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**Via Hand Delivery**

June 23, 2004

Hon. Jaclyn A. Brillling  
Secretary  
New York State Public Service Commission  
Three Empire State Plaza  
Albany, New York 12223-1350

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

Dear Secretary Brillling:

Enclosed please find an original and twenty five (25) copies of the Brief on Exceptions of Constellation NewEnergy, Inc. and Constellation Power Source, Inc. in the above reference case.

Respectfully submitted,

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Attorneys for Constellation NewEnergy, Inc.  
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By: \_\_\_\_\_  
Jeffrey B. Durocher

cc: Hon. Eleanor Stein  
Active Parties (Via Electronic Service)

STATE OF NEW YORK  
DEPARTMENT OF PUBLIC SERVICE

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

**BRIEF ON EXCEPTIONS**  
**OF CONSTELLATION NEWENERGY, INC. AND**  
**CONSTELLATION POWER SOURCE, INC.**

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Dated: June 23, 2004  
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**BRIEF ON EXCEPTIONS**  
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**CONSTELLATION POWER SOURCE, INC.**

**INTRODUCTION**

This Brief on Exceptions is submitted on behalf of Constellation NewEnergy, Inc. (“CNE”) and Constellation Power Source, Inc. (“CPS”) (collectively “Constellation”) in response to the *Notice of Schedule for Filing Exceptions* issued in this Docket. On June 3, 2004 Administrative Law Judge (“ALJ”) Stein released a Recommended Decision (“RD”) regarding the implementation of Renewable Portfolio Standard (“RPS”) in New York. Constellation takes exception to several of the RD’s recommendations.

The Public Service Commission (“Commission”) should reject the proposed Hybrid procurement approach and adopt the Individual Compliance approach. The Commission should also modify or, more preferably, eliminate the ALJ’s recommended deliverability requirement and adopt an RPS that permits unbundling and regional trading of Renewable Energy Credits (“RECs”). The Commission should clarify and modify the RD’s eligibility criteria. Specifically, the Commission should make renewable Waste-to-Energy (“WTE”) sources eligible for the RPS. Finally, the initial RPS target is not realistic and should be revised.

In addition to the exceptions noted above, Constellation notes that the RD is in several respects insufficiently detailed and leaves too many important issues unresolved. The design of

the RPS is left to an unstructured implementation phase and contemplates a broad reopener, both of which create uncertainty that will discourage investment in renewable resources. Throughout this Brief on Exceptions, Constellation notes where the RD is vague or fails to decide critical issues that should not be left to an implementation phase. Constellation urges the Commission to clarify these critical issues as recommended herein.

**I. THE COMMISSION SHOULD REJECT THE DELIVERABILITY REQUIREMENT AND ADOPT A REGIONAL APPROACH.**

The parties to this proceeding evinced broad support for the import of RECs from other states. The deliverability requirement suggested by the RD, however, hinders this consensus position, threatens to increase costs for consumers and erects an unjustifiable barrier to interstate commerce. The deliverability requirement prevents the unbundling of RECs and is at odds with the goal of replacing New York's conversion transactions with a certificate trading system that is aligned with its neighboring regions. The deliverability requirement should be eliminated or modified as discussed herein.

**A. THE COMMISSION SHOULD REJECT THE DELIVERABILITY REQUIREMENT BECAUSE IT LIMITS THE BENEFITS OF REC TRADING FOR NO VALID REASON.**

A fluid REC market must be based upon the separation, or unbundling of RECs from electricity. The deliverability requirement should be rejected because it will effectively prevent the unbundling of RECs from the underlying energy.

The Commission must clarify that the deliverability requirement, if imposed, applies only to imports. While we read the RD to suggest this limitation, and although the Department of Public Service Staff ("Staff") only suggested that the deliverability requirement apply only to imports,<sup>1</sup> the RD states in rather sweeping fashion that some of the RPS benefits "only accrue if

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<sup>1</sup> The Staff stated in its September 23, 2003 comments that it "supports the eligibility of imports of otherwise eligible resources from outside of New York, subject to a delivery requirement," but did not explicitly state that the deliverability requirement would apply only to imports.

the energy is actually delivered into New York State.” The RD never explicitly states that the deliverability requirement will only apply to imports.<sup>2</sup> In this respect the RD is unclear. One possible interpretation is that the deliverability requirement applies to exports. Such a reading will impair the value of any RECs produced by a renewable generator, such as a wind project located in New York State that sells its energy to an out-of-state customer. For example, that wind farm could sell its energy to a customer in another state and its RECs would be effectively confiscated by New York at the border. The result will be to discourage in-state renewable projects, despite the significant economic and environmental benefits that would be created within New York. The benefits accrue to New York even when the power is sold elsewhere. Accordingly, the Commission should clarify that a deliverability requirement if imposed will not apply to in-state generators of renewable energy.

Constellation recommends that the Commission reject the deliverability requirement even as to imports. When applied only to imported RECs, the deliverability requirement places an unnecessary and unjustified burden on interstate commerce. Out-of-state RECs would be placed at a serious competitive disadvantage, raising the overall cost of RPS compliance, inviting retaliatory discrimination from neighboring regions and potentially violating the Commerce Clause of the United States Constitution. The availability of REC imports will also be reduced. As the Independent Power Producers of New York has pointed out, there is considerable effort being spent by stakeholders and by federal and state regulators to reduce the seams between energy markets. The RD approach of requiring deliverability even for imports is entirely contrary to these efforts and to notions of free interstate commerce.

The RD itself recognizes that for each megawatt hour of power generated, two separate products result: a megawatt hour of electricity and a megawatt hour of renewable attribute.<sup>3</sup> An

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<sup>2</sup> RD at pp. 23-24.

<sup>3</sup> RD p. 76.

unbundled approach to REC trading is a consensus among the parties to this proceeding. Yet the RD also recommends a deliverability requirement that prevents the separation of the RECs from the electricity. In effect, the renewable certificates are rendered ineligible unless the concurrently produced electricity is delivered into the state. Because the associated energy must be delivered, in effect, the RECs will never be unbundled from the underlying energy.

The deliverability requirement eviscerates two consensus positions – that RECs should be unbundled from electricity and that imports should be included in the REC market. The reasons offered for departing from this widespread consensus are vague at best. Consumer acceptance is cited as a reason but this has not been a problem at all in those states which have unbundled RECs from the underlying energy. Nor is any justification offered as to why this is an import-only issue. The RD also attempts to justify the deliverability requirement on economic grounds. The decision supposes that the RECs will continue to be imported into New York and that the bundled energy will add additional benefits. There is no basis for this assumption. The added flexibility of unbundled RECs offered in places such as New England and PJM may well deter bundled imports altogether. Moreover, discrimination against the import of RECs will invite retaliation from other states. Currently, Connecticut is in the process of considering rules for the treatment of RECs from outside New England (including New York) to meet the Connecticut RPS requirements, but only if certain standards of reciprocity are met. For all these reasons the unnecessary imposition of a deliverability restriction on the REC import market should be rejected.

**B. THE COMMISSION SHOULD REJECT THE DELIVERABILITY REQUIREMENT BECAUSE IT IS UNNECESSARY, BURDENSOME AND COSTLY.**

Implementing a deliverability requirement would be impractical. The electrons associated with each REC cannot be tracked. If the output of a renewable generator is sold to a marketer, who then sells portions of it to various customers, some of which may be located within the state, some which may be located out of the state, and some of which may use the

electricity both in-state and out-of-state,<sup>4</sup> it will be extremely difficult to track and determine which portions will render a REC saleable and which portions will be used in a manner that disqualifies the REC. That usage information must be traced back to its origin - the generator that created the electricity and the REC. A very detailed system capable of tracking usage in this manner would be necessary to implement the deliverability requirement. Such a system will be complicated, expensive and an administrative burden. The advantage of an unbundled REC trading system is that it solves all of the complicated logistics associated with tracking the daisy chain of trades, the contract transmission paths, the NERC tags and the metaphysical journey of a bundled energy transaction. Certificate trading recognizes that the environmental, economic and even reliability benefits of increased renewable generation are societal in nature and do not require a transmission line to bring them into the home. These benefits will all be realized and the difficulties of physical tracking will be avoided entirely if the deliverability requirement is simply rejected.

The RD's justification for imposing a deliverability requirement is that it will advance one of the RPS objectives: improving New York's environment.<sup>5</sup> This is an insufficient justification. Because pollution knows no boundaries, New York's environment will be improved by encouraging the development of renewable energy in neighboring states. If the Commission rejects the deliverability requirement, that decision will be supported by four additional RPS objectives.<sup>6</sup> In addition to improving New York's environment, a regional RPS<sup>7</sup> will serve the goals of diversifying the electricity generation available to New York, enhancing reliability in New York, reducing prices and providing economic efficiency, and advancing the competitive energy markets in New York State.

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<sup>4</sup> Consider, for example, a large supermarket chain operating in New York and at least one other state.

<sup>5</sup> RD at p. 33.

<sup>6</sup> See RD pp. 33-34.

<sup>7</sup> See Section I.D., *infra*.

Requiring deliverability serves only to reduce the potentially available renewable resources, which runs counter to the primary goals of the RPS and will increase the scarcity of RECs. The result is higher costs for consumers, which should be avoided by rejecting the unnecessary deliverability requirement.

- C. IF THE COMMISSION REQUIRES DELIVERABILITY, IT SHOULD ADOPT AN ANNUAL, RATHER THAN MONTHLY MATCHING PERIOD AND CLARIFY WHAT CONSTITUTES “DELIVERABILITY.”

The RD suggests a relaxed wholesale matching regime, which is certainly more appropriate than a strict deliverability requirement, but is still too restrictive. Under the RD’s regime, energy deliveries may be matched on a monthly basis. Although this standard is intended to accommodate intermittent resources, it will have the opposite effect, particularly upon seasonal generation sources such as hydroelectric and solar generation. An annual true up period, on the other hand, will accommodate the seasonal nature of certain renewable sources. If the Commission imposes a deliverability requirement, it should reject the RD’s monthly matching proposal in lieu of an annual true up period because this will enhance the flexibility of intermittent generating sources to sell their RECs and to enter into economic supply contracts. Therefore, regardless of the final decision on deliverability requirements, we recommend that eligible resources be qualified for RECs as long as the associated energy was generated in the same year in which the obligation accrued.

If a deliverability requirement is imposed, the Commission should clarify the definition of deliverability. The RD does not specify what constitutes deliverability. Staff, for example, views energy scheduled by the New York Independent System Operator (“NYISO”) as proof the energy was delivered.<sup>8</sup> The CPB, on the other hand, defines deliverability as a contractual arrangement.<sup>9</sup> Although Constellation recommends against a deliverability requirement, should

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<sup>8</sup> Initial Comments of the Staff of the Department of Public Service, p. 24.

<sup>9</sup> Comments of the Consumer Protection Board, pp. 2, 8.

such a requirement be imposed, we request that “deliverability” for purposes of the RPS be clarified to include both electricity scheduled with the NYISO as well bilateral contracts.

**D. THE COMMISSION SHOULD ADOPT A REGIONAL APPROACH.**

The RD suggests only briefly that an alternative approach to the deliverability requirement would be to trade RECs on a regional basis.<sup>10</sup> Constellation urges the Commission to adopt a regional approach, permitting RECs to be traded so long as the energy is sold in an interconnected control area or state that offers reciprocity. New York should follow the approach of its neighbors in Connecticut, Massachusetts, Maryland and Maine which permit regional trading of RECs. For instance, Connecticut is considering allowing RECs not only from New England, but also from New York, New Jersey, Pennsylvania, Maryland and Delaware, to be used to satisfy the Connecticut RPS requirements, provided these states have a comparable RPS. A regional approach is far superior because benefits will accrue to New York: expanded availability of renewable energy and reduced pollution. Further, the regional approach eliminates the disadvantages identified above, reduces complications and costs, and avoids unnecessary restrictions that would hinder the REC market.

As Constellation and other parties have pointed out, a deliverability requirement is completely unnecessary, particularly if the exporting region has reciprocity or a comparable tracking system and prevents double counting of RECs. The Commission should reject the deliverability requirement and adopt a regional approach.

**II. THE COMMISSION SHOULD REJECT THE HYBRID PROCUREMENT APPROACH AND ADOPT THE INDIVIDUAL COMPLIANCE MODEL.**

The parties in the proceeding advocated two different approaches for REC procurement. One approach is the Central Procurement model where a state agency will hold an auction or

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<sup>10</sup> RD at p. 79.

issue a request for proposal (“RFP”) and purchase RECs on behalf of all LSEs. The other approach is the Individual Compliance model, a market-based approach where each LSE obtains its RECs in the bilateral market.

The Commission should reject a Central Procurement approach. Shifting commercial risk from ratepayers to suppliers is one of the salutary benefits of a competitive energy market. With the State acting as procurement agent, however, the cost of RPS compliance becomes a de facto pass-through and the risk of rising REC prices returns to the ratepayer. For a market to be successful there must be market liquidity, i.e., multiple sellers and multiple buyers. The central procurement model inhibits liquidity by creating a single or dominant buyer. LSEs will be willing to manage price risk where a liquid REC market exists. Where the State becomes the dominant market buyer, however, the liquidity and confidence in the residual REC market will deteriorate and the ability of consumers to benefit from the transfer of price risk to the LSE will vanish. Constellation has stressed the advantages of an Individual Compliance approach over any type of Central Procurement, because Central Procurement is inconsistent with the Commission’s policies for a competitive energy market in New York State.<sup>11</sup> The RD points out that “a market-based approach is designed to provide the greatest amount of clean power for the lowest price.”<sup>12</sup> Constellation agrees. Accordingly, the Commission should adopt the superior Individual Compliance approach.

The RD adopts a hybrid model that combines the two approaches. Under this compromise approach, an unnamed state agency would solicit bids through an RFP to procure RECs on behalf of LSEs. LSEs would also have the choice of obtaining RECs through bilateral contracts. Constellation disagrees with the RD’s recommended Hybrid approach because it will interfere with a workable REC market and because it is unnecessary.

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<sup>11</sup> See Case 94-E-0952 – *Competitive Opportunities Regarding Electric Service* (May 20, 1996).

<sup>12</sup> RD at p. 73.

The adoption of the Hybrid procurement approach to supplement the Individual Compliance model is unnecessary and problematic. The state agency procurement process will seriously hinder or even destroy the market-based aspects of the proposal. Because all LSEs will have the option of obtaining their REC requirements from the state agency, the state agency will effectively set the ceiling price for RECs.

The alternative compliance mechanism is an element of the Individual Compliance approach that provides all the benefits of central procurement without undermining the market. Consumers are protected with what amounts to a price cap when the demand for RECs exceeds the available supply. Through the administration of the funds collected as alternative compliance payments the available supply of renewable resources can be increased to meet the demand. In addition, the State can use these revenues to target specific technologies which it seeks to encourage for policy reasons. The RD is correct in embracing the alternative compliance mechanism and is consistent with the trend in neighboring states such as Connecticut, Massachusetts and soon Rhode Island, where legislation now headed for passage includes the alternative compliance mechanism. According to the RD itself, under the Individual Compliance mechanism, no other additional enforcement or penalty mechanism is necessary in order to ensure that the RPS targets are met.<sup>13</sup> The state agency alternative is therefore superfluous and should be rejected because it eviscerates the benefits of a market-based procurement system.

The RD ignores the fact that the Renewable Energy Technology and Environmental Coalition (“RETEC”) straw proposal from which the Hybrid model derives was not RETEC’s preferred approach. Instead, the Hybrid model was only an alternative straw proposal, secondary to the preferred Individual Compliance approach.<sup>14</sup> Constellation also prefers the Individual

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<sup>13</sup> RD at p. 68.

<sup>14</sup> Comments of RETEC, p. 43 (Sep. 26, 2003).

Compliance mechanism because it is a proven market-based system that provides the greatest amount of flexibility.<sup>15</sup>

The RD improperly defers to the RETEC straw proposal. The RD does not even note that many parties have commented upon and identified flaws in the proposal. The RETEC proposal itself leaves many open questions. Among the open questions are whether the state agency would procure a fixed price product and whether it would procure energy and RECs or RECs only. The straw proposal does not suggest an approach to pricing, but lists alternative approaches: paying each winning bidder based on its bid or using a market clearing approach.<sup>16</sup> There is no indication of how much of the annual RPS requirement would be obtained through a state agency auction and how much would be obtained through bilateral transactions. The RETEC straw proposal suggests that the Hybrid model could involve the state agency procuring some, all or 50 percent of the RECs needed for any given year, yet the RD provides no recommendation. None of these important issues are addressed by the RD and the potential impact of these variations is not before the Commission. The RD is therefore insufficient to serve as a basis for a Commission decision to adopt the Hybrid model.

The Hybrid model should be rejected in favor of the proven and less complicated market-based Individual Compliance approach. The Individual Compliance method will procure renewables with the least administrative burden and least cost to consumers.

Assuming, *arguendo*, that the Commission adopts the Hybrid approach, the amount of renewables to be obtained by the state agency should be limited. Constellation suggests that state agency procurement should be limited to no more than 10 percent of the RPS requirements, in order to minimize negative effects on the market-based approach to procuring RECs.

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<sup>15</sup> The RD acknowledges that the Individual Compliance approach is the only option with a proven track record. RD at p. 70.

<sup>16</sup> See Comments of RETEC, Appendix B, p 5 (Sep. 26, 2003).

### **III. ELIGIBILITY REQUIREMENTS ARE TOO RESTRICTIVE.**

#### **A. RESTRICTIVE ELIGIBILITY REQUIREMENTS SHOULD NOT AFFECT REC EXPORTS.**

The RD is silent as to whether the restrictive RPS eligibility requirements are intended to preclude in-state generators from selling its RECs to other states. Because the RD does not take such a position and because such a rule would be unreasonable, Constellation requests that the Commission clarify this point. This issue is related to the clarification sought, *infra*, that the RPS does not preclude the trading of additional environmental attributes.<sup>17</sup> The Commission should specify that restrictions on the RPS in New York are not intended to abrogate the eligibility of resources in other states (except to prevent double counting of RECs). Any abrogation would be an unreasonable restriction upon REC exports.

#### **B. WTE SHOULD BE ELIGIBLE FOR THE RPS.**

The RD recommends that WTE should not be eligible for the RPS. This recommendation should be rejected because WTE provides environmental benefits by reducing the waste stream and displacing generation by fossil fuels. No renewable resource is 100% environmentally benign. Wind power involves visual impacts, solar collection equipment is costly and requires a large amount of energy to produce, and hydropower necessitates aquatic impacts. WTE generation is a renewable source of energy and WTE generators are required to meet all air quality requirements imposed by state and federal regulations to be protective of the public health. The RD provides insufficient justification for excluding WTE from RPS eligibility.

One of the arguments for excluding WTE is that New York State's environmental justice policy precludes the siting of new WTE facilities because they would be located in urban environments.<sup>18</sup> This assertion is false: the policy does not preclude the siting of new generation

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<sup>17</sup> See, *infra*, Section IV.C.

<sup>18</sup> RD at p. 56.

in urban environments. Although WTE facilities may be most useful and needed in urban areas, especially New York City, the environmental justice policy merely ensures new projects do not impose disproportionate impacts on low income and minority communities. Those communities are protected by the policy regardless of their location in an urban environment, or a rural location. The environmental justice policy is a standard that applies to all projects, not just WTE, and the policy does not exclude WTE from the state or from urban locations.

The RD bases its exclusion of WTE, in part, on the fact that WTE has “a source of funding in addition to electric sales,”<sup>19</sup> specifically tipping fees, and claims that WTE does not need RPS revenues. This argument is irrelevant to new facilities. New facilities with additional revenue streams will be able to compete to provide renewable energy at a lower cost. This competitive edge would directly benefit ratepayers.

Including WTE in the RPS will provide benefits to New York State. Supporting WTE supports the RPS goal of increasing fuel diversity.<sup>20</sup> Including WTE also will reduce the cost of the RPS to consumers. For these reasons, Constellation supports the eligibility of WTE facilities to meet the RPS requirements.

#### **IV. IMPLEMENTATION ISSUES.**

##### **A. THE COMMISSION SHOULD MODIFY THE RD’S PROPOSED TARGETS.**

The RD recommends that the incremental target for 2006 is 0.94 percent of state load,<sup>21</sup> or 56,797,412 MWh. This target is too aggressive for the first year of the RPS and is unlikely to be met in the early years. Constellation estimates that 18 to 24 months is required to obtain the necessary renewable capacity. This means that the deficit is unlikely to be met until well into

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<sup>19</sup> RD at p. 59.

<sup>20</sup> See RD at pp 2-3, 36.

<sup>21</sup> RD at p. 16.

2006 at the earliest. Accordingly, Constellation recommends that RPS implementation begin in the 3<sup>rd</sup> quarter of 2006 at the earliest.

There is another reason that the RPS should not take effect until at least 18-24 months after the Commission issues an Order establishing the RPS. ESCOs, including Constellation, have a number of existing retail contracts that have not (nor could they have) taken into account RPS requirements. ESCOs will therefore need time for existing contracts to expire and to plan for the implementation of new contracts that account for the costs associated with the RPS.

The targets recommended in the RD are much more aggressive and do not ramp up gradually as was assumed in the Cost Study II. The RD itself supports the option of a gradual increase, specifically acknowledging that these gradual targets are supported by the record.<sup>22</sup> Constellation recommends that the Commission pursue achievable targets. The targets should be lower in the first years of implementation, and Constellation recommends adopting the more realistic targets in the Cost Study II.

**B. THE COMMISSION SHOULD LIMIT OR ELIMINATE THE RD'S OVERLY BROAD 2008 RE-OPENER.**

The RD suggests a reevaluation of the RPS in 2008. The reevaluation is a broad reopener “to evaluate the costs and benefits, invite more generation resources to participate, adjust incentives for incremental renewable acquisition, or otherwise modify the RPS.” The reopener is too broad and creates uncertainty that will hinder project financing and discourage long-term contracts necessary to develop renewables. The uncertainty arises because the Commission could be expected to change the RPS scheme significantly only a short time after its implementation. This will be a concern to lenders and constitute a barrier to long term financing. From a practical standpoint, long term contracts will be greatly hindered, if not precluded.

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<sup>22</sup> RD at p. 45.

The Commission will be monitoring the RPS on an annual basis, if not more frequently. A reopener is therefore unnecessary. The Commission should reject the RD's proposed 2008 reopener because it will hinder the RPS goals and is not necessary.

The RD discusses the recommendations of several parties to adjust the target to match actual load growth, however the RD makes no recommendation in this regard. The RD merely states that "the Commission can review the target and adjust it if necessary." The parties reached a consensus that the RPS should be adjusted for changes in load,<sup>23</sup> which will help to ensure that the RPS goal of 25 percent renewables is met by 2013. We suggest that if the Commission adopts a reopener in 2008, the review should be limited solely to adjusting for load growth. Otherwise, market risks will be unacceptable and will discourage investment in renewables.

### C. THE RPS DOES NOT BUNDLE ALL ENVIRONMENTAL ATTRIBUTES.

The RD does not provide sufficient detail about the manner in which unbundled RECs will be implemented. One controversy in the proceeding has been the proposal to preclude the marketing of environmental attributes other than the REC.<sup>24</sup> Examples of other attributes include CO<sub>2</sub> reductions and conversion transactions under the Commission's Environmental Disclosure program. Constellation and the Office of the Attorney General ("OAG") have commented on this point<sup>25</sup> and agree that bundling all attributes is clearly the wrong path for the RPS in New York because it precludes marketing that can support development of environmentally sound generation sources. The future existence of markets for additional environmental attributes should not be precluded. The RD does not decide this issue, nor does it advocate the "bundling" of all environmental attributes. We request the Commission to explicitly reject preclusive bundling of environmental attributes.

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<sup>23</sup> RD at pp. 36, 37, 44, 45.

<sup>24</sup> RD at p. 24.

<sup>25</sup> Initial Comments of Eliot Spitzer, Attorney General of the State of New York, p. 18.

#### D. THE COMMISSION SHOULD REJECT THE TIERED APPROACH.

The RD recommends a tiered approach whereby two percent of renewables are obtained from small scale sources or experimental technologies. This tier would be obtained on a capacity basis, rather than the output basis for the great majority of the RPS goal. The purpose of the two percent tier is to subsidize technologies that are otherwise not viable.<sup>26</sup> The tiered approach should be rejected. The cost of these developmental technologies will far exceed the cost of mainstream renewables. The effect will be to encourage uneconomic renewable resources that will not contribute significant amounts of renewable generation to New York State. The New York State Energy Research and Development Authority (“NYSERDA”) already administers programs to develop and encourage renewable energy research and development. The RD acknowledges that the tiered approach creates complications and makes verification difficult.<sup>27</sup> Administering the developmental technologies tier will involve a burden and NYSERDA’s role should not be duplicated here. The RPS should instead focus on the larger challenge of developing significant renewable resources with a simpler, clearer RPS. The Commission should avoid the additional, duplicative administrative burden and reject the tiered approach.

#### E. NYPA SHOULD NOT BE EXCLUDED FROM THE RPS.

The RD recommends that the New York Power Authority (“NYPA”) be excluded from the RPS requirements. Even though NYPA’s load will be removed from the RPS targets,<sup>28</sup> the Commission should reject this recommendation. NYPA already provides low cost power to customers throughout the state and if it avoids the RPS requirements, the competitive market will be harmed. Customers that might otherwise benefit from a competitive environment might be

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<sup>26</sup> RD at p. 63.

<sup>27</sup> Id.

<sup>28</sup> See RD at p. 65. The exclusion of NYPA’s load for calculating the RPS targets is crucial if NYPA is excluded. The reason is that the other LSEs should not be required to absorb the cost burden of NYPA’s significant load. It is also crucial for the same reason that if the Long Island Power Authority elects not to participate that its load be removed from the RPS requirements.

discouraged from leaving NYPA's below market service. This problem is exacerbated if NYPA customers avoid the RPS costs. Excluding NYPA is inconsistent with the Commission's competitive energy policies. Constellation recommends that NYPA be placed on even competitive footing with other LSEs.

F. THE IMPLEMENTATION PHASE CREATES UNACCEPTABLE UNCERTAINTY.

In general, the RD leaves too many details undecided and pushes the decision off to an unstructured implementation phase. This approach only creates uncertainty that will hinder the accomplishment of the RPS goals. Investment in renewables will not take place in such an uncertain environment. We therefore recommend that the Commission established a more detailed framework for the RPS that leaves undecided as few implementation issues as is possible.

CONCLUSION

The Commission should reject four aspects of the Recommended Decision as discussed herein. The RPS will be more efficient and will provide more benefit to the state if it is designed with less restrictive deliverability requirements, utilizes an Individual Compliance mechanism, includes broader eligibility requirements and can be implemented with a greater level of certainty.

Respectfully submitted,

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