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December 27, 2004

**VIA HAND DELIVERY**

Honorable Jaclyn A. Brillling  
Secretary  
New York State Public Service Commission  
Three Empire State Plaza  
14<sup>th</sup> Floor  
Albany, New York 12223

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

ID No. PSC-45-04-00013-P

Dear Secretary Brillling:

Multiple Intervenors hereby files an original and five copies of “Comments of Multiple Intervenors in Response to ID No. PSC-45-04-00013-P Regarding a Retail Renewable Portfolio Standard Implementation Plan.”

Very truly yours,

COUCH WHITE, LLP

Barbara S. Brenner

Barbara S. Brenner

BSB/sem/vaf

Enclosures

cc: RPS Contact List (via email)

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**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**

**COMMENTS OF MULTIPLE INTERVENORS IN  
RESPONSE TO ID NO. PSC-45-04-00013-P  
REGARDING A RETAIL RENEWABLE PORTFOLIO  
STANDARD IMPLEMENTATION PLAN**

**Dated: December 27, 2004**

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## **PRELIMINARY STATEMENT**

Multiple Intervenors, an unincorporated association of approximately 55 large commercial and industrial energy consumers with manufacturing and other facilities located throughout New York State, hereby submits its Comments on the draft RPS Implementation Plan (“Plan”) issued for public comment by the State of New York Public Service Commission (“Commission”) in conjunction with Case 03-E-0188, Proceeding on Motion of the Commission Regarding a Retail Renewable Portfolio Standard. Notice of the proposed rulemaking (I.D. No. PSC-45-04-00013-P) was published in the November 10, 2004 edition of the *New York State Register*. The Commission has solicited comments on the design of a plan to be utilized in the implementation of the renewable portfolio standard (“RPS”) adopted in Case 03-E-0188. On the same date that the Commission published notice of this proposed rulemaking, it also published a notice of proposed rulemaking regarding initial facility certification and procurement. Multiple Intervenors filed Comments on initial facility certification and procurement issues on December 10, 2004 (“December 10<sup>th</sup> Comments”). Multiple Intervenors’ December 10<sup>th</sup> Comments are incorporated by reference herein.

These Comments focus on issues in the same order in which they are addressed in the draft Plan. Specifically, Multiple Intervenors addresses the issues that are set forth in the following sections of the Plan: Section II (“Procurement Methodologies for Main Tier and Customer-Sited Tier Resources”); and Section V (“Design of On-Going Monitoring and Evaluation Program”).

## STATEMENT

In its December 10<sup>th</sup> Comments, Multiple Intervenors urged the Commission to establish a cost-based procurement process that utilized requests for proposals (“RFPs”) for the RPS initial facility certification and procurement. Multiple Intervenors also urged the Commission to base the RPS payment to each generator on that individual generator’s specific costs, utilizing contracts for differences (“CFDs”) in order to ensure that consumers do not pay more than is necessary for the development of renewable resources.

In the Commission’s “Order Authorizing Fast Track Certification and Procurement” issued on December 16, 2004 (“December 16<sup>th</sup> Order”), the Commission authorized the New York State Energy and Research and Development Authority (“NYSERDA”) to use a RFP procurement method for the initial RPS procurement solicitation according to a schedule designed to allow NYSERDA to award and execute RPS contracts “at a reasonable cost” by no later than the end of January 2005. The Commission stated specifically that the procurement methodology approved in the December 16<sup>th</sup> Order was for the initial solicitation only. The Commission did not adopt the CFD approach for the initial solicitation.

In its December 16<sup>th</sup> Order, the Commission stated that although it agrees with Multiple Intervenors that cost minimization is an important objective, the cost-based pricing methodology recommended by Multiple Intervenors would result in too great a time delay to be utilized in the initial procurement. The Commission also stated that “a cost-based approach is antithetical to the development of competitive markets.” (December 16<sup>th</sup> Order at 28, n.16.)

Multiple Intervenors does not believe that a cost-based approach is antithetical to the development of competitive markets and urges the Commission to adopt a cost-based approach to the procurement of renewable resources. The criteria used for the procurement of renewable resources can specify, as one of the contract terms, that the generator must supply electricity during all peak hours. For intermittent resources, that requirement would be applicable when the wind or hydro is available. This would minimize any negative consequences on the markets administered by the New York State Independent System Operator, Inc. (“NYISO”). Importantly, a cost-based procurement method would minimize the cost of the RPS to consumers.

However, if, *arguendo*, the Commission does not adopt Multiple Intervenors’ cost-based approach for the procurement of new Main Tier RPS resources, it should, at the very least, adopt the cost-based approach for the Maintenance Tier and the SBC-like Tier. In the Commission’s “Order Regarding Retail Renewable Portfolio Standard,” issued on September 24, 2004 (“September 24<sup>th</sup> Order”), the Commission stated that established wind and small hydroelectric facilities will have to demonstrate that they require a RPS subsidy to remain financially viable. (September 24<sup>th</sup> Order at 44.) Moreover, as the Plan recognizes for Maintenance Tier resources, “an estimate of costs and overall requirement of each entity will be known.” (Plan at 9.) Thus, a cost-based subsidy not only is appropriate, but easy to quantify.

Multiple Intervenors also urges the Commission to utilize a cost-based RFP procurement model. However, if the Commission authorizes the use of an auction format, it is essential that the Commission refrain from adopting a market-clearing price model. An as-

bid approach, as opposed to a market-clearing price model, would minimize the cost of the RPS to consumers. As demonstrated throughout this proceeding, a market-clearing price model would increase dramatically the cost of the RPS to consumers, without providing any additional environmental benefits. In fact, in its September 24<sup>th</sup> Order, the Commission estimated that the market-clearing approach would increase significantly the RPS subsidies paid by end-use customers. The market-clearing approach was estimated to cost consumers an additional \$180 million (2003 \$) during the period 2006-2013. Also, consumers would continue paying additional, inflated RPS subsidies long after 2013. Thus, a market-clearing approach should not be adopted by the Commission.

In its September 24<sup>th</sup> Order, the Commission stated that the financial incentives for RPS projects will be “the minimum necessary to stimulate development of generating facilities that meet the eligibility requirements....” (September 24<sup>th</sup> Order at 4.) A cost-based approach would result in the payment of the *minimum* financial payments necessary. The use of a market-clearing approach, on the other hand, would result in the *maximum* payments and cost consumers hundreds of millions of dollars over the 10, 20, or 30 year period of the RPS contracts. Under the market-clearing approach, with the possible exception of the highest-priced generator that sets the clearing price, all other generators selected would receive subsidies in excess of their costs and what they bid – out of pockets of consumers.

## **COMMENTS ON SPECIFIC SECTIONS OF DRAFT IMPLEMENTATION PLAN**

### **II. PROCUREMENT METHODOLOGIES FOR MAIN TIER AND CUSTOMER-SITED TIER RESOURCES**

#### **A. Main Tier**

##### **1. Procurement Context**

In Section II.A.1, the draft Plan states that the Commission is considering a number of objectives in the context of assessing procurement options. Those objectives include minimization of costs to end-use customers. (Plan at 6.) Multiple Intervenors urges the Commission to prioritize the objectives and state unequivocally that cost minimization is the threshold criterion for the selection of resources that will receive RPS subsidies. In order to minimize the adverse impact on energy costs of a RPS, it is essential that only the least-cost renewable resources are selected in the procurement process. As set forth below, a cost-based process would result in the procurement of renewable resources at a lower cost to New York consumers.

##### **2. Procurement Timeframe Considerations**

The draft Plan states that the Commission is considering authorizing NYSERDA “to modify procurement procedures and methods” in each successive solicitation based on the market and feedback on the solicitation process. (Plan at 7.) The Commission should not give blanket authorization to NYSERDA to make changes in the procurement procedures and methods. Rather, the Implementation Plan should require NYSERDA to obtain advance approval by the Commission of any proposed modifications to the

procurement methods. It is essential that any changes to the procurement procedures and methods be noticed for public comment prior to implementation by NYSERDA. In addition, the Commission, if appropriate, should schedule a public hearing at which NYSERDA could be required to provide the basis for requesting modifications to the existing procedures.

Also, Section 2.b (“2006-2009, Refinements and Transition”) should be modified. The Commission should clarify that if successive solicitations are “refined or redesigned,” any proposed changes to the solicitation process: (1) will be subject to a public notice and comment period; and (2) must be approved by the Commission prior to implementation.

The public notice and comment period would place, *inter alia*, renewable resource developers and customer representatives on notice of proposed modifications to the process. It also would ensure that the procurement process is open and transparent, as is warranted in this circumstance, particularly in light of the millions of dollars that customers are being forced to pay to fund renewable projects.

### **3. Procurement Situations**

#### **a. Existing Maintenance Tier Projects**

The draft Plan states that the Commission is considering two approaches for the Maintenance Tier – a case-by-case approach and competitive bidding. (Plan at 9.) Those approaches are not mutually exclusive. A case-by-case analysis, based on each project’s costs, could be utilized. Then, only if there were too many Maintenance Tier projects, would competitive bidding be needed.

In its September 24<sup>th</sup> Order, the Commission held that for the Maintenance Tier projects there would be “a case-by-case process ... to seek financial assistance.” (September 24<sup>th</sup> Order at 34.) The case-by-case process would require a showing that a project needs a RPS subsidy “in order to remain financially viable.” (*Id.* at 44.)

However, it is important to recognize that there is no specific “set-aside” for the Maintenance Tier. Thus, NYSERDA may have to select among the projects that are eligible for the RPS Maintenance Tier subsidies. Multiple Intervenors supports the Plan’s proposal that Maintenance Tier projects compete head-to-head with new resources. (Plan at 9-10.) The cost of the RPS to consumers would be minimized by implementing a process that requires the selection of the least-cost resources.

#### **b. Main Tier Projects**

The Plan discusses three “procurement situations that may occur with Main Tier projects.” (Plan at 10.) However, the third situation – “small Main Tier projects” -- was not included in the Commission’s September 24<sup>th</sup> Order. In that Order, the Commission held that facilities that became operational after January 1, 2003 and those that have obtained financing or are under construction are eligible for a RPS subsidy as Main Tier projects.

Importantly, the “Eligibility” section of the Commission’s September 24<sup>th</sup> Order does *not* discuss “small Main Tier projects.” (*See* September 24 Order at 7-8.) Rather, the Commission established only two tiers of eligible resources. The first tier, the Main Tier, “shall consist primarily of medium to large scale electric generation facilities that we expect to compete against each other on a kWh price premium basis for RPS funding.” (*Id.* at 7.)

The other tier is the SBC-like tier, appropriate for “‘behind-the-meter’ facilities that are not generally economically competitive with the Main Tier technologies.” (*Id.*)

Thus, there should not be a separate category for “small Main Tier projects” in the final Plan. Those projects would be more expensive than other Main Tier projects. (*See* Plan at 12.) Thus, inclusion of a separate category for such projects would increase, not minimize, the cost of the RPS to end-use consumers. This additional cost is not reflected in cost analysis annexed to the Commission’s September 24<sup>th</sup> Order. The Commission has not authorized a special category or “set-aside” for “small Main Tier projects” and, consequently, this proposal in the draft Plan is inconsistent with the September 24<sup>th</sup> Order and should not be adopted.

The Plan states that the Commission is considering allowing NYSERDA “to use its discretion in choosing among alternative procurement models for formats.” (Plan at 13.) Multiple Intervenors opposes allowing NYSERDA to select the procurement model that is utilized. The Commission should select the appropriate procurement model. The RPS was established by the Commission. The Commission is requiring customers to fund the RPS program and, therefore, the Commission should be the entity responsible for designing and approving the procurement process. The Commission should analyze the comments it receives, commence a collaborative process, if necessary, and then select a procurement model for the Main Tier resources and a model for the SBC-like Tier.

Multiple Intervenors recommends that the Commission require NYSERDA to issue a renewables RFP that is tailored to focus on price and require the resources to operate

on-peak, when feasible operationally. This would ensure that the resources are selected not only on a least-cost basis, but also without negatively impacting competitive markets.

Multiple Intervenors also urges the Commission to require RPS eligible resources to provide specific cost information. While the provision of such cost information may be unusual in competitive energy markets, it must be remembered that the RPS program is not part of the market design but, rather, is a regulated subsidy program intended to achieve a particular purpose. Generators seeking to receive regulated, customer-funded subsidies should be required to provide whatever cost information is deemed necessary to help minimize the cost of the RPS to consumers.

Maintenance Tier resources should be required to provide specific cost information. The information would include capital costs, operation and maintenance costs, as well as a proposed rate of return on equity. The generator would include the anticipated capacity factor for the facility and the revenue per kilowatt-hour that would be required to construct and operate the plant. Each project would have a different revenue requirement, depending on its cost structure. Then, the resources would be selected on a least-cost basis.

The virtue of a cost-based premium is that it does not permit the renewable resource provider to earn anything more than a fair profit based on its cost structure. Any subsidy payments that are greater than a developer's cost of service would provide excessive profits to renewable resource providers and result in consumers incurring excessive costs. A cost-based subsidy also would ensure that new renewable resources that do not require any subsidies do not receive a subsidy.

The Commission should reject any proposal that would permit renewable resources to be paid more than their costs. The RPS is a subsidy program, not a competitive market. Thus, each subsidy should be limited to the minimum amount necessary for the project to be built. Multiple Intervenors urges the Commission to require NYSERDA to utilize a procurement approach for the Maintenance Tier based on each bidder's costs. This would ensure that the RPS subsidy is no greater than is absolutely necessary for a project to be built.

If, *arguendo*, the Commission does not accept Multiple Intervenors' cost-based procurement model, then it should pay the renewable resources their bid price, not a market-clearing or uniform price. The record in this proceeding demonstrates that as-bid premiums, not premiums based on a market clearing price, would be the least-cost procurement approach relying on auctions. A market-clearing approach would result in higher payments to generators and would increase the cost to consumers without providing any additional benefits. The market-clearing approach would cost consumers an estimated \$762 million (2003 \$) between 2006 and 2013. In contrast, the as-bid approach would cost an estimated \$582 million (2003 \$) over the same period. Significantly, the additional cost to consumers associated with the market-clearing approach would not result in any benefits to consumers.

Finally, the Commission should not adopt a standard offer approach. Such an approach could result in developers receiving a greater subsidy than what they truly need. The Plan recognizes "the challenges posed by the standard offer format." (Plan at 19.)

#### **4. Product Pricing and Terms**

Renewable resources that are selected to participate in the RPS should receive a customized subsidy based on a CFD. The use of a fixed price or standard offer procurement approach should not be adopted by the Commission. Each subsidy should be customized based on the cost of development for the particular renewable resource project. Any revenues received by the project in excess of the amount needed to cover the developer's cost of service and a reasonable rate of return on equity must be returned to consumers. This procurement approach would ensure that projects that do not need subsidies in any given year will not receive them.

The subsidy would be the difference between the payments received by the facility from the NYISO (or other buyers) for energy, capacity and ancillary services and the facility's cost of service. Those revenues plus the subsidy would be the ceiling price for that unit. Thus, if the payments from the NYISO exceed the subsidized price on an annual basis, then the consumers that are funding the RPS would receive a credit. To provide a developer with a subsidy that is larger than the amount that is needed to construct and operate the project would result in a windfall and increase unnecessarily the cost of the RPS to consumers.

Moreover, a CFD procurement approach would reduce the amount paid to the developers. Because the risk of low market prices would be shifted to consumers, the developer's cost of debt and cost of equity for each project should be less than if another approach is used. The CFD procurement approach would provide developers with a degree of revenue certainty while, at the same time, ensuring that consumers do not subsidize

renewable resource projects any more than is necessary, and not at all in those situations where no subsidy is needed.

Any proponent of a fixed premium approach should consider the “lessons learned” from New York State’s Six-Cent Law. Prior to its repeal, the Six-Cent Law required the State’s electric utilities to purchase electricity from qualifying non-utility generators at \$0.06 kWh or the utility’s avoided costs, whichever was greater. This approach resulted in the purchase of electricity at a cost well in excess of avoided costs, at a cost to consumers in the billions of dollars. A fixed premium, determined today, based on market price forecasts could have the same result. Experience has taught us that one thing is a certainty – whatever the forecasted price is, it will be wrong. In order to avoid saddling consumers with excess costs that would be paid over long-term contracts, CFDs should be utilized in the initial procurement process.

## **V. DESIGN OF ON-GOING MONITORING AND EVALUATION PROGRAM**

NYSERDA’s monitoring and evaluation (“M&E”) activities should be limited to the evaluating of the effectiveness (*i.e.*, cost, location of RPS resources) of the RPS program. Requiring NYSERDA to perform other evaluations would increase the cost of the RPS to consumers. Thus, the Commission should not request NYSERDA to analyze, for instance, the role of future demand-side management initiatives or the RPS interaction with the Regional Greenhouse Gas Initiative.

Indeed, prior to authorizing NYSERDA to perform any M&E activities, the Commission should establish an M&E budget. The budget should be capped, and then,

based on the available funding, NYSERDA should prioritize the M&E activities. The M&E activities relating to the procurement process and cost-effectiveness of the RPS program are the most important.

## CONCLUSION

For the reasons stated herein, Multiple Intervenors urges the Commission to approve an RPS Implementation Plan that minimizes the RPS premiums paid by consumers. A cost-based procurement model should be implemented. NYSERDA should be required to use an RFP approach, tailored to focus on price and terms that are necessary in order to ensure that the RPS does not impact negatively the competitive electricity markets. If, *arguendo*, the Commission does not adopt a cost-based procurement method, it should use an as-bid approach.

Dated: December 27, 2004  
Albany, New York

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Comments on ID No. PSC-45-04-00013-P 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:           December 27, 2004  
                  Albany, New York

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Linda M. Haskell

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