

June 25, 2012

Honorable Jaclyn A. Brillling  
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 a Restructuring of Its RPS Agreement**

Dear Secretary Brillling:

Please accept these comments on behalf of Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., New York State Electric & Gas Corporation, Rochester Gas & Electric, and Orange and Rockland Utilities, Inc. (collectively the “Joint Utilities”) on the petition filed by Niagara Generation, LLC (“NiGen”) on April 12, 2012 (the “Verified Petition”) for modification of its Renewable Portfolio Standard (“RPS”) agreement. As explained below, the Joint Utilities have consistently supported the Public Service Commission’s (“PSC” or the “Commission”) Renewable Portfolio Standards but respectfully urge the Commission to decline to permit NiGen, an existing renewable renewable supplier with an RPS contract with the New York State Energy Research and Development Authority (“NYSERDA”) to seek renegotiation of contractual terms to increase RPS payments now in exchange for lower rates later. The Joint Utilities also note the pendency of a related petition

filed by NiGen to set a limit for the amount of wood glue it may process in its facility.<sup>1</sup> 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 State's RPS to develop renewable energy in the State funded by contributions by the State's electric customers.<sup>2</sup> 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.<sup>3</sup> As part of the establishment of these programs, the Commission completed its first mid-course review in 2010 and is scheduled to undertake another review next year. As part of its first review, in recognition of the particular needs of fuel-based renewable generators, the Commission restated its support of ten-year Main Tier contracts for biomass facilities with an escape clause that permits new biomass developers to terminate their RPS contracts at two and one-half year intervals throughout the term of the contracts.<sup>4</sup>

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<sup>1</sup> 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, filed March 26, 2012 ("Glued Wood Petition).

<sup>2</sup> 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).

<sup>3</sup> *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), at pages 30-33.

<sup>4</sup> 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.

NiGen owns and operates a 51 MW electric generating facility in Niagara Falls, New York. On April 17, 2007, NiGen signed an RPS contract with NYSEERDA as a result of NiGen's successful bid in a Main Tier program opportunity notice issued by NYSEERDA. While NiGen suspended operations in March 2010, the facility returned to commercial operations in March 2012.<sup>5</sup> Meanwhile, however, the Commission denied NiGen's petition for an adjustment of the pricing levels in the NYSEERDA contract.<sup>6</sup> In rejecting that petition, even though the Commission had formulated an escape clause for future biomass contracts, the Commission observed that the incentive levels were set at the price NiGen bid before it was awarded the contract and that allowing a mid-stream price adjustment in a contract lacking a provision for such adjustment "would undermine the competitive process established for the RPS program."<sup>7</sup>

In this petition, NiGen asks that the Commission authorize the restructuring of NiGen's NYSEERDA contract to "increase the price that NiGen will receive for its RECs in the next three years, in exchange for a reduction in the price that NiGen will receive for the RECs it provides during the remaining terms of the RPS Agreement."<sup>8</sup> NiGen states that this restructuring would not increase the total payments due to NiGen over the remaining term of its RPS Agreement and that the "end result would be no additional cost to New York State."<sup>9</sup>

### **Comments**

As noted above, the Joint Utilities have long supported the Commission's Renewable Portfolio Standard policies. In doing so, the Joint Utilities s have consistently urged the Commission to implement the program to ensure that the funds collected from our customers are

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<sup>5</sup> Verified Petition, at page 4.

<sup>6</sup> 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).

<sup>7</sup> *Id.* at page 10.

<sup>8</sup> Verified Petition, at page 4.

<sup>9</sup> *Id.*

spent wisely. In particular, the Joint Utilities have urged against raising the level of RPS collections and have been vigilant with respect to proposals that would have the effect of raising program costs.<sup>10</sup> Contrary to NiGen's arguments, this petition could have the effect of raising costs.

NiGen's assertion that its request will have no impact on customer costs ignores the substantial increase in risk to customers should NiGen face further, unanticipated financial challenges that could lead to bankruptcy. Specifically, an underlying assumption to the petition is that electricity prices will rise in the not-too-distant future. There is, of course, no certainty that this will occur. Moreover, energy prices, driven by low natural gas prices which are themselves the result in part of technological changes in the way natural gas is produced, could remain low for an extended period. If prices remain low for an extended period, approving this petition would have the effect of simply deferring the financial risks to NiGen of continued low energy prices and increasing the likelihood that higher prices would have been paid for a facility that might close before the electric customers would see the benefits of paying reduced prices. Indeed, NiGen has suspended its operations in the past due to economic conditions. There is no guarantee, should the Commission approve this petition, that NiGen will not choose to suspend operations again, once the "front-loaded" higher REC price expires. As a result, the Joint Utilities respectfully request that the Commission reject the contract restructuring sought in NiGen's Verified Petition.

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<sup>10</sup> For example, although the recent petition to include waste-to-energy plants within RPS eligibility was withdrawn, comments were filed 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.

The Joint Utilities suggest that if the Commission chooses to grant NiGen's petition, safeguards be required so that the customers are protected from paying higher REC prices to NiGen for a short term, followed by a NiGen suspension of operations or bankruptcy. This could be done by modifying the NiGen contract to include a form of collateral such that if NiGen does not produce the required amount of renewable energy at the overall average price proposed by NiGen, then NiGen will refund to NYSERDA, backed by collateral available to NYSERDA, any payments it has received above the original price approved by the Commission. This would protect customers from being unfairly disadvantaged from the contract adjustment requested by NiGen.

**Conclusion**

For the reasons discussed above, it is urged that the Commission reject this petition. Should the Commission determine to grant NiGen's petition, it is respectfully urged that the Commission establish safeguards to minimize the effect of any bankruptcy or suspension of operations on customers, and to limit the nature of the relief to the circumstances presented.

Respectfully submitted,

CENTRAL HUDSON GAS AND ELECTRIC  
CORPORATION

*/s/ Michael Mosher*

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