

**STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION**

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**Proceeding on Motion of the Commission  
Regarding a Retail Renewable Portfolio  
Standard**

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**Case 03-E-0188**

**MULTIPLE INTERVENORS'  
BRIEF OPPOSING EXCEPTIONS**

**Dated: July 8, 2004**

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## **PRELIMINARY STATEMENT**

Multiple Intervenors, an active party in this proceeding, hereby submits its Brief Opposing Exceptions in accordance with the schedule established by the State of New York Public Service Commission (“Commission”) in its June 3, 2004 “Notice of Scheduling for Filing Exceptions.” On June 23, 2004, Multiple Intervenors filed its Brief on Exceptions to the Recommended Decision issued by Administrative Law Judge Eleanor Stein (“ALJ Stein”) on June 3, 2004.<sup>1</sup> Thus far, Multiple Intervenors has received Briefs on Exceptions from 31 other parties.<sup>2</sup>

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<sup>1</sup> Parenthetical references to ALJ Stein’s Recommended Decision are preceded by the notation “RD.” Parenthetical references to Briefs on Exceptions to the Recommended Decision are preceded by the party’s name, as abbreviated herein (e.g., MI at \_\_\_.)

<sup>2</sup> Multiple Intervenors has received Briefs on Exceptions from: AES-NY, LLC (“AES”); The Business Council of New York State, Inc.; Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation (“Niagara Mohawk”), Orange and Rockland Utilities, Inc. and Rochester Gas and Electric Corporation (collectively, the “Joint Utilities”); Changing World Technologies; Community Energy, Inc. (“Community Energy”); Consolidated Edison Solutions, Inc. (“Con Ed Solutions”); Constellation NewEnergy, Inc. and Constellation Power Source, Inc. (“Constellation”); Empire State Forest Products Association; Enel North America, Inc. (“Enel”); Energy Management, Inc. (“EMI”); Evolution Markets, LLC; Independent Power Producers of New York, Inc. (“IPPNY”); Integrated Waste Services Association; KeySpan Corporation; Long Island Power Authority; the Lyonsdale Biomass facility (“Lyonsdale”); New York Independent System Operator, Inc. (“NYISO”); New York State Energy Research and Development Authority; New York State Reliability Council; NRG Energy, Inc.; Nucor Steel Auburn, Inc.; Plug Power Inc. (“Plug Power”); RCB Wind Advocates (“RCB”); Renewable Energy Technology and Environment Coalition (“RETEC”); Ridgewood Renewable Power LLC (“Ridgewood”); Small Hydro Group; Solar Energy Industries Association (“Solar Energy”); Sterling Planet, Inc. (“Sterling Planet”); Strategic Energy L.L.C.; Taylor Recycling Facility LLC; and Integrated Waste Services Association. The Energy Association of New York State also submitted a letter joining in and endorsing the Brief on Exceptions filed by the Joint Utilities.

## STATEMENT

In its Brief on Exceptions, Multiple Intervenors advocated that certain of ALJ Stein's recommendations regarding the proposed adoption of a renewable portfolio standard ("RPS") in New York State should be rejected, modified or clarified, and that rulings from the Commission also are necessary with respect to certain issues upon which no specific recommendations were proffered in the Recommended Decision. Multiple Intervenors 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 would exacerbate the problem. Nonetheless, if, arguendo, the Commission does issue a policy statement implementing a RPS, it is imperative that the RPS be designed in a manner that minimizes the cost to consumers. The cost to consumers should be the threshold criterion used in the selection of renewable resources.

Multiple Intervenors will not repeat its arguments on exceptions here. Rather, Multiple Intervenors hereby responds in opposition to the following exceptions to ALJ Stein's Recommended Decision advanced by other parties:

1. the arguments of RETEC, Solar Energy and Plug Power that the System Benefits Charge ("SBC")-like tier recommended by ALJ Stein should be greater than 2 percent (RETEC at 18-23; Solar Energy at Point 3; Plug Power at Point 2);
2. the arguments of Enel, IPPNY, Ridgewood, AES and Lyonsdale that existing renewable generation facilities developed prior to January 1,

2003 should be eligible for RPS subsidies (Enel at 1-2; IPPNY at 12; Ridgewood at 12-15; AES at 3; Lyonsdale at 1-5);

3. Community Energy's arguments in opposition to including green marketing sales of renewable energy in the targets for a RPS (Community Energy at 1-4);
4. the arguments of the Joint Utilities and RETEC in opposition to the recommended exemption from the RPS for New York Power Authority ("NYPA") customers (Joint Utilities at 45-46; RETEC at 23-25); and
5. the arguments of Con Ed Solutions, IPPNY, Constellation, RCB and RETEC in opposition to any deliverability requirement associated with a RPS (Con Ed Solutions at 2; IPPNY at 9-11; Constellation at 2-6; RCB at Point 5; RETEC at 28-31.)

## **ARGUMENT**

### **POINT I**

#### **THE RPS SHOULD NOT INCLUDE AN SBC-LIKE TIER**

In her Recommended Decision, ALJ Stein recommended that the Commission adopt a RPS containing an SBC-like tier for solar, small wind (up to 300 kW) and fuel cells equivalent to 2 percent of the targeted incremental renewable load. (RD at 20.) The recommended SBC-like tier is twice the size – and more than twice the cost – of the very expensive 1 percent SBC-like tier analyzed in the prime case of the February 27, 2004 Cost Study sponsored by the New York State Department of Public Service Staff. (See Feb. 27, 2004 Cost Study.) In their Briefs on Exceptions, RETEC, Solar Energy and Plug Power

argue that the SBC-like tier recommended by ALJ Stein is inadequate and should be increased. (RETEC at 18-23; Solar Energy at Point 3; Plug Power at Point 2.) In addition, RETEC and Plug Power argue that there should be a “set aside” for small customers. (RETEC at 21; Plug Power at Point 3.) For the reasons set forth below, these exceptions should be denied.<sup>3</sup>

The Recommended Decision indicates that the cost of acquiring 274,138 MWh and 50.93 MW of solar, wind and fuel cell resources (i.e., the recommended SBC-like tier) would be \$148,947,952 (2003\$) between 2006 and 2013. (RD, App. B at 3, Tables 4-7.) RETEC argues that the Recommended Decision overstates the cost of the tier. (RETEC at 18-19.) RETEC asserts that the Commission should not rely on the acquisition costs associated with an SBC-like tier, but, rather, should consider its net cost, using an assumption that “a 2% SBC-like tier would back out the most expensive 2% of generation in the main tier of the RPS.” (RETEC at 18-19.)

RETEC and Plug Power claim that the net cost of the 2 percent SBC-like tier is less than 50% of its gross cost. (RETEC at 19, Plug Power at Point 1.) Solar Energy makes a similar claim, but argues that the Recommended Decision overstates the cost “by nearly 100%.” (Solar Energy at Point 2.) As set forth below, the Recommended Decision does not overstate the cost of the SBC-like tier by anywhere close to 50 percent, let alone nearly 100 percent.

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<sup>3</sup> In its Brief on Exceptions, Multiple Intervenors demonstrated that the Commission should refrain from adopting any SBC-like tier as part of a RPS due to its staggering costs and benefits that are, at best, speculative. (MI at 21-26.)

Using the average cost per megawatt and per megawatthour over the 2006-2013 time frame, it is clear that substituting main tier resources for SBC-like tier resources would reduce the cost of a RPS substantially. The SBC-like tier included in the RD Cost Study Analysis would cost consumers ten times as much as main tier resources on a megawatt basis and almost eight times as much on a megawatthour basis.

Moreover, in their Briefs on Exceptions, RETEC and Plug Power are mixing apples and oranges. RETEC and Plug Power are comparing the cost of the 2 percent SBC-like tier between 2006-2013 of \$148,947,952 with the projected “Replacement Cost” associated with the entire “Life-cycle” of the resources of \$77,846,764. (RD, Worksheets, RDCase-Results-603-04.xls at SBC-Like Tier @ 2% (II).) The Replacement Cost associated with the 2 percent SBC-like tier over the same timeframe, *i.e.*, 2006-2013, only is \$22,831,176. (*Id.*) Thus, in evaluating the 2 percent SBC-like tier recommended by ALJ Stein, the Commission should recognize that the net cost of the SBC-like tier between 2006 and 2013 would be \$126,116,776, which equates to **over \$460 per MWh** and **almost \$2.5 million per MW**. Even though less than the gross cost of \$148,947,952, the net cost of a SBC-like tier still would require consumers to pay a substantially larger RPS subsidy to developers than is necessary to achieve the 25 percent renewable energy goal.

Based in part on its flawed cost analysis, RETEC then argues that the SBC-like tier adopted by the Commission should be “at least twice the size” as that recommended by ALJ Stein. (RETEC at 19-20.) However, as demonstrated in Multiple Intervenors’ Brief on Exceptions, any SBC-like tier would increase the cost of a RPS to consumers and should not be included in a RPS. (MI at 21-26.)

Ignoring the additional costs that would be imposed on consumers by a larger SBC-like tier, RETEC argues that the resources comprising an SBC-like tier provide unique benefits, thereby justifying expansion of the tier. (RETEC at 19-20.) RETEC's argument should be rejected.<sup>4</sup> For instance, RETEC asserts that solar, small wind and fuel cells provide diversity in size and location. (RETEC at 19; see also Plug Power at Point 2.) However, there is no evidence that the diversity in size provided by those resources, as compared to other resources included in a RPS, would produce any tangible benefits to consumers justifying the enormous additional cost. Moreover, although those resources may be capable of being located in diverse locations, there is no evidence that they actually would be located in diverse or resource-constrained areas, such as in New York City.<sup>5</sup>

Another reason proffered by RETEC for expanding the recommended SBC-like tier is to encourage the location of emerging technologies within New York, which it implies will result in "an economic multiplier effect." (RETEC at 20; see also Plug Power at Point 2.) RETEC's argument should be rejected. In advancing this argument, RETEC relies on economic development benefits that are highly speculative. Plug Power makes the same claims, and uses itself as "an excellent example of this multiplier effect." (Plug Power at Point 2.) However, Plug Power decided to locate its facilities in New York State long before this proceeding was instituted. That decision is not an "effect" of a RPS.

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<sup>4</sup> It is noteworthy that although ALJ Stein recommended inclusion of a 2 percent SBC-like tier as part of a RPS, she acknowledged that "[o]ther options, including reducing ... or elimination of the SBC-like tier, are also supported by this record." (RD at 67.)

<sup>5</sup> Similarly, RETEC argues that a RPS would produce certain economic benefits related to gas price suppression, price stability/hedging and reduced air pollution. (RETEC at 32-33.) However, there is no evidentiary support for RETEC's claims, or its "estimates" of RPS benefits. (See, e.g., RD at 96, n.127 [noting that a "decline in gas consumption by NY generators does not impact the national price"].)

Moreover, RETEC and Plug Power ignore completely the harm that high electricity prices have on consumers and, in particular, energy-intensive businesses. As the Commission is well aware, electricity prices in New York are well above the national average, and are higher than prices paid in other states that compete with New York in attracting business.<sup>6</sup> Consequently, the State has concluded as a matter of policy that “[e]nergy prices need to be brought more in-line with other states to compete more effectively for economic opportunities.”<sup>7</sup> In fact, the 1998 New York State Energy Plan concluded that for each \$100 million increase in electricity costs to consumers, employment in New York is reduced by 1,100 to 1,600 jobs.<sup>8</sup> As detailed above, the 2 percent SBC-like tier recommended by ALJ Stein is projected to cost almost \$150 million between 2006 and 2013 (and over \$126 million even if a so-called “net” number is used). Thus, the SBC-like tier alone could wind up costing New York well over 2,000 jobs; a larger SBC-like tier, such as that advocated by RETEC and Plug Power, would cost the State even more jobs. Significantly, however, there is no evidence that the purported economic development benefits that RETEC and Plug Power argue would flow from expanding the recommended SBC-like tier ever would be realized, much less compare favorably to the economic impacts that would result from adoption of even the 2 percent SBC-like tier.

In addition, RETEC proposes that 20 percent of the SBC-like tier subsidies be directed to residential and small business customers. (RETEC at 21.) Plug Power

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<sup>6</sup> New York State Energy Plan and Final Environmental Impact Statement (June 2002) at 2-26 – 2-27.

<sup>7</sup> Id. at 2-37.

<sup>8</sup> See 25 N.Y. St. Reg. 18 at 9 (May 7, 2003).

recommends that 20 percent of the SBC-like tier “be targeted to non-demand-billed customers.” (Plug Power at Point 3.) For numerous reasons advanced here and in Multiple Intervenors’ Brief on Exceptions, if the Commission implements a RPS, it should not include any SBC-like tier. However, if, arguendo, an SBC-like tier is adopted, neither RETEC’s proposal nor Plug Power’s proposal should be adopted unless the costs associated with the proposed set asides are recovered solely from eligible customers. There is no justification for requiring large commercial and industrial customers to pay for subsidies limited to residential and small business customers.

Finally, RETEC argues that the size limitation on wind projects eligible for ALJ Stein’s recommended SBC-like tier (i.e., 300 kW or less) be expanded to include wind projects up to 1 MW. (RETEC at 22-23.) RETEC’s argument should be rejected. ALJ Stein’s SBC-like tier is limited to certain emerging technologies; RETEC has failed to proffer any compelling justification for more than tripling the recommended size limitation. Moreover, expanding the eligibility criteria for the SBC-like tier would increase the cost of the tier to consumers, without any corresponding benefits.

For all the foregoing reasons, the arguments of RETEC, Solar Energy and Plug Power in favor of expanding the SBC-like tier advanced in the Recommended Decision should be rejected. If the Commission implements a RPS, it should refrain from adopting any SBC-like tier whatsoever. Cost should be the only criterion for selecting between renewable resources.

## **POINT II**

### **EXISTING RENEWABLE GENERATION FACILITIES SHOULD NOT BE ELIGIBLE FOR RPS SUBSIDIES**

In her Recommended Decision, ALJ Stein recommended that existing renewable generation facilities developed prior to January 1, 2003 be included as part of the RPS baseline but not be eligible for RPS subsidies, with the exception of very small hydropower (10 MW or less). (RD at 17, Table 3, 20-21, 23, as modified by Erratum Notice issued June 16, 2004.) In their Briefs on Exceptions, Enel, IPPNY, Ridgewood and Lyonsdale oppose ALJ Stein's recommendation and assert that RPS subsidies should be made available to other existing renewable generation facilities. (Enel at 1-2; IPPNY at 12; Ridgewood at 12-15; Lyonsdale at 1-5.) AES argues that any output of existing facilities that exceeds a pre-established historical baseline also should be eligible for a RPS subsidy. (AES at 3.) For the reasons set forth below, the exceptions of Enel, IPPNY, Ridgewood, AES and Lyonsdale should be denied.

Enel argues that existing wind projects should be eligible for RPS subsidies. Enel asserts that absent such subsidies, the ongoing viability of these projects is endangered. (Enel at 1-2.) Similarly, IPPNY argues that all existing renewable generation facilities of 20 MW or less be eligible for RPS subsidies. IPPNY asserts that excluding these facilities from RPS subsidies would undercut their ongoing viability. (IPPNY at 12.) Ridgewood urges the Commission to make eligible for RPS subsidies all hydroelectric facilities of less than 10 MW that have "existing contracts that are priced at or below market." (Ridgewood at 12.) AES contends that "the State will lose the potential to tap a low cost renewable option" if any increase above the baseline is not eligible for a RPS subsidy. (AES at 3.) Lyonsdale seeks

an exception from ALJ Stein's recommendation for its facility. (Lyonsdale at 1-5.) The arguments advanced by Enel, IPPNY, Ridgewood, AES and Lyonsdale should be rejected because they lack any factual support, disregard the purpose of RPS subsidies, and would increase the cost of a RPS to consumers if adopted.

Initially, neither Enel nor IPPNY offer any factual support for their assertions that, absent RPS subsidies, existing wind projects and/or other existing renewable generation facilities of 20 MW or less would cease operations. For instance, no financial records, affidavits or other documentation or citations to the record are proffered to bolster their assertions. Moreover, it must be remembered that the facilities in dispute were developed prior to January 1, 2003. The capital costs associated with their construction – which, for renewable generators, are much larger than ongoing operating costs – previously were incurred based upon financial projections that did not include the prospect of future RPS subsidies (i.e., the January 1, 2003 cut-off date predates the institution of this proceeding).<sup>9</sup>

Ridgewood has a contract with Niagara Mohawk that provides that Ridgewood is paid either the LBMP or 90 percent of the LBMP for energy. (Ridgewood at 13.) In its Brief on Exceptions, Ridgewood states that its contracts are priced at or below market. Therefore, Ridgewood claims, it would be “unfair” for its hydroelectric facilities not to be eligible for a RPS subsidy. However, Ridgewood acknowledges it currently is making a profit on these facilities. (Id. at 14.) Lyonsdale similarly seeks RPS subsidies, yet its current

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<sup>9</sup> The Recommended Decision notes that according to cost studies conducted by Staff, absent RPS subsidies approximately 7 MW of small hydroelectric resources would be lost each year. (RD at 49.) ALJ Stein's recommendation that very small existing hydroelectric facilities (10 MW or less) be eligible for RPS subsidies (RD at 20-21) already addresses this purported risk.

owner elected to purchase the facility in 2003 without the existence of a RPS. (Lyonsdale at 2.)

Expanding the eligibility for RPS subsidies to existing renewable generating facilities that were developed prior to January 1, 2003, or to their output above a historical baseline (as advocated by AES), would disregard the very purpose of the subsidies. The purpose of the RPS subsidies is to enable the development of renewable resources that otherwise would not be developed. The goal is not to provide additional compensation to renewable resources that already have been constructed or would be developed even without a RPS. As ALJ Stein recognized:

The Instituting Order can best be read to assume that today's existing or baseline renewable resources need not, generally, be offered further ratepayer price support to succeed. An RPS is necessary, in fact, to promote the development of additional renewable resources for New York's retail energy portfolio.

(RD at 23; emphasis in original.)

Finally, providing RPS subsidies to additional, existing renewable generating facilities would increase the cost of a RPS to consumers. The exceptions of Enel, IPPNY, Ridgewood, AES and Lyonsdale, if adopted by the Commission, would force consumers to pay subsidies to the owners of existing generation facilities that were built without a RPS.

The owners of existing facilities should not receive a windfall now. Given the significant projected costs associated with the recommended RPS, the Commission should refrain from increasing those costs by rejecting here all arguments to expand the eligibility for RPS subsidies to renewable generating facilities that were developed prior to January 1,

2003 without the promise of future consumer-funded subsidies.<sup>10</sup> For all the foregoing reasons, the exceptions of Enel, IPPNY, Ridgewood, AES and Lyonsdale should be denied.

### **POINT III**

#### **GREEN MARKETING SALES SHOULD BE INCLUDED IN THE RPS TARGETS**

ALJ Stein recommended that the Commission adopt a RPS with a goal of attaining “a target of 25 percent renewable energy retailed in the State ...” (RD at 107.) In calculating the overall and annual RPS targets, ALJ Stein included projected electricity sales from voluntary green marketing programs as part of the targets. (See RD at 16, Table 2.) Importantly, in the cost analyses supporting the Recommended Decision, sales related to green marketing programs were modeled as contributing to the 25% target, but not eligible for RPS subsidies because the programs “have their own funding streams.” (RD, Appendix C at vi.) In its Brief on Exceptions, Community Energy argues that green marketing sales should be treated as incremental to (*i.e.*, excluded from) the RPS targets. (Community Energy at 1-4.) For the reasons set forth below, Community Energy’s exception to ALJ Stein’s Recommended Decision should be denied.<sup>11</sup>

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<sup>10</sup> These exceptions demonstrate the necessity of basing the amount of any RPS subsidy on the cost of each renewable resource. Existing wind facilities or other renewable resources below 20 MW, if eligible, that do not need a RPS subsidy could game the system if a market-clearing approach or pay-as-bid approach is adopted by the Commission. (See MI at 13-21.)

<sup>11</sup> In their Briefs on Exceptions, Enel, RETEC and Sterling Energy also advocate that green marketing sales be excluded from the RPS targets. (Enel at 2-3; RETEC at 23; Sterling Energy at 1.) Those parties raise the same arguments as Community Energy and, therefore, their exceptions similarly should be denied for the reasons set forth herein.

Community Energy argues that including green marketing sales in the RPS targets would confuse customers. (Community Energy at 2-4.) It even asserts that the Recommended Decision “threatens to kill Green Marketing.” (Id. at 2.) Significantly, however, Community Energy fails to proffer one iota of factual support for its position. There is no basis upon which the Commission could conclude that a RPS which includes green marketing sales in the targets either would confuse customers or cause them not to participate in the programs.<sup>12</sup> Consumers still will be able to decide to “make a difference” and purchase renewable resources. (See id. at 3.)

Residential and non-residential consumers have elected to participate in green marketing programs for a variety of reasons. If consumers want increased reliance on renewable resources, they will demonstrate this desire by purchasing electricity from renewable resource generators and suppliers, even at a premium price. Voluntary green marketing programs promote this behavior and increase customer choice. There is no evidence that green marketing programs will be unsuccessful if a RPS is adopted.

Community Energy’s unsubstantiated attempts to portray the Recommended Decision as the harbinger of a demise in green marketing programs should be rejected. ALJ Stein’s recommendation that projected green marketing sales be included as part of the RPS targets, but not eligible for subsidies, should be adopted by the Commission. There is no reason to subsidize green marketing sales, which are voluntary and do not require a

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<sup>12</sup> According to a March 16, 2004 report to the Commission, green marketing programs now are, or soon will be, available to customers of all of the major electric utilities in New York, including the Long Island Power Authority. Commission Public Session (March 16, 2004), Item 302, Report by Ronald Cerniglia.

subsidy.<sup>13</sup> To exclude green marketing sales from the target, as advocated by Community Energy, would increase the cost of a RPS to consumers.

As detailed above, the cost analyses relied upon by ALJ Stein include a projection of green marketing sales. (RD at 16, Table 2, Appendix C at vi.) If green marketing sales were to be excluded from the RPS targets, the amount of renewable resources that would have to be acquired – and subsidized – would be higher, thereby increasing the cost of a RPS to consumers by a significant amount. Additionally, because electricity sales from green marketing programs would be ignored, consumers really would wind up paying subsidies to achieve a renewables penetration rate in excess of the 25 percent goal articulated by the Commission.<sup>14</sup>

#### **POINT IV**

#### **NYPA ECONOMIC DEVELOPMENT CUSTOMERS SHOULD BE EXEMPT FROM A RPS SURCHARGE**

In her Recommended Decision, ALJ Stein recommended that the design of a RPS exempt NYPA customers from any surcharges. (RD at 24, 69-71.) Multiple Intervenors strongly supports the exemption for NYPA economic development program customers and urges the Commission to expand the exemption to include utility flex-rate

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<sup>13</sup> See Initial Comments of Multiple Intervenors (March 28, 2003) at 19-22 (summarizing the numerous, ongoing efforts to increase the State's reliance on renewable resources and asserting that compliance with a RPS can and should be achieved through voluntary programs).

<sup>14</sup> For the reasons advanced by Multiple Intervenors in its Brief on Exceptions and previously in this proceeding, the projected costs of a RPS – which are understated due to numerous, substantial flaws in the cost study relied upon by ALJ Stein – are too high and would place New York at a further competitive disadvantage vis-à-vis other states in terms of retaining and attracting jobs. (See, e.g., MI at 8-12, 33-35.)

contract customers. (See MI at 33-42.) The Joint Utilities and RETEC, however, except to the recommendation that NYPA customers be exempted from any RPS surcharges. (Joint Utilities at 45-46; RETEC at 23-25.) For the reasons set forth below, the exceptions of the Joint Utilities and RETEC should be denied.

Initially, the Joint Utilities argue that the fact that NYPA customers already consume large quantities of hydropower is irrelevant, and that the focus should be on the incremental consumption of electricity generated by renewable resources. (Joint Utilities at 45.) RETEC advances similar arguments. (RETEC at 24.) However, as ALJ Stein recognized, “[i]ncluding NYPA ratepayers in the RPS would require them to pay an additional charge although their utility is already at more than twice the RPS target standard.” (RD at 71.) Moreover, the primary reason that Judge Stein recommended exempting NYPA’s customers from the RPS surcharge was not that NYPA’s portfolio has a high percentage of renewable resources. Rather, that was a “secondary consideration.” (RD at 70.)<sup>15</sup> Additionally, regardless of the outcome of this proceeding, NYPA customers are funding upgrades at the St. Lawrence and Niagara hydroelectric projects.

The Joint Utilities also argue that NYPA customers should be forced to pay for a RPS because “if the RPS is going to benefit everyone in New York State, then everyone in New York State should fund it.” (Joint Utilities at 45.) However, NYPA customers would not benefit from a RPS like other customers purportedly would benefit. For instance, because NYPA customers have fixed long-term contracts, they would not benefit from any

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<sup>15</sup> As ALJ Stein also recognized, the Commission cannot require NYPA customers to pay a RPS surcharge because it “does not regulate NYPA.” Accordingly, ALJ Stein’s recommendations on this issue are “advisory only” and “not binding.” (Id.)

price suppression that may occur if a RPS is implemented; their costs simply would increase.<sup>16</sup>

The Joint Utilities and RETEC then argue that NYPA customers should not be excluded from any RPS-related surcharges because they currently pay very low rates. (Joint Utilities at 45-46; RETEC at 24.)<sup>17</sup> This argument must be rejected. The legislative intent of NYPA's economic development program is that customers should purchase electricity at a lower price than investor-owned utility tariff rates. To impose a RPS surcharge on NYPA customers because their electric rates are below the State average would be entirely inconsistent with State policy. Customers that purchase electricity under the Replacement Power, Expansion Power, Economic Development Power and Power For Jobs programs have demonstrated that the lower-cost power is essential to retain existing jobs and/or attract new jobs.<sup>18</sup> To increase the price paid by those customers to fund RPS subsidies would be contrary to the legislative intent of the programs. As ALJ Stein observed, "adding costs to a priority program for economic development may have adverse consequences disproportionate to the benefits." (RD at 70.)

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<sup>16</sup> See Case 03-E-0188, *supra*, Transcript at 546, 548; see also RD at 69-70. The same also can be said for customers with flex-rate contracts that include commodity – they would experience no price suppression effects, only higher costs due to a RPS.

<sup>17</sup> RETEC argues, without any factual support, that NYPA customers receive hydropower at "subsidized rates." (RETEC at 24.) RETEC is wrong. NYPA's economic development customers pay rates based on NYPA's cost to serve them; there are no subsidies paid by other customers. Indeed, Replacement Power and Expansion Power customers pay rates that are significantly in excess of NYPA's cost of service.

<sup>18</sup> See MI at 35-39 (detailing the statutory history and intent to promote economic development underlying the different NYPA programs). The same also could be said for utility flex-rate contract customers, who for similar reasons also should be exempt from any RPS surcharge. (*Id.* at 39-42.)

For all the foregoing reasons, the exceptions of the Joint Utilities and RETEC to ALJ Stein’s recommendation that NYPA customers be exempt from the RPS should be denied. Rather, ALJ Stein’s recommendation to exempt NYPA’s economic development program customers should be adopted by the Commission and extended to customers that have flex-rate contracts with the State’s utilities.

### **POINT V**

#### **A RPS SHOULD INCLUDE A DELIVERY REQUIREMENT**

In her Recommended Decision, ALJ Stein recommended that the Commission adopt a deliverability requirement as part of a RPS. (RD at 24, 84-86.) Pursuant to this requirement, energy must “be delivered into the New York electric grid for the attributes associated with that energy to be traded in the New York Trading System.” (RD at 77.) In their Briefs on Exceptions, Con Ed Solutions, IPPNY, Constellation and RETEC oppose the delivery requirement recommended by ALJ Stein. (Con Ed Solutions at 2; IPPNY at 9-11; Constellation at 2-6; RETEC at 28-31.) RCB Wind Advocates urge the Commission to adopt the requirement, but only for imported renewable energy. (RCB at Point 5.) For the reasons set forth below, these exceptions should be denied.

Con Ed Solutions opposes adoption of the delivery requirement because, due to the intermittent nature of certain renewable resources, there is “a significant risk premium to schedule them for physical delivery.” (Con Ed Solutions at 2.) IPPNY similarly argues that the delivery requirement would limit the acquisition of renewable attributes from out-of-State resources “due to the additional costs to reserve transmission capability to import energy into New York.” (IPPNY at 10.) And, RETEC argues that the recommended

delivery requirement would increase transaction costs and constrain flexibility in unbundling energy and attributes. (RETEC at 29.)

Initially, it is noteworthy that, in consideration of the intermittent nature of certain renewable resources, ALJ Stein recommended that the deliverability requirement would be satisfied by an out-of-State resource, if an equivalent amount of energy is delivered into New York on a monthly basis. (RD at 85.) Thus, the Recommended Decision accords renewable resources more flexibility than the “strict” delivery requirement favored by some parties that would mandate that the actual energy generated by the renewable resource be delivered physically into the State on a real-time basis. (See, e.g., EMI at 2 [criticizing ALJ Stein’s recommendation that credits would be available for “(i) renewable energy that never enters New York and ... (ii) non-renewable energy that does enter New York”].)

IPPNY and RETEC argue that the recommended delivery requirement is not necessary. (See IPPNY at 10-11; RETEC at 29.) However, IPPNY overlooks the fact that the Commission’s goals in instituting this proceeding, and the benefits hoped to be realized by implementing a RPS, necessitate the adoption of a delivery requirement. In its Order Instituting Proceeding, the Commission opined that increasing the amount of electricity “used in New York State” that is provided by renewable resources to 25 percent “would be in the public interest.”<sup>19</sup> Accordingly, the Commission instituted this proceeding to develop a RPS “for electric energy retailed in New York State.”<sup>20</sup> Obviously, electricity generated by out-of-State renewable resources cannot be “used” or “retailed” in New York if it never is

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<sup>19</sup> Case 03-E-0188, Proceeding on Motion of the Commission Regarding a Retail Renewable Portfolio Standard, Order Instituting Proceeding (February 19, 2003) at 2.

<sup>20</sup> Id.

delivered to New York. Thus, the entire premise behind the proposed RPS necessitates the adoption of some form of delivery requirement.

Moreover, absent a delivery requirement, New York consumers would be required to pay for electricity that is unavailable to them. If New York consumers are going to be forced to pay RPS subsidies, the least they should get in return is electricity delivered into the State. As ALJ Stein stated, the recommended delivery requirement “has the advantage of maximizing benefits to New York.” (RD at 24.)

Constellation urges the Commission to reject the deliverability requirement because it purportedly limits the benefits of REC trading “for no valid reason.” (Constellation at 2.) Constellation maintains that the deliverability requirement would impair the value of the RECs for a project in New York State that sells its energy to an out-of-State customer. (Id. at 3.) This argument ignores the fact that the Commission’s goal in instituting this proceeding is to increase the amount of renewable energy that is “retailed” in New York State; the goal of the proceeding is not to maximize the value of the RECs to developers.

Constellation also argues that the deliverability requirement would “discourage in-state renewable projects” (Constellation at 3), but does not provide any evidence to support its contention. Nor does Constellation provide any support for its argument that a deliverability requirement may deter imports. (See id. at 4.) If a generator, whether in-State or out-of-State, receives a RPS subsidy, then the developer should be required to deliver the renewable energy to New York consumers in New York. Contrary to Constellation’s conclusion that a transmission line is not necessary to deliver the “environmental, economic and even reliability benefits of increased renewable generation” to New Yorkers (see id. at 5), use of a transmission line is necessary. There is no basis for claiming that New York

would experience benefits (e.g., reliability benefits, price suppression) from renewable energy that is not delivered in the State.

Con Ed Solutions argues that the recommended deliverability requirement would “isolate” New York’s renewable market from surrounding regions. (Con Ed Solutions at 2.) However, Con Ed Solutions offers no facts or analysis to support its contention. In fact, ALJ Stein purposefully tailored her recommendation with respect to the delivery requirement to ensure consistency with New England:

As long as the transaction into ISO-New England and the NYISO occur within the same calendar month and the generator surrenders its New England REC, it would be assigned a New York REC. This approach puts intermittent renewables in New England and in New York on the same footing.

(RD at 85.) There is no evidence that adoption of ALJ Stein’s recommended delivery requirement would isolate New York in an undesirable manner.

Lastly, the exception of RCB Wind Advocates should be rejected. Although RCB argues that the deliverability requirement should apply only to imports (see RCB at Point 5), it does not provide any support for its argument. The Commission should adopt a deliverability requirement for all resources that receive a RPS subsidy, whether in-State or out-of-State. A deliverability requirement that applies only to imports would place an “unjustified burden on interstate commerce.” (See Constellation at 3.) For the foregoing reasons, the exceptions of Con Ed Solutions, IPPNY, Constellation, RCB and RETEC to the delivery requirement recommended by ALJ Stein in the Recommended Decision should be denied. To be eligible for a RPS subsidy funded by New York electricity consumers, a renewable generator should be required, at a minimum, to deliver electricity into the State.

## CONCLUSION

For the reasons set forth herein, if the Commission adopts a RPS notwithstanding Multiple Intervenors' arguments that it refrain from doing so at this time, then it also should reject the arguments raised on exceptions to ALJ Stein's Recommended Decision and design a RPS that:

1. does not include a SBC-like tier;
2. does not allow existing renewable generating facilities developed prior to January 1, 2003 to be eligible for RPS subsidies;
3. includes green marketing sales of renewable energy in the RPS targets;
4. exempts NYPA's economic development customers from any RPS surcharge; and
5. includes a delivery requirement.

In addition, the Commission should not adopt the recommendations of ALJ Stein that would make the RPS more costly for consumers. For the reasons demonstrated in its Brief on Exceptions, Multiple Intervenors urges the Commission, if it implements a RPS, also to incorporate the following guidelines into the design of the 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. the start date of the RPS should be no sooner than 2009;
3. the incremental RPS targets should be lower in the early years of a RPS, increasing in the later years;

4. the alternative compliance payments should not impose additional costs on consumers;
5. the RPS surcharge should not be imposed on any customer that purchases electricity through flex-rate contracts; and
6. 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.

Dated: July 8, 2004  
Albany, New York

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Brief Opposing 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:            July 8, 2004  
                     Albany, New York

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Sharon Matthews

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