

**BEFORE THE  
PUBLIC SERVICE COMMISSION  
STATE OF NEW YORK**

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Application of Niagara Generation, LLC  
for A Declaratory Ruling That It Has  
Become An Alternate Energy Production  
Facility Exempt From Regulation Under  
the Public Service Law.

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Case No. 13-E-

**VERIFIED PETITION FOR EXPEDITED DECLARATORY RULING**

Niagara Generation, LLC(“NiGen”) submits this Verified Petition for an Expedited Declaratory Ruling that it has become an Alternate Energy Production Facility exempt from regulation under the New York Public Service Law (“PSL”) pursuant to Rule 8.1 of the Commission’s Procedural Rules, 16 N.Y.C.R.R. § 8.1 (2012).

**REQUEST FOR EXPEDITED REVIEW**

NiGen respectfully requests that the Commission expedite action on its Petition so that it may appropriately determine if it needs to file a PSL § 66(6) Annual Report pursuant to the Commission’s Order dated January 23, 2013 in Case 11-M-0294 on or before the July 1, 2013 reporting deadline.

**BACKGROUND**

NiGen is the owner of an approximately 51 MW electric generating facility located in Niagara Falls, New York (the “Plant”). The Plant was originally constructed as a coal-fired, fluidized bed cogeneration facility supplying both electricity and steam. Electricity from the Plant was sold to Niagara Mohawk Power Corporation (“NiMo”) under a long-term power purchase agreement that was subsequently terminated as part of

NiMo's restructuring process. Thereafter, the Plant operated as a merchant supplier of electric power in the wholesale markets administered by the New York Independent System Operator, Inc. ("NYISO"). Because the Plant operated only sporadically as a merchant provider, it could no longer provide a reliable source of steam to its thermal host and its steam contract was terminated.

By order dated April 26, 2002, the Commission authorized WPS Power Development, Inc. ("WPS") to acquire the Plant from Central Hudson Energy Services, Inc.<sup>1</sup> In that order, the Commission also granted lightened regulation to WPS for its operation of the Plant as a wholesale supplier of electric power. By order dated January 22, 2007, the Commission authorized NiGen to acquire all of WPS's ownership interest in the Plant and to continue to operate the Plant as a wholesale supplier of electric power under lightened regulation.<sup>2</sup>

As a result of modifications to the Plant begun by WPS and continued by NiGen, the fluidized bed boiler in the Plant can now combust a variety of solid fuels. The most notable of these alternative fuels are biomass and used tires. Since January of 2009, the Plant has been powered predominantly by these new fuel sources, and the amount of coal burned in the Plant has been reduced to less than 25 percent on a BTU basis. Specifically, the Plant has consumed the following amounts of coal during the years from 2009 to 2012:

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<sup>1</sup> Case 02-M-0093, *WPS Power Development, Inc., CH Resources, Inc., and Central Hudson Energy Services, Inc. – Joint Petition for Approval of the Sale of Certain Electric Generating Facilities and a Steam Plant*, Order Approving Transfers, Providing For Lightened And Incidental Regulation, And Granting A Certificate Of Public Convenience And Necessity (Issued and Effective April 26, 2002).

<sup>2</sup> Case 06-E-1301, *WPS Empire State, Inc., WPS Niagara Generation LLC and USRG Niagara Biomass LLC – Joint Petition For Expedited Approval of the Transfer of All Membership Interests*, Order Approving Transfer And Financing (Issued and Effective January 22, 2007).

<u>Year</u>	<u>Total Plant BTU Input</u>
2012	5.47%
2011	No fuel burned
2010	9.66%
2009	23%

### **ANALYSIS**

#### **I. THE COMMISSION SHOULD FIND AND DECLARE THAT THE PLANT HAS BECOME AN ALTERNATE ENERGY PRODUCTION FACILITY**

PSL § 2(2-b) defines the term “alternate energy production facility” as follows:

The term “alternate energy production facility”, when used in this chapter, includes any solar, wind turbine, waste management resource recovery, refuse-derived fuel or wood burning facility, together with any related facilities located at the same project site, with an electric generating capacity of up to eighty megawatts, which produces electricity, gas or useful thermal energy.

PSL § 2(13) excludes entities owning, operating or managing “alternate energy production facilities” from the definition of an “electric corporation” subject to the Commission’s jurisdiction under the Public Service Law. The Commission recently recognized this fact when it ruled that entities owning, operating or managing alternate power production facilities were not subject to the revised annual reporting requirements established by the Commission.<sup>3</sup>

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<sup>3</sup> Case 11-M-0294, *In the Matter of the Filing of Annual Reports by Electric and Gas Corporations Subject to Lightened Ratemaking Regulation*, Order On Annual Reporting Under Lightened Ratemaking Regulation And Establishing Further Procedures, slip op. at 3 (Issued and Effective March 23, 2012) (“Qualifying facilities, as defined in PSL §2(2-a) through §2(4), do not file annual reports because exempted from the PSL generally, except for Article VII.”).

Nothing in PSL § 2(2-b) requires that a generating facility be fueled exclusively by solar, wind, waste or wood in order to qualify as an “alternate energy production facility.” Instead, the Legislature delegated responsibility to determine the minimum use of these fuels required to qualify. Although PSL § 2(2-b) was adopted over a quarter of a century ago, NiGen has been unable to locate any Commission orders or rulings addressing this important issue. Accordingly, NiGen respectfully requests that the Commission address this important issue in this proceeding and find that as a result of the changes made to the Plant to enable it to be powered predominantly by solid fuels other than coal, as demonstrated by the low level of coal consumption at the Plant over the last four years, the Plant now qualifies as an “alternate energy production facility” exempt from regulation under the PSL.

As further support for this request, NiGen notes that the regulations of the Federal Energy Regulatory Commission (“FERC”) implementing the Public Utility Regulatory Policies Act of 1978 (“PURPA”) require “small power production facilities” to demonstrate only that waste, renewable resources, geothermal resources or any combination thereof be the “primary” energy source for the facility and permit such facilities to obtain up to 25 percent of their thermal energy input from fossil fuels such as coal.<sup>4</sup> While NiGen would clearly qualify as a “small power production facility” under this definition, it does not qualify for exemption from state regulation under PURPA because its facility is larger than 30 MW.<sup>5</sup>

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<sup>4</sup> See 18 C.F.R. § 292.203(b) (2012).

<sup>5</sup> See 18 C.F.R. § 292.602(a) (2012), which incorporates by reference the exclusion of small power production facilities with a capacity which exceeds 30 MW from the exemption from state laws and regulations relating to utility rates, financing and organization established in 18 C.F.R. § 292.601(b) (2012).

Because the Plant would qualify as a small power production facility under PURPA, and because the Commission's definitions of qualifying facilities under PSL § 2 have generally been far less restrictive than the definitions for similar facilities established by FERC under PURPA,<sup>6</sup> NiGen respectfully requests that the Commission find and declare that, as a result of the changes made to the Plant to expand the types of solid fuel that may be combusted in its fluidized bed boiler, the Plant has become an alternate energy production facility that is exempt from regulation under the PSL.

Respectfully submitted,

*/s/ George M. Pond*

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George M. Pond  
Hiscock & Barclay, LLP  
80 State Street  
Albany, New York 12207  
(518) 429-4200

*Attorney for Niagara Generation, LLC*

Dated: May 30, 2013

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<sup>6</sup> For example, the Commission's definition of a "co-generation facility" under PSL § 2(2-a) requires only that the facility in question produce both electricity and useful thermal energy. *See, e.g.,* Case 98-S-1855, *AG-Energy, L.P. and Sterling Power Partners, L.P. - Petition for a Declaratory Ruling that Certain Facilities are not Steam Corporations Pursuant to PSL '2(22); or in the Alternative, for Certificates of Public Convenience and Necessity for These Facilities*, Declaratory Ruling On Exemption From Steam Corporation Regulation (Issued and Effective September 29, 1999) ("The exemption from regulation afforded cogeneration facilities is not dependent upon any particular level of electric production. Rather, to satisfy the '2(2-a) definition, a cogenerator is required to produce steam whenever electricity is produced, as the Sithe affiliates will.").

In contrast, FERC's regulations implementing PURPA establish detailed requirements regarding the efficiency of the facility in question and the use of the thermal energy provided. *See generally*, 18 C.F.R. § 292.205 (2012).

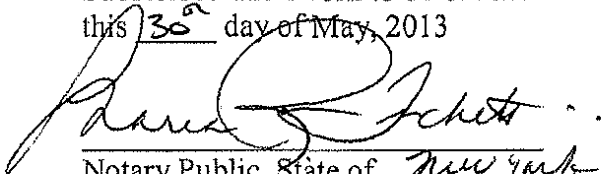
STATE OF NEW YORK                    )  
                                                  ) ss.:  
COUNTY OF WESTCHESTER        )

**VERIFICATION**

I, Jonathan Koch, being duly sworn, deposes and says as follows: I am the President of Niagara Generation, LLC, the Petitioner in this proceeding. I have read the foregoing Verified Petition for Expedited Declaratory Ruling, and know the contents thereof. The information set forth therein is true to my own knowledge.

  
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Subscribed and sworn to before me  
this 30<sup>th</sup> day of May, 2013

  
\_\_\_\_\_  
Notary Public, State of New York.  
My Commission is/expires 3/21/2014

**MARIA R. FISCHETTI**  
Notary Public, State of New York  
No. 01F14914402  
Qualified in Nassau County  
Commission Expires March 21, 2014