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June 28, 2012

VIA ELECTRONIC FILING

Hon. Jaclyn A. Brillling
Secretary
New York State Public Service Commission
Three Empire State Plaza
Albany, New York 12201-1350

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

Case 12-E-____ - Petition of Niagara Generation, LLC for a Restructuring of its RPS Maintenance Tier Contract

Dear Secretary Brillling:

On April 12, 2012, Niagara Generation, LLC (“Niagara Generation”) filed its *Verified Petition of Niagara Generation, LLC for a Restructuring of its RPS Agreement* (“Verified Petition”) with the New York State Public Service Commission (“Commission”) in the above-referenced proceedings, pertaining to the implementation of a Renewable Portfolio Standard (“RPS”) in New York State. In its Verified Petition, Niagara Generation asserts that it “signed a RPS *Maintenance Tier* Contract” with the New York State Energy Research and Development Authority (“NYSERDA”) on April 17, 2007 (the “RPS Contract”).¹ Niagara Generation requests that the Commission restructure its RPS Contract by (i) increasing the RPS subsidy paid thereunder for the next three years, and (ii) decreasing the RPS subsidy to be paid (relative to the current amount) for the balance of the contract term such that the total amount of subsidies paid does not change.

The Commission published notice soliciting comments on the Petition in the May 9, 2012 edition of the New York State Register (I.D. No. PSC-19-12-00009-P; the “Notice”). On June 25, 2012, Multiple Intervenors filed its *Comments of Multiple Intervenors in Opposition to the Petition of Niagara Generation, LLC* (“June 25th Comments”) in response to the Notice.

¹ Verified Petition at 3 (emphasis added). The caption on Niagara Generation’s Petition states: “Petition of Niagara Generation, LLC for a Restructuring of its RPS *Maintenance Tier* Contract” (emphasis added).

Multiple Intervenors advocated that the Commission should refrain from modifying the terms and conditions of contracts executed under the RPS, including the RPS Contract applicable to the Maintenance Resource facility purportedly identified in Niagara Generation's Verified Petition.

On June 26, 2012, Multiple Intervenors was advised by a representative of NYSERDA that Niagara Generation *does not* operate any electric generation facility as a Maintenance Resource under the RPS. Instead, contrary to the caption and the assertion at page 3 of its Verified Petition, the biomass facility that Niagara Generation operates pursuant to an RPS Contract is a Main Tier facility, and *not* a Maintenance Resource.

In light of this new information, Multiple Intervenors hereby supplements its June 25th Comments in order to address the factual misrepresentation in the Verified Petition. This misrepresentation – even if unintentional – pertains to an essential element of the Verified Petition and its request for relief, and provided the basis for much of Multiple Intervenors' June 25th Comments. Multiple Intervenors is filing these supplemental comments as quickly as practicable after learning of Niagara Generation's factual misrepresentation. In light of the fact that Multiple Intervenors did not learn of this misrepresentation until after the deadline established by the Notice for submitting comments on the Verified Petition, Multiple Intervenors respectfully requests that the Commission consider these supplemental comments notwithstanding the passage of that deadline.

In addition to the reasons enumerated in its June 25th Comments, Multiple Intervenors hereby urges the Commission to deny the Verified Petition in its entirety for two additional reasons. First, Niagara Generation's Verified Petition is premised upon a misrepresentation of material fact. Specifically, Niagara Generation asserted that it had a Maintenance Tier contract, and even captioned its Verified Petition as one seeking restructuring of a Maintenance Tier Contract when, in fact, Niagara Generation's RPS Contract apparently was executed under the Main Tier and it does not own or operate a Maintenance Tier facility. As a result of that misrepresentation, the Verified Petition essentially asks the Commission to modify a contract that does not exist. It would be impossible, therefore, for the Commission to grant the relief requested, nor should it even consider the requested relief given Niagara Generation's material misrepresentation.

Second, the Commission clearly has stated – and recently affirmed – that it will not modify the terms of agreements executed by facilities operating under RPS Main Tier, including the agreement that is the subject of the instant Verified Petition. On August 19, 2010, Niagara Generation filed a Verified Petition with the Commission seeking to restructure this RPS Contract.² Niagara Generation asserted that “[u]nder its current price structure, NiGen loses money on each MWh of electricity produced from biomass. When fixed costs of labor, major maintenance and overhead are added to the analysis, these losses increase dramatically.”³

² Case 03-E-0188, supra, Petition of Niagara Generation, LLC for Restructuring of its RPS Agreement (filed August 19, 2010) (hereinafter, “Restructuring Petition”).

Niagara Generation requested that the Commission extend to it an “escape clause” that allows new biomass facilities to receive periodic increases to their RPS subsidies under certain circumstances.⁴

On November 19, 2010, the Commission issued an order denying the Restructuring Petition and Niagara Generation’s request to modify the terms of its RPS Contract.⁵ The Commission explained that:

The incentive level in the NiGen RPS contract is set at the price NiGen itself bid before it was awarded the contract. The changes in the market NiGen describes are all risks that a developer in a competitive market accepts when it enters into a long term contract, and must responsibly be factored by the developer into any bid price that the developer offers. The premise of our move to wholesale competition was that wholesale generators would bear these risks rather than ratepayers. **Allowing the requested mid-stream price adjustment in a contract that does not provide for such adjustments would undermine the competitive process established for the RPS program.**⁶

The Commission noted that Niagara Generation was one of many bidders in a competitive solicitation that applied the same rules even-handedly to all participants. Consequently, it would be unfair to other bidders that were not awarded a contract to now grant an increased subsidy to Niagara Generation that might be above those other, competitive bids.⁷ The Commission stated further that:

In addition, our stepping in and breaking the price terms of an executed contract would invite all other RPS contract holders to petition us to adjust their prices upwards whenever market changes do not go their way. **Contracting under such circumstances would be a mockery and there would be little protection for**

³ Id. at 7. Niagara Generation identified decreased energy market revenues as a driver of the facility’s inability to operate economically in both the instant Verified Petition and its Restructuring Petition. (See, e.g., Verified Petition at 4; Restructuring Petition at 6.)

⁴ Restructuring Petition at 6.

⁵ Case 03-E-0188, supra, Order Denying Request to Adjust Contract Price (issued November 9, 2010).

⁶ Id. at 10 (emphasis added).

⁷ Id.

ratepayers as to the cost certainty of the RPS program that the current contract prices provide.⁸

The unequivocal precedent that Niagara Generation fails to acknowledge or distinguish was affirmed by the Commission only two months ago. In its *Order Approving Request for Modification of Funding as a Maintenance Resource*, the Commission repeated its conclusion that modifying a Main Tier contract resulting from a competitive solicitation would be unfair and anti-competitive.⁹ It further stated that its Order Denying Request to Adjust Contract Price “**remains a controlling precedent against all future requests for price modifications to RPS Main Tier contracts.**”¹⁰

Notwithstanding this clear and unequivocal precedent, Niagara Generation now seeks to modify the same RPS Contract addressed by the Commission in its Order Denying Request to Adjust Contract Price. In seeking such relief, Niagara Generation (i) does not acknowledge its prior, similar request, (ii) does not acknowledge that such request was rejected by the Commission, (iii) does not acknowledge this prior rejection, and (iv) does not attempt to distinguish the relief sought in its Verified Petition from the “controlling precedent” established in the Order Denying Request to Adjust Contract Price. Rather, Niagara Generation simply mischaracterizes its RPS contract, executed following a Main Tier solicitation, as a Maintenance Tier contract, which, apparently, simply is not true.

For the reasons described above and in its June 25th Comments, Multiple Intervenors respectfully urges the Commission to deny the Verified Petition in its entirety.

Respectfully submitted,

MULTIPLE INTERVENORS

S. Jay Goodman

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⁸ Id. (emphasis added).

⁹ Case 03-E-0188, supra, Order Approving Request for Modification of Funding as a Maintenance Resource (issued April 20, 2012) at 10.

¹⁰ Id. at 10 (emphasis added).