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By Electronic Mail

Hon. Jaclyn A. Brilling
Secretary
NYS Public Service Commission
Three Empire State Plaza
Albany, New York 12223

Case 10-E-0050 – Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Niagara Mohawk Power Corporation d/b/a National Grid for Electric Service

Dear Secretary Brilling:

In accordance with the schedule adopted in this proceeding, enclosed for filing with the Commission please find the *Brief on Exceptions of the Retail Energy Supply Association.*

Copies have been served electronically upon all parties on the active service list.

Thank you for your assistance in this matter.

Respectfully submitted,

Retail Energy Supply Association

By: *Usher Fogel, Counsel*
Usher Fogel, Counsel

Cc: Hon William Bouteiller (by electronic and regular mail)
Hon. Rudy Stegmoeller (by electronic and regular mail)
Service List (by electronic mail)

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Case 10-E-0050 – Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Niagara Mohawk Power Corporation d/b/a Niagara Mohawk for Electric Service

BRIEF ON EXCEPTIONS OF THE RETAIL ENERGY SUPPLY ASSOCIATION

I. PRELIMINARY STATEMENT

In accordance with the *Notice For Filing Exceptions*,[1] the Retail Energy Supply Association ("RESA")[2] hereby submits this Brief on Exceptions in response to the Recommended Decision ("RD") of Administrative Law Judges William Bouteiller and Rudy Stegemoeller ("ALJs) issued in this proceeding on November 17, 2010.

[1] CASE 10-E-0050 - Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Niagara Mohawk Power Corporation for Electric Service, *Notice For Filing Exceptions* (issued November 17, 2010).

[2] RESA's members include ConEdison *Solutions*; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; Energy Plus Holdings, LLC; Exelon Energy Company; GDF SUEZ Energy Resources NA, Inc.; NextEra Energy Services; Green Mountain Energy Company; Hess Corporation; Integrys Energy Services, Inc.; Just Energy; Liberty Power; PPL EnergyPlus; Reliant Energy Northeast LLC; Sempra Energy Solutions LLC. The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of RESA.

II. STATEMENT OF THE CASE

On January 29, 2010, Niagara Mohawk Power Corporation ("Company" or "Niagara Mohawk") filed with the Commission amendments to its tariff schedules designed *inter alia* to increase delivery rates by approximately $392 million through a three year rate plan for the period January 1, 2011 through December 31, 2013, implement a new Merchant Function Charge and modify its existing ESCO Purchase of Receivables program ("POR").[3] Thereafter, evidentiary hearings were held in Albany, New York from September 1, 2010 through September 16, 2010, before the ALJs, at which the pre-filed direct and rebuttal testimony and related exhibits submitted by the parties were incorporated into the record and the sponsoring witnesses were subjected to cross-examination. Initial briefs of the parties were filed on or about October 8, 2010 and reply briefs on or about October 28, 2010.[4] On November 17, the RD was issued by Secretary Brilling.

III. Summary of RESA Exception

Based upon the entire record developed in this proceeding, it is respectfully submitted that the ALJs erred by failing to adopt the proposal of RESA that under the POR Program the ESCO should have the ability to use Dual Billing or Utility Consolidated Billing for customers served within each service classification.

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[3] See, filing cover letter dated January 28, 2010.
[4] In this brief, references to the transcript are cited as "SM ______" and to Exhibits as "Exh.____".

IV. THE ALJS RECOMMEDATION REJECTING RESA'S PROPOSAL THAT ESCOS HAVE THE ABLILITY TO USE DUAL OR CONSOLIDATED BILLING IN THE POR PROGRAM WAS UNREASONABLE AND SHOULD BE REVERSED.

As part of its retail access infrastructure, Niagara Mohawk has instituted a POR program under which it purchases the accounts receivables of the ESCOs operating on its system who use consolidated billing in connection with the provision of competitive commodity supply service. Originally Niagara Mohawk's program was designated as a "with recourse" program under which the ESCO would remain liable if a customer failed to make payment on the receivable that had originally been purchased by the Company (Exhibit 364; SM 2370). Subsequently, and as is currently the practice, the Niagara Mohawk POR program has been designated as a "without recourse" program under which the ESCO is not liable if the customer fails to make payment for receivables purchased by the Company (Exhibit 364;SM 2370).

In return for acquiring the receivable on a without recourse basis, the Company is authorized to assess a discount rate to the receivables purchased under the program which has reflected the utilities uncollectable rate for a designated period. As currently constituted, under the POR program the discount rate is fixed for the designated prospective period and there are no subsequent adjustments or true ups to that discount rate in any subsequent period.[5] When an ESCO agrees to use the utility consolidated billing model,[6] by which the utility bills both for the

[5] Case 05-M-0333 - In the Matter of Niagara Mohawk Power Corporation's Plan to Foster the Development of Retail Energy Markets, Case 99-G-0336 - Niagara Mohawk Power Corporation – Petition for Approval of a Gas Multi-Year Rate and Restructuring Proposal, Case 98-M-1343 - In the Matter of Retail Access Business Rules. *Order Clarifying And Adopting Joint Proposal On Competitive Opportunities* (issued April 20, 2006), Joint Proposal, p. 12.

[6] Case 98-M-1343 – In the Matter of Retail Access Business Rules, Case 07-M-1514 – Petition of New York State Consumer Protection Board and the New York City Department of Consumer Affairs Regarding the Marketing Practices of Energy Service Companies, Case 08-G-0078 – Ordinary Tariff Filing of National Fuel Gas Distribution Corporation to establish a set of commercially reasonable standards for door-to-door sales of natural gas by ESCOs, *Order Adopting Amendments to the Uniform Business Practices, Granting in Part Petition on Behalf of Customers*

utility delivery charge as well as the ESCO commodity charges, the ESCO must also agree to participate in the POR program.[7] Further, within each service classification served by the ESCO, except for limited instances, the ESCO must choose either consolidated billing or dual billing for all of the customers served by the ESCO in that service classification.[8]

As noted, currently ESCOs, except in limited instances, must choose either consolidated billing or dual billing for all of its customers in a particular service classification and within each service classification the ESCO cannot use consolidated billing for some customers and dual billing for others. This requirement is unduly restrictive and RESA recommended that it should be modified to allow ESCOs to apply either dual or consolidated billing to individual customers served by the ESCO within each particular utility service classification. RESA explained that the record amply demonstrates that the Company has not provided a rational or sufficient basis for imposition of this restriction on the use of customer billing.

After summarizing the arguments raised in brief in connection with this recommendation the ALJs concluded that:

> "[T]o alter the status quo for this company to allow ESCOs to choose, customer-by-customer, to use the consolidated billing option and the POR program that it provides, it appears to us to be entirely reasonable to require ESCOs to choose between dual billing and consolidated billing for each of their customer groups as is the current practice. While Consolidated Edison has apparently agreed to a different approach, Niagara Mohawk remains opposed to it and we do not recommend that the Company be mandated, at this time, to make more liberal the selection of options for ESCOs." (RD, p. 156).

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and Rejecting National Fuel Gas Distribution Corporation's Tariff Filing (issued October 27, 2008), Appendix B – Uniform Business Practices ("UBP"), UBP, Section 1, p.1.

[7] See Record Request No. RR-38, annexed hereto as Attachment A.

[8] SM 2377; SM 2378; Exhibit 362, Page 4 Question 9(i)).[8] Dual billing is the process by which the ESCO issues its own bill for commodity service and the utility bills separately for delivery service (SM 2377; UBP Section 1, p. 2).

This recommendation fails to address the persuasive facts and arguments presented in support of the proposal. It is unreasonable, erroneous and should be reversed.

As argued by the Company, the sole justification for limiting the ESCO's discretion to use dual or consolidated billing rests upon its belief that ESCOs "would choose to place only those customers with bad credit ratings on the purchase of receivables program which would cause the Company to experience a greater amount of losses."[9]

The Company acknowledged however that this concern over the purported movement of bad credit customers into the POR program was "essentially a subjective assessment" that was not supported by any formal analysis or studies (SM 2380; Exhibit 362, Page 4, Question 9 (iii)). The Company further acknowledged that it had not prepared any study or analysis or accumulated data demonstrating that allowing ESCOs to choose dual or consolidated billing would result in ESCOs placing a disproportionate number of customers with bad credit risks into the POR program, or where ESCOs have the ability to choose dual or consolidated billing, ESCOs have in fact placed a disproportionate number of customers with bad credit risks into the POR program. Moreover, the Company has not prepared or provided any analysis that identifies the financial impact upon the Company and ratepayers resulting from allowing ESCOs to choose dual or consolidated billing within each service classification (SM 2382; Exhibit 362, RESA – 3, Question 15).

In addition to the failure to offer any reliable analysis, the Company's expressed view is conceptually without merit. The existence of customers that may not pay their bills is ever present in the Company's system and is not a function of the creation of POR. The Company always experiences bad credit customers regardless of POR. Such type of customers will default on payment regardless of the entity providing commodity service. In reality POR does not really

[9] RD, p. 154. See also, SM 2379; Exhibit 362, Page 4, Question 9 (ii).

impact upon the Company's bad debt experience. All delivery service customers must also receive commodity service. If the Company provides the service and the customer does not pay the utility is left with the entire bad debt. If an ESCO provides commodity, the utility would have to collect on the debt, but the level of debt would be reduced by the discount rate. In sum, bad debt is ever present, and the utility is better off if the customer is on POR.

Niagara Mohawk also overlooks that the POR program does not insulate the ESCO from other material losses or costs that the ESCO would incur in the event a customer failed to maintain service with the ESCO. These costs could in many instances outweigh the potential loss of receivables. Under POR, the utility would only purchase the receivable for services rendered; there is no reimbursement for other costs that remain unpaid by the customer. Thus, for example, assume an ESCO purchased a hedge to support fixed price service over a 12 month period and the customer defaults after the second month. Under this scenario the utility would only purchase the receivables associated with the two months during which service was provided by the ESCO. The utility would not reimburse the ESCO for the remaining cost of the hedge that was previously purchased by the ESCO. This would represent the mark to market risk which could outstrip the receivable risk. Consequently, ESCOs are not incentivized to take on bad risk customers as intimated by the utility

Niagara Mohawk's restrictive approach is also inconsistent with the POR programs of other utilities. ESCOs participating in the POR program instituted by Consolidated Edison Company of New York, Inc. (Con Edison), have discretion to apply either dual or consolidated billing to particular customers within each service classification (SM 2379; RD 156). And the Company acknowledges that except for Niagara Mohawk, it could not identify or was not aware of any other utility which imposed such a limitation upon the use of consolidated billing (SM 2378).

The Company repeatedly acknowledged the pure subjectivity of its assertions by admitting that "it performed no studies to determine the precise impact of this kind of ESCO selection of customers on the basis of credit risk…" And in the RD, the ALJs did not conclude that the Company's position was based on a firm factual basis. Nonetheless, without any supporting analysis, the Company opined, that no study or analysis is needed to determine that the "resulting impacts would be both negative and unnecessary."[10]

It is unreasonable for Niagara Mohawk to claim omniscience concerning how the entire ESCO community would behave in the event that discretion was afforded regarding the specific customers that would be included in the POR program. Each ESCO faces differing operating parameters and business models that will impact on its decision of whether or how it will use POR. For example, an ESCO may have specific customers within a class that want or favor the use of dual billing. An ESCO responding to this factor is addressing a customer preference not a credit related parameter.

Moreover, the charge that the resulting impacts would be "negative" is belied by the practices of other utilities. Under the Con Edison POR program, ESCOs have discretion to apply either dual or consolidated billing to particular customers within each service classification (SM 2379). And the Company acknowledged that except for Niagara Mohawk, it could not identify or was not aware of any other utility which imposes such a restriction upon the use of consolidated billing (SM 2378). If the resulting impacts were truly "negative", it is unlikely that the other utilities would allow the practice.

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[10] Niagara Mohawk Initial Brief, p. 265.

Furthermore, in setting the POR discount rate the Company does not reflect the uncollectible experience of an individual ESCO or the experience of all the ESCOs. Niagara Mohawk will incorporate the uncollectible rate that is derived from Niagara Mohawk's uncollectible expense used in setting rates for all customers (full service and retail access), and reflects the uncollectible experience of the entire customer base.[11] The uncollectible rate is the same across the Company and is not linked to the performance of an individual ESCO's customer pool. Following this structure, it is once again unreasonable to assume that allowing an ESCO to choose dual or consolidated billing for particular customers would lead to "negative" impact.

The unduly restrictive billing approach also acts in a discriminatory manner and limits customer choice and options.

Individual customers have differing billing preferences depending on the nature of their operations and internal reporting and payment processes. Thus, some customers within a particular service classification may desire a consolidated bill while others would seek a dual bill where the ESCO bills directly for the service. Unfortunately, with the Company's all or nothing approach, the preferences of individual customers cannot be accommodated and effectively the program discriminates against certain customers with respect to available billing options.

This approach in combination with the Company's use of the rate ready consolidated billing model with POR tends to restrict the available product options that ESCOs can offer to their customers. Under the rate ready system with POR, the ESCO must provide a single volumetric rate prior to receiving the customer's actual billing data for the billing period. It therefore precludes ESCOs from offering customized products for different customers within the same service class, such as time-of-use or real time pricing. These types of products can then

[11] Exhibit 362, Page 3, Question 1; SM 2256; SM 2370.

only be offered if the ESCO employs the dual bill model under which the ESCO issues its own bill and can thereby incorporate a more customized product like real time pricing. It is therefore extremely important for the ESCO to have the ability to use either a dual bill or consolidated billing. However, the Company prevents this from happening by requiring the ESCO to choose one billing option for the entire class. The result is diminished customer choice.

For these reasons, it is unreasonable for the Company to restrict ESCOs to choose either dual or consolidated billing for all customers served by an ESCO within a particular service classification. As is the practice followed in other utility POR programs, ESCOs should have the discretion to apply dual or consolidated billing for particular customers within each service classification.

V. CONCLUSION

For the reasons set forth herein, RESA respectfully urges the Commission to issue a final order that is consistent with the recommendations and exception presented by RESA in this proceeding.

Respectfully submitted

Retail Energy Supply Association

By: *Usher Fogel, Counsel*
Usher Fogel, Counsel

Dated, Cedarhurst, New York
December 8, 2010