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November 8, 2004

VIA HAND DELIVERY

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

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

Dear Secretary Brillling:

In accordance with 16 NYCRR Section 3.7(c), Multiple Intervenors hereby files an original and 25 copies of the “Reply of Multiple Intervenors to the Small Hydro Group’s Petition for Rehearing.” A copy has been served on each to the proceeding through the RPS contact list.

Very truly yours,

COUCH WHITE, LLP

Barbara S. Brenner

Barbara S. Brenner

BSB/sem
Enclosures
cc: RPS Contact List (via email w/enc.)
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**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

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

Case 03-E-0188

**REPLY OF MULTIPLE INTERVENORS TO THE SMALL HYDRO
GROUP'S PETITION FOR REHEARING**

Dated: November 8, 2004

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PRELIMINARY STATEMENT

In accordance with 16 NYCRR § 3.7(c), Multiple Intervenors, an active party in this proceeding, hereby submits its Reply to the Small Hydro Group's request for clarification and/or reconsideration insofar as the Small Hydro Group seeks reconsideration of the Commission's determination that certain customers should be exempt from the renewable portfolio standard ("RPS") surcharge.¹ For the reasons set forth below, the Small Hydro Group's request that the Commission reverse its determination with respect to this exemption should be denied. Multiple Intervenors has demonstrated in this proceeding that the New York Power Authority ("NYPA") economic development program customers and customers that are exempt from the system benefits charge ("SBC") should be exempt from the RPS surcharge. *See* "Comments of Multiple Intervenors," dated September 26, 2003, at pages 17-20; "Multiple Intervenors' Brief on Exceptions," dated June 23, 2004, at pages 33-42; and "Multiple Intervenors' Brief Opposing Exceptions," dated July 8, 2004, at pages 14-17.

STATEMENT

By letter dated October 25, 2004, the Small Hydro Group requested clarification and/or reconsideration of portions of the Commission's September 24, 2004 "Order Regarding Retail Renewable Portfolio Standard" ("September 24 Order"). The Small Hydro Group stated in its letter that it seeks "clarification of the order, insofar as the

¹ Multiple Intervenors also received a Petition for Clarification filed by the New York State Energy Research and Development Authority and a letter motion for reconsideration filed by Ridgewood Renewable Power L.L.C. Multiple Intervenors is not replying to those motions.

order, as issued, presents several barriers to the continuing existence of small hydroelectric power projects in New York State.” (SHG letter at 1.) The letter does not specify by page number or section which portions of the Order the Small Hydro Group seeks to have either clarified or reconsidered. Nor does the letter specify the relief that the Small Hydro Group is seeking. Indeed, the letter states only that the Small Hydro Group “has concerns” with certain areas of the Commission’s Order. (SHG letter at 2.)

However, the Small Hydro Group’s letter does include several statements pertaining to the exemption of “large industrial customers” from the RPS surcharge. The letter states that a statewide renewables goal “should be supported by all consumers.” (SHG letter at 2.) Although the letter does not specifically request that the Commission eliminate the exemption that is set forth in the September 24 Order, it argues that the exemption is improper. But, the Small Hydro Group fails to demonstrate that the Commission’s determination is affected by an error of law or fact. Indeed, the Small Hydro Group ignores the Commission’s grounds for exempting certain customers from the RPS surcharge, namely that it would be counterproductive to impose the RPS surcharge on customers that participate in economic development programs. (September 24 Order at 55.) The letter simply states that “[i]t makes no sense that large industrials are exempted from this [RPS] charge...” (SHG letter at 2.)

The Small Hydro Group’s request for clarification and/or reconsideration should be denied because it is procedurally and substantively defective. The Small Hydro Group did not raise the exemption issue in its Brief on Exceptions. Rather, for the first time in this proceeding, the Small Hydro Group argues on rehearing that large industrial

customers should not be exempt from the RPS surcharge. (*See* SHG letter at 2.) Having failed to raise the issue of the exemption of NYPA customers in its Brief on Exceptions, the Small Hydro Group has waived its objection. Moreover, in its letter, the Small Hydro Group does not even allege, let alone demonstrate, an error of law or fact or that new circumstances warrant a different determination. Thus, the request for reconsideration should be denied on procedural grounds.

However, even if, *arguendo*, the Small Hydro Group's letter were not procedurally defective, which it is, the request should be denied on substantive grounds. The Commission harmonized the rate recovery associated with a RPS with New York's economic development policies. The Commission recognized that in order to further the State's economic development goals consumers that participate in economic development programs which are intended to reduce the price of electricity must not be required to pay a RPS surcharge. The Commission found that to impose a RPS surcharge on businesses that participate in economic development programs would undermine the State's economic development initiatives by increasing the price of electricity for these businesses. Thus, the request of the Small Hydro Group also should be denied on substantive grounds.

POINT I

THE SMALL HYDRO GROUP'S OBJECTION TO THE EXEMPTION FOR CERTAIN CUSTOMERS FROM THE RPS SURCHARGE SHOULD BE DENIED ON PROCEDURAL GROUNDS

In its letter, the Small Hydro Group states that “it makes no sense that large industrial customers are exempted from this [RPS] charge...” (SHG at 2.) The Small Hydro Group states that the RPS “should be supported by all consumers.” (*Id.*) However, as set forth in more detail below, the Small Hydro Group has waived any objection to the exemption for NYPA customers from the RPS surcharge because the Small Hydro Group failed to raise the issue in its Brief on Exceptions. As to its objection to the exemption for other customers that are currently exempt from the SBC contribution, the Small Hydro Group’s petition also is procedurally deficient. It does not specify an error of law or fact or any new circumstance that warrants rehearing.

A. Exemption For NYPA Customers

In the Recommended Decision, Administrative Law Judge Stein recommended that the RPS be designed “such that NYPA customers do not contribute to the premiums.” (RD at 71.) Judge Stein found that “...adding costs to a priority program for economic development may have adverse consequences disproportionate to the benefits.” (*Id.* at 70.) The Small Hydro Group filed a Brief on Exceptions and a Brief Opposing Exceptions after the Recommended Decision was issued in this proceeding. In its Brief on Exceptions, the Small Hydro Group stated that “it concurs with many of the conclusions in the RD” and that

“[t]he recommendations by ALJ Stein in the RD are a significant first step in the development of a RPS in New York State.” (SHG Brief on Exceptions at 9-10.) In its Brief on Exceptions, the Small Hydro Group addressed several issues, namely renewable attributes, standard interconnection agreements, market barriers, long-term standard contracts, migration, and SBC-like tiers. Nowhere in its Brief on Exceptions did the Small Hydro Group even mention, let alone except to, the recommendation of Judge Stein that NYPA customers be exempt from the RPS surcharge.

Nor did the Small Hydro Group address the issue in its Brief Opposing Exemptions. Multiple Intervenors supported Judge Stein’s recommendation that NYPA industrial customers be exempt from the RPS surcharge in its Brief on Exceptions and urged the Commission not only to adopt Judge Stein’s recommendation to exempt NYPA economic development customers, but also to extend the exemption to flex-rate contract customers. (MI Brief on Exceptions at 33-42). Nonetheless, the Small Hydro Group did not mention the issue of the exemption in its Brief Opposing Exceptions. The Small Hydro Group did not address any of Multiple Intervenors’ arguments in its Brief on Exceptions. Rather, the Small Hydro Group addressed only the exceptions of Ridgewood Renewable Power, Inc., the Independent Power Producers of New York, Inc., the Joint Utilities and expressed concerns about reliability.

Having failed to raise the issue of the exemption of NYPA customers in its Brief on Exceptions, the Small Hydro Group has waived its right to raise the objection on rehearing. Both the Commission’s regulations and case law prohibit the Small Hydro Group

from raising the issue of exemption of NYPA customers on rehearing. The Commission's regulations specifically provide that:

A party's failure to except with respect to any issue shall constitute a waiver of any objection to the recommended decision's resolution of that issue. If the Commission adopts the recommended resolution, a party that had not excepted may not seek a different resolution of that issue on rehearing.

16 NYCRR § 4.10(d)(2). In *Citizens for the Hudson Valley v. New York State Board on Electric Generation Siting and the Environment*, 281 A.D.2d 89, 94 (3d Dept 2001), the Appellate Division held that 16 NYCRR § 4.10(d)(2) is a "regulatory requirement that a party take exception to the Recommended Decision as a pre-requisite to raising arguments in a petition for rehearing." See also *New York Institute of Legal Research v. New York State Board on Electric Generation Siting and the Environment*, 295 A.D.2d 517, 518 (2nd Dept 2002).

In this proceeding, the Administrative Law Judge recommended that the NYPA customers be exempt from the RPS surcharge. (RD at 71.) The Commission adopted the recommended resolution of this issue. Thus, pursuant to 16 NYCRR §4.10(d)(2), the Small Hydro Group has waived its objection to the NYPA customers' exemption from the RPS surcharge.

**B. Exemption For Other Customers That Do Not Pay
The SBC**

In its letter seeking clarification or reconsideration, the Small Hydro Group states that it objects to the exemption for "large industrial customers" and that the RPS goal "should be supported by all consumers." (SHG at 2.) However, the Small Hydro Group

does not allege, let alone demonstrate, that the Commission has committed an error of law or fact or that new circumstances warrant a different determination on the issue of the exemption.

The Commission's regulations provide that:

Rehearing may be sought only on the grounds that the Commission committed an error of law or fact or that new circumstances warrant a different determination. A petition for rehearing shall separately identify and specifically explain and support each alleged error or new circumstance said to warrant rehearing.

16 NYCRR §3.7(b). In its September 24 Order, the Commission articulated the grounds for exempting certain customers, i.e. those who do not currently pay the SBC, from the RPS surcharge. The September 24 Order states, at page 55, that:

Such customers are generally provided electricity at reduced prices to achieve economic development objectives such as sustaining or creating jobs. We recognize that requiring such customers to pay for the objectives of the RPS would be counterproductive to economic development goals.

Nowhere in its letter does the Small Hydro Group even mention the Commission's rationale. Nor does the Small Hydro Group demonstrate that the Commission's determination is legally or factually incorrect or that new circumstances warrant a different determination. Rather the Small Hydro Group merely rehashes arguments that had been raised by other parties before the Administrative Law Judge and the Commission and rejected.

For example, in its letter, the Small Hydro Group states that “[a] statewide goal should be supported by all consumers.” (SHG letter at 2.) But this argument was rejected by both Judge Stein and the Commission. In the Recommended Decision, Judge

Stein specifically rejected the argument that “fairness requires spreading the cost of the RPS among all electric customers.” (RD at 70.) And, in the September 24 Order the Commission rejected the arguments of the Joint Utilities and RETEC that everyone should pay since everyone is going to benefit. (September 24 Order at 54-55.)

Because the Small Hydro Group did not allege any error of law or fact or present any new circumstances to support its position, it has not established grounds for rehearing. *See Proceeding on Motion of the Commission to Establish Gas Transportation Rates for Distributed Generation Technologies*, 2004 N.Y. PUC LEXIS 216 (June 8, 2004). The Small Hydro Group’s motion should be denied.

POINT II

THE COMMISSION PROPERLY DETERMINED THAT CUSTOMERS CURRENTLY EXEMPT FROM SBC CONTRIBUTIONS SHOULD BE EXEMPT FROM THE RPS SURCHARGE

In its September 24 Order, the Commission harmonized the RPS with the State’s economic development policies. The State Energy Plan recognized the importance of reducing energy costs to attract, retain, and expand business in New York.² The price of electricity is a matter of particular importance to businesses. The State Energy Plan concluded that “[e]nergy prices tend to be important factors in business location and expansion decisions. . . .”³ The State Energy Plan reports that:

² New York State Energy Plan and Final Environmental Impact Statement (June 2002) (“State Energy Plan”) at 2-15.

³ *Id.* at 2-16.

In a national survey of businesses that primarily included manufacturers, 81% of the respondents considered energy cost and availability to be either an important or very important site-selection factor. Given the relative cost of energy in New York, manufacturers in the State regard energy costs as being even more significant than is indicated by the national survey.⁴

The State Energy Plan recognizes the importance of economic development programs that have been developed in the State to attract and retain business. It cites to the NYPA programs and the Commission's flex-rate contract program.⁵ As the State Energy Plan states, the cost of energy remains an obstacle to overcome in New York's efforts to retain, expand and attract business.⁶ In fact, the State Energy Plan concludes that:

New York's success in working with businesses that could relocate to other states frequently depends on the availability of discounted, low-cost energy and incentives offered through various State and local government and utility-sponsored programs. . . [E]ffective energy-related economic development programs for businesses will continue to be necessary to help preserve and expand the State's economic base.⁷

The Commission correctly held that NYPA economic development program customers should be exempt from the RPS surcharge. As the record in this proceeding demonstrates, "NYPA customers' load would not see the price reductions, price suppression, caused by the renewables." (Tr. at 546; *see also* 548.) Because NYPA customers have fixed long term contracts, they will not benefit from any price suppression that may occur as the

⁴ *Id.* at 2-16 (footnote omitted).

⁵ *Id.* at 2-17, 2-22.

⁶ *Id.* at 2-23.

⁷ *Id.* at 2-24.

result of implementing a RPS. Without the RPS surcharge exemption, all NYPA customers would experience an increase in the price that they pay for electricity.

New York's economic development agency, the Empire State Development Corporation ("ESD"), relies on NYPA's low-cost electricity "as one of the state's most valuable assets in promoting business and job growth."⁸ According to Charles A. Gargano, ESD Chairman and Commissioner, the NYPA economic development programs protect and create more than 420,000 jobs statewide.⁹ Chairman Gargano has stated that "NYPA power is both affordable and reliable and can be an effective economic development tool to attract or retain companies that provide our citizens with well-paying jobs."¹⁰

The NYPA Replacement Power, Expansion Power, Economic Development Power and Power for Jobs programs are designed to promote economic development by providing low-cost electricity to businesses. In order to achieve the goal of these programs, the Commission properly adopted ALJ Stein's recommendation that NYPA economic development program customers be exempt from the RPS surcharge.

The Commission also correctly exempted other industrial customers from the RPS surcharge. The Commission's grounds for exempting these customers was the same as for exempting NYPA customers. The Commission exempted other industrial customers who do not pay the SBC because they participate in economic development programs. These programs are intended to retain and attract business. The Commission has recognized that

⁸ New York Power Authority 2002 Annual Report, at 15.

⁹ *Id.*

¹⁰ *Id.*

“flex rate contracts remain a valuable tool for promoting economic development through the retention and attraction of business customers.” Increasing the cost of doing business in New York State is antithetical to the State’s economic development goals.¹¹ The Commission correctly exempted flex-rate contract customers that do not pay the SBC from a RPS surcharge. The Small Hydro Group’s motion for reconsideration of the Commission’s determination must be denied.

¹¹ As Governor George Pataki has stated, “[w]e know that enacting tax cuts and lowering the cost of doing business is a proven way to create new jobs.” “Governor unveils workers’ comp proposals at council event,” available at www.bcnys.org (March 29, 2004 at 1).

CONCLUSION

For the reasons set forth herein, the New York State Public Service Commission should deny the Small Hydro Group's request for clarification and/or reconsideration insofar as the Small Hydro Group seeks reconsideration of the Commission's determination that customers that do not currently pay the system benefits charge should be exempt from the renewable portfolio standard surcharge.

Dated: November 8, 2004
Albany, New York

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing “Reply of Multiple Intervenors to the Small Hydro Group’s Petition for Rehearing” has been served via electronic transmission upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated: November 8, 2004
 Albany, New York

Sharon Matthews

Sharon Matthews

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