LAW OFFICE

USHER FOGEL
ATTORNEY AT LAW

557 CENTRAL AVENUE, SUITE 4A CEDARHURST, NY 11516

TEL: 516.374.8400 X 108
FAX: 516.374.2600
CELL: 516.967.3242
E-MAIL: ufogel@aol.com

September 25, 2003

Hon. Jaclyn Brilling
Secretary
NYS Public Service Commission
Three Empire State Plaza
Albany, New York 12223

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

Dear Secretary Brilling:

In accordance with the schedule in this proceeding, enclosed for filing with the Commission are the original and ten (10) copies of the *Initial Comments of the Small Customer Marketer Coalition.*

The parties on the service list have been served by electronic mail.

Respectfully submitted,

Small Customer Marketer Coalition

By: Usher Fogel
Usher Fogel, Counsel

Cc: Hon. Eleanor Stein (electronic mail)
Parties on Service List (by electronic mail)

State of New York
Public Service Commission

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INITIAL COMMENTS OF THE SMALL CUSTOMER MARKETER COALITION

Usher Fogel
Counsel
Small Customer
Marketer Coalition
557 Central Avenue
Suite 4A
Cedarhurst, New York 11516
Tel: 516.374.8400 x 108
Fax: 516.374.2600
E-mail: ufogel@aol.com

Dated: Cedarhurst, New York
September 25, 2003

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

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

INITIAL COMMENTS OF THE SMALL CUSTOMER MARKETER COALITION

I. INTRODUCTION

These initial comments are submitted on behalf of the Small Customer Marketer Coalition (SCMC) in accordance with the schedule adopted and the Honorable Eleanor Stein, Administrative Law Judge.[1]

II. PRELIMINARY STATEMENT

In its Order Instituting Proceeding, issued on February 19, 2003, the Commission initiated this proceeding "to develop and implement a renewable portfolio standard for electric energy retailed in New York State."[2] As to stated goal, the Commission sought

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[1] Case 03-E-0188 – Proceeding on Motion, the Commission Regarding a Retail Renewable Portfolio Standard, *Ruling Granting, in Part, Motion to Amend Schedule* (issued August 18, 2003).
[2] Case 03-E-0188 – Proceeding on Motion of the Commission Regarding a Retail Renewable Portfolio Standard, *Order Instituting Proceeding, p.2* (issued February 19, 2003) ("Order").

to increase the level of electricity used and the state that is provided by renewable resources from the current 17% level to 25% over a ten-year period.[3]

The Commission, recognizing the complexity involved in implementing such a far-ranging policy initiative, requested that the parties address a series of "Threshold Issues" that included inter alia, identification of the type of resources that would be considered "renewable for purposes of the renewable portfolio standard, the types of entities that would be subject to the new standard, creation of monitoring mechanisms and many others. In this regard, the Commission was acutely aware that imposition of the higher renewable portfolio standard had the potential to negatively impact energy service companies (ESCOs) that did not have the purchasing power of utilities and ultimately were forced to meet the specific demands of their customers, rather than a governmental mandate. The Commission, therefore, requested that the parties address the following issue:

> "4. The impact, if any, on the ability of energy service companies' (ESCOs) abilities to compete with utilities if they are required to procure renewable resources beyond what their customers request, given the relative sizes of the loads supplied by utilities and ESCOs currently, and how such impacts might be overcome."[4]

SCMC is an ad-hoc association of ESCOs engaged in the independent marketing and supply of electricity and natural gas throughout the State of New York and other jurisdictions. Our members focus on providing efficient and value added service to residential and commercial customers. The members of SCMC have of their own initiative taken steps to expand their portfolios to include the renewable or green power sources. These steps, however, were undertaken in the context of a market

[3] *Id.*, p. 2.
[4] *Id.*, p. 3.

encumbered or restricted by a governmental mandate requiring the purchase of a fixed level of renewable power sources. SCMC is deeply concerned that without institution of proper and effective safeguards, introduction of the portfolio requirement may place ESCOs at a serious competitive disadvantage to utilities who, through their comparatively larger purchasing power, will be able to meet the renewable requirement at a lower cost than ESCOs and who, regardless of price, will be able to recover the cost of this supply from their customers. As the Commission correctly noted, ESCOs are not assured recovery of the costs associated with renewable energy for those levels of supplies that exceed the levels requested by their customers. Inevitably, this will degrade the ESCO's customer base and economic viability.

In view of this paramount concern, we respectfully urge the Commission to adopt a renewable portfolio policy that, in all aspects, satisfies the goal of supply diversity in a competitively neutral manner. This can be achieved by incorporating the positions supported by SCMC in these comments.

III. SUMMARY OF COMMENTS

As set forth below in detail, SCMC respectfully urges that the Commission incorporate the following measures as part of the RPS policy.

First, the Commission should include a variety of relevant working objectives by which to measure the success of the policy.

Second, the RPS structure should be based on the State Agency Central Procurement Model.

Third, the Commission will need to implement an annual monitoring and review program to assess the impact associated with implementation of the new policy.

IV. <u>COMMENTS OF SCMC</u>

A. Working Objectives

Ostensibly, the primary objectives guiding the renewable policy will be achievement of the 25% goal by the year 2013. However, such a perspective fails to fully reflect the complexities and ramifications stemming from the imposition of a governmental purchasing standard into what has heretofore been a relatively competitively based market. To this end, implementation of the policy may lead to an unanticipated rise in State energy costs, thus denigrating the competitive status of the State, or the anticipated increase in fuel diversity may be considerably less than desired due to difficulties encountered in siting new facilities. What becomes clear is that the Commission must develop a multi-faceted policy that, in addition to the quantitative target of 25% by 2013, also incorporates additional objectives that can temper the target goal and the actual implementation of the policy.

The critical additional objectives include the following:

1. New York's environment: improve New York's environment, by reducing air emissions, including greenhouse gas emissions, and other adverse environmental impacts on New York State of electricity generation.

2. Generation diversity: diversify New York State's electricity generation mix and improve energy security and reliability.

3. Economic development: develop renewable resources and advance renewable resource technologies in, and attract renewable resource generators, manufacturers, and installers to New York State.

4. Equity and economic efficiency: develop an equitable and economically efficient RPS requirement that minimizes adverse impact on energy costs.

5. Competitive neutrality: develop a renewable portfolio standard ("RPS") compatible with competition in energy markets in New York State and which does not degrade the ability of ESCOs to compete in electric retail markets.

6. Administrative fairness and efficiency: develop an RPS that is administratively transparent, efficient, and verifiable.

7. Cost minimization: develop and implement an RPS that maintains energy costs at a level that does not degrade the competitive standing of the State, and does not overly burden consumers.

For all of these individual objectives, the Commission should establish measuring parameters by which it can be ascertained whether and to what degree, the RPS is enhancing or detracting from economic development, improved diversity or energy costs. In this way, the Commission and affected parties can rationally assess the full and comprehensive impact of the RPS policy.

B. Overall RPS Structure

After due consideration of the central and individual procurement models, for the reasons presented below, SCMC prefers use of the central procurement model using a State Agency as the implementing entity.

The specific RPS structure adopted by the Commission will, in our view, constitute the most dominant factor affecting the competitive impact of the RPS standard as it relates to this proceeding. ESCOs differ from the utilities in two fundamental areas. First, the purchasing power of any utility dwarfs the purchasing power of a typical ESCO. Second, a utility is authorized by the Commission and under the Public Service Law to collect from customers all prudently incurred commodity costs. Each utility will be fully capable of recovering from ratepayers all costs associated with meeting the RPS standard, regardless of whether customers want the additional and costlier renewable energy. In marked contrast, an ESCO must accede to and satisfy the demand of the customer and has no assurance or ability to recover the cost of incremental renewable energy that is in excess of what the customer desires or wants to pay. Consequently, if meeting the renewable standard raises commodity costs by, for example, 10%, the ESCO has no assurance that the customer will want such expensive power or be willing to pay for it. The utility, however, will not be subject to such concerns, as the true desire of the customer will not affect cost recovery.

Furthermore, the distribution utility is able to spread recovery of the renewable premium cost over a far larger customer base than can any ESCO, thus significantly reducing the volumetric charge assessed to each of the utility customers.

In view of these factors, the RPS standard could competitively disadvantage an ESCO in two distinct ways. Initially, given the overwhelming disparity in purchasing power, it is most unlikely that the utility and ESCO will be able to acquire the requisite renewable supplies on comparable economic terms; the more likely scenario is that the utility will obtain a more favorable price for the same supply. Moreover, in the unlikely event that the ESCO and utility acquire the supply for the same price, the ESCO has no assurance that the customer will be willing to pay for the higher cost supply, while the utility is fully assured of cost recovery for this more expensive source of supply.

The RPS structure chosen by the Commission must therefore address both of the competitive discrepancies that will accompany implementation of the RPS. The structure must address the purchasing power imbalance and also place the utility and ESCO on equal footing with respect to cost recovery. Given these considerations, the use of central procurement is the most effective and workable structure.

Working Group 2 analyzed the use of individual procurement and developed a Draft Straw Proposal dated May 5, 2003. As presented therein, ESCOs would be included as a participating entity, and would be assigned a target level based upon the ESCOs actual load. The Straw Proposal does state that the program "should be designed such that there will be no degradation in any participant's ability to compete in electricity markets." But saying so, does not make it so. Ultimately, under this model, each entity is obligated individually to go into the market and secure the needed level of renewable supplies. This in effect, forces the ESCO to compete with the utility for all qualifying options. Obviously, the ESCO will be unable to compete with the utility's larger purchasing and financial power. Thus, the structure inherent in this approach degrades the ability of ESCOs to compete in electric markets.

Furthermore, even if perchance, the ESCO is able to secure the supply on terms equivalent to those obtained by the utility, the ESCO is still at a competitive disadvantage due to the uncertainty as to cost recovery. It therefore does not appear that the individual procurement model can successfully address the concern of competitive degradation.

This leads ineluctably to the use of a central procurement model for all participating entities, under which the entire annual RPS supplies are purchased by one central entity who in turn sells it to all participating entities at an equivalent volumetric price.

To address the issue of the disparity in price recovery, SCMC believes the most practical approach is for the central procurement agency to assign or sell the RPS contracts or attributes only to the distribution utilities which would, in turn, recover the cost thereof from each customer (sales and those served by an ESCO) on an equivalent cents per kWh basis through the utility regulated delivery rate. The cost of the RPS governmental mandate would be correctly viewed as a non-competitive cost that was imposed to serve a greater societal purpose and would thus be properly recovered through the regulated portion of each customer's bill. In this manner, the recovery of RPS costs would not have any disparate cost impact impact for each delivery customer would incur the same level of increase to the regulated distribution portion of the bill. This would be entirely similar to the recovery of the System Benefits Charge.

Through this process, the Commission could assure full compliance with the RPS standard, with a minimum level of administrative and implementation problems, and without degrading the competitive standing of ESCOs.

This approach would apply only to the incremental level of renewable resources that are to be acquired, *i.e*. between 17% and 25%. Each ESCO would then continue to be free to acquire renewable resources on its own, should it so desire, to maintain the 17%base level.

This form of RPS structure is most appealing from both a practical and equitable basis. In one stroke it greatly minimizes the overall cost that would need to be incurred to assure compliance with the standard by all LSEs. Under this model, one entity would procure the necessary resources, and would provide them to the distribution utilities. The costs of these supplies would then be incorporated in the distribution portion of the bill and would be the same rate for each customer. As is easily discerned, each ESCO would be relieved of the obligation to individually acquire requisite renewable supplies and attributes, as the LDC through the central procurement agency would acquire the supplies for <u>all</u> customers on its distribution system. ESCOs are thus not forced into a competitive bidding war with the LDC - a battle they could never win - and they can sidestep the more knotty issue of how such costs could be recovered on an equitable competitive basis.

To monitor and assure compliance, the Commission need only make sure that in each year of the program, the electric distribution utilities under its jurisdiction have acquired the requisite supplies from the central procurement agency. The Commission will thereby avoid the more difficult and complex task of monitoring compliance by each LSE providing service in the State.

SCMC would further extend its support for the use of the State Agency Procurement Model, under which a state agency such as the PSC or NYSERDA rather than the NYISO[5] would procure the requisite supplies for the entire state. The use of the NYISO presents a number of practical impediments. Initially, there is the specter of jurisdictional conflicts between the federal and state governments as the operations of the NYISO are subject to the jurisdiction of FERC. It is unclear and unknowable at this time, whether and to what degree, the FERC would confer its support for the NYISO playing the role envisioned by the central procurement model and even if initial approval is granted, any modifications to the program that inevitably will arise would be subject to FERC review and oversight. Thus, adoption of this model and its subsequent implementation would be fraught with uncertainty and the additional delay needed to go through the FERC process.

Further, the NYISO is a private entity that is not fully subject to state regulatory jurisdiction. While the PSC has representation on various NYISO committees, the business of the NYISO is run by a private Board of Trustees. It is therefore inconsistent to entrust implementation of a State mandated energy purchasing program to a private entity that is not subject to direct State supervision or oversight.

Finally, agencies such as NYSERDA and the Commission that already have much experience in handling implementation of State energy programs as well as familiarity and oversight of regulated utility rates, are more suitable candidates for

[5] NYISO stands for New York Independent System Operator.

handling the procurement and cost recovery associated with the implementation of the RPS standard.

In view of the foregoing, the central procurement model would incorporate the following elements.

1. Each year the PSC would establish the annual RPS target.

2. The target is to reflect a percentage of retail sales and each distribution utility would have the same target.

3. The sales of each ESCO providing service in a particular service territory would be included within the retail sales for that distribution utility.

4. The PSC/NYSERDA would combine the percentage targets with sales and calculate the level of supplies and/or attributes that are needed each year.

5. NYSERDA/PSC would conduct an auction for a portfolio of contracts of physical supply or attributes of a variety of term lengths.

6. NYSERDA/PSC would allocate attributes or assign contracts to each distribution utility in proportion to the retail sales of the utility and ESCOs in each utility's service territory or an equivalent cents per kWh basis.

7. Each distribution utility would recover the cost of the RPS contracts through a surcharge to the delivery rate of all delivery customers on an equivalent cents per kWh basis as approved by the PSC.

8. The ESCOS in each services territory would report the attributes on their disclosure labels.

9. At the end of each year, the distribution utilities would file a report to the PSC demonstrating that it has met the annual RPS standard.

C. Monitoring and Review

The Commission has now embarked on a new initiative that will profoundly influence the cost and type of supplies used to meet the energy needs of the State during the rest of the decade. Although the Commission will use its best efforts to anticipate the problems that may occur, it can be safely assumed that, at this point, no party to this proceeding can predict with any level of precision what the future will hold. In the proceeding alone, the parties have been unable to reach consensus regarding what cost impact of the RPS standard will be[6] and whether sufficient supplies will even be available to allow the parties to meet the annual RPS targets.

In the face of such uncertainty, it is vitally necessary for the Commission to monitor and review the implementation of the RPS standard on an annual basis. Such review should not focus narrowly on whether the percentage target has been met, but must be expanded to incorporate the other measurers discussed above, such as, diversity, cost, or competitive neutrality. Thus, for example if reaching the target has engendered a dramatic increase in energy costs, it will behoove the Commission to identify this trend and develop steps to correct such an unfortunate development.

It would be most unwise to embark on this new regulatory adventure without establishing programmatic features that can identify emerging problems and allow for course corrections.

[6] Compare the divergent estimates included in the *New York Renewable Portfolio Standard Cost Study Report,* prepared by Staff to those contained in the *Report of Initial Analysis of Proposed New York RPS,* prepared at the behest of the electric distribution utilities.

V. CONCLUSION

SCMC respectfully urges the Commission to adopt an RPS policy statement consistent with the comments set forth herein.

Respectfully submitted,

Small Customer Marketer Coalition

By:______________________________________
Usher Fogel, Counsel

Dated: Cedarhurst, New York
September 25, 2003