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June 18, 2012

Honorable Jaclyn A. Brilling
Secretary
State of New York
Public Service Commission
Three Empire State Plaza
Albany, NY 12223

Re: Case 03-E-0188 – Proceeding on Motion of the Commission Regarding a Retail Renewable Portfolio Standard – Petition by Niagara Generation, LLC, for Rulemaking to Allow For Up to Ten Percent of Glued Wood within Clean MRF Fuel to Be Eligible for Use as Biomass Fuel in the Renewable Portfolio Program

Dear Secretary Brilling:

Please accept these comments on behalf of Consolidated Edison Company of New York, Inc. and Orange and Rockland Utilities, Inc (collectively the “Companies”) in response to the petition filed by Niagara Generation, LLC (“NiGen”) on March 26, 2012, for modification of its Renewable Portfolio Standard (“RPS”) agreement. As explained below, the Companies have consistently supported the Public Service Commission’s (“PSC” or the “Commission”) Renewable Portfolio Standards but respectfully urge close scrutiny of NiGen’s petition for authorization to burn up to 10 percent glued wood and still receive RPS payment under its RPS contract with the New York State Energy Research and Development Authority (“NYSERDA”). In addition, the Companies note the pendency of a related petition filed by NiGen to renegotiate

*Admitted only in New Jersey

terms of its RPS contract with NYSERDA.¹ In that both of these petitions effectively hinge on the presumed level of profitability necessary for the NiGen facility to remain in operation, it is respectfully suggested that these petitions be considered together.

Background

In 2004, the Commission established the RPS to develop New York State renewable energy funded by the State's electric customers.² To that end, the Commission delineated two tiers of renewable facilities eligible to participate in the RPS: (1) Main Tier facilities which are generally medium-to-large-scale electric generation and (2) Customer-Sited facilities which are generally smaller behind-the-meter facilities.³ Thereafter, the Commission established an implementation plan with a process for determining the eligibility of additional RPS resources and a list of criteria including the probable cost of providing RPS program support for that resource.⁴

NiGen owns and operates a 51 MW electric generating biomass facility in Niagara Falls, New York.⁵ On April 17, 2007, NiGen signed an RPS contract with NYSERDA that provided incremental revenues to support the conversion of the NiGen facility to operate in part on

¹ Case 03-E-0188, *Proceeding on Motion of the Commission Regarding a Retail Renewable Portfolio Standard*, Petition by Niagara Generation, LLC, for a Restructuring of Its RPS Agreement (filed April 12, 2012) ("Restructuring Petition").

² Case 03-E-0188, *Proceeding on Motion of the Commission Regarding a Retail Renewable Portfolio Standard*, Order Regarding Retail Renewable Portfolio Standard (issued September 24, 2004).

³ *Id.* at pages 6-7. Less relevant to this proceeding is a third tier for Maintenance Resource facilities which are renewable energy facilities that began commercial operation before January 1, 2003, and for which the Commission has determined that RPS subsidies are necessary for their continued ability to operate. Case 03-E-0188, *Proceeding on Motion of the Commission Regarding a Retail Renewable Portfolio Standard*, Order Approving Implementation Plan, Adopting Clarifications, and Modifying Environmental Disclosure Program (issued April 14, 2005).

⁴ Case 03-E-0188, *Proceeding on Motion of the Commission Regarding a Retail Renewable Portfolio Standard*, Order Approving Implementation Plan, Adopting Clarifications, and Modifying Environmental Disclosure Program (issued April 14, 2005), page 33, Appendix A, pages 8-9.

⁵ NiGen is a majority-owned subsidiary of U. S. Renewables Group ("USRG") that describes itself as one of the largest private equity firms focused exclusively on investments in renewable power, biofuels, and clean technology infrastructure. Founded in 2003, NiGen states that USRG has mobilized more than \$750 million of capital commitments for investment in clean energy. Case 03-E-0188, *Verified Petition of Niagara Generation, LLC for Rulemaking to Allow for Up to Ten Percent of Glued Wood Within Clean MRF Fuel to Be Eligible for Use as Biomass Fuel in the Renewable Portfolio Program*, filed March 26, 2012 ("Glued Wood Petition"), page 3.

biomass fuel.⁶ In March 2010, NiGen suspended operations because of the claim that energy markets prices were insufficient to cover operations.⁷ In November 2010, the Commission rejected NiGen’s petition to modify the terms of its RPS contract because the Commission found that allowing a mid-stream price adjustment in a contract “would undermine the competitive process established for the RPS program.”⁸

In that same time frame, however, the Commission granted NiGen’s petition to allow clean Construction and Demolition debris (“CCD”) collected from approved material reclamation facilities to be eligible for use as a biomass fuel in the RPS program.⁹ The Commission also approved a quality assurance plan, inspection, record retention, reporting, and third-party evaluation requirements to ensure that waste wood meets the standards for inclusion in the RPS program.¹⁰ In so ruling, the Commission emphasized the comments of the New York State Department of Environmental Conservation (“NYSDEC”) that any changes to RPS biomass eligibility requirements be consistent with New York solid waste management policy, greenhouse gas emission mitigation efforts, and State environmental requirements.¹¹ The Commission also relied upon an expert study of the eligibility of clean wood prepared by the ANTARES Group, Inc. (“ANTARES”). Thereafter, the New York State Renewable Portfolio

⁶ Restructuring Petition, at page 3.

⁷ *Id.* at page 4.

⁸ Case 03-E-0188, *Proceeding on Motion of the Commission Regarding a Retail Renewable Portfolio Standard*, Order Denying Request to Adjust Contract Price (issued November 19, 2010), page 10.

⁹ Case Nos. 09-E-0843 and 03-E-0188, *In the Matter of the Petition of Niagara Generation, LLC for Rulemaking Allowing Clean Wood Separated from Construction and Demolition Waste at Material Reclamation Facilities to be Eligible for Use as Biomass Fuel in the Renewable Portfolio Standards Program and Proceeding on Motion of the Commission Regarding a Retail Renewable Portfolio Standard*, Order Approving Petition with Modifications (issued November 22, 2010).

¹⁰ *Id.*

¹¹ *Id.* at pages 4-5.

Standard Biomass Power Guide, prepared by ANTARES, was issued on September 29, 2011.¹²

It is noteworthy that nowhere in this fifty-page guide is glued wood discussed.

In March 2012, the facility returned to commercial operations.¹³ In the within petition, filed shortly thereafter, NiGen asks that the Commission determine that CDD containing up to 10 percent of glued wood be considered an acceptable limit for RPS-eligible fuel for the NiGen facility and for similar Qualifying Biomass Facilities.¹⁴ NiGen notes that the presence of glued wood can be identified by visual inspection such that its limited presence within CDD, with appropriate testing, reporting requirements and performance standards would preserve the goals of the RPS Program and the viability of NiGen's operations and its economic acquisition of biomass fuel.¹⁵ NiGen states that this "minor" modification will enhance the public policy goals of the RPS, lower the costs of fuel to NiGen's facility, and decrease the amount of this type of debris in landfills.¹⁶ Based upon consultation with ANTARES, NiGen states that burning this waste will pose no environmental concerns¹⁷ and will be consistent with its air permits issued by NYSDEC.¹⁸

Comments

As noted above, the Companies have long supported the Commission's Renewable Portfolio Standard policies. In doing so, the Companies have consistently urged the Commission to implement the program to ensure that the funding collected from our customers is spent wisely. In particular, the Companies have urged against raising the level of RPS collections and have sought to be vigilant with respect to proposals that could have the effect of raising program

¹² www.nyserda.ny.gov/~media/Files/EDPPP/Energy and Environmental Markets/RPS/RPS Documents/rps-biomass-guide.ashx.

¹³ Restructuring Petition, at page 4.

¹⁴ Glued Wood Petition, at page 2.

¹⁵ *Id.* at pages 3-4.

¹⁶ *Id.* at page 7.

¹⁷ *Id.*

¹⁸ *Id.* at page 9.

costs.¹⁹ This petition could have the effect of raising environmental costs and may also result in electric customers paying for activities that are not directly related to achieving a cleaner energy future.

The Companies are confident that the Commission will, as it has in the past and indeed with respect to the recent clean wood petition by NiGen, take no steps in furtherance of the RPS without assurance that such steps do not harm the State's environment.²⁰ The Companies have also taken the position that the State's electric customers who fund the RPS program should not see those funds used as a method to fund the local costs of solid waste disposal.²¹ The Commission too has long closely examined this type of expansion of RPS eligibility.²² A challenge of this petition, however, is that every point in support of burning glued wood could be used to urge eligibility of other, possibly problematic, waste streams to NiGen's fuel supply. Finally, to the extent that this petition, if approved, could lower the cost of NiGen's fuel supply, it is notable that this petition was not mentioned in NiGen's almost contemporaneous petition to restructure its RPS contract. Rather than separate evaluation of each petition, it is suggested that these matters be reviewed together. The Companies further observe that while clean wood recovered from construction debris meets the criteria for a renewable resource, glue on its own likely would not meet such criteria. As such, the Companies suggest that, should the

¹⁹ For example, although the recent petition to include waste-to-energy plants within RPS eligibility was withdrawn, the Companies had filed comments urging the Commission to continue exclusion of that type of energy. Case 03-E-0188, *Covanta Petition to Include Garbage Incineration (Waste-to-Energy) in New York's Renewable Portfolio Standard Program*, Comments of Consolidated Edison Company of New York, Inc., and Orange and Rockland Utilities, Inc., dated August 19, 2011.

²⁰ Although NiGen specifically states that its proposal meets the testing requirements of the Biomass Power Guide and has made such a showing to NYSERDA, NiGen is less clear about the basis for its assertion that this petition will meet the requirements of its air permit. For example, NiGen does not expressly state that it has sought the NYSDEC's approval for this application. *Id.* at page 6. Similarly, NiGen's statement that personnel from ANTARES see no evidence of appreciable increases in regulated emissions for the proposed glued wood would appear to be less than the searching inquiry the Commission required before approving the burning of clean wood.

²¹ See Note 19, *supra*.

²² Case 03-E-0188, *Proceeding on Motion of the Commission Regarding a Retail Renewable Portfolio Standard*, Order Resolving Main Tier Issues, (issued April 2, 2010) , pages 14-17.

Commission choose to approve this petition, the Commission should require NiGen to account for any increase in the heating value of the biomass combustion stream attributable solely to the addition of glue, and reduce its resulting RPS payments by that factor. The State's electric customers should not pay NiGen to burn glue.

Conclusion

As discussed above, it is respectfully urged that the Commission closely scrutinize this petition, in conjunction with NiGen's restructuring petition, and that any approval exclude payment by electric customers for the burning of glue.

Respectfully submitted,

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