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June 25, 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

Dear Secretary Brillling:

Multiple Intervenors hereby submits for filing the annexed “Comments of Multiple Intervenors in Opposition to the Petition of Niagara Generation, LLC” in the above-referenced proceeding. The annexed Comments are submitted in response to a notice published in the May 9, 2012 issue of the New York State Register (I.D. No. PSC-19-12-00009-P).

Respectfully submitted,

MULTIPLE INTERVENORS

S. Jay Goodman

S. Jay Goodman

SJG/dp

Attachment

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**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

**Proceeding on Motion of the Commission
Regarding a Retail Renewable Portfolio
Standard**

Case 03-E-0188

**COMMENTS OF MULTIPLE INTERVENORS IN OPPOSITION
TO THE PETITION OF NIAGARA GENERATION, LLC
(I.D. No. PSC-19-12-00009-P)**

Dated: June 25, 2012

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PRELIMINARY STATEMENT

Multiple Intervenors, an unincorporated association of more than 55 large industrial, commercial and institutional energy consumers with manufacturing and other facilities located throughout New York State, hereby submits its Comments in Opposition to the petition filed by Niagara Generation, LLC (“Niagara Generation”) requesting certain modifications to an agreement executed under the Renewable Portfolio Standard (“RPS”), which was established by the New York State Public Service Commission (“Commission”) in Case 03-E-0188.¹ Multiple Intervenors’ Comments respond to the notice soliciting comments on the Petition published by the Commission in the May 9, 2012 edition of the New York State Register (I.D. No. PSC-19-12-00009-P).

Niagara Generation operates a 51 MW electric generating facility (the “Facility”) that is fueled, in part, by biomass. (Petition at 3.) Operation of the Facility is subsidized under an RPS contract that Niagara Generation executed with the New York State Energy Research and Development Authority (“NYSERDA”) on April 17, 2007 (the “Maintenance Contract”). (Id.) In its Petition, Niagara Generation requests that the Commission restructure its Maintenance 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.

Niagara Generation asserts that an immediate increase to its RPS subsidy is necessary to support commercial operations of the Facility. According to Niagara Generation, energy market revenues have been insufficient to cover the Facility’s operating costs since 2009,

¹ Case 03-E-0188, Proceeding on Motion of the Commission Regarding a Retail Renewable Portfolio Standard, Verified Petition of Niagara Generation, LLC for a Restructuring of its RPS Agreement (filed April 12, 2012) (hereinafter, the “Petition”).

and commercial operations were suspended in March, 2010. (Petition at 3-4.) In an effort to resume operations, Niagara Generation received approval to increase the amount of tire-derived fuel that may be used for generation purposes at the Facility, and undertook certain unspecified actions to “improve Facility economics and to prepare the Facility for a return to commercial operations.” (Id. at 4.) It is unclear whether commercial operations actually were resumed and, if so, whether the Facility remains in operation today.²

Initially, Multiple Intervenors has no objections to the continued operation of the Facility and, to the extent the RPS continues to be implemented in New York, supports the eligibility of biomass facilities in that program. For the reasons detailed herein, however, Multiple Intervenors urges the Commission to deny the Petition. The relief sought by Niagara Generation would affirm detrimental precedents by undermining the sanctity of long-term contracts executed under the RPS program, and by fostering an environment where renewable facilities with existing RPS contracts are encouraged to seek increased subsidies whenever economic circumstances are not what they expect or desire. The proposed acceleration of subsidy payments to Niagara Generation also would increase the risk that the modified Maintenance Contract would increase customer costs if the Facility does not maintain commercial operations for the balance of its RPS contract term. Accordingly, the positions advocated herein by Multiple Intervenors are focused primarily on the detrimental precedents that would attach to the possible granting of the Petition, as well as the potential impact of the relief sought by Niagara Generation on the cost of the RPS program to customers.

² In its Petition, Niagara Generation states, in apparent conflict, that (i) the Facility resumed commercial operations in March, 2012, and (ii) an immediate increase in the RPS subsidy is necessary “to permit the Facility to be restarted and to remain in operation...” (Petition at 4.) It is not clear, therefore, whether or not the Facility has resumed commercial operations.

BACKGROUND

The Commission established an RPS for New York State that included three “tiers” of eligible renewable facilities: (a) Main Tier facilities, which consist primarily of medium- to large-scale electric generation facilities that compete against each other on the basis of a per-MWh price premium; (b) Customer-Sited Tier facilities, which consist primarily of “behind-the-meter” facilities that rely on developing technologies and/or are not economically-competitive with Main Tier facilities; and (c) Maintenance Resource facilities, which are facilities that commenced commercial operations prior to January 1, 2003 and have demonstrated to the Commission that RPS subsidies are necessary for them to remain financially viable.³

The Commission explained that it extended eligibility to certain Maintenance Resources to help achieve the RPS target by avoiding the loss of “baseline renewable resources, not eligible due to vintage, because they may be financially unable to continue operations without RPS program support.”⁴ The Commission explained further that the case-by-case process it established for considering the applications of prospective Maintenance Resource facilities balanced competing concerns and policy objectives by ensuring that: (a) “the largest possible proportion of RPS Program funds are reserved for encouraging the development of additional renewable resources”; and (b) “achievement of the overall target is not made more challenging due to the loss of existing resources from the baseline.”⁵

³ Case 03-E-0188, supra, Order Regarding Retail Renewable Portfolio Standard (issued September 24, 2004) at 7-8.

⁴ Case 03-E-0188, supra, Order Approving Implementation Plan, Adopting Clarifications, and Modifying Environmental Disclosure Program (issued April 14, 2005) at 31.

⁵ Id. at 31-32.

On November 15, 2011, Boralex New York, L.P. (“Boralex”) filed with the Commission a petition requesting that its RPS Maintenance Tier Contract be modified by increasing the subsidy paid thereunder.⁶ Multiple Intervenors opposed Boralex’s petition on numerous grounds including, inter alia, that it would increase RPS costs to customers and establish negative precedents that undermine the sanctity of previously-executed RPS contracts.⁷

The Commission granted Boralex’s request, in part, in an order issued on April 20, 2012.⁸ The Commission explained that “our granting of **any** modification to the maintenance contract is an extraordinary occurrence,” and stated that the incremental payment should be set at the “minimum level to assure the project solvency.”⁹ The Commission restricted use of the customer-funded subsidies by barring their application to discretionary costs, such as incentive compensation or an intercompany management fee.¹⁰ The Commission explained further that it was “troubled” by the fact that ReEnergy had failed to hedge its energy revenues, which would have obviated the need for a contract modification, and that ReEnergy did not “have a plan that

⁶ Case 03-E-0188, supra, Petition of Boralex New York, L.P. for Modification of the RPS Maintenance Tier Contract (Agreement No. 9510) Dated April 1st, 2006 (filed November 15, 2011) (hereinafter, the “Boralex Petition”).

⁷ Case 03-E-0188, supra, Comments of Multiple Intervenors in Opposition to Petition of Boralex New York, L.P. (filed January 10, 2012). Given the brief interval of time between the submission of petitions by Boralex and Niagara Generation seeking RPS contract modifications (i.e., approximately five months) Multiple Intervenors’ concerns appear well founded.

⁸ Case 03-E-0188, supra, Order Approving Request for Modification of Funding as a Maintenance Resource (issued April 20, 2012) (hereinafter, “Boralex Order”). ReEnergy Holdings, LLC (“ReEnergy”) is the successor-in-interest to Boralex, and the entity that will operate the subject biomass facility in compliance with the Boralex Order.

⁹ Id. at 14 (emphasis added).

¹⁰ Id.

would eventually provide for [its facility] to operate economically without RPS support.”¹¹ Significantly, ReEnergy was prohibited from seeking additional RPS maintenance support for its facility after the current RPS contract expires.¹²

The Facility was approved as a Maintenance Tier resource, and Niagara Generation executed an RPS contract with NYSERDA on April 17, 2007. (Petition at 3.) All financial information submitted with the Petition – including information regarding the RPS subsidies authorized previously by the Commission, and the amount that Niagara Generation asserts now may be necessary to support the Facility – was redacted from the public filing. Niagara Generation does not state in its Petition the RPS premium (i.e., customer-funded subsidy) that it currently receives for renewable energy produced by the Facility, or the amount of incremental payments that it believes may be necessary to sustain the Facility.¹³ Instead, it asks the Commission to approve an increase and allow Niagara Generation, NYSERDA, and Department of Public Service Staff (“Staff”) to work out the details later (apparently in the proverbial “back room” shielded from public scrutiny).

¹¹ Case 03-E-0188, supra, Boralex Order at 16.

¹² Id.

¹³ Neither the RPS Contract nor an order of the Commission approving Niagara Generation’s request to designate its Facility as a Maintenance Resource are available through the Commission’s website. Multiple Intervenors was informed by a representative of NYSERDA that the RPS contracts executed with participating facilities, including the Facility operated by Niagara Generation, are not made available to the public. Consequently, Multiple Intervenors was not able to examine any information regarding the Facility’s finances. In Multiple Intervenors’ opinion, this “shroud of secrecy” is inappropriate and constitutes another reason to deny the pending Petition. Niagara Generation is seeking to increase the subsidy paid by customers, at least in the near-term, based on its purported costs to operate the Facility. Accordingly, Niagara Generation should not be entitled to any greater degree of confidentiality than utilities seeking rate increases under cost-of-service ratemaking. Now, there is no public information about a contract that may be providing millions of dollars in subsidies annually, all at the expense of customers.

ARGUMENT

POINT I

THE COMMISSION SHOULD REFRAIN FROM MODIFYING ADDITIONAL RPS CONTRACTS

Multiple Intervenors advocated previously that allowing one developer to modify its RPS contract would elicit numerous similar requests from other developers also seeking to modify their long-term RPS contracts.¹⁴ Allowing such an outcome would increase overall procurement and administration costs associated with the RPS program, and make a mockery of the supposedly-binding contracts that have formed the basis for much of the renewable generation procurement process. It also would create an opportunity for developers to “game” the system by misrepresenting their financial condition in order to receive increased customer-funded subsidies.

The Commission now has considered multiple requests to modify RPS contracts, and has acknowledged that such requests could have the effect of encouraging similar proposals. In rejecting a request by Niagara Generation to modify a Main Tier contract, the Commission stated:

[O]ur 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 ratepayers as to the cost certainty of the RPS program that the current contract prices provide.¹⁵

¹⁴ Case 03-E-0188, supra, Comments of Multiple Intervenors in Opposition to Petition of Boralex New York, L.P. (filed January 10, 2012) at 6.

¹⁵ Case 03-E-0188, supra, Order Denying Request to Adjust Contract Price (issued November 19, 2010) at 10.

The Commission subsequently distinguished between (i) Main Tier contracts, which are awarded pursuant to competitive solicitation and reflect bids submitted by prospective participants, and (ii) Maintenance Tier contracts, which may be awarded by petitioning the Commission for such relief and reflect a subsidy determined by an administrative process.¹⁶ According to the Commission, modifying the RPS contracts of Main Tier facilities would “undermine the competitive process established for the RPS program,” whereas modifying the RPS contracts of Maintenance Tier facilities apparently would not.¹⁷

This distinction is overstated, and should not be relied upon when resolving the pending Niagara Generation Petition. Although the subsidy awarded to Niagara Generation ultimately was established by the Commission, the developer undoubtedly had numerous opportunities to discuss with Staff and/or NYSERDA the level of support it considered necessary for the Facility to maintain commercial operations, and to advocate for a particular outcome. That outcome should not be treated more casually simply because it was the product of an administrative process. Any such distinction, if perpetuated, would institutionalize the practice and encourage other RPS participants to request modifications of their RPS contracts. Instead, *all* RPS contracts should be treated as binding agreements irrespective of whether they pertain to Main Tier resources or Maintenance Tier resources.¹⁸

¹⁶ Case 03-E-0188, supra, Boralex Order at 10.

¹⁷ Case 03-E-0188, supra, Order Denying Request to Adjust Contract Price at 10.

¹⁸ Several years ago, when wholesale electricity prices were very high, not a single entity with an RPS contract offered to reduce the customer-funded subsidies it was receiving. This dichotomy highlights the inequitable position that contract modifications place customers – when market prices are high, contract subsidies are maintained, yet when market prices decline, certain generation owners seek increased subsidies.

Developers that seek to participate in the RPS program must be held accountable to the terms and conditions of the agreements that they execute with NYSERDA. Allowing RPS contracts to be modified in response to volatile market forces would shift the risks associated with a competitive marketplace from wholesale generators – including Maintenance Resources – to customers. Although the Commission may distinguish Maintenance Resource facilities from Main Tier facilities for policy reasons, the reasoning proffered by the Commission in support of its decision to reject a Main Tier contract modification proposed by Niagara Generation applies with equal force to the instant Petition:

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.¹⁹

Maintenance Resources participate in the development of the subsidies they are offered. They have the option to accept or to decline any such award. If a subsidy is accepted by a Maintenance Tier facility, and a RPS contract reflecting same is executed with NYSERDA, then the agreement should be treated as binding in a manner identical to that afforded to RPS contracts for Main Tier facilities.

Finally, the Commission has affirmed that: (a) the “RPS program ... is not a guarantor of profits or continued operation for any generator”; (b) the Commission will not act to maintain “all existing resources regardless of the cost”; and (c) the RPS program will not “provide permanent financial support for any generator.”²⁰ These boundaries on the RPS

¹⁹ Case 03-E-0188, supra, Order Denying Request to Adjust Contract Price at 10-11.

²⁰ Case 03-E-0188, supra, Boralex Order at 16.

program are reasonable, and constitute important safeguards for customers (who bear the costs of the entire program). However, such statements are meaningless if the Commission does not act in a manner consistent with its statements. The Commission should refrain from allowing further modifications of executed RPS contracts, including the Maintenance Contract underlying the Petition. Absent denial of the Petition, the Commission effectively will be inviting additional requests for similar relief, no matter how narrowly it may try to frame its decision here. It also would foster an environment for the RPS in which “[c]ontracting ... 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.”²¹

For the foregoing reasons, Multiple Intervenors respectfully urges the Commission to discontinue its practice of granting RPS contract modifications under certain circumstances.

POINT II

THE PETITION SHOULD BE DENIED

Niagara Generation executed its RPS Contract with NYSERDA approximately five years ago, in 2007. The Facility has been uneconomic since at least 2009, when it was converted to operate, in part, on biomass fuel. Its operations were suspended for approximately two years and, therefore, it has not operated for at least 40% of the time since Niagara Generation executed the RPS Maintenance Contract (i.e., two of five years). Against this backdrop, Niagara Generation asserts that increased RPS subsidies for a period of approximately

²¹ Case 03-E-0188, supra, Order Denying Request to Adjust Contract Price at 10.

three years somehow would enable the Facility to achieve a degree of financial viability that it heretofore has yet to demonstrate.

Niagara Generation asserts that “Facility operation economics remain challenging during this period of record low gas prices and correspondingly low electricity prices.” (Petition at 4.) To increase revenues, Niagara Generation proposes to restructure its Maintenance Contract by increasing subsidies due thereunder over the next three years, and subsequently reducing the subsidies due for the balance of the contract term. (Id.) It asserts that the proposed restructuring would avoid increasing the total value of the Maintenance Contract while allowing the Facility to survive until “power commodity prices stabilize to anticipated and customary levels.” (Id. at 5.) Although Niagara Generation states that it has implemented certain actions to “improve Facility economics” (id. at 4), those actions are not described in the Petition. Given the lack of information regarding what plan – if any – Niagara Generation has developed to transform the Facility into a financially-viable operation during the proposed period of accelerated subsidy payments, the Petition offers no assurance whatsoever that the Facility will be able to sustain commercial operations when the “restructured” subsidy payments drop below their current, purportedly-inadequate levels.

The Petition indicates that market revenues have not been adequate to cover Facility operations for approximately the last three years, and Niagara Generation assumes that market conditions will reverse within three years. No explanation, analysis or discussion of this assumption is provided in the Petition. If this assumption is wrong, and energy prices do not increase to levels that Niagara Generation deems necessary to cover Facility operations and provide a satisfactory return on its investment, then Niagara Generation simply may pocket the increased RPS subsidies in the near-term and close the Facility – or discontinue operations –

when the subsidies are scheduled to be reduced.²² The Commission should not allow Niagara Generation to bet customer collections on speculation regarding future energy market conditions in this manner. Customers should not be compelled to bear the risk of paying increased contract subsidies to a Facility that apparently lacks any meaningful plan to wean itself from customer-funded subsidies to become financially independent. Niagara Generation assumed the risk of market price volatility when it negotiated, accepted and executed its Maintenance Contract and now is attempting to shift at least some of that risk to customers.

Niagara Generation asserts that, if implemented, its proposed Maintenance Contract restructuring will not increase costs to customers. (Petition at 4-5.) If, however, the Facility cannot achieve a degree of financial viability that it heretofore has failed to demonstrate, and again ceases (or does not resume) commercial operations before the term of the Maintenance Contract ends, then the proposed restructuring would in fact increase total costs to customers.

The Commission has recognized the risks and concerns associated with restructuring long-term RPS contracts. In its Boralex Order, the Commission noted that energy revenues for the subject biomass facility were not hedged, as similar facilities had done.²³ Such prudent risk management would have avoided the “need for a price adjustment.”²⁴

²² In any event, it does not appear that the Facility is viable absent customer-funded subsidies and, therefore, it is difficult to discern how increasing subsidies in the near-term can possibly be in the public interest.

²³ Cases 03-E-0188, et al., supra, Boralex Order at 15.

²⁴ Id. In determining that the Maintenance Contract held by ReEnergy may be modified, the Commission took into consideration the fact that ReEnergy acquired the subject biomass facility after Boralex had petitioned the Commission for relief, noting that “ReEnergy ... had no control over the actions of Boralex at the time.” (Id.) The Commission, therefore, may have refrained from holding ReEnergy accountable for the failures and omissions of Boralex that it had no ability to avoid or correct. There is no such extenuating circumstance underlying the Niagara Generation Petition.

Second, the Commission agreed that the RPS program should not foster an environment in which facilities seek to modify their RPS contracts whenever their revenues “are not what they expect or desire.”²⁵ The Commission explained that:

The RPS program, including the provisions allowing for maintenance support, is not a guarantor of profits or continued operation for any generator. Maintenance support was established to preserve existing renewable electric generation that was in service prior to the RPS program which, under certain financial circumstances, might cease operations or be abandoned altogether. ... **That does not mean, however, that we will maintain all existing resources regardless of the cost or that we will provide permanent financial support for any generator.**²⁶

Finally, the Commission was troubled that the ReEnergy biomass facility did not have a plan that would allow it to operate economically without receiving subsidies from the RPS program.²⁷ The Commission explained that, although RPS support for Maintenance Resources may be justified under certain circumstances, it “becomes questionable” when the investment “does not result in long-term sustainability of the resource”²⁸

The foregoing concerns apply with equal force to the relief sought by Niagara Generation. As described above, the Petition does not set forth an action plan for the Facility to achieve solvency during the proposed period of enhanced subsidy payments. Any such “plan” apparently is limited to a hope that energy market revenues will increase. The Petition similarly does not indicate whether Niagara Generation hedged the energy revenues for its Facility, although if it had taken such action, the purported need for relief now presumably would be

²⁵ Cases 03-E-0188, et al., supra, Boralex Order at 15.

²⁶ Id. at 16 (emphasis added).

²⁷ Id. at 16-17.

²⁸ Id.

sharply reduced or nonexistent. Granting the relief requested by Niagara Generation under such circumstances would encourage facilities with existing RPS contracts “to seek larger subsidies whenever economic circumstances are not what they expect or desire.”²⁹

For the reasons described above, Niagara Generation has failed to justify its proposal to restructure subsidy payments due under the Maintenance Contract. Accordingly, its Petition should be denied.

POINT III

IF, ARGUENDO, THE COMMISSION AUTHORIZES A RESTRUCTURING OF THE MAINTENANCE CONTRACT, IT SHOULD CONDITION SUCH RELIEF ON THE ADOPTION OF STRONG CUSTOMER SAFEGUARDS

In its Boralex Order, the Commission agreed that the RPS program should be administered in a manner that discourages facilities with existing RPS contracts from “seek[ing] larger subsidies whenever economic circumstances are not what they expect or desire.”³⁰ Multiple Intervenors agrees and, therefore, urges the Commission to refrain from modifying additional RPS contracts, including Niagara Generation’s Maintenance Contract.

If, arguendo, the Commission continues to entertain such requests, then it is essential that strong customer protections be adopted as a condition to any such modification. Developers that participate in any part of the RPS program must be held accountable to the terms and conditions of the agreements that they negotiate and/or execute with NYSERDA. Allowing RPS contracts to be modified from time to time in response to volatile market forces would shift

²⁹ Cases 03-E-0188, et al., supra, Boralex Order at 15.

³⁰ Id.

the risks associated with a competitive marketplace from wholesale generators to customers. It would be manifestly unfair to customers, and inconsistent with the public interest, for the Commission not to offset that increased risk by all means necessary, including by imposing strong customer protections as a condition on its approval of contract modifications. To the extent that RPS participants seek to alter contract terms to shield themselves from market forces, they should be required to provide additional consideration in the form of consumer protections.

For instance, if the Commission elects to grant the relief sought in Niagara Generation's Petition notwithstanding Multiple Intervenors' strong opposition thereto, any such modification should be contingent on Niagara Generation adopting a strong suite of measures to protect consumer interests. Such measures are necessary to ensure that customers will not be harmed by the risks associated with the contract modification proposed by Niagara Generation and, at a minimum, should include the following: (a) a requirement that Niagara Generation 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 Maintenance Contract; (b) Commission review and approval of a plan for the Facility to become viable without customer-funded subsidies; (c) agreement by Niagara Generation not to seek any further modifications to its Maintenance Contract; (d) Commission review and approval of a plan for Niagara Generation to hedge the Facility's energy revenues in a manner consistent with established industry practice, if it is not already doing so; (e) prohibit 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. These conditions are consistent with measures discussed by the Commission in its

Boralex Order,³¹ and should comprise the minimum set of consumer safeguards imposed on Niagara Generation – or any other RPS participant seeking similar relief – as a condition to modification of an RPS Maintenance Tier contract.³²

The Commission must never forget that the RPS program is being funded by customers already struggling under the weight of electricity prices that are among the highest in the country. It would be manifestly unfair to refrain from imposing stringent – but reasonable – customer safeguards in exchange for obligating customers to bear even greater RPS program costs and risks in an effort to sustain uneconomic facilities. For the foregoing reasons, Multiple Intervenors respectfully urges the Commission to deny the Petition or, if it is inclined to grant the Petition over Multiple Intervenors’ opposition, to condition approval of the Maintenance Contract restructuring proposed by Niagara Generation on the adoption of stringent customer protections, consistent with those described herein.

³¹ Case 03-E-0188, supra, Boralex Order at 14-17.

³² Under no circumstances should the Commission eliminate its existing prohibition of modifications to RPS Main Tier contracts. (See Case 03-E-0188, supra, Order Denying Request to Adjust Contract Price at 11.)

CONCLUSION

For all the foregoing reasons, Multiple Intervenors respectfully urges the Commission to resolve the Niagara Generation Petition in a manner consistent with these Comments.

Dated: June 25, 2012
Albany, New York

Respectfully submitted,

Michael B. Mager

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