

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on August 16, 2012

COMMISSIONERS PRESENT:

Garry A. Brown, Chairman
Patricia L. Acampora
Maureen F. Harris
James L. Larocca
Gregg C. Sayre

CASE 03-E-0188 - Proceeding on Motion of the Commission
Regarding Retail Renewable Portfolio Standard.

ORDER DENYING REQUEST FOR RESTRUCTURING OF A CONTRACT

(Issued and Effective August 16, 2012)

BY THE COMMISSION:

INTRODUCTION

The Main Tier is a major component of the Renewable Portfolio Standard (RPS) program administered by the New York State Energy Research and Development Authority (NYSERDA). It provides financial incentives on a per megawatt-hour basis to chosen large-scale renewable resource generation facilities. Which facilities are chosen for financial incentives, and the amount or price of the incentive premium to be paid to them, is determined by the award of contracts following competitive solicitations of bids. The solicitations are purposefully designed to be of a competitive nature to get the best price possible (lowest price after considering economic benefits) so as to minimize the cost of adding incremental renewable resources to the mix of resources generating the electricity consumed in New York. In this order, the Commission denies the request of Niagara Generation, LLC (NiGen) for a restructuring of the price terms of its RPS incentive contract that had been

determined by the award of the contract in a competitive solicitation at the price bid by NiGen, because to do otherwise would undermine the competitive process established for the RPS Main Tier.

BACKGROUND

The RPS program was instituted by the Commission in 2004. NiGen participated in the second Main Tier solicitation, which was conducted in December of 2006. That Main Tier solicitation resulted in 34 bids, and the awarding of 21 contracts including the NiGen contract. The 13 bids that did not result in contract awards were scored to have bid higher prices than the price bid by NiGen. The NiGen Main Tier contract was executed on April 17, 2007. It provides for incentive payments for biomass generation commencing in 2008 and terminating in 2017. By a Verified Petition dated April 12, 2012, NiGen requests that the Commission issue an order directing NYSERDA to work with NiGen to restructure the price terms of the NiGen contract.

The NiGen generating facility is a former coal plant that NiGen converted to operate on a multiple fuel boiler. NiGen has permits that allow it to burn several fuels at the facility including coal, tires, and various wood-based fuels. The facility is eligible for RPS incentives only when it is operating on feedstock qualified as eligible biomass as defined by the Commission.¹

¹ Case 03-E-0188, Renewable Portfolio Standard (RPS), Order Approving Implementation Plan, Adopting Clarifications, And Modifying Environmental Disclosure Program (issued April 14, 2005), Amended Appendix B, p. 4, entitled "Definition of Eligible Sources of Biomass".

The NiGen generating facility is a "fuel-based" facility in the sense that NiGen must procure fuel to operate the plant, as distinguished from wind and hydropower facilities that do not consume fuel. As a fuel-based bid facility, NiGen had the option in the second Main Tier solicitation to bid any whole number of contract years between three and ten. The Commission gave that leeway to fuel-based facilities because their proponents claimed it is difficult for such facilities to secure long-term fuel supplies such that they can fix their long-term costs. By being allowed to bid in subsequent solicitations, such facilities are able to adjust their bids to reflect their current fuel costs over time. If NiGen had been awarded a contract of less than ten years in duration, it would have been permitted to bid in subsequent RPS solicitations for additional years up to a cumulative maximum of ten years for the facility. Bid facilities that were not fuel-based were required to bid a contract duration fixed at ten years. Despite being a fuel-based bid facility with flexibility as to contract duration, NiGen chose to submit a bid for a full ten-year contract term and was awarded a fixed-price ten-year contract on that basis.

NiGen's April 12, 2012 Verified Petition is the fourth petition submitted by NiGen in the RPS proceeding. By a petition dated March 26, 2012, NiGen seeks authorization to burn glued wood as a portion of its eligible biomass fuel. By a petition dated November 6, 2009, NiGen sought authorization to burn clean wood separated from construction and demolition debris after comingling, as distinguished from already eligible clean wood debris that is source-separated. The November 6, 2009 petition was granted with modifications and all biomass facilities were authorized to use clean wood separated from construction and demolition debris at approved material

reclamation facilities as eligible "biomass" fuel, subject to quality assurance plans, inspections, record retention, reporting, and third-party evaluation requirements to ensure that the separated waste wood meets the appropriate standards. Finally, by a petition dated August 19, 2010, NiGen sought authorization to adjust the pricing levels in the April 17, 2007 contract, the same contract that is the subject of the instant Verified Petition, such that the pricing levels would be cost-based and established by negotiation with the Staff of the Department of Public Service (Staff) after an examination by Staff of the financial books of NiGen, with NiGen being allowed to request future price adjustments every two and one half years during the term of its RPS contract. NiGen also sought consideration of a flexible pricing Contract for Differences (CFD) scenario. The requests in the August 19, 2010 petition were denied, in summary, "because the contract is a binding agreement that was awarded in a competitive solicitation at the price bid by NiGen and allowing a price adjustment in such a circumstance would undermine the competitive process established for the Renewable Portfolio Standard (RPS) program."²

SUMMARY OF THE PETITION

In the instant Verified Petition, NiGen requests that the Commission authorize NYSERDA to restructure the NiGen contract to "front-load" or increase the level or price of the incentive payment that NiGen will receive for each megawatt-hour of generation in the next three years, in exchange for a

² Case 03-E-0188, supra, Order Denying Request to Adjust Contract Price (issued November 19, 2010), p 1. It is germane to a later discussion in this order that in the cited order the Commission referred to the NiGen contract as a "Main Tier" incentive contract.

reduction in the price of the incentive payment that NiGen will receive for each megawatt-hour of generation during the remaining term of the contract. NiGen asserts that the restructuring will give NiGen additional RPS funds during the current period of extremely low electricity prices, without increasing the total payments due over the full term of the contract. It anticipates that the end result would be no additional cost to New York State and that the new price structure would lead to what it calls a "break even" price in the next three to four years while power commodity prices stabilize to anticipated and customary levels.

In support of its proposal, NiGen argues that (a) the facility cannot operate economically under current conditions; (b) because the total amount ultimately paid would not exceed the total payment already allowed by the contract, the relief requested would hold the State and its ratepayers harmless and would not create a precedent that will increase pressure on the RPS fund; (c) the biomass generation is needed to balance the largely wind-based RPS portfolio; (d) the NiGen biomass resource is provided at a cost that is more cost-effective than potential alternative renewable resources available to the RPS program; and (e) the facility contributes jobs and other economic benefits to the fragile economy of Western New York.

In addition, NiGen asserts that the NiGen contract is an RPS "Maintenance" contract and that the relief requested by NiGen is consistent with Commission precedent because the restructuring will allow a biomass facility to stay open. Citing the August 21, 2009 RPS Order,³ NiGen claims that the Commission has established a process by which the Commission

³ Case 03-E-0188, supra, Order Authorizing Additional Main Tier Solicitation and Setting Solicitation Guidelines (issued August 21, 2009), p. 7.

could allow for price restructuring where a new facility cannot operate under its current rate schedule/contract, and seeks that this relief be granted to NiGen. NiGen offers to open its books to Staff and NYSERDA so that the restructured price can be set in a manner that provides NiGen with no more than a reasonable return on its capital investment.

NOTICE OF PROPOSED RULEMAKING

A Notice of Proposed Rulemaking concerning the request made by NiGen to restructure the price terms of the RPS contract under consideration here was published in the State Register on May 9, 2012 [SAPA 03-E-0188SP33]. The minimum period for the receipt of public comments pursuant to the State Administrative Procedure Act (SAPA) regarding the notice expired on June 25, 2012. Three comments (including supplemental comments) were received.⁴ The comments received are summarized below.

SUMMARY OF COMMENTS

The Joint Utilities urge that the Verified Petition be rejected. The Joint Utilities state that they have long supported the Commission's RPS policies and that they have consistently urged the Commission to implement the RPS program in a manner that assures funds are spent wisely and with vigilance against proposals that would have the effect of raising program costs. The Joint Utilities oppose NiGen's Verified Petition because, contrary to NiGen's arguments, implementation of the proposal could have the effect of raising

⁴ Joint comments were submitted by Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., New York State Electric and Gas Corporation, Rochester Gas & Electric Corporation, and Orange and Rockland Utilities, Inc. (Joint Utilities). Comments were also received from Multiple Intervenors (MI). MI also submitted supplemental comments.

costs for the RPS program with no guarantee that electric customers would see the benefits promised by NiGen. The Joint Utilities note that there is no certainty that the underlying assumption of the Verified Petition, that in the not-too-distant future electricity prices will rise, is correct. To the contrary, the Joint Utilities note that energy prices, driven by low natural gas prices as a result in part of technological changes in the way natural gas is produced, could remain low for an extended period. The Joint Utilities further note that NiGen has suspended its operations in the past due to economic conditions, and once it receives the proposed higher "front-loaded" incentive payments, there is no guarantee that NiGen will not choose to suspend operations again, or be forced to suspend operations due to economic conditions or bankruptcy, before electric customers get the benefit of the reduced prices of the later incentive payments. While they oppose the Verified Petition, the Joint Utilities offer that if the Commission chooses to grant the Verified Petition, NiGen should be made to post collateral to ensure refund of the "front-loaded" portion of the incentive payments in case NiGen goes bankrupt or suspends operations before producing sufficient generation at the lower price to offset the incentive payments made for generation at the higher price.

MI submitted initial and supplemental comments. MI's initial comments present arguments in a manner that relies on NiGen's assertion in the verified Petition that the NiGen contract is a "Maintenance" contract. Upon learning authoritatively from NYSERDA that the NiGen contract is not a Maintenance contract, MI submitted supplemental comments charging NiGen with making a material misrepresentation of fact in its Verified Petition. MI's supplemental comments present arguments in a manner based on the NiGen contract being a "Main

Tier" contract. This summary describes MI's arguments as they relate to the "Main Tier" contract.

MI has no objection to the continued operation of the facility, and supports the inclusion of biomass in the RPS program, but like the Joint Utilities, urges that the Verified Petition be rejected. MI asserts that the factual misrepresentation in the Verified Petition, even if unintentional, pertains to an essential element of the request for relief in the Verified Petition. MI notes that NiGen asserted that it had a "Maintenance" contract, and even captioned its Verified Petition as one seeking restructuring of a Maintenance contract. In fact, NiGen does not own or operate a Maintenance facility. MI asserts that as a result of that misrepresentation, the Verified Petition essentially asks the Commission to modify a contract that does not exist. According to MI, it would be impossible, therefore, for the Commission to grant the relief requested. MI asserts that the Commission should not even consider the requested relief given NiGen's material misrepresentation.

MI describes what it characterizes as "clear and unequivocal precedent" that NiGen now seeks to modify the same RPS contract addressed by the Commission in its November 19, 2010 RPS Order denying a previous NiGen request to adjust the contract price.⁵ MI notes that in seeking such relief, NiGen (a) does not acknowledge its prior, similar request; (b) does not acknowledge that such request was acted upon and rejected by the Commission; and (c) does not attempt to distinguish the relief sought in its Verified Petition from the "controlling precedent" established in the November 19, 2010 RPS Order

⁵ Case 03-E-0188, supra, Order Denying Request to Adjust Contract Price.

denying the previous NiGen request to adjust the contract price. Rather, NiGen simply mischaracterizes its RPS contract, executed following a Main Tier solicitation, as a Maintenance contract, which, apparently, simply is not true.

In support of its position that the issues presented here are the same as previously addressed by the Commission and warrant rejection of the request for the same reasons the previous request was rejected, MI provides excerpts from the November 19, 2010 RPS Order, including:

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.

Contracting under such circumstances would be a mockery and there would be little protection for ratepayers as to the cost certainty of the RPS program that the current contract prices provide.

[The Order] remains a controlling precedent against all future requests for price modifications to RPS Main Tier contracts.

MI also agrees with the Joint Utilities that the NiGen proposal would shift risks associated with a competitive marketplace from the wholesale generator, NiGen, to customers, and therefore MI is strongly opposed to the proposal. If the contract had been a Maintenance contract and the Commission chose to grant the Verified Petition in spite of MI's objections, MI would have gone even further than the Joint Utilities and recommended the imposition of such measures as are necessary to ensure that customers will not be harmed by the risks associated with the contract modification proposed by NiGen including, at a minimum: (a) a requirement that NiGen post a bond in an amount at least equivalent to the difference

between enhanced subsidies to be paid during the next three years, and the payments that otherwise would be due under the current contract; (b) Commission review and approval of a plan for the facility to become viable without customer-funded subsidies; (c) agreement by NiGen not to seek any further modifications to its contract; (d) Commission review and approval of a plan for NiGen to hedge the facility's energy revenues in a manner consistent with established industry practice, if it is not already doing so; (e) prohibition on the use of customer-funded subsidies to pay for discretionary expenses, including, but not limited to, incentive compensation and intercompany fees for management or operation of the facility; and (f) any other measures that the Commission deems necessary to safeguard customers against the facility remaining uneconomic. Since the contract is not a Maintenance contract, MI does not believe that any modification should even be considered.

DISCUSSION AND CONCLUSION

Having reviewed the Verified Petition, the comments, and the underlying facts, we find and determine that (a) the April 17, 2007 NiGen contract at issue in the instant Verified Petition is the same NiGen contract we declined to restructure in the November 19, 2010 RPS Order; (b) this same April 17, 2007 NiGen contract is not a Maintenance contract, despite characterizations to that effect made by NiGen in the Verified Petition, but is in fact a Main Tier contract awarded in the second Main Tier solicitation conducted in December of 2006; (c) the April 17, 2007 NiGen contract is not eligible for restructuring under the rules applicable to RPS Maintenance resources because it is not a Maintenance resource; (d) the April 17, 2007 NiGen contract is not eligible for restructuring

under the August 21, 2009 RPS Order because that order by its terms applies only to new solicitations after the date of the order so as to preserve the integrity of the competitive process established for the RPS Main Tier; (e) NiGen's proposal to "front-load" the prices in the April 17, 2007 NiGen contract is a proposal to modify the price terms of an existing RPS Main Tier contract; (f) as we have previously stated and determined, the price terms of existing RPS Main Tier contracts in general, and the April 17, 2007 NiGen contract in particular, are not eligible for modification because to do so would undermine the competitive process established for the RPS Main Tier; (g) NiGen's proposal to "front-load" the prices in the April 17, 2007 NiGen contract is denied as anticompetitive and unfair to the other bidders in the second Main Tier solicitation, particularly those that were not awarded contracts; and (h) while not determinative of the result stated in this order, NiGen's proposal to "front-load" the prices in the April 17, 2007 NiGen contract would shift risks from NiGen to electric customers and could result in increased ratepayer cost on a per megawatt-hour basis for the actual renewable resource generation output of the NiGen facility.

NiGen's Verified Petition is based on two premises, that NiGen has a Maintenance contract eligible for restructuring under the RPS program rules and that the proposed "front-loaded" payment structure would hold customers funding the RPS program harmless from any cost increases. We have no explanation for why NiGen makes the claim that the April 17, 2007 NiGen contract is a Maintenance contract. The Maintenance contract claim is clearly false. The contract is a Main Tier and not a Maintenance contract, and that plain fact is not a matter open to argument, opinion or interpretation. It is unfortunate that the Commission and the parties were asked by NiGen to address

the instant Verified Petition on that mistaken or misrepresented basis. Regarding being held harmless from additional cost, as the commenting parties point out, NiGen's proposal does not hold customers harmless and could well result in NiGen reaping the benefit of higher payments in the first three years, and then suspending operations due to economic conditions or bankruptcy, leaving ratepayers without the promised rewards of compensating generation in the later years at a lower level of incentive payments.

The policy issues raised in this Verified Petition are identical to those we considered when NiGen previously sought to restructure the price terms of this same April 17, 2007 NiGen contract, and do not ultimately hinge on whether the restructuring would be accomplished in a manner that would hold ratepayers harmless. The proposal is rejected for the same reasons as before. Prices set in a competitive solicitation cannot be adjusted without undermining the competitive process. The NiGen contract is a binding contract awarded under a competitive solicitation at a price that was chosen by NiGen, for a term of years chosen by NiGen, bid by NiGen, and awarded to NiGen on that basis. As we discussed in the November 19, 2010 RPS Order, other bidders in the same auction were subject to the same rules as NiGen. A non-winning bidder (there were 13 of them) might have received a contract had NiGen not underbid its real needs. It would be unfair to the other bidders in that auction to now allow an adjustment to NiGen's contract that was not part of the terms of the auction or process available to all under which the competitors bid. Such an adjustment would also undermine the success and value of future solicitations.

The Commission orders:

1. The request of Niagara Generation, LLC to restructure the price terms of its April 17, 2007 Renewable Portfolio Standard Main Tier incentive contract is denied.

2. This proceeding is continued.

By the Commission,

(SIGNED)

JACLYN A. BRILLING
Secretary