020 should be the date for achieving the 25 percent goal;
3. the baseline should be adjusted annually;
4. the interim targets should be reviewed every two years to determine if they need to be modified;
5. the cost to consumers must be the threshold criterion used in the selection of renewable resources;

6. renewable portfolio standard subsidies must not be provided to existing renewable resources, or to generating facilities that will be constructed without a subsidy;

7. the amount of any subsidy should be cost-based to ensure that consumers are not unduly burdened; and

8. there should not be any tiers that favor any specific technologies.

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