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Via Regular Mail

July 8, 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 Constellation NewEnergy, Inc. and Constellation Power Source, Inc.'s Brief Opposing Exceptions in the above reference case.

Respectfully submitted,

READ AND LANIADO, LLP
Attorneys for Constellation NewEnergy, Inc.
and Constellation Power Source, Inc.

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 OPPOSING EXCEPTIONS
BY CONSTELLATION NEWENERGY, INC. AND
CONSTELLATION POWER SOURCE, INC.

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Dated: July 8, 2004
Albany, New York

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BRIEF OPPOSING EXCEPTIONS
BY CONSTELLATION NEWENERGY, INC. AND
CONSTELLATION POWER SOURCE, INC.

INTRODUCTION

This Brief Opposing 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* dated June 3, 2004.

On June 3, 2004 Administrative Law Judge Stein released a Recommended Decision (“RD”) regarding the implementation of a Renewable Portfolio Standard (“RPS”) in New York. Constellation filed a Brief on Exceptions and opposed several of the RD’s recommendations. Specifically, Constellation urged the Public Service Commission (“Commission”) to reject the Hybrid procurement approach, eliminate the deliverability requirement, and make renewable Waste-to-Energy (“WTE”) sources eligible for the RPS.

Several parties recommend variations on the RPS that should be rejected by the Commission. Specifically, the Commission should reject the following positions advocated by parties in their Briefs on Exceptions: (i) imposition of RPS rate regulation, (ii) adoption of an inferior Central Procurement model, (iii) exclusion of New York Power Authority (“NYPA”) and small ESCO customers from the RPS, and (iv) exclusion of renewable WTE energy.

I. THE COMMISSION SHOULD ADOPT A MARKET-BASED RPS AND SHOULD NOT IMPOSE COST OF SERVICE RATES

In its Brief on Exceptions, Multiple Intervenors (“MI”) suggests that the Commission adopt a cost-of-service pricing regime for the RPS.¹ MI’s recommendation is inconsistent with the Commission’s policies for a competitive energy market and should be rejected.

Essentially, MI's recommendation is that a generator should receive its cost of service from the markets administered by the New York Independent System Operator (“NYISO”). The NYISO administers the electricity market using a market clearing approach. The system of paying all winning bidders the price of the highest selected bid helps to ensure adequate capacity and rewards efficient generation sources. The Commission should adopt a market clearing approach for the RPS similar to energy pricing used by the NYISO. Because it creates the proper incentives, a market clearing approach will be more likely to result in the development of renewable resources than a cost-of-service regime, and would enhance achievement of the RPS goals.

The Commission has determined that a competitive energy market is the best way to obtain an adequate supply of electricity at the least cost. Similarly, a competitive, market-based approach will produce the most renewable energy at the lowest cost. The Commission should not impose RPS rate regulation as proposed by MI.

MI also seeks clarification that RPS costs will be recovered as part of a demand charge and not as a volumetric charge.² The Commission should reject MI’s proposed clarification for two reasons. First, the rates of Energy Service Companies (“ESCOs”) are not set by the Commission and the Commission should not now require ESCOs to structure their

¹ MI Brief on Exceptions at pp. 3, 13-21.

² MI Brief on Exceptions at p. 7.

rates in any particular fashion. Such a policy would be a regression towards the regulated market in contravention of the Commission’s policy for competitive markets. Second, a volumetric charge is the appropriate rate recovery mechanism. The RPS is based on a percentage of statewide load – a volumetric measure in and of itself.

II. THE COMMISSION SHOULD REJECT THE INFERIOR CENTRAL PROCUREMENT APPROACH

The Joint Utilities argue that individual Load Serving Entities (“LSEs”) should not be responsible for RPS compliance.³ The Joint Utilities are the only parties advocating a Central Procurement model and the Commission should reject their arguments.

The RD adopted a hybrid procurement approach, which incorporates aspects of both Central Procurement and Individual Compliance. The New York State Energy Research and Development Agency (“NYSERDA”) volunteered in its Brief on Exceptions to facilitate the procurement of RECs by administering “the central procurement component.”⁴ The RD, NYSERDA, Constellation, Joint Utilities and other parties agree that the state agency procurement proposal merely supplements procurement by Individual Compliance. While Constellation agrees with the Joint Utilities that the hybrid model is an “Individual Compliance Model at its core,”⁵ Constellation still advocates for a pure Individual Compliance method as stated in its previous comments and Brief on Exceptions.

The Joint Utilities argue that under the proposed hybrid, or modified Individual Compliance approach proposed in the RD, changing load will make it difficult for LSEs to comply or will create stranded costs.⁶ This argument is without merit. An LSE that forecasts its

³ Joint Utilities Brief on Exceptions at p. 4.

⁴ NYSERDA Brief on Exceptions at p. 1 (emphasis added).

⁵ Joint Utilities Brief on Exceptions at p. 5.

⁶ Joint Utilities Brief on Exceptions at p. 10.

load accurately will be rewarded by satisfying its RPS obligations at a lower cost. An LSE that obtains more load than predicted will seek to obtain the additional necessary RECs from the marketplace. One place where RECs might be available is from an LSE that made conservative assumptions about its load and has additional RECs that it does not need. However, if that LSE is a utility, according to the Joint Utilities' Brief on Exceptions, the cost of the additional REC is "stranded" and that utility would seek rate recovery from its customers. In that situation, the Commission should deny rate recovery to the utility. Constellation suggests that instead of chalking up stranded costs, additional RECs not needed by a utility (or any LSE) should be sold to another LSE that is (or would be) short. These transactions are the basis of a liquid, functioning market.

Individual Compliance is a superior approach that benefits all market participants. Individual Compliance creates competition not only among the suppliers of RECs, but also among the purchasers of RECs. Accordingly, the Individual Compliance approach should be adopted because it is more fully compatible with the Commission's policies on competition in the New York electric markets.

Constellation has serious concerns that a centralized market in which a standardized product exists for renewables will be unworkable as compared to a purely bilateral renewables market. A workable bilateral market for renewables exists in New England. Creating a standard product for renewables, on the other hand, limits the flexibility that accompanies bilateral contracts. For example, contracting parties may wish to fulfill not only an RPS requirement, but also green products, such as carbon dioxide reductions, etc. If the Commission narrowly defines the renewable market by creating a standard product, competitive product innovations will be stifled.

The Joint Utilities advocate a Central Procurement model that involves only one buyer and state that if LSEs compete with each other to obtain annual RPS increments, the cost of the

RPS program will be driven up.⁷ Only when there is a competitive and liquid market, with multiple buyers and sellers, will costs ultimately be driven down. The Individual Compliance model creates competition among both sellers and buyers of RECs. Accordingly, the Commission should adopt a competitive, market-based Individual Compliance approach as described in Constellation’s previous comments and its Brief on Exceptions.

III. RPS PARTICIPATION

A. NYPA Customers Should Participate in the RPS.

The RD suggests that customers of the New York Power Authority (“NYPA”) should not contribute to the RPS.⁸ The recommendation should be rejected. Low cost NYPA power is and should remain an economic development tool, but the RPS must be implemented in light of additional, sometimes competing policy goals. As the Joint Utilities point out, “[t]he Commission has made it quite clear that both the RPS and retail competition are high policy priorities.”⁹ Because the RPS benefits will occur on a statewide scale, it is more important that RPS costs are apportioned equally to all electricity consumers. In order for the RPS to be fair to all customers, the requirement should be applied to all customers and all market participants. RPS is a state-wide mandate and should be run as such in order to be fair and equitable. Accordingly, NYPA customers should not be exempt from the RPS.

B. The Commission Should Not Address Flex Rates in the RPS Proceeding.

MI seeks clarification that flex-rate customers should be exempt from the RPS. It is not necessary for the Commission to decide the issue in the context of this proceeding. The administration of flex-rate contracts, whereby customers receive discounted service that varies

⁷ Joint Utilities Brief on Exceptions at pp. 11-12.

⁸ RD at p. 66.

⁹ Joint Utilities Brief on Exceptions at p. 12.

from standard tariff rates, is being addressed in a separate proceeding.¹⁰ The Commission should address the flex-rate contract specific issues in that case.

C. Small ESCOs Should Not Be Exempt From the RPS.

The Joint Utilities take exception to the exemption of small ESCOs.¹¹ Constellation also believes that small ESCOs should not be exempt from the RPS.

The RD contradicts itself in its recommendation regarding participating entities. It states that “all Energy Service Companies (ESCOs) should be included to ensure all customers contribute to achieving the targets.”¹² Constellation supports this recommendation. Appendix C of the RD, on the other hand, states that “a mechanism to exempt very small ESCOs should be developed.”¹³ Constellation strongly disagrees with this exemption because it violates the Commission’s policies for a fair and competitive energy market. The Joint Utilities point out that “very small ESCOs” are not defined and that small ESCOs can grow to be large ESCOs,¹⁴ doing so on the basis of unfair competitive advantages. The statement from Appendix C quoted above is in error, has no basis in the record, and should be rejected.

IV. WASTE-TO-ENERGY (“WTE”) AND ASSOCIATED BIOMASS SHOULD BE ELIGIBLE FOR THE RPS

The RD recommends that WTE be excluded from the RPS at this time, except for the biomass portion of its fuel. The portion of the output from a WTE facility associated with eligible biomass qualifies for the RPS. RETEC takes exception to the RD on this point, stating

¹⁰ Case 03-E-1761 – Proceeding on Motion of the Commission to Reexamine Policies and Tariffs for Flexible Rate Contract Service to Economic Development Customers, *Order Instituting Proceeding* (Jan. 12, 2004).

¹¹ Joint Utilities Brief on Exceptions at pp. 45-46.

¹² RD at p. 69.

¹³ RD, App. C, p. ii, ¶ 4.

¹⁴ Joint Utilities Brief on Exceptions at p. 46.

that the use of otherwise eligible renewable fuel, if used at a WTE facility, should not be considered renewable.

Constellation urges the Commission to reject RETEC's exception regarding WTE. RETEC's position runs directly contrary to the primary goal of the RPS, which is to increase renewable energy sources. Although Constellation supports WTE eligibility, even if WTE is not eligible for the RPS, the use of otherwise eligible fuels at WTE facilities should be permitted.

RETEC makes other arguments opposing WTE eligibility that are directly contrary to the accomplishment of the RPS goals. For example, RETEC suggests that fossil fuels use is preferable to WTE.¹⁵ A preference for fossil fuel is untenable given the nature of this proceeding: to *reduce* the use and dependence upon fossil fuels. Accordingly, Constellation supports the eligibility of WTE and WTE biomass.

CONCLUSION

Constellation respectfully requests the Commission reject the arguments of several parties as discussed herein.

Respectfully submitted,

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¹⁵ RETEC Brief on Exceptions at p. 11.