

**REPLY COMMENTS OF
THE RENEWABLE ENERGY TECHNOLOGY AND
ENVIRONMENT COALITION¹**

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

October 31, 2003

¹ RETEC members include: American Lung Association of New York State; American Wind Energy Association; Community Energy; Fuel Cell Energy, Inc.; Hudson River Sloop Clearwater; Natural Resources Defense Council; New York Lawyers for the Public Interest; New York League of Conservation Voters; New York Public Interest Research Group; New York Renewable Energy Coalition; New York Solar Energy Industries Association; Pace Energy Project; Plug Power; PowerLight; Public Utility Law Project; Riverkeeper; Safe Alternatives for Energy Long Island, Scenic Hudson; Sierra Club Atlantic Chapter; Solar Energy Industries Association; Sustainable Energy Developments, Inc.; and Union of Concerned Scientists.

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I. Summary of Reply Comments

The Renewable Energy Technology and Environment Coalition (“RETEC”) is pleased to be able to provide this reply in response to the comments submitted by the active parties to this case on September 26, 2003.² RETEC continues to support the rapid implementation of a renewable portfolio standard (“RPS”) in New York. In general, the parties’ initial comments in this proceeding reflect the hard work that has been put by all into the working group process to design an effective, workable least-cost RPS that will produce substantial environmental and economic benefits. This hard work has produced substantial consensus in many areas that were once contentious, e.g. biomass, and has focused and narrowed many other remaining areas of difference, e.g. the individual v. central procurement mode.

RETEC restricts its comments here to responses to particular comments by other active parties. For a complete representation of our positions and justifying arguments, please see our previous comment submissions. In these reply comments, we focus in particular on several key remaining areas of disagreement with other active parties. These include: calls for delay in implementation based on so-called reliability concerns; calls

² RETEC members include: American Lung Association of New York State; American Wind Energy Association; Community Energy; Fuel Cell Energy, Inc.; Hudson River Sloop Clearwater; Natural Resources Defense Council; New York Lawyers for the Public Interest; New York League of Conservation Voters; New York Public Interest Research Group; New York Renewable Energy Coalition; New York Solar Energy Industries Association; Pace Energy Project; Plug Power; PowerLight; Public Utility Law Project; Riverkeeper; Safe Alternatives for Energy Long Island, Scenic Hudson; Sierra Club Atlantic Chapter; Solar Energy Industries Association; Sustainable Energy Developments, Inc.; and Union of Concerned Scientists. This proposal is a consensus document submitted on behalf of all RETEC members for consideration as a whole. Individual member organizations reserve the right to take different positions on individual components of the proposal on a stand-alone basis or in other policy arenas but support the RETEC proposal as a whole on a consensus basis.

for delay based on cost concerns; challenges and criticisms of our proposals for incentives for emerging technologies; certain features of the eligibility criteria, particularly in the areas of hydropower and biomass; and criticism of our proposal for a central procurement model.

We also note that there are a number of themes running through the comments of those parties who continue to oppose any form of mandatory RPS and those who appear to be calling for substantial delay in moving forward. We briefly summarize these themes here.

First, some parties try to characterize the RPS as a rigid subsidy rather than a flexible market-based tool. For example, the Joint Utilities (“JU”) quote from an AWEA document on subsidies to argue that the wind industry receives a high level of subsidy that should not be duplicated by the RPS. JU Initial Comments at 30. The JU selectively quote from an Alliance to Save Energy report by restating its finding that in 1989 \$900 million was channeled to renewable energy sources. However, the full quote reads: “Energy subsidies in 1989 favored mature, conventional energy supply resources...\$21 billion went to fossil fuels, \$11 billion to nuclear, and \$900 million to all renewable energy sources including wind.” The text ends with the conclusion that “...conventional technologies received almost 90% of the subsidies.”³ In other words, the RPS should be viewed not as a unique subsidy but as a step toward moving renewable energy to a level playing field with conventional technologies. See pages 24-25, 35-36 and 38-39 below.

Second, as discussed more fully in Section IX, while RETEC concurs with parties that reliability is a fundamental concern, we do not believe the issue presents a serious

³ See The Most Frequently Asked Questions About Wind Energy, AWEA with DOE, NREL, 2002, p.25. <http://www.awea.org/pubs/documents/FAQ2002%20-%20web.PDF>

obstacle to the full and timely implementation of an RPS. Rather than adapt RPS requirements to parties' prejudgments about the RPS and its impacts on reliability, all that is necessary at this point is an acknowledgement that these issues must and are being studied and that reliability and market rules can and must be adjusted to accommodate new renewable development. Those raising the issue of reliability are doing so primarily as a cover or alternative name for system cost and market rule considerations that are correctly within the NYISO's domain. The NYISO has urged the Commission to proceed to design and adopt the RPS, indicating that it will take whatever steps are necessary to adjust the electric system rules to accommodate further renewables. See NYISO letter to Judge Stein, June 9, 2003 ("Separate and apart from the outcome of the RPS, and consistent with its paramount legal obligation, however, the NYISO is prepared, and will take whatever steps are necessary, to secure the safety and reliability of the New York transmission grid if and when intermittent resources are added in significant amounts in the future. The NYISO respectfully suggests, therefore, that there is no need to delay this proceeding now solely on the basis of any reliability issues that may be presented by a final RPS.") In contrast to the NYISO, whose structure guarantees some degree of independence and neutrality, it should be recognized that the positions taken by the New York State Reliability Council ("NYSRC") reflect the interests and positions of the transmission owners, power companies and large electricity users that dominate its governance.⁴ See Section IX.A below.

⁴The NYSRC is governed by a thirteen-member Executive Committee, composed of six representatives of transmission owners (the five IOU utilities, plus LIPA), one representative of large consumers (Multiple Intervenors), one representative of municipal and cooperative systems, one representative of wholesale sellers (IPPNY), and four unaffiliated persons. See <http://www.nysrc.org/about.html> "Transmission owners. . . have a larger proportional share of control of the NYSRC than transmission owners have on the

Third, several parties have raised misconceived legal objections to aspects of this proceeding. Multiple Intervenors argues that evidentiary hearings may be required in this proceeding. Central Hudson claims that the Commission is not following state environmental review requirements, despite the fact that Staff is in fact preparing a draft environmental impact statement. RETEC responds briefly to these legal arguments in Section X of these comments. See Section IX.B below.

II. Comment on the Revised Working Objectives

RETEC believes many of the active parties have supported the working objectives for the most part. We continue to support the Working Objectives with the caveats and suggestions provided in our initial comments and have no response comments.

III. RETEC Straw Proposal

The RETEC Straw Proposals, as previously sent to active parties, are contained in the appendices of our initial comments. Our replies to comments of others are contained below under the appropriate subject headings.

IV. Eligibility

A. Baseline

RETEC continues to support the Staff's baseline compromise. See RETEC Initial Comments at 8. The New York State Consumer Protection Board ("CPB"), New

NYISO's three committees." Restructuring New York's Electric Power Industry: A Progress Report, Committee on Energy, the Record of the Association of the Bar of the City of New York 56, 65, Vol. 56, No. 1 (Winter 2001).

York State Department of Environmental Conservation (“DEC”) and the New York State Attorney General’s Office (“Attorney General”) also support the baseline compromise. CPB Initial Comments at 7; DEC Initial Comments at 5; Attorney General Initial Comments at 21-22. Multiple Intervenors (“MI”) and JU objected that the compromise baseline is overly vague and commented that the baseline should include all “waste to energy” (“WTE”) facilities. MI Initial Comments at 30; JU Initial Comments at 26. In essence, these parties are saying that no compromise is possible on this issue and that the issue of RPS eligibility must be addressed with respect to existing facilities. While RETEC disagrees with this position, if the Administrative Law Judge believes it necessary to address the eligibility of facilities included in the RPS, we respectfully submit that all existing WTE facilities should be excluded, for all the reasons discussed in the RETEC Initial Comments. Staff’s compromise baseline could then be adjusted simply by subtracting out the portion of that baseline that Staff has attributed to existing WTE facilities.

MI also objects that “the baseline should not be considered a static number,” and proposes that the baseline be adjusted annually to reflect the addition of renewable resources “that do not require a RPS subsidy.” MI Initial Comments at 30. But a baseline is necessarily static and MI’s plan to limit RPS eligibility to new renewables projects that “need” a “subsidy” and those that do not is unworkable and unnecessary. Finally, JU asks that Staff list those facilities that are included in the baseline to avoid double counting facilities in both the baseline and the RPS. RETEC agrees that facilities should not be both included in the baseline and eligible for participation in the program. If the baseline compromise is not adopted, a listing of the facilities covered by the

baseline may be appropriate. However, limiting participation in the RPS to new facilities, as RETEC proposes, serves much the same purpose.

B. Requirement Levels

See RETEC Initial Comments at 9-13. RETEC has no reply comments on this issue at this time.

C. Target Resource Eligibility

RETEC addressed the issue of RPS eligibility at length in its Initial Comments. See RETEC Initial Comments at 13-31. Based on our review of the other parties' Initial Comments, there continues to be substantial consensus that the following technologies should be included as eligible for the RPS: biomass (as defined by the Biomass Working Group), fuel cells, solar power, tidal, and wind power. RETEC's reply comments will focus on 1) the differing general approaches to eligibility taken by some parties; and 2) those technologies whose eligibility are in dispute: chiefly, hydropower and WTE.

1. General Requirements

At the outset, RETEC reiterates three important eligibility principles for the New York RPS: only renewable energy should be eligible for the RPS; only new renewable energy facilities should be eligible for the RPS; and renewable energy resources behind the customer's meter should be eligible for the RPS.

a) Only Renewable Energy Should Be Eligible for the RPS.

Although this point should be superfluous, only renewable energy should be eligible for the New York Renewable Portfolio Standard. The RPS by definition is a focused policy tool designed to encourage renewable energy, not other forms of energy

resources, and the Commission’s Order Instituting Proceeding was very clear that the ultimate goal of this proceeding is to design an RPS policy. See Order Instituting Proceeding at 2. New York State Department of Public Service Staff (“Staff”) agrees with us on this basic point. Staff Initial Comments at 9. Some other parties, however, seek to bootstrap the RPS into a policy tool to encourage natural-gas technologies and other non-renewable technologies. The New York Power Authority (“NYPA”) even goes so far as to suggest that coal should be included in the RPS. This is a wholly inappropriate proposal (particularly coming from a New York State public authority), given that the impacts from mining coal alone are enough to make coal antithetical to the goal of the RPS, not to mention coal’s air pollution impacts, climate change impacts, and the fact that increased reliance on coal would reduce fuel diversity instead of increasing it. NYPA Initial Comments at 6.

The Initial Comments of the E Cubed Company, LLC (“E Cubed”), argue that eligibility decisions for the RPS should not be based on whether the technology is actually renewable or not. E Cubed Initial Comments at 5 (“[The RPS does not]... mean that only renewable resources are eligible”). Indeed, eligibility would have nothing to do with renewability, but would turn instead on a technology’s weighted contribution to any of seven criteria that E Cubed has devised as an “illustration,” which are loosely based on Judge Stein’s working objectives. By taking the “R” out of “RPS,” E Cubed turns this proceeding inside out. The working objectives are meant to guide decisions as to what kinds of renewable energy should be included in the RPS and how the RPS mechanisms should be designed: they are intended to augment, rather than supplant, the basic requirement of renewability, which is necessarily the sine quo non of eligibility in this

renewable energy proceeding. Furthermore, E Cubed acknowledges itself that its complicated and undefined criteria scoring system is “conceptual,” “arduous,” and “difficult.” E Cubed Initial Comments at 3, 6. Although it is framed as an “objective” process, each step of the process involves making highly subjective decisions by the stakeholders. Finally, E Cubed promotes its arcane stakeholder scoring system as a preferable alternative to having “policy makers” determine eligibility decisions. *Id.* at 6. RETEC submits, however, that it is very much the role of New York State policy makers to make the crucial decisions about eligibility in the RPS, rather than leaving it up to a show of hands by stakeholders.

b) Only New Renewables Should Be Eligible for the RPS.

Because the stated goal of the Commission in its Instituting Order was to increase the amount of renewable energy in New York, RETEC believes that only new renewables (as discussed in our initial comments) should be considered eligible. Other parties, including Staff, generally agreed with RETEC on this point, although the definition of “new” differs in the position of various parties. *See, e.g.* Staff Initial Comments at 10; Attorney General Initial Comments at 26.⁵ Also, several parties argue that an exception should be made for existing small hydro projects (e.g. Staff, small hydro owners),

⁵ RETEC defines “new” to include any facility installed and put into operation on or after January 1, 2000. RETEC Initial Comments at 14. The Attorney General takes the same position. Initial Comments of the Attorney General at 22 n. 49. Staff argues that because the amount of existing wind generation currently in New York is small, that it should all be defined as new and RPS eligible for administrative convenience. Staff Initial Comments at 10-12. The Consumer Protection Board argues that renewable resources developed before January 2003 should not be eligible for the RPS. CPB Initial Comments at 2. CPB’s approach is overly restrictive: recently installed renewable facilities deserve and require the support of the RPS. While RETEC does not object to Staff’s approach (which might require an adjustment of the baseline to avoid double counting), RETEC’s approach may also provide an appropriate middle ground. We also note that MI’s suggestion that the Flat Rock wind project be excluded from the RPS although it has not yet been completed is wholly without merit: by any definition, a project not yet completed must be considered “new” for purposes of RPS eligibility.

existing large hydro (NYPA) and biomass facilities. RETEC replies to these comments more fully in the eligibility section below.

MI argues that no newly built renewable facility or any renewable facility currently in development should be eligible. MI Initial Comments at 30. This argument fails to acknowledge not only the significant benefits these resources can provide in keeping with the intent and working objectives of the RPS but also is antithetical to MI's concern over costs. The wind project developers currently active in New York are most certainly here with the expectation that there will be an RPS to use as an incentive for financing. In fact, market uncertainty is the major barrier to securing financing for wind projects, and that uncertainty includes eligibility under the RPS. The Commission should state clearly and as soon as possible that all such wind farms in New York are eligible. Inclusion of newly built (e.g. put into operation after January 1, 2000) and proposed wind farms, which MI claims are currently competitive with conventional generation (although RETEC does not believe this to be true), within the RPS will drive costs down as newer projects will be forced to compete with these projects for RPS contracts.

c) Behind the Meter Resources Should Be Eligible for the RPS.

Once a resource is eligible, it should be eligible wherever it is connected to the grid including behind a customer's meter or a wholesale meter. In other words, RPS eligibility should be neutral as to the point of interconnection. We note a number of parties agreed with this position, including KeySpan, NYPA and E Cubed. KeySpan Initial Comments at 15; NYPA Initial Comments at 6-7; E Cubed Initial Comments at 10.

2. Hydropower

Staff, DEC, CPB and the Attorney General have a similar position to RETEC in calling for only low-impact hydropower to be eligible for inclusion in the RPS and DEC and the Attorney General also call for a case-by-case review that goes beyond simple permitting. Staff Initial Comments at 11; DEC Initial Comments at 6; CPB Comments at 8; Attorney General Initial Comments at 26-28. RETEC's initial comments provided detailed suggestions as to how the Commission could establish an easy to implement standard that would evaluate projects on a case-by-case basis building off of existing licensing.

Staff, however, commented that all run-of-river hydropower facilities less than 30 MW should be defined as "low impact." Staff Initial Comments at 11. While this approach has a seductive simplicity to it, RETEC continues to believe that plant size is a poor indicator of environmental impacts, particularly when it is used alone. Flow regimes and operations can make small projects have big impacts and big projects have small impacts. We continue to believe that the only way to truly know whether hydroelectric facilities should be considered "low impact" is to evaluate them using environmentally rigorous criteria in their site-specific river context. However, since development of new criteria or coming to consensus on adopting existing criteria will take time, perhaps more than a year, we suggest an interim (2-3 years) process for recognizing "low impact" hydroelectric facilities. This approach will qualify any hydropower project that had received a new FERC license in the post Electric Consumer Protection Act of 1986 ("ECPA") era or a similar open, transparent, and equally rigorous process. While not perfect, ECPA guarantees a reasonable degree of environmental protection, due process

and an equal consideration approach to power and non-power resources. Further, using post-ECPA licenses to identify qualifying hydropower plants would require minimal staff resources.

Staff also appears to suggest that all expansions of existing hydro should be deemed “low impact.” Again, RETEC believes that its proposed criteria properly address the issues raised by capacity additions, in a way that the simple formulation proposed by Staff does not. Finally staff also calls for a maintenance tier for project 5 MW and smaller with pre-1996 power purchase contracts that expire during the RPS. RETEC objects to the concept of a maintenance tier in general and to this approach specifically. As noted above, size is not a good indicator of environmental impact, so there is no guarantee that projects below 5 MW are good for New York’s environment. Furthermore the goal of the RPS should be to promote new renewables.

Other parties such as Reliant, Hydro-Québec, Tannery Island, NYPA and the Joint Utilities argue for blanket inclusion of all hydropower including existing plants. Indeed, NYPA appears to argue that its existing large hydropower plants should be double-counted by both inclusion in the baseline and inclusion for full eligibility in the RPS credits. The two main reasons given for this position are 1) that hydropower is based on a renewable resource and simply by virtue of this should be included, and 2) that hydropower is important for diversity. In support of these positions the Joint Utilities quote from the following two passages from National Association of Regulatory Utility Commissioners’ The Renewables Portfolio Standard: A Practical Guide (Rader and Hempling, 2001) (“NARUC Guide”). First, JU quotes this passage:

All renewables have significant benefits in several environmental categories. This feature could argue for extending eligibility to every renewable type.

NARUC Guide at 15. Second, JU quotes this passage:

If policy makers are interested in renewable energy to obtain related resource diversity benefits, they should define eligibility broadly.

NARUC Guide at 16.

However, JU has quoted the NARUC Guide very selectively. Indeed, the first paragraph quoted above actually reads in full as follows:

All renewables have significant benefits in several environmental categories. This feature could argue for extending eligibility to every renewable type. Environmental benefits and costs among renewables do vary significantly, however, which may warrant selectivity.

NARUC Guide at 15.

The second quote is also strategically chosen. The full paragraph reads:

If policy makers are interested in renewable energy to obtain related resource diversity benefits, they should define eligibility broadly. All types of renewables will diversify the existing electricity system in most parts of the country, which are now largely dependent on coal, gas, and nuclear power. An exception to this principle is that, where a state is served by large existing quantities of hydropower and where the policy goal is to diversify the resource base, hydropower should be excluded from eligibility. Achieving resource diversity also means that RPS eligibility should not extend to emerging technologies that use fossil fuels, although some states have allowed such extension.

NARUC Guide at 16.

The fact of the matter is that hydropower can have very significant impacts on river ecosystems and simply because the underling resource—water—is renewable, does not mean that the technology is sustainable or should be included in the RPS. To quote the National Association of Attorneys General:

It is ... deceptive to claim, directly or by implication, that a renewable energy source has no significant negative environmental impacts by sole virtue of the fact that it is renewable.⁶

The Commission should adopt the RETEC interim standards and begin the process of developing a case-by-case evaluation for hydropower.

3. Municipal Solid Waste

Significantly, DEC, Staff, and the Attorney General have each opposed inclusion of municipal solid waste (“MSW”) incineration as eligible for inclusion in the RPS. See DEC Staff Initial Comments at 6-9; DPS Staff Initial Comments at 11-13; Attorney General Initial Comments at 28-36. The clear and well-supported positions on this issue of these three crucial state agencies strongly support RETEC’s position with respect to MSW incineration.⁷

The Initial Comments submitted by the Integrated Waste Services Association (“IWSA”) add little new information and are, for the most part, a rehash of earlier IWSA submissions that have already been thoroughly rebutted by RETEC. Significantly, IWSA does not dispute the three central points made by RETEC both in its Initial Comments and in its previous submissions in this proceeding: 1) that MSW contains a substantial amount of non-biomass based material; 2) that New York’s existing WTE plants, on average, have higher emissions rates per unit of electricity produced than New York’s

⁶National Association of Attorneys General, Environmental Marketing Guidelines for Electricity (December 1999), p. 15.

⁷ Several other parties also commented on the MSW issue. The New York City Council also opposed inclusion of MSW incineration in the RPS. Comments of New York City Council at 2. Several other parties, including Multiple Intervenors and the Joint Utilities, supported including MSW incineration, apparently based on the mistaken notion (well rebutted in Staff’s Initial Comments and Cost Study at 29-30) that inclusion of MSW incineration will make RPS compliance cheaper. MI Initial Comments at 30; JU Initial Comments at 26 n. 19. Westchester County and several other representatives of local governments that currently host WTE facilities also support inclusion of WTE, in the apparent hope that RPS inclusion will help to reduce the high operating costs of these existing WTE facilities.

coal burning power plants for mercury and NOx; and 3) that New York City is a likely location for new WTE facilities. See RETEC Initial Comments at 20-21 and Appendix D. There are three areas in IWSA's comments, however, that necessitate a reply.

First, IWSA, pointing to a high recycling rate in one New York State community with a WTE facility, continues to suggest that deployment of WTE facilities somehow encourages recycling. IWSA Initial Comments at 5. This illogical conclusion is unsupported.⁸ In a report entitled Cutting the Waste Stream in Half: Community Record-Setters Show How, U.S. EPA identified eighteen communities across the United States with record-setting residential or municipal solid waste reduction levels.⁹ Of these communities, as Table 1 indicates, the vast majority do not employ waste incineration as a solid waste management technique. Indeed, EPA points out that one of the keys in building a cost-effective waste reduction program is having a flexible solid waste management system which allows the shifting of resources, and that "[t]his shifting of resources can be easier to accomplish if communities are not tied into capital-intensive or long-term arrangements, i.e. ownership of landfills and incinerators."¹⁰ Cutting the Waste Stream in Half at 41.

⁸ While it is heartening that Onondaga, New York has a high recycling rate, another New York State community utilizing WTE -- Cheektowaga, NY -- halted its recycling program altogether in January 2003, but continues to send its municipal solid waste -- including all its formerly recycled materials -- to the American Ref-Fuel WTE garbage incinerator in Niagara Falls, despite a provision in that facility's permit that prohibits it from accepting municipal solid waste from a community without a DEC approved recycling program. See Attachment 1 to RETEC Reply Comments (Jan. 3, 2003 letter from DEC Region 9 to Cheektowaga Town Supervisor) (objecting to town's decision to eliminate its recycling program and to send recyclable materials to the American Ref-Fuel WTE facility); Jan. 16, 2003 from DEC Region 9 to Cheektowaga Town Supervisor (advising that sending garbage to a WTE facility does not count as "recycling"); State Air Permit, American Ref-Fuel Co. of Niagara Falls.

⁹ U.S. EPA, Cutting the Waste Stream in Half: Community Record-Setters Show How (June 1999), available at <http://www.epa.gov/epaoswer/non-hw/reduce/r99013.pdf>.

¹⁰ Although the national figures cited by IWSA (based on IWSA's own surveys) state that average recycling rates in WTE communities are 5% higher than national average recycling rates, IWSA's numbers also indicate that 43% of communities with WTE recycle at the same or lower rates than the national

Table 1: WTE Usage in Communities with Record-Setting Waste Reduction Rates¹¹

Community	Population	Recycling Level ¹	Composting Level ¹	Total Waste Reduction ²	Are Programs Cost Effective ^{3?}	Is WTE Used? ⁴
Ann Arbor, MI	112,000	30%	23%	52%	Yes	No
Bellevue, WA	103,700	26%	34%	60%	NA	No
Bergen County, NJ	825,380	17%	32%	49%	NA	No
Chatham, NJ	8,289	22%	43%	65%	Yes	No
Clifton, NJ ⁵	75,000	16%	28%	44%	Yes	Yes
Crockett, TX	8,300	20%	32%	52%	Yes	No
Dover, NH	26,094	35%	17%	52%	Yes	No
Falls Church, VA	~10,000	25%	40%	65%	Yes	Yes
Fitchburg, WI	17,266	29%	21%	50%	Yes	No
Leverett, MA ⁶	1,908	31%	23%	53%	Yes	No
Loveland, CO	44,300	19%	37%	56%	No	No
Madison, WI	200,920	16%	34%	50%	Yes	No
Portland, OR	503,000	23%	17%	40%	Yes	No
San Jose, CA ⁷	873,300	19%	26%	45%	Yes	No
Seattle, WA	534,700	29%	20%	49%	Yes	No
Visalia, CA	91,314	16%	33%	50%	Yes	No
Worcester, MA	169,759	27%	27%	54%	NA	Yes

Notes: Figures may not total due to rounding. Ramsey County, MN, not included because data on residential waste generation and recovery not tracked separately from total municipal solid waste. All data represent the 1996 calendar year except for Ann Arbor (fiscal year 1996 data); Bergen County (1995); and Falls Church, Leverett, San Jose, and Visalia (all fiscal year 1997 data). Waste reduction levels above represent residential solid waste (RSW) only. In some cases, residential waste reduction levels largely represent rates for single-family households and exclude multi-family households, which are often served by private haulers.

- 1: The study recognizes composting as a form of recycling but treats it separately so that the costs and diversion levels of materials such as paper, bottles, and cans can be compared to the recycling of yard trimmings. Therefore, “Recycling Level” + “Composting Level” = “Waste Reduction Level.”
- 2: Waste reduction levels may differ from the EPA Standard Recycling Rate as defined in *Measuring Recycling: A Guide for State and Local Governments*. ILSR (which EPA contracted to do the report) excluded MRF rejects from recycling tonnages and included estimates of materials collected through container deposit systems for the communities in bottle bill states. Furthermore, materials recovered for reuse are included in both recycling and generation figures and backyard composting tonnage was included in the composting and generation figures for those communities that provided creditable data on the amounts of material handled this way.
- 3: Have net solid waste management costs per household served decreased as compared to a specific previous year (these years were chosen to reflect the period before waste reduction program implementation or a major program expansion or change) or can trash disposal fee increases wholly account for increased per household costs? See individual profiles for more information.

average. See IWSA Attachment 6 at 1 (“57% of the 98 WTE communities contacted for this investigation have a higher recycling rate [than the national average]”).

¹¹ The first six columns of this Table are directly based, with minor formatting changes, on: Cutting the Waste Stream in Half: Community Record-Setters Show How, EPA 1999, Table 1 and Table 3 (Columns 1, 3-6 are directly from Table 1 and population (column 2) is from Table 3), Record-Setting Residential Waste Reduction, at pages 3, 5. NRDC added the last column on whether the community uses WTE as a solid waste management tool and note 4 to the Table, using either information stated in the report or direct communications with the listed community representative. Ramsey County, MN, discussed in the EPA report but not listed in EPA’s Table 1, does utilize WTE.

- 4: The report discusses each community in detail. Often the particular means of waste disposal were indicated (incineration, landfilling, or both). Where this was not the case, the community was directly contacted to verify the means of waste disposal.
- 5: Clifton serves approximately 1,300 small businesses in its primarily residential trash and recycling programs. The reported rates include the total waste stream from 26,200 households and these 1,300 businesses and, as such, is not strictly residential.
- 6: The waste reduction level for Leverett includes an estimate of material composted at home because the community has no municipal composting program.
- 7: San Jose's residential waste reduction in FY97 was 45%; for single-family households it was 55%.

Second, IWSA argues that WTE emissions rates for some air pollutants, including dioxins, are lower than emissions rates for these pollutants from landfill gas ("LFG") and wood waste biomass facilities. IWSA Initial Comments at 4 and Attachment 4.

IWSA's emission rates estimates for landfill gas energy facilities are significantly skewed.¹² Roughly assuming 1000 MW of existing LFG capacity in the United States operating at a capacity factor of 0.8, an emission rate of 2.07E-05 lb/MWh for landfill gas (as assumed by IWSA) would yield 145 pounds of dioxins, or about 20 times the amount of the total EPA dioxin inventory in 1995. Even a conservatively high EPA LFG facility dioxin emission factor of 1.65E-09 lb/MWh¹³ is about 50 times lower than the WTE emissions rate cited in IWSA Attachment 4, and 12,000 times lower than the LFG emissions rate that IWSA uses. EPA data on total dioxin sources in the United States confirms that the total dioxin contribution of LFG energy facilities is small: in 1995, the most recent year for which EPA has published data, LFG facilities produced just 6/1000 of the dioxins produced by WTE facilities.¹⁴ See Attachment 2 to RETEC Reply

¹² IWSA does not provide documentation or specific references for the emission rates cited in its Attachment 4. IWSA also does not identify what type of LFG or biomass facility it is basing this comparison on.

¹³ This is based on the EPA Draft Dioxin Reassessment emission factor of 0.198 ng I-TEQ/m³ on an exhaust basis, which is high compared to more recent data. Conversion to exhaust basis and lbs/MWH assumes LFG High Heating Value of 500 Btu/ft³, reciprocating engine efficiency of 36%, LFG dry-F factor of 9350 ft³/mmBtu, 11% ambient O₂, and 4% exhaust O₂.

¹⁴ LFG facilities produced 7 grams I-TEQ (international toxic equivalents) of dioxins compared to 1250 gram WHO-TEQ (World Health Organization toxic equivalents). I-TEQ and WHO-TEQ are used to sum

Comments (EPA Inventory of Environmental Releases (grams/year) of I-TEQ DF from Known Sources in the United States for 1995 and 1987), taken from Database of Sources of Environmental Release of Dioxin-like Compounds in the United States (version 3.0.) EPA staff has indicated to us that the unpublished inventory for the year 2000 shows that biogas facilities emitted less than a gram TEQ per year. (See footnote 14 for a brief explanation of TEQ.) The same inventory indicates the contribution of dioxin emissions (in WHO-TEQ) from WTE had dropped significantly (to 79 grams per year), but remain tens of times higher than either LFG or biogas facilities.¹⁵

IWSA's comparison of WTE emissions rates to LFG emissions rates is also flawed in that IWSA fails to acknowledge the agreement reached by the Biomass Working Group on NO_x emissions. According IWSA's data, WTE emissions of NO_x are 5.6 lb/MWh. The working group agreed to limit eligibility of new landfill gas facilities to those with emissions below 2.90 lb/MWh in the near-term and 2.63 after 2008.¹⁶ IWSA's presentation of CO₂ emissions rates is also misleading. To understand the CO₂ impacts of WTE and landfill gas facilities, it is essential to look at the context of alternative waste management options. Reuse, reduction, and recycling are far preferable to either option from a CO₂ perspective.¹⁷ However in the context of current emissions, it is important to recognize that garbage buried 20 to 30 years ago is still producing methane emissions today. Methane is about 23 times more powerful at trapping heat in the atmosphere than

various types of dioxin-like compounds and are basically equal. For more information on TEQ see <http://www.ping.be/~ping5859/Eng/Glos.html>.

¹⁵ Personal communication, Sam Swanson Pace Energy Project, with EPA National Center for Environmental Assessment.

¹⁶ While RETEC does not support the inclusion of existing renewables in the RPS, the Biomass Working Group agreed that if existing plants are included, they should be limited to 3.0 lb/MWh.

¹⁷ U.S. Environmental Protection Agency, "Greenhouse Gas Emissions from Management of Selected Materials in Municipal Solid Waste," report no. EPA530-R-02-006, May 2002.

CO₂. The fact of this on-going methane emissions from old garbage coupled with the air pollution in raw landfill gas make combustion of landfill gas environmentally preferable. WTE facilities, on the other hand, are a direct and immediate competitor with recycling and reuse programs, and as such there can be no rationale from a greenhouse gas perspective for including them in the RPS.

Third, IWSA points to a study commissioned by the New York State Energy Research & Development Authority (“NYSERDA”), Energy Efficiency and Renewable Energy Resource Development Potential in New York State, which IWSA states “prominently includes waste-to-energy as [a] renewable technology.” IWSA Initial Comments at 7. The potential study, however, which was performed by outside experts rather than NYSERDA itself, does not explicitly conclude that WTE is renewable, nor does it conclude that WTE should be included in the RPS. As the notice on the inside of the cover of the report indicates, opinions stated in the study are not necessarily those of NYSERDA. The inclusion of WTE in the NYSERDA study, therefore, has no bearing on the definition of renewable energy that should be used in this proceeding. As is discussed in RETEC’s Initial Comments, New York State policy makers, including the Governor, DEC and the New York State Energy Planning Board, chaired by NYSERDA, have consistently excluded WTE from the definition of renewables. See RETEC Initial Comments at Appendix D.

4. Biomass

The Empire State Forest Products Association (“ESFPA”) argues for that both old and new biomass facilities should be included in the RPS. See ESFPA Final Comments at unnumbered page 2. As with the idea of a hydro maintenance tier, RETEC opposes

including existing biomass facilities. The RPS should drive new renewables and only biomass that meets the eligibility requirements as proposed by the biomass working group with the improvements recommended in RETEC's initial comments.

Taylor Recycling's Initial Comments raise the issue of waste-derived biomass and call for what they term a "middle way." Taylor Recycling Initial Comments at unnumbered page 2. Specifically, Taylor Recycling calls for excluding mass-burn incinerators but allowing gasification of a clean stream of biomass derived waste. Gasification technologies certainly offer a lot of promise in term of reducing the release of air pollutants including toxics. However, as Taylor Recycling's comments note, much of the material in mixed waste is not renewable and that includes much of the biomass. As the Affidavit of Allen Hershkowitz submitted with RETEC's Initial Comments explains, not all forms of biomass are renewable. Furthermore, there remains yet to be developed a set of standards that would ensure a sufficient degree of material separation to ensure that only clean biomass is being used.

5. Fuel Cells

RETEC believes that there is a consensus that fuel cell generation is eligible for inclusion in the RPS (acknowledging that there are differing opinions on how to ensure actual participation and the mechanism for support).

6. Solar

RETEC believes there is a consensus that solar electric generation is eligible for inclusion in the RPS (acknowledging that there are differing opinions on how to ensure actual participation and the mechanism for support).

7. Tidal

RETEC believes there is a consensus for the inclusion of tidal power in the RPS.

8. Wind

RETEC believes there is a consensus for the inclusion of wind power in the RPS.

9. Customer-Sited

As discussed above, RETEC believes that once a resource is eligible, it should be eligible wherever it is connected to the grid including behind a customer's meter or a wholesale meter. In other words, RPS eligibility should be neutral as to the point of interconnection. A number of other parties support this position including NYPA, KeySpan and E Cubed. See Initial Comments of NYPA at 6-8; Initial Comments of KeySpan at 15; Initial Comments of E Cubed at 10-11.

D. Tiers

1. No Tiers

RETEC remains opposed to the use of tiers within a renewable portfolio standard for New York. RETEC does not support policies based on “shades of green.” Resources are either eligible or they are not. See discussion above in Section V.C.1.a.

2. Emerging Technologies

RETEC has proposed incentives for emerging technologies as described in the initial comment submission and straw proposals. These emerging technologies – photovoltaics, fuel cells, and small wind – offer the immediate benefit of reduced

customer demand and associated grid relief, and the long-range prospect of greater electric generation diversity and security.

Most of the parties opposing an emerging technologies incentive do so without explanation, or with the simple explanation that it would add to the cost of the program. See, e.g., MI Initial Comments at 38. CPB adds a concern that such an incentive would reduce the market's flexibility to absorb and reflect cost reductions in these technologies. CPB Initial Comments at 10.

Simply to state that an emerging technologies incentive would add cost to the program is not to state an objection. Any added cost must be evaluated with respect to the objectives of the RPS. RETEC has shown how an emerging technologies incentive will contribute to the diversity and reliability of the system, will add substantial environmental benefits, and in the long term will in fact *reduce total costs*. Staff's cost estimate, in fact, shows a substantial savings over the life of the systems installed under the SBC-like tier. So long as the costs of an emerging technologies incentive are reasonable with respect to the benefits provided, cost is not a reason to oppose the incentive.

The Joint Utilities argue that the incentive would reflect "artificial discrimination" among generation technologies. JU Initial Comments at 29. The most direct response to this argument is that "discrimination" among technologies is the premise of an RPS, but not artificial discrimination. Emerging technologies should be supported because they will add substantial value to the RPS, and this will not happen in the absence of an incentive.

The “discrimination” argument also falters when considered in light of the numerous regulatory burdens still faced by distributed generation. The capacity value of smaller units is unaccounted for within wholesale markets. There is no mechanism to account for the line losses avoided by distributed generation, nor for the enhanced security and reliability provided to customers. Market mechanisms to account for environmental benefits are incomplete and, again, to the extent that trading programs exist, small units have no practical way of participating. Rate design encourages utilities to maximize throughput over their lines, which discourages them from utilizing distributed resources even where such generation would be less expensive than capital investment in grid infrastructure. Reasonable interconnection requirements are still in the early stages of development.

RETEC is not suggesting that the Commission should resolve these issues in the context of the RPS. RETEC simply observes that incentives for distributed resources are offset by other handicaps remaining from traditional regulatory structures. The Commission and other regulatory bodies have begun the process of addressing these obstacles, but full and fair integration of distributed resources into the regulatory structure of the electricity industry remains a distant goal.

The Joint Utilities argue that incentives would make the administration of the RPS “much more complex and expensive.” JU Initial Comments at 29. No support is offered for this conclusion. The program proposed by RETEC would be administered separately from the RPS until the year 2010. Despite the relatively straightforward nature of the incentive, the fact that similar programs have been instituted and successfully administered for many years in many states, and the absence of any evidence that it would be

incompatible with the RPS process, RETEC's proposal represents a compromise designed to allay any concerns about administrative complexity with respect to the RPS process.

The Joint Utilities argue that an emerging technologies incentive will depend on potentially inaccurate forecasts, and will project "today's priorities" into an uncertain future. See JU Initial Comments at 28-29. The same can be said for any action other than purchase of energy in the hourly spot market. The Commission will remain in full control of the RPS, and can make adjustments at any time. More important, as explained in RETEC's Comments, the structure of the emerging technologies incentive will be market-based to the extent possible. In reference to the objections of the CPB, any pricing assumptions built into the program will be subject to periodic adjustment; in fact, RETEC's Straw Proposal already actively considers their steady decline and eventual sunset for some technologies – answering the questions raised by the Independent Power Producers of New York ("IPPNY"), IPPNY Initial Comments at 6, and others of how long they will remain in place.

The Joint Utilities argue that an emerging technologies incentive within the RPS "may inappropriately duplicate existing incentives." JU Initial Comments at 29. This argument is flawed for several reasons.

The emerging technologies incentive proposed by RETEC would only be available to field-proven technologies that will be subject to performance requirements over multi-year periods. It is not a research and development ("R&D") program, and will not duplicate R&D programs administered by NYSERDA.

Capacity pricing mechanisms available in the downstate area to encourage investments in congested areas are, for the most part, not available to small distributed generation resources. Even should they become available, in the foreseeable future they would only be available to resources that are aggregated under conditions that may not be favorable for development.

Moreover, the pricing mechanism for the incentive will not duplicate other incentives that might be available, because it will reflect the incremental amount that is necessary to bring the technology to market. For example, if fuel cells were eligible for a tax credit amounting to \$500 per kilowatt, the value of this credit would be assumed in the bids submitted by fuel cell developers seeking to participate in the RPS. In cases where a standard offer is available rather than a competitive auction, the establishment of the standard offer price will take all relevant factors into consideration, including other incentives.

Finally, the argument that emerging technologies must not receive “duplicative” incentives assumes that the market presently represents an unsubsidized level playing field. This is, of course, far from true. Aside from the market barriers still faced by distributed generation, referenced above, conventional generating sources continue to receive massive government subsidies. From 1948 through 1998, the federal government spent \$66 billion on nuclear research and \$26 billion on fossil fuel research. These industries presently enjoy annual subsidies exceeding \$3 billion, with Congress actively considering new subsidies that will nearly double the existing ones. See [Running On Empty](#), a report by Green Scissors, a coalition of environmental and taxpayers’ groups, available at www.greenscissors.org. It is unlikely that any nuclear plants would operate

in the U.S. were it not for federal liability coverage under the Price-Anderson Act. In New York, a large number of independent power plants obtained taxpayer-subsidized financing through Industrial Development Agencies. The turbine technologies critical to most conventional generation plants were developed with billions of dollars in military contracts. The energy industry is rife with subsidies of all kinds. The purpose of the emerging technologies incentive in the RPS is not to duplicate incentives but rather to provide the difference that is needed to bring emerging technologies to market.

3. High Value Locations

The RPS should include incentives to locate renewable resources in areas where they will produce maximum benefits. Of the benefits of the RPS, the one that is most location-specific is the air quality benefit. Non-polluting renewable generation should be located, to the maximum extent possible, within non-attainment areas. On-site renewable generation also offers key benefits in grid-constrained areas, or areas experiencing measurable peak supply shortages.

Some parties commented that location based marginal pricing (“LBMP”) already addresses this need. See, e.g., Staff Initial Comments at 20; JU Initial Comments at 29 n. 27. As discussed earlier, location-based pricing mechanisms are not available to many smaller distributed generating units. Even for larger wholesale units, location-based pricing reflects energy needs, not environmental quality needs. If the RPS is to result in direct air quality improvements where they are most needed, a pricing mechanism is needed to encourage location of generation in the non-attainment areas. This point is echoed by the City of New York and the New York City Council. LBMP also does not

address the value of distributed generation in instances where congestion creates a need for utilities to invest in construction of new distribution facilities.

4. Resource Criteria Tier

RETEC reiterates its opposition to policies based on “shades of green.” Resources are either eligible or they are not. We do not support a tier system founded on desirability of resources based on scales of emissions or other such criteria. See discussion above in Section V.C.1.a.

5. Maintenance Tier

As discussed in our initial comments and above, RETEC opposes a maintenance tier.

6. Other

RETEC does not support any other tier proposal.

V. Overall RPS Structure

A. Preferred Structure—Central or Individual Procurement

RETEC continues to prefer an Individual Compliance Model as stated in our initial comments. However, RETEC will support a Central Procurement Model in so far as the chosen mechanisms for implementation provide the requirements we believe are necessary for a well-functioning RPS.

A number of active parties, including NYISO, NYPA and IPPNY, concur with our position in favor of Individual Procurement. As DPS Staff states, “One strength of the individual procurement approach is that it is in harmony with the State’s competitive

market structure; competition among LSEs for renewable resources may lead to greater creativity and incentives to lower costs.” DPS Initial Comments at 21. See also NYISO Initial Comments at 5; NYPA Initial Comments at 7-8; IPPNY Initial Comments at 11-12.

In fact, while the Joint Utilities argue for Central Procurement, they clearly state the need to preserve the rights of LSEs to engage in bilateral contracting. See JU Initial Comments at 11 and 14. In particular, they cite the need to be able to use bilateral purchases of renewable energy credits as a hedge. What they fail to mention is that bilateral contracts for renewable energy can also serve as a hedge. See RETEC’s Initial Comments at 44. It is precisely for this reason that RETEC has offered a hybrid approach to procurement whereby the Central Procurement Agency engages in long term contracting for half of the RPS requirement while LSEs are required to procure the other half on their own. We welcome the JU’s agreement that bilateral contracting for hedging purposes is possible and desirable.

B. Individual Procurement

Many of the complaints and criticisms of the Individual Procurement Model (e.g., those of Con Ed Solutions Comments and Amerada Hess), such as fairness among LSEs, costs, and load shifting, could be overcome through a liquid market for renewable energy credits. Therefore, it should be noted that where we may agree with the Central Procurement details provided by other parties, we do not by so doing accept their arguments against Individual Procurement as a workable and worthy model.

1. Alternative Compliance Mechanism

We continue to believe an alternative compliance mechanism (“ACM”) is a fundamental component of an RPS for use as a cost cap for when renewable generation is not available in sufficient quantity at given prices. In addition, if the RPS is not structured in a manner to ensure development of new renewables (for example, if the RPS does not include a long term contract requirement), we would argue for an ACM set at a higher rate to act as a penalty for non-compliance. Joint Utilities do not support an ACM but fail to provide an explanation for their rejection of such a beneficial and widely accepted tool in RPS design. JU Initial Comments at 8 n.14.

2. Cost Recovery for Delivery Utilities

RETEC continues to support cost recovery by utilities and the opportunity to recover reasonable and prudent costs associated with RPS implementation. RETEC does not agree with energy service companies (“ESCOs”) who argue that providing cost recovery to regulated utilities provides a competitive advantage. See, e.g., Initial Comments of the Small Customer Marketer Coalition at 6. Utilities are regulated and may not raise rates without approval; ESCOs are free to do so at any time. The reality of retail markets in New York State is that substantial numbers of customers continue to take full service from the distribution utility. Nothing in the individual procurement model alters this bifurcated reality. In fact, in the worst case scenarios put forward by ESCOs, there are significant RPS costs recovered by utilities. In this instance (and RETEC is not hereby accepting rate increases as a foregone conclusion), higher rates

charged by utilities may provide an opportunity for ESCOs to engage in creative contracting and marketing to gain market share.¹⁸

C. Central Procurement

Most, if not all, active parties appear to agree on the benefits of an efficient marketplace and price transparency. They disagree, however, on whether these goals are best met via individual or central procurement. RETEC offers the suggestion that either can produce the desired results as long as the specific implementing details are appropriate. An individual procurement system is fairly well agreed upon with the exceptions of where to set an ACM and whether or not long-term contracts are required. With no real models to use as a starting point, RETEC believes the parties are unable at this time in the proceeding to come to agreement on the specific implementing provisions of a central procurement mechanism. RETEC continues to support the proposal in its initial comments but also sees some merit in the JU proposal although with caveats. Most importantly, RETEC continues to oppose the NYISO as the central procurer. The JU proposal, in fact, is similar to the approach we call “contracts for differences” in that the generators receive payment for energy through the already established energy markets. While an auction of the sort they suggest may be possible, we believe that a five-year contract period is insufficient. See JU Initial Comments at 17. Either the central procurement agency would not get sufficient bids or the bid prices would be higher than necessary, thereby increasing the cost of the RPS. This point cannot be stressed enough.

¹⁸ It is crucial that all load serving entities participate in the RPS. See RETEC Initial Comments at 45. We welcome LIPA’s open attitude toward RPS participation and urge NYPA to take the same more positive approach. NYPA’s objection to adjusting the targeted amount of incremental renewable energy if NYPA opts not to participate is particularly unworkable and potentially unfair to other load serving entities. NYPA Initial Comments at 10. Similarly, the municipal electric utilities should participate in the RPS: the happenstance that they are NYPA customers does not support their exclusion.

Arguments over long-term contracts must acknowledge that the issue is one of risk and price. In fact, RETEC believes that longer contract lengths will serve to reduce the costs to consumers. Risk averse project developers and investors will seek to ensure return on their investment over a five-year period rather than spread that return out over 15 or 20 years, which is a normal contract length for a wind energy facility, for example.

Likewise, an auction for attributes or certificates, which attempts to shift risk from consumers to generators, may be more costly. The energy price can be projected but is not known. In certificates only purchases, investors will raise the price of the certificate to cover the risks of the energy market. If the price of energy increases, the developer simply sees additional profits.

The NYISO and IPPNY both call into question the “contract for differences” approach of RETEC’s Central Procurement model by arguing that it undermines the usual market incentive for generators to only produce when the LBMP is higher than their incremental production cost. However, renewable resources such as wind do not respond in this way to LBMPs. Wind energy is not turned on and off according to market price but is bid into the energy market as a price taker. See NYISO Initial Comments at 16. And, while very low or negative pricing may be seen occasionally, Central Procurement contracts will need to use an average energy price over a specified period of time. As the NYISO correctly points out, different contracting methods are simply a way of shifting risks. NYISO Initial Comments at 17.

Decisions on the specific implementing details for Central Procurement will need to balance the potential costs and risks and decide how to allocate them while still providing the market confidence needed to attract investors and to provide appropriate

market signals from LBMPs. Various options proposed – total price, attribute only contracting, etc. – represent different assumptions about risks and costs and who should bear them among the central players of rate-payers, renewable generators and conventional generators.

1. Preferred Central Procurement Entity

A number of other parties join RETEC in supporting the state agency model for central procurement. Staff supports a hybrid central procurement system with a state agency acting as an administrator, similar to RETEC’s hybrid central procurement straw proposal. Staff Initial Comments at 21-22. CPB takes a similar position. CPB Initial Comments at 11-12. Other parties support the NYISO as the central procurer. However, RETEC continues to oppose this role for the NYISO and notes that the NYISO itself concurs with RETEC’s position that numerous practical and legal barriers prevent designation of the NYISO as the central procurement agent. NYISO Initial Comments at 6. The NYISO’s own opposition to designating itself for the central procurement role should be dispositive.

VI. Credit Trading

A. Consensus Issues

RETEC believes a certificates-based accounting and verification system for tracking and verification of renewable generation and the associated renewable energy credits (“RECs”) is needed. Indeed, the comments show there is widespread support for this position and for unbundled trading of such certificates within New York among active parties. We note as well that the Judge has proposed the reconvening of Work

Group Four to continue to work on this issue. See Further Ruling on Procedure, October 21, 2003.

The comments submitted by Multiple Interveners, however, imply opposition to a certificates based trading platform, although the argument made appears to contradict the support for least-cost renewables and voluntary green market transactions cited by MI elsewhere in their comments and to also imply opposition to New York's current system of conversion transactions for environmental disclosure. See MI Initial Comments at 40. MI writes: "Any system of credit trading...must not separate the credits from the energy." MI Initial Comments at 40. But the current conversion transactions system does allow a limited form of unbundling and expansion of the voluntary green market depends upon it. Unbundling of energy and certificates provides a least-cost method for achieving the State's renewable energy goals by allowing the generation to be placed where resources exist while spreading the costs over all consumers and allowing for a market in tradable certificates.

B. Deliverability Issue

The issue of deliverability received much discussion in parties' initial comments. RETEC's position opposing a "deliverability" requirement where there is a compatible and reciprocal system is supported by a number of parties, while others agree with RETEC but would apply the completely "unbundled" trading of renewable energy credits to imports and exports regardless of the existence of similar State support programs for renewables. See, e.g., IPPNY Initial Comments at 13-14; NYISO Initial Comments at 8-9; LIPA Initial Comments at 6; KeySpan Initial Comments at 19. Our initial comments argue for no delivery requirement in situations where there is a reciprocal and compatible

system in the neighboring jurisdiction. The comments submitted by the NYISO on this issue also provide an excellent explanation of the benefits of allowing attribute-only trading across borders providing there is reciprocity. See NYISO Initial Comments at 8-10. (RETEC supports this only where there is also a policy supporting renewable energy development, such as an RPS.)

In addition, some comments (Con Edison Solutions, National Energy Marketers Association) misconstrue the RETEC position and believe RETEC supports a prohibition on imports in the absence of a reciprocal and compatible system. To clarify, RETEC does support unbundled (i.e., no delivery requirement) trading of renewable energy credits where there is reciprocity as described in the initial comments. While any other trading *could* then be prohibited, RETEC does not believe it must be. In the absence of such a compatible and reciprocal system, however, RETEC believes a demonstration of delivery would be sufficient. In these instances, the delivery of energy requirement would ensure the ability to have an adequate environmental disclosure system, that only NY RPS eligible generators are participating, and that there is no untenable imbalance between those paying for the renewables and those receiving the benefits. RETEC hopes this clarification may help those seemingly opposed to its position reconsider their view.

C. Other Open Issues

RETEC has no reply comments on the other open issues on credit tracking and trading. RETEC expects Work Group Four will reconvene and develop appropriate suggestions for implementation of such a system.

VII. Contracting Standards

In their Initial Comments, several parties including RETEC have underscored the critical need for procurement of renewable energy via long-term contracts. In a post-restructuring environment, such long-term commitments from creditworthy buyers afford developers of renewable energy projects the assured stream of revenue needed to secure adequate financing. While this situation is not unique to renewable energy development, it is especially pronounced given the capital intensive and “front-loaded” nature of such investments. See, e.g., Initial Comments of Staff at 25-27; RETEC at 55; Westchester County at 8.

Some parties have taken issue with a requirement that long-term contracts be required, preferring instead that contracting issues, including contract duration, be left to market participants. These parties fear that long-term contracts will limit the flexibility of LSEs to respond to changing technologies and market prices, and liken mandated long-term contracts to New York State’s now repealed “Six Cents Law.”¹⁹ See, e.g., Initial Comments of Multiple Intervenors at 41, 53; NYPA Initial Comments at 12-13; Constellation New Energy at 11.

Any comparison of the long-term contracts required under the RETEC models to the New York Six Cent Law is misplaced. The fundamental problem with the Six Cent Law was the underlying legislative determination that electricity prices would continue to escalate and never fall below the statutory floor price of six cents per kilowatt-hour – a determination that in hindsight proved quite wrong. Unlike the Six Cents law, however,

¹⁹ This law, now repealed, required electric utilities to purchase energy from certain PURPA qualified facilities at the greater of 6 cents/kWh or the utility’s long-run avoided cost. Public Service Law §66-c.

the RETEC models do not arbitrarily assign price or duration terms. Rather, these issues are left to market participants - under RETEC's Centralized Procurement model to the participating bidders under guidelines set by the bid administrator; and under the Individual Compliance model to willing buyers and sellers in arms-length negotiations.

Another critical distinction is that unlike the Six Cent law, which guaranteed a minimum price, the RETEC models envisions that bidders will offer to "float" the premium required based on the market clearing price for energy. As we stated in our initial comments, this approach "will provide investors with the fixed price they need, while allowing the State to procure renewable generation at a fair cost to generators and consumers. Consumers will pay no more than the actual premium above actual energy prices required to develop the new renewable generation." See RETEC Initial Comments at 5-8. Thus, unlike the Six Cent law, which over time diverged from market realities, we would expect the long-term contracts under the RETEC model to have flexible, market-based price terms.

Finally, the Attorney General suggests taking a "wait-and-see" approach to procurement, and giving the state agency to "tailor each request for bids taking into account then-current capital market conditions." See Attorney General Initial Comments at 62. The Attorney General further offers that if the offered contract term is too short to generate bidder interest, the procuring agency can tender a new offer. While the Attorney General's approach has surface appeal, RETEC is concerned that it will prove difficult to implement in practice. First, it may prove difficult to isolate the contract term as the root cause of the limited response. Second, this approach could add time and cost to the bid process and jeopardize timely attainment of renewable energy targets.

In sum, none of the parties stating their opposition to a long-term contract requirement has challenged the basic premise that such contracts are the lynchpin to renewable project success and the environmental, energy security and economic development benefits that go with it. The Commission should adopt RETEC's proposed approach to contracts; namely, that all contracts be specified as long-term with the exact length based on the particular needs of the eligible technology. In the alternative, the Commission should require that at least 50% of the RPS requirement be procured via long-term contracting undertaken by the Central Procurement agency, with the remaining 50% procured by the LSEs under no such requirement.

VIII. Cost and Benefit Considerations

This proceeding has allowed ample opportunity for parties to raise issues of costs and benefits. RETEC continues to believe that when the long-term benefits of cleaner air, reduced risk of climate change, development of new industries and jobs, reduced fuel price risk and greater energy security are factored in, it seems clear that even under the Joint Utilities' worst case analysis the RPS would still be a good investment and good policy for New York. We turn first to the argument related to the costs of an RPS and then to those regarding the benefits.

A. Cost Issues

IPPNY, MI and others raise the issue of costs to argue for delay in implementing an RPS. No "market" is entirely independent of State and federal policy and in no market are all costs ever known with certainty many years before they must be paid. The

ramp-up in RPS percentage requirements and the flexibility afforded a policy initiative determined by the PSC mean that the RPS will be subject to continual review as it takes effect. RETEC strongly objects to the notion that all costs can be predetermined and projected if only the Commission waits until the end of 2004 to issue a decision.

MI argue that New York should not implement an RPS at this time and cites reports projecting declining prices for renewables as one of the justifications for its position. This argument misses the point entirely. Instituting an RPS now provides New York with the benefits of renewables now and will still allow the State to take advantage of declining costs over time. For solar power, for example, declining costs are a function of increased demand and economies of scale. In addition, the implementation of an RPS now is key to jump-starting the renewables industry in New York and building a market for a clean, diversified energy portfolio that will serve the State for many, many years.

In fact, MI fails to discuss the many benefits of renewable energy, dismissing RETEC's report Cleaner Air, Fuel Diversity and High Quality Jobs: Reviewing Selected Potential Benefits of an RPS in New York State, the only previous discussion of benefits in this proceeding as "hearsay." See MI Initial Comments at 44.²⁰ But no discussion of costs can be had in the absence of consideration of benefits. Again, where MI argues, for

²⁰ RETEC's report, prepared by energy experts with substantial experienced in renewable energy, can and should be relied upon by the ALJ in this proceeding. As MI knows, the rules of evidence do not apply in Public Service Commission hearings. Instead, ALJs can consider any form of reliable evidence. In these proceedings in which a hearing is "not required by law," State Administrative Procedure Act ("SAPA"), Sec.102(a), 16 NYCRR Sec.4.1, "the agency may consider whatever evidence is at hand, whether obtained through hearing or otherwise" Scherbyn v. Finger Lakes, 77 N.Y.2d 753, 757-758 (1991). Further, even in administrative adjudicatory proceedings, the rules of evidence do not apply. SAPA Sec. 306(1). Hearsay is not only admissible, it can be the basis for agency decision-making. EJG. Corp v. NYS Liquor Authority, 213 A.D. 2d 924 (3rd Dept. 1995). Expert reports routinely rely on secondary literature as well as original data analysis to arrive at conclusions and opinions. In short, RETEC's thorough and well-supported report on the benefits to New York of an RPS fills an important gap in this proceeding, as no other party systematically examined the benefits of an RPS. The ALJ should give it weight and consider it together with the cost studies performed by Staff and JU.

example, that an SBC-like set aside for emerging technologies would “unnecessarily” increase the cost to consumers, MI Initial Comments at 22, they are failing to acknowledge the real benefits such technologies can provide to some of the very problems identified by MI, such as transmission congestion.

MI further argues that the RPS will raise customer rates contrary to other policies of the State to provide lower rates for certain industries. If MI’s members receive a “subsidy” perhaps they too should open their books for scrutiny to ensure there is no “over-recovery” in these industrial sectors as MI suggests renewable generators do under an RPS. See MI Initial Comments at 3 and 22-24. Central Hudson Electric and Gas (“Central Hudson” or “CHGE”) makes a similar argument in passing. See CHGE Initial Comments at 17 n. 22. And, since conventional generators also receive “subsidies” of various sorts (see Section I above), does MI suggest that all generators show their cost recovery is limited to cost of service and there is no “over-recovery?” RETEC is certainly not proposing this requirement but simply illustrating the illogic of this position.

Furthermore, an RPS is in fact a market-based policy tool. Structured properly it does require renewable developers to compete against one another and thereby drive the price of renewable premiums down. It should be obvious that if businesses, such as renewable energy developers, are required to reveal confidential financial information, as suggested by MI and other, they will simply will take their investment dollars to other States.

On other cost issues, a number of comments have misinterpreted cost data supplied by others. For example, Empire State Development Corporation (“ESD”) argues that the 0.52% monthly bill rate increase estimated by DPS Staff for industrial users will

translate to an annual increase of over 6%. ESD Initial Comments at 1. The monthly increase is expressed as a percentage increase over that month's business-as-usual bill, not a rate of increase that compounds over time. Therefore, the estimated annual increase would be approximately 0.52%.

Central Hudson also misinterprets Staff's analysis. The company repeatedly makes claims such as this one: "The direct, out-of-pocket costs through 2020 of implementing a 25% RPS on New York's consumers and businesses will be about \$1.5 Billion in today's dollars, under the approach of Staff's Cost Study." CHGE Initial Comments at 18. However, this completely ignores the wholesale price suppression effect of the RPS, which would offset approximately half of the premiums required to drive renewables. Later in their comments Central Hudson does acknowledge the wholesale price suppression, but without substantiation states that Staff has overstated these effects. To the extent that Central Hudson may have been thinking of Staff's assumptions regarding ICAP, Staff's supplemental response to questions from the Joint Utilities shows that the total extra cost from updated ICAP values between 2006 and 2013 will be about \$35 million or between 0.02% and 0.04% on bills in 2009. See DPS Cost Study ICAP Revisions 10-3-03, circulated October 3, 2003.

Central Hudson also claims that Staff analysis underestimated the price of renewables and they fault Staff's supply curve as overly subjective. There is an irony in a member of the Joint Utilities faulting the Staff's study for using an overly subjective supply curve when as noted in RETEC's initial comments, the Joint Utility cost study relies on such skewed supply curves. Furthermore, as noted in Staff supplemental response to questions from the Joint Utilities, Staff's supply curves are relatively flat

suggesting that the resulting costs are relatively robust to changes in underlying assumptions. See DPS Staff Supplemental Response to Joint Utility Questions, Question 20, circulated October 3, 2003.

Finally, the UWA/IBEW Locals claim that even the relatively modest premiums required under the RPS are beyond what consumers are willing to pay. However, the unions have substantially mischaracterized the findings of the LBNL report cited in their comments. They refer to scenarios and bid amounts that are irrelevant in the context of an RPS. Of the distinct minority who indicated an unwillingness to pay for the green pricing scenario that is relevant to this proceeding, 19.1% stated that they “objected to this type of question,” with 29.4% stating that they would “need more information before making a decision.”²¹ The study cited in fact demonstrates that the scenario corresponding to the RPS elicits the highest willingness to pay across the board. The simple fact is that close to 80% of respondents nationwide indicated a willingness to pay \$.50 / month for a renewables portfolio standard – a level of support seldom seen for any public policy initiative.

B. Benefit Issues

Central Hudson and the Joint Utilities also belittle potential for the natural gas price suppression without any support. CHGE Initial Comments at 23; and JU Initial Comments at 59. The ACEEE and Energy and Environmental Analysis, Inc. study cited in RETEC’s initial comments, RETEC Initial Comments at 59, addresses Central Hudson’s claim that no studies have been done and rebuts the Joint Utilities blind

²¹ Wisner, R., Using Contingent Valuation to Explore Willingness to Pay for Renewable Energy: A Comparison of Collective and Voluntary Payment Vehicles, report no. LBNL-53239, Lawrence Berkeley National Laboratory, p. 29. (http://eetd.lbl.gov/ea/EMS/EMS_pubs.html#RE.)

assertion that an RPS would not impact natural gas prices. The Joint Utilities continue to misleadingly point to the impacts on natural gas consumption in New York predicted in their study, ignoring the impact on consumption outside of the state. They claim without support that their predicted reductions are not big enough to change prices. As noted in RETEC's initial comments, ICF's model is simply too blunt to predict changes, whereas the ACEEE/Energy and Environmental Analysis study with its finer level of resolution predicts over \$300 million in savings from reduced prices just through 2008.

The UWA/IBEW Locals, UWA/IBEW Locals Initial Comments at 7, call into question RETEC's positions on property values and job creation. To state that the linear regression models are illegitimate due to their low r-squared values for the Fenner and Madison projects ignores the trending and accumulated data in the rest of the study: "we looked at thirty individual analyses and found that in twenty-six of those, property values in the affected view shed performed better than the alternative."²²

MI's allegations of inconsistency in the RETEC jobs estimates arise from an attempt to perform direct multiplicative scaling of construction jobs across projects, (akin to expecting a 200 – person apartment building in Binghamton to employ exactly 50x the construction workers of a 4 – person home in Rochester), and an attempt to compare jobs generated within the rural counties that actually hosted the turbine emplacements with jobs generated throughout the lifecycle of a turbine project.

The UWA/IBEW further states that what is true regarding job creation for one renewable facility will likely not be true for another. This may be true. However, all data submitted by RETEC's studies and assembled in preparation for the same demonstrates

²² Renewable Energy Policy Project, The Effect of Wind Development on Local Property Values, Renewable Energy Policy Project Analytical Report, May 2003, pp. 29-30.

that renewable energy resources invariably produce more in-state employment than the equivalent non-renewable sources. The Renewable Energy Policy Project report referenced in RETEC's comments predicts upwards of 15,000 jobs created to support just the wind, photovoltaic and co-firing components of the RPS. The renewable generation produces jobs for electricians, contractors, engineers and manufacturing employees close to home, and many more of them per megawatt than traditional fossil fuel plants. Given the annual growth rates in the clean energy technologies, New York has a compelling reason to invest in these industrial sectors.

IX. Other Issues

A. NYISO and System Reliability

A number of parties to this proceeding have argued that an RPS may adversely impact system reliability, and they have used the recent blackout to press for additional time to investigate reliability as it pertains to an RPS, despite the obvious lack of a relationship between the two. The blackout was not caused by renewables or a lack of in-state generating capacity. RETEC has argued that the RPS proceeding is not the appropriate forum to determine system reliability needs.

JU, MI, and IPPNY believe reliability should be recognized as the paramount consideration. RETEC believes the NYISO will continue to ensure reliability of the system. The question is not whether the system will continue to be reliable or not, but whether or not any changes will be needed to the system and/or the market rules to ensure reliability with the addition of a considerable amount of renewable resources. This is precisely what the NYSERDA/NYISO study seeks to ascertain without prejudgments

such as those in the comments of the JU and others. In addition, all parties concur that the RPS should be implemented gradually with an eight to ten year ramp-up in the required percentage of renewables. This will provide ample time to address any concerns that may arise. Also, as was discussed at the October 10, 2003 meeting on reliability concerns, the “grid” (in terms of capacity and transmission) may look different in the future than it does today. See Transcript of October 10, 2003 Meeting (“Transcript”) at 116. Specifically, there are a number of new transmission proposals being considered, and renewed interest in transmission upgrades generally. In fact, concrete and rapid decisions on RPS design would assist the effort to determine if there are likely to be any impacts on system operations, and, if there are, how best to address them. This point was in fact acknowledged by the NYISO. See Transcript at 127.

Despite IPPNY’s calls for the Commission to wait on decision-making until after completion of Phase II of the NYSERDA/NYISO wind integration study, it should be clear to all market participants that renewables are not the only cause of consideration of changes to rules to enhance reliability. This process of refining market rules is likely to be on-going. For example, the recent NYISO report, Summer 2003 Review of the New York Electricity Markets, mentions possible changes for both reliability and other reasons that have nothing to do with added renewable generation.²³

The issue of VAR support raised by IPPNY (see IPPNY Initial Comments at 17) is not significant. In fact, wind farms need not consume large amounts of VARs as voltage issues are addressed within the turbines themselves or by the addition of

²³ Patton, D.B., Summer 2003 Review of the New York Electricity Markets, presented to the NYISO on Oct. 21, 2003.

capacitors prior to the interconnection. In fact, New York’s largest wind farm, the Fenner Project, has supplied VAR support on occasion when asked to so by the NYISO.²⁴

Finally, experiences and cost studies from other States and countries provide valid and useful information to show that any reliability and cost impacts of the additional intermittent resources expected from the RPS will be minor and easily addressed. See RETEC’s Initial Comments at 65-68. In addition, AWEA has begun an initiative to develop a wind industry-sponsored “National Grid Code,” a set of performance specifications that will define “good utility practice” for interconnection and operation of wind turbines in the United States. While good utility practice for fossil and nuclear-fueled generators developed over the past seventy years as central generation technology and transmission technology evolved together, this is not true for wind. Recent experience in many parts of the world with wind generation has given engineers confidence that integration of large quantities of wind while maintaining traditional levels of reliability is practical and cost effective, but the engineering practices have yet to be reduced to a commonly understood grid code. Development of a national grid code will give manufacturers a set of performance standards to design equipment, and provide project developers and transmission operators a common set of standards to ensure safe, cost effective, and reliable installations. This effort should make it easier and cheaper to reliably interconnect wind to the grid, and help system operators become more comfortable with incorporating wind energy into their systems. The phased-in implementation of the RPS in New York will allow renewable energy to grow in New York while providing time to make any necessary system adjustments.

²⁴ Conversation with Stephen Pike, Project Manager, Enel North America, Inc.

B. Legal Issues

Several parties have raised misconceived legal objections to aspects of this proceeding. Multiple Intervenors argues that evidentiary hearings may be required in this proceeding. Central Hudson claims that the Commission is not following state environmental review requirements, despite the fact that Staff is in fact preparing a draft environmental impact statement. RETEC will briefly respond to each argument.

1. Evidentiary Hearings are Not Required.

In her June 19, 2003 Ruling Establishing Comment Procedure, Administrative Law Judge Stein provided parties an opportunity to submit substantive factual information to buttress their Initial Comments in this proceeding. Ruling Establishing Comment Procedure, issued June 19, 2003 at 3. (“Procedural Ruling”). Multiple Intervenors urge the Commission to convene evidentiary proceedings in order to “allow parties an opportunity to cross-examine the experts making the factual assertions.” MI Initial Comments at 49. For the reasons stated below, the Commission is under no legal obligation to hold evidentiary hearings in this proceeding; nor would the Commission be acting outside its discretionary authority in giving some weight to factual submissions in rendering its final order in this proceeding without first subjecting such factual information to cross-examination.

Evidentiary hearings are not required to support Commission action in this proceeding. Evidentiary hearings are non-discretionary only “in cases where required by law.” 16 N.Y.C.R.R §4.1. Otherwise, the Commission retains wide procedural latitude to administer the proceeding in a way best designed to provide it the record basis necessary to support its factual determinations. As codified in the Commission’s own Rules of

Practice, “Legislative-type hearings shall be conducted in accordance with such procedures as the Commission may direct.” Id. (emphasis added)

This is not a case where the Commission is statutorily required to hold evidentiary hearings before issuing its findings. MI has not cited to any specific statutory provision obligating the Commission to hold evidentiary hearings. Indeed, in the instant proceeding, the Commission is acting in its quasi-legislative capacity, issuing general principles of applicability concerning implementation of a Renewable Portfolio Standard.

MI’s due process interests are protected by the numerous opportunities afforded parties to provide relevant information to the Commission and to challenge the positions and analyses of other parties. Over the course of this proceeding, parties have had ample opportunity to participate in working group meetings, submit comments and analyses, proffer expert opinion all of which has resulted in a voluminous and highly detailed record. In light of this record, MI cannot now claim that failure to hold evidentiary hearings is an abuse of discretion. See Consumer Protection Board v. Public Service Commission, 110 Misc.2d 1, 441 N.Y.S.2d 590 (S.Ct. Albany County 1981) (Commission’s decision to forego evidentiary hearings into power outage not an abuse of discretion where the Staff conducted extensive investigations and “all parties had an opportunity to discuss, analyze and object to the proposed findings.”). See also Leroy Fantasies, Inc. v. Swidler, 44 A.D.2d 266, 354 N.Y.S.2d 182 (3rd Dept. 1974), appeal denied, 34 N.Y.2d 519, 359 N.Y.S.2d 1026 (banning by Public Service Commission of decorative torches as wasteful devices was an act legislative in nature and so long as the prohibition of such devices was susceptible of review at some stage to determine if such prohibition was within the power of the PSC, rights of natural gas users were protected

and users were not denied due process by failure of PSC to allow users an evidentiary hearing).

In any event, in her June 19, 2003 procedural ruling the Administrative Law Judge has explicitly given parties the right to use the Reply Comments as a vehicle to challenge factual assertions that may have been made by Parties in Initial Comments. Procedural Ruling at 3. The ultimate test of the validity of the Commission's judgment is whether there is a rational basis and reasonable support in the record; not whether the Commission has chosen a particular means in arriving at that record support. New York Telephone Co. v Public Service Com'n, 471 N.Y.S.2d 891 (3 Dept. 1984).

Finally, MI argues that the importance of this proceeding necessitate evidentiary hearings. This argument is also undercut by the other avenues available to parties to challenge factual information proffered by other parties. It is also undercut by recent Commission precedent. As MI well knows, the Commission accomplished no less a feat than the restructuring of New York's electric industry through a similar collaborative process and without any evidentiary proceedings being held. See 94-E-0952 In the Matter of Competitive Opportunities Regarding Electric Service (Issued and Effective May 20, 1996). This process withstood legal challenge, with the court concluding that: "[t]he thought processes of the PSC in carrying out its duties cannot be placed in a strait-jacket, lest it becomes rigid and ineffective." Energy Ass'n of New York State v. Public Service Commission, 653 N.Y.S.2d 502, 516 (S. Ct. Albany County 1996).

2. SEQRA Issues

Contrary to the claims of Central Hudson, Central Hudson Initial Comments at 26-30, the Commission has established a collaborative process, which complies with the

requirements of the State Environmental Quality Review Act (“SEQRA”), N.Y. Env’t. Conserv. L Article 8, 6 NYCRR Part 617. Central Hudson’s arguments are contrary to a plain reading of SEQRA. Furthermore, even if its arguments were correct (which they are not), they would be untimely.

In its Order Instituting Proceeding, (“Commission’s Instituting Order”), the Commission initiated a “collaborative process with a goal of developing a draft policy statement.” Commission’s Instituting Order at 3. The Commission’s Order outlined parameters for the parties to consider in developing the draft policy statement (“threshold issues”) and observed that “a return to the 25% (renewable resource) figure would be in the public interest.” *Id.* The Order also indicated that the Commission’s goal was to “develop and implement a renewable portfolio standard for electric energy retailed in New York State.” *Id.* The Commission contemplated a collaborative process resulting in a recommended decision from ALJ Stein followed by final decision-making by the Commission. Subsequent to initiating the proceeding the Commission determined that a final decision in this proceeding may have significant impacts on the environment and accordingly ordered the preparation of Draft Environmental Impact Statement (“DEIS”). Case 03-E-0188, Notice of Determination of Significance (issued March 18, 2003).

The Commission’s Instituting Order in this case initiated an administrative process to address the threshold issues posed with respect to the RPS. This was not, as Central Hudson asserts, a final agency action (6 NYCRR §6 NYCRR §617.2[b][2]) requiring prior SEQRA compliance. 6 NYCRR §617.6. Although the Commission announced a goal of adopting and implementing an RPS, the Instituting Order did not adopt or finalize a specific RPS policy or rule. Instead, it directed the parties and the ALJ

to participate in a process to address the threshold issues and to develop a draft policy statement as a first step toward the implementation of an RPS policy. Consequently, its Order is a non-final action. See Energy Association of New York State v. Public Service Commission of the State of New York, 169 Misc. 2d 924 (Harris J., 1996) (not requiring prior compliance with SEQRA); Programming & Systems, Inc. v. New York State Urban Development Corp., 93 AD2d 733, aff'd 61 N.Y.2d 738 (1984) (SEQRA does not apply until a specific plan is actually formulated and proposed); Citizens for an Orderly Energy Policy v. Cuomo, 78 N.Y.3d 398 (1991) (SEQRA applies to decision-making involving a specific plan).

In the instant case the final decision-making will occur when the Commission issues an order determining to proceed with the RPS and establishes the details of the RPS. The Commission must comply with SEQRA, including issuance of a Final Environmental Impact Statement and findings (as required by 6 NYCRR §§617.9 and 617.11) before issuing this final decision on the RPS. This is exactly the track that the Commission is presently following.

Moreover, even if Central Hudson were correct that the Commission's Order of February 19, 2003 triggered SEQRA (although it did not), the company's objection would be untimely. The statute of limitations in SEQRA matters runs from the date of the final determination. Young v. Bd of Trustees of the Village of Blasdell, 221 A.D.2d 975, 977-978 (4th Dept.) aff'd 89 N.Y.2d 846 (1996), Town of Yorktown v. New York State Dept. of Mental Hygiene, 92 A.D.2d 897 (2d Dept., 1983) aff'd on basis of opinion below, 59 N.Y.2d 999 (1983). Accordingly, if the Commission's final determination did occur in February 2003, as Central Hudson asserts, the four month period to raise

SEQRA objections (CPLR §217) would have long since passed and Central Hudson's argument, were it to be pursued in a judicial challenge, would be barred.

The Commission has yet to make a final decision in this case. It has initiated the EIS process and proposes to complete the process prior to final decision-making. This schedule comports with SEQRA's requirements.

C. Conclusion

RETEC believes New York can truly be a national leader on renewable energy through the expeditious development of a renewable portfolio standard that will lead to 25% of electricity sold in New York coming from renewable resources by 2013. We appreciate the efforts of the many parties who have put substantial thought and effort into exploring the many important issues involved in designing and implementing the RPS. RETEC looks forward to continuing to work with all of the parties to this proceeding to implement an RPS that will be the best in the nation in terms of providing environmental, public health and economic benefits; diversifying the state's energy resources; and enhancing reliability.

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