



Carol E. Murphy
Executive Director

November 8, 2010

Honorable Jaclyn A. Brillling
Secretary to the Commission
New York State Public Service Commission
Agency Building 3
Empire State Plaza
Albany, New York 12223-1350

Re: Case Number 03-E-1088 – Proceeding on Motion of the Commission Regarding a
Retail Renewable Portfolio Standard

Dear Secretary Brillling,

I have enclosed comments of the Alliance for Clean Energy New York (ACE NY) regarding
SAPA Notice 03-E-0188SP26: Petition of Niagara Generation. We will also serve all parties to
this case via the electronic list serve.

Sincerely,

A handwritten signature in black ink that reads 'Carol E. Murphy'.

Carol E. Murphy, Executive Director
Alliance for Clean Energy New York

Encl.

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**COMMENTS OF THE
ALLIANCE FOR CLEAN ENERGY NEW YORK
ON THE PETITION OF NIAGARA GENERATION
SAPA 03-E-0188SP26**

I. Introduction

The Alliance for Clean Energy New York (ACE NY) respectfully submits the following comments in the Renewable Portfolio Standard (RPS) program proceeding in response to the notice for public comment on the petition by Niagara Generation. ACE NY is a nonprofit organization whose mission is to promote the use of clean, renewable electricity technologies and energy efficiency in New York State in order to increase energy diversity and security, boost economic development, improve public health, and reduce air pollution. Members of the Alliance for Clean Energy New York (ACE NY) include nonprofit environmental, public health, and consumer advocacy organizations; educational institutions; and private companies that develop, produce and sell renewable energy and renewable energy technologies, as well as energy efficiency services, in New York. Many of ACE NY's member organizations and companies have been active parties in the RPS since the proceeding's inception. ACE NY believes the Commission should reject Niagara Generation's petition on principle, as accepting it would be detrimental to the competitive procurement model and invites "gaming" of the system and, furthermore, its acceptance would be unfair to other project developers, especially those that lost during the procurement round in which Niagara Generation won.

II. Niagara Generation's Petition Should be Rejected

ACE NY believes acting favorably on Niagara Generation's petition would be grossly unfair to those projects that lost in the solicitation in which Niagara Generation won its RPS contract. Clearly, a project that bid in the solicitation lost to Niagara Generation and now Niagara Generation could be requesting a price potentially above that submitted by the next highest bidder when they lost to Niagara Generation. This is prejudicial to the losers of the procurement and could be used in the future to "game" the system, i.e. win a contract with a low bid and then ask for an increase in price after the fact.

The Commission itself acknowledged the concern that allowing biomass projects to opt out of contracts and re-bid could be detrimental to the program and could, in fact, result in "gaming" the system. On page 11 of the Order issued on April 2, 2010, the Commission noted that "...if we were to allow fuel-based renewable energy generators to terminate their contracts and then re-bid in future solicitations, our attempt to hold these entities harmless of a loss caused by an unstable fuel supply market could be turned against us into an opportunity for these entities to extract extra and unnecessary profits." There is no difference between allowing contract winners to withdraw from a contract and re-bid, and requesting a higher price under the initial contract – even if they are willing to open their books (they could very well have known they would be uneconomic but bid anyway). ACE NY is opposed to "gaming" of the process, regardless of technology.

In addition, not only is Niagara Generation requesting that its contract be renegotiated after two and a half years, but also it appears that Niagara Generation has not even fulfilled its obligations under the initial contract since it is currently not operating. If a project can win an RPS contract and then fail to deliver without repercussions, such treatment should be afforded to all generators under RPS contracts, and yet we are under the impression that this is not the case and that there are generally penalties for non-fulfillment of contract terms. When the

Commission decided to provide biomass resources with an “opt-out” provision after two-and-a-half years, we assume that it expected biomass generators to ensure they had a fuel supply for that period or could in some way “make good” on their proposed energy deliveries. In addition, that opt-out option was not in effect at the time Niagara Generation was awarded an RPS contract. The Commission cannot change the rules of the procurement after the fact – and especially not for a single project rather than for all of the winners of that particular procurement. The Commission should not “reopen” a specific RPS contract any time an entity with a contract experiences an economic downturn from regulatory uncertainty or low fuel prices. In fact, all projects with current RPS contracts are currently receiving lower than anticipated energy revenues because of decreased energy demand and low gas prices. If the Commission feels it is appropriate to reopen Niagara Generation’s contract, then it also should be willing to reopen all other RPS contracts to account for changes in the cost of construction materials and for the unexpectedly low wholesale prices being received in the energy markets.

We also are concerned with the impact on the market of the Commission accepting this petition to reopen a contract between NYSERDA and a corporation. Doing so could have a chilling effect on the ability of project developers to obtain financing based on NYSERDA REC contracts. The RPS program is based upon the willingness of financial institutions to fund projects backed by a revenue stream guaranteed by the RPS contracts. The Commission reopening a contract sends a signal that outside factors or players can insert themselves into a contract and change its terms; this could be questionable from a legal perspective and it is most certainly questionable from a market stability perspective.

Finally, as we have noted in previous comments, the 10-year contract term appears to have worked to date. We have noted that we are not in principle opposed to alternative contract lengths. We have also noted in previous comments however, that if funds are used to finance a

fuel-based project that after a relatively short time stops using eligible fuel, the State's goals are then not being met and we would question if those funds were wisely spent in the first place.

III. ACE NY Would Support a CFD Applied to All Contracts

We do believe that Niagara Generation's petition raises an interesting potential remedy to low gas prices for all RPS contracts – that of a Contract for Difference (CFD). ACE NY would support the Commission returning to its exploration of the use of a CFD and is willing to work with the Commission and other RPS stakeholders to address outstanding and unresolved concerns raised during the Commission's previous consideration of this financial tool. However, we do not believe it would be fair and in keeping with the competitive process to award Niagara Generation a CFD while not doing so for others; therefore a CFD is only an appropriate option for Niagara Generation providing that option is made available to all generators with RPS contracts (or only made available for projects bidding into the RPS in future solicitations – the current Niagara Generation contract excluded).

IV. Niagara Generation is Unfairly Critical of Wind Generation

ACE NY believes Niagara Generation unfairly characterizes wind energy and believes Niagara Generation errs in statements regarding the importance of maintaining biomass resources within the mix of technologies supported by the RPS. Since its inception the Main Tier of the RPS has been based on competition among technologies generating energy sold in wholesale markets. Wind projects are not being “favored” over biomass projects; there are simply more wind projects in existence and more of them have successfully bid in the competitive solicitations. Furthermore, biomass resources do not offer the same environmental benefits as do emissions-free resources such as wind and hydropower, and environmental benefits are one of the main reasons, if not *the* main reason, for establishment

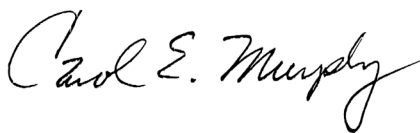
of the RPS in the first place. Energy security, economic development, and reducing price volatility are important, though not overriding, considerations.

Additionally, Niagara Generation's argument that wind resources require "standby" natural gas capacity is a misnomer. Regardless of whether or not there is wind on the system, it is certainly true that it requires some plants capable of ramping quickly and providing regulation as needed. Numerous studies have shown however that wind, particularly at the levels found currently or expected to exist in NY, does not require a significant increase in regulation or spinning reserves. We also would argue that biomass plants such as Niagara Generation cannot be counted on; Niagara Generation has shut down and is not operating for lack of reasonably priced and environmentally sound fuel. Wind plants, once built, are fuel free and have high availability rates.

V. Conclusion

For the reasons stated above, ACE NY urges the Commission to reject the petition of Niagara Generation requesting a higher REC price under its RPS contract. We do support, however, the exploration and eventual adoption of a contract for difference approach for future solicitations.

Respectfully submitted,

A handwritten signature in cursive script that reads "Carol E. Murphy". The signature is written in black ink and is positioned above the typed name and title.

Carol E. Murphy, Executive Director
Albany, NY
November 8, 2010