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July 8, 2004

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

Re: Case 03-E-0188
Renewable Portfolio Standard

Dear Secretary Brillling:

Enclosed is an original and 25 copies of *DPS Staff's Brief Opposing Exceptions* in the above-referenced proceeding. Copies have been served electronically on subscribers to the RPS ListServe established for this proceeding.

Very truly yours,

Saul Rigberg

SAUL RIGBERG
Assistant Counsel

cc.: RPS ListServe Subscribers

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION



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

***DPS STAFF'S
BRIEF OPPOSING EXCEPTIONS***

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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ARGUMENT	2
	Lyonsdale Biomass Facility	2
	New York State Energy Research and Development Authority ...	4
	Changing World Technologies	4
	KeySpan Corporation	5
	Consolidated Edison Solutions, Inc.	5
	Community Energy, Inc.	6
	Strategic Energy, L.L.C.	7
	Enel North America, Inc.	8
	Ridgewood Renewable Power L.L.C.	8
	Business Council of New York State, Inc.	9
	Plug Power Inc.	9
	Constellation NewEnergy, Inc. & Constellation Power Source, Inc.	10
	Renewable Energy Technology and Environment Coalition	11
	Solar Energy Industries Association	14
	NRG Energy, Inc.	14
	Nucor Steel Auburn, Inc.	15
	Small Hydro Group	15
	Taylor Recycling Facility, LLC	15
	Empire State Forest Products Association	16
	AES-NY, LLC	16
	Independent Power Producers of New York, Inc.	16
	RCB Wind Advocates	17
	Energy Management, Inc.	17
	Multiple Intervenors	17
	New York State Reliability Council	18
	Joint Utilities	18
	New York Independent System Operator	20
	Sterling Planet, Inc.	20
	Long Island Power Authority	21
	Energy Association of New York State	21
	Integrated Waste Services Association	21
	Evolution Markets LLC	21
III.	CONCLUSION	22

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I. INTRODUCTION

This Brief Opposing Exceptions is submitted by the Staff of the Department of Public Service (DPS Staff). It is submitted in opposition to certain exceptions made by the parties to this proceeding. Briefs on Exceptions were filed (in chronological order) by Lyonsdale Biomass Facility, New York State Energy Research and Development Authority, Changing World Technologies, KeySpan Corporation, Consolidated Edison Solutions, Inc., Community Energy, Inc., Strategic Energy, L.L.C., Enel North America, Inc., Ridgewood Renewable Power L.L.C., Business Council of New York State, Inc., Plug Power Inc., Constellation NewEnergy, Inc. & Constellation Power Source, Inc., Renewable Energy Technology and Environment Coalition, Solar Energy Industries Association, NRG Energy, Inc., Nucor Steel Auburn, Inc., Small Hydro Group, Taylor Recycling Facility, LLC, Empire State Forest Products Association, AES-NY, LLC, Independent Power Producers of New York, Inc., RCB Wind Advocates, Energy Management, Inc., Multiple Intervenors, New York State Reliability Council, Joint

Utilities, New York Independent System Operator, Sterling Planet, Inc., Long Island Power Authority, Energy Association of New York State, Integrated Waste Services Association, and Evolution Markets LLC.

This brief addresses the exceptions in the chronological order in which the briefs were received. Where parties made redundant exceptions, this brief does not repeat arguments in opposition for each redundant exception. To the degree that the exceptions are based on arguments already addressed adequately in the Recommended Decision, such exceptions may not be further addressed in this brief. Therefore, failure of this brief to address particular arguments made on exceptions should not be construed as consent or acquiescence.

II. ARGUMENT

Lyonsdale Biomass Facility

Lyonsdale makes some good arguments about the potential need to include New York's two existing biomass facilities in a maintenance tier to ensure their continued viability after expiration of above-market energy contracts, similar to the resources designated in the hydropower maintenance tier. However, there may be insufficient information in the record of this proceeding to decide the issue without additional investigation. Factors the Commission may wish to consider in deciding this issue are (a) the nature of

the original above-market contracts; (b) whether the original above-market contracts expired or were bought out; (c) the nature of the capital and operational expenses currently necessary to keep the plants operating; (d) the degree to which current market conditions support the plants; (e) whether adjustments to the Baseline levels and compliance targets would be necessary to avoid double-counting (as were made for the hydropower maintenance tier); and (f) what conditions or rules should be imposed on such a biomass maintenance tier. The RD already recommends that over time the Commission should continue to refine RPS eligibility criteria and allow for additions on a going forward basis. The RD recommendation would allow additional technologies to be added, but rightly preserves stability by not allowing technologies to be removed from eligibility. To preserve that stability, the Commission should not lightly add technologies if there is a chance that an in-depth investigation might lead to a desire to remove such technologies, because the consequence of removing a resource would be to create an atmosphere of regulatory risk for eligible resources. Because the concept of a maintenance tier is so fundamental to program design and affects the calculation of the Baseline levels and the compliance targets, DPS Staff recommends that the Commission separate, investigate and resolve this issue on a fast-track basis. Our estimation at this time is that Lyonsdale will likely be able to demonstrate that is should

qualify for treatment as a maintenance resource.

New York State Energy Research and Development Authority

No DPS Staff Response.

Changing World Technologies

CWT seeks to have its bio-generated oil deemed an RPS eligible fuel source for electric generation. Such bio-fuel, most likely to be used as a diesel/bio-fuel mixture and burned in existing oil-fired generators, has only been proposed for eligibility at the post-RD stage of this proceeding. The RD already recommends that over time the Commission should continue to refine RPS eligibility criteria and allow for additions on a going forward basis. The RD recommendation would allow additional technologies to be added, but rightly preserves stability by not allowing technologies to be removed from eligibility. To preserve that stability, the Commission should not lightly add technologies if there is a chance that an in-depth investigation might lead to a desire to remove such technologies, because the consequence of removing a resource would be to create an atmosphere of regulatory risk for eligible resources. DPS Staff recommends that the Commission consider such bio-fuel for RPS eligibility in a subsequent investigation. There appears to be insufficient information in the record of this proceeding to decide the issue without additional investigation. Bio-fuel in general appears to emit less carbon dioxide than fossil fuel resources, but may emit higher levels

of nitrogen oxides and particulate matter.

KeySpan Corporation

KeySpan raises a concern that a landfill gas fired electric generating facility might be deemed to be required to be located on the same site as the landfill to be RPS eligible. DPS Staff does not see a need for such a restrictive interpretation, however, for electric generation from landfill gas to be eligible there must be a clear physical and contract path between the landfill and the generator. DPS Staff recommends that given the project-specific nature of such a question, the Commission should defer a decision on such an issue until a specific project proposal is made. DPS Staff does not oppose the idea of crediting dual-fuel facilities as RPS eligible for the portion of energy generated using landfill gas, similar to the crediting of co-firing biomass at coal facilities.

Consolidated Edison Solutions, Inc.

Con Edison Solutions requests that the effective date of the first RPS requirement should be 24 months after a Commission order establishing the requirement so as to allow time to adjust its retail contracts that generally extend for 18 to 24 months. Con Edison Solutions is already on notice of a potential RPS requirement and could already be including a contingency clause in its retail contracts. It is likely that the earliest RPS compliance period will not begin until January

2006, 18 months from now. DPS Staff does not recommend that any action be taken by the Commission on the above-described request of Con Edison Solutions.

Community Energy, Inc.

CEI raises concerns about keeping voluntary "green power" marketing independent from the RPS. The RD treats voluntary green power marketing in three contexts. First, existing renewable resources including those serving the existing voluntary green power market are included in the Baseline level of renewable resources. This is proper given that the Commission is considering the 25% goal in the context of current conditions that include some voluntary green power marketing. Second, an estimate of additional voluntary green power marketing that could be achieved prior to the commencement of the RPS program is provided on the assumption that the Commission would extend the Niagara Mohawk green marketing program to the other five major electric utility companies. Third, after 2005 when the RPS compliance targets are applied, the RD treats all green power marketing as additional and separate from the RPS in a manner that it does not reduce the RPS requirements, thereby preserving the viability of a voluntary green market. DPS supports the concept of keeping the clear separation between the RPS and the voluntary green power market after 2005 when the RPS compliance targets are applied. If the Commission does not extend the Niagara Mohawk green

marketing program to the other five major electric utility companies, the second context described above should be modified accordingly.

CEI also takes exception to the exclusion of existing wind facilities (developed prior to January 1, 2003) from RPS eligibility. Exclusion is consistent with the calculation of the Baseline level of renewable resources. Inclusion would require a corresponding decrease in the Baseline level and increase in the RPS compliance targets. Such resources largely serve the voluntary green power market at above-market prices and given CEI's predictions elsewhere in its brief of the future growth of such market, DPS Staff sees little justification for treating existing wind facilities as if they need maintenance support. In addition, DPS Staff is concerned about creating a perverse incentive for green power marketers to dump their customers and resell existing wind RECs should RPS premiums prove more lucrative than voluntary green power marketing premiums.

Strategic Energy, L.L.C.

Strategic Energy raises concerns about how RPS costs are recovered. DPS Staff recommends that the SBC-Like Tier charges be recovered volumetrically by the delivery company in the same manner as SBC charges. DPS Staff recommends that the Main Tier charges be recovered volumetrically by the load serving entity (LSE) in the same manner as energy charges. We

believe that these cost recovery principles will preserve competitive markets without unfairly treating any competitor. Enel North America, Inc.

See DPS Staff response to CEI.

Ridgewood Renewable Power L.L.C.

Due to concerns about potential gaming, Ridgewood raises concerns about the "monthly matching" settlement period delivery requirement proposed in the RD concerning imports. Ridgewood proposes imposition of the same hourly matching requirement imposed by New England. Such an hourly matching requirement might serve the needs of dispatchable resources such as landfill gas, but makes it difficult for intermittent renewable resources to participate. The added flexibility of monthly settlements is an important and positive contribution of the RD. DPS Staff recommends that the gaming concerns identified could be eliminated by a requirement (implicit in the RD) that the energy and REC both come from the same ISO control area, or zone within an ISO control area.

Ridgewood requests that the hydropower maintenance tier be extended to include certain "at or below" market power contracts. DPS Staff reviewed Ridgewood's arguments during the proceeding and determined that the contracts in question were purchased in a package that as a whole is profitable. DPS Staff does not recommend that any action be taken by the Commission on the above-described request of Ridgewood.

Business Council of New York State, Inc.

Business Council cites the worst case bill impacts for certain usage levels in certain customer classes for certain utility companies as if they apply across the board and asks the Commission to insist that the RPS not disproportionately impact commercial and industrial ratepayers. The numbers cited do not give a full picture of the bill impacts. In fact, many of the constitute members of Business Council located upstate may enjoy net bill decreases as a result of the RPS. The RPS bill impact tables spread all RPS costs evenly on a volumetric basis and do not disproportionately impact any class of ratepayers.

Plug Power Inc.

Plug Power urges the Commission to consider the net cost of the SBC-Like Tier rather than the gross cost. As noted by Plug Power, the tables accompanying the RD already provide both the gross and the net costs for the Commission's consideration.

Plug Power proposes that the Commission at least double the size of the SBC-Like Tier proposed in the RD. While DPS Staff generally agrees with the beneficial attributes of the SBC-Like Tier resources described by Plug Power, no specific objective criteria is proffered by Plug Power (or RETEC) to guide the Commission in its decision as to what level of funding should be devoted to such resources.

Constellation NewEnergy, Inc. & Constellation Power Source, Inc.

Constellation raises several concerns about the delivery requirement. One of its concerns is that the delivery requirement might be interpreted as applying to exports. Rules regarding the treatment of exports are set by the importing state, not the exporting state, so the concerns about how New York exports will be treated will not be resolved by the New York Commission.

Second, Constellation opposes a delivery requirement for imports into New York because it believes such a requirement will provide a competitive disadvantage to out-of-state resources, increase their price and decrease their availability. The delivery requirement is an important component of an RPS because it ensures that the resources receiving price premiums will have an impact on the dispatch of electric generation resources in and around New York, contributing to environmental and price benefits in New York. While it is true that the premium costs for out-of-state renewable resources may be higher than for in-State resources due to transmission costs and line losses, those higher delivery costs are fundamental to the electric market and act as a self-correcting device that ensures that ratepayers in New York do not pay price premiums to resources that do not contribute to New York's goals. Such a requirement is not impermissibly discriminatory. In addition, if implemented as described in the RD, a "monthly matching"

delivery requirement is more flexible than the existing hourly matching delivery requirement for renewable resources imported into the New England market.

Third, Constellation opposes the Central Procurement Model as providing less liquidity than the Individual Compliance Model where LSEs would compete with each other for RECs. The Central Procurement Model has several advantages including allowing small LSEs (ESCOs) to benefit from economies of scale that might only be enjoyed by larger LSEs in an Individual Compliance Model and, in a supply-constrained situation, the presence of a countervailing force to the market power of generators. Central procurement is no different than the existing capacity markets in New York, which are competitive markets.

Renewable Energy Technology and Environment Coalition

Concerning the year 2008 review of the RPS program, RETEC urges the Commission to commit that any program modification as a result of the review will be applied prospectively and not affect any long-term contracts with generators entered into prior to the milestone review. DPS Staff believes that such a commitment is consistent with the RD and the DPS Staff cost study methodologies and would enhance stability. In particular, the compliance target levels in effect at the time of the review period (the "slices" of procurement already in effect in 2008) should not be reduced.

The Commission could consider pushing back the date of the review to a later year if it believes that a later review would enhance the stability of the RPS program.

As to biomass eligibility, RETEC objects to the RD's failure to adopt emissions limits for certain facilities. The emissions limits proffered by RETEC were intended to represent a consensus agreement of the Biomass Working Group. However, upon testing the consensus, DPS Staff was unable to confirm that the members of the working group representing electric generators had agreed that the limits were desirable or even attainable. In addition, our investigation of emission limits in general was that they are in a state of flux and that it may be more prudent to wait for further clarity before considering adopting such an approach. DPS Staff recommends further investigation and consensus building before adoption of a final approach to biomass eligibility.

As to a certificates tracking system, RETEC claims that limiting REC transactions to the spot market would compromise the ability of generators to compete and would leave residual attributes in the spot market rather than allowing generators to retain possession of this "commodity" until it is sold. The vast majority of renewable resources are likely to participate in the spot market so as to take advantage of its scheduling flexibility. Every LSE in New York currently obtains many times more than enough energy from the spot market on an

annual basis to cover its RPS compliance targets, even through year 2013. Therefore, the ability of generators to compete in such an environment would not be hindered as the spot market is fluid and provides liquidity. Many parties are not aware of the pervasiveness of the spot market in New York's energy procurement system. As to residual attributes, there is a time dimension to tracking REC transactions that is essential to the environmental disclosure program. RETEC's argument that generators should be able to retain RECs, perhaps for years if drawn to its logical conclusion, does not account for the need of consumers to periodically be informed of the resources used to generate their electricity. Admittedly, a considerable amount of work lies ahead to transform New York's current tracking system into a more user-friendly RECs based system as described in the RD. Such a system will have to balance considerations of regional compatibility, accountability to consumers and parties, consumer sentiment, jurisdictional issues, and market issues. DPS Staff recommends that the Commission not foreclose any particular RECs system or system component at present until all necessary issues and alternatives are properly explored. Because the concept of REC trading is so fundamental to RPS compliance DPS Staff recommends that the Commission resolve this issue on a fast-track basis.

As to the delivery requirement, in-lieu thereof RETEC proposes a reciprocity test that would be difficult to meet in

any jurisdiction and likely impossible to meet in Quebec where system contracts are mandated by law. The Commission tried a similar reciprocity test, at the request of NRDC and others, when it established the environmental disclosure tracking system. The result was that no neighboring system ever established reciprocity and the environmental disclosure administrator had to apply a more cumbersome transaction reciprocity standard to imports. Rather than encourage the development of more renewable resources, DPS Staff believes that the reciprocity test would likely result in significant exclusions of many imports, particularly from Canada. RETEC appears to understand this relationship when it states that "RETEC notes that it does not agree that it is likely, nor was there consensus, that New York will be a net importer of renewables" [RETEC BOE p. 35]. DPS Staff does not recommend a "reciprocity" approach.

Solar Energy Industries Association

SEIA claims that the SBC-Like Tier costs are overstated due to a mathematical error. We disagree. As noted by Plug Power (see discussion above), the tables accompanying the RD already provide both the gross and the net costs for the Commission's consideration.

NRG Energy, Inc.

NRG proposes that the Commission clarify the January 1, 2003 eligibility date for the Main Tier as applying to all

resources that became fully operational and went into service on or after January 1, 2003, so as to preserve eligibility for the NRG Dunkirk Steam Station 10 MW biomass co-firing system. DPS Staff has no objection to the clarifying language stated above.

Nucor Steel Auburn, Inc.

No DPS Staff response.

Small Hydro Group

In the context of PURPA contracts, SHG requests a determination that the generator and not the purchaser of the electricity holds title to a REC. DPS, as the Commission's environmental disclosure administrator, has already made determinations that in New York the holder of a PURPA contract also holds the REC. The New York determination is identical to a determination more recently made in Connecticut and conforms to FERC's policy of deferring to the state entity that creates the REC system on such matters. DPS Staff does not recommend that any action be taken by the Commission on the above-described request of SHG.

Taylor Recycling Facility, LLC

Taylor Recycling makes some attractive arguments about expanding the definition of Biomass, and it is not clear that some of the additions proposed are not already permitted. To the extent they are not, DPS Staff supports completion of the discussion of how adulterated wood and other biomass could be recovered, qualified as eligible, and converted into clean

renewable energy through non-combustion gasification technologies. It is not clear from the record in this proceeding what emissions and other impacts would result. The supply of viable renewable resource options is critical to the success of the RPS program, therefore DPS Staff recommends that eligibility issues such as those raised by Taylor Recycling be investigated and resolved expeditiously by the Commission.

Empire State Forest Products Association

DPS Staff has no objection to the eligibility of co-firing Biomass with technologies other than coal, if that is in fact feasible as stated by ESFPA.

AES-NY, LLC

No DPS Staff response.

Independent Power Producers of New York, Inc.

IPPNY recommends that the 10 MW cut-off for hydropower maintenance eligibility be increased to 20 MWs to include small hydroelectric facilities that are not significantly larger than the cut-off proposed by the RD. DPS Staff does not recommend that the change be adopted. DPS Staff originally proposed a 5 MW cut-off which was increased to 10 MWs to include small hydroelectric facilities that were not significantly larger than the original cut-off, the inclusion of which would not significantly affect the program on a MWh basis. Continuing such logic would effectively make the cut-off meaningless. The general economics of hydroelectric facilities larger than 10 MWs

are such that they should be generally self-sustaining.

RCB Wind Advocates

As to the Hybrid Model, RCB opines that such a model is disadvantageous in that LSEs will be encouraged to wait and see and not participate in direct procurement. RCB's proposal to artificially mandate a phase out of central procurement would defeat the purpose of the hybrid model. LSEs should be left to choose their own withdrawal strategy, if any.

Energy Management, Inc.

EMI raises concerns about the relaxed "monthly matching" delivery requirement recommended in the RD. As to New England and potentially PJM and Ontario, surrendering a REC for the energy delivered from the control area or other similar techniques to prevent double-counting between jurisdictions should provide sufficient protection. As to Quebec, RECs would likely be assigned at the New York border based on actual tracking.

Multiple Intervenors

MI's claim that the calculation of RPS incremental targets appears to be incorrect is wrong. MI is comparing two different sets of percentages that represent different factors -

apples to oranges. The correct comparison is as follows:

COMPARISON OF LSE TARGET PERCENTAGES 2013	<u>Study I</u>	<u>Study II</u>	<u>RD</u>
LSE TARGETS NYPA-IN:	9.20%	6.45%	7.50%
LSE TARGETS NYPA-OUT:	10.83%	7.59%	8.82%
25% minus YEAR 2005 %:	7.52%	4.66%	5.68%

New York State Reliability Council

DPS Staff has reviewed the two suggested recommendations to ensure the protection of reliability and has no objection to their adoption by the Commission.

Joint Utilities

DPS Staff does not agree with the arguments the Joint Utilities make about fixing the RPS compliance targets through 2013 without any potential for change after the 2008 review. Experience has shown that long-term projections should always be subject to continuing review. What is critical for the stability of the RPS program is that any adjustments be made on a going-forward basis only.

Assuming NYPA-out, the RD clearly establishes the LSE targets as follows:

Table 22
Incremental RPS Regulatory Targets for LSEs other than NYPA & MUNIs

Year	RPS Increment
2006	1.11%
2007	2.25%
2008	3.38%
2009	4.48%
2010	5.58%
2011	6.68%
2012	7.75%
2013	8.82%

The figures in Table 22 above show the RPS Increment including the SBC-Like Tier. The following tables break out the two tiers:

Percentage Compliance Targets

Year	Main Tier	SBC-Like Tier	Total RPS Increment
2006	1.07%	0.04%	1.11%
2007	2.17%	0.08%	2.25%
2008	3.26%	0.12%	3.38%
2009	4.34%	0.14%	4.48%
2010	5.42%	0.16%	5.58%
2011	6.50%	0.18%	6.68%
2012	7.57%	0.18%	7.75%
2013	8.65%	0.18%	8.82%

Corresponding MWhs

Year	Main Tier	SBC-Like Tier	Total RPS Increment
2006	1,519,115	58,403	1,577,518
2007	3,138,793	116,807	3,255,600
2008	4,780,876	175,210	4,956,086
2009	6,446,626	206,030	6,652,656
2010	8,143,888	236,849	8,380,737
2011	9,892,191	267,668	10,159,859
2012	11,638,667	270,903	11,909,571
2013	13,432,768	274,138	13,706,906

As to whether the object of compliance is the acquisition of energy, certificates, or both, the goal is for certain percentages of the energy used to supply New York State retail customers to be supplied from renewable resources. Certificates are a way to demonstrate compliance. DPS Staff agrees that the tracking and trading programs must mesh with the environmental disclosure program and avoid double-counting. There may be more than one way to accomplish these objectives, which will be fully explored.

New York Independent System Operator

No DPS Staff response.

Sterling Planet, Inc.

Sterling Planet opines that the rules established for conversion transactions hinder the development of a voluntary green power market for solar and fuel cell resources. Conversion transaction rules are a subset of the Commission's environmental disclosure tracking system rules. Conversion transactions affect the treatment of certain wholesale energy transactions in the spot market. Solar (photovoltaic) and fuel cells are generally "behind the meter" resources that do not participate in wholesale energy markets. However, assuming such a resource generated electric energy in excess of the customer's need, and such excess energy was not sold to the delivery company under a net metering regime, there is nothing in the Commission's environmental disclosure rules prohibiting the

participation of such a resource, including the rules on conversion transactions. The reality is that such resources are too small to participate under NYISO rules in New York's wholesale markets. Instead, to the degree that such resources produce excess energy they are treated as load modifiers on the distribution system. During the collaborative process of Working Group IV, it was suggested that based on experience in New England, the only system to track such resources would be to establish a cumbersome meter reading regime similar to that conducted by utility meter readers. The inability of these resources to realistically participate in wholesale markets is one of the reasons why DPS Staff has recommended that such resources be encouraged in an SBC-Like Tier rather than on a market basis.

Long Island Power Authority

No DPS Staff response.

Energy Association of New York State

No DPS Staff response.

Integrated Waste Services Association

No DPS Staff response.

Evolution Markets LLC

Evolution Markets recommends the adoption of a fixed-price alternative compliance payment as a key factor in setting prices for forward contracts. DPS Staff considered and rejected such an approach because its use in Massachusetts appears to

Case 03-E-0188

have failed its objective and instead has merely driven up ratepayer costs in a supply-constrained environment. The RD approach appears to create the proper incentive without needlessly driving up ratepayer costs.

III. CONCLUSION

For the foregoing reasons, the Staff of the Department opposes certain exceptions made by the parties to this proceeding.

Respectfully submitted,

Saul Rigberg

SAUL RIGBERG
Assistant Counsel

Dated: Albany, New York
July 8, 2004