

**VIA OVERNIGHT MAIL**

July 8, 2004

Honorable Jaclyn A. Brillling  
Secretary  
State of New York  
Public Service Commission  
Three Empire State Plaza, 19th Floor  
Albany, New York 12223-1350

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

"Notice of Schedule for Filing Exceptions" (6/3/04)

**JOINT UTILITIES BRIEF OPPOSING EXCEPTIONS**

Dear Secretary Brillling:

Pursuant to the above-referenced Notice, enclosed please find for filing an original and twenty-five copies of the Brief Opposing Exceptions submitted on behalf of Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation, Orange and Rockland Utilities, Inc., and Rochester Gas and Electric Corporation (collectively the "Joint Utilities").

Copies of this Brief were served via e-mail today on the RPS Server-subscribed parties in this proceeding, including ALJ Stein. In addition, copies have been served via U.S. Mail on all Active Parties to this proceeding identified on the Commission's website.

Please acknowledge receipt of this filing by date-stamping as received the enclosed duplicate copy of this letter and returning the same to the undersigned.

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Hon. Jaclyn A. Brillling  
July 8, 2004

Respectfully submitted,

THE JOINT UTILITIES

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NEW YORK STATE PUBLIC SERVICE COMMISSION

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PROCEEDING ON MOTION OF THE COMMISSION :  
REGARDING A RETAIL RENEWABLE PORTFOLIO : Case 03-E-0188  
STANDARD :  
-----X

**JOINT UTILITIES**

**BRIEF OPPOSING EXCEPTIONS**

Dated: July 8, 2004

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NEW YORK STATE PUBLIC SERVICE COMMISSION

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**JOINT UTILITIES**

**BRIEF OPPOSING EXCEPTIONS**

**I. INTRODUCTION**

This Brief Opposing Exceptions (the "Brief") is submitted on behalf of Central Hudson Gas & Electric Corporation ("Central Hudson"), Consolidated Edison Company of New York, Inc. ("Con Edison"), New York State Electric & Gas Corporation ("NYSEG"), Niagara Mohawk Power Corporation ("Niagara Mohawk"), Orange & Rockland Utilities, Inc. ("O&R"), and Rochester Gas and Electric Corporation ("RG&E") (collectively, the "Joint Utilities") in response to the Briefs on Exceptions ("BOEs") filed by numerous parties<sup>1</sup> in the above-captioned proceeding. The BOEs were submitted to

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<sup>1</sup> In addition to the Joint Utilities, each of the following parties also filed BOEs in the above-captioned proceeding: AES-NY, LLC ("AES"); The Business Council of New York State, Inc. (the "Business Council"); Changing World Technologies; Community Energy, Inc. ("Community Energy"); Consolidated Edison Solutions, Inc. ("ConEd Solutions"); Constellation NewEnergy, Inc. and Constellation Power Source, Inc. ("Constellation"); Empire State Forest Products Association ("Empire State Forest"); Enel North America, Inc. ("Enel North America"); Energy Answers Corporation; Energy Association of New York State; Energy Management, Inc. ("EMI"); Evolution Markets LLC; Independent Power Producers of New York, Inc. ("IPPNY"); Integrated Waste Service Association; Keyspan Corporation ("Keyspan"); Long Island Power Authority ("LIPA"); Lyonsdale Biomass Facility; Multiple Intervenors ("MI"); New York Independent System Operator, Inc. ("NYISO"); New York State Energy and Telecommunications Committee; New York State Energy Research & Development Authority ("NYSERDA"); New York State Reliability Council, LLC ("NYSRC"); Northeast Maryland Waste Disposal Authority; NRG Energy, Inc.; Nucor Steel Auburn, Inc. ("Nucor"); Plug Power Inc. ("Plug Power"); RCB Wind Advocates ("RCB Wind"); Renewable Energy Technology and Environment Coalition ("RETEC"); Ridgewood Renewable Power, L.L.C. ("Ridgewood"); Solar Energy Industries Association ("SEIA"); Sterling Planet, Inc. ("Sterling Planet"); Strategic Energy, L.L.C. ("Strategic Energy"); Tannery Island Power Corporation, Hydro Power, Inc., Energy Enterprises, Inc., Mercer Asset Management Corp., Chittenden Falls Hydro Power, Inc. and Seneca Falls Power Corporation (the "Small Hydro Group"); and Taylor Recycling Facility, LLC. Unless otherwise specified, all references herein are to each party's respective BOE.

address the Recommended Decision ("RD") issued on June 3, 2004, by the Administrative Law Judge ("ALJ").

The Joint Utilities respond herein to the BOEs filed by other parties on June 23, 2004. Most noteworthy of those are the submissions of NYSERDA and the NYISO. Accordingly, we turn to them first, followed by a short discussion of certain aspects of some other parties' filings.

The submissions by NYSERDA and the NYISO, when read together with the Joint Utilities' BOE, reflect a significant consensus among key parties, on crucial RPS elements. As a result, there should be a high level of confidence that the positions recommended in common by these parties will lead to a successful New York RPS. Moreover, these parties (and the Joint Utilities) each have experience and expertise that is particularly relevant to this proceeding. Their submissions (including the most recent) express focused, policy-level considerations going to the core of their missions and to the essence of a New York Renewable Portfolio Standard ("RPS"). Furthermore, an important and significant fact not previously known to the parties has now become available: NYSERDA is prepared to serve as the central procurement administrator ("CPA").

## **II. RPS POLICY ISSUES**

A consistent concept of how to achieve success in a New York RPS program is shown in the BOE of the Joint Utilities<sup>2</sup> and NYSERDA. These parties support central

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<sup>2</sup> Joint Utilities' BOE, p. 8 (footnote omitted), stated that: "The Joint Utilities are hopeful that the Commission will demonstrate its commitment to fostering the development of renewables consistent with consumers' interests in the lowest reasonable costs and the other policy objectives

procurement by NYSERDA and they support prompt implementation. In the Joint Utilities' BOE (pp. 5-6), we renewed our earlier recommendation for prompt implementation of a pilot program that would employ central procurement by a State agency for the first acquisitions under the New York RPS program: "If the Commission now were to 'fast-track' development of the pilot, enlisting the participation of an appropriate State body 'central procurer,' the Joint Utilities see no reason why that State body could not acquire renewables resources as soon or sooner than any other approach...." To a similar effect, NYSERDA has stated (p. 1) that it is prepared to act "...as the administrator ('CPA') of the central procurement component of the Renewable Portfolio Standard,"<sup>3</sup> and that it "would be prepared to issue a solicitation as early as the latter part of 2005" (pp. 2-3). NYSERDA's objective of an efficient, expedited, near-term implementation plan for renewables through central procurement by NYSERDA matches the intention of the Joint Utilities' pilot program. Moreover, both approaches incorporate the opportunity to learn from the initial acquisition before irrevocably committing to specific procedures for additional procurements. The Joint Utilities (p. 7) have previously supported such flexibility, and we support both NYSERDA's proposal to be the responsible CPA and its apparent intention to improve subsequent acquisitions based upon experience gained in the first.

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described above. This goal can be achieved through a clear endorsement of the Centralized Procurement Model, using a State procuring body (to the extent that the NYISO is unwilling to serve the function) to enter into such long term financial commitments with renewables developers as the procuring entity may determine are advisable, that will be funded by the customers of LSEs."

<sup>3</sup> The Joint Utilities had explicitly recommended that central procurement be the acquisition method adopted by the Commission, and nothing in the NYSERDA BOE states, or implies, any contrary position or recommendation.

NYSERDA also believes that relatively few program aspects of the RPS procurement structure warrant clarification at this time, so that central procurement implementation can proceed. The Joint Utilities agree with each of the elements identified by NYSERDA<sup>4</sup> and with the governing principles that should apply to each.<sup>5</sup>

**A. Eligibility and Targets**

NYSERDA envisions (p. 1) that the Commission will define “RPS eligible megawatt hours based on aggregate megawatt hour targets.” This approach is equivalent to a specification of RPS-eligible resources and statewide “targets” by the Commission, and is the approach that has been adopted in the RD. The Joint Utilities took no exception to those portions of the RD and support NYSERDA’s position.<sup>6</sup>

**B. Acquisition of Renewable Energy Credits ("RECs")**

NYSERDA envisions (p. 1) that it would “procure only the renewable credits...”<sup>7</sup>

The Joint Utilities agree.

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<sup>4</sup> The Joint Utilities have not supported the establishment of an “SBC-like Tier” in the RPS program. We continue to believe that adequate support for the “emerging” technologies apparently targeted in that tier already exists in the present SBC program, such that continued progress towards market acceptability will be produced by the combination of continuing the existing SBC program and implementing the new RPS program. In the event that an SBC Tier is established, however, it should be administered by NYSERDA.

<sup>5</sup> NYSERDA anticipates (p. 1) that a written agreement identifying the responsibilities of NYSERDA and the Commission will be developed. The Joint Utilities believe that such a memorandum of agreement, along the lines of that in place for the SBC program, is appropriate.

<sup>6</sup> The Joint Utilities have taken exception to certain specific recommendations of the RD concerning eligibility and failure to consider alternatives, but those issues are entirely separate from the aspects of eligibility and targets being addressed by NYSERDA.

<sup>7</sup> Development of the New York form of REC will be necessary under any model. The Joint Utilities believe that the New York REC should explicitly include any and all attributes, identified in the implementation phase.

**C. REC Tracking and Accounting**

NYSERDA anticipates (p. 1) that a computer tracking system will be developed that will “provide a registry of [RECs and] allow the unbundling of the REC from the associated energy.” The Joint Utilities agree that an accurate accounting and record-keeping system is necessary, and support this portion of NYSERDA’s position as well.<sup>8</sup>

**D. Contracting**

NYSERDA states (p. 1) its expectation that acquiring RECs “will require long-term contracting.” The Joint Utilities believe that the implementation phase is the place to determine the appropriate role of long, medium or short-term contracts or other procurement mechanisms. The Joint Utilities have taken exception (pp. 13-14) to the RD requirement for mandatory long-term contracting between utilities and renewables. Since NYSERDA’s BOE did not refer to contracts involving utilities (or LSEs) in any fashion, NYSERDA apparently intends to enter into long-term contracts in its own right, should it determine that they are necessary for the successful acquisition of RECs. That approach is consistent with the position described in the Joint Utilities BOE (p. 4), that the role of utilities should be as “conduits that facilitate the funding of the RPS” by transferring to NYSERDA revenues produced from a to-be-determined Commission funding mechanism. The Joint Utilities agree with NYSERDA that contracting should be evaluated as a REC procurement mechanism.

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<sup>8</sup> Adopting terminology of the New England ISO and the APX Report, NYSERDA refers to a “generation information system (‘GIS’).” The Joint Utilities have used the term Generation Attribute Tracking System (“GATS”), as employed in the PJM Regional Transmission Organization to refer to the same concept.

**E. Funding the Program and Contractual Commitments**

NYSERDA refers (p. 1) to the need for a “funding stream” that will cover reasonable expenses, and be adequate to meet required cash outflows over the period of the program. NYSERDA suggests (p. 1) that the specific funding approaches be developed in the implementation phase activities.

The Joint Utilities agree with NYSERDA that these topics should be resolved in the implementation phase. We further agree that the mechanism ultimately adopted should provide for assured coverage of NYSERDA’s administrative expenses, and the expenditures it will make for the acquisition of RECs over the terms of the obligations into which NYSERDA will enter. In addition, the funding of NYSERDA through LSEs (acting as conduits under consistent Commission policies demonstrating an on-going State commitment to the RPS program obligations entered into by NYSERDA) will instill confidence in market participants that anticipated financial commitments would be adequately funded over the term of those obligations.

The demonstrated success of the pass-through of identified utility revenues to NYSERDA in the SBC program shows that a similar pass-through of revenues from LSEs generally to NYSERDA can be expected to be equally successful in the current context. Just as with the SBC program, the mechanism ultimately selected should be implemented in ways that accord proper consideration to phasing in the funding and commencing funding as soon as practicable. These activities should be undertaken to both minimize the effects perceived in customer bills, and the incremental and mandated nature of such funding in relation to existing utility rate plans. Thus, the Joint Utilities are confident that funding of NYSERDA’s financial needs can be accomplished

consistent with full recognition of these objectives, such that market participants will correctly perceive a State commitment to continued funding support by the Commission throughout the RPS program.

**F. Timely Development of GIS and REC Platform**

NYSERDA also “strongly” suggests (p. 2) that the development of the “GIS” and “REC platform” begin immediately.<sup>9</sup> The Joint Utilities have previously recommended the development of a functionally equivalent GATS, and, therefore, agree. Our previous requests that Working Group IV be reconvened were intended to permit work on these topics to proceed.

While we support, in general, NYSERDA’s proposal (p. 2) to “oversee and coordinate the design and development of the REC accounting and tracking system,” one caveat should be noted. To the extent that a REC Market may be involved (and the Joint Utilities have recommended development of a REC Market), NYSERDA’s efforts as CPA would make it a buyer of RECs and it would be appropriate for NYSERDA to participate in the design and development of the REC market as a stakeholder. However, that portion of the effort should be “overseen” by a third party independent of all participants in the REC Market, to be designated by the Commission.

In addition, there may be efficiencies available if the REC Market were to be administered by the NYISO, and this possibility should be considered in the implementation phase. The NYISO has successfully administered such functions with the energy market of New York State. The Joint Utilities fully support the NYISO

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<sup>9</sup> The NYISO (p. 5) has also supported the immediate reinvigoration of efforts to develop a GATS and an online, real-time trading platform.

assertion (p. 6) that, "the Commission should affirmatively indicate that the NYISO is to be an involved party in the design of any GATS system." It is entirely appropriate that the NYISO (as well as NYSERDA, Staff, the Joint Utilities and other interested parties) be involved in the "design, trading rules, and operation of the New York GATS, and should be an active participant in its design." (NYISO, p. 6). Finally, adequate provision should be made for funding the operation of the REC Market and its independent market monitor function (whether through NYISO or a separate entity).

**G. Consequence of NYSERDA Acquisition**

The discussion of "RPS Design" in the Joint Utilities' BOE (p. 13) closed by stating:

The Joint Utilities believe that the Commission should expressly designate some body (other than LSEs) to be responsible for RPS compliance under the Central Procurement Model.

In light of NYSERDA's statement (p. 1) that it is "prepared to serve" as the CPA, the Commission should now formally designate NYSERDA as the entity responsible for RPS targets.<sup>10</sup>

While NYSERDA's statement (p. 1) refers to the central procurement "component" of the New York RPS, NYSERDA does not place any limitation or restriction on the context in which it is prepared to serve as CPA, leading to the inevitable conclusion that it is prepared to serve that role as the sole entity responsible for attaining

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<sup>10</sup> As previously discussed (*see n. 5, supra*), a memorandum of agreement between the two agencies, memorializing any applicable procedures or other requirements, akin to that adopted in the SBC context, appears desirable.

RPS targets in the State. As a result, NYSERDA’s position confirms the view of the Joint Utilities that a NYSERDA-administered central procurement effort can successfully “occupy the field” of RPS acquisition in New York, such that placing any acquisition “responsibility” on delivery utilities or other LSEs would be not merely unwarranted, but counter-productive.<sup>11</sup> New York’s experience with streaming of customer-funded revenues to governmentally-identified and implemented projects through the SBC program, coupled with NYSERDA’s expertise and experience with that and other energy programs, provides a unique context, unlike that of any other state already implementing an RPS program,<sup>12</sup> for achieving successful implementation of an RPS through central procurement by NYSERDA. Moreover, NYSERDA uniquely could function as the CPA for both the Executive Order 111 component of New York’s renewables activities and the RPS component, thereby achieving cost savings and other administrative efficiencies unavailable from any other arrangement.<sup>13</sup>

#### **H. Hybrid Contracts For Differences**

The NYISO (p. 5) expresses concern about the potential effects of “the hybrid contracts for differences [(‘CFDs’)] approach initially proposed by DPS Staff” on wholesale market efficiency and competitiveness. The NYISO also states (p. 5) that it is seeking advice from its independent Market Advisor on these efficiency and competitiveness subjects and requests that the Commission “refrain” from endorsing any

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<sup>11</sup> Joint Utilities (pp. 7-13; Attachment B, pp. 11-15).

<sup>12</sup> It appears that, of the states already implementing an RPS, only three have any SBC-type programs.

<sup>13</sup> Constellation (p. 10) and RCB Wind (pp. 2-3) propose subjective and arbitrary “caps” on the extent of acquisition by NYSERDA. Those recommendations should be rejected as being without basis and as preventing some of the important synergies that a CPA can attain, thereby driving up costs to consumers.

particular methodologies that could impact these considerations. The Joint Utilities (pp. 14-17) have also expressed concern about the effects of hybrid CFDs.

In light of NYSERDA's anticipation (pp. 2-3) that it may issue a solicitation "as early as" the latter part of 2005, adequate time is available for the Commission and the parties to be informed of the assessment of the NYISO's Market Advisor, without meaningful risk of delay to the overall implementation of an RPS. RPS implementation efforts can continue through the use of a "placeholder" for a considerable period. Accordingly, while the Joint Utilities believe that they have correctly analyzed the consequences of hybrid CFDs and are now opposed to hybrid CFDs for reasons described previously, it would be appropriate for all parties to be informed by the findings of the NYISO's Market Advisor. We therefore recommend that the Commission make no decision concerning adopting hybrid CFDs until that information is available.

On the merits, the Joint Utilities have previously described that a descending clock auction, employing "fixed" REC values,<sup>14</sup> offers an economically efficient means of acquiring RECs.<sup>15</sup> The Joint Utilities are prepared to work with NYSERDA and other parties to develop the detailed methods for implementing this approach, or alternative approaches that may be shown to offer similar advantages, as part of the implementation plan for the initial solicitation by NYSERDA as the CPA.

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<sup>14</sup> The term "fixed" is not meant to convey a single value, but rather that the RECs would not represent a floating difference between a known and unknown amount, as in the hybrid CFD concept. The Joint Utilities expect that schedules of REC values would likely be bid, with specified values corresponding to specified time periods.

<sup>15</sup> Joint Utilities, Appendix B, pp. 17-20.

**I. Reliability**

The NYISO states (p. 4) that RPS implementation must “accommodate, and not merely consider” the conclusions to be reached in the NYISO/NYSERDA Phase II Reliability Report and the NYISO’s short-term reliability study. The Joint Utilities concur (pp. 21-24).

In addition, the NYISO (p. 3) identifies a particular concern that “the addition of significant subsidized resources, particularly in the western part of the State, could adversely impact existing, marginally operating, thermal generation.” The Joint Utilities share this concern from reliability and cost standpoints (pp. 30-33).

**J. Conclusion**

The briefs of NYSERDA, the NYISO and the Joint Utilities are in harmony. There is essential agreement that implementation of an RPS can proceed. NYSERDA (p. 4) is prepared to serve as the CPA and is ready to “move forward with this important undertaking in the near future.” The Joint Utilities are ready to move forward along with other LSEs to act as conduits for the funding of revenues to NYSERDA, under the central procurement approach with NYSERDA as the responsible CPA. The NYISO agrees that implementation can proceed, subject to future accommodation of certain concerns discussed above. The Joint Utilities share the NYISO’s substantive (and procedural ) concerns. But no conflict exists between moving forward with NYSERDA as the responsible CPA and accommodating the concerns of the NYISO (and the similar concerns of the Joint Utilities) during implementation, and nothing in the NYSERDA BOE implies any conflict.

This is not to suggest that there are no other matters requiring the Commission's attention. Many parties have taken one or more exceptions to the RD.<sup>16</sup> The most productive course of action, however, is for the Commission to accept NYSERDA's readiness to serve as the responsible CPA and to move forward on that basis.

The anticipated RPS Policy Statement will also likely include identification of broad objectives, descriptions of the significant issues, parties' interests and positions, and discussions of the Commission's reasoning for its goals and objectives. Recognizing the desire of both NYSERDA and the Joint Utilities that NYSERDA issue an initial solicitation by the latter part of 2005, it would also be necessary for the Commission to identify any key mile post dates and design parameters it may believe are necessary to achieve that date, if possible. Then the parties, in concert with NYSERDA, can undertake several activities: spelling out the specifics of NYSERDA's role as the CPA and administrator of the SBC-like Tier (if adopted), the funding mechanism for NYSERDA, and drafting any needed protocol governing the relationship between NYSERDA and the Commission.

Staff and interested parties can begin work on finalizing load and compliance tracking criteria; RPS resource eligibility criteria (including the eligibility date); the mechanism to determine whether an RPS resource facility has met those criteria; and the mechanism to approve new criteria or new technologies for the RPS, as pointed out by RETEC (p. 34). These activities relate in one way or another predominantly to the initial solicitation (acknowledging that they have implications beyond the initial solicitation)

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<sup>16</sup> For example, the Joint Utilities (pp. 31, 37) have noted that the Commission is subject to State Environmental Quality Review Act ("SEQRA") requirements to consider the alternatives identified in the Draft Generic Environmental Impact Statement.

and are more pressing. Staff and interested parties can develop other RPS operating rules -- such as REC attributes, reporting requirements, import requirements, and banking and balancing functionality requirements -- that may have an effect on the GIS/GATS system specifications. Additionally, interested parties, presumably including the NYISO as a party having potentially a significant interest, can work on the necessary GIS/GATS system and market monitoring capabilities required to support the RPS.<sup>17</sup>

While these important activities can be undertaken in the near term, as a wide variety of parties note (NYISO (pp. 2-4), NYSRC (pp. 1-2), IPPNY (pp. 3-7), Keyspan (pp. 6-9), AES (p. 2), Business Council (pp. 3-4), Joint Utilities (pp. 21-24)), resolution of significant issues relating to system reliability can only be reached after the NYISO/NYSERDA Phase 2 Reliability Report is released. In addition, the NYISO, which is responsible for system operations and reliability (along with the NYSRC), should complete its market study and identify the aspects of the RPS that should be changed as a result of that study. The RPS parameters may need to be further adjusted to reflect the NYISO conclusions. The RD also recommended (p. 106) that the Commission consider the interaction between the RPS and existing Commission and other State programs and policies; this analysis also remains to be conducted and can be accomplished without delaying the successful and timely acquisition of RECs by NYSERDA.

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<sup>17</sup> Most of these implementation tasks are required regardless of the RPS model promulgated in the RPS Policy Statement.

### **III. RESPONSES TO SPECIFIC EXCEPTIONS**

#### **A. Costs**

Plug Power (pp. 1-2), RETEC (pp. 18-19, 32-34), and SEIA (p. 2) contend that RPS program costs have been vastly overstated in the RD. RETEC asserts that main tier costs have been overstated by \$524 M in uncaptured benefits associated with alleged natural gas price suppression, price stability/hedging, and reduced air pollution. Plug Power, RETEC, and SEIA contend that the 2% SBC-Like Tier costs have been overstated by over 50%, representing the main tier generation that would be displaced by the SBC-like Tier.

The Joint Utilities have already commented at length on RETEC's claimed benefits in their Initial Comments and Supplemental Cost Study Comments (*see* BOE, Attachments B and E). Those assertions were never quantified in any analytical fashion previously in RETEC's "cost study" and they have not been so supported now. Suffice it to say that the RD correctly rejects such extravagant claims. The record in this proceeding establishes these claims to be unsubstantiated and uncorroborated.

Con Edison, NYSEG, Niagara Mohawk, O&R, and RG&E<sup>18</sup> oppose RETEC's proposal (pp. 7-10) to restrict the eligibility of a wide category of hydroelectric resources including Canadian-based resources from RPS program eligibility. Assuming, *arguendo*, the Commission were to adopt such an exclusion, thereby limiting or excluding Canadian hydroelectric power, the cost of the RPS would more closely approximate the no imports/5% emerging technology sensitivity previously run as part of the cost analysis in this proceeding. Neither RETEC's BOE, nor its sponsored cost study, take into account

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<sup>18</sup> Central Hudson did not join in this issue.

the elimination of such Canadian resources, and their offsetting of the benefits claimed by RETEC. Finally, as we have noted, any restriction of incremental hydroelectric resources that meet site permitting guidelines and environmental laws is unjustified. With respect to the purported overstatement of the 2% SBC-like Tier costs, Plug Power, RETEC and SEIA could have advanced the same type of argument in connection with the on-the-record examination of Staff's Supplemental Cost Study that modeled a 1% SBC-like Tier, and did not. In the absence of an opportunity for parties to have examined these parties' one-for-one displacement argument, this assertion should not be accorded any weight. Moreover, on the merits, a one-for-one displacement argument presupposes an apples-for-apples comparison between the SBC-like, customer-sited, behind-the-meter technologies and the main tier merchant plant technologies. It is not clear such a comparison can or should be drawn.

**B. Funding Mechanism**

Strategic Energy (p. 2) contends that utility RPS cost recovery should be reflected in the monthly energy charge, in order to avoid alleged energy service company ("ESCO") subsidization of utility customers' commodity supply. There is no subsidization under the Joint Utilities' funding approach. As set forth in our BOE (p. 26), the Joint Utilities support a separately stated surcharge, visible and transparent to customers. Both ESCOs and utilities would assess on customers utilizing electricity supply service such a surcharge separate and distinct from any commodity charges. The mechanism must be designed so that no customer pays twice or avoids paying at all. Under these circumstances, there would be no impermissible subsidization by one class of LSEs of another class.

**C. Baseline**

Community Energy (pp. 2-5), Enel North America (pp. 3-4) and RETEC (pp. 5, 25) have argued that the Green Marketing Program should be removed from the baseline because its inclusion will, among other things, harm the Green Marketing Program and reduce the RPS compliance mandate (*i.e.*, it is being counted as part of RPS compliance). ConEd Solutions (pp. 1-2) and Enel North America (pp. 3-4) also urge that the Green Marketing Program and the RPS program be “separate.”

The Joint Utilities agree that the Green Marketing and RPS programs should be separate and parallel programs (although there would be a single tracking system for all RECs). Customers wishing to purchase 100% of their energy from a renewable resource should be permitted to do so. In turn, all renewable resources should be permitted to sell their RECs to green marketers. To help guarantee the separation, any resource (RPS eligible and RPS premium eligible) that sells its RECs to green marketers should not be allowed to offer the same RECs in the RPS program and vice-versa (*i.e.*, no double counting or cross subsidizing).

On the other hand, the Joint Utilities disagree with removing the Green Marketing Program from the baseline. The Green Marketing Program and the RPS are two programs (the current SBC is a third) that can work in tandem to reach the 25% target. There is no basis for presuming that the 25% renewables target must only be achieved through the RPS. Green Marketing participants are not “subsidizing or reducing the RPS mandates” (Enel North America, p. 2); they are selecting another method for achieving the 25% target.

Finally, Sterling Planet (pp. 2-3) recommends that the Commission direct utilities to adopt voluntary green marketing programs applicable to all customer classes (not just residential) and to spend a "significant" amount of money annually in marketing and outreach and education activities. The record in this proceeding contains no support for Sterling Planet's proposal. Any discussion concerning the promotion or funding of the Green Marketing Program should be in the context of individual rate cases and/or individual multi-year rate plans. Importantly, however, it should be noted that several utilities already have in place successful outreach and education initiatives. No modifications to those initiatives have been justified by Sterling Planet and none would be appropriate. Further, the costs associated with the activities proposed by Sterling Planet will only increase the overall costs of the RPS program to New York State consumers.

**D. RECs**

A number of parties have asserted that the RD erred in advancing that the purchaser of attributes, or otherwise the payor of RPS premiums to RPS resource technologies, owns the attributes. Thus, Small Hydro Group (pp. 2-3) and SEIA (pp. 1-2) maintain that the RPS resource should have the right to keep the attributes even though they have received premium payments, whether in the form of above-market prices for energy or in the form of SBC-like incentive payments. Plug Power (p. 5) and RETEC (pp. 22-23) believe that, notwithstanding their initial financing via SBC-like premiums, SBC-like Tier technologies should have the opportunity to sell attributes for their RPS-funded technologies as participants in the main tier, *i.e.*, should receive two RPS program subsidies -- an SBC-like incentive payment and main-tier proceeds from the sale of

attributes. Sterling Planet (pp 3-4) and LIPA (pp. 1-2) appear to also suggest that SBC-like Tier technologies should be able to sell attributes into markets.

The Joint Utilities' position on this topic is simple: the party who streams premiums to an RPS resource owns the attributes, the same attributes should not be sold by a generator to two or more buyers, and New York consumers should not pay for those attributes more than once. Once a technology resource receives the benefits of RPS program premiums, it automatically transfers any attributes to the funding entity. In the case of the main tier, payments are made on a megawatthour basis one-for-one in exchange for attributes measured on a megawatthour basis. In the case of the SBC-like Tier, however, lump-sum payments will be made in advance on a life-cycle basis. In exchange, the rights to, and ownership of, all attributes produced by the generator over that lifetime should be transferred to the SBC administrator.<sup>19</sup>

Generators of RPS-eligible resources are not required to accept premium payments. If they choose not to accept such payments, they then can claim the right to sell any attributes they may have. But the consideration for receipt of RPS program premiums must be the transfer of attributes. New York State consumers should not be expected to pay twice for the same attributes, fund a supplier's ability to sell attributes inside or outside of New York State a second time, or fund a generator's windfall profits.

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<sup>19</sup> If behind-the-meter technologies were provided with attribute certificates in the GIS/GATS system, and such a facility were to be funded through the SBC-like Tier on an up-front lump-sum basis, the certificates of that facility would be contractually owed to the SBC administrator. If a decision is made to fund the SBC-like Tier on some other basis, attribute certificates should properly transfer from the generator to the RPS purchaser.

Small Hydro Group (pp. 2-3) asserts that generators own all attributes under existing power purchase agreements. The Joint Utilities submit that in the case of such agreements, the purchasers of the output also purchase any resulting RECs, whether or not the resource is eligible for, and receives, RPS premiums. We believe the Commission has already ruled on the issue of ownership in developing the environmental disclosure program. Further, in the case of the Joint Utilities, most, if not all, of these agreements were entered into to assure that projects could receive financing. In essence, the stream of money paid under these purchase power agreements is no different from a stream of RPS premium payments.

Finally, the RD notes (pp. 24-25) that the Commission should explore the possibility of separating the REC into the CO<sub>2</sub> component and the balance of the attributes (RD, Appendix C, p. v). The Joint Utilities agree with NYSERDA (p. 3) that, because this option was not considered as part of the collaborative process in this proceeding, it should not be adopted without further stakeholder input. As NYSERDA correctly points out (p. 3), the Commission should recognize that uncertainty in the future direction and design of the RPS will threaten the pace of its development. NYSERDA states (p. 3) that, "[a]s a practical matter, contracts for RPS-eligible RECs must identify with specificity what attributes are to be delivered to the purchaser. Uncertainty over what attributes must be included in the REC in order for it to be RPS eligible will bring considerable complication and difficulty into this process." (*See also* Constellation, p. 14).

However, as noted in the Joint Utilities' Initial Comments (p. 31, n. 34), the Joint Utilities believe that the procurer is entitled to the whole of the output it purchases from renewable generators, including the RECs. Moreover, any policy statement issued in this proceeding must explicitly state that the purchaser of a REC, which is a bundled set of attributes, owns all of the attendant individual attributes -- such individual attributes, if separated and sold individually, must be separated and sold by the owner of the bundled REC.

If the Commission wishes to entertain the possibility of separating the individual attributes of renewable generating facilities from the bundled certificates, then the implementation phase of this proceeding must consider the consequences of such separation on the RPS and the value of the residual RECs. Such effort must include: (i) an examination of the impact of such separation on banking and borrowing, true-up trading, and imports and exports; and (ii) the development of an appropriate set of rules and a mechanism to separate the renewable attributes from one another and the residual REC without harm to the RPS program.

**E. Deliverability**

Various parties, including EMI (pp. 4-10), RETEC (pp. 28-31), and Ridgewood (pp. 7-12), have argued that energy must be delivered into the State in order to qualify for RPS premiums. Con Edison, NYSEG, Niagara Mohawk, O&R, and RG&E<sup>20</sup> have previously established (pp. 44-45) that deliverability is unnecessary. However, if the Commission determines that deliverability will be a requirement, it must reject the hourly matching proposal advanced by EMI (pp. 3, 4, 8) as too restrictive. Other parties have

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<sup>20</sup> Central Hudson did not join in this issue.

argued for monthly, quarterly and even annual matching. While annual matching may be a little too long, hourly matching is definitely too short. A requirement of hourly matching will virtually eliminate the ability of intermittent resources external to New York to compete in the RPS, therefore reducing the pool of potential suppliers. A credit tracking system (to guarantee no double counting of RECs), coupled with a reasonable intra-area delivery balancing system, will meet the spirit of “deliverability” without detracting from what the RPS is trying to achieve.

**F. RPS Participation**

As explained in detail in the Joint Utilities' BOE (pp. 45-47), the record in this proceeding does not support the RD's recommendation to exclude any LSEs (such as the New York Power Authority ("NYPA"), municipals/municipal public power entities, and "very small" ESCOs) from the RPS. The RD's rationale (that NYPA and NYPA-supplied customers already support renewables in the form of NYPA hydro), elevated form over the economic reality that NYPA hydro resources are the least, or certainly among the least, costly resources available in New York State such that excusing those paying the least from supporting above market resources further burdens those already paying more because they do not have access to the low-cost NYPA hydro resources. Moreover, fairness and equity dictate that the RPS program apply to all LSEs and their customers, without exception. It is elementary that, because the RPS will benefit everyone in New York State, all New York State electric consumers should fund it. Accordingly, as a matter of principle, the Joint Utilities oppose MI's proposal (pp. 33-42) to exempt customers served under economic development programs or those with flex rate contracts.

MI has also failed to justify its contention that economic development and flex-rate customers be excluded from the RPS. MI asserts that the ALJ's rationale for excluding NYPA customers from contributing to the RPS surcharge applies equally to flex rate and economic development program customers.<sup>21</sup> The support MI offers for its proposal suffers from the same defect as the ALJ's rationale underlying her recommendation that NYPA customers be excluded. Simply stated, the defect in rationale is that the ALJ and MI presume that customers receiving reduced rates should be excluded from funding the RPS (*see* RD, pp. 65-66; *see also* MI, pp. 33-42). We agree with MI that all such customers should be treated equally. We submit, however, that equal treatment requires that those customers bear their fair share of the costs associated with the State-mandated RPS program.

Moreover, picking and choosing the parties to which such exclusions apply is a slippery slope -- once certain customers are excluded from the RPS program, other parties can rationalize arguments, *ad infinitum*, why additional customers should be also be excluded. This situation is exemplified by the argument in the MI BOE that economic development and flex-rate customers also are excluded from the RPS program. Assuming, *arguendo*, that MI's argument has validity, every energy consumer in the State could argue that some regulatory policy (*e.g.*, approved multi-year plans with rate reductions, retail access) should relieve them from participating in an RPS program. Thus, Commission approval of MI's proposed exclusions (as well as those exclusions recommended by the ALJ) could ultimately result in an RPS program funded by a select

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<sup>21</sup> Taken to its logical extreme, MI's proposal would have flex rate customers (who may be industrial customers with a substantial amount of load) excused from contributing to the RPS program, and would have RPS program costs shifted to other customers, including low-income customers.

group of customers for the benefit of *all* New York consumers. With such exclusions, the program would likely become cost prohibitive to sustain and would eviscerate the environmental benefits that the Commission contemplated in proposing an RPS.

Additionally, the fact that economic development and flex-rate customers are currently not accorded blanket exemptions from SBC charges strongly suggests that similar treatment for RPS program costs will not result in the dire impacts alleged in the MI BOE. Accordingly, the RPS program should apply to all New York State electric customers and the MI proposal should be rejected. Similarly, New York State Public Service Law Section 66 (12-b)(a) requires flex rate customers to contribute to common system costs. This statutory requirement demonstrates the Legislature's intent that even customers that benefit from reduced rates should bear some responsibility for the costs of facilities and programs that benefit all customers. That concept applies equally to the funding of the RPS.

**G. Pre-2003 Resources**

A number of parties, including AES (pp. 2-3), Community Energy (pp. 4-5), Enel North America (pp. 1-2), IPPNY (pp. 2, 12), and RETEC (pp. 17-18), would expand the eligibility of pre-2003 resources for RPS premiums. Small Hydro Group (pp. 6-7) contends that all existing small hydroelectric projects should be eligible for RPS premiums, in the form of long-term contracts. In related arguments, Empire State Forest (pp. 2-3) and Ridgewood (pp. 12-15) argue for the expansion of resources that would fall within an RPS maintenance tier. Specifically, according to these parties, existing biomass facilities and small hydroelectric facilities with existing contracts at or below market price, respectively, should receive special treatment in a maintenance tier.

The Joint Utilities (pp. 47-48) have already expressed their opposition to the funding of resources that clearly do not require it. Existing resources clearly require no incremental financing for their development. These resources have the right to sell energy into markets and available, qualifying attributes into a non-New York State RPS market, and thus have no need for further subsidies. Accordingly, RPS premium costs should not be needlessly increased in order to stream funding to these resources.

If, however, the Commission were to deem pre-2003 resources to be not only RPS-eligible resources, but also RPS-premium eligible resources, the Joint Utilities believe that the procuring entity -- NYSEDA, for example -- should give careful consideration as to the need for long-term contracts with such entities. The rationale for long-term contracts (*i.e.*, the certainty of financing for project development) simply does not exist for such resources.

#### **H. Standardized Interconnection Requirements**

Small Hydro Group (pp. 3-4) asserts that the Commission should consider making its standardized interconnection requirements ("SIRs") applicable to hydroelectric generators of 10 MW or less. This RPS proceeding clearly is not the forum for such a discussion. Such comments are more properly addressed in Case 02-E-1282, In the Matter of the New York State Standardized Interconnection Requirements and Application Process for New Distributed Generators 2 MW or Less Connected in Parallel with Utility Distribution Systems.<sup>22</sup> On the merits of the assertion, the Joint Utilities

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<sup>22</sup> Proposed revisions to the SIRs were issued for comment by the Commission on December 12, 2003, and on December 24, 2003 under the State Administrative Procedure Act ("SAPA") (Proposed Rulemaking, Standardized Interconnection Requirements, I.D. No. PSC 51-03-00003-P, *New York State Register*, December 24, 2003 (the "SAPA Notice")). Among other

would point out the considerable gulf between 300 kVA units and 10 MW units, and note that the interconnection solution for a generation source many times greater could have significant differences in technical or procedural requirements.

#### IV. CONCLUSION

For the reasons set forth in this Brief and in their BOE, the Joint Utilities respectfully urge that the positions discussed herein and therein be adopted by the Commission and incorporated into an RPS Policy Statement.

Respectfully submitted,

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modifications, the SAPA Notice proposed revisions to the SIRs necessary to increase the upper capacity threshold from 300 kW to 2 MW. As noted in the Joint Utilities' Reply Comments of May 14, 2003 in Case 02-E-1282 (pp. 3-4), proposals to expand applicability of the revised SIRs to units rated above 2 MW were outside the scope of the proceeding and, thus, should be disregarded.

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