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June 23, 2004

VIA HAND DELIVERY

Honorable Jaclyn A. Brillling
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 Secretary Brillling:

In accordance with the “Notice of Scheduling for Filing Exceptions,” issued on June 3, 2004, enclosed are an original and 25 copies of “Multiple Intervenors’ Brief on Exceptions.” An electronic copy is being served on all active parties.

Very truly yours,

COUCH WHITE, LLP

Barbara S. Brenner

BSB/sem
Enclosures
cc: ALJ Eleanor Stein (via Hand Delivery 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

MULTIPLE INTERVENORS' BRIEF ON EXCEPTIONS

Dated: June 23, 2004

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TABLE OF CONTENTS

	<u>Page</u>
PRELIMINARY STATEMENT	1
OVERVIEW OF COMMENTS	1
POINT I	8
THE RD COST ANALYSIS DOES NOT PROVIDE A MEANINGFUL ESTIMATE OF THE COST TO CONSUMERS OF IMPLEMENTING A RPS.....	8
A. The Use of 2003 Dollars Understates the Cost of the RPS	9
B. The Failure to Include Costs after 2013 Understates the Cost of a RPS	10
C. By Not Including NYISO Costs, the Costs of the RPS are Understated.....	11
D. The RD Cost Analysis Includes a PTC which Understates the Cost of a RPS.....	12
POINT II.....	13
THE COST OF A RPS TO CONSUMERS MUST BE THE THRESHOLD CRITERION FOR THE RPS DESIGN	13
A. The Amount of Any RPS Subsidy Should Be Based on the Cost of Each Renewable Resource That Receives RPS Subsidy Payment	13
B. There Should Be No SBC-Like Tier	21
C. The Start Date for Implementation of a RPS Should Be 2009.....	26

D.	The Incremental RPS Target Rates Should Be Lower In The Early Years	29
1.	The Calculation of RPS Incremental Targets Appears to be Incorrect.....	29
a.	Lower Incremental Targets in Early Years will Reduce the Cost of the RPS.....	30
b.	The Cost of the Alternative Compliance Mechanism should not exceed the Cost of Renewable Resources ...	31
c.	Feb. 27 Cost Capital Study Baseline should be Adopted	32
POINT III		33
	THE RPS SHOULD BE HARMONIZED WITH THE STATE’S ECONOMIC DEVELOPMENT POLICIES	33
A.	The RPS Surcharge Should Not Be Imposed On Any Customers That Participate in New York State Economic Development Programs.....	33
1.	NYPA Economic Development Program Customers Should Be Exempt from the RPS Surcharge.....	35
2.	Flex-Rate Contract Program Customers Should Be Exempt from the RPS Surcharge	39
B.	The RPS Costs Should Be Recovered as a Part of a Demand Charge and Not on a Volumetric Basis	42
POINT IV		44
	THE SCOPE OF REVIEW AND THE CRITERIA THAT WILL BE USED IN THE 2008 REVIEW SHOULD BE SPECIFIED	44
CONCLUSION		46

PRELIMINARY STATEMENT

Multiple Intervenors, an active party in this proceeding, hereby submits its Brief on Exceptions in accordance with the schedule established by the State of New York Public Service Commission (“Commission”) in the “Notice of Scheduling for Filing Exceptions” issued on June 3, 2004. Multiple Intervenors has addressed the fundamental policy issues pertaining to the proposed adoption of a renewable portfolio standard (“RPS”) in New York State, including issues related to implementation, in Initial Comments dated March 28, 2003; Comments dated September 26, 2003; Reply Comments dated October 31, 2003; Supplemental Comments on the Phase I: Preliminary Overall Reliability Assessment dated March 19, 2004; Comments on the RPS Cost Study dated April 8, 2004; and Comments on the Draft Generic Environmental Impact Statement dated May 14, 2004. The Comments previously filed by Multiple Intervenors in this proceeding are incorporated by reference into this Brief on Exceptions.

OVERVIEW OF COMMENTS

On June 3, 2004, Administrative Law Judge Eleanor Stein (“ALJ Stein”) issued a Recommended Decision in the above captioned proceeding.¹ That decision recommended that a RPS be implemented in New York with the goal of increasing the amount of electric energy retailed in State from renewable resources to 25 percent by 2013. (RD at 14-16.) In the Recommended Decision, ALJ Stein stated that she was addressing “[b]asic RPS design

¹ Parenthetical references to the Recommended Decision are preceded by the notation “RD.” Parenthetical references to the transcript of technical conferences and other proceedings conducted herein are preceded by the notation “Tr.”

issues, including portfolio procurement design, eligible technologies, funding mechanisms, targets and objectives. . . .” (RD at 5.) ALJ Stein advanced specific recommendations on other issues and no recommendations at all on selected issues. As set forth herein, some of ALJ Stein’s recommendations should be rejected or modified by the Commission and other recommendations should be clarified. In addition, the Commission should address other basic design issues for which ALJ Stein refrained from making any recommendations.

Multiple Intervenors has urged the Commission not to implement a RPS *at this time* because the cost of electricity in New York State is too high and increasing the price of electricity by providing subsidies to select generators will exacerbate the problem. Multiple Intervenors has shown that the adoption of a RPS is inconsistent with the development of competitive electricity markets, is the antithesis of customer choice, and may degrade, rather than enhance, the reliability of the State’s bulk power system. Moreover, the cost studies conducted by the Department of Public Service Staff (“Staff”) and relied upon by ALJ Stein are so flawed that they do not provide a meaningful estimate of the cost to consumers of implementing a RPS. Multiple Intervenors excepts to the Recommended Decision insofar as it recommends that the Commission implement a RPS now.

Nonetheless, if the Commission does adopt ALJ Stein’s recommendation that a RPS be implemented, it is essential that the RPS be designed on a least-cost basis. The Commission should provide guidance on the basic elements of a RPS, ensuring that it will minimize the cost to consumers to the maximum extent possible. The cost to consumers must be the threshold criterion used in the design of a RPS.

In determining the cost, it is essential that all costs, including 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 revenues 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 resource that will be developed regardless of whether RPS subsidies are available.

In addition, the rate recovery associated with a RPS must be harmonized with New York’s economic development policies. In order to ensure that the State’s economic development goals are not thwarted, consumers that participate in economic development programs which are intended to reduce the price of electricity must not be required to pay a RPS surcharge. To impose a RPS surcharge on businesses that participate in economic development programs would undermine the State’s economic development initiatives by increasing the price of electricity for these businesses.

The RPS recommended by ALJ Stein does not minimize the cost of a RPS. It is significantly more expensive than the Staff’s prime case in its February 27, 2004 cost study (“Feb. 27 Cost Study”), which was the basis for the Proposed Action in the Draft Generic Environmental Impact Statement (“Draft GEIS”). In that study, the cost of the RPS would have been \$876,787,514, using the cost-based approach, or \$1,017,387,965, using the

market-clearing approach. (Feb. 27 Cost Study, Vol. A, Tables 5C-3, 5C-4.) The Recommended Decision Cost Analysis (“RD Cost Analysis”) indicates that the recommended RPS would cost consumers \$1,139,461,484 under the cost-based approach, or \$1,350,591,524 using the market clearing approach. (RD Cost Analysis, Tables 7, 8.)² *If ALJ Stein’s recommendations are adopted, the RPS would cost consumers approximately 30 percent more than the Feb. 27 Cost Study prime case.* And, both the Feb. 27 Cost Study and RD Cost Analysis understate the cost of a RPS to consumers by, *inter alia*, using 2003 dollars; ignoring the cost of long-term contracts after 2013; not including the cost of changes in the NYISO rules which will be necessary to ensure the reliable operation of the bulk power system; and assuming the availability of a federal production tax credit (“PTC”).

Multiple Intervenors excepts to the following recommendations and urges the Commission to refrain from adopting a RPS *at this time*, or, alternatively, to implement a less costly RPS:

1. Multiple Intervenors excepts to the inclusion of a SBC-tier in the RPS. The RD Cost Analysis includes a SBC-like tier that would cost consumers \$148,947,952. (RD, App. B, Table 8.) This is twice the amount of the SBC-like tier included in the Staff July 28, 2003 prime case Cost Study (\$74,021,863) (“July 28 Cost Study”) and almost two and one-half times as much as the amount of the SBC-like tier included

² The Recommended Decision did not include any recommendations as to whether the cost-based approach or the market-clearing approach should be utilized. As demonstrated in Point II, A. *infra*, the Commission should adopt the cost-based approach if a RPS is implemented.

in the Feb. 27 Cost Study (\$64,800,238). The Recommended Decision states that “[o]ther options, including reducing, increasing or elimination of the SBC-like tier, are also supported by this record.” (RD at 63.) Multiple Intervenors urges the Commission to eliminate the SBC-like tier.

2. Multiple Intervenors excepts to a 2006 start date for implementation of a RPS. (*See* RD at 16.) Multiple Intervenors urges the Commission to adopt a 2009 start date for the RPS. This later start would minimize the cost of a RPS and still achieve the goal of increasing the amount of electricity retailed in New York State from renewable resources to 25 percent by 2013.
3. Multiple Intervenors excepts to the equal annual incremental RPS targets in the Recommended Decision. (*See* RD at 16.) The incremental rates should be lower in the early years and higher in the later years. As ALJ Stein stated in the Recommended Decision, “a more gradual increase in the amount of renewables” is supported by the record. (RD at 45.)
4. Multiple Intervenors excepts to an alternative compliance mechanism of 150 percent of the past year’s certificate costs. (RD at 23.) Consumers should not be required to pay for an alternative compliance mechanism that is more costly than the renewable resources would be if

they provided electricity to consumers. As ALJ Stein recognized, the RPS target may not be achievable because of factors outside of anyone's control. (*See* RD at 44-45.)

5. Multiple Intervenors excepts to the reduction in the baseline number. The Recommended Decision recommends decreasing the amount of New York Power Authority ("NYPA") hydroelectric power and green marketing power that is included in the baseline as compared to the amount included in the Feb. 27 Cost Study. (RD at 16.) Multiple Intervenors urges the Commission to adopt the higher baseline that was utilized in the Feb. 27 Cost Study or, in the alternative, indicate that the NYPA hydropower baseline number and the green marketing number will be reexamined as part of the 2008 review of RPS issues recommended by ALJ Stein.

In addition, there are several important issues that ALJ Stein discussed in the Recommended Decision, but upon which no recommendation was advanced. Multiple Intervenors urges the Commission to address these issues now. Specifically, Multiple Intervenors urges the Commission to adopt the following:

1. The RPS premiums should be based on the individual cost of each renewable project that receives a RPS subsidy payment and *not* on a RPS market-clearing approach or the Staff pay-as-bid auction proposal. (*See* RD at 81-82).

2. The RPS surcharge should not be imposed on flex-rate contract customers who, by virtue of their contracts, already have demonstrated a compelling economic need for lower electricity rates.
3. The RPS costs should be recovered as part of a demand charge and not on a volumetric basis.

Furthermore, the Commission should clarify and adopt the following two recommendations advanced in the Recommended Decision:

1. The Commission should adopt ALJ Stein's recommendation that there be a 2008 review of the progress and design of the RPS ("2008 Review"). The Recommended Decision states that the review is necessary "in recognition of the vicissitudes of project development, site selection, fuel prices, and the economy" (RD at 14.) The Commission should specify the scope of the review and the criteria that will be used to evaluate the RPS in 2008.³
2. ALJ Stein recommended that the RPS be designed such that NYPA customers do not contribute to the RPS premiums. (RD at 66.) The Recommended Decision recognized that "[a]dding costs to a priority program for economic development may have adverse consequences disproportionate to the benefits." (*Id.*) The Commission should clarify that customers that purchase NYPA economic development power

³ Additionally, the Commission should revisit all elements of a RPS following issuance of the Phase 2 Reliability Assessment, scheduled for December, 2004.

pursuant to sale for resale agreements, rather than directly from NYPA, are exempt from the RPS subsidy. These are NYPA's economic development program customers.

POINT I

THE RD COST ANALYSIS DOES NOT PROVIDE A MEANINGFUL ESTIMATE OF THE COST TO CONSUMERS OF IMPLEMENTING A RPS

In the Recommended Decision, ALJ Stein states that “the bill impacts for the RPS are modest if not minimal.” (RD at 21.) ALJ Stein concluded that Staff cost estimates are sufficient to advise the Commission on policy choices, “given the long-term uncertainties inherent in such forecasting.” (RD at 98.) Multiple Intervenors disagrees. Many of the basic assumptions in the Staff cost studies, which are also basic assumptions in the RD Cost Analysis, are so flawed that the cost studies can not be relied on by the Commission.

The results of the RD Cost Analysis are skewed by numerous faulty assumptions. As a result, the cost estimates are understated by a substantial amount. The RD Cost Analysis significantly understates the cost of a RPS because: (1) it uses 2003 dollars; (2) it ignores the costs that will continue after 2013; (3) it does not include the increased NYISO costs that will result from implementing a RPS; and (4) it reduces the cost of the RPS by including a PTC. In addition, the RD Cost Analysis does not include the costs of administering a RPS.

A. The Use of 2003 Dollars Understates the Cost of the RPS

The RD Cost Analysis uses 2003 dollars throughout, although consumers will not pay for a RPS in 2003 dollars. The experts retained by the Staff have acknowledged that the cost estimates would be higher if inflation were taken into account.

MS. BRENNER: Well, when you were doing this analysis and you used - - I thought you said you - - I apologize - - used 2003 dollars. In 2006, will consumers be paying with 2003 dollars or 2006 dollars?

MR. GRACE: 2006 consumers would be paying with 2006 dollars.

...

MS. SMITH: ... you're right, by 2006, that implicitly there would be three years of inflation to arrive at the number of total dollars customers would pay in that year.

MR. GRACE: That is correct.

...

MS. BRENNER: And in order for me to compare the 2006 costs and the 2013 costs to consumers. ... I would have to assume a rate of inflation and then compound - - in other words, if I have two percent in the first year then I'm working off \$1.02 for every dollar, is that correct?

MR. SMITH: Yes.

(Tr. at 428-430.)⁴

⁴ Because the RD Cost Analysis disregarded all RPS-related costs after 2013, it is not possible to calculate the impact of using 2003 dollars to analyze proposed financial commitments that may be as long as 30 years in duration.

Consumers will not be paying for the renewable resources in the year 2003 and, thus, the use of 2003 dollars is inappropriate. In order to reflect the cost of the RPS premiums to consumers, it would be necessary to calculate the premiums in 2006 using 2006 dollars, 2007 using 2007 dollars, and so on for each year, reflecting the annual rate of inflation. Inflation in the United States over the last 5 years has ranged from 1.6 percent to 3.4 percent.

Year	Inflation Rate ⁵
1999	2.2
2000	3.4
2001	2.8
2002	1.6
2003	2.2

The average rate of inflation over the last 5 years has been 2.44 percent annually. Thus, the average inflation rate should be used to determine the cost of a RPS to consumers. Accounting for inflation will result in RPS premiums that are significantly higher than the RD Cost Analysis indicates.

B. The Failure to Include Costs after 2013 Understates the Cost of a RPS

The RD Cost Analysis does not include costs incurred after 2013, although all of the renewable resources in the main tier of the prime case will have long-term contracts that will extend past 2013 -- some extending almost 30 years past 2013! Staff witness Grace

⁵ Available at: <http://minneapolisfed.org/research/data/us/calc/hist1913.cfm>, Federal Reserve Bank of Minneapolis.

testified that the length of the contracts for each of the main tier projects that would be included in the RPS would match the economic life of the technologies. (Tr. at 431-432.) According to Mr. Grace, it is correct to assume a contract duration of a term similar to the economic life of each renewable technology. (*Id.* at 434.) The economic life of each technology is set forth in Table 4 of Appendix A of the Feb. 27 Cost Study.

Thus, the assumed contract length for wind is 20 years and the assumed contract length for hydro upgrades of 30 years. Even for resources added in 2006, the contracts will extend past 2013. Indeed, contracts for wind projects that come on line in 2006, the contracts would extend until 2020 and the hydro projects contracts would extend to 2036. Obviously, the hydro projects and wind projects that come on line later will have contracts that extend even further into the future. And consumers will continue to pay for these resources.

Thus, the costs that will be incurred after 2013 should be considered by the Commission before adopting a RPS.

C. By Not Including NYISO Costs, the Costs of the RPS Are Understated

The RD Cost Analysis does not include any increase in NYISO costs that will result from implementing a RPS. However, there may need to be changes to the NYISO rules in order to protect the reliability of the bulk power system. The Phase 1 Preliminary Overall Reliability Assessment recognized that changes to the reliability rules for the planning and operation of the bulk power system may be necessary to accommodate a large

increase in the amount of intermittent generation in the State. The Phase 2 Report will include recommendations for “necessary modifications to existing procedures and guidelines to reliably accommodate the intergration of the new wind generation.”⁶ After the Phase 2 Study is issued, then the Commission can estimate the costs that will be incurred by consumers as the result of necessary changes in the NYISO rules, and incorporate them into the RPS cost estimates.

D. The RD Cost Analysis Includes a PTC Which Understates the Cost of a RPS

The Recommended Decision acknowledges that the PTC is not available to new renewable resources today, but concludes that the additional cost to consumers, resulting from no PTC, is “a minimal cost increase.” (RD at 22, n.31.) The RD Cost Analysis does not reflect the fact that the PTC is not available to reduce the cost of a RPS to consumers.

However, the cost increase is not minimal. The main tier of the RPS recommended by ALJ Stein is substantially more expensive for consumers without the PTC. In the RD Cost Analysis, using the cost based approach, the RPS main tier would cost \$990,513,532. (*Id.*, App. B, Table 7.) However, without the PTC, the RPS main tier would costs consumers \$1,254,552,878. (RDCase-No-PTC-Results-6-03-04.xls RD NO PTC Key Costs Results (NF)). This is an increase of over \$250 million during the period 2006 through 2013. Without a PTC, the cost of a RPS between 2006 and 2013 using the market-clearing

⁶ *Report on Phase 1: Preliminary Overall Reliability Assessment* at 1.1.

price approach increases to over *\$1.5 billion*. (RDCase-No-PTC-Results-6-03-04.xls RD NO PTC MktclrAppr (NF)).

Moreover, the additional costs resulting from the fact that there is no PTC available to wind projects would be even greater than the no PTC cost analysis indicates because the contracts for wind projects will extend far beyond 2013. (Tr. at 431-432.) The assumed economic life of wind projects is 20 years. (*Id.* at 433.) (July 28 Cost Study, App. A, Table 4.) Thus, in determining the cost of a RPS to consumers, the Commission should use the no PTC cost study and not the RD Cost Analysis.

POINT II

THE COST OF A RPS TO CONSUMERS MUST BE THE THRESHOLD CRITERION FOR THE RPS DESIGN

A. The Amount of Any RPS Subsidy Should Be Based on the Cost of Each Renewable Resource That Receives RPS Subsidy Payment

In the Recommended Decision, ALJ Stein discussed whether the RPS should be designed so that no renewable generator would receive more than is necessary for incremental projects to be built or if a market-clearing auction should be utilized. (RD at 81-82.) However, the Recommended Decision does not advance a recommendation to the Commission on the issue of which approach should be utilized in the design of the RPS. This is a critically important issue that will have a major impact on the cost of a RPS to consumers.

Three approaches have been examined in this proceeding. One is a market-clearing price auction, where each winning bidder would be paid the market-clearing price. The second is Staff's cost-based approach which is referred to as the "pay as bid" approach. Each winning bidder would be paid its own bid price. The third approach is a real cost of service approach, with each winning bidder being paid its verifiable costs (including a reasonable return on investment) minus its verifiable revenues as a subsidy. Staff states that "[a] pay as bid auction would push subsidies down toward individual generator's costs." (Staff Reply Comments [October 31, 2003] at 8.) However, according to Staff, its "[p]ay as bid" represents a compromise between market-clearing price and cost-of-service regime." (*Id.* at 9.)

The cost studies demonstrate that the Commission should not adopt the market-clearing approach. The market-clearing price approach would significantly increase the cost to consumers and not provide any additional benefits. In both the Feb. 27 Cost Study and the RD Cost Analysis, the market-clearing approach was much more expensive than Staff's pay-as-bid approach. Staff's pay-as-bid approach results in significantly lower RPS costs than a market-clearing approach. In the prime case examined by Staff in its Feb. 27 Cost Study and the subsequent sensitivity analyses, as well as the RD Cost Analysis, the market-clearing approach results in consumers paying more for the same number of megawatts and

megawatthours for the main tier resources than if the resources are acquired using Staff's pay-as-bid approach.⁷

In the RD Cost Analysis, the RPS main tier would cost consumers, using the Staff pay-as-bid approach, \$990,513,532 (2003\$) between 2006 and 2013, assuming a PTC. Using a market-clearing approach, the same number of megawatts and megawatthours would cost consumers \$1,201,643,572 (2003\$). (RD, App. B, Tables 7, 8.) Accordingly, the market-clearing approach would cost consumers an additional \$200 million between 2006 and 2013 to achieve exactly the same goal, if a PTC were available.

Without the PTC, the cost disparity is even greater. The total cost of the RPS main tier using the pay-as-bid approach would be \$1,254,552,878. (RDCase-No-PTC-Results-6-04-04. xls RD No PTC Key Cost Results (NF)). But, using the market-clearing approach it would be \$1,551,063,532, or an additional \$300 million to achieve the same goal. (RD Case-No-PTC-Results-6-03-04. xls RD No PTC MktCLrAppr (NF)). Thus, the Commission should reject a market-clearing approach.

The total RPS subsidy using the pay-as-bid approach would be less than if the market clearing price is paid for all the renewable resources because only the last increment of renewable resources acquired in each year would receive the market-clearing price.⁸

⁷ The SBC-like tier costs do not vary because the SBC-like tier RPS payments are lump sum grants.

⁸ 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

However, even though the pay-as-bid approach will result in lower costs to consumers than the market-clearing approach, it is not the least cost approach. Rather an approach whereby the RPS subsidy payments to each renewable generator are based on that particular generator's verifiable cost of service is the least cost approach.

In responding to a renewables RFP, the developer/generator would be required to provide specific cost information about the renewable facility. The information would include capital costs, operation and maintenance costs, as well as a proposed rate of return on equity.⁹ 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. 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

without providing any additional benefits. In this instance, it would not be appropriate to provide market-clearing revenues to the recipients of a regulatory subsidy program.

⁹ The Commission could establish a generic rate of return on equity for the RPS on an annual basis.

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 the 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 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.¹⁰ A cost-based subsidy also would ensure that new renewable resources that do not require any subsidies do not receive a subsidy.¹¹ With the Staff proposal, a developer that does not need a subsidy could bid and receive a subsidy. As long as the bid was lower than the most expensive increment selected, the developer could be a winning bidder. Thus, the Staff approach would provide bidders with the opportunity to receive excessive profits by bidding above their cost of service, as long as their bid was below the last increment.

Moreover, the cost of service, as compared to both the market-clearing price and the pay-as-bid approaches, would reduce the amount paid to the developers because it would reduce the cost of each project. Utilizing a cost-of-service approach reduces the

¹⁰ 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.

¹¹ Such projects would be developed regardless of whether a RPS is adopted and, therefore, to provide the developers of those projects with subsidies increases unnecessarily the cost of a RPS to consumers.

developer's risk and, therefore, the cost of debt and cost of equity for each project should be less than if the market-clearing or pay-as-bid approach is used. The Feb. 27 Cost Study assumes incorrectly that the debt cost and equity cost for each technology would be the same whether a pay-as-bid approach or market-clearing approach is implemented by the Commission. (See Feb. 27 Cost Study, App. A, Table 4; Tr. at 320.)¹²

The Feb. 27 Cost Study assumes a 16 percent equity cost for all technologies except wind, which has a higher equity cost -- 19 percent. (Feb. 27 Cost Study, App. A, Table 4.) However, if a cost-of-service approach is used, the cost of debt and equity should be lower because the developer would have less risk. The investors will know that their contracts will enable the developer to recover the cost of the project, plus an established return on investment. Therefore, the equity cost and debt cost should be considerably lower than if the market-clearing approach is used. Developers would have more risk under Staff's pay-as-bid approach than under a real cost-based approach because they would be at risk for inaccurate forecasts of market prices.

Long-term contracts based on estimates of the market price of energy, using a market-clearing approach or pay-as-bid approach, expose consumers to far greater risk of over-paying than cost-based contracts. Bidders would need to inflate their bids to hedge against the risk of lower than forecasted energy prices. With the cost-of-service approach that will not be necessary.

¹² It appears that the same assumption was used in the RD Cost Analysis.

The Commission 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 resulting cost to consumers in the billions of dollars. A market-clearing price or pay-as-bid price, which would be based on forecasts of LBMP, could have the same result. The Six-Cent Law taught the State that any long-term contracts based on forecasts of future energy prices can be very costly to consumers.

However, using a cost-of-service approach, if the payments from the NYISO exceed the forecasted LBMP, then the consumers that are funding the RPS would receive a credit. Consequently, if the developer has a better capacity factor than expected, or market prices exceed the forecasts, the amount of the RPS premiums required from consumers would be reduced. With the market-clearing approach or the pay-as-bid approach, if the payments from the NYISO exceed the developer’s forecast, the developer reaps additional profits and consumers pay more than they need to pay in order to ensure that the renewable resource is developed.

In addition, the cost-based approach would ensure that consumers receive a credit for the SBC funds and other grants or tax credits that are provided to projects. According to Staff, wind projects that are being funded by NYSERDA, using SBC funds, would be eligible to receive a RPS premium. (Tr. at 396.) A cost-based approach would protect consumers from paying for the same project twice -- once through a SBC surcharge

and again through a RPS surcharge. A developer, in determining the cost of a project, would have to reduce the RPS cost by any outside funding, such as a SBC subsidy. But, if a market-clearing price or pay-as-bid approach is adopted, the developer may be able to recover those funds twice.

Staff's only apparent objection to the cost-of-service approach appears to be that it would be "untenable from an administrative perspective" for Staff to audit generators every year. (Staff Reply Comments at 9.) Staff argued that a cost of service approach would require Staff:

[T]o predict capital, fuel, and other operating costs, and the weather, as well as energy prices and capacity factors, for the prospective year for each proposed project (or, even more severe, audit generators' actual costs every year *ex post facto*).

(*Id.*) However, Staff overstates the burden.

An annual true up of costs and revenues for each project would not require the Staff to predict anything. Rather, based on the books and records of the generator, it would be possible to determine the costs incurred by the generator and the revenues that the generator received. As indicated above, the Commission could establish a generic return on equity that would be applied to all projects. Then, if a project's revenues exceeded its costs, including its return on equity, consumers would receive a credit to the RPS surcharge. The generator would return the overpayment to the program administrator, who, in turn, would provide a credit to consumers.

In its Reply Comments, Staff stated that "[t]here could be, quite possibly, hundreds of generators by 2013. . . ." (*Id.*) However, even if, *arguendo*, Staff were correct,

one thing is clear, there will not be hundreds of generators prior to the 2008 Review. Thus, the Commission should implement a cost-of-service approach to the RPS and, then, during the 2008 Review, a determination can be made as to whether the administrative burden of a cost-of-service approach outweighs its benefits.¹³ If the cost-of-service approach results in lower costs than forecast in the Feb. 27 Cost Study, then that benefit should be weighed against the administrative burden as part of the 2008 Review.

Because RPS subsidies based on each generator's cost-of-service will result in the lowest cost to consumers of a RPS, the Commission should adopt a cost-of-service approach.

B. There Should Be No SBC-Like Tier

In the Recommended Decision, ALJ Stein recommended that the RPS include a SBC-like tier that is targeted to provide two percent of the incremental renewable load. ALJ Stein has recommended a SBC-like tier that, by itself, would cost consumers almost \$150 million between 2006 and 2013. (RD, App. B, Table 8.) In the Feb. 27 Cost Study, the SBC-like tier cost was approximately \$65 million. (Feb. 27 Cost Study at Table 5C-3.) Even in the July 28 Cost Study, which was based on an incremental RPS target of 16,653,010 megawatthours of renewables, as compared to the lesser amount in the

¹³ In evaluating the administrative burden, it should be remembered that the cost-based approach is projected to save consumers hundreds of millions of dollars thereby justifying the expenditure of a reasonable amount of administrative resources to protect customers.

Recommended Decision (13,706,906 megawatthours), the cost of the SBC-like tier was half the amount included in the RD Cost Analysis -- \$74,021,863. There is no explanation in the Recommended Decision for the increase in the amount of the SBC-like tier and the resulting increase in the cost to consumers.

The SBC-like tier included in the RD Cost Analysis would cost consumers over \$2.9 *million* per megawatt, or \$543 per megawatthour.¹⁴ The cost of such a proposed subsidy is staggering. This compares to approximately \$243,000 per megawatt and \$72 per megawatthour for the main tier renewable resources, based on the RPS premiums, using Staff's pay-as-bid cost-based approach. The SBC-like tier represents approximately 10 percent of the total RPS premiums. Yet, it only would provide approximately 2 percent of the RPS megawatthours. (RD at 20.)

Judge Stein stated that a SBC-like tier is necessary "to ensure continued and accelerated development of emerging technologies such as solar and fuel cells..." (*Id.*) She stated that although the "emerging technologies such as solar and fuel cells" cannot compete on a price basis with other renewable resources, "their potential value in, among other things, locating renewable generation near heavy load areas, environmental benefits, and fuel costs, argues for a serious effort to support their development." (*Id.*) However, she notes that "[o]ther options, including reducing, increasing, or elimination of the SBC-like tier are also supported by this record." (*Id.*)

¹⁴ The \$2.9 million per megawatt is calculated based on the cost of the SBC-like tier of \$148,947,952 (RD, App., B, Table 7), divided by 50.93 megawatts (*Id.*, Table 4.) The \$543 per megawatthour is derived from the same tables, namely \$148,947,952 divided by 274,138 megawatthours.

The Recommended Decision's rationale for including a SBC-like tier is not supported by the record in this proceeding. There is nothing in the record that demonstrates that a SBC-like tier is needed to accelerate development of the SBC-like tier technologies or that they provide greater environmental benefits than other renewable resources. Nor is there any evidence relating to their fuel costs *vis-à-vis* other renewable resources.¹⁵ Thus, they provide no greater benefits to consumers than other renewable resources. As to the ability to locate them "near heavy load areas," even if they can be located in heavy load areas, there is no record evidence that they will be located in Southeastern New York.

But, even if, *arguendo*, they were located in heavy load areas, their increased cost outweighs any benefit. Multiple Intervenors urges the Commission, if it implements a RPS, not to include a SBC-like tier. A SBC-like tier increases significantly the cost of a RPS to consumers. As ALJ Stein noted in the Recommended Decision, solar PV, small wind and fuel cells are more expensive than other renewable resources. (RD at 63.) The record on this issue is clear. And Staff has acknowledged that solar PV, fuel cells, and small wind cannot "compete head-to-head" with other renewable resources because "they would be so much more expensive on a megawatt basis." (Tr. at 613.)

¹⁵ This is particularly true of fuel cells, which Staff argues should be eligible for RPS subsidies even though they use natural gas as their primary fuel source. (Staff Initial Comments [September 26, 2003] at 15.) And, fuel cells account for approximately 60 percent of the SBC-like tier megawatts and more than 90 percent of the megawatthours. If they are fueled by natural gas, they are no more renewable than a natural gas combined cycle generating plant.

Nonetheless, if, *arguendo*, the Commission does include a SBC-like tier in the RPS, it should mitigate the associated costs by reducing the amount of SBC-like tier renewables to a much smaller percentage of the total RPS (*e.g.* 0.25 percent). In addition, the SBC-like tier should not be front-end loaded. At the March 18, 2004 Technical Conference, a Staff witness testified that the idea of frontloading the fuel cells was to achieve “commercialization advancement that would lead to lower costs.” (Tr. at 617.) However, Staff did not perform any analysis to determine whether front end loading would have this effect:

MS. BRENNER: Did you do any analysis to determine whether the amount of fuel cells included in the New York RPS would affect the price of fuel cells in the years to come?

MR. AGRESTA: No.

(*Id.* at 631.)¹⁶

The SBC-like tier included in the RD Cost Analysis is front-end loaded, with expenditures of almost \$25 million for each of the first three years. (RD, App. B, Table 5.) This makes the SBC-like tier more expensive than it would be if it were not front-end loaded because the cost of the renewable technologies included in the SBC-like tier is expected to decline between 2006 and 2013. (Feb. 27 Cost Study, App. A, Tables 16-18.)

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

¹⁶ Mr. Agresta’s testimony that he believes that including the fuel cells in the RPS “would help bring down the price of fuel cells eventually” should not be accorded any weight by the Commission. (Tr. at 631.) His belief is not based on any study or analysis.

over the previous ten years and that project costs would decline further in the next five to ten years as technologies were refined.¹⁷ Indeed, the cost of wind energy has been going down since 1980. The levelized cost in 1979 was 40 cents per kWh.¹⁸ 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.¹⁹ The projected cost in the year 2010 is 2.5 cents per kWh because of increased turbine size, R&D advances, and manufacturing improvements.²⁰

Indeed, renewable resources are among the world's fastest growing energy sources.²¹ Between 2000 and 2003, BP is committed to spend \$500 million on its photovoltaics business. Shell will invest \$1.5 billion between 2002 and 2007.²² Solar cells were a \$2.5 billion business worldwide in 2001, with a 30 percent annual growth rate.²³

¹⁷ See New York State Energy and Research and Development Authority ("NYSERDA"), *Wind Technology Assessment*, at 1 (July 1991).

¹⁸ See *Wind Energy: New York's Future*, The Times Union (Albany), September 23, 2003, at 8.

¹⁹ New York State Energy Plan and Final Environmental Impact Statement, June 2002 ("State Energy Plan"), at 3-58-3-59 (June 2002).

²⁰ *Id.* At that cost, there is no apparent need for wind power projects to be subsidized.

²¹ 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.

²² See *id.*

²³ "Solar cell maker leases manufacturing location," *Times Union* (June 19, 2004) at B11.

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 expected more than \$1 billion in sales in 2003 "with solid profitability" and expects the business to pay for itself in two years.²⁴

Although solar PV, fuel cells, and small wind resources remain uncompetitively expensive even through 2013, they would be less expensive on a megawatt and a megawatthour basis in 2013 than they are currently. (Feb. 27 Cost Study, App. A, Tables 16-18.) If the Commission adopts a SBC-like tier, it should be 0.25 percent of the RPS and the acquisition of solar PV, fuel cells, or small wind should not be included in a RPS until 2011. Alternatively, if, *arguendo* the Commission implements a RPS design with a SBC-like tier that includes expenditures before 2011, the expenditures should be lower in the early years and ramp up in the later years. And, the costs and benefits of the SBC-like tier should be addressed as part of the 2008 Review.

C. The Start Date for Implementation of a RPS Should Be 2009

In the Recommended Decision, ALJ Stein recommended that the start date for the implementation of a RPS should be 2006. (RD at 16.) However, the Recommended Decision also stated that "[a]nother option for the Commission is to adopt a more gradual increase in the amount of renewables.... This option is also supported by the record." (*Id.* at

²⁴ *See id.* at 53.

45.) Multiple Intervenors urges the Commission, if it implements a RPS, to delay the start date until 2009. As demonstrated in section in Point I.B., *supra*, the costs of all renewable resources are expected to decrease between 2006 and 2013. If the Commission were to implement a RPS with the goal of having 25 percent of New York's energy supply be renewable resources by the year 2013, then the start date could be 2009 and the incremental target amounts for the years 2009 through 2013 could be increased above the level of the incremental targets in the Recommended Decision. The goal of 25 percent by the year 2013 still could be reached. Using a 2009 start date would enable the State to acquire the same amount of renewable resources by 2013, but at a cost to consumers that would be significantly less.

And, the cost savings resulting from a 2009 start date are dramatic. In the Recommended Decision, the spreadsheets indicate that using the Staff's pay-as-bid approach, with no SBC-like tier and a start date of 2009, the cost of a RPS would be \$292,683,186 instead of \$1,139,461,484, which is the cost of the Recommended Decision's RPS. (RD-Strawman-A-Results-6-03-04 XLS new fuel costs approach). Part of the cost reduction is attributable to not having a SBC-like tier. But, even if the RPS start date were 2009 and included the Recommended Decision's \$148,947,952 SBC-like tier, the total cost of the program would be \$441,631,138, which is one-third of the cost implementing the same RPS in 2006, as recommended by Judge Stein.

In addition to reducing the cost of a RPS to consumers, a 2009 start also would enable the State to gain valuable experience with renewable resources that currently are

under development in New York State. According to the NYISO, there are approximately 888 megawatts of wind facilities that have been proposed for the State as of December, 2003.²⁵ 500 to 700 megawatts are being funded, in part, by NYSERDA, utilizing system benefits charge funding. Cherry Valley Wind Farm, Chautauqua Wind Farm, the Prattsburg Wind Farm, as well as the Flat Rock Wind Project, already have been awarded SBC funds by NYSERDA. As of May 2003, NYSERDA had awarded \$24 million to wind facilities.²⁶

A 2009 start date would also enable the Commission to ensure that the results of the Phase 2 Reliability Assessment will be incorporated into the final design of a RPS. The NYISO would have an opportunity to revise the market rules to ensure that a RPS enhances the actual operation of the New York bulk power system. The NYISO and the New York State Reliability Council will be able to ensure that the reserves necessary for operating capacity are sufficient; the impact of intermittent resources on ancillary services, including the impact of frequency control and voltage regulation, are addressed; and whether existing, marginally operating, thermal generation will be retired or expected new generation deferred.

²⁵ New York Independent System Operator, “Proposed Interconnections/New York Control Area” (December 18, 2003.)

²⁶ “Draft New York Energy Smart Program Evaluation and Status Report, Report to the System Benefit Charge Advisory Group” (May 2003) at 4.15.

D. The Incremental RPS Target Rates Should Be Lower In The Early Years

In the Recommended Decision, there are incremental RPS targets for the years 2006 through 2013. As set forth below, the Commission should: (a) examine the accuracy of the incremental target percentages included in the Recommended Decision; and (b) should modify the incremental targets in the Recommended Decision to lower the incremental targets in the early years.

1. The Calculation of RPS Incremental Targets Appears to be Incorrect

The calculation of the incremental percentage in the RPS targets in the Recommended Decision appears to be overstated. In the Recommended Decision, the renewables percentage baseline is 19.42 percent and the incremental percentage by 2013 is 7.50 percent. (RD, Table 2.) However, in the July 28 Cost Study, the baseline was 18.01 percent and yet the incremental percentage in order to achieve the RPS 25 percent target in 2013 in that study is virtually identical.

Incremental RPS Percentages

Year	Recommended Decision	July 28 Cost Study
2006	0.94%	0.94%
2007	1.92%	1.88%
2008	2.87%	2.82%
2009	3.81%	3.76%
2010	4.74%	4.70%
2011	5.67%	5.64%
2012	6.58%	6.58%
2013	7.50%	7.52%

(RD, Table 1; July 28 Cost Study, Table 5A-1.)

In the July 28 Cost Study, the 7.52 percent represents 16,653,010 megawatthours. In the Recommended Decision, the 7.50 percent represents 13,706,906 megawatthours. Given the difference in the number of megawatthours, the incremental percentages in the Recommended Decision would be expected to be different than the incremental percentages in the July 28 Cost Study. Because the incremental target in the Recommended Decision is 3 million megawatthours less than in the July 28 Cost Study, the incremental targets in the Recommended Decision should be lower.

a. Lower Incremental Targets in Early Years will Reduce the Cost of the RPS

In the Recommended Decision, the Administrative Law Judge has recommended that the renewable resources be acquired in equal increments beginning in 2006. (RD, Table 1.) However, the Administrative Law Judge stated that “[a]nother option for the Commission is to adopt a more gradual increase in the amount of renewables...this

option is also support by the record.” (*Id.* at 45.) If in the early years of the RPS the incremental targets are lower, with the incremental targets increasing in the later years, the same amount of renewables would be acquired by 2013, but the cost to consumers would be significantly less. As demonstrated in Point II. B., *supra*, the cost of renewable resources will be less in a few years and in Point II.C, *supra*, it will provide additional time to examine fully the reliability impacts of a RPS.

b. The Cost of the Alternative Compliance Mechanism should not exceed the Cost of Renewable Resources

In the Recommended Decision, Judge Stein recommended that “(a) load serving entity failing to acquire target renewables should comply in the alternative by a payment of 150 percent of past year’s certificate cost.” (RD at 23.) An alternative compliance mechanism that exceeds the cost of renewable resources would unnecessarily increase the cost of a RPS. The Recommended Decision recognizes that there may be many causes for a load serving entity’s inability to reach an incremental target in any given year. For example, Judge Stein indicated that there are vicissitudes of project development, site selection, fuel prices, the economy and the investment climate. (*Id.* at 14, 45.) The Recommended Decision also states that there may be “unforeseen implementation obstacles.” (*Id.* at 36.)

The alternative compliance mechanism penalizes customers. Yet, whether a load serving entity is able to meet the incremental target in any given year is beyond the

customers' and, perhaps, the load serving entity's control. The cost of any alternative compliance mechanism should not exceed the cost of the renewable resources that would have been acquired if the target had been met.

**c. Feb. 27 Cost Capital Study Baseline
should be Adopted**

In the Recommended Decision, the Administrative Law Judge reduced the baseline that was used by Staff in the Feb. 27 Cost Study. (RD at 41.) According to the Recommended Decision, these changes reduced the year 2005 baseline from 33,620,339 megawatthours, or 23.4 percent to 31,937,479 megawatthours or 19.29 percent. This change in the baseline results in an increase in the cost of the RPS main tier of approximately \$180 million. (RD, App. B, Table 7; Feb. 27 Cost Study, Table 5C-3)²⁷

The changes in the baseline were made based on comments filed by NYPA. (RD at 40.) In its comments, NYPA stated that the out-of-state sales requirements for the St. Lawrence project are approximately 4.8 percent. (NYPA April 8, 2004 letter to Secretary Brilling, at 5, n.4.) However, on June 4, 2004, the Federal Energy Regulatory Commission ("FERC") issued an order that reduces the amount of St. Lawrence power that is sold out-of-state. The FERC held that NYPA is not required to provide 0.6 percent of project power, or

²⁷ The comparison is not apples-to-apples because the amount of energy that would be acquired as part of the SBC-like tier in the Recommended Decision is greater than in the Feb. 27 Cost Study. Thus, the increase in the main tier, if the SBC-like tier had remained at one percent, would be even greater.

4.8 megawatts, to Massachusetts.²⁸ This Commission should adjust the baseline upwards to reflect this additional hydroelectric power that will be sold in state. In addition, as part of the 2008 Review, the NYPA baseline numbers should be revisited.

Also, since April 8, 2004, the date on which the parties filed their supplemental comments concerning the Staff cost studies, RG&E has announced its Catch the Wind Program. This program is not taken into account in the baseline numbers included in the Recommended Decision. Obviously, between now and 2006, there will be other green marketing programs available to consumers. The green marketing baseline numbers should be those used in the Feb. 27 Cost Study and should be reexamined as part of the 2008 Review.

POINT III

THE RPS SHOULD BE HARMONIZED WITH THE STATE'S ECONOMIC DEVELOPMENT POLICIES

A. The RPS Surcharge Should Not Be Imposed On Any Customers That Participate in New York State Economic Development Programs

In the Recommended Decision, ALJ Stein recommended that the RPS be designed “such that NYPA customers do not contribute to the premiums.” (RD at 66.) Multiple Intervenors urges the Commission to adopt the recommendation to exempt NYPA economic development customers, as detailed below, and to extend the exemption to flex-rate contract customers. ALJ Stein’s conclusion that “. . . adding costs to a priority program

²⁸ Project No. 2000-046, *Power Authority of the State of New York*, “Order on Rehearing” (issued June 4, 2004) at ¶¶ 12, 17.)

from economic development may have adverse consequences disproportionate to the benefits” applies not only to NYPA industrial customers, but also to flex-rate contract customers. (*See id.*)

The State Energy Plan recognized the importance of reducing energy costs to attract, retain, and expand business in New York.²⁹ The price of electricity is a matter of particular importance to businesses. The State Energy Plan concluded that “[e]nergy prices tend to be important factors in business location and expansion decisions. . . .”³⁰ 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.³¹

The State Energy Plan recognizes the importance of economic development programs that have been developed in the State to attract and retain business. It cites to the NYPA programs and the Commission’s flex-rate contract program.³² As the State Energy

²⁹ New York State Energy Plan and Final Environmental Impact Statement (June 2002) (“State Energy Plan”) at 2-15.

³⁰ *Id.* at 2-16.

³¹ *Id.* at 2-16 (footnote omitted).

³² *Id.* at 2-17, 2-22.

Plan states, the cost of energy remains an obstacle to overcome in New York's efforts to retain, expand and attract business.³³ In fact, the State Energy Plan concludes that:

New York's success in working with businesses that could relocate to other states frequently depends on the availability of discounted, low-cost energy and incentives offered through various State and local government and utility-sponsored programs. . . [E]ffective energy-related economic development programs for businesses will continue to be necessary to help preserve and expand the State's economic base.³⁴

1. NYPA Economic Development Program Customers Should Be Exempt from the RPS Surcharge

Multiple Intervenors, as stated above, urges the Commission to adopt ALJ Stein's recommended exemption from the RPS surcharge for NYPA economic development program customers. As the record demonstrates, "NYPA customers' load would not see the price reductions, price suppression, caused by the renewables." (Tr. at 546; *see also* 548.) Because NYPA customers have fixed long term contracts, they will not benefit from any price suppression that may occur, if a RPS is implemented, all NYPA customers would experience an increase in the price that they pay for electricity. In addition to paying the RPS premium charge, the price that they pay for electricity would increase as a result of any changes in the NYISO rules that increase any NYISO charges, including ancillary service charges.

³³ *Id.* at 2-23.

³⁴ *Id.* at 2-24.

New York's economic development agency, the Empire State Development Corporation ("ESD"), relies on NYPA's low-cost electricity "as one of the state's most valuable assets in promoting business and job growth."³⁵ According to Charles A. Gargano, ESD Chairman and Commissioner, the NYPA economic development programs protect and create more than 420,000 jobs statewide.³⁶ Chairman Gargano has stated that "NYPA power is both affordable and reliable and can be an effective economic development tool to attract or retain companies that provide our citizens with well-paying jobs."³⁷

However, the Commission should clarify that the exemption applies to all categories of NYPA industrial power, whether the power is sold directly to the industrial consumers by NYPA or pursuant to sale for resale agreements through the local utility. Most of the economic development power sold by NYPA is sold as a sale for resale. NYPA allocates the power to specific economic development customers. NYPA then sells the power to the local utility which resells the power to the designated economic development customers.

The two categories of NYPA Niagara Project hydropower that is sold to industrial consumers within 30 miles of the Niagara Project switchyard are sold pursuant to sale for resale agreements. Replacement Power, in accordance with the federal Niagara Redevelopment Act, 16 USC § 836(a), is sold to Niagara Mohawk Power Corporation

³⁵ New York Power Authority 2002 Annual Report, *supra*, at 15.

³⁶ *Id.*

³⁷ *Id.*

(“Niagara Mohawk”) by NYPA for resale to industries that are located in the Buffalo/Niagara area. This 445 megawatts of hydroelectric power has been sold to industrial customers for more than 40 years.

In addition, 250 megawatts of power generated at NYPA’s Niagara Project, known as Expansion Power, is sold to designated industries on the Niagara Frontier for economic development. Expansion Power is sold pursuant to sale for resale agreements to Niagara Mohawk and New York State Electric & Gas Corporation (“NYSEG”) for resale to specific industrial customers. This power has been sold to industrial customers since the early 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.

In addition, there are other NYPA economic development programs. 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

Development Power. The New York State Legislature created this program to encourage job development and 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.”³⁸ The Legislature currently is considering extending the PFJ program.

These programs are designed to promote economic development by providing low-cost electricity to businesses. In order to achieve the goal of these programs, it is essential that the Commission adopt ALJ Stein’s recommendation that NYPA economic development program customers be exempt from the RPS surcharge.

2. Flex-Rate Contract Program Customers Should Be Exempt from the RPS Surcharge

ALJ Stein did not recommend that flex-rate contract customers be exempt from the RPS surcharge. However, the rationale for exempting NYPA customers applies equally to flex-rate contract customers. The flex-rate contract program, like the NYPA economic development programs, is intended to retain and attract business. Multiple Intervenors urges the Commission, in designing a RPS, to exempt flex-rate contract customers from the RPS surcharge.

³⁸ 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).

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 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 State Energy Plan concluded that the State’s “[l]ow-cost power programs have been successful to date in retaining and expanding employment opportunities in the state.”³⁹ And, it stated that “[o]ffering electricity discounts as a means of retaining or attracting jobs is an important economic development tool.”⁴⁰ To increase the price of electricity paid by flex-rate contract customers by imposing a RPS surcharge would be inconsistent with the economic development goals of the flex-rate contract program.⁴¹

³⁹ State Energy Plan at 2-36.

⁴⁰ *Id.* at 2-37.

⁴¹ Many flex-rate contract customers have made business decisions, and commitments to their New York operations, based upon electricity prices that were fixed in negotiations prior to the institution of this proceeding.

Importantly, many flex-rate contract customers will not benefit from any forecasted suppression effect of a RPS. In the RD Cost Analysis, the impact of the RPS premium on the price that consumers would be required to pay for a RPS has been reduced by assuming that there will be a suppression effect on supply and capacity costs. (RD, App. B, Table 9.) And, the suppression effect assumed by Staff is significant. The average price reduction that is included in the RD Cost Analysis for industrial customers in the Niagara Mohawk and in the NYSEG service territories exceeds the RPS premium in 2006 and 2013. (*Id.*, Table 14.) In the Rochester Gas and Electric Corporation (“RG&E”) service territory, the suppression effect exceeds the premium in 2013. (*Id.*) However, as Staff witness Myers testified, “just because MAPS says rate payers’ costs would go down, doesn’t mean rate payers’ costs would go down.” (*Id.* at 592.)

However, even if, *arguendo*, there were a suppression effect on supply and capacity costs in general, there would be no suppression effect for many flex-rate contract customers. Staff acknowledged that the suppression effect on supply and capacity costs, even if it occurs, would not flow through to load covered by long term contracts. (Tr. at 538.) NYSEG and RG&E each have approximately 25 flex-rate contracts in effect; Niagara Mohawk has approximately 160 flex-rate contracts.

The cost impact of implementing a RPS is understated in the RD Cost Analysis for all customers, but especially for the flex-rate contract customers. By failing to include all of the actual costs and using potential suppression effects to reduce the cost to consumers of a RPS, the RD Cost Analysis understates the cost of a RPS to flex-rate contract consumers

that purchase energy under their flex-rate contracts. The Commission has recognized that “flex rate contracts remain a valuable tool for promoting economic development through the retention and attraction of business customers.” Increasing the cost of doing business in New York State is antithetical to the State’s economic development goals.⁴² Multiple Intervenors urges the Commission to exempt flex-rate contract customers from a RPS surcharge.

B. The RPS Costs Should Be Recovered as a Part of a Demand Charge and Not on a Volumetric Basis

In the Recommended Decision, ALJ Stein discussed whether RPS costs should be collected as an explicit demand charge or on a volumetric basis. (RD at 82.) The Recommended Decision states that “Staff prefers a volumetric charge since subsidies will be paid by MWh the benefits of an RPS are tied to the volume of overall load.” (*Id.*)⁴³ However, ALJ Stein does not recommend either a demand charge collection or a volumetric surcharge. Staff’s argument that the benefits of a RPS are tied to the volume of overall load ignores the cost causation principles that are the bedrock of cost allocation and disproportionately impacts high-load factor customers.

⁴² As Governor George Pataki has stated, “[w]e know that enacting tax cuts and lowering the cost of doing business is a proven way to create new jobs.” “Governor unveils workers’ comp proposals at council event,” available at www.bcny.org (March 29, 2004 at 1).

⁴³ The argument that a volumetric surcharge is appropriate because subsidies will be paid by megawatt-hour does not apply to the SBC-like tier, in any event, because the payments will be a one-time subsidy to offset capital costs.

The purpose of a RPS is to subsidize the construction of new renewable resources that will provide energy in New York State. The National Association of Regulatory Utility Commissioners states in its “Electric Utility Cost Allocation Manual” that:

Costs that are based on the generating capacity of the plant, such as depreciation, debt service and return on investment, are demand-related costs. Other costs, such as cost of fuel and certain operation and maintenance expenses, are directly related to the quantity of energy produced.⁴⁴

Thus, the capital costs should be collected from customers in the demand charge. And, the Commission recently has affirmed its commitment to rate design that “align[s] cost causation with cost recovery.”⁴⁵

Based on the tables in Appendix A of the July 28 Cost Study, it is clear that most of the costs related to renewable resources are demand-related costs. Table 10 of Appendix A of the July 28 Cost Study indicates that the total installed cost of wind ranges from \$1,010 to \$1,650 per kilowatt (2003\$/kW of rated max output) in 2006. Other fixed costs (2003\$/kw) are \$100 per kilowatt. However, the O&M and fuel costs are only \$16 to \$18 per kilowatt (2003\$/MWh). Thus, fixed or demand-related cost of a wind farm in 2006 would be \$1110 to \$1750, and the energy-related costs (O&M/fuel costs) would be \$16 to \$18.

⁴⁴ NARUC, *Electric Utility Cost Allocation Manual* (January, 1992) at 21.

⁴⁵ Case 03-E-0686, *Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Village of Freeport for Electric Service*, “Order Determining Revenue Requirement and Rate Design” (issued March 25, 2004) at 19.

It is clear that virtually all of the costs are demand-related costs and not energy-related costs for wind projects. Only approximately one to one and one-half percent of the total cost of a wind project is energy-related. And, the demand-related costs for the other renewable resources also far exceed the energy related costs. (*See id.*) Hydroelectric, Table 13; landfill gas, Table 14; photovoltaics, Table 16; fuel cells, Table 17; and small wind, Table ?.) Thus, a volumetric surcharge is not the appropriate methodology for collecting the RPS costs from consumers.

POINT IV

THE SCOPE OF REVIEW AND THE CRITERIA THAT WILL BE USED IN THE 2008 REVIEW SHOULD BE SPECIFIED

In the Recommended Decision, the Administrative Law Judge recommended that the Commission should conduct a review of the RPS in 2008. (RD at 14.) In particular, the Recommended Decision states that in 2008 the Commission should “evaluate the costs and benefits, invite more generation resources to participate, adjust incentives for incremental renewable acquisition, or otherwise modify the RPS.” (*Id.* at 45.) In addition, “... the recommendation is that delivery requirement should be reconsidered as part of the 2008 Review, after two years’ experience with the program.” (*Id.* at 24.) Judge Stein makes this recommendation because meeting the target of 25% retail renewables by 2013 “will be challenging.” (*Id.*)

If the Commission adopts the recommendation to conduct a 2008 Review, and Multiple Intervenors urges the Commission to adopt that recommendation, it is important that all aspects of the RPS be examined. The Commission should not only review the issues indicated in the Recommended Decision as part of the 2008 Review, but also the load forecasts and the baseline should be examined. The target should be adjusted to match actual load growth and, if necessary, the target should be modified to account for “unforeseen implementation obstacles.” (*See id.* at 36.) It is important that a through review is conducted in 2008.

CONCLUSION

Multiple Intervenors urges the Commission not to implement a renewable portfolio standard *at this time* because the cost of electricity in New York State is too high and increasing the price of electricity by providing subsidies to select generators will exacerbate the problem. Nonetheless, if, *arguendo*, the Commission does issue a policy statement implementing a renewable portfolio standard, it is imperative that the standard be designed to minimize the cost to consumers. The cost to consumer should be the threshold criterion used in the selection of renewable resources.

As demonstrated herein, the Commission should not adopt the recommendations of ALJ Stein that would make the RPS more costly for consumers. Multiple Intervenors urges the Commission, if it implements a RPS, to incorporate the following guidelines into the design of a RPS:

1. the amount of any RPS subsidies should be based on the cost of each renewable resource that receives a subsidy payment and not on a market-clearing approach;
2. there should not be any SBC-like tier;
3. the start date of the renewable portfolio standard should be no sooner than 2009;
4. the incremental RPS targets should be lower in the early years of a renewable portfolio standard, increasing in the later years;

5. the alternative compliance payment should not impose additional costs on consumers;
6. the RPS surcharge should not be imposed on any customers that participate in New York State economic development programs; and
7. the RPS cost should be recovered as part of a demand charge and not on a volumetric basis.

In addition, the Commission should adopt ALJ Stein's recommendation that a 2008 Review of the RPS policy be conducted and establish the criterion that will be employed to determine whether changes in the design of the RPS are needed.

Based on the RD Cost Study, if the Commission implements a RPS using Staff's pay-as-bid approach, with no SBC-like tier and a start date of 2009, the cost of a RPS will be significantly less - - \$292,683,186, instead of \$1,139,461,484! Thus, the State can achieve the same goal of having 25 percent of the energy in the State be renewables by 2013 at a cost that is 75 percent less than if the Commission adopts Judge Stein's recommendations. It would not be good public policy to adopt a RPS design that would cost consumers four times as much to achieve the same goals.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief on Exceptions of Multiple Intervenors, has been served via electronic transmission upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated: June 23, 2004
 Albany, New York

Sharon Matthews
Sharon Matthews

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