

**VanNess  
Feldman**  
ATTORNEYS AT LAW

A PROFESSIONAL CORPORATION  
1050 Thomas Jefferson Street N.W.  
Washington, D.C. 20007-3877  
(202) 298-1800 Telephone  
(202) 338-2416 Facsimile

Seattle, Washington  
(206) 623-9372

Jay T. Ryan  
(202) 298-1878

**BY HAND DELIVERY**

August 19, 2005

The Honorable Magalie Roman Salas  
Secretary  
Federal Energy Regulatory Commission  
888 First Street, N.E.  
Washington, D.C. 20426

FEDERAL ENERGY  
REGULATORY COMMISSION

2005 AUG 19 A 9 35

FILED  
OFFICE OF THE  
SECRETARY

RE: Niagara Power Project Relicensing, FERC Project No. 2216-\_\_\_\_  
Offer of Settlement and Explanatory Settlement

Dear Secretary Salas:

Pursuant to Rule 602 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission, 18 C.F.R. § 385.602 (2005), the Power Authority of the State of New York hereby files an original and fourteen (14) copies of the "Niagara Power Project Relicensing Offer of Settlement and Explanatory Statement." As set forth in the Explanatory Statement, the Offer of Settlement satisfies all Federal and State statutory and regulatory requirements pertaining to the relicensing of the Niagara Power Project. Further, the Offer of Settlement is supported by substantial evidence in the record, as required under Section 313(b) of the Federal Power Act, 16 U.S.C. 8251(b).

As set forth in Rule 602(f), comments on the Offer of Settlement must be filed on or before September 8, 2005. Reply comments must be filed on or before September 19, 2005. If you need additional information regarding this filing, please contact me at (202) 298-1878.

Sincerely,



Jay Ryan

Counsel to the New York Power Authority

Cc: Service List  
Settlement Parties

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

**POWER AUTHORITY OF THE  
STATE OF NEW YORK**

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**PROJECT NO. 2216-\_\_\_\_  
NIAGARA POWER PROJECT**

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**NIAGARA POWER PROJECT RELICENSING OFFER OF  
SETTLEMENT AND EXPLANATORY STATEMENT**

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Pursuant to Rule 602 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("FERC" or "Commission"), the Power Authority of the State of New York ("Power Authority") hereby files its Offer of Settlement and an accompanying Explanatory Statement for the relicensing of the Niagara Power Project ("Niagara Project").<sup>1</sup> This Offer of Settlement includes the following four (4) settlement agreements: (i) the Relicensing Settlement Agreement Addressing New License Terms and Conditions ("Relicensing Agreement"); (ii) the Host Community Settlement Agreement Addressing Non-License Terms and Conditions ("Host Community Agreement"); (iii) the Relicensing Settlement Agreement Between the Power Authority of the State of New York and the Tuscarora Nation ("Tuscarora Agreement") and (iv) the Relicensing Settlement Agreement Addressing Allocation of Project Power and Energy to Neighboring States ("Allocation Agreement") (collectively, the "Settlement Agreements").

By their terms, the individual Settlement Agreements resolve among the parties all of their issues associated with the Niagara Project relicensing, and the

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<sup>1</sup> 18 C.F.R. § 385.602 (2005).

Offer of Settlement constitutes each party's complete recommendations, terms, conditions, and prescriptions pursuant to Sections 10(a) and 10(j) of the Federal Power Act ("FPA").<sup>2</sup> Moreover, the proposed license articles set forth in Appendix A of the Relicensing Agreement are fully supported by the record in this proceeding, including the Preliminary Draft Environmental Assessment ("PDEA") and the associated relicensing studies.<sup>3</sup>

Collectively, the commitments set forth in the Settlement Agreements far exceed the Power Authority's obligations under applicable state and federal statutes. Accordingly, the Power Authority requests that the Commission: (1) approve the Offer of Settlement; and (2) issue a new fifty (50) year license for the Niagara Project that incorporates -- without modification or expansion -- the proposed license articles set forth in Appendix A of the Relicensing Agreement.

### **OFFER OF SETTLEMENT**

#### **I. BACKGROUND**

On March 6, 2002, the Power Authority filed a request with the Commission seeking authorization to utilize alternative licensing procedures ("ALP") for the Niagara Project relicensing. On July 15, 2002, the Commission approved the Power Authority's request, finding the ALP would foster improved communication, participation, and cooperation among stakeholders. In December of 2002, the Power Authority formally began the ALP process and thereafter, until June 2003, the Power

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<sup>2</sup> 16 U.S.C. §§ 803(a), 803(j).

<sup>3</sup> See City of New Martinsville v. FERC, 102 F.3d 567 (D.C. Cir. 1996) (rejecting compensation for fish entrainment because of a lack of substantial evidence indicating significant entrainment resulting from project operations); Allegheny Energy Supply Co., 109 FERC ¶ 61,028 (2004) (rejecting provisions not supported by substantial evidence). In contrast to these proceedings, the Power Authority and the settlement parties have clearly provided a basis upon which the proposed license measures are supported by substantial evidence.

Authority met with stakeholders on a regular basis to identify and scope issues associated with the Niagara Project relicensing.

The scoping process, which included thirteen (13) ALP stakeholder meetings (and numerous associated small group meetings and teleconferences) culminated in the issuance of Scoping Document 2 ("SD-2") in December 2003. After completing most of the proposed licensing studies, the Power Authority initiated settlement negotiations with stakeholders in September 2004. The Power Authority was able to reach conceptual settlement with major stakeholders by December 2004, and the settlement agreements that comprise the Offer of Settlement were finalized in July 2005.

## **II. POWER AUTHORITY'S APPROACH TO SETTLEMENT**

From the very outset of the ALP process, the Power Authority communicated its strong interest in achieving a comprehensive settlement.<sup>4</sup> In scoping, the desire for a negotiated resolution of relicensing issues was reflected in the Power Authority's commitment to conduct studies that would inform the settlement of both licensing and non-licensing issues (*i.e.*, issues beyond the scope of FERC's jurisdiction under Part I of the FPA).<sup>5</sup>

During the settlement phase of the ALP, the Power Authority and the stakeholders worked collectively to address issues that had been raised during the ALP. Ultimately, the Power Authority and stakeholders were able to craft settlement

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<sup>4</sup> By attempting to achieve a comprehensive settlement, the Power Authority sought to give effect to established FERC policy encouraging settlement of relicensing issues. See e.g., Alcoa Power Generating, Inc., 110 FERC ¶ 61,056, at P 30 (2005) (noting the "Commission strongly favors settlement agreements, which provide the opportunity to eliminate the need for more lengthy proceedings if the parties reach an agreement on the issues that is in the public interest . . .").

<sup>5</sup> See Scoping Document 2 § 1.1 (acknowledging that scoping included both regulatory and non-regulatory issues).



agreements that will enhance the Niagara River and its surrounding communities for the next fifty (50) years. The Offer of Settlement reflects the careful balancing of these stakeholders' interests, and includes significant environmental, recreation, and socioeconomic benefits. At the same time, the Offer of Settlement recognizes the importance of the Power Authority's low-cost power by maintaining existing project operations. Consequently, the parties to the Settlement Agreements believe the public interest will best be served if the Commission approves the Offer of Settlement as filed.

### **III. STRUCTURE OF THE SETTLEMENT AGREEMENTS**

At the commencement of the ALP, the Power Authority stated its willingness to exceed its regulatory obligations under the FPA in order to achieve a multi-party settlement agreement that addressed both licensing and non-licensing issues. In return, the Power Authority requested that stakeholders support a new license that: (1) provides for a fifty (50) year term; (2) does not expand the proposed Niagara Project boundary; and (3) does not impose any changes to Niagara Project operations. Pursuant to the terms of the Settlement Agreements, all of the parties have endorsed these three conditions and the Power Authority has made a commitment of over \$384 million<sup>6</sup> (Net Present Value or "NPV" 2007) to the region over the term of the new license.

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~~These commitments, however, are contingent upon the Commission's~~  
approval of the Offer of Settlement and the adoption – without modification or expansion – of the proposed license articles included as Appendix A to the

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<sup>6</sup> All figures in this pleading are rounded for convenience. Actual figures are set forth in the attached Settlement Agreements.

Relicensing Agreement. If the proposed license articles are not accepted, or if the licensing order requires additional measures, all of the Power Authority's settlement commitments are subject to termination.<sup>7</sup>

To mitigate against this possibility, the parties to the Settlement Agreements have rigidly adhered to FERC precedent and Commission guidance regarding settlement agreements.<sup>8</sup> Further, the justification for license measures established by the PDEA provides a reasoned basis upon which the Commission can determine: (1) that the Offer of Settlement (including the proposed license articles) is in the public interest; and (2) the Project is best adapted to a comprehensive plan for improving or developing the Niagara River.

### **EXPLANATORY STATEMENT**

The Offer of Settlement reflects both licensing measures and non-licensing measures. Only the Relicensing Agreement and the Allocation Agreement, however, address matters subject to the Commission's jurisdiction. While the Explanatory Statement provides an overview of all of the Power Authority's commitments, only the proposed license articles set forth in Appendix A of the Relicensing Agreement should be incorporated into the new license.

#### **I. LICENSING COMMITMENTS SUBJECT TO FERC JURISDICTION**

##### **A. Relicensing Agreement Addressing New License Terms**

~~The Relicensing Agreement proposes protection and enhancement measures~~  
to address ecological, recreation, and water quality resources affected by Niagara Project impacts. The parties to the Relicensing Agreement include the United States

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<sup>7</sup> See e.g., Relicensing Agreement § 2.1.2; Host Community Agreement § 2.1.2; Tuscarora Agreement § 2.1.2; and Allocation Agreement § 5.2.2.

<sup>8</sup> See e.g., Virginia Electric Power Co., 110 FERC ¶ 61,241, at PP 11-13 (2005).

Department of the Interior ("DOI"), through its component bureaus, the United States Fish and Wildlife Service ("Service"), the Bureau of Indian Affairs ("BIA"), and the National Park Service ("NPS"); the New York State Department of Environmental Conservation ("DEC"); the New York State Office of Parks, Recreation, and Historic Preservation ("OPRHP"); New York Rivers United ("NYRU"); Friends of the Buffalo-Niagara River ("FOBNR"); the Niagara Relicensing Environmental Coalition ("NREC"); the Niagara Falls Water Board ("NFWB"); the New York Association of Public Power; the New York State Rural Electric Cooperative Association; and the Municipal Electric Utility Association.<sup>9</sup> Set forth below are the major provisions of the Relicensing Agreement, including a description of the rationale for each protection and enhancement measure.

**1. Fund for Habitat Improvement Projects**

During the scoping process, DOI, DEC, NREC, FOBNR, and other stakeholders identified a number of proposed Habitat Improvement Projects ("HIPs") that warranted further study. The Power Authority subsequently completed an exhaustive relicensing study to determine the feasibility and utility of each of the HIPs identified during scoping. From this study, the Power Authority and stakeholders agreed upon eight (8) HIPs that should be constructed during the new license term. These HIPs include: (1) Strawberry Island Wetland Restoration; (2) Frog Island Restoration; (3) Motor Island Shoreline Protection; (4) Beaver Island Wetland Restoration; (5) Control of Invasive Species: Buckhorn and Tiffit Marshes;

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<sup>9</sup> The New York State Department of State ("DOS") is also listed as a party to the relicensing agreement but, as of the date of this filing, has not executed the agreement.

(6) Osprey Nesting; (7) Common Tern Nesting; and (8) Installation of Fish Habitat / Attraction Structures.

Accordingly, as part of its settlement with regulatory agencies and environmental organizations, the Power Authority has agreed to establish a fund in the amount of \$12 million (NPV 2007) ("HIPs Fund") to support the eight (8) identified HIPs.<sup>10</sup> Utilizing monies from the HIPs Fund, the Power Authority will construct the proposed HIPs consistent with the relicensing study entitled "Investigation of Habitat Improvement Projects for the Niagara Power Project" (June 2005) and the proposed implementation schedule set forth in Appendix B of the Relicensing Agreement. The parties to the Relicensing Agreement have specifically agreed that construction of the proposed HIPs will be a *one-time obligation* for the Power Authority to ensure that -- consistent with Commission precedent -- the Niagara Project boundary as proposed in Exhibit G will not be expanded.<sup>11</sup>

The balance of the HIPs Fund will be made available to DEC to undertake monitoring, operation, and maintenance of the HIPs.<sup>12</sup> To conform to Commission precedent, which rejects cost caps associated with specific protection, mitigation, and

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<sup>10</sup> Relicensing Agreement § 4.1.2.

<sup>11</sup> See e.g., Pacific Gas & Electric Co., 97 FERC ¶ 61,084, at p. 61,410, n.48 (2001) (finding that the protection, mitigation, and enhancement measures "constitute basically one-time requirements, and the license therefore requires them without also requiring that the spawning grounds or channels, terraces, or weir be brought within the project's boundaries."). Id. at 61,410, n.48. See also Power Authority of the State of New York, 107 FERC ¶ 61,259, at P 45 (2004) (stating that "a requirement for the licensee to carry out a one-time action outside of the existing project boundary may not require the locations where the act is to be performed to be included within the project boundary.") The Commission added that "... a project boundary does not define those responsibilities and does not always reflect the geographic extent of those responsibilities." Id. at P 44.

<sup>12</sup> Relicensing Agreement § 4.1.2. The agreement provides further that for any HIPs that DEC determines should not be constructed, the proposed funding for that particular HIP will be transferred to the Fish and Wildlife Habitat Enhancement and Restoration Fund established pursuant to Section 4.1.3 of the Relicensing Agreement.

enhancement measures,<sup>13</sup> the settlement (and the associated proposed license article) specifically provides that “[s]hould the cost of the HIPs exceed the amount in the HIPs Fund, the Power Authority will cover additional expenses.”<sup>14</sup>

The proposed HIPs are designed to address a number of impacts related to Niagara Project operations.<sup>15</sup> Specifically, water level fluctuations in the Niagara River impact geological, soil, aquatic, terrestrial, and wildlife resources.<sup>16</sup> These water level fluctuations are caused by a number of factors including treaty-mandated flow requirements, power generation by both the Power Authority and Ontario Power Generation, natural factors including flow surges from Lake Erie, wind, ice conditions, regional and long-term precipitation patterns, and water levels of Lake Erie and Lake Ontario.<sup>17</sup> All of these contributory factors are interrelated and dynamic; consequently, it would be difficult to determine – with any accuracy – the exact amount of fluctuation that is attributable to each factor.<sup>18</sup> Accordingly, stakeholders did not attempt to isolate the scope of impacts specifically related to Niagara Project operations.

Instead, settlement negotiations among stakeholders focused on identifying particular HIPs and specific locations where enhancement measures would ensure the greatest benefit to resources affected by water level fluctuations. While all of the HIPs are located outside of the Niagara Project boundary (but within the Niagara

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<sup>13</sup> See e.g., *Virginia Electric Power Co.*, 106 FERC ¶ 62,245, at P 43 (2004).

<sup>14</sup> Relicensing Agreement § 4.1.2.

<sup>15</sup> See generally, PDEA at 4-1 to 4-61.

<sup>16</sup> *Id.*

<sup>17</sup> PDEA at 3-2, 3-3. See also PDEA at 2-6, 2-7 (discussing Project operations under the 1909 Treaty Between the United States and Great Britain Relating to Boundary Waters and Questions Arising Between the United States and Canada, and the 1950 Treaty Between Canada and the United States of America Concerning the Diversion of the Niagara River).

<sup>18</sup> *Id.*

River basin), their locations reflect the collective determination of stakeholders that these particular HIPs are best-suited to protect and enhance the resources of the Niagara River. The HIPs also reflect the fact that Niagara River resources are subject to unavoidable impacts related to treaty-mandated flows, Canadian power operations, and natural influences that cannot be fully mitigated.<sup>19</sup>

The specific HIPs contemplated by the proposed license article requiring the establishment of a HIPs Fund are described below.

a. Strawberry Island Restoration.

Strawberry Island, located in the upper Niagara River, is owned by the State of New York and is part of Beaver Island State Park. The island contains upland and emergent marsh habitats not typically found in the upper river. Gravel mining and erosion caused by severe storms have significantly reduced the size of the Island over the years.

The proposed HIP would extend protection measures to downstream shallow-water habitats of the island and create complex marsh and high-energy wetland habitats for fish and wildlife.<sup>20</sup> This project would also increase the size and long-term stability of Strawberry Island using breakwaters along the newly-created shoreline. Functionally valuable wetlands would be created behind the breakwaters through the placement of fill material to build elevations to optimal levels for target habitats. ~~The primary target function created would be enhanced fish and wildlife~~ habitat. However, other wetland functions, including recreational opportunities (*i.e.*, fishing, hunting, bird watching, *etc.*) and water quality (*i.e.*, sediment settling,

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<sup>19</sup> PDEA at 3-2.

<sup>20</sup> PDEA at 4-19, 4-20 (describing the Strawberry Island HIP).

nutrient retention, *etc.*) would be enhanced as well. This HIP is expected to result in approximately seven (7) acres of new habitat, including the footprints of, and the area located between, the breakwaters.

b. Frog Island Restoration.

The Frog Island Restoration HIP will restore and create approximately 5.5 acres of Frog Island and associated habitat using a U-shaped perimeter of breakwater structures in the approximate vicinity of this historic island complex.<sup>21</sup> Specifically, the HIP would create diverse habitat conditions within, and between, the breakwaters including coarse (boulders, cobbles, and gravel) and fine (muck, silt, clay, and sand) substrate at variable depths ranging from just above the normal water level to several feet below the normal water level. These conditions will facilitate the development of wetland interspersed with deeper areas and shoal habitat. Ultimately, this project will restore habitat complexity and create marsh and submerged coarse substrates for fish and wildlife in the area formerly occupied by the islands.

c. Motor Island Shoreline Protection.

Motor Island is owned by the State of New York and managed by DEC for the protection and enhancement of fish and wildlife. Shoreline erosion processes are currently occurring at the southern tip and along the western shoreline of Motor Island.<sup>22</sup> Additionally, existing shoreline protection structures along the eastern shoreline are in various stages of disrepair. This side of the island is often subject to impacts from boat wakes due to commercial and recreational boating traffic in the navigation channel.

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<sup>21</sup> PDEA at 4-20, 4-21 (describing the Frog Island Restoration HIP).

<sup>22</sup> PDEA at 4-20.

Protection measures are necessary to minimize further damage to this important habitat feature of the upper Niagara River. This HIP would provide shoreline protection measures along the western and eastern shorelines and at the southern tip of Motor Island.<sup>23</sup> Shoreline protection measures would incorporate bioengineering wherever possible to provide vegetation up to the water's edge and help stabilize erosion protection. In addition, anthropogenic structures such as the boat docking facilities along the western shoreline would be removed in an effort to restore the island shoreline and minimize future maintenance activities.<sup>24</sup>

d. Beaver Island Wetland Restoration.

The quantity and quality of wildlife habitat on Beaver Island and in the Beaver Island State Park is limited by a lack of emergent marsh and shallow pond habitat. Historic wetlands were dredged and filled in this area, and the resulting topography and hydrology do not optimize wetland structure and function. A crescent-shaped area of open water and wetlands on the inside of Beaver Island (known as Little Beaver Marsh) historically included hemi-marsh with excellent structural and vegetative diversity. Around 1960, this area was filled and the hemi-marsh was replaced with poor quality habitat such as mowed lawn.

The proposed HIP would restore hemi-marsh and shallow pools to the inside (northeast) shoreline of Beaver Island through removal of fill, site grading, plantings, and invasive species control.<sup>25</sup> ~~This project also would assess the approximate~~

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<sup>23</sup> PDEA at 4-20 (describing the Motor Island Shoreline Protection HIP).

<sup>24</sup> Id. Also included in this HIP is a boat landing area on the northeast portion of the island. The boat landing would be used for landing construction equipment during the initial island improvements and later for monitoring activities that may be associated with this project and enhancements to the Motor Island Heron Rookery. Wooden pilings or similar structures would be incorporated for mooring work vessels.

<sup>25</sup> PDEA at 4-21, 4-22 (describing the Beaver Island Wetland Restoration HIP).



historical extent and structure of Beaver Island wetlands using aerial photographs, historic records, and site plans/engineering drawings (as available). The wetland restoration design would include a grading plan that would specify elevations and associated hydrologic regimes that would result in the development of a complex system of emergent marsh and shallow pond habitat. Wetland planting plans would also be developed, emphasizing diverse native species with high wildlife food and cover values and bank stabilization capacity. Lastly, due to the existence of common reed (*Phragmites australis*), purple loosestrife (*Lythrum salicaria*), and other exotic/invasive species in the area, the control of such species would be incorporated into the design, implementation, and monitoring and maintenance phases of this HIP. It is anticipated that this HIP would result in the restoration of approximately 36 acres of deep emergent marsh habitat.<sup>26</sup>

e. Control of Invasive Species.

Several exotic and invasive plants of concern occur in, and near, Buckhorn Marsh ("Buckhorn") and Tift Farm Nature Preserve ("Tift"). The species of greatest concern in Buckhorn and Tift, as well as in the Niagara River area in general, are purple loosestrife and common reed. These two wetland species occur primarily in palustrine emergent marsh habitat with little to no canopy cover (e.g., wet meadows and marshes). The proposed HIP would control exotic and invasive ~~plant species and promote the growth of a diverse community of native wetland~~ species to enhance and preserve wetland functions.<sup>27</sup>

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<sup>26</sup>

Id.

<sup>27</sup>

PDEA at 4-22, 4-23 (describing HIP activities directed at controlling invasive species at Buckhorn and Tift Marshes).

f. Osprey Nesting.

Birds that nest in, or near, wetlands may be limited by the availability of suitable nesting sites in the Niagara River Corridor. Wetland nesting sites may be limited by human disturbance, invasive species, or a lack of suitable habitat. Osprey nest along rivers and in wetlands and are present on the Niagara River during migration. A local breeding population, however, is not currently established. The proposed HIP would increase nest site availability for osprey by installing pole-mounted nesting platforms.<sup>28</sup> These structures would be placed in existing wetlands and in wetlands created, enhanced, or restored through other HIPs. Osprey platforms could be installed at or near Buckhorn Weir, Beaver Island State Park (East River marsh), Strawberry Island, Bird Island Pier, and Tift Farm Nature Preserve. Two platforms will be installed at Tift Farm, and one platform would be installed at each of the other locations. Given the success of osprey nest platforms in other areas, implementation of this HIP potentially would be an effective way of attracting nesting ospreys to the Niagara River.<sup>29</sup>

g. Common Tern Nesting.

This proposed HIP will provide high quality nesting habitat for common terns and increase the local population of terns by creating or enhancing nesting sites and increasing tern breeding productivity.<sup>30</sup> The locations of these nesting sites would be ~~identified in consultation with DEC staff. Potential locations for this project include~~ current (e.g., Buffalo Harbor breakwalls) and historical (e.g., Buckhorn Island Tern Colony) tern nesting sites. Nesting habitat for common tern would be restored and

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<sup>28</sup> PDEA at 4-41.

<sup>29</sup> Id.

<sup>30</sup> PDEA at 4-42.

enhanced by adding appropriate gravel nesting substrate, removing vegetation, installing gull or cormorant exclusion devices, installing perimeter fencing and chick shelters, and using tern nesting rafts or barges. These methods would provide high quality nesting habitat for terns and increase tern productivity by increasing hatching success and fledging success.<sup>31</sup>

h. Installation of Fish Habitat / Attraction Structures.

Observations of the upper Niagara River indicate that the amount of large-object cover where fish can seek shelter from water velocity is limited. It is likely that this lack of cover is largely due to dredging operations that have historically occurred to aid commercial navigation.<sup>32</sup> Dive observations also found that the nominal cover that is available appears to be highly utilized, especially by large predator species such as muskellunge and smallmouth bass.<sup>33</sup>

Sufficient cover is important because adult and juvenile fish of numerous species can seek shelter from the current and use these areas to prey on, and/or hide from, other fish. The proposed HIP would provide large-object cover, which would function as fish attraction structures in deep water areas (*i.e.*, >10 ft) where fish can seek shelter, forage, and otherwise maintain activities as expected in a lotic environment.<sup>34</sup> The primary fish species that are intended to benefit from this HIP are muskellunge, northern pike, walleye, and largemouth and smallmouth bass.

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<sup>31</sup> Id.

<sup>32</sup> PDEA at 4-22 (describing HIP activities related to the creation of fish habitat and fish attraction structures)

<sup>33</sup> Id.

<sup>34</sup> Id.

## 2. Fish and Wildlife Habitat Enhancement and Restoration Fund

In addition to the eight (8) specific HIPs, the Power Authority has agreed to provide funding to support future HIPs in the Niagara River basin.<sup>35</sup> Selection of these future HIPs would be subject to specific criteria and use of the funds would be subject to Commission oversight through an annual reporting requirement.

Specifically, the Power Authority would establish a Fish and Wildlife Habitat Enhancement and Restoration Fund ("HERF") in the amount of \$16.2 million (NPV 2007).<sup>36</sup> The HERF would be utilized to address impacts from water level fluctuations that are caused, in part, by Niagara Project operations. In particular, the HERF would fund future HIPs, land acquisition, habitat research, fish, wildlife and indigenous plant species restoration, and stewardship activities in the Niagara River. Selection of future Projects would be guided by the following criteria:<sup>37</sup>

- Projects that address a demonstrated Project impact
- Projects that preserve rare, threatened, and endangered ("RTE") plant, aquatic, or terrestrial species and/or their habitat in the Niagara Basin
- Projects with a strong scientific foundation
- Projects that contribute to long-term protection and enhancement of RTE plant, aquatic, or terrestrial species and/or their habitat in the Niagara Basin
- Projects that achieve multiple ecological goals

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<sup>35</sup> Relicensing Agreement § 4.1.3.

<sup>36</sup> Id.

<sup>37</sup> Id. Consistent with Commission guidance, expenditure of HERF funds will be for specified measures subject to specific criteria. See e.g., Virginia Electric Power Co., 110 FERC ¶ 61,241, at P 11-13 (2005).

- Projects that preserve and restore Haudenosaunee cultural, religious, and historic features
- Projects that involve multi-stakeholder collaboration
- Projects consistent with applicable local, State, and Federal resource management plans
- Projects that feature matching resources
- Projects that are time-sensitive
- Projects that have documented municipal, county, and Tribal support
- Projects that are feasible from a cost/probability of success perspective

Further, the Relicensing Agreement specifically prohibits the use of the HERF to replace natural resource management programs funded by the General Fund of the State of New York or DEC environmental programs.

### 3. Establishment of an Ecological Standing Committee

To facilitate implementation of the HIPs and the selection of projects to be funded by the HERF, the Relicensing Agreement provides for the creation of an Ecological Standing Committee ("ESC"), consisting of a representative from the Power Authority, DEC, the Service, the Seneca Nation of Indians ("SNI"), the Tuscarora Nation ("TN"), the Tonawanda Seneca Nation ("TSN"), NYRU, and NREC.<sup>38</sup> Among other things, the ESC would provide guidance with regard to the

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<sup>38</sup> Relicensing Agreement § 4.1.1.

construction, operation, maintenance, and monitoring of the HIPs.<sup>39</sup> The Power Authority would convene the ESC shortly after the filing of the license application in order to ensure that enhancement measures can begin as soon as the new license becomes effective.

#### **4. Reporting Requirement for the HIPs and HERF**

The proposed license articles include a related reporting requirement that requires the Power Authority to prepare and submit annually to the Commission a report that includes:

- A summary, including progress reports, of: (1) all HIPs and (2) projects funded, in whole or in part, by the HERF;
- A project-by-project listing of HIPs as well as all expenditures from the HIPs Fund and the HERF during the previous fiscal year;
- A detailed listing of all planned expenditures during the current fiscal year in which the report is issued;
- An updated balance sheet for the HIPs Fund and the HERF, which includes HIPs Fund and HERF expenditures, administrative expenses, and accrued interest; and
- Any material changes or deviations from proposed implementation schedules.<sup>40</sup>

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#### **5. Public Access Improvements**

The Niagara Project footprint impedes recreational access to the Niagara River by interrupting the Great Gorge Railway Right of Way Hiking Trail.<sup>41</sup>

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<sup>39</sup>

Id.

<sup>40</sup>

Relicensing Agreement § 4.1.4; Relicensing Agreement, Appendix A at A-3.

Accordingly, the Relicensing Agreement provides for capital improvements that would enhance public access to the River.<sup>42</sup>

These improvements include: (1) up to six (6) additional angler parking spaces at the Robert Moses Niagara Power Plant Fishing Pier Parking Area; (2) a parking area for sixteen (16) vehicles, a gravel trail across the Niagara Mohawk Power Company transmission right-of-way for pedestrian use, and a gravel path to traverse the reservoir dike in an area located on the northwest side of Lewiston Reservoir near the Upper Mountain Fire Company Station; and (3) resurfacing of the asphalt in the parking lot and along the walkways at the Project's intake structure area, designating Americans with Disabilities Act ("ADA") parking spaces, installing curb cuts to allow ADA access to walkways, and installing a removable seven (7) foot chain link fence parallel to the retaining wall approximately twenty-five (25) feet from the Niagara River's edge near the intakes. The improvements would be completed within two years of the effective date of the new license.

## **6. Parks and Recreation Fund**

Recreation studies undertaken during the ALP demonstrated the need for improvements to OPRHP recreational facilities located on lands within, or in the vicinity of, the Niagara Project boundary.<sup>43</sup> To that end, the Power Authority would establish a fund in the amount of \$9.2 million (NPV 2007) for capital improvements to be undertaken by OPRHP.<sup>44</sup> Section 5.1.1 of the Relicensing Agreement sets forth the specific improvements that are contemplated for Reservoir State Park, the Niagara

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<sup>41</sup> PDEA at 4-64.

<sup>42</sup> Relicensing Agreement § 4.2. See also PDEA at 4-65, 4-66.

<sup>43</sup> See generally, PDEA § 4.1.5.

<sup>44</sup> Relicensing Agreement § 5.1.1.

Gorge, and ArtPark. Pursuant to the Relicensing Agreement, the Power Authority would submit, for Commission approval, detailed information for each improvement located within the Niagara Project boundary as part of the Power Authority's Recreation Plan (discussed *infra*). Further, the proposed license article requires the Power Authority to submit annually to the Commission a report of fund expenditures, as well as a progress report on the capital improvements to facilities within the Niagara Project boundary.<sup>45</sup>

#### **7. Niagara Falls Water Board Capital Improvement Fund**

The Niagara Project's Lewiston Reservoir and the Project's conduit drainage system alter groundwater flow patterns in the vicinity of the Niagara Project.<sup>46</sup> The impact of the Niagara Project's conduit drainage system, in particular, has resulted in 5.2 mgd of infiltration to the NFWB's Falls Street Tunnel ("FST").<sup>47</sup>

The FST is part of a combined sewer / sanitary overflow system. During dry weather, water infiltrating into the FST is typically treated at the NFWB wastewater treatment plant prior to being discharged to the Niagara River.<sup>48</sup> During some larger magnitude wet weather events, however, when tunnel flows exceed the capacity of the wastewater treatment plant, some portion of this excess flow must be discharged directly to the lower Niagara River without treatment.<sup>49</sup>

To address the impacts associated with groundwater infiltration of the FST, the Power Authority would establish a Niagara Falls Water Board Capital

Improvement Fund ("Capital Improvement Fund") in the amount of \$19 million

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<sup>45</sup> Relicensing Agreement, Appendix A at A-4.

<sup>46</sup> PDEA at 4-8 through 4-11.

<sup>47</sup> Id.

<sup>48</sup> PDEA at 4-10.

<sup>49</sup> Id.



(NPV 2007) to minimize groundwater infiltration into the FST in the area of the Project's conduits.<sup>50</sup> The amount of this fund represents a conservative estimate – based on extensive consultation with the NFWB – of the resources that will be needed to make capital improvements to the FST.

The Capital Improvement Fund would be managed and administered by the NFWB and improvements may include: (i) construction of access shafts in the FST; (ii) sediment removal; (iii) 860 lineal feet of “cured in-place” repair of existing seven (7) foot diameter concrete pipe over the conduits and concrete bypass pipes; (iv) 1,100 lineal feet of slip-lined FST rock tunnel lining; and (v) other miscellaneous construction elements (*e.g.*, mob / demob, structural removal, structural sealing, testing, *etc.*) and related costs.<sup>51</sup> The Capital Improvement Fund also would cover future costs incurred by the NFWB over the term of the new license in connection with management or treatment of residual groundwater infiltration into the FST, as well as any repairs or maintenance related to the capital improvements.<sup>52</sup> The Power Authority would provide annual reports to the Commission on the status of the capital improvements until such time as the improvements are completed.<sup>53</sup>

#### **B. Allocation Agreement**

The Allocation Agreement would implement the requirements of the Niagara Redevelopment Act<sup>54</sup> (“NRA”) which direct the Power Authority to make, *inter alia*, a “reasonable portion” of preference power “available for use within reasonable economic transmission distance in neighboring States,” provided the requirement

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<sup>50</sup> Relicensing Agreement § 6.1(a).

<sup>51</sup> Id.

<sup>52</sup> Id.

<sup>53</sup> Relicensing Agreement, Appendix A at A-4.

<sup>54</sup> 16 U.S.C. §§ 836-836a.

“shall not be construed to require more than 20 per centum of the project power subject to preference provisions to be made available for use in such States.”<sup>55</sup>

When issuing the original license for the Niagara Project in 1958, the Federal Power Commission implemented these requirements simply by adopting verbatim the preference power requirements of the NRA under Articles 20 and 21 of the original license.<sup>56</sup> Pursuant to these articles, the Power Authority has provided Niagara Project power and energy during the original license term to the State of Connecticut, the Commonwealth of Massachusetts, the State of New Jersey, the State of Ohio, the Commonwealth of Pennsylvania, the State of Rhode Island, and the State of Vermont (collectively, “Neighboring States”).

The Allocation Agreement between the Neighboring States and the Power Authority resolves the interests of the Neighboring States in the Niagara Project Relicensing consistent with the Power Authority’s obligations under the NRA. Specifically, the Allocation Agreement proposes to preserve the *status quo* with regard to the Power Authority’s obligation to provide preference power to public bodies and non-profit cooperatives located in Neighboring States. Under the Allocation Agreement, the Power Authority and Neighboring States have agreed that the Commission should simply continue Articles 20 and 21 under the new license<sup>57</sup>—with very little modification.<sup>58</sup> Inclusion of Articles 20 and 21 in the new license is in

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<sup>55</sup> Id. § 836(b)(2).

<sup>56</sup> Power Auth. of the State of N.Y., 19 F.P.C. 186, 193-94 (1958).

<sup>57</sup> See Neighboring States Agreement § 3.2.

<sup>58</sup> In order to avoid confusion in any future proceedings involving neighboring state preference power requirements under the NRA, the Power Authority and Neighboring States propose only to modify these license articles to identify, by name, each Neighboring State, instead of retaining the generic concept included in the original license articles. See Neighboring States Agreement § 3.1.

the public interest because the articles implement the Power Authority's obligations under the NRA.

**C. Additional Proposed License Articles**

In addition to the proposed license articles arising out of the Relicensing Agreement and the Allocation Agreement, the Power Authority has proposed license articles regarding Historic Properties and the development of Land Management and Recreation Plans.

**1. Historic Properties**

To address the treatment of Historic Properties, a proposed license article would require the Power Authority to implement a Programmatic Agreement ("PA") that will be executed by the Commission, the New York State Historic Preservation Officer ("SHPO"), and the Advisory Council on Historic Preservation ("ACHP"). The PA will include a requirement to develop a Historic Properties Management Plan ("HPMP").<sup>59</sup> The HPMP, which will be submitted to the Commission for approval within one (1) year of license issuance, will be prepared in consultation with the SHPO, ACHP, TN, SNI, TSN, and other entities specified on the Cultural Resources Mailing List and Historic Properties and Uses Mailing List maintained by the Commission in the relicensing of the Project.<sup>60</sup>

The HPMP, together with the PA, will satisfy the Commission's obligations under Section 106 of the National Historic Preservation Act ("NHPA")<sup>61</sup> and ensure

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<sup>59</sup> Regulatory Agreement, Appendix A at A-5. The Power Authority expects that the Commission will invite other entities, such as the Power Authority, TN, SNI, and TSN, to sign the PA as concurring parties.

<sup>60</sup> Draft PA § 1.A; Tuscarora Agreement § 8.2; Letter from Vince Yearick, Federal Energy Regulatory Commission, to Restricted Service Lists, Project No. 2216-058 (issued Jan. 19, 2005).

<sup>61</sup> 16 U.S.C. § 470f.

appropriate protection and treatment of historic properties listed in, or eligible for listing in, the National Register of Historic Places (“National Register”)<sup>62</sup> throughout the new license term for the Niagara Project. During the pre-filing stage, the Power Authority, in consultation<sup>63</sup> with the SHPO, TN, SNI and TSN, completed a draft report entitled *Phase 1A Cultural Resources Investigation, Niagara Power Project* (“*Phase 1A Report*”), which identified approximately thirty-seven (37) possible archaeological sites within the investigation area of the study,<sup>64</sup> six (6) of which are listed in the National Register.<sup>65</sup> The *Phase 1A Report* also identified approximately seventy-nine (79) locations within the investigation area of the study where water erosion is occurring and where archeological sites may be present.<sup>66</sup> Finally, the *Phase 1A Report* identified approximately eight (8) architectural structures within the investigation area of the study that are listed in, or eligible for listing in, the National Register,<sup>67</sup> and fifteen (15) that are potentially eligible for listing.<sup>68</sup>

<sup>62</sup> 36 C.F.R. § 800.16(I)(1).

<sup>63</sup> By letter dated July 17, 2003, the Commission authorized the Power Authority “to initiate consultation with the SHPO, appropriate Indian Tribes, and other consulting parties,” pursuant to the requirements of Section 106 of the NHPA and ACHP regulations. Letter from Tom DeWitt, Federal Energy Regulatory Commission, to the Restricted Service List, Project No. 2216-058 (issued July 17, 2003); see 16 U.S.C. § 470f; 36 C.F.R. Part 800. Since that time, the Power Authority has convened a number of meetings with the SHPO, TN, SNI and/or TSN to review study results, tour Project facilities, discuss Project operations and impacts, review comments on a draft PA, and discuss the scope of the HPMP.

<sup>64</sup> The investigation area for the Phase 1A study included not only all lands and waters within the Project boundary, but the entire Niagara River corridor (as well as tributaries to the upstream extent of influence of Niagara River water levels) on the United States side of the Niagara River between the Peace Bridge in the City of Buffalo and the mouth of the Niagara River at Lake Ontario, that may be affected by water level fluctuations including associated upland areas that may be impacted by Project features. The investigation area also included a 500-foot buffer around the Project boundary, a 50-foot buffer along the shoreline of the Niagara River, and a 50-foot buffer along the shoreline of some tributaries. See *Phase 1A Cultural Resources Investigation, Niagara Power Project* § 1.0, at 1-1 (draft, 2004) [hereinafter, *Phase 1A Report*].

<sup>65</sup> *Phase 1A Report* § 2.4.1, at 2-66 to 2-67.

<sup>66</sup> *Id.* § 3.2, at 3-2 to 3-15.

<sup>67</sup> *Id.* § 4.2, at 4-12 to 4-22.

<sup>68</sup> *Id.* § 6.2, at 6-7 to 6-9.

As of the date of this Offer of Settlement, the Power Authority is in the process of completing its Phase 1B/ 2 study investigations, which will determine: (1) whether any of the identified archeological and architectural sites qualify as historic properties listed in or eligible for listing in the National Register and (2) whether any such listed or eligible historic properties are within the Niagara Project's Area of Potential Effects ("APE").<sup>69</sup> As part of these ongoing studies, the Power Authority will continue to work with the TN, SNI, and TSN to identify any historic properties "of traditional religious and cultural importance" located within the Niagara Project's APE.<sup>70</sup>

To appropriately protect and address all historic properties within the Niagara Project's APE during the new license term for the Niagara Project, the Power Authority's HPMP will address the following matters:

- Completion, if necessary, of identification of historic properties within the existing Niagara Project's APE;
- Continued use, maintenance, protection, and preservation of historic properties within the Niagara Project's APE, including the development and implementation of rehabilitation standards and an oversight protocol, as well as a monitoring protocol and provisions for enforcement, as appropriate;
- ~~Consideration and, where appropriate, adoption of prudent and feasible~~ project alternatives that would avoid adverse effects on historic properties within the Niagara Project's APE;

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<sup>69</sup> 36 C.F.R. § 800.16(d).  
<sup>70</sup> 36 C.F.R. § 800.16(l)(1).

- Consideration and implementation of appropriate treatment that would mitigate any unavoidable adverse effects to historic properties within the APE;
- Consultation with the SHPO, TN, SNL, TSN and other entities regarding identification and evaluation of historic properties, determination of, and ways to avoid, minimize, or mitigate adverse effects;
- An action plan for unanticipated discoveries during Niagara Project-related construction;
- Measures for the treatment and disposition of any human remains that may be discovered, taking into account any applicable state laws and, with respect to any federal lands, the Native American Graves Protection and Repatriation Act;<sup>71</sup>
- Measures for the treatment of previously unidentified historic properties discovered during Niagara Project operation;
- Compliance with Section 14.09 of the New York State Historic Preservation Act of 1980;
- Public interpretation of the historic and archeological values of the Niagara Project;
- ~~Identification and proposed treatment, avoidance, or mitigation of~~ effects to historic properties of traditional religious and cultural importance to the TN, SNL, and TSN through the development and

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<sup>71</sup> 25 U.S.C. §§ 3001-3013.

implementation of a traditional cultural properties plan after consultation with the SHPO and these Nations;

- Procedures for training Power Authority staff in their responsibility to protect historic properties and requirements of the HPMP;
- Identification of activities and routine maintenance not requiring consultation; and
- Coordination with the SHPO, TN, SNI, TSN and other entities during implementation of the HPMP, including provisions for periodic reporting, meetings, review and revision of the HPMP.<sup>72</sup>

## **2. Land Management Plan**

To address the Power Authority's management of Niagara Project lands, a proposed license article would require the Power Authority to develop a Land Management Plan ("LMP").<sup>73</sup> Pursuant to the proposed license article, the LMP would be filed for Commission approval within one (1) year of the effective date of the new license or license issuance, whichever is later.

The LMP would be developed in consultation with, at a minimum, the Service, BIA, NPS, DEC, OPRHP, the TN, NREC, local municipalities, and adjacent landowners. The LMP would identify and explain the policies, standards, guidelines, and land use designations utilized to enhance safety and protect and manage ~~environmental resources, public use, aesthetics, and TN customary uses. More~~ specifically, the LMP would address the following:

<sup>72</sup> PDEA § 4.1.8, at 4-89 to 4-91.

<sup>73</sup> Relicensing Agreement, Appendix A at A-5.

a. Road Maintenance Practices.

The LMP would establish appropriate techniques for winter maintenance and road infrastructure maintenance that will allow for safe access, while providing for the maximum practical protection of adjacent resources.<sup>74</sup>

b. Vegetation Management.

The LMP would set forth appropriate techniques associated with vegetation management for mowing, herbicide use, hand and mechanical removal, standard agricultural practices, and landscaping. Practices proposed to be included in the LMP are timing restrictions for mowing specific areas and/or habitats, integrated vegetation management, and utilizing native plants for landscaping purposes.<sup>75</sup>

c. Invasive Species Control.

The LMP would outline techniques to be employed by the Power Authority to discourage the spread of invasive species and, where appropriate, designate areas where invasive species will be controlled and specify methods to be utilized in the control efforts.<sup>76</sup> One such area to be addressed by this element of the LMP is found on the Lewiston Reservoir Dike, where crown vetch (*Coronilla* species), a plant some consider invasive, has been planted and maintained.

d. Use of Project Lands.

The LMP would ensure that use of Niagara Project lands would continue in public areas that are not otherwise restricted for Project and public safety purposes.<sup>77</sup>

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<sup>74</sup> PDEA at 4-73.

<sup>75</sup> Id. at 4-74.

<sup>76</sup> Id.

<sup>77</sup> Id.



e. Aesthetic Enhancements.

The LMP would include measures for the Power Authority to address aesthetic issues through the planting/enhancement of vegetative buffers/screens. Other aesthetic enhancements would be completed as part of normal Niagara Project operation and maintenance activities, including debris clean-up and lighting adjustments. Finally, the LMP would address reestablishing a vegetative screen at Niagara Project Service Facilities and utilization of low- to no-maintenance native herbaceous plants on the Lewiston Reservoir dike.<sup>78</sup>

f. Customary Use Plan for the Tuscarora People.

The LMP would include a Customary Use Plan ("CUP") that recognizes customary uses of Niagara Project lands by the Tuscarora People. The Power Authority and TN have agreed to work together in developing the CUP, which would, as reasonably and practicably as possible, include such uses as fishing, hunting, and gathering.<sup>79</sup> The CUP would be subject, however, to the following conditions: (1) the CUP would not effectuate any change in the Niagara Project boundary or Niagara Project operations; (2) the CUP would be consistent with the Niagara Project's Recreation Plan, the HPMP, the Commission's policies on recreation at licensed projects,<sup>80</sup> and considerations of public safety and Niagara Project security; and (3) the CUP would not supersede state and local requirements pertaining to hunting and ~~fishing licenses and the possession and use of firearms.~~<sup>81</sup>

<sup>78</sup>

Id.

<sup>79</sup>

Tuscarora Agreement § 7.2.1.

<sup>80</sup>

See 18 C.F.R. § 2.7.

<sup>81</sup>

Tuscarora Agreement § 7.2.1.

### 3. Recreation Plan

To address recreation within the Niagara Project boundary, the Power Authority would develop a Recreation Plan.<sup>82</sup> The Recreation Plan would be filed for Commission approval within one (1) year of the effective date of the new license or license issuance, whichever is later. In preparing the Recreation Plan, the Power Authority would consult with, at a minimum: the Service, BIA, NPS, DEC, OPRHP, a representative from the TN, a representative from NREC, and a representative of the Niagara Power Coalition ("NPC").

The Recreation Plan would describe all recreational facilities and resources at the Niagara Project, including new measures set forth in the Relicensing Agreement described above, and would include the following provisions:<sup>83</sup>

- a. Final designs, estimated costs, and a proposed implementation schedule for proposed recreational enhancements, including those funded by the Parks and Recreation Fund;
- b. Soil and sedimentation control measures for the above enhancements;
- c. A map showing the upgraded or new facilities in relation to existing recreation facilities;
- d. A discussion on how each Niagara Project recreation facility will be operated and maintained during the term of the new license, including a discussion of existing management agreements and plans for amendment, revision, and/or extension thereof;

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<sup>82</sup> Relicensing Agreement, Appendix A at A-5 to A-6.

<sup>83</sup> Id.

- e. A description of reasonable and prudent measures, developed in consultation with the TN, to reduce and prevent, as practicably as possible, trespass on TN lands by users of the Niagara Project's recreational facilities;<sup>84</sup> and
- f. A program for monitoring recreational use and updating the Recreation Plan on a twelve (12) year cycle.<sup>85</sup>

**D. Proposed License Terms and Conditions Serve the Public Interest**

The settlement commitments set forth in the Relicensing Agreement (including the proposed license articles set forth in Appendix A) and the Allocation Agreement establish measures that would address impacts to resources that are directly or indirectly related to Niagara Project operations. Taken together, these measures meet or exceed the Power Authority's obligations under the FPA and the NRA.

Specifically, the HIPs and the HIPs Fund would provide significant benefits for aquatic, terrestrial, and wildlife resources in the Niagara River basin affected by water level fluctuations caused, in part, by Niagara Project operations. The public access improvements, the Recreation Fund, and the development of a Recreation Plan would enhance existing and future recreation and access opportunities within, and in the vicinity of, the Niagara Project consistent with the Commission's recreation policy.<sup>86</sup> The development of the LMP would establish land and vegetation management practices that benefit aquatic and terrestrial resources at the Niagara

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<sup>84</sup> See Tuscarora Agreement § 8.3.

<sup>85</sup> This report would be in addition to the Form 80 reports filed with the Commission. PDEA at 4-70.

<sup>86</sup> 18 C.F.R. § 2.7.

Project, as recognized by the PDEA,<sup>87</sup> and also affirm, preserve, and accommodate, as reasonably and practicably as possible, customary uses of Niagara Project lands by the TN. The development of the HPMP would “provide measures to evaluate previously unknown sites” and would “identify measures to be taken to assure that archaeological sites or any other historic properties are given due consideration during ground disturbing Project activities.”<sup>88</sup>

Collectively, these measures provide for substantial environmental and recreational enhancements in the Niagara River basin. Accordingly, the public interest would be well-served by the Commission’s adoption of the proposed license terms and conditions set forth in Appendix A of the Relicensing Agreement.

## **II. SETTLEMENT PROVISIONS OUTSIDE THE SCOPE OF FERC’S JURISDICTION**

In addition to the settlement provisions set forth in the Relicensing Agreement and the Allocation Agreement, the Power Authority executed two additional settlement agreements. These settlement agreements – the Host Community Agreement and the Tuscarora Agreement – do not address the Power Authority’s obligations under the FPA or the NRA; instead, they reflect the Power Authority’s desire, as a corporate municipal instrumentality and political subdivision of the State of New York, to support the communities within which the Niagara Project is located. As noted above, however, the settlement commitments contained in these Agreements are contingent upon the Commission’s acceptance – without expansion or modification – of the proposed license articles set forth in Appendix A of the Relicensing Agreement.

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<sup>87</sup> PDEA § 4.1.6.3, at 4-86.

<sup>88</sup> PDEA § 4.1.8.2, at 4-91.

**A. Host Community Agreement**

The Power Authority has entered into an agreement with NPC and the seven individual taxing entities that comprise the NPC: City of Niagara Falls, New York; Town of Lewiston, New York; Town of Niagara, New York; Niagara County, New York; Lewiston-Porter School District; Niagara-Wheatfield School District; and the City of Niagara Falls School District (collectively, the "Host Communities"). The Host Community Agreement addresses a number of issues that were raised by NPC and the Host Communities during the scoping process related to socioeconomics, land use, low-cost power, and regional recreation.

Pursuant to the terms of the Host Community Agreement, the Power Authority would establish a Host Communities Fund ("HC Fund") with a value of \$89.9 million (NPV 2007).<sup>89</sup> The HC Fund, which would be funded in the amount of at least \$5 million annually for the term of the New License after an initial payment of \$8 million, would be available to the Host Communities for capital projects and infrastructure that benefit the general public and promote economic development, public health, and safety. The Power Authority also has agreed to offer eight parcels of land to the Host Communities (and adjacent landowners within the Host Communities).<sup>90</sup> Additionally, the Power Authority has agreed to consider opportunities to convey two additional parcels to the Town of Lewiston.<sup>91</sup>

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The Power Authority also has agreed to make available twenty-five (25) MW of firm power and associated energy for sale to the Host Communities (or to entities designated by the Host Communities to receive such power and energy on their

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<sup>89</sup> Host Community Agreement § 4.1.

<sup>90</sup> Id. § 5.1.

<sup>91</sup> Id. § 5.3.

behalf) during the term of the new license.<sup>92</sup> All power and energy sold to the Host Communities or their designees pursuant to this Host Community Agreement would be at the Power Authority's cost-based rate for Niagara Project power and energy. The sale of this power would be consistent with applicable state and federal laws, and it would be the sole responsibility of the Host Communities to arrange for the transmission and distribution of all power and energy provided. The estimated value of this power over the term of the new license is \$ 92.7 million (NPV 2007).

Finally, the Power Authority has agreed to establish a Greenway Recreation/Tourism Fund for the Host Communities ("Host Community Greenway Fund") sixty (60) days after the Power Authority files its acceptance of the new license with FERC. The Host Community Greenway Fund would have a value of \$48.5 million (NPV 2007) and would be funded in the amount of \$3 million annually for the term of the new license.<sup>93</sup> The fund is designed to support the construction and/or rehabilitation of parks and other recreation and related facilities, for the purpose of redefining the Niagara riverfront, promoting tourism, enhancing the environment, and advancing the economic revitalization of the Niagara River Greenway within Niagara County, consistent with the Niagara River Greenway Plan.

**B. Tuscarora Nation Agreement**

The TN and the Power Authority also have executed a settlement agreement ~~to resolve the TN's issues associated with the relicensing of the Niagara Project. The~~ Power Authority and the TN believe the settlement agreement will establish a

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<sup>92</sup> Id. § 6.1.

<sup>93</sup> Id. § 7.1.

foundation for future cooperation and improved communication between the two parties.

Pursuant to the terms of the Tuscarora Agreement, the Power Authority has agreed to make a single payment or a series of payments totaling \$21.8 million (NPV 2007) to the TN during the term of the new license for the Niagara Project. For all such payments, the TN will have sole and absolute discretion over all expenditures and investments, as well as all associated management and administrative responsibilities.<sup>94</sup>

For the term of the new license for the Niagara Project, the Power Authority also has agreed to provide up to one (1) megawatt of firm power and associated energy to the TN at the Power Authority's cost-based rate for Niagara Project power and energy. This power would be used by the TN to meet its current electricity requirements and accommodate reasonable future needs during the term of the new license. The sale of this power would be consistent with applicable state and federal laws, and it would be the sole responsibility of the TN to arrange for the transmission and distribution of all power and energy provided.<sup>95</sup> In addition to these measures, the Power Authority has agreed to work with the TN to conduct an energy audit and develop an energy plan, including the identification of energy efficiency opportunities, new technologies, and applicable existing public programs offered by the Power Authority.<sup>96</sup>

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<sup>94</sup> Tuscarora Agreement § 4.1.

<sup>95</sup> Id. § 5.

<sup>96</sup> Id. § 8.6.

Further, the Power Authority has agreed to convey to the TN a 52-acre parcel located outside of the boundary for the Niagara Project.<sup>97</sup> The Power Authority also has agreed that, if at anytime during the term of the new license it determines (subject to Commission approval) that it no longer needs for its purposes or for other public purposes the parcel of land taken by eminent domain from the TN for the Lewiston Reservoir, it will convey fee title to the TN for nominal consideration.<sup>98</sup>

Additionally, if the Power Authority seeks (subject to Commission approval if necessary) to surplus, dispense, or otherwise convey any real property interest in the vicinity of the Niagara Project, it would provide notice of that determination and consult with the TN at its earliest opportunity prior to the conveyance. Finally, the Power Authority will help facilitate open communication and consultation between the TN and OPRHP regarding OPRHP's management of lands outside the Niagara Project boundary.<sup>99</sup>

The Tuscarora Agreement also provides for the implementation of several measures related to cultural resources. For the term of the new license, the Power Authority has agreed to fund programs and events sponsored by the TN that promote the arts, history, cultural heritage, and historic preservation of the TN and the Tuscarora people, up to \$5,000 per year.<sup>100</sup> The Power Authority also has agreed to work with the TN, SNI, and TSN (collectively, "Nations") to develop, implement,

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<sup>97</sup> Id. § 6.1.

<sup>98</sup> Id. § 6.2.

<sup>99</sup> Id. § 7.3.1.

<sup>100</sup> Id. § 7.1.1.



and maintain a new exhibit at the Power Vista devoted to the Haudenosaunee people and their associations with the Niagara Project.<sup>101</sup>

To promote educational opportunities, the Power Authority has agreed to develop and implement, in consultation with the Nations, an internship program, which would be available exclusively to members of the Nations. The internship program would accommodate, on an annual basis through the term of the new license for the Niagara Project, up to three (3) matriculated, degree-seeking university students to work as unpaid interns with the Power Authority during the summer months.<sup>102</sup> The Power Authority also has agreed to develop and implement, in consultation with the TN, a scholarship program. Under this scholarship program, which will be available exclusively to members of the TN, the Power Authority would provide, on an annual basis through the term of the new license for the Niagara Project, two (2) undergraduate full-tuition scholarships to citizens of the TN matriculating at any community college or university in the State University of New York System.<sup>103</sup>

**C. Additional Non-Jurisdictional Settlement Commitments**

In addition to the settlement provisions set forth in the settlement agreements with the TN and the Host Communities, the Power Authority has agreed to four (4) other post-license measures. These commitments, which also are outside of the scope of Commission's jurisdiction because they do not address Niagara Project impacts, are set forth in Appendix E of the Relicensing Agreement. They include a Greenway

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<sup>101</sup> Id. § 7.4.1. The Power Authority has agreed to contribute up to \$150,000 (NPV 2007) for the development and implementation of this exhibit, and will be responsible for the ongoing cost of maintaining the exhibit.

<sup>102</sup> Id. § 7.5.

<sup>103</sup> Id. § 7.6.

Ecological Fund, a State Parks Greenway Fund, a Land Acquisition Fund, and funds for stream restoration and a RTE/native terrestrial plant feasibility study.

The Greenway Ecological Fund would be established by the Power Authority within ninety (90) days of the effective date of the new license or license issuance, whichever is later.<sup>104</sup> The Greenway Ecological Fund would have a value of \$16.2 million (NPV 2007) and would be funded in the amount of \$1 million annually for the term of the new license. The Fund will support the creation, improvement, and maintenance of conservation areas and ecological projects along the Niagara River basin to promote tourism, enhance the environment, advance the economic revitalization of riverfront communities, and support the creation of a Greenway. The Greenway Ecological Fund would have a standing committee ("GESC") comprised of the Power Authority, DEC, the Service, SNL, TN, TSN, and NREC. The GESC would select projects to be funded from the Greenway Ecological Fund on a consensus basis, provided they are consistent with the Niagara River Greenway Plan.

A State Parks Greenway Fund also would be established by the Power Authority within ninety (90) days of the effective date of the new license or license issuance, whichever is later.<sup>105</sup> The fund would have a value of \$48.5 million (NPV 2007) and would be funded in the amount of \$3 million annually for the term of the new license. The Fund would support the construction and/or rehabilitation of parks and other recreation and related facilities in order to promote tourism, enhance the environment, advance the economic revitalization of riverfront communities, and support the creation of a Greenway. The State Parks Greenway Fund would have a

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<sup>104</sup> Relicensing Agreement, Appendix E § 1.1.

<sup>105</sup> Relicensing Agreement, Appendix E § 3.1.

standing committee comprised of OPRHP and the Power Authority to administer and oversee projects financed by the State Parks Greenway Fund.

Beyond the two Greenway Funds, the Power Authority has agreed to establish a Land Acquisition Fund within ninety (90) days of the effective date of the new license or license issuance, whichever is later.<sup>106</sup> The fund would have a value of \$1 million (NPV 2007) and would be available to acquire lands identified by DEC. The Power Authority also has agreed to provide funding for: (1) Cayuga Creek Stream Restoration, up to a maximum of \$200,000, for work directed by the Town of Niagara, Niagara County, the City of Niagara Falls, a representative from the NREC, and the TN; and (2) a study within the Niagara River Gorge to assess the feasibility of restoring RTE/native terrestrial plants.<sup>107</sup> The total cost of the feasibility study would not exceed \$100,000.

### III. REQUEST FOR FIFTY YEAR LICENSE TERM

Pursuant to established FERC policy, the Commission will grant:

30-year terms for the licenses for projects with little or no proposed redevelopment, new construction, new capacity, or environmental mitigative and enhancement measures; 40-year terms for projects with a moderate amount of proposed redevelopment, new construction, new capacity or mitigative and enhancement measures; and 50-year terms for projects with proposed extensive redevelopment, new construction, new capacity, or mitigative and enhancement measures.<sup>108</sup>

As acknowledged in each of the Settlement Agreements, and explained in detail

~~above, the Power Authority has proposed extensive mitigative and enhancement~~

measures. These license measures, set forth as proposed license articles in Appendix A to the Relicensing Agreement, total approximately \$59.5 million (NPV 2007). The

<sup>106</sup> Relicensing Agreement, Appendix E § 2.

<sup>107</sup> Relicensing Agreement, Appendix E § 4.

<sup>108</sup> Mead Corporation, 72 FERC ¶ 61,027, at p. 61,077 (1995).

Power Authority also has committed another \$324.8 million (NPV 2007) as part of its non-license settlement provisions. While not addressing project impacts, these non-license resources will provide significant environmental, recreation, and socioeconomic benefits to the region.

Given the substantial investment the Power Authority has committed to make during the new license term, the proposed license conditions represent extensive mitigative and enhancement measures that warrant a 50-year license term. Moreover, the \$324.8 million in non-license measures are predicated on a fifty-year license; if the Power Authority does not receive a fifty-year license term, the non-jurisdictional Settlement Agreements explicitly provide that the Power Authority can terminate those agreements. Notably, all of the parties to the Settlement Agreements support the Power Authority's request for a fifty (50) year license term.

Finally, the NRA grants the Authority the exclusive right to develop the hydroelectric potential of the Niagara River reserved to the United States by treaty. Therefore, it is in the interest of administrative convenience and the rational use of public resources for the Commission to grant a fifty (50) license term.

#### IV. CONCLUSION

The Offer of Settlement represents the successful culmination of the Niagara Project ALP and sets forth the Power Authority's commitments to the Niagara River and its environs over the term of the new license. These settlement provisions were carefully crafted in consultation with our settlement partners to ensure that the Power Authority would meet or exceed its regulatory obligations under the FPA while providing additional substantial benefits to the agencies, communities, environmental

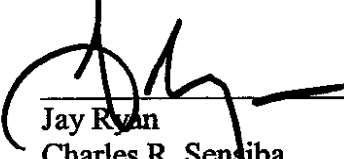
organizations, and customers that participated in the ALP. The result is an Offer of Settlement that provides significant environmental, recreation, and socioeconomic benefits to the Niagara region.

Implementation of these measures will clearly be in the public interest. As explained above, however, the Power Authority's settlement commitments are contingent upon the Commission's issuance of a new fifty (50) year license that accepts – without modification or expansion – the license articles as proposed in Appendix A of the Relicensing Agreement. Accordingly, the Power Authority requests that the Commission approve the Offer of Settlement, including the proposed license articles, in order to give full force and effect to the negotiated Settlement Agreements. In doing so, the Commission will ensure that the Power Authority and the ALP Stakeholders can continue their collective efforts to revitalize and enhance the Niagara River and its surrounding communities.

WHEREFORE, for the foregoing reasons, the Power Authority respectfully requests that the Commission approve the Offer of Settlement and incorporate – without expansion or modification – the Proposed License Articles set forth in Appendix A of the Relicensing Agreement into a new fifty (50) year license for the Niagara Project.

Respectfully Submitted,

David E. Blabey  
Executive Vice President, Secretary  
and General Counsel  
New York Power Authority  
30 South Pearl Street,  
Albany New York 12207-3425  
TEL: (518) 433-6725  
FAX: (518) 433-6781



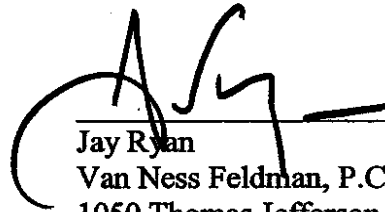
Jay Ryan  
Charles R. Sensiba  
Van Ness Feldman, P.C.  
1050 Thomas Jefferson Street, NW  
Suite 700  
Washington, D.C. 20007-3877  
TEL: (202) 298-1800  
FAX: (202) 338-2416  
[jtr@vnf.com](mailto:jtr@vnf.com)  
[crs@vnf.com](mailto:crs@vnf.com)

*Counsel to the New York  
Power Authority*

## **CERTIFICATE OF SERVICE**

Pursuant to Rule 2010 of the Commission's Rules of Practice and Procedure, I hereby certify that I have this day caused the foregoing "Niagara Power Project Offer of Settlement and Explanatory Statement" to be served upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C., this 19<sup>th</sup> day of August 2005.

A handwritten signature in black ink, appearing to be "JR" with a large loop on the left side, positioned above a horizontal line.

Jay Ryan  
Van Ness Feldman, P.C.  
1050 Thomas Jefferson Street, NW  
Seventh Floor  
Washington, D.C. 20007-3877  
202-298-1800

**NIAGARA POWER PROJECT,  
FERC PROJECT NO. 2216**

**RELICENSING  
SETTLEMENT AGREEMENT  
ADDRESSING NEW LICENSE TERMS  
AND CONDITIONS**

*Including*  
**PROPOSED LICENSE ARTICLES**

**July 18, 2005**



**NIAGARA POWER PROJECT,  
FERC PROJECT NO. 2216**

**RELICENSING SETTLEMENT AGREEMENT ADDRESSING  
NEW LICENSE TERMS AND CONDITIONS**

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**THIS RELICENSING SETTLEMENT AGREEMENT ADDRESSING NEW LICENSE TERMS AND CONDITIONS** ("Relicensing Agreement") is made and entered into this \_\_\_\_ day of \_\_\_\_\_, 2005 by and among, the Power Authority of the State of New York ("Power Authority"); the United States Department of the Interior ("DOI"), through its component bureaus, the United States Fish and Wildlife Service ("Service"), Bureau of Indian Affairs ("BIA"), and National Park Service ("NPS"); the New York State Department of Environmental Conservation ("DEC"); the New York State Department of State ("DOS"); the New York State Office of Parks, Recreation and Historic Preservation ("OPRHP"); the Niagara Falls Water Board ("NFWB"); the New York Association of Public Power; the Municipal Electric Utility Association; the New York State Rural Electric Cooperative Association; New York Rivers United ("NYRU"); Friends of the Buffalo-Niagara River ("FOBNR"); and the Niagara Relicensing Environmental Coalition ("NREC") on behalf of its constituent members (collectively, the "Parties").

**WITNESSETH:**

WHEREAS, the Power Authority owns and operates the Niagara Power Project ("Project"), located on the Niagara River in Niagara County, New York;

WHEREAS, the 50-year original license for the Project, issued to the Power Authority by the Federal Power Commission on January 30, 1958, expires on August 31, 2007;

WHEREAS, the Parties recognize the importance of reliable, low-cost, Project power to the Power Authority's customers, the region, and the State of New York;

WHEREAS, the Power Authority, on or before August 31, 2005, will file an application with the Federal Energy Regulatory Commission ("Commission" or "FERC") seeking a 50-year New License for the continued operation and maintenance of the Project;

WHEREAS, the Power Authority will file an application for a water quality certification from DEC in connection with the relicensing of the Project, as provided under Section 401 of the Clean Water Act ("CWA");

WHEREAS, the Power Authority, concurrent with the filing of its relicensing application with FERC, will file a consistency certification with DOS in connection with the relicensing of the Project, as provided under Section 307 of the Coastal Zone Management Act ("CZMA");

WHEREAS, the Parties have negotiated and resolved all of their respective issues associated with the Commission's issuance of a New License for the Project to the Power Authority;

WHEREAS, the Parties agree that all provisions of this Relicensing Agreement that are within the jurisdiction of FERC are identified separately herein and set forth in Part II of this Relicensing Agreement and as Proposed License Articles in Appendix A; and

WHEREAS, the Parties agree that the Commission should adopt, without modification, all of the License Terms and Conditions, including the Proposed License Articles into the New License for the Project.

NOW THEREFORE, the Parties agree as follows:

**PART I**

**GENERAL TERMS AND CONDITIONS**

---

## SECTION 1 GENERAL PROVISIONS

### 1.1 ACRONYMS AND DEFINITIONS

**"1950 Treaty"** shall mean the 1950 Niagara River Water Diversion Treaty Between the United States and Canada, codified at 1 U.S.T. 694.

**"Commission"** shall mean the Federal Energy Regulatory Commission.

**"CWA"** shall mean the Clean Water Act.

**"CZMA"** shall mean the Coastal Zone Management Act.

**"FERC"** shall mean the Federal Energy Regulatory Commission.

**"FPA"** shall mean the Federal Power Act.

**"IJC"** shall mean the International Joint Commission.

**"License"** shall mean the regulatory authorization for construction, maintenance, and operation of a hydroelectric project subject to the jurisdiction of FERC pursuant to the Federal Power Act, 16 U.S.C. § 791 *et seq.*

**"Licensee"** shall mean the Power Authority of the State of New York, the legal entity to which the Commission issues the New License for the Project, and its successors and assigns.

**"License Provision"** shall mean any term, condition, prescription, requirement, holding, reservation of authority, or article included into the New License for the Niagara Power Project by the Commission, or any condition, term, reservation or other License requirement adopted or otherwise included into the New License for the Project, including, but not limited to, a water quality certificate issued by DEC pursuant to Section 401 of the CWA.

**"License Terms and Conditions"** shall mean the entirety of the terms, prescriptions, conditions, and articles set forth in Section 3 and Appendix A of this Relicensing Agreement, which the Parties agree that the Commission should include, without modification or expansion, in the New License issued to the Power Authority for the continued operation of the Project.

**"NEPA"** shall mean the National Environmental Policy Act.

**"New License"** shall mean the first new License, not including any annual license, issued by the Commission to the Power Authority for the continued operation and maintenance

of the Project, pursuant to Section 15 of the FPA, effective after expiration of the Project's original license issued on January 30, 1958.

**"Niagara River Greenway"** shall have the same meaning as set forth in Section 39.03(1) of the New York Parks, Recreation, and Historic Preservation Law.

**"Niagara River Greenway Commission"** shall have the same meaning as set forth in Section 39.03 of the New York Parks, Recreation, and Historic Preservation Law.

**"Niagara River Greenway Plan"** shall have the same meaning as set forth in Section 39.07 of the New York Parks, Recreation, and Historic Preservation Law.

**"NPV"** shall mean net present value.

**"NPV 2007"** shall equal the  $\sum_{i=1}^{n=50} \frac{Value_i \times (1 + EscalationRate)^{YearSpent_i - BaseYear_i}}{(1 + DiscountRate)^{YearSpent_i - 2007}}$  based on the following inputs: O & M Escalation Rate = 3.5%; Capital Cost Escalation Rate = 4.5%; and Discount Rate = 6.25%. All NPV figures in this Relicensing Agreement assume a 50-year license term.

**"NREC"** shall mean the Niagara Relicensing Environmental Coalition, comprised of Adirondack Mountain Club, Buffalo Niagara Riverkeeper (formerly Friends of the Buffalo Niagara Rivers), Cattaraugus Creek Watershed Task Force, Citizens Campaign for the Environment, Citizens Environmental Coalition, Citizens Regional Transit Corporation, Town of Grand Island, Great Lakes United, League of Women Voters Buffalo/Niagara, Nature Conservancy Central and Western New York Chapter, New York Audubon, New York Rivers United, Niagara Frontier Wildlife Heritage Council, Niagara Musky Association, Niagara Waterfront Revitalization Task Force, Quality Quest, Sierra Club, Western New York Land Conservancy, Presbytery of Western New York.

**"Offer of Settlement"** shall mean an offer of settlement to be filed with FERC pursuant to 18 C.F.R. § 385.602, which offer shall include this Relicensing Agreement.

**"Party"** or **"Parties"** shall mean, in context, a signatory to this Relicensing Agreement. The use of the term **"Party"** or **"Parties"** in this Agreement shall *not* refer to a **"Party"** (specifically defined in 18 C.F.R. § 385.102) which has formally intervened in the Niagara Power Project's relicensing proceeding which FERC will establish after the Power Authority files its license application.

**"PM&E"** shall mean protection, mitigation and enhancement.

**"Project"** shall mean the Niagara Power Project, licensed to the Power Authority as FERC Project No. 2216.



**"Project Boundary"** shall mean the external limits of the Project, as set forth in Exhibit G of the Power Authority's Application for New License for the Project, which encloses all Project lands, waters, works and other features that are necessary for Project purposes and subject to FERC jurisdiction.

**"Proposed License Articles"** shall mean the PM&E measures set forth in Appendix A of this Relicensing Agreement, which the Parties agree that the Commission should include, without modification, in the New License issued to the Power Authority for the continued operation of the Project.

**"Relicensing Agreement"** shall mean the entirety of this Relicensing Settlement Agreement Addressing New License Terms and Conditions, including all Appendices.

**"RTE"** shall mean rare, threatened, or endangered.

**"SNI"** shall mean the Seneca Nation of Indians.

**"TN"** shall mean the Tuscarora Nation.

**"TSN"** shall mean the Tonawanda Seneca Nation.

## **1.2 SCOPE OF THE RELICENSING AGREEMENT**

The Parties agree that this Relicensing Agreement, including the License Terms and Conditions set forth in Section 3, and the Proposed License Articles set forth in Appendix A, resolves among the Parties all their issues associated with the relicensing of the Niagara Power Project. Pursuant to the Parties' obligations and authorities under Sections 10(a), 10(j) and 18 of the FPA, this Relicensing Agreement establishes the Power Authority's obligations for the protection, mitigation and enhancement of ecological, environmental, cultural, and recreational resources affected by the Project under a New License issued by FERC. Pursuant to this Relicensing Agreement, all Parties will support the Power Authority's entire proposal set forth in its Application for New License for the Project and the Offer of Settlement, including the Commission's issuance of a 50-year New License for the Project.

## **1.3 POWERS RESERVED**

### **1.3.1 Clean Water Act Section 401 Water Quality Certification**

As required by Section 401 of the CWA, FERC may not issue a New License for the Project unless and until a certification of compliance with water quality standards has been made or waived by the State agency responsible for CWA implementation. DEC is the agency in the State of New York that is statutorily authorized and obligated to issue water quality certifications under Section 401 of the CWA. The Power Authority will submit an application for water quality certification to DEC. While DEC specifically reserves authority and discretion

herein to issue a water quality certification, DEC agrees that absent a material change in applicable law or the collection or discovery of new information by DEC through the public process, environmental review, or other further actions contemplated under this Relicensing Agreement: (1) the water quality certification for the Project will not include any conditions that are inconsistent with the terms of this Relicensing Agreement; and (2) DEC's execution of this Relicensing Agreement indicates its belief that the Power Authority's application for a New License, together with provisions contained herein, satisfy the water quality standards applicable under New York law.

### **1.3.2 Coastal Zone Management Act Consistency Certification**

- (a) As required under the CZMA, the relicensing of the Project is subject to a Consistency Certification from DOS. In compliance with these requirements, the Power Authority, in its Application for New License, shall include a certification, pursuant to 15 C.F.R. § 930.57(b), that "the proposed activity complies with the enforceable policies of the New York approved management program and will be conducted in a manner consistent with such program." The Power Authority, moreover, shall submit to DOS, Division of Coastal Resources, a Coastal Policies Consistency Statement and Federal Consistency Assessment Form on or before August 31, 2005. DOS agrees that the six-month period under 16 U.S.C. § 1456(c)(3)(A) for DOS to issue a Consistency Certification shall commence the day after DOS receives the Power Authority's Application for New License.
- (b) DOS expressly reserves the right, consistent with Federal and State law, to issue a Consistency Certification as it may deem necessary in any pending application. DOS's signature on this Relicensing Agreement indicates, however, that absent a material change in applicable law or the collection or discovery of new information by DOS through the public process, environmental review, or other further actions contemplated under this Relicensing Agreement, DOS agrees that the provisions contained in this Relicensing Agreement meet the requirements of a Consistency Certification.

### **1.3.3 DOI Prescription Authority Under Section 18 of the FPA**

Pursuant to Section 18 of the FPA, DOI has agreed to reserve its authority to prescribe fishways as set forth in a proposed license article in Appendix A.

## **1.4 COMPLIANCE WITH STATUTES AND REGULATIONS**

Each Party represents that this Relicensing Agreement is consistent with, and fully satisfies, any and all of its currently applicable statutory and regulatory rights and responsibilities under Federal and State law pertaining to the New License for the Project. Each Party represents, further, that no PM&E measure or other License Provision, other than those provided in this Relicensing Agreement, is necessary or appropriate to satisfy

any and all of its current Federal or State statutory obligations pertaining to the relicensing of the Project. This Section shall not be read to predetermine any obligation that a Party may have under applicable State or Federal law or regulation that is reserved in Section 1.3 of this Relicensing Agreement.

#### **1.5 LIMITATION OF APPLICABILITY**

This Relicensing Agreement is made with the express understanding that it constitutes a negotiated settlement of issues specific to the Project. No Party shall be deemed, by virtue of execution of this Relicensing Agreement, to have established precedent or admitted or consented to any approach, methodology, or principle, except as expressly provided herein. In the event this Relicensing Agreement is approved by FERC, such approval shall not be deemed precedential or controlling regarding any particular issue or contention in any other proceeding. Further, by entering into this Relicensing Agreement, the Power Authority shall not be deemed to have admitted to any liability for any action arising from the construction, operation, and maintenance of the Project and this Relicensing Agreement shall not be evidence of, or otherwise construed as, liability for any action arising from the construction, operation, and maintenance of the Project.

#### **1.6 EFFECTIVE DATE AND TERM OF RELICENSING AGREEMENT**

This Relicensing Agreement shall become effective upon its execution by the Power Authority. Except as provided for in Section 8, this Relicensing Agreement shall remain in effect for the term of the New License issued by the Commission for the Project and for any annual License issued subsequent thereto. This Relicensing Agreement shall be binding on and inure to the benefit of the Parties and their successors and assigns, unless otherwise specified in this Relicensing Agreement.

#### **1.7 EFFECTIVE DATE OF POWER AUTHORITY OBLIGATIONS**

Unless otherwise expressly provided for in this Relicensing Agreement, the obligations of the Power Authority under this Relicensing Agreement shall become effective upon the effective date of the New License; *provided, however*, that with respect to matters covered by this Relicensing Agreement that are subject to a rehearing request, the Parties agree to support the Power Authority's request to stay such license condition until the date on which resolution of the issue for which rehearing is sought becomes final and non-appealable following FERC or judicial action.

#### **1.8 ENFORCEABILITY**

It is the intent of the Parties that the Proposed License Articles set forth in Appendix A to this Relicensing Agreement shall be enforced by FERC and other regulatory agencies that have concurrent jurisdiction to enforce such articles. The Offer of Settlement shall request FERC to incorporate all Proposed License Articles as numbered license articles, without modification, into the New License for the Project and to identify all Proposed License Articles, if any, that are unenforceable by FERC.

## **1.9 EVIDENTIARY SUPPORT FOR LICENSE TERMS AND CONDITIONS**

The Parties agree that the administrative record developed as of the date of their signatures on this Relicensing Agreement, including, among other things, the completed relicensing studies, supports and justifies the proposed License Terms and Conditions set forth in Section 3 and Appendix A of this Relicensing Agreement.

## **SECTION 2 SETTLEMENT COMMITMENTS**

### **2.1 COMMITMENTS OF THE POWER AUTHORITY**

#### **2.1.1 Offer of Settlement**

The Parties agree that, concurrent with the filing of an application for a New License for the Project, the Power Authority shall file this Relicensing Agreement with FERC as part of an Offer of Settlement pursuant to Rule 602 of the Rules of Practice and Procedure, 18 C.F.R. § 385.602.

#### **2.1.2 Implementation of Settlement Commitments**

The Power Authority agrees that it will comply with, carry out, and implement all commitments in this Relicensing Agreement, according to the effective date of such commitments, as set forth herein; *provided, however*, that FERC adopts, without modification or expansion, the License Terms and Conditions.

### **2.2 COMMITMENTS OF FEDERAL AND STATE AGENCIES**

#### **2.2.1 Exercise of Regulatory Authority**

Except as provided for in Section 1.3 of this Relicensing Agreement, DOI, the Service, BIA, NPS, DEC, DOS, and OPRHP shall not, throughout the duration of the term of this Relicensing Agreement, exercise any statutory and regulatory authorities under currently applicable Federal or State law in a manner that is inconsistent with the terms of this Relicensing Agreement. DOI, the Service, BIA, NPS, DEC, DOS, and OPRHP agree not to impose any additional obligations on the Power Authority, except for the provisions in this Relicensing Agreement, and agree further not to propose, advocate, or adopt any License Provision that is in any way contrary to or inconsistent with this Relicensing Agreement unless required by a material change in law or a material change in environmental circumstances. Notwithstanding the above, Section 2.2.1 shall not be read to predetermine the outcome of any issues over which federal and state agencies have jurisdiction.

## **2.2.2 Submittal of Recommendations, Terms and Conditions, and Prescriptions**

Except as provided in Section 1.3 of this Relicensing Agreement, DOI, the Service, BIA, NPS, DEC, DOS, and OPRHP agree that the terms of this Relicensing Agreement constitute their complete and final recommendations, terms and conditions, and prescriptions for the New License including, but not limited to, PM&E measures submitted under Section 10(j) of the FPA, as provided in 18 C.F.R. § 4.34(b).

## **2.3 COMMITMENTS OF ALL PARTIES**

### **2.3.1 Submittal of Recommendations, Terms and Conditions, and Prescriptions**

Except as provided for in Section 1.3 of this Relicensing Agreement, all Parties agree that the terms of this Relicensing Agreement constitute their complete and final recommendations, terms and conditions, and prescriptions for the New License including, but not limited to, PM&E measures submitted under Section 10(a) of the FPA.

### **2.3.2 Support for Offer of Settlement**

All Parties shall submit to FERC, within 20 days after the Power Authority files the Offer of Settlement pursuant to Section 2.1.1 of this Relicensing Agreement, a statement, either individually or collectively, in support of the Offer of Settlement.

### **2.3.3 Filings and Submittals Consistent with Relicensing Agreement**

All Parties shall ensure that, throughout the term of this Relicensing Agreement and New License for the Project, any and all of the Parties' filings or other submittals with FERC, DEC, or any other administrative entity or court are not inconsistent with this Relicensing Agreement, and said Parties shall not support, propose, advocate, impose, or adopt any License Provision that is in any way contrary to, or inconsistent with, this Relicensing Agreement, or encourage any other entity to do so. Notwithstanding the foregoing, the Parties reserve their rights under applicable law to fully participate in any future license amendment proceedings initiated by the Power Authority.

### **2.3.4 Support Adoption of License Terms and Conditions**

All Parties shall actively support, in all relevant regulatory proceedings, the incorporation of the License Terms and Conditions into the New License issued by FERC and incorporation of consistent terms into the water quality certification and other applicable permits and authorizations, as appropriate.

### **2.3.5 Consultation Regarding a Material Change in Law or Circumstances**

Should a material change in law or a material change in circumstances arise during the term of this Relicensing Agreement that may impact a Party's fulfillment of its obligations, the Parties agree to consult in accordance with the requirements of Section 10.2 prior to seeking an amendment to, or re-opener of, the New License.

### **2.3.6 Non-License Settlement Provisions**

The Parties agree to implement certain non-license settlement provisions according to the terms set forth in Appendix E.

## **PART II**

### **LICENSE PROVISIONS PURSUANT TO THE FPA**

## **SECTION 3 LICENSE TERMS AND CONDITIONS**

### **3.1 PROPOSED LICENSE ARTICLES**

The PM&E measures in this Relicensing Agreement are set forth in Appendix A to this Relicensing Agreement as Proposed License Articles. The Parties agree that FERC should include all Proposed License Articles as numbered License Articles in the New License for the Project without modification.

### **3.2 LICENSE TERM**

Because the Power Authority has engaged in a broad-based and extensive alternative licensing process for the relicensing of the Project, and because of the substantial investment the Power Authority has committed to make during the New License term under the terms of this Relicensing Agreement, DEC will include a fifty-year (50) license term as a condition of the Section 401 water quality certificate, and the Parties agree that FERC should grant the Power Authority a New License for the Project for a term of fifty (50) years.

### **3.3 PROJECT BOUNDARY**

The Parties agree that the Power Authority's implementation of this Relicensing Agreement, as set forth in Section 2.1.2 herein, should not effectuate any expansion of the proposed Project Boundary, as set forth in Exhibit G of the Power Authority's Application for New License for the Project. The Parties agree further that FERC, when issuing a New License to the Power Authority for the continued operation and maintenance of the Project, should adopt the proposed Project Boundary for the Project set forth in Exhibit G of the license application, without expansion or any other modification.

### **3.4 PROJECT OPERATION**

The Parties agree that the Power Authority's application for a New License appropriately balances water uses (including, without limitation, waterpower development, water quality, and the protection, mitigation and enhancement of ecological, environmental, cultural, recreational, historical, and aesthetic resources) of the Niagara River. Therefore, the Parties agree that FERC, when issuing a New License to the Power Authority for its continued operation and maintenance of the Project, should not impose or otherwise require any changes to existing Project operations.



## **SECTION 4 ECOLOGICAL MEASURES**

### **4.1 HABITAT IMPROVEMENT PROJECTS**

#### **4.1.1 Ecological Standing Committee**

Within one hundred twenty (120) days after the effective date of this Relicensing Agreement, the Power Authority will convene an Ecological Standing Committee ("ESC"), consisting of a representative from the Power Authority, DEC, the Service, SNI, TN, TSN, NYRU, and NREC, which shall establish: (1) the organization and administration of the funds established in Sections 4.1.2 and 4.1.3 herein; (2) a cash flow schedule for fund expenditures; (3) measures to track and recover administrative costs; (4) associated auditing and reporting requirements; and (5) all other necessary and appropriate tasks consistent with Section 4.1.2 and 4.1.3 herein, including the development of a schedule for future ESC meetings.

Once convened, the ESC shall periodically assess, and amend as necessary, the membership of the ESC. The ESC also may consult with technical advisors as necessary. The ESC shall have an Executive Committee, consisting of one representative each from the Power Authority, DEC, and the Service, which shall make decisions in circumstances where consensus cannot be reached by the ESC. The Executive Committee shall operate on a consensus basis and provide a clear written record identifying any criteria and justifications for its decisions.

The Power Authority will serve as the coordinator of the ESC and provide for its administrative support. Members of the ESC, however, serve without compensation and will not be reimbursed for their expenses.

#### **4.1.2 Habitat Improvement Projects Fund**

(a) Within ninety (90) days of the effective date of the New License or license issuance, whichever is later, the Power Authority shall establish a Habitat Improvement Projects Fund ("HIPS Fund") in the amount of \$12,000,000 (NPV 2007), in an interest bearing account at an accredited bank in the State of New York. The HIPS Fund, including any accrued interest, shall be used for the following proposed Habitat Improvement Projects ("HIPS"):

- (i) Strawberry Island Wetland Restoration
- (ii) Frog Island Restoration
- (iii) Motor Island Shoreline Protection
- (iv) Beaver Island Wetland Restoration
- (v) Control of Invasive Species-Buckhorn and Tift Marshes
- (vi) Osprey Nesting
- (vii) Common Tern Nesting

(viii) Installation of Fish Habitat /Attraction Structures

Current cost estimates for individual proposed HIPs are set forth in Appendix C. Utilizing monies from the HIPs Fund, the Power Authority shall be responsible for constructing the proposed HIPs, consistent with the relicensing study entitled "Investigation of Habitat Improvement Projects for the Niagara Power Project" (June 2005) and the proposed implementation schedule set forth in Appendix B. The Power Authority's construction of the proposed HIPs shall be a one-time obligation occurring outside of the FERC Project Boundary. DEC shall undertake the monitoring, operation and maintenance of the identified HIPs, using monies from the HIPs Fund. Should the cost of the HIPs exceed the amount in the HIPs Fund, the Power Authority will cover additional expenses.

The ESC shall provide guidance with regard to the construction, operation, maintenance, and monitoring of the HIPs. For any HIPs that the DEC determines should not be constructed, or otherwise cannot be constructed, the proposed funding for those particular HIPs will be transferred to the Fish and Wildlife Habitat Enhancement and Restoration Fund established in Section 4.1.3 of this Relicensing Agreement. The Power Authority shall determine, with the agreement of the ESC established pursuant to Section 4.1.1, the amount to be transferred based on cost data available at the time of the transfer. All transferred funds shall be in addition to the funding established in Section 4.1.3 of this Relicensing Agreement. Further, should any matching funds or resources provided in-kind reduce the amount of expenditures needed to construct a particular HIP, the Power Authority shall transfer, with the agreement of the ESC, an equivalent amount of funds to the Fish and Wildlife Habitat Enhancement and Restoration Fund; *provided, however*, the total cost of the HIP does not exceed the estimate set forth in Appendix C.

(b) The Power Authority shall consult with appropriate landowners prior to undertaking any construction-related activities, including consulting with OPRHP for the Strawberry Island, Buckhorn Marsh, and Tift Marsh HIPs.

**4.1.3 Fish and Wildlife Habitat Enhancement and Restoration Fund**

(a) Within ninety (90) days of the effective date of the New License or license issuance, whichever is later, the Power Authority shall establish a Fish and Wildlife Habitat Enhancement and Restoration Fund ("HERF"), in the amount of \$16,179,645 (NPV 2007), in an interest-bearing account at an accredited bank in the State of New York.

(b) The HERF, including any accrued interest, shall be used exclusively to fund ESC-approved projects, including but not limited to future HIPs, land acquisition, habitat improvement, habitat research, fish, wildlife, and indigenous plant species restoration, and stewardship activities throughout the Niagara River including within the Niagara Gorge, its headwaters at Lake Erie, the mouth of the river at

Lake Ontario, its tributaries between these two points, and their associated watersheds (the "Niagara Basin").

(c) The ESC, established pursuant to Section 4.1.1, shall, in consultation with technical advisors as necessary, identify and select projects and activities to be funded by the HERF.

(d) Proposals for funding shall not replace natural resource management programs funded by the General Fund of the State of New York or DEC Environmental Programs. Further, the following criteria shall be considered when determining whether to fund projects under the HERF:

- Projects that address a demonstrated Project impact
- Projects that preserve RTE plant, aquatic, terrestrial species and/or their habitat in the Niagara Basin
- Projects with a strong scientific foundation
- Projects that contribute to long-term protection and enhancement of RTE plant, aquatic, and terrestrial species and/or their habitat in the Niagara Basin
- Projects that achieve multiple ecological goals
- Projects that preserve and restore Haudenosaunee cultural, religious, and historic features
- Projects that involve multi-stakeholder collaboration
- Projects consistent with applicable local, State, and Federal resource management plans
- Projects that feature matching resources
- Projects that are time-sensitive
- Projects that have documented municipal, county and Tribal support
- Projects that are feasible from a cost/probability of success perspective

Projects do not have to meet all of the above-listed criteria to be eligible for funding under the HERF. Project proponents, however, must consult with the chief elected official or a designated representative of any affected municipal, county, Tribal and appropriate State and Federal agencies and provide written documentation in the form of a letter of such consultation with any application for funding.

(e) If this Relicensing Agreement is terminated as set forth in Section 8 herein, ~~the entire HERF, plus any accrued interest and minus any administrative costs,~~ shall be completely refunded to the Power Authority; *provided, however,* that any funds already encumbered at the time the Relicensing Agreement is terminated shall not be refunded to the Power Authority.

#### **4.1.4 Annual Reports**

The Power Authority shall prepare and submit to FERC an annual report for the HERF and the HIPs. The annual report, at a minimum, shall include:

- (a) A summary, including progress reports, of: (1) all HIPs; and (2) projects funded, in whole or in part, by the HERF;
- (b) A project-by-project listing of HIPs as well as all expenditures from the HIPs Fund and the HERF during the previous fiscal year;
- (c) A detailed listing of all planned expenditures during the current fiscal year in which the report is issued; and
- (d) An updated balance sheet for the HIPs Fund and the HERF, which includes HIPs Fund and HERF expenditures, administrative expenses, and accrued interest.

If FERC, after notice and opportunity for comment, determines based on this reporting requirement that modifications to the implementation of the proposed HIPs or the HERF are required, the Power Authority, as licensee, shall implement such changes as directed by the Commission.

#### **4.2 PUBLIC ACCESS IMPROVEMENTS**

To maximize public access at the Project, the Power Authority, after consultation with DEC and others as necessary, shall construct within two (2) years of the effective date of the New License, and consistent with applicable security and safety requirements, various improvements at the following areas located within the Project Boundary:

- (a) Upper Mountain Parking Lot / Fishing Access. The Power Authority shall construct: (1) a parking area for sixteen vehicles; (2) a gravel trail across the Niagara Mohawk Power Company transmission right-of-way for pedestrian use; and (3) a gravel path to traverse the reservoir dike in an area located on the northwest side of Lewiston Reservoir near the Upper Mountain Fire Company Station. The Power Authority also shall implement measures, including the placement of signage and large boulders, to discourage vehicle access and use of the Upper Mountain gravel trail.
- (b) Robert Moses Fishing Pier Parking Area. Adjacent to the main gate of the Robert Moses Niagara Power Plant, the Power Authority shall provide for up to six (6) additional angled parking spaces at the Robert Moses Fishing Pier parking area.
- (c) Bulkhead Fence at the Upper River Intakes. At the Project's intake structure area, the Power Authority shall; (1) resurface the asphalt in the parking lot and along the walkways; (2) in compliance with the Americans With Disabilities Act ("ADA"), designate parking spaces and install curb cuts to allow access to walkways; and (3) install a removable 7-foot chain link fence parallel to the retaining wall approximately twenty-five (25) feet from the Niagara River's edge. The fence will be installed when icebreakers are dry-docked for repairs; at all other times, the fence will be removed and stored to

provide unimpeded access to the Niagara River along the intake structure bulkhead railing.

#### **4.3 HISTORIC PROPERTIES**

Prior to undertaking any activities pursuant to Sections 4.1 or 4.2, the Power Authority will ensure that Historic Properties are managed and protected consistent with either (1) the "*Programmatic Agreement Among the Federal Energy Regulatory Commission, The Advisory Council on Historic Preservation, and the New York State Historic Preservation Officer For Managing Historic Properties That May Be Affected By A License Issuing To The Power Authority Of The State of New York For the Continued Operation and Maintenance of the Niagara Power Project in Niagara County, New York*" and the associated Historic Properties Management Plan that will be developed, in consultation with the New York State Historic Preservation Officer, TN, TSN, and SNI, or (2) the requirements of the New York State Historic Preservation Act of 1980, as appropriate.

### **SECTION 5 PARKS AND RECREATION**

#### **5.1 ESTABLISHMENT OF PARKS AND RECREATION FUND**

##### **5.1.1 Establishment of Fund**

Within ninety (90) days of the effective date of the New License or license issuance, whichever is later, the Power Authority shall establish a Parks and Recreation Fund in the amount of \$9,260,000 (NPV 2007) for capital improvements undertaken by OPRHP on lands located within, or in the vicinity of, the Project Boundary.

- (a) Reservoir State Park. Reservoir State Park, which is located within the Project Boundary, shall be allocated approximately \$3,710,000 (NPV 2007) to make various improvements, which may include but are not limited to: (i) restoration of green space near Parking Lot One; (ii) rehabilitation of the Maintenance Building; (iii) replacement and expansion of the comfort station; (iv) expansion of the existing basketball courts; (v) upgrade of the tennis courts; (vi) rehabilitation of existing ball diamonds; (vii) expansion of the parking lot near the baseball diamonds to accommodate 120 cars; (viii) addition of 20 parking spaces for model airplane use and casual golfing; (ix) creation of a new perimeter exercise path in compliance with the ADA; (x) planting of tree and shrub islands in passive areas of the Park; (xi) enhancement of entry features, signage and tree plantings; (xii) general upgrade of playground areas; (xiii) replacement of outdoor site furniture; (xiv) creation of 20 parking spaces at the sledding hill; (xv) repaving of existing path to top of Reservoir Dike; (xvi) construction of a winter pavilion and comfort station; (xvii) improvement of drainage in soccer fields and

installation of soccer field bleachers; (xviii) enhancement of entry features, signage and tree plantings; and (xix) installation of a new playground.

- (b) Niagara Gorge Area. The Niagara Gorge Area shall be allocated approximately \$3,550,000 (NPV 2007) for improvements which may include but are not limited to: (i) upgrades to Gorge Trails; (ii) construction of overlooks and fishing platforms near the lower trail; (iii) installation of interpretive signage along Gorge trails; (iv) construction of a new Whirlpool Trailhead; (v) upgrade to the Rim Trail; (vi) construction of new Whirlpool Rapids access stairs; (vii) construction of a new rapids overlook; (viii) reduction of excess paved areas and restoration of green space near the Discovery Center; (ix) rehabilitation and relocation of existing rock garden features near the Discovery Center; (x) reconfiguration of Discovery Center parking lot; (xi) removal of chain link fence and planting of trees and shrubs near the Discovery Center; (xii) replacement of the safety rail along the Gorge; (xiii) rehabilitation of paved pathways into the Discovery Center and associated landscaping; (xiv) upgrades to seating and audio visual equipment at Cataract Theatre; (xv) addition of sound barrier door to front of elevator at the Discovery Center; (xvi) upgrades to web cam; (xvii) improvements to the Gift Shop; and (xviii) exhibit modifications.
- (c) ArtPark Improvements. ArtPark shall be allocated approximately \$2,000,000 (NPV 2007) to make various improvements which may include but are not limited to: (i) repairs to address erosion; (ii) installation of ditching in the Lewiston Gorge Trail and the Fishing Access Trail; (iii) replacement of all three existing stairways and landings; (iv) repair of existing erosion areas; and (v) other facility enhancements.
- (d) A final determination of funding allocations will be subject to further negotiations between the Power Authority and OPRHP. Specific capital improvements within the Project Boundary, and their associated costs, will be submitted for FERC approval as part of the Power Authority's Recreation Plan. The Power Authority, as licensee, shall be responsible for ensuring that improvements within the Project Boundary funded by the Parks and Recreation Fund are implemented in accordance with the FERC-approved Recreation Plan.

#### **5.1.2 Revised Letter Agreement**

The Power Authority and OPRHP agree to revise, replace or amend their April 24, 1964 letter agreement to incorporate the proposed enhancement measures identified above in Section 5.1.1.

**SECTION 6**  
**NIAGARA FALLS WATER BOARD**

**6.1 NIAGARA FALLS WATER BOARD CAPITAL IMPROVEMENT FUND**

(a) Within ninety (90) days of the effective date of the New License or license issuance, whichever is later, the Power Authority shall establish the Niagara Falls Water Board Capital Improvement Fund in an amount of \$19,000,000 (NPV 2007) for capital improvements to minimize groundwater infiltration into the Falls Street Tunnel ("FST") in the area of the conduits (the "Work"). The Capital Improvement Fund will be managed and administered by the NFWB and improvements may include: (i) construction of access shafts in the FST; (ii) sediment removal; (iii) 860 lineal feet of "Cured in-place" repair of existing 7-foot diameter concrete pipe over the conduits and concrete bypass pipes; (iv) 1,100 lineal feet of slip-lined FST rock tunnel lining; and (v) other miscellaneous construction elements (e.g., mob / demob, structural removal, structural sealing, testing, etc.) and related costs. The Capital Improvement Fund also will cover future costs incurred by the NFWB over the term of the New License in connection with management or treatment of groundwater infiltration into the FST in the area of the conduits attributable to the influence of the conduits as well as repairs or maintenance related to the Work.

(b) The Power Authority, DEC, and the NFWB agree that the Niagara Falls Water Board Capital Improvement Fund resolves all existing claims, issues and matters related to FST groundwater infiltration in the area of the conduits attributable to the influence of the conduits, as well as all reasonable foreseeable claims, issues and matters related thereto, including adverse environmental impacts, relating to such infiltration over the term of the New License. Notwithstanding any other provision of this Relicensing Agreement, the NFWB agrees that, during the term of the New License, it will not support, propose, or advocate before any administrative body or court a License Provision or other directive or decree that is inconsistent with this Relicensing Agreement unless required to do so by a material change in applicable law or a material change in circumstances caused by the Power Authority with respect to groundwater infiltration into the FST in the area of the conduits.

(c) Unless and until there is a material change in applicable law or a material change in circumstances caused by the Power Authority with respect to groundwater infiltration into the FST in the area of the conduits, the NFWB does, for the term of the New License, hereby: (1) release and discharge the Power Authority and its trustees, officers, agents, and employees from all manner of actions, claims and demands of every nature and kind that the NFWB has or will have against the Power Authority and its trustees, officers, agents, and employees arising out of the groundwater infiltration into the FST in the area of the conduits and attributable to the influence of the conduits and (2) agrees to indemnify and hold harmless the Power Authority from any and all claims, demands, costs, environmental liabilities, and causes of action relating to or in any way arising out of the management or treatment of groundwater infiltration into the FST in the area of the conduits and attributable to the influence of the conduits or the performance of the Work

(including design, construction, and reconstruction thereof) and of any subsequent repairs or maintenance related thereto funded by the Capital Improvement Fund.



**PART III**

**PROCEDURAL PROVISIONS**

## **SECTION 7**

### **ADOPTION WITHOUT MODIFICATION BY FERC**

The Parties have entered into this Relicensing Agreement with the express expectation and condition that FERC approves this Relicensing Agreement as part of the Offer of Settlement and issues a New License for the Project that incorporates, without modification or expansion, the License Terms and Conditions set forth in Section 3 herein, including the Proposed License Articles set forth in Appendix A as numbered license articles. In addition, the Power Authority has entered into this Relicensing Agreement with the express expectation and condition that: (1) DEC will issue a water quality certification under Section 401 of the CWA that is consistent with the terms of this Relicensing Agreement; and (2) and DOS will issue a Consistency Certification pursuant to the CZMA that is consistent with the terms of this Relicensing Agreement.

The Parties agree that if FERC approves this Relicensing Agreement as part of the Offer of Settlement and incorporates all License Terms and Conditions, including the Proposed License Articles set forth in Appendix A into the New License without modification, the Parties will not seek rehearing of the FERC order granting a New License for any and all issues covered by this Relicensing Agreement, or support in any way any such request for rehearing by any non-Party to this Relicensing Agreement; *provided, however*, that as to DEC, this obligation applies only if FERC also incorporates into the New License all conditions contained in its CWA Section 401 water quality certification.

The Parties reserve the right, even if FERC approves this Relicensing Agreement as part of the Offer of Settlement and incorporates the License Terms and Conditions into the New License without modification, to seek rehearing or other administrative or judicial review: (1) for any and all License Provisions included in the New License that are not set forth in Section 3 or Appendix A herein; or (2) if the water quality certification issued by DEC pursuant to Section 401 of the CWA or Consistency Certification issued by DOS pursuant to the CZMA are inconsistent with the terms of this Relicensing Agreement.

## **SECTION 8**

### **WITHDRAWAL AND TERMINATION**

#### **8.1 PROCESS FOR WITHDRAWAL**

Should FERC issue a New License that omits, modifies, alters or expands the obligations the Parties have agreed should be included in the New license, in a manner that materially affects the interests of a Party, the Parties agree to adhere to the following process for amending or withdrawing from this Relicensing Agreement.

##### **8.1.1 Notification**

Within twenty (20) days of issuance of an order containing objectionable License Provision(s), the Party whose interests are directly and materially aggrieved by such License Provision(s) shall provide written notification, pursuant to the

requirements of Section 13.1 of this Relicensing Agreement, to all other Parties of its intent to withdraw from the Relicensing Agreement.

#### **8.1.2 Administration Appeals**

Following notification as set forth in Section 8.1.1, all Parties shall file a joint request for rehearing and/or pursue all appropriate administrative appeals, requesting the agency responsible for the objectionable License Provision(s) to amend such License Provision(s) to conform to this Relicensing Agreement.

#### **8.1.3 Good-Faith Negotiation**

Following the submittal of administrative appeal(s) as set forth in Section 8.1.2, the Parties agree that the aggrieved Party shall engage the other Parties in good-faith negotiations in an attempt to amend this Relicensing Agreement by making it conform to the objectionable License Provision(s). The Parties agree to a one hundred twenty (120) day period to conduct good-faith negotiations under this Section, with a minimum of three (3) meetings to be held during a ninety (90) day period.

If, during the pendency of the good-faith negotiations, an order is issued that alleviates the aggrieved Party's concerns, the Parties shall discontinue the negotiation process. If, however, an order is issued during the pendency of the good-faith negotiations that denies the Parties' joint administrative appeal or does not reverse the objectionable License Provision(s), the Parties shall continue the negotiations under this Section, but the aggrieved Party may pursue judicial review, pursuant to Section 8.1.4 of this Relicensing Agreement.

If the good-faith negotiations result in an agreement among all Parties to amend this Relicensing Agreement to conform it to the objectionable License Provision(s), the Parties shall withdraw the joint administrative appeal(s) filed pursuant to Section 8.1.2 or petition for review filed pursuant to Section 8.1.4, and this Relicensing Agreement shall be deemed modified to conform to said order.

#### **8.1.4 Judicial Review**

If, as a result of the administrative appeal(s) filed pursuant to Section 8.1.2 of this Relicensing Agreement, a final order is issued denying the merits of the joint appeal by not reversing the objectionable License Provision(s), aggrieved Parties may file a petition for review by the appropriate reviewing court. Other Parties may intervene in the proceeding, but such parties shall not take a position adverse to the terms of this Relicensing Agreement.

### **8.1.5 Withdrawal**

The Party whose interests are materially and directly aggrieved by any License Provision may withdraw from this Relicensing Agreement, but only after: (1) the Parties comply with Sections 8.1.1. through 8.1.4 of this Relicensing Agreement; and (2) the aggrieved Party exhausts all reasonably available avenues for review of the order(s) imposing the objectionable License Provision(s) by filing timely requests for rehearing, petitions for review, and other required filings to continue the review process. Following the final, non-appealable order or ruling that fails to remedy the objectionable License Provision(s), the aggrieved Party may provide written notification to the other Parties of its withdrawal from this Relicensing Agreement, pursuant to the notification requirements of Section 13.1. Upon notification, the provisions of Section 8.2 of this Relicensing Agreement shall apply. The Parties acknowledge that participation in judicial proceedings by DOI is dependent on approval by the Department of Justice.

If the aggrieved Party fails to comply with Sections 8.1.1 through 8.1.4 of this Relicensing Agreement or exhaust all reasonably available avenues for review of the order(s) imposing the objectionable License Provision(s), then the Party may not withdraw from this Relicensing Agreement, and, upon expiration of the time period to continue the review process, this Relicensing Agreement shall be deemed amended with the final order issued by an administrative agency or court.

## **8.2 EFFECT OF WITHDRAWAL**

### **8.2.1 Withdrawal by the Power Authority**

Withdrawal by the Power Authority, pursuant to Section 8.1 of this Relicensing Agreement, shall render this Relicensing Agreement null and void, and the Parties shall not have any rights or obligations under this Relicensing Agreement, nor shall any Party receive any benefits under this Relicensing Agreement. Notwithstanding this Relicensing Agreement being rendered null and void, the Parties shall continue to be bound by Section 9 of this Relicensing Agreement. If this Relicensing Agreement is rendered null and void, the Parties agree that the Commission cannot consider this Relicensing Agreement as part of the record of the relicensing proceeding when issuing a New License for the Project.

### **8.2.2 Withdrawal by a Party Other Than the Power Authority**

Withdrawal by any Party other than the Power Authority, pursuant to Section 8.1 of this Relicensing Agreement, shall not render this Relicensing Agreement null and void and shall not affect the enforceability of this Relicensing Agreement. Withdrawal by any Party other than the Power Authority, however, shall: (1) render null and void provisions of this Agreement that are implicated by the objectionable License Provision(s) as they relate to the Party withdrawing; and (2) amend this Relicensing Agreement to omit the terms applicable to said Party. The

withdrawing Party shall have no rights and receive no benefits under this Relicensing Agreement or the Offer of Settlement. The withdrawing Party shall, however, continue to be bound by Section 9 of this Relicensing Agreement.

If a Party other than the Power Authority withdraws from this Relicensing Agreement pursuant to Section 8.1, the Power Authority may at its option choose to let the Relicensing Agreement stand, thereby obligating the Power Authority and the non-withdrawing Parties to continue to be bound by the terms of this Relicensing Agreement, or to itself withdraw from this Relicensing Agreement. If the Power Authority invokes its option to withdraw in response to a withdrawal by another Party, the provisions of Section 8.2.1 shall apply.

## **SECTION 9 SETTLEMENT NEGOTIATIONS PRIVILEGED**

The Parties have entered into the negotiations and discussions leading to this Relicensing Agreement with the understanding that, to the fullest extent allowed by law, all discussions relating to this Relicensing Agreement are privileged and confidential. This material shall not prejudice the position of any Party or participant taking part in such discussions and negotiations, and are not to be used by any entity in any manner, including admission into evidence, in connection with these or any other proceedings related to the subject matter of this Relicensing Agreement. In the event that this Relicensing Agreement is rendered null and void pursuant to Section 8.2, the Relicensing Agreement, and all drafts, work papers, and notes related to its development, to the fullest extent allowed by law, shall be deemed settlement materials and shall not constitute a part of the record in any proceeding, nor be admissible into evidence in any proceeding related to the subject matter of this Relicensing Agreement.

## **SECTION 10 RESOLVING DISPUTES AMONG THE PARTIES**

The Parties agree to utilize the following alternative dispute resolution mechanism to resolve all disputes related to the compliance with, or the performance of, obligations set forth in this Relicensing Agreement:

### **10.1.1 Notice of Dispute**

Any Party who believes that a dispute has arisen shall provide written notice pursuant to Section 13.1 to the other Parties specifying the Parties with whom the dispute exists and describing the matter(s) in dispute, including the proposed relief or resolution to address the dispute. Each Party who wishes to participate in the resolution of the dispute ("Participating Parties") may do so by providing, within fifteen (15) days of receipt of such notice, written notification to the other Parties pursuant to Section 13.1 of its intention to do so.

### **10.1.2 Consultation**

The Participating Parties shall commence a one hundred twenty (120) day Consultation period (measured from the date of the notice of the dispute) to engage in good faith negotiations to resolve the dispute(s). During the Consultation period, the Participating Parties shall hold at least three (3) meetings. At any time during this one hundred twenty (120) day Consultation period, the Participating Parties may, by mutual consent, initiate Facilitated Mediation as set forth in Section 10.3.

#### **10.1.3 Facilitated Mediation**

If a disagreement persists at the conclusion of the Consultation period, or if the Participating Parties mutually consent during the Consultation period, an aggrieved Participating Party may, within fifteen (15) days after the conclusion of the consultation period, seek Facilitated Mediation through a mutually-agreed upon organization. The mediation process shall continue until the dispute is settled or until the mediator makes a finding that there is no possibility of settlement through Facilitated Mediation. At any time during Facilitated Mediation, the Participating Parties may, by mutual consent, initiate proceedings before FERC as set forth in Section 10.4.

#### **10.1.4 FERC Proceedings**

If a disagreement persists at the conclusion of the Facilitated Mediation, or if the Participating Parties mutually consent during Facilitated Mediation, an aggrieved Participating Party may initiate proceedings before FERC as set forth in its Rules of Practice and Procedure.

### **SECTION 11 HEADINGS**

The descriptive headings of the various Sections of this Relicensing Agreement have been inserted for convenience of reference only and are of no significance in the interpretation or construction of this Relicensing Agreement. To the extent that there is any inconsistency between the heading of a Section of this Relicensing Agreement and the text of the Section, the text shall govern.

### **SECTION 12 CHOICE OF LAW AND FORUM**

To the extent that these provisions are within the jurisdiction of the FPA, the provisions of this Relicensing Agreement shall be incorporated into the New License and shall be enforceable through proceedings before FERC. With regard to any and all other matters, this Relicensing Agreement shall be governed by and construed under New York law without reference to its conflicts of law principles. Any action at law, suit in equity, or other judicial proceedings for the enforcement of this Relicensing Agreement or any of its provisions must be brought in and maintained only in a court of competent jurisdiction located in Albany County, New York.

## **SECTION 13 NOTICE AND COMMUNICATION**

### **13.1 NOTIFICATION REQUIREMENTS**

All written notices to be provided pursuant to this Relicensing Agreement shall be mailed by U.S. certified mail, or overnight express service, postage prepaid, to each Party at the addresses in Appendix D or at a subsequent address, as a Party shall identify. Notices shall be deemed to be given five (5) business days after the date of mailing or on date of receipt if overnight express or other receipt-notification service is used.

### **13.2 NOTIFICATION CONTACT INFORMATION**

For purposes of implementing this Relicensing Agreement, the Parties agree that the individuals listed in Appendix D shall be designated the primary contact persons and all written notices shall be posted to these individuals at the addresses listed in Appendix D. Notification of changes in the contact persons must be made in accordance with Section 13.1 to all other contact persons listed in Appendix D.

### **13.3 OTHER COMMUNICATIONS**

Notices and other communications not required to be made to all Parties or not required to be made in a specific manner under the terms of this Relicensing Agreement need not be in writing and may be made by telephone, electronic mail, or facsimile.

## **SECTION 14 COSTS**

Except as provided in this Relicensing Agreement, all Parties shall bear their own costs of participating in this Relicensing Agreement; *provided, however*, that nothing in this Relicensing Agreement shall be interpreted as, or constitute a commitment or requirement that, the Federal agencies obligate or pay funds in violation of the Anti-Deficiency Act, 31 U.S.C. § 1341.

## **SECTION 15 MERGER CLAUSE**

This Relicensing Agreement, including all Appendices attached hereto, constitutes the entire agreement between the Parties with reference to the subject matter hereof, and supersedes all prior and contemporaneous understandings or agreements, oral or written, between the Parties with respect to the subject matter of this Relicensing Agreement.

**SECTION 16  
WAIVER**

The failure of any Party to this Relicensing Agreement to insist, on any occasion, upon strict performance of any provision of this Relicensing Agreement will not be considered a waiver of any obligation, right, or duty of, or imposed upon, such Party.

**SECTION 17  
AMENDMENT**

The Parties may, by mutual agreement, amend this Relicensing Agreement by a written instrument duly executed by the Parties.

**SECTION 18  
RESERVATION OF RIGHTS**

The Power Authority reserves all of its rights under the FPA to unilaterally petition FERC to, among other things, amend or otherwise modify the New License; *provided, however*, that the Power Authority shall not seek amendments or modifications inconsistent with the provisions of this Relicensing Agreement unless required by a material change in law or a material change in environmental circumstances, in which case the Power Authority will comply with Section 2.3.5 herein.



**SECTION 19  
EXECUTION**

Each signatory to this Relicensing Agreement represents that: (1) he or she is authorized to execute this Relicensing Agreement and legally bind the Party he or she represents; and (2) the Party he or she represents will be fully bound by the terms hereof. This Relicensing Agreement may be executed in any number of counterparts, and each executed counterpart shall have the same force and effect as an original instrument as if all the signatory parties had signed the same instrument. Any signature page of this Relicensing Agreement may be detached from any counterpart of this Relicensing Agreement without impairing the legal effect of any signature(s) thereon, and may be attached to another counterpart of this Relicensing Agreement identical in form hereto but having attached to it one or more signature pages.

Intending to be legally bound, the Parties have executed this Relicensing Agreement through their duly authorized representatives.

IN WITNESS WHEREOF, the Parties have caused this Relicensing Agreement to be executed as of the date set forth in this Relicensing Agreement.

**POWER AUTHORITY OF THE STATE OF NEW YORK**

By: Eugene W. Zeltmann Date: 8/5/05  
Eugene Zeltmann, President and Chief Executive Officer

**NATIONAL PARKS SERVICE**

By: \_\_\_\_\_

Mary A. Bomar, Regional Director

Date: \_\_\_\_\_

7.22.05

**UNITED STATES FISH AND WILDLIFE SERVICE**

By: \_\_\_\_\_

Marvin Moriarty, Regional Director

Date: \_\_\_\_\_

**BUREAU OF INDIAN AFFAIRS**

By: \_\_\_\_\_

Franklin Keel, Director, Eastern Region

Date: \_\_\_\_\_

**NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

By: \_\_\_\_\_

Lynette Stark, Deputy Commissioner

Date: \_\_\_\_\_

**NEW YORK STATE DEPARTMENT OF STATE**

By: \_\_\_\_\_

Frank P. Milano, Deputy Secretary of State

Date: \_\_\_\_\_

**NATIONAL PARKS SERVICE**

By: \_\_\_\_\_  
Mary A. Bomar, Regional Director

Date: \_\_\_\_\_

**UNITED STATES FISH AND WILDLIFE SERVICE**

By: James H. Meigh  
Marvin Moriarty, Regional Director **ACTING**

Date: 8/11/05

**BUREAU OF INDIAN AFFAIRS**

By: \_\_\_\_\_  
Franklin Keel, Director, Eastern Region

Date: \_\_\_\_\_

**NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

By: \_\_\_\_\_  
Lynette Stark, Deputy Commissioner

Date: \_\_\_\_\_

**NEW YORK STATE DEPARTMENT OF STATE**

By: \_\_\_\_\_  
Frank P. Milano, Deputy Secretary of State

Date: \_\_\_\_\_

**NATIONAL PARKS SERVICE**

By: \_\_\_\_\_  
Mary A. Bomar, Regional Director

Date: \_\_\_\_\_

**UNITED STATES FISH AND WILDLIFE SERVICE**

By: \_\_\_\_\_  
Marvin Moriarty, Regional Director

Date: \_\_\_\_\_

**BUREAU OF INDIAN AFFAIRS**

By:  \_\_\_\_\_  
Franklin Keel, Director, Eastern Region

Date: 8-3-2005

**NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

By: \_\_\_\_\_  
Lynette Stark, Deputy Commissioner

Date: \_\_\_\_\_

**NEW YORK STATE DEPARTMENT OF STATE**

By: \_\_\_\_\_  
Frank P. Milano, Deputy Secretary of State

Date: \_\_\_\_\_

**NATIONAL PARKS SERVICE**

By: \_\_\_\_\_  
Mary A. Bomar, Regional Director

Date: \_\_\_\_\_

**UNITED STATES FISH AND WILDLIFE SERVICE**

By: \_\_\_\_\_  
Marvin Moriarty, Regional Director

Date: \_\_\_\_\_

**BUREAU OF INDIAN AFFAIRS**

By: \_\_\_\_\_  
Franklin Keel, Director, Eastern Region

Date: \_\_\_\_\_

**NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

By: \_\_\_\_\_  
Lynette Stark, Deputy Commissioner


Date: 7/29/05 \*

**NEW YORK STATE DEPARTMENT OF STATE**

By: \_\_\_\_\_  
Frank P. Milano, Deputy Secretary of State

Date: \_\_\_\_\_

\*The execution of this agreement by the New York State Department of Environmental Conservation is made with the express understanding and is only valid on the basis that the agreement does not constitute or comprise in any way a release of any party hereto as to any Natural Resource Damages claims.

  
LMS 7/29/05

**NEW YORK STATE OFFICE OF PARKS, RECREATION AND HISTORIC  
PRESERVATION**

By:  Date: 7-20-05  
Christopher M. Pushkarsh, Executive Deputy Commissioner

**NIAGARA FALLS WATER BOARD**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Robert Game, Executive Director

**NEW YORK ASSOCIATION OF PUBLIC POWER**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Paul Pallas, President

**MUNICIPAL ELECTRIC UTILITY ASSOCIATION**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Robert A. Mullane, Executive Director

**NEW YORK STATE RURAL ELECTRIC COOPERATIVE ASSOCIATION**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Dean Kropp, President

**NEW YORK RIVERS UNITED**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Bruce Carpenter, Executive Director

**NEW YORK STATE OFFICE OF PARKS, RECREATION AND HISTORIC  
PRESERVATION**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Christopher M. Pushkarsh, Executive Deputy Commissioner

**NIAGARA FALLS WATER BOARD**

By: Robert E. Game Date: 8/11/05  
Robert Game, Executive Director

**NEW YORK ASSOCIATION OF PUBLIC POWER**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Paul Pallas, President

**MUNICIPAL ELECTRIC UTILITY ASSOCIATION**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Robert A. Mullane, Executive Director

**NEW YORK STATE RURAL ELECTRIC COOPERATIVE ASSOCIATION**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Dean Kropp, President

**NEW YORK RIVERS UNITED**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Bruce Carpenter, Executive Director

**NEW YORK STATE OFFICE OF PARKS, RECREATION AND HISTORIC  
PRESERVATION**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Christopher M. Pushkarsh, Executive Deputy Commissioner

**NIAGARA FALLS WATER BOARD**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Robert Game, Executive Director

**NEW YORK ASSOCIATION OF PUBLIC POWER**

By: Paul Pallas Date: 7/22/2005  
Paul Pallas, President

**MUNICIPAL ELECTRIC UTILITY ASSOCIATION**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Robert A. Mullane, Executive Director

**NEW YORK STATE RURAL ELECTRIC COOPERATIVE ASSOCIATION**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Dean Kropp, President

**NEW YORK RIVERS UNITED**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Bruce Carpenter, Executive Director



**NEW YORK STATE OFFICE OF PARKS, RECREATION AND HISTORIC  
PRESERVATION**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Christopher M. Pushkarsh, Executive Deputy Commissioner

**NIAGARA FALLS WATER BOARD**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Robert Game, Executive Director

**NEW YORK ASSOCIATION OF PUBLIC POWER**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Paul Pallas, President

**MUNICIPAL ELECTRIC UTILITY ASSOCIATION**

By:  Date: 8/5/05  
Robert A. Mullane, Executive Director

**NEW YORK STATE RURAL ELECTRIC COOPERATIVE ASSOCIATION**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Dean Kropp, President

**NEW YORK RIVERS UNITED**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Bruce Carpenter, Executive Director

**NEW YORK STATE OFFICE OF PARKS, RECREATION AND HISTORIC  
PRESERVATION**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Christopher M. Pushkarsh, Executive Deputy Commissioner

**NIAGARA FALLS WATER BOARD**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Robert Game, Executive Director

**NEW YORK ASSOCIATION OF PUBLIC POWER**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Paul Pallas, President

**MUNICIPAL ELECTRIC UTILITY ASSOCIATION**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Robert A. Mullane, Executive Director

**NEW YORK STATE RURAL ELECTRIC COOPERATIVE ASSOCIATION**

By: Dean R. Kropp Date: 7/21/05  
Dean Kropp, President

**NEW YORK RIVERS UNITED**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Bruce Carpenter, Executive Director

**NEW YORK STATE OFFICE OF PARKS, RECREATION AND HISTORIC  
PRESERVATION**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Christopher M. Pushkarsh, Executive Deputy Commissioner

**NIAGARA FALLS WATER BOARD**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Robert Game, Executive Director

**NEW YORK ASSOCIATION OF PUBLIC POWER**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Paul Pallas, President

**MUNICIPAL ELECTRIC UTILITY ASSOCIATION**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Robert A. Mullane, Executive Director

**NEW YORK STATE RURAL ELECTRIC COOPERATIVE ASSOCIATION**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Dean Kropp, President

**NEW YORK RIVERS UNITED**

By: \_\_\_\_\_ Date: 7/22/05  
Bruce Carpenter, Executive Director

**FRIENDS OF THE BUFFALO-NIAGARA RIVER**

By: Julie Barrett O'Neill Date: 7/25/05  
Julie Barrett O'Neill, Executive Director, *Friends of the Buffalo Niagara Rivers, Inc.*  
and Buffalo Niagara Riverkeeper, *frs*

**NIAGARA RELICENSING ENVIRONMENTAL COALITION**

By: Julie Barrett O'Neill Date: 7/25/05  
Julie Barrett O'Neill

## **APPENDIX A PROPOSED LICENSE ARTICLES**

### **PRESCRIPTION ARTICLE OF THE SECRETARY OF THE INTERIOR UNDER SECTION 18 OF THE FEDERAL POWER ACT**

**Article \_\_\_\_.** Pursuant to Section 18 of the Federal Power Act, authority is reserved to the Commission to require the Licensee to construct, operate, and maintain, or provide for the construction, operation, and maintenance, of such fishways as may be prescribed by the Secretary of the Interior.

### **ECOLOGICAL STANDING COMMITTEE**

**Article \_\_\_\_.** The Licensee shall convene an Ecological Standing Committee ("ESC"), comprised of a representative from the Licensee, the New York State Department of Environmental Conservation, the U.S. Fish and Wildlife Service, the Seneca Nation of Indians, the Tuscarora Nation, the Tonawanda Seneca Nation, New York Rivers United, and the Niagara Relicensing Environmental Coalition to establish: (1) the organization and administration of the Habitat Improvement Projects Fund and the Fish and Wildlife Habitat Enhancement and Restoration Fund established in Articles \_\_\_\_; (2) a cash flow schedule for fund expenditures; (3) measures to track and recover fund administrative costs; (4) associated auditing and reporting requirements; and (5) all other necessary and appropriate tasks, including the development of a schedule for future ESC meetings. The Licensee shall serve as the coordinator of the ESC and provide for its administrative support, and shall report annually to the Commission on the activities of the ESC.

### **FUND FOR PROPOSED HABITAT IMPROVEMENT PROJECTS**

**Article \_\_\_\_.** (a) Within ninety (90) days of the effective date of the New License or license issuance, whichever is later, the Power Authority shall establish a Habitat Improvement Projects Fund ("HIPS Fund") in the amount of \$12,000,000 (NPV 2007), in an interest bearing account at an accredited bank in the State of New York. The HIPS Fund, including any accrued interest, shall be used for the following proposed Habitat Improvement Projects ("HIPS"):

- (i) Strawberry Island Wetland Restoration
- (ii) Frog Island Restoration
- (iii) Motor Island Shoreline Protection
- (iv) Beaver Island Wetland Restoration
- (v) Control of Invasive Species-Buckhorn and Tiff Marshes
- (vi) Osprey Nesting
- (vii) Common Tern Nesting
- (viii) Installation of Fish Habitat /Attraction Structures

Utilizing monies from the HIPS Fund, the Power Authority shall construct the proposed HIPS, consistent with the relicensing study entitled "Investigation of Habitat Improvement Projects for

the Niagara Power Project" (June 2005) and the proposed implementation schedule set forth in Appendix B of the Relicensing Settlement Agreement. Prior to undertaking any construction-related activities, the Licensee shall consult with appropriate landowners, including consulting with OPRHP for the Strawberry Island, Buckhorn Marsh, and Tift Marsh HIPs. Pursuant to the Relicensing Settlement Agreement, the Licensee shall ensure that the balance of the HIPs Fund is made available to the New York State Department of Environmental Conservation to undertake monitoring, operation and maintenance of the HIPs. Should the cost of the HIPs exceed the amount in the HIPs Fund, the Power Authority will cover additional expenses.

For any HIPs that the New York State Department of Environmental Conservation determines should not be constructed, or otherwise cannot be constructed, the Licensee shall transfer the proposed funding for those particular HIPs to the Fish and Wildlife Habitat Enhancement and Restoration Fund established pursuant to Article \_\_\_\_\_. The Licensee shall determine, with the agreement of the Ecological Standing Committee ("ESC"), the amount to be transferred based on cost data available at the time of the transfer. Further, should any matching funds or resources provided in-kind reduce the amount of expenditures needed to construct a particular HIP, the Licensee shall transfer, with the agreement of the ESC, an equivalent amount of funds to the Fish and Wildlife Habitat Enhancement and Restoration Fund; *provided, however*, the total cost of the HIP does not exceed the estimate set forth in Appendix C of the Relicensing Settlement Agreement.

#### **FISH AND WILDLIFE HABITAT ENHANCEMENT AND RESTORATION FUND**

**Article \_\_\_\_\_.** Within ninety (90) days of the effective date of the New License or license issuance, whichever is later, the Licensee shall establish a Fish and Wildlife Enhancement and Restoration Fund ("HERF"), in the amount of \$16,179,645 (NPV 2007), in an interest-bearing account at an accredited bank in the State of New York. The HERF, including any accrued interest, shall be used exclusively to fund projects identified and selected by the Ecological Standing Committee ("ESC"), including but not limited to future HIPs, land acquisition, habitat improvement, habitat research, fish, wildlife, and indigenous plant species restoration, and stewardship activities throughout the Niagara River Basin including within the Niagara Gorge, its headwaters at Lake Erie, the mouth of the river at Lake Ontario, its tributaries between these two points, and their associated watersheds. The ESC shall, in consultation with technical advisors as necessary, identify and select projects and activities to be funded by the HERF.

While projects do not have to meet all of the below-listed criteria to be eligible for funding under the HERF, the Licensee shall ensure that the following criteria are considered by the ESC when determining whether to fund proposed projects under the HERF:

- Projects that address a demonstrated Project impact
- Projects that preserve RTE plant, aquatic, terrestrial species and/or their habitat in the Niagara Basin
- Projects with a strong scientific foundation
- Projects that contribute to long-term protection and enhancement of RTE plant, aquatic, and terrestrial species and/or their habitat in the Niagara Basin

- Projects that achieve multiple ecological goals
- Projects that preserve and restore Haudenosaunee cultural, religious, and historic features
- Projects that involve multi-stakeholder collaboration
- Projects consistent with applicable local, State, and Federal resource management plans
- Projects that feature matching resources
- Projects that are time-sensitive
- Projects that have documented municipal, county and tribal support
- Projects that are feasible from a cost/probability of success perspective

#### **ANNUAL REPORT FOR THE HABITAT IMPROVEMENT PROJECTS FUND AND THE FISH AND WILDLIFE HABITAT AND RESTORATION FUND**

The Licensee shall prepare and submit to the Commission an annual report for the Habitat Improvement Projects Fund ("HIPs Fund") and the Fish and Wildlife Habitat and Restoration Fund ("HERF"). The annual report, at a minimum, shall include:

- (a) A summary, including progress reports, of: (1) all HIPs; and (2) projects funded, in whole or in part, by the HERF;
- (b) A project-by-project listing of HIPs as well as all expenditures from the HIPs Fund and the HERF during the previous fiscal year;
- (c) A detailed listing of all planned expenditures during the current fiscal year in which the report is issued;
- (d) An updated balance sheet for the HIPs Fund and the HERF, which includes HIPs Fund and HERF expenditures, administrative expenses, and accrued interest; and
- (e) Any material changes or deviations from proposed implementation schedules.

If the Commission, after notice and opportunity for comment, determines based on this reporting requirement that modifications to the implementation of the HIPs Fund or the HERF are required, the Licensee shall implement such changes as directed by the Commission.

#### **PUBLIC ACCESS IMPROVEMENTS**

**Article \_\_\_\_.** Within two (2) years of the effective date of the New License, the Licensee shall: (1) undertake the following recreational improvements, as provided for in Section 4.2 of the Relicensing Settlement Agreement; and (2) submit annual reports to the Commission on the ~~status of the recreational improvements until such improvements are completed:~~

- (a) Upper Mountain Parking Lot / Fishing Access. The Licensee shall construct: (1) a parking area for sixteen vehicles; (2) a gravel trail across the Niagara Mohawk Power Company transmission right-of-way for pedestrian use; and (3) a gravel path to traverse the reservoir dike in an area located on the northwest side of Lewiston Reservoir near the Upper Mountain Fire Company Station. The Licensee also shall implement measures, including the placement of signage and large boulders, to discourage vehicle access and use of the Upper Mountain gravel trail.

(b) Robert Moses Fishing Pier Parking Area. Adjacent to the main gate of the Robert Moses Niagara Power Plant, the Licensee shall provide for up to six (6) additional angled parking spaces at the Robert Moses Fishing Pier parking area.

(c) Bulkhead Fence at Upper River Intakes. At the Project's intake structure area, the Power Authority shall; (1) resurface the asphalt in the parking lot and along the walkways; (2) designate ADA parking spaces and install curb cuts to allow ADA access to walkways; and (3) install a removable 7-foot chain link fence parallel to the retaining wall approximately twenty-five (25) feet from the Niagara River's edge. The fence should be installed when icebreakers are dry-docked for repairs; at all other times, the fence should be removed and stored to provide unimpeded access to the Niagara River along the intake structure bulkhead railing.

#### **ESTABLISHMENT OF PARKS AND RECREATION FUND**

**Article \_\_\_\_.** In accordance with Section 5.1.1 of the Relicensing Settlement Agreement, the Licensee shall, within ninety (90) days of the effective date of the New License or license issuance, whichever is later, establish a Parks and Recreation Fund for capital improvements to recreation facilities within the Project boundary. Specific recreation projects, and more detailed cost information, shall be submitted for Commission approval as part of the Licensee's Recreation Plan as required by Article \_\_\_\_\_. The Licensee shall submit annually to the Commission a report of fund expenditures, as well as a progress report on the proposed capital improvements to facilities within the Project Boundary.

#### **NIAGARA FALLS WATER BOARD FALLS STREET TUNNEL REMEDIATION**

**Article \_\_\_\_.** Within ninety (90) days of the effective date of the New License or license issuance, whichever is later, the Power Authority shall establish the Niagara Falls Water Board Capital Improvement Fund in an amount of \$19,000,000 (NPV 2007) for capital improvements to minimize groundwater infiltration into the Falls Street Tunnel ("FST") in the area of the conduits. The Capital Improvement Fund will be managed and administered by the Niagara Falls Water Board ("Water Board") and the Licensee is directed to work with the Water Board to ensure that capital improvements are implemented consistent with Section 6.1 of the Relicensing Settlement Agreement. These improvements may include: (i) construction of access shafts in the FST; (ii) sediment removal; (iii) 860 lineal feet of "Cured in-place" repair of existing 7-foot diameter concrete pipe over the conduits and concrete bypass pipes; (iv) 1,100 lineal feet of slip-lined FST rock tunnel lining; and (v) other miscellaneous construction elements (e.g., mob / demob, structural removal, structural sealing, testing, etc.) and related costs. The Capital Improvement Fund also will cover future costs incurred by the Water Board over the term of the New License in connection with management or treatment of groundwater infiltration into the FST in the area of the conduits attributable to the influence of the conduits as well as repairs or maintenance associated with the capital improvements. The Licensee shall provide annual reports to the Commission on the status of the capital improvements until such time as the improvements are completed.



## **HISTORIC PROPERTIES**

**Article \_\_\_\_.** The Licensee shall implement the "*Programmatic Agreement Among the Federal Energy Regulatory Commission, the Advisory Council on Historic Preservation, and the New York State Historic Preservation Officer for Managing Historic Properties that may be Affected by a License Issuing to the Power Authority of the State of New York For the Continued Operation and Maintenance of the Niagara Power Project in Niagara County, New York*" executed on \_\_\_\_, 2005, including the development of a Historic Properties Management Plan ("HPMP") within one year of license issuance. In the event the Programmatic Agreement is terminated, the Licensee shall implement the provisions of its approved HPMP. The Commission reserves the right to require changes to the HPMP at any time during the term of the license. If the Programmatic Agreement is terminated prior to Commission approval of the HPMP, the Licensee shall obtain approval before engaging in any ground-disturbing activities or taking any other action that may affect any historic properties within the Project's area of potential effect.

## **LAND MANAGEMENT PLAN**

**Article \_\_\_\_.** Within one (1) year of the effective date of the New License or license issuance, whichever is later, the Licensee shall file for Commission approval a Land Management Plan for the Project. The Land Management Plan shall identify and explain the policies, standards, guidelines, and land use designations utilized to enhance safety and protect and manage environmental resources, public use, aesthetics, and Tuscarora Nation customary uses. In preparing the Land Management Plan, the Licensee shall consult with, at a minimum, the United States Fish and Wildlife Service, the Bureau of Indian Affairs, the National Park Service, the New York State Department of Environmental Conservation, the New York State Office of Parks, Recreation and Historic Preservation, the Tuscarora Nation, Niagara Relicensing Environmental Coalition, and adjacent landowners. The Licensee shall include with the Land Management Plan documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the consulted entities, and specific descriptions of how the entities' comments and recommendations are accommodated by the plan. The Licensee shall allow a minimum of thirty (30) days for entities to comment and make recommendations before filing the plan with the Commission. If the Licensee does not adopt a recommendation, the filing shall include the Licensee's reasons based on project-specific information.

The Commission reserves the right to require changes to the plan. The plan shall not be implemented until the Commission notifies the Licensee that the plan is approved. Upon approval of the plan, the Licensee shall implement the plan, including any changes required by the Commission.

## **RECREATION PLAN**

**Article \_\_\_\_.** Within one (1) year of the effective date of the New License or license issuance, whichever is later, the Licensee shall file with the Commission, for approval, a Recreation Plan for the Project that includes a description of the proposed recreational enhancements located

within the Project Boundary as agreed to in the Relicensing Agreement. Additionally, the Recreation Plan should include the following provisions:

- (a) Final designs, estimated costs, and a proposed implementation schedule for proposed recreational enhancements, including those that will be funded by the Parks and Recreation Fund.
- (b) Soil erosion and sedimentation control measures for the above enhancements.
- (c) A map showing the upgraded or new facilities in relation to existing recreation facilities.
- (d) A discussion on how each Project recreation facility will be operated and maintained during the term of the license, including a discussion of existing management agreements and plans for amendment, revision, and/or extension thereof.
- (e) A description of reasonable and prudent measures, developed in consultation with the Tuscarora Nation, to reduce and prevent, as practicably as possible, trespass on Nation lands by users of the Project's recreational facilities.
- (f) A program for monitoring recreational use and updating the Recreation Plan on a twelve (12) year cycle.

The Recreation Plan shall be prepared in consultation with, at a minimum, the United States Fish and Wildlife Service, the Bureau of Indian Affairs, the National Park Service, the New York State Department of Environmental Conservation, the New York State Office of Parks, Recreation and Historic Preservation, a representative from the Tuscarora Nation, a representative from the Niagara Relicensing Environmental Coalition, and a representative of the Niagara Power Coalition. The Licensee shall include with the Recreation Plan documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the consulted entities, and specific descriptions of how the entities' comments and recommendations are accommodated by the plan. The Licensee shall allow a minimum of thirty (30) days for entities to comment and make recommendations before filing the plan with the Commission. If the Licensee does not adopt a recommendation, the filing shall include the Licensee's reasons based on project-specific information.

The Commission reserves the right to require changes to the plan. The plan shall not be implemented until the Commission notifies the Licensee that the plan is approved. Upon approval of the plan, the Licensee shall implement the plan, including any changes required by the Commission.

#### **CONSOLIDATED ANNUAL REPORT**

**Article \_\_\_\_.** With the exception of any reports required by statute or the Commission's regulations, the reporting requirements herein shall constitute the totality of the Licensee's reporting requirements and shall supersede any prior reporting requirements imposed on the Licensee either by Commission order or the original license. For all compliance reports required

under this license to be filed with the Commission, the Licensee shall prepare a single compliance report that consolidates all required reporting information for each calendar year. The consolidated annual report shall be filed with the Commission on or before June 1 of each year.

#### **NIAGARA REDEVELOPMENT ACT REQUIREMENTS**

**Article \_\_\_\_.** In order to assure that at least 50 per centum of the project power shall be available for sale and distribution primarily for the benefit of the people as consumers, particularly domestic and rural consumers, to whom such power shall be made available at the lowest rates reasonably possible and in such manner as to encourage the widest possible use, the Licensee in disposing of 50 per centum of the project power shall give preference and priority to public bodies and non-profit cooperatives within economic transmission distance. In any case in which project power subject to the preference provisions of this Article is sold to utility companies organized and administered for profit, the Licensee shall make flexible arrangements and contracts providing for the withdrawal upon reasonable notice and fair terms of enough power to meet the reasonably foreseeable needs of the preference customers.

**Article \_\_\_\_.** The Licensee shall make a reasonable portion of the project power subject to the preference provisions of Article \_\_\_\_ available for use within reasonable economic transmission distance in neighboring States, defined herein as the States of Connecticut, Massachusetts, New Jersey, Ohio, Pennsylvania, Rhode Island, and Vermont, *but* this Article shall not be construed to require more than 20 per centum of the project power subject to such preference provisions to be made available for use in such States. The Licensee shall cooperate with the appropriate agencies in such States to ensure compliance with this requirement. In the event of disagreement between the Licensee and the power marketing agencies of any of such States, the Federal Energy Regulatory Commission may, after public hearings, determine and fix the applicable portion of power to be made available and the terms applicable thereto: Provided, That if any such State shall have designated a bargaining agency for the procurement of such power on behalf of such State, the Licensee shall deal only with such agency in that State. The arrangements made by the Licensee for the sale of power to or in such States shall include observance of the preferences in Article \_\_\_\_.

## APPENDIX B

### PROPOSED HIPS IMPLEMENTATION SCHEDULE

HIP	Planning and Administration	Pre-Construction Monitoring, Inventory, or Site Selection	Engineering/Design and Permitting	Construction and Implementation	Construction Management	Post-Construction Monitoring	Annual O & M Through 50-year Period
Strawberry Island Wetland Restoration	2012	2012-2013	2014	2015	2015	2016-2020	2021-2057
Frog Island Restoration	2008	2008-2009	2010-2011	2013-2014	2013-2014	2015-2019	2020-2057
Motor Island Shoreline Protection	2008	2008-2009	2010-2011	2012-2014	2012-2014	2015-2019	2020-2057
Beaver Island Wetland Restoration	2009	2009	2010	2011-2012	2011-2012	2013-2017	2018-2057
Invasive Species- Buckhorn and Tift Marsh	2008	2008	2008-2009	2010	2010	2011-2020	2021-2057
Osprey Nesting Platforms	2008	2008	2008	2008-2011	2008-2011	2012-2016	2017-2057
Common Tern Nesting	2008	2008	2008-2009	2010	2010	2011-2015	2016-2057
Fish Attraction Structures	2008	2008	2008-2009	2010-2015	2010-2012	2016-2019	
Cayuga Creek Restoration	2008						
RTE Native Plant Feasibility Study	2008						

# **APPENDIX C** **COST ESTIMATES FOR PROPOSED HIPS**

HIP	COST (NPV 2007 \$\$) rounded to nearest \$1,000		
	Capital	O & M	Total
Strawberry Island Wetland Restoration	\$1,457,000	\$272,000	\$1,729,000
Frog Island Restoration	\$2,913,000	\$455,000	\$3,368,000
Motor Island Shoreline Protection	\$1,377,000	\$226,000	\$1,603,000
Beaver Island Wetland Restoration	\$2,106,000	\$239,000	\$2,345,000
Invasive Species-Buckhorn and Tift Marsh	\$293,000	\$416,000	\$709,000
Osprey Nesting Platforms	\$64,000	\$124,000	\$188,000
Common Tern Nesting	\$490,000	\$570,000	\$1,060,000
Fish Attraction Structures	\$247,000	\$34,000	\$281,000
Cayuga Creek Restoration	\$200,000		\$200,000
RTE Native Plant Feasibility Study	\$100,000		\$100,000
<b>Total:</b>	<b>\$9,247,000</b>	<b>\$2,336,000</b>	<b>\$11,583,000</b>

## **APPENDIX D**

### **CONTACT INFORMATION**

Eugene Zeltmann  
President and Chief Executive Officer  
New York Power Authority  
30 South Pearl Street  
10th Floor  
Albany, NY 12207-3425

William Little & Christopher Hogan  
N.Y. State Department of  
Environmental Conservation  
625 Broadway  
Albany, NY 12233-1500

Duncan Hay  
National Park Service  
Northeast Region  
One Gateway Center  
Suite 612  
Newton, MA 02458

Frank P. Milano  
Deputy Secretary of State  
New York State Department of State  
41 State Street  
Albany, NY 12231

Steve Patch  
Fish & Wildlife Biologist  
United States Fish and Wildlife Service  
New York Field Office (Region 5)  
3817 Luker Rd.  
Cortland, NY 13045

Dan Kane  
Director of Resource Management  
N.Y. State Office of Parks,  
Recreation, and Historic  
Preservation  
Empire State Plaza  
Agency Building 1 – 17th Floor  
Albany, NY 12238

Jim Kardatzke  
Bureau of Indian Affairs  
Eastern Region Office  
545 Marriott Drive  
Suite 700  
Nashville, TN 37214

Robert Game  
Executive Director  
Niagara Falls Water Board  
5815 Buffalo Avenue  
Niagara Falls, NY 14304

Paul Pallas  
President  
New York Association of Public Power  
110 Maple Avenue  
Rockville Centre, NY 11571

Kevin Brocks (on behalf of MEUA)  
Read and Laniado, LLP  
Attorneys at Law  
25 Eagle Street  
Albany, NY 12207-1901

**Dick Moyle**  
**Steuben Rural Electric Cooperative, Inc.**  
**9 Wilson Avenue**  
**Bath, NY 14810**

**Bruce Carpenter**  
**Executive Director**  
**New York Rivers United**  
**Market Street**  
**East Wing Depot 1**  
**Rome, NY 13442**

**Julie Barrett O'Neill**  
**Executive Director, Buffalo Niagara**  
**Riverkeeper**  
**Friends of the Buffalo-Niagara River**  
**567 Potomac Avenue**  
**Buffalo, NY 14222**

## **APPENDIX E**

### **NON-LICENSE SETTLEMENT PROVISIONS**

#### **SECTION 1**

#### **NIAGARA RIVER GREENWAY ECOLOGICAL FUND**

##### **1.1 Establishment of Greenway Ecological Fund**

Within ninety (90) days of the effective date of the New License or license issuance, whichever is later, the Power Authority shall establish, in an interest bearing account at an accredited bank in the State of New York, a Niagara River Greenway Ecological Fund ("Greenway Ecological Fund") to support the creation, improvement, and maintenance of conservation areas and ecological projects along the Niagara River basin that will promote tourism, enhance the environment, advance the economic revitalization of riverfront communities, and support the creation of a Greenway. The Greenway Ecological Fund, which will have a value of \$16,179,645 (NPV 2007), will be funded in the amount of \$1 million annually for the term of the New License; *provided, however*, that the Power Authority may elect to adjust the schedule of payments after consultation with the Greenway Ecological Standing Committee ("GESC"), but in no event shall the value of the Power Authority's payments into the fund exceed \$16,179,645 (NPV 2007) or be reduced below \$16,179,645 (NPV 2007) if the New License term is for 50 years. The initial payment of \$1,000,000 shall be made within ninety (90) days of the effective date of the New License or license issuance, whichever is later.

##### **1.2 Timing of the Annual Payment to Greenway Ecological Fund**

Unless otherwise agreed to as provided for in Section 1.1 of Appendix E, the Power Authority shall make an annual payment to the Greenway Ecological Fund of \$1,000,000 for the term of the New License within sixty (60) days of the anniversary of the Power Authority's establishment of the Greenway Ecological Fund. The annual payment shall be made regardless of whether the Niagara River Greenway Commission or the Niagara River Greenway Plan is terminated.

##### **1.3 Greenway Ecological Standing Committee**

The GESC, consisting of a representative from the Power Authority, DEC, the Service, SNI, TN, TSN, and NREC shall, ~~on a consensus basis, select projects to be funded from~~ the Greenway Ecological Fund. Prior to establishing the Greenway Ecological Fund, the Licensee shall convene the GESC to establish: (1) the organization and administration of the Greenway Ecological Fund; (2) a mechanism for identifying cash flow schedules necessary to fund the creation, improvement, and maintenance of conservation areas and ecological projects along the Niagara River that will promote tourism, enhance the environment, advance the economic revitalization of riverfront communities, and support the creation of a Greenway; (3) measures to track and recover administrative costs of the Greenway Ecological Fund; (4) associated auditing and reporting requirements; and (5)



all other necessary and appropriate tasks consistent with the Greenway Ecological Fund, including the development of a schedule for future GESC meetings.

Greenway Ecological Fund projects may be proposed by the GESC or individuals and organizations located within the Buffalo-Niagara region; *provided, however*, that each proposal shall provide written documentation: (1) evidencing consultation with the Greenway Commission and the chief elected official, or a designated representative, of any affected municipal, county, tribal entity and appropriate State and Federal agencies; and (2) setting forth an operations and maintenance plan for each proposed project. Before authorizing any project to be financed by the Greenway Ecological Fund, the GESC shall ensure that the proposed project is consistent with the Niagara River Greenway Plan and any State and Federal law or regulation, including New York State Coastal Zone policies, where applicable. With respect to any proposed project to be located within the FERC Project Boundary, the GESC shall not authorize any financing from the Greenway Ecological Fund until and unless the Power Authority obtains any necessary or appropriate FERC approval of the proposed project.

All determinations by the GESC shall be based on consistency with the Niagara River Greenway Plan, engineering feasibility, operation, biological effectiveness, and maintenance feasibility and cost effectiveness. In no event, however, shall the Greenway Ecological Fund be utilized to: (1) meet the obligations, existing as of August 31, 2007, of any local municipality or State agency; or (2) pay for operation and maintenance of any projects existing as of August 31, 2007. To the extent practicable, the GESC shall attempt to secure matching funds or other resources to offset the funding of Greenway projects.

#### **1.4 Administrative Costs and Refunds**

Members of the GESC shall serve without compensation and will not be reimbursed by this fund for their expenses. Any administrative costs associated with the establishment and maintenance of the Greenway Ecological Fund shall be paid from any accrued interest on the Greenway Ecological Fund or, if adequate interest is not accrued, borne by the Greenway Ecological Fund. In no event shall the Greenway Ecological Fund be utilized to pay for personnel costs. If this Relicensing Agreement is terminated as set forth in Section 8 of the Relicensing Settlement Agreement, the balance of unused monies in the Greenway Ecological Fund, plus any accrued interest and minus any administrative costs, shall be completely refunded to the Power Authority; *provided, however*, that any funds already encumbered at the time the Relicensing Agreement is terminated shall not be refunded to the Power Authority.

## **SECTION 2 LAND ACQUISITION FUND**

Within ninety (90) days of the effective date of the New License or license issuance, whichever is later, the Power Authority shall establish a Land Acquisition Fund in the amount of \$1,000,000 (NPV 2007). Monies from the Land Acquisition Fund will be available to acquire

land parcels identified by DEC. Until such time as this fund is extinguished, DEC shall submit to the Power Authority, on an annual basis, a report providing a summary of land acquired by the Fund.

### **SECTION 3**

#### **STATE PARKS GREENWAY FUND**

##### **3.1 Establishment of State Parks Greenway Fund**

Within ninety (90) days of the effective date of the New License or license issuance, whichever is later, the Power Authority shall establish a State Parks Greenway Fund to support the construction and/or rehabilitation of parks, recreation and related facilities that will promote tourism, enhance the environment, advance the economic revitalization of riverfront communities, and support the creation of a Greenway. The State Parks Greenway Fund will have a value of \$48,538,934 (NPV 2007) and will be funded in the amount of \$3,000,000 annually for the term of the New License. The initial payment of \$3,000,000 shall occur within ninety (90) days of the effective date of the New License or license issuance, whichever is later; *provided, however*, that the Power Authority may elect to adjust the schedule of payments after consultation with State Parks, but in no event shall the value of the Power Authority's payments into the fund exceed \$48,538,934 (NPV 2007) or be reduced below \$48,538,934 (NPV 2007) if the New License term is for 50 years.

##### **3.2 Timing of Annual Payment to State Parks Greenway Fund**

Unless otherwise agreed to as provided for in Section 3.1 of Appendix E, for the term of the New License, the Power Authority shall make an annual payment to the State Parks Greenway Fund of \$3,000,000 within sixty (60) days of the anniversary of the Power Authority's establishment of the State Parks Greenway Fund. The annual payment shall be made regardless of whether the Niagara River Greenway Commission or the Niagara River Greenway Plan is terminated.

##### **3.3 State Parks Standing Committee**

The Power Authority shall facilitate the organization of the State Parks Standing Committee ("State Parks Committee") to administer and oversee projects financed by the State Parks Greenway Fund. Prior to establishing the State Parks Greenway Fund, the Licensee shall convene the State Parks Committee to establish: (1) the structure, organization, and administration of the State Parks Greenway Fund; (2) a mechanism for identifying cash flow schedules necessary to support the construction and/or rehabilitation of parks, recreation and related facilities that will promote tourism, enhance the environment, advance the economic revitalization of riverfront communities, and support the creation of a Greenway; (3) measures to track and recover administrative costs of the State Parks Greenway Fund; (4) associated auditing and reporting requirements; and (5) all other necessary and appropriate tasks consistent with the State

Parks Greenway Fund, including the development of a schedule for future State Parks Committee meetings.

The State Parks Committee, which will consist of a representative from the Power Authority and OPRHP, shall be solely responsible for selecting projects to be financed, in whole or in part, by the State Parks Greenway Fund. Projects may be proposed by the State Parks Committee or individuals and organizations located within the Buffalo-Niagara region; *provided, however*, that each proposal shall provide written documentation: (1) evidencing consultation with the Greenway Commission and the chief elected official, or a designated representative, of any affected municipal, county, tribal entity and appropriate State and Federal agencies, including the National Park Service, with respect to National Historic Landmarks and any designated National Heritage Corridor; and (2) an operations and maintenance plan for each proposed project. Prior to authorizing any project to be financed by the State Parks Greenway Fund, the State Parks Committee shall ensure that: (1) the proposed project is consistent with the Niagara River Greenway Plan and State and Federal law or regulation, including New York State Coastal Zone policies, where applicable; and (2) that with respect to any proposed project to be located within the FERC Project Boundary, the State Parks Committee shall not authorize any financing from the State Parks Greenway Fund until and unless the Power Authority obtains any necessary or appropriate FERC approval of the proposed project. All determinations by the State Parks Committee shall be based on consistency with the Niagara River Greenway Plan, engineering feasibility, operation and maintenance feasibility and cost effectiveness. In no event, however, shall the State Parks Greenway Fund be utilized to: (1) meet the obligations, existing as of August 31, 2007, of any local municipality or State agency; or (2) pay for operation and maintenance of any projects or facilities existing as of August 31, 2007. To the extent practicable, the State Parks Committee shall attempt to secure matching funds or other resources to offset the funding of Greenway projects.

### **3.4 Administrative Costs and Refunds**

Members of the State Parks Committee shall serve without compensation and will not be reimbursed for their expenses. Any administrative costs associated with the establishment and maintenance of the State Parks Greenway Fund shall be paid from any accrued interest on the State Parks Greenway Fund or, if adequate interest is not accrued, borne by the State Parks Greenway Fund. In no event shall the State Parks Greenway Fund be utilized to pay for personnel costs. If this Relicensing Agreement is terminated as set forth in Section 8 herein, the balance of unused monies in the State Parks Greenway Fund, plus any accrued interest and minus any administrative costs, shall be completely refunded to the Power Authority; *provided, however*, that any funds already encumbered at the time this Relicensing Agreement is terminated shall not be refunded to the Power Authority.

**SECTION 4**  
**CAYUGA CREEK RESTORATION AND FEASIBILITY STUDY**

The Power Authority will provide funding for Cayuga Creek Stream Restoration, up to a maximum of \$200,000, for work directed by the Town of Niagara, Niagara County, the City of Niagara Falls, a representative from the NREC, and the TN.

The Power Authority will conduct a study within the Niagara River Gorge to assess the feasibility of restoring RTE/native terrestrial plants. The total cost of the study will not exceed \$100,000.

**NIAGARA POWER PROJECT,  
FERC PROJECT NO. 2216**

**HOST COMMUNITY RELICENSING  
SETTLEMENT AGREEMENT ADDRESSING  
NON-LICENSE TERMS AND CONDITIONS**

**June 27, 2005**

**NIAGARA POWER PROJECT,  
FERC PROJECT NO. 2216**

**HOST COMMUNITY RELICENSING SETTLEMENT AGREEMENT  
ADDRESSING NON-LICENSE TERMS AND CONDITIONS**

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## **EXHIBITS**

<b>EXHIBIT 1</b>	<b>ALLOCATION AMONG HOST COMMUNITIES</b>
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**THIS HOST COMMUNITY RELICENSING SETTLEMENT AGREEMENT ADDRESSING NON-LICENSE TERMS AND CONDITIONS** ("Host Community Agreement") is made and entered into this \_\_ day of June, 2005 by and among, the Power Authority of the State of New York ("Power Authority"); the Niagara Power Coalition ("NPC"); City of Niagara Falls, New York; Town of Lewiston, New York; Town of Niagara, New York; Niagara County, New York; Lewiston Porter School District; Niagara Wheatfield School District; and the City of Niagara Falls School District (collectively, the "Parties").

**WITNESSETH:**

WHEREAS, the Power Authority owns and operates the Niagara Power Project ("Project"), located on the Niagara River in Niagara County, New York;

WHEREAS, the 50-year original license for the Project, issued to the Power Authority by the Federal Power Commission on January 30, 1958, expires on August 31, 2007;

WHEREAS, the Parties recognize the importance of reliable, low-cost Project power to the Power Authority's customers, the region, and the State;

WHEREAS, the Power Authority, on or before August 31, 2005, will file an application with the Federal Energy Regulatory Commission ("Commission" or "FERC") seeking a 50-year New License for the continued operation and maintenance of the Project;

WHEREAS, the Power Authority, concurrent with its filing of the relicensing application with FERC, will file an application for a water quality certification from DEC in connection with the relicensing of the Project, as provided under Section 401 of the Clean Water Act ("CWA");

WHEREAS, the Power Authority, concurrent with the filing of its relicensing application with FERC, will file a consistency certification with DOS in connection with the relicensing of the Project, as provided under Section 307 of the Coastal Zone Management Act ("CZMA");

WHEREAS, the Parties have negotiated and resolved all issues associated with the Commission's issuance of a New License for the Project to the Power Authority;

WHEREAS, the NPC has agreed to forebear from exercising any rights and remedies it may have against the Power Authority and FERC pertaining to the relicensing of the Project subject to the terms and conditions set forth herein; and

WHEREAS, the Parties agree that the Commission should adopt, without modification, all of the License Terms and Conditions, including the Proposed License Articles, into the New License for the Project.

NOW THEREFORE, in consideration of the mutual covenants set forth herein, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

## **SECTION 1 GENERAL PROVISIONS**

### **1.1 ACRONYMS AND DEFINITIONS**

**"1950 Treaty"** shall mean the 1950 Niagara River Water Diversion Treaty Between the United States and Canada, codified at 1 U.S.T. 694.

**"Acceptance of the New License"** shall mean the date upon which the Power Authority files its acceptance of the New License with FERC, or the date of the expiration of the existing original license, August 31, 2007, whichever occurs later.

**"Agencies"** shall mean, collectively, the U.S. Department of the Interior, the Advisory Council on Historic Preservation, the New York State Department of Environmental Conservation, the New York State Department of State, and the New York State Office of Parks, Recreation, and Historic Preservation.

**"Breach"** shall mean the failure of a Party to perform or observe any material term or condition of this Agreement.

**"Breaching Party"** shall mean a Party that is in Breach of this Agreement.

**"Commission"** shall mean the Federal Energy Regulatory Commission.

**"CWA"** shall mean the Clean Water Act.

**"CZMA"** shall mean the Coastal Zone Management Act.

**"Default"** shall mean the failure of a Breaching Party to cure its Breach in accordance with Section 8 of this Agreement.

**"FERC"** shall mean the Federal Energy Regulatory Commission.

**"Host Community Agreement"** shall mean the entirety of this Relicensing Settlement Agreement Addressing Non-License Terms and Conditions, including all Appendices.

**"IJC"** shall mean the International Joint Commission.

**"License"** shall mean the regulatory authorization for construction, maintenance, and operation of a hydroelectric project subject to the jurisdiction of FERC pursuant to the Federal Power Act, 16 U.S.C. § 791 *et seq.*

**"License Provision"** shall mean any term, condition, prescription, requirement, holding, reservation of authority, or article included into the New License for the Niagara Power Project by the Commission, or any condition, term, reservation or other License requirement adopted or otherwise included into the New License for the Project,

including, but not limited to, a water quality certificate issued by DEC pursuant to Section 401 of the CWA.

**"License Terms and Conditions"** shall mean the entirety of the terms, prescriptions, conditions, and articles set forth in Section 3 of this Host Community Agreement, including the Proposed License Articles set forth in Appendix A of the Relicensing Agreement and incorporated herein by reference, which the Parties agree that the Commission should include, without modification or expansion, in the New License issued to the Power Authority for the continued operation of the Project.

**"New License"** shall mean the License, not including any annual license, issued by the Commission to the Power Authority for the continued operation and maintenance of the Project, pursuant to Section 15 of the Federal Power Act, effective after expiration of the Project's original license issued on January 30, 1958.

**"Niagara River Greenway"** shall have the same meaning as set forth in Section 39.03(1) of the New York Parks, Recreation, and Historic Preservation Law.

**"Niagara River Greenway Commission"** shall have the same meaning as set forth in Section 39.03 of the New York Parks, Recreation, and Historic Preservation Law.

**"Niagara River Greenway Plan"** shall have the same meaning as set forth in Section 39.07 of the New York Parks, Recreation, and Historic Preservation Law.

**"Niagara Power Coalition" or "NPC"** shall mean the coalition comprised of the following member entities: City of Niagara Falls, New York; Town of Lewiston, New York; Town of Niagara, New York; Niagara County, New York; Lewiston Porter School District; Niagara Wheatfield School District; and City of Niagara Falls School District.

**"NPV"** shall mean net present value.

**"NPV 2007"** shall equal the  $\sum_{i=1}^{n=50} \frac{Value_i \times (1 + EscalationRate)^{YearSpent_i - BaseYear_i}}{(1 + DiscountRate)^{YearSpent_i - 2007}}$  based on

the following inputs: O & M Escalation Rate = 3.5%; Capital Cost Escalation Rate = 4.5%; and Discount Rate = 6.25%. All NPV figures in this Host Community Agreement assume a 50-year license term. For example: \$3,000,000 that will be spent in 2011 has Net Present Value in 2007 dollars equal to \$2,353,995. It means that \$2,353,995 invested in 2007 (with Rate = 6.25%) will have a value of \$3,000,000 in 2011.

$$NPV_{2007}^{2011} = \frac{\$3,000,000 \times (1 + 0.045)^{2011 - 2011}}{(1 + 0.0625)^{2011 - 2007}} = \$2,353,995$$

Where base year=2011; year spent=2011

**"Offer of Settlement"** shall mean an offer of settlement to be filed with FERC pursuant to 18 C.F.R. § 385.602, which offer shall include this Host Community Agreement.

**"Party"** shall mean, in context, a signatory to this Host Community Agreement. The use of the term "Party" or "Parties" in this Agreement shall *not* refer to a "Party" (specifically defined in 18 C.F.R. § 385.102) which has formally intervened in the Niagara Power Project's relicensing proceeding which the Federal Energy Regulatory Commission will establish after NYPA files its license application.

**"PM&E"** shall mean protection, mitigation and enhancement.

**"Project"** shall mean the Niagara Power Project, licensed to the Power Authority as FERC Project No. 2216.

**"Project Boundary"** shall mean the external limits of the Project, as set forth in Exhibit G of the Power Authority's Application for New License for the Project, which encloses all Project lands, waters, works and other features that are necessary for Project purposes and subject to FERC jurisdiction.

**"Proposed License Articles"** shall mean the PM&E measures set forth in Appendix A of the Relicensing Agreement, which are incorporated by reference herein under Section 3 of this Host Community Agreement and which the Parties agree that the Commission should include, without modification, in the New License issued to the Power Authority for the continued operation of the Project.

**"Relicensing Agreement"** shall mean the Relicensing Settlement Agreement Addressing New License Terms and Conditions, including all Appendices, by and among the Power Authority and other signatories in settlement of the relicensing of the Project.

**"SNI"** shall mean the Seneca Nation of Indians.

**"TN"** shall mean the Tuscarora Nation.

**"TSN"** shall mean the Tonawanda Seneca Nation.

## **1.2 SCOPE OF HOST COMMUNITY AGREEMENT**

- (a) The Parties agree that this Host Community Agreement resolves among the Parties all issues associated with, and constitutes a comprehensive settlement of, all issues associated with the relicensing of the Project in FERC Docket No. P-2216.
- (b) The Parties agree that the License Terms and Conditions establish the entirety of the Power Authority's FERC-jurisdictional obligations for the PM&E of ecological, environmental, cultural, and recreational resources that may be affected by the Project under a New License issued by FERC.

- (c) All Parties agree to support the Power Authority's entire proposal set forth in its Application for New License for the Project and the Offer of Settlement, including the Commission's issuance of a 50-year New License for the Project.

### **1.3 COMPLIANCE WITH STATUTES AND REGULATIONS**

Each Party represents that this Host Community Agreement, together with the Relicensing Agreement, is consistent with, and fully satisfies, any and all applicable statutory and regulatory requirements and obligations under Federal and State law pertaining to the relicensing of the Project. Each Party represents, further, that no PM&E measure or other License Provision, other than those License Terms and Conditions set forth in Section 3 herein, is necessary or appropriate to satisfy any and all Federal or State law pertaining to the relicensing of the Project. If FERC imposes objectionable License Provision(s), the Parties recognize that such objectionable License Provision(s) may trigger the rights of the Parties under the Withdrawal and Termination provisions of Section 10 of this Host Community Agreement.

### **1.4 LIMITATION OF APPLICABILITY**

This Host Community Agreement is made with the express understanding that it constitutes a negotiated settlement of issues specific to the Project. No Party shall be deemed, by virtue of execution of this Host Community Agreement, to have established precedent or admitted or consented to any approach, methodology, or principle, except as expressly provided herein. In the event the Offer of Settlement is approved by FERC, such approval shall not be deemed precedential or controlling regarding any particular issue or contention in any other proceeding. Further, by entering into this Host Community Agreement, the Power Authority shall not be deemed to have admitted to any liability for any action arising from the construction, operation, and maintenance of the Project, and this Host Community Agreement shall not be evidence of, or otherwise construed as, liability for any action arising from the construction, operation, and maintenance of the Project.

### **1.5 EFFECTIVE DATE AND TERM OF HOST COMMUNITY AGREEMENT**

This Host Community Agreement shall become effective upon its execution by the Power Authority. Except as provided for herein, this Host Community Agreement shall remain in effect for the term of the New License issued by the Commission for the Project and for any annual License issued subsequent thereto. This Host Community Agreement shall be binding on and inure to the benefit of the Parties and their successors and assigns unless otherwise specified in this Host Community Agreement, and shall terminate when a subsequent new license is issued following the end of the term of the New License.

## **1.6 EFFECTIVE DATE OF POWER AUTHORITY OBLIGATIONS**

Unless otherwise expressly provided for in this Host Community Agreement, the obligations of the Power Authority under this Host Community Agreement shall become effective after the Power Authority files its Acceptance of the New License for the Project with FERC; *provided, however*, that with respect to any license term that is subject to a rehearing request, the Parties agree to support the Power Authority's request to stay such license condition until the date on which resolution of the issue for which rehearing is sought becomes final and non-appealable following FERC or judicial action.

## **1.7 ENFORCEABILITY**

- (a) It is the intent of the Parties that the License Terms and Conditions set forth in Section 3 herein shall be enforced by FERC and other regulatory agencies that have concurrent jurisdiction to enforce such articles, as set forth in the Relicensing Agreement. The Offer of Settlement shall request that FERC: (1) incorporate all License Terms and Conditions into the New License for the Project, without modification; and (2) identify all License Terms and Conditions, if any, that are unenforceable by FERC. All Proposed License Articles included in the New License shall be enforceable by FERC.
- (b) The Parties agree that all terms of this Host Community Agreement, other than the License Terms and Conditions set forth in Section 3 herein, are outside FERC's jurisdiction. Such terms of this Host Community Agreement shall not be incorporated into the New License for the Project and shall be enforced only as provided in Section 12 and Section 15 herein.

## **1.8 EVIDENTIARY SUPPORT FOR LICENSE TERMS AND CONDITIONS**

The Parties agree that the administrative record developed to date, including, *inter alia*, the completed relicensing studies, support and justify the License Terms and Conditions set forth in Section 3 of this Agreement.

## **SECTION 2 SETTLEMENT COMMITMENTS**

### **2.1 COMMITMENTS OF THE POWER AUTHORITY**

#### **2.1.1 Offer of Settlement**

The Parties agree that, concurrent with the filing of an application for a New License for the Project, the Power Authority shall file this Host Community Agreement as part of an Offer of Settlement with FERC pursuant to Rule 602 of the Rules of Practice and Procedure, 18 C.F.R. § 385.602.

### **2.1.2 Implementation of Settlement Commitments**

The Power Authority agrees that it will comply with, carry out, and implement all commitments in this Host Community Agreement, according to the effective date of such commitments, as set forth in Section 1.6 herein; *provided, however*, that FERC adopts, without modification or expansion, the License Terms and Conditions.

## **2.2 COMMITMENTS OF ALL PARTIES**

### **2.2.1 Submittal of Additional Study Requests and Recommendations**

All Parties agree that this Host Community Agreement constitutes their complete and final recommendations for the New License including, but not limited to, PM&E measures submitted under Section 10(a) of the FPA. All Parties agree further that they shall not submit to FERC any request for additional studies after the Power Authority files its Application for New License with FERC.

### **2.2.2 Support for Offer of Settlement**

All Parties shall submit to FERC, within 20 days after the Power Authority files the Offer of Settlement pursuant to Section 2.1.1 of this Host Community Agreement, a statement, either individually or collectively, in support of the Offer of Settlement.

### **2.2.3 Filings and Submittals Consistent with Host Community Agreement**

All Parties shall ensure that, throughout the term of this Host Community Agreement and New License for the Project, any and all of the Parties' filings or other submittals with FERC, DEC, or any other administrative entity or court are consistent with this Host Community Agreement and the Relicensing Agreement, and said Parties shall not support, propose, or advocate any License Provision that is in any way contrary to, or inconsistent with, this Host Community Agreement or the Relicensing Agreement. Notwithstanding the foregoing, the Parties reserve their rights under applicable law to fully participate in any future license amendment proceedings initiated by the Power Authority.

### **2.2.4 Support Adoption of License Terms and Conditions**

All Parties shall actively support, in all relevant regulatory proceedings, the incorporation of the License Terms and Conditions into the New License issued by FERC and incorporation of consistent terms into the water quality certification and other applicable permits and authorizations, as appropriate.

## **SECTION 3 LICENSE TERMS AND CONDITIONS**

### **3.1 PROPOSED LICENSE ARTICLES**

Those PM&E measures set forth in the Relicensing Agreement that are enforceable by the Commission are set forth in Appendix A to the Relicensing Agreement, which Appendix is incorporated herein by reference. The Parties agree that FERC should include all Proposed License Articles in the New License for the Project without modification, as set forth in Section 9 of this Host Community Agreement. These Proposed License Articles fully satisfy all Federal and State requirements for the relicensing and continued operation of the Project.

### **3.2 LICENSE TERM**

The Parties acknowledge that the Power Authority has engaged in a broad-based and extensive alternative licensing process for the relicensing of the Project. The Parties acknowledge further that the Power Authority has committed to make a substantial investment in the Project and the surrounding communities during the New License term under the terms of this Host Community Agreement and the Relicensing Agreement. For these reasons, the Parties agree that FERC should grant the Power Authority a New License for the Project for a term of fifty (50) years.

### **3.3 PROJECT BOUNDARY**

The Parties agree that the Power Authority's implementation of this Host Community Agreement, as set forth in Section 2.1.2 herein, as well as its implementation of the Relicensing Agreement, should not effectuate any change in the proposed Project Boundary, as set forth in Exhibit G of the Power Authority's Application for New License for the Project. The Parties agree further that FERC, when issuing a New License to the Power Authority for the continued operation and maintenance of the Project, should adopt the proposed Project Boundary for the Project set forth in Exhibit G of the license application, without expansion or any other modification.

### **3.4 PROJECT OPERATION**

The Parties agree that this Host Community Agreement, the Relicensing Agreement, and the 1950 Treaty between the United States and Canada, implemented by IJC and its Niagara River International Board of Control, appropriately balance water uses (including, without limitation, waterpower development, water quality, historic preservation, and the protection, mitigation and enhancement of ecological, environmental, cultural, recreational, historical, and aesthetic resources) of the Niagara River consistent with applicable treaty requirements, as well as any and all requirements of the FPA, CWA, and any other applicable Federal or State statute or regulation. Therefore, the Parties agree that FERC, when issuing a New License to the Power



Authority for its continued operation and maintenance of the Project, should not impose or otherwise require any changes to existing Project operations.

## **SECTION 4 HOST COMMUNITIES FUND**

### **4.1 ESTABLISHMENT OF HOST COMMUNITIES FUND**

Within sixty (60) days after the Power Authority files its Acceptance of the New License for the Project, the Power Authority and the Host Communities, in a manner approved by the Host Communities in accordance with the by-laws of the NPC, shall establish a Host Communities Fund ("HC Fund") for the benefit of the City of Niagara Falls, Town of Niagara, Town of Lewiston, Niagara County, Lewiston Porter School District, Niagara Wheatfield School District, and City of Niagara Falls School District (collectively, "Host Communities"). The HC Fund, which will have a value of \$89,929,474 (NPV 2007), will be funded in the amount of \$5,000,000 million annually for the term of the New License after an initial payment of \$8,000,000. Within sixty (60) days after the Power Authority files its acceptance of the New License with FERC, the Power Authority shall make its initial payment of \$8,000,000 to the Host Communities; *provided, however*, that the Power Authority may elect to adjust the schedule of this initial payment after consultation with, and the consent of, each respective member of the Host Communities. In no event shall this initial payment be made at any point in time greater than sixty (60) days after the Power Authority files its Acceptance of the New License with FERC.

### **4.2 ANNUAL PAYMENT TO HC FUND**

- (a) For the term of the New License, the Power Authority shall make an annual payment to the HC Fund. The first payment of \$5 million shall be made within sixty (60) days after the Power Authority files its Acceptance of the New License for the Project. Thereafter, such payment shall be made on or before July 1 of each year. Each annual HC Fund payment shall be made with seven separate payments; one payment being made to each Host Community, in accordance with the payment percentage allocated to each Host Community in Section 4.3. The annual payments will: (1) result from the Power Authority's sale of hydropower, which will be allocated to the benefit of the Host Communities and sold by the Power Authority to their account; and (2) be based on the "net value" of the power, *i.e.*, the difference between the Power Authority's cost-based rate for Niagara Project power and energy and the prevailing wholesale market price in the market administered by the New York Independent System Operator ("NYISO") or any successor.
- (b) Under no circumstances will the Power Authority's annual payments be less than \$5,000,000. To the extent the net value of the amount of power allocated in 2007, as set forth in the preceding paragraph, increases over the term of the license, the HC Fund payments shall reflect this additional value; *provided, however*, in years in which the net value is less than \$5 million, the Power Authority will pay \$5 million and keep a record of the accumulated net value shortfall. In years in

which the net value is greater than \$5 million, the Power Authority will first apply any amounts above \$5 million to reduce the accumulated net value shortfall, if any, and will pay the remainder to the HC Fund.

#### **4.3 HC FUND EXPENDITURES**

The HC Fund is to be allocated among the NPC members as follows. The initial \$8 million payment shall be allocated in accordance with the schedule as shown below and as previously authorized by the NPC in accordance with its bylaws:

Niagara Falls CSD	14%
City of Niagara Falls	17%
Lewiston Porter CSD	14%
Town of Lewiston	17%
Niagara Wheatfield CSD	12%
Niagara County	13%
Town of Niagara	13%

The annual \$5 million payments shall be allocated in accordance with the schedule as shown below and as previously authorized by the NPC in accordance with its bylaws:

Niagara Falls CSD	13.5%
City of Niagara Falls	17%
Lewiston Porter CSD	14.5%
Town of Lewiston	17%
Niagara Wheatfield CSD	12%
Niagara County	13%
Town of Niagara	13%

While the Host Communities shall have sole discretion over HC Fund expenditures, the Host Communities agree that the funds shall be expended on capital projects and infrastructure that benefit the general public and promote economic development, public health, and safety.

#### **4.4 ADMINISTRATIVE COSTS AND REFUNDS**

Any administrative costs associated with the establishment and maintenance of the HC Fund shall be paid from any accrued interest on the HC Fund or, if adequate interest is not accrued, borne by the HC Fund. If this Host Community Agreement is terminated as set forth in Section 8 or Section 10 herein, the entire HC Fund, plus any accrued interest and less any administrative costs, shall be completely refunded to the Power Authority; *provided, however*, that any funds already encumbered at the time this Host Community Agreement is terminated shall not be refunded to the Power Authority.

#### **4.5 NON-LICENSE MEASURE**

The Parties agree that the Power Authority's obligation to establish and contribute to the HC Fund is not subject to FERC's jurisdiction and shall not be included within any license article, condition, or other provision of the New License for the Project.

### **SECTION 5 CONVEYANCE OF SURPLUS LANDS**

#### **5.1 PARCELS TO BE CONVEYED AS SURPLUS LANDS**

The Parties agree that Parcels 1 through 8 identified on the map in Appendix A, all of which are outside the FERC Project Boundary for the Project, are surplus lands owned by the Power Authority and shall be offered to adjoining landowners and/or local governmental entities as follows:

- (a) *Parcel 1:* An approximately 0.3-acre parcel within the Town of Lewiston at the intersection of Upper Mountain Road and Military Road shall be offered to the adjoining landowner for \$1.00.
- (b) *Parcels 2:* Three separate parcels of approximately 1.4, 1.5 and 3.6 acres within the Town of Lewiston, located north of the Lewiston Reservoir and running parallel with a Niagara Mohawk transmission line easement, shall be offered to the adjoining landowner for \$1.00.
- (c) *Parcels 3:* Three separate parcels, all of which are approximately 0.2 acres, are located in the City of Niagara Falls. The first parcel is located along, and west of, Whirlpool Street between Orchard Parkway Avenue and Chilton Avenue. The second parcel, also located along, and west of, Whirlpool Street, is in the vicinity of the Ashland Avenue Water Board parking lot. The third parcel is a triangularly-shaped parcel situated at the intersection of Third Street and Whirlpool Street. All three of these parcels shall be offered to adjoining landowners for \$1.00 each.
- (d) *Parcel 4:* An approximately 1.25-acre parcel within the City of Niagara Falls, located along the Robert Moses Parkway right-of-way fence adjacent to DeFranco Park, shall be offered to the City of Niagara Falls for \$1.00; *provided, however,* the City of Niagara Falls agrees to consult with OPRHP regarding future plans for the parcel.
- (e) *Parcel 5:* An approximately 0.4-acre parcel within the City of Niagara Falls, located along the Robert Moses Quay Street exit ramp, shall be offered to the adjoining landowner for \$1.00.

- (f) **Parcels 6:** Two separate parcels, both of which are approximately 0.1 acres, are located in the Town of Niagara along Interstate 190. Both parcels shall be offered to the adjoining landowner for \$1.00.
- (g) **Parcel 7:** An approximately 48.6-acre parcel, located along Porter Road in the City of Niagara Falls, shall be offered to the City of Niagara Falls for \$1.00.
- (h) **Parcel 8:** An approximately 47-acre parcel, most of which is located within the Village of Lewiston, shall be offered to the Village of Lewiston for \$1.00; *provided, however*, that the Power Authority and the Village of Lewiston shall consult with the New York State Historic Preservation Officer, TN, SNI, and TSN regarding Historic Properties prior to the offer of conveyance.

## **5.2 TERMS AND CONDITIONS OF CONVEYANCES**

All conveyances enumerated in Section 5.1 herein shall be subject to purchase and sale agreements between the Power Authority and the identified purchasers, which agreements shall include, but will not be limited to, the following terms and conditions:

- (a) **Quitclaim Deed:** The instrument of conveyance from the Power Authority to the purchaser shall be a quitclaim deed containing no general or special warranties to the purchaser.
- (b) **Approval of Board of Trustees:** Where deemed appropriate at the sole discretion of the Power Authority, the purchase and sale agreement shall condition the conveyance upon proper approval by the Power Authority's Board of Trustees.
- (c) **Environmental Site Assessments:** The purchase and sale agreement shall provide that the Power Authority will conduct a Phase I, and Phase II if necessary, Environmental Site Assessment prior to conveyance.
- (d) **Environmental Indemnification:** The purchase and sale agreement shall provide that the sale by the Power Authority and the acceptance by the purchaser is "as is" and "with all faults." The Power Authority shall not make any representation or warranty regarding the absence or presence of environmental hazards or the compliance of prior uses on or present conditions of the conveyed parcel under any and all applicable Federal, State, and local environmental laws. The purchaser shall agree to release, acquit, forever discharge, and hold harmless the Power Authority from any and all claims, demands, and causes of action relating to or in any way arising out of any noncompliance under environmental laws of the conveyed land and any property damage or personal injury alleged to be caused by environmental conditions of the conveyed land.

- (e) **Support for License Application.** Execution of purchase and sale agreements between the Power Authority and any non-Municipal entity shall be conditioned upon the non-Municipal entity's filing of a letter with FERC expressly supporting for the Power Authority's license application.

### **5.3 ADDITIONAL POTENTIAL CONVEYANCES**

The Power Authority shall reasonably consider opportunities to convey to the Town of Lewiston the following two additional parcels as further identified on the map in Appendix D: (1) a parcel of approximately eight acres in area located between the western boundary of the right of way (ROW) associated with the Robert Moses parkway and the eastern boundary of the ROW associated with the former New York Central Railroad line, part of which is located within the current boundary of Earl W. Brydges Artpark; and (2) a parcel of approximately twenty acres in area located (a) between the western border of the ROW associated with Military Road and the eastern border of the ROW associated with Interstate I-190 and the eastern border of the ROW, (b) south of the Interplant Road, and (c) north of an east-west line drawn from the center of the intersection of Military Road and the cemetery access road, all of which is within the current boundary of Reservoir State Park and the FERC-established Project boundary.

### **5.4 NON-LICENSE MEASURE**

The Parties agree that the Power Authority's obligation to offer Parcels 1 thorough 8 as provided for herein is not subject to FERC's jurisdiction and shall not be included within any license article, condition, or other provision of the New License for the Project.

## **SECTION 6 POWER ALLOCATION**

### **6.1 PROVISION OF POWER AND ENERGY TO HOST COMMUNITIES**

For the term of the New License, the Power Authority shall make available twenty-five (25) MW of firm power and associated energy for sale to the Host Communities (or to entities designated by the Host Communities to receive such power and energy on their behalf).

### **6.2 CONTRACTS FOR THE SALE OF POWER AND ENERGY**

Following the effective date of this Host Community Agreement, as set forth in Section 1.5, herein, the Host Communities and the Power Authority shall negotiate contracts for the sale of the 25 MW of firm power and associated energy, which shall include, *inter alia*, the following terms and conditions:

- (a) *Allocation of 25 MW Among Host Communities:* The power and energy sold to the Host Communities or their designees pursuant to this Host Community Agreement shall be allocated among the Host Communities in a manner approved by the Host Communities in accordance with the bylaws of NPC and as set forth in Exhibit 1.
- (b) *Resale of Power and Energy:* All power and energy sold to the Host Communities or their designees pursuant to this Host Community Agreement shall be for the sole purpose of serving, without mark-up, consumers within the Host Communities, as designated by the Host Communities and approved by the Power Authority. The Power Authority shall cooperate with the Host Communities or their designees in making arrangements for the sale and resale of power and energy sold pursuant to this Host Community Agreement.
- (c) *Consistent with Federal and State Law:* The Power Authority's sale of power and energy to the Host Communities or their designees pursuant to this Host Community Agreement shall at all times be consistent with the New License, the Niagara Redevelopment Act, the New York Public Authorities Law, and any other applicable law, license, precedent, or regulation.
- (d) *Cost of Power:* All power and energy sold to the Host Communities or their designees pursuant to this Host Community Agreement shall be at the Power Authority's cost-based rate for Project power and energy.
- (e) *Delivery of Power and Energy:* The point of delivery for sale of all power and energy sold to the Host Communities or their designees pursuant to this Host Community Agreement shall be at the Project Switchyard.
- (f) *Transmission and Delivery of Power and Energy:* It shall be the Host Communities' sole responsibility to arrange for the transmission and distribution of all power and energy sold to the Host Communities or their designees pursuant to this Host Community Agreement, including any and all charges imposed by the NYISO or any successor; *provided, however,* that the Power Authority shall cooperate with the Host Communities or their designees in making arrangements for the transmission and delivery of power and energy sold pursuant to this Host Community Agreement.

### **6.3 APPROVAL OF CONTRACTS FOR THE SALE OF POWER AND ENERGY**

Following the negotiation of contracts for the sale of power and energy between the Power Authority and Host Communities or their designees, as set forth in Section 6.2 herein, the Power Authority shall recommend to the Power Authority's Trustees that, pursuant to New York's statutory approval process (New York Public Authorities Law § 1009), such contracts be approved and submitted to the Governor of the State of New

York for approval. Upon approval pursuant to such process, the Host Communities and the Power Authority shall execute such contracts.

#### **6.4 EFFECTIVE DATE OF OBLIGATION FOR THE SALE OF POWER AND ENERGY**

Notwithstanding any other provision in this Host Community Agreement, the Power Authority's obligation to sell power and energy to the Host Communities or their designees pursuant to this Host Community Agreement shall become effective upon the later of: (1) the first day after the Power Authority files its Acceptance of the New License with FERC; or (2) the date upon which the Power Authority and Host Communities execute contracts for the sale of power and energy, as set forth in Section 6.3 herein.

#### **6.5 POTENTIAL ALLOCATION OF POWER TO THE TOWN OF LEWISTON**

Pursuant to Appendix C and the terms set forth in this Section 6, the Power Authority may provide up to 3 MW of power to the Town of Lewiston. This power would be in addition to the allocation set forth in Exhibit 1.

#### **6.6 NON-LICENSE MEASURE**

The Parties agree that the Power Authority's obligation to provide twenty-five (25) MW of power and energy to the Host Communities or their designees as provided herein is not subject to FERC's jurisdiction and shall not be included within any license article, condition, or other provision of the New License for the Project.

### **SECTION 7**

#### **GREENWAY RECREATION/TOURISM FUND IN THE HOST COMMUNITIES**

##### **7.1 ESTABLISHMENT OF GREENWAY RECREATION/TOURISM FUND**

Within sixty (60) days after the Power Authority files its Acceptance of the New License with FERC, the Power Authority and the Host Communities, in a manner approved by the Host Communities in accordance with the by-laws of the NPC, shall establish a Greenway Recreation/Tourism Fund in the Host Communities ("Host Community Greenway Fund") to support the construction and/or rehabilitation of parks, recreation and related facilities, for the purpose of redefining the Niagara riverfront, promoting tourism, enhancing the environment, and advancing the economic revitalization of the Niagara River Greenway within Niagara County. The Host Community Greenway Fund will have a value of \$48,538,934 (NPV 2007) and will be funded in the amount of \$3,000,000 million annually for the term of the New License. Within sixty (60) days after the Power Authority files its Acceptance of the New License with FERC, the Power Authority shall make its initial payment of \$3,000,000 to the Host Communities; *provided, however*, that the Power Authority may elect to adjust the schedule of payments after consultation with, and the consent of, the Host Communities, but in no

event shall the value of the fund exceed \$48,538,934 (NPV 2007) or be reduced below \$48,538,934 (NPV 2007) if the New License term is for 50 years.

## **7.2 TIMING OF ANNUAL PAYMENT TO HOST COMMUNITY GREENWAY FUND**

For the term of the New License, the Power Authority shall make an annual payment to the Host Community Greenway Fund of \$3,000,000 on or before July 1 of each year. The annual payment shall be made regardless of whether the Niagara River Greenway Commission or the Niagara River Greenway Plan is established or terminated.

## **7.3 HOST COMMUNITY GREENWAY FUND STANDING COMMITTEE**

The Power Authority shall facilitate the organization of the Host Community Greenway Fund Standing Committee ("HC Committee") to administer and oversee projects financed by the Host Community Greenway Fund. The HC Committee shall consist of one representative each from the following: the Power Authority; City of Niagara Falls, New York; Town of Lewiston, New York; Town of Niagara, New York; Niagara County, New York; Lewiston Porter School District; Niagara Wheatfield School District; and City of Niagara Falls School District.

Projects may be proposed by HC Committee members or by individuals and organizations with an interest in Niagara County's section of the Niagara River Greenway provided that each proposal provides written documentation: (1) evidencing consultation with the Greenway Commission (but only if the Greenway Commission has been established and only if it remains active in accordance with its purpose for which it was created) and the chief elected official, or a designated representative, of any affected municipal, county, tribal entity and appropriate State and Federal agencies; and (2) setting forth an operations and maintenance plan for each proposed project. The HC Committee, however, shall have sole responsibility for selecting projects to be financed, in whole or in part, by the Host Community Greenway Fund; *provided, however*, that prior to authorizing any project to be financed by the Host Community Greenway Fund, the HC Committee shall ensure that the proposed project is consistent with: (1) the Niagara River Greenway Plan or, if the Niagara Greenway Plan is terminated, the HC Committee shall ensure that the proposed project: (i) entails the construction and/or rehabilitation of parks, recreation, and related facilities; or (ii) has been proposed for the purpose of redefining the Niagara riverfront, promoting tourism, enhancing the environment, and advancing the economic revitalization of the Niagara River Greenway within Niagara County, and (2) any State and Federal law or regulation, including, but not limited to, New York State Coastal Zone policies, where applicable; *provided further*, that with respect to any proposed project to be located within the FERC Project Boundary, the HC Committee shall not authorize any financing from the Host Community Greenway Fund until and unless the Power Authority obtains any necessary or appropriate FERC approval of the proposed project.



The Parties agree that the HC Committee shall work in a cooperative manner and shall make a concerted effort to achieve consensus in all decisions. All determinations by the HC Committee shall be based on consistency with the Niagara River Greenway Plan, engineering feasibility, operation and maintenance feasibility, and cost effectiveness. In no event, however, shall the Host Community Greenway Fund be utilized to: (1) meet the obligations, existing as of August 31, 2007, of any local municipality, school district or State agency; or (2) pay for operation and maintenance of any projects existing as of August 31, 2007; *provided, however*, the Host Community Greenway Fund can be utilized by the Host Communities to recover costs incurred after this Agreement becomes effective for planning and developing new Greenway projects. To the extent practicable, the HC Committee shall attempt to secure matching funds or other resources to offset the funding of Greenway projects.

#### **7.4 ADMINISTRATIVE COSTS AND REFUNDS**

Members of the HC Committee shall serve without compensation and will not be reimbursed for their expenses. Any administrative costs associated with the establishment and maintenance of the Host Community Greenway Fund shall be paid from any accrued interest on the Host Community Greenway Fund or, if adequate interest is not accrued, borne by the Host Community Greenway Fund. In no event shall the Host Community Greenway Fund be utilized to pay for personnel costs; *provided, however*, that Host Community Greenway Funds may be utilized to hire a limited number of personnel to manage and oversee Greenway Projects. If this Host Community Agreement is terminated as set forth in Section 8 or Section 10 herein, the balance of unused monies in the Host Community Greenway Fund, plus any accrued interest and minus any administrative costs, shall be completely refunded to the Power Authority; *provided, however*, that any funds already encumbered at the time this Host Community Agreement is terminated shall not be refunded to the Power Authority.

#### **7.5 ANNUAL REPORT**

No later than sixty (60) days following the close of each fiscal year during the term of the New License for the Project, the HC Committee shall submit to the Power Authority an annual report for the Host Community Greenway Fund. The annual report, at a minimum, shall include:

- (a) A summary of all active projects funded, in whole or in part, by the Host Community Fund;
- (b) A project-by-project listing of all expenditures from the Host Community Fund during the previous fiscal year;
- (c) A detailed listing of all planned expenditures during the current fiscal year in which the report is issued;

- (d) An updated balance sheet for the Host Committee Greenway Fund, which includes Host Committee Greenway Fund expenditures, administrative expenses, and accrued interest; and
- (e) A summary of significant correspondence with the Niagara River Greenway Commission.

## **7.6 NON-LICENSE MEASURE**

The Parties agree that the Power Authority's obligation to establish the Host Community Greenway Fund, and make annual payments to the Host Community Greenway Fund, is not subject to FERC's jurisdiction and shall not be included within any license article, condition, or other provision of the New License for the Project.

## **SECTION 8 DEFAULT**

### **8.1 GENERAL**

Upon a Breach, the non-Breaching Party shall give written notice of such Breach to the Breaching Party. If the Breaching Party does not agree that a breach has occurred, the dispute will be resolved in accordance with the dispute resolution procedures set forth in Section 12. If the Breaching Party acknowledges the Breach, the Breaching Party shall have thirty (30) days from receipt of the Default notice within which to cure such Breach; *provided, however, if such Breach is not capable of cure within thirty (30) days, the Breaching Party shall commence such cure within thirty (30) days after notice and continuously and diligently complete such cure within ninety (90) days from receipt of Default notice; and if cured within such time, the Breach specified in such notice shall cease to exist. No Default shall exist where such failure to discharge an obligation is the result of Force Majeure as defined herein in Section 13.*

### **8.2 RIGHT TO TERMINATE**

If a Breach is not cured as provided for in Section 8.1, or if a Breach is not capable of being cured within the period provided for herein, the non-Breaching Party shall have the right to declare a Default, withdraw from this Host Community Agreement, be relieved of any further obligation hereunder, and recover from the Breaching Party all amounts due, plus all other damages and remedies provided for in law or equity. The provisions of this Section will survive termination of this Host Community Agreement.

## **SECTION 9 ADOPTION BY FERC**

The Parties have entered into this Host Community Agreement with the express expectation and condition that FERC approves the Offer of Settlement and issues a New License for the Project that incorporates, without modification or expansion, the License Terms and Conditions set forth in Section 3 herein. In addition, the Power Authority has entered into this Host Community Agreement with the express expectation and condition that: (1) DEC will issue a water quality certification under Section 401 of the CWA that is consistent with the terms of this Host Community Agreement and the Relicensing Agreement; and (2) and DOS will issue a Consistency Certification pursuant to the CZMA that is consistent with the terms of this Host Community Agreement and the Relicensing Agreement.

The Parties agree that if FERC approves the Offer of Settlement and incorporates all License Terms and Conditions, including the Proposed License Articles, into the New License without modification or expansion, the Parties will not seek rehearing of the FERC order granting a New License for any and all issues covered by this Host Community Agreement or support in any way any such request for rehearing by any non-Party to this Host Community Agreement.

The Power Authority reserves the right, even if FERC approves the Offer of Settlement and incorporates the License Terms and Conditions into the New License without modification or expansion, to seek rehearing or other administrative or judicial review in connection with: (1) any and all License Provisions included in the New License that are not set forth in Section 3 herein; or (2) any and all provisions of the water quality certification issued by DEC pursuant to Section 401 of the CWA or Consistency Certification issued by DOS pursuant to the CZMA that are inconsistent with the terms of this Host Community Agreement or the Relicensing Agreement.

## **SECTION 10 WITHDRAWAL AND TERMINATION**

### **10.1 PROCESS FOR WITHDRAWAL**

Should FERC or any of the Agencies take any action related to the issuance of the New License that materially and directly affects the proposed License Terms and Conditions, and aggrieve the interests of any Party, the Parties agree to adhere to the following process for amending or withdrawing from this Host Community Agreement.

#### **10.1.1 Notification**

Within ten (10) days of issuance of an order containing objectionable License Provision(s), the Party whose interests are directly and materially aggrieved by such License Provision(s) shall provide written notification, pursuant to the requirements of Section 16.1 of this Host Community Agreement, to all other Parties of its intent to withdraw from the Host Community Agreement.

### **10.1.2 Administrative Appeals**

Following notification as set forth in Section 10.1.1, all Parties shall file a joint request for rehearing and/or pursue all appropriate administrative appeals, requesting the agency responsible for the objectionable License Provision(s) to amend such License Provision(s) to conform to this Host Community Agreement.

### **10.1.3 Good-Faith Negotiation**

Following the submittal of administrative appeal(s) as set forth in Section 10.1.2, the Parties agree that the aggrieved Party shall engage the other Parties in good-faith negotiations in an attempt to amend this Host Community Agreement by making it conform to the objectionable License Provision(s). The Parties agree to a one hundred twenty (120) day period to conduct good-faith negotiations under this Section, with a minimum of three (3) meetings to be held during a ninety (90) day period.

If, during the pendency of the good-faith negotiations, an order is issued that alleviates the aggrieved Party's concerns, the Parties shall discontinue the negotiation process. If, however, an order is issued during the pendency of the good-faith negotiations that denies the Parties' joint administrative appeal or does not reverse the objectionable License Provision(s), the Parties shall continue the negotiations under this Section, but the aggrieved Party may pursue judicial review, pursuant to Section 10.1.4 of this Host Community Agreement.

If the good-faith negotiations result in an agreement among all Parties to amend this Host Community Agreement to conform it to the objectionable License Provision(s), the Parties shall withdraw the joint administrative appeal(s) filed pursuant to Section 10.1.2 or petition for review filed pursuant to Section 10.1.4, and this Host Community Agreement shall be deemed modified to conform to said order.

### **10.1.4 Judicial Review**

If, as a result of an administrative appeal(s) filed pursuant to Section 10.1.2 of this Host Community Agreement, a final order is issued denying the merits of the joint appeal by not reversing the objectionable License Provision(s), aggrieved Parties may file a petition for review by the appropriate reviewing court. Other Parties may intervene in the proceeding, but said Parties shall not take a position adverse to the terms of this Host Community Agreement.

### **10.1.5 Withdrawal**

The Party whose interests are materially and directly aggrieved by any License Provision may withdraw from this Host Community Agreement, but only after:  
(1) the Parties comply with Sections 10.1.1 through 10.1.4 of this Host

Community Agreement; and (2) the aggrieved Party exhausts all available avenues for review of the order(s) imposing the objectionable License Provision(s) by filing timely requests for rehearing, petitions for review, and other required filings to continue the review process. Following the final, non-appealable order or ruling that fails to remedy the objectionable License Provision(s), the aggrieved Party may provide written notification to the other Parties of its withdrawal from this Host Community Agreement, pursuant to the notification requirements of Section 16.1. Upon notification, the provisions of Section 10.2 of this Host Community Agreement shall apply.

If the aggrieved Party fails to comply with Sections 10.1.1 through 10.1.4 of this Host Community Agreement or exhaust all available avenues for review of the order(s) imposing the objectionable License Provision(s), then the Party may not withdraw from this Host Community Agreement, and, upon expiration of the time period to continue the review process, this Host Community Agreement shall be deemed amended with the final order issued by an administrative agency or court.

## **10.2 EFFECT OF WITHDRAWAL**

### **10.2.1 Withdrawal by the Power Authority**

Withdrawal by the Power Authority, pursuant to Section 8 or Section 10.1 of this Host Community Agreement, shall render this Host Community Agreement null and void, and the Parties shall not have any rights or obligations under this Host Community Agreement, nor shall any Party receive any benefits under this Host Community Agreement. Notwithstanding this Host Community Agreement being rendered null and void, the Parties shall continue to be bound by Section 8.2 and Section 11 of this Host Community Agreement. If this Host Community Agreement is rendered null and void, the Parties agree that the Commission cannot consider this Host Community Agreement as part of the record of the relicensing proceeding when issuing a New License for the Project.

### **10.2.2 Withdrawal by a Party Other Than the Power Authority**

Withdrawal by any Party other than the Power Authority, pursuant to Section 8 or Section 10.1 of this Host Community Agreement, shall not render this Host Community Agreement null and void and shall not affect the enforceability of this Host Community Agreement. Withdrawal by any Party other than the Power Authority, however, shall: (1) render null and void provisions of this Agreement that are implicated by the objectionable License Provision(s) as they relate to the Party withdrawing; and (2) amend this Host Community Agreement to omit the terms applicable to said Party. The withdrawing Party shall have no rights and receive no benefits under this Host Community Agreement or the Offer of Settlement. The withdrawing Party shall, however, continue to be bound by Section 8.2 and Section 11 of this Host Community Agreement.

If a Party other than the Power Authority withdraws from this Host Community Agreement pursuant to Section 8 or Section 10.1, the Power Authority may at its option choose to let the Host Community Agreement stand, thereby obligating the Power Authority and the non-withdrawing Parties to continue to be bound by the terms of this Host Community Agreement, or to itself withdraw from this Host Community Agreement, notwithstanding the requirements of Section 10.1 herein. If the Power Authority invokes its option to withdraw in response to a withdrawal by another Party, the provisions of Section 10.2.1 shall apply.

### **10.2.3 Effect of Termination of the Relicensing Agreement**

If the Relicensing Agreement is terminated for any reason, the Power Authority may elect, in its sole discretion, to let this Host Community Agreement stand, thereby obligating the Parties to continue to be bound by the terms of this Host Community Agreement, or to unilaterally withdraw from this Host Community Agreement, notwithstanding the requirements of Section 10.1 herein. If the Power Authority invokes this option to withdraw from this Host Community Agreement in response to the termination of the Relicensing Agreement, the provisions of Section 10.2.1 of this Host Community Agreement shall apply.

## **SECTION 11 SETTLEMENT NEGOTIATIONS PRIVILEGED**

The Parties have entered into the negotiations and discussions leading to this Host Community Agreement with the understanding that, to the fullest extent allowed by law, all discussions relating to this Host Community Agreement are privileged and confidential. This material shall not prejudice the position of any Party or participant taking part in such discussions and negotiations, and are not to be used by any entity in any manner, including admission into evidence, in connection with these or any other proceedings related to the subject matter of this Host Community Agreement. In the event that this Host Community Agreement is rendered null and void pursuant to Section 8 or Section 10 herein, the Host Community Agreement, and all drafts, work papers, and notes related to its development, to the fullest extent allowed by law, shall be deemed settlement materials and shall not constitute a part of the record in any proceeding, nor be admissible into evidence in any proceeding related to the subject matter of this Host Community Agreement.

## **SECTION 12 RESOLVING DISPUTES AMONG THE PARTIES**

The Parties agree to utilize the following alternative dispute resolution mechanism to resolve all disputes related to the compliance with, or the performance of, obligations set forth in this Host Community Agreement:

## **12.1 NOTICE**

Any Party who believes that a dispute has arisen shall provide written notification pursuant to Section 16.1 to the other Parties specifying the Parties with whom the dispute exists and describing the matter(s) in dispute, the circumstances under which it arises, and the proposed relief or resolution to address the dispute. Each Party that has an interest directly and substantially affected by the dispute may participate in the resolution of the dispute (collectively, "Participating Parties") by providing, within fifteen (15) days of receipt of such notice, written notification to the other Parties pursuant to Section 16.1 of its intention to do so.

## **12.2 CONSULTATION**

The Participating Parties shall commence a one hundred twenty (120) day Consultation period (measured from the date of the notice of the dispute) to engage in good faith negotiations to resolve the dispute(s). During the Consultation period, the Participating Parties shall hold at least three (3) meetings. At any time during the Consultation period, the Participating Parties may, by mutual consent, initiate Facilitated Mediation as set forth in Section 12.3.

## **12.3 FACILITATED MEDIATION**

If disagreement persists at the conclusion of the Consultation period, or if the Participating Parties mutually consent during the Consultation period, an aggrieved Party may, within fifteen (15) days after the conclusion of the Consultation period, initiate Facilitated Mediation through a mutually-agreed upon organization. The mediation process shall continue until the dispute is settled or until the mediator makes a finding that there is no possibility of settlement through Facilitated Mediation. At any time during Facilitated Mediation, the Participating Parties may, by mutual consent, initiate Court Proceedings as set forth in Section 12.4.

## **12.4 COURT PROCEEDINGS**

If the Parties choose not to engage in Facilitated Mediation, or if a disagreement persists at the conclusion of the Facilitated Mediation, or if the Participating Parties mutually consent during Facilitated Mediation, an aggrieved Participating Party may commence Court Proceedings in the New York State Supreme Court located in Albany County, New York, as set forth in Section 15 of this Host Community Agreement. The final disposition of the Court Proceedings shall be binding upon all Parties to this Host Community Agreement.



### **SECTION 13 FORCE MAJEURE**

An event of *Force Majeure* as used herein means any event beyond the reasonable control of and which occurs without the fault or negligence of the Power Authority or any entity controlled by the Power Authority, including its contractors and subcontractors (to the extent said contractor was acting under the control or direction of the Power Authority), which events may include but are not limited to: any delay or failure to grant a permit or other regulatory authorization required by law to be granted by any Federal, State, or local government authority, or any regulation, law, or prohibitory or mandatory action of any Federal or State governmental authority; acts of God or sudden actions of the elements, including fire; drought or critically high or low flows and levels in the Lake Erie/Lake Ontario/Niagara River watershed; strikes, lockouts or other similar industrial disturbances; acts of the public enemy, including terrorist acts, wars, civil disturbances, blockades, military actions, insurrections or riots; landslides, floods, washouts, lightning, earthquakes, tornadoes, hurricanes, blizzards or other storms or storm warnings; explosions, fires, sabotage, or vandalism; breakage, defects, malfunctioning, or accident to machinery, equipment, materials, or lines of pipe or wires; freezing of machinery, equipment, materials or lines of pipe or wires; inability or delay in the obtaining of materials or equipment; inability to obtain or utilize any permit, approval, easement, license or right-of-way. The settlement of strikes, lockouts, or other similar such industrial disturbances shall be entirely within the discretion of the Power Authority. The requirement herein that any event of *Force Majeure* shall be remedied with all reasonable dispatch shall not require the settlement of strikes, lockouts or other similar such industrial disturbances when such course is, in the opinion of the Power Authority, inadvisable.

If any event of *Force Majeure* directly renders the Power Authority unable, wholly or in part, to perform any obligations under this Host Community Agreement, it is agreed that, upon giving notice and full particulars of such event of *Force Majeure* to other Parties, as soon thereafter as practicable, the Power Authority is authorized to suspend performance under such obligations during the continuance of any inability or incapacity so caused, but for no longer period; *provided, however*, the Power Authority shall not be relieved from: (1) any obligations of this Host Community Agreement not directly affected by the event of *Force Majeure*; or (2) any obligation to make payment to another Party for pre-existing obligations. The Power Authority shall use best efforts to remedy the cause of such inability or incapacity with all reasonable dispatch, including, but not limited to, the prompt commencement and prosecution of litigation. When the Power Authority is able to resume performance of its obligations, it shall give the other Parties notice to that effect. The occurrence of a *Force Majeure* that results in impossibility of performance of an obligation, however, shall excuse the Power Authority's performance.

### **SECTION 14 HEADINGS**

The descriptive headings of the various Sections of this Host Community Agreement have been inserted for convenience of reference only and are of no significance in the interpretation or construction of this Host Community Agreement. To the extent that there is any inconsistency



between the heading of a Section of this Host Community Agreement and the text of the Section, the text shall govern.

## **SECTION 15 CHOICE OF LAW AND FORUM**

This Host Community Agreement, as a binding contract between the Parties, shall be governed by and construed under New York law without reference to its conflicts of law principles. Any action at law, suit in equity, or other judicial proceedings for the enforcement of this Host Community Agreement or any of its provisions must be brought in and maintained only in the New York State Supreme Court located in Albany County, New York.

## **SECTION 16 NOTICE AND COMMUNICATION**

### **16.1 NOTIFICATION REQUIREMENTS**

All written notices to be provided pursuant to this Host Community Agreement shall be mailed by U.S. certified mail, or overnight express service, postage prepaid, to each Party at the addresses listed in Appendix B or at a subsequent address, as a Party shall identify. Notices shall be deemed to be given five (5) business days after the date of mailing or on date of receipt if overnight express or other receipt-notification service is used.

### **16.2 NOTIFICATION CONTACT INFORMATION**

For purposes of implementing this Host Community Agreement, the Parties agree that the individuals listed in Appendix B shall be designated the primary contact persons and all written notices shall be posted to these individuals at the addresses listed in Appendix B. Notification of changes in the contact persons must be made in accordance with Section 16.1 to all other contact persons listed in Appendix B.

### **16.3 OTHER COMMUNICATIONS**

Notices and other communications not required to be made to all Parties or not required to be made in a specific manner under the terms of this Host Community Agreement need not be in writing and may be made by telephone, electronic mail, or facsimile.

## **SECTION 17 COSTS**

Except as provided in this Host Community Agreement, all Parties shall bear their own costs of participating in this Host Community Agreement.

## **SECTION 18 MERGER CLAUSE**

This Host Community Agreement, including all Appendices attached hereto, constitutes the entire agreement between the Parties with reference to the subject matter hereof, and supersedes all prior and contemporaneous understandings or agreements, oral or written, between the Parties with respect to the subject matter of this Host Community Agreement.

## **SECTION 19 WAIVER**

The failure of any Party to this Host Community Agreement to insist, on any occasion, upon strict performance of any provision of this Host Community Agreement will not be considered a waiver of any obligation, right, or duty of, or imposed upon, such Party.

## **SECTION 20 AMENDMENT**

The Parties may, by mutual agreement, amend this Host Community Agreement by a written instrument duly executed by the Parties.

## **SECTION 21 RESERVATION OF RIGHTS**

The Power Authority reserves all of its rights under the FPA to unilaterally petition FERC to, among other things, amend or otherwise modify the New License, *provided, however*, that the Power Authority shall not seek amendments or modifications inconsistent with the provisions of this Host Community Agreement.

## **SECTION 22 EXECUTION**

Each signatory to this Host Community Agreement represents that: (1) he or she is authorized to execute this Host Community Agreement and legally bind the Party he or she represents; and (2) the Party he or she represents will be fully bound by the terms hereof. This Host Community Agreement may be executed in any number of counterparts, and each executed counterpart shall have the same force and effect as an original instrument as if all the signatory parties had signed the same instrument. Any signature page of this Host Community Agreement may be detached from any counterpart of this Host Community Agreement without impairing the legal effect of any signature(s) thereon and may be attached to another counterpart of this Host Community Agreement identical in form hereto but having attached to it one or more signature pages.

Intending to be legally bound, the Parties have executed this Host Community Agreement through their duly authorized representatives.

IN WITNESS WHEREOF, the Parties have caused this Host Community Agreement to be executed as of the date set forth in this Host Community Agreement.

**POWER AUTHORITY OF THE STATE OF NEW YORK**

By: Eugene W. Zeltmann Date: 7/27/05  
Eugene Zeltmann, President and Chief Executive Officer

**NIAGARA POWER COALITION**

By: William L. Ross

William L. Ross, President

Date: 6-27-05

**CITY OF NIAGARA FALLS**

By: Vincenzo V. Anello

Vincenzo V. Anello, Mayor

Date: 6-27-05

**CITY OF NIAGARA FALLS SCHOOL DISTRICT**

By: Carmen A. Grant

Carmen Grant, Superintendent of Schools

Date: 6-27-05

**LEWISTON PORTER SCHOOL DISTRICT**

By: Whitney K. Vantine

Whitney K. Vantine, Superintendent of Schools

Date: 6/27/05

**NIAGARA COUNTY**

By: William L. Ross

William L. Ross, Chairman, Niagara County Legislature

Date: 6-27-05

**NIAGARA WHEATFIELD SCHOOL DISTRICT**

By: Kerri Dumphrey

Kerri Dumphrey, Superintendent of Schools

Date: 6/27/05

**TOWN OF LEWISTON**

By: Fred Newlin

Fred Newlin, Town Supervisor

Date: June 27, 2005

**TOWN OF NIAGARA**

By: Steven C. Richards

Steven C. Richards, Town Supervisor

Date: June 27, 2005

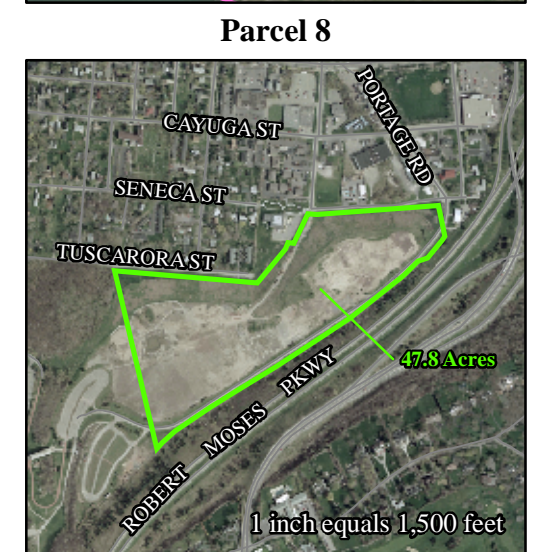
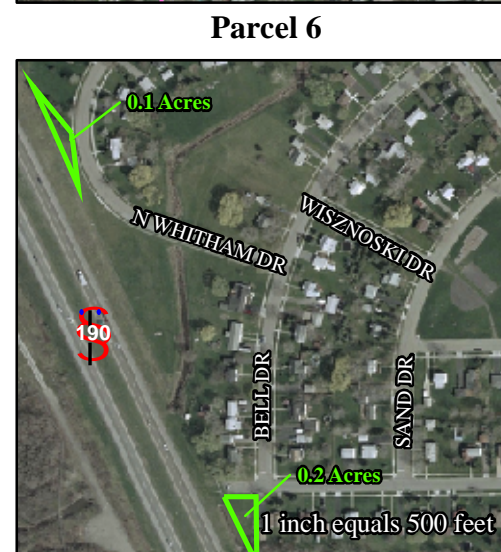
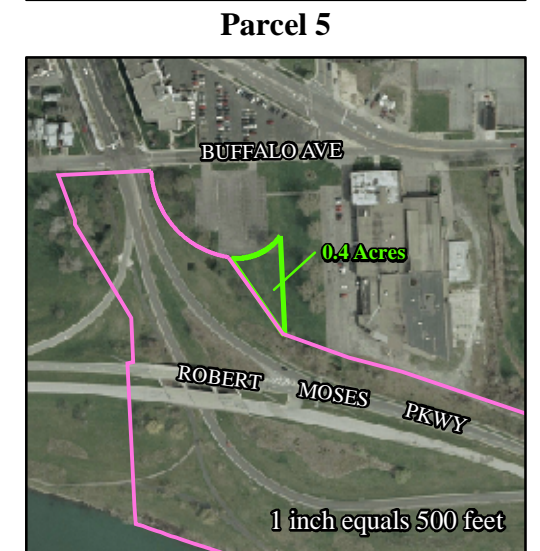
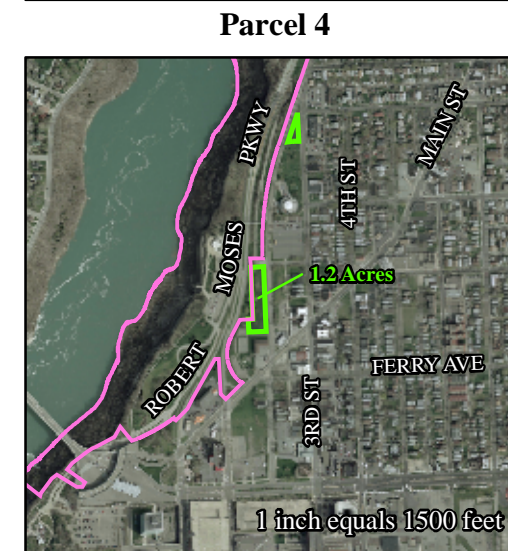
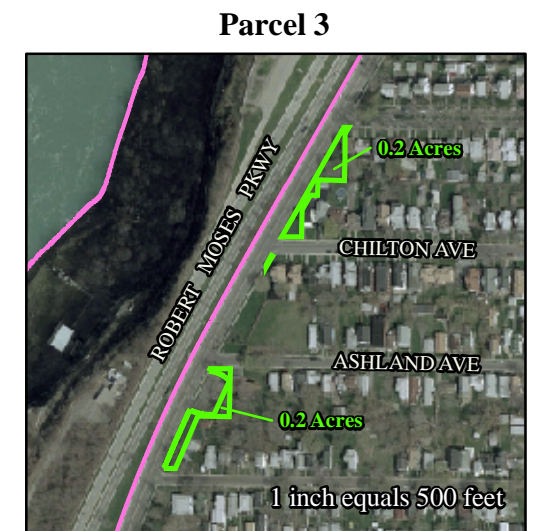
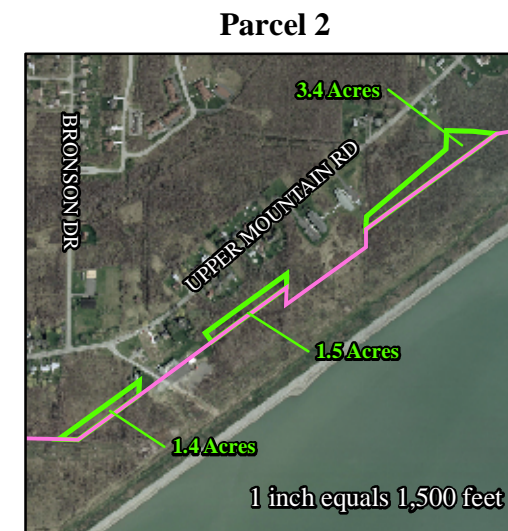
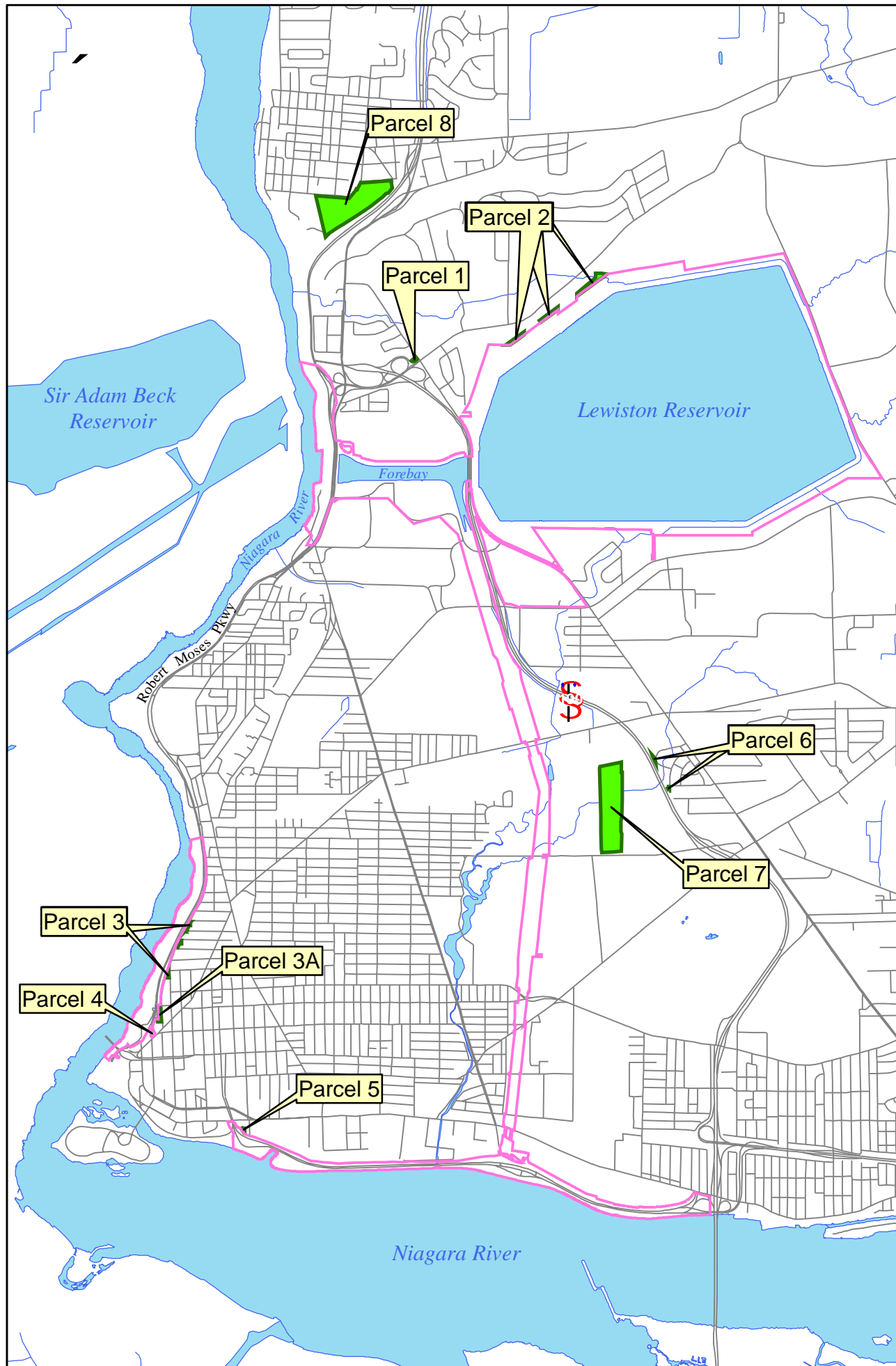
**Exhibit 1**

**Minimum Allocation of 25 MW Among Host Communities**

Niagara Falls CSD	3.5 MW
City of Niagara Falls	5.5 MW
Lewiston Porter CSD	1.5 MW
Town of Lewiston	3.5 MW
Niagara Wheatfield CSD	1.5 MW
Niagara County	9.0 MW
Town of Niagara	0.5 MW

**APPENDIX A**  
**MAP OF SURPLUS LANDS**





### Legend

- Project Boundary
- Surplus Lands



NIAGARA POWER PROJECT (FERC NO. 2216)  
COMPREHENSIVE RELICENSING SETTLEMENT  
AGREEMENT

APPENDIX D  
MAP OF SURPLUS LANDS





**APPENDIX B  
CONTACT INFORMATION**

Anello, Vincenzo V. <u>Vincenzo.Anello@niagarafallsny.gov</u>	City of Niagara Falls 745 Main St., P.O. Box 69 Niagara Falls NY 14302	P: 286-4310 F: 286-4349
Dumphrey, Kerin <u>kdumphrey@wzrd.com</u>	Niagara Wheatfield P O Box 309 Sanborn NY 14132	P: 215-3022 F: 215-3030
Newlin, Fred <u>fnewlin@townoflewiston.us</u>	Town of Lewiston 1375 Ridge Rd. Lewiston NY 14092	P: 754-8213 F: 754-2319
Richards, Steve <u>srichards@townofniagara.com</u>	Town of Niagara 7105 Lockport Rd Niagara Falls NY 14305	P: 297-2150 (x. 136) F: 298-4651
Ross, William <u>William.Ross@niagaracounty.com</u>	Niagara Co. Legislature 6761 Walmore Rd Niagara Falls NY 14304	P: 439-7003 F: 439-7124
Vantine, Whitney <u>vantine@lew-port.com</u>	Lewiston-Porter CSD 4061 Creek Rd Youngstown NY 14174	P: 754-8281 F: 286-7877
Zito, Mark	c/o 607 Walnut Ave. Niagara Falls NY 14301	P: 286-4109 C: 990-3448



## **APPENDIX C LEWISTON POWER ALLOCATION**

Pursuant to Sections 4.1 and 4.2 of the Host Community Settlement Agreement, the New York Power Authority (NYPA) has agreed to establish a Host Community Fund, which will be funded at \$5 million annually for the term of the new license. The initial payment made by NYPA will result from the sale of hydropower in the market administered by the New York Independent System Operator (NYISO). At the time the settlement agreement was negotiated with the Niagara Power Coalition (NPC) in October 2004, NYPA estimated that it would need to sell approximately 24 MW of power into the market in order to fund the \$5 million distribution to the Host Communities. In 2007, NYPA will review the electricity market prices and calculate how much power it will actually take to generate the \$5 million to support the fund. This will become the benchmark from which future fund levels will be calculated as called for in the settlement agreement at Sections 4.1 and 4.2.

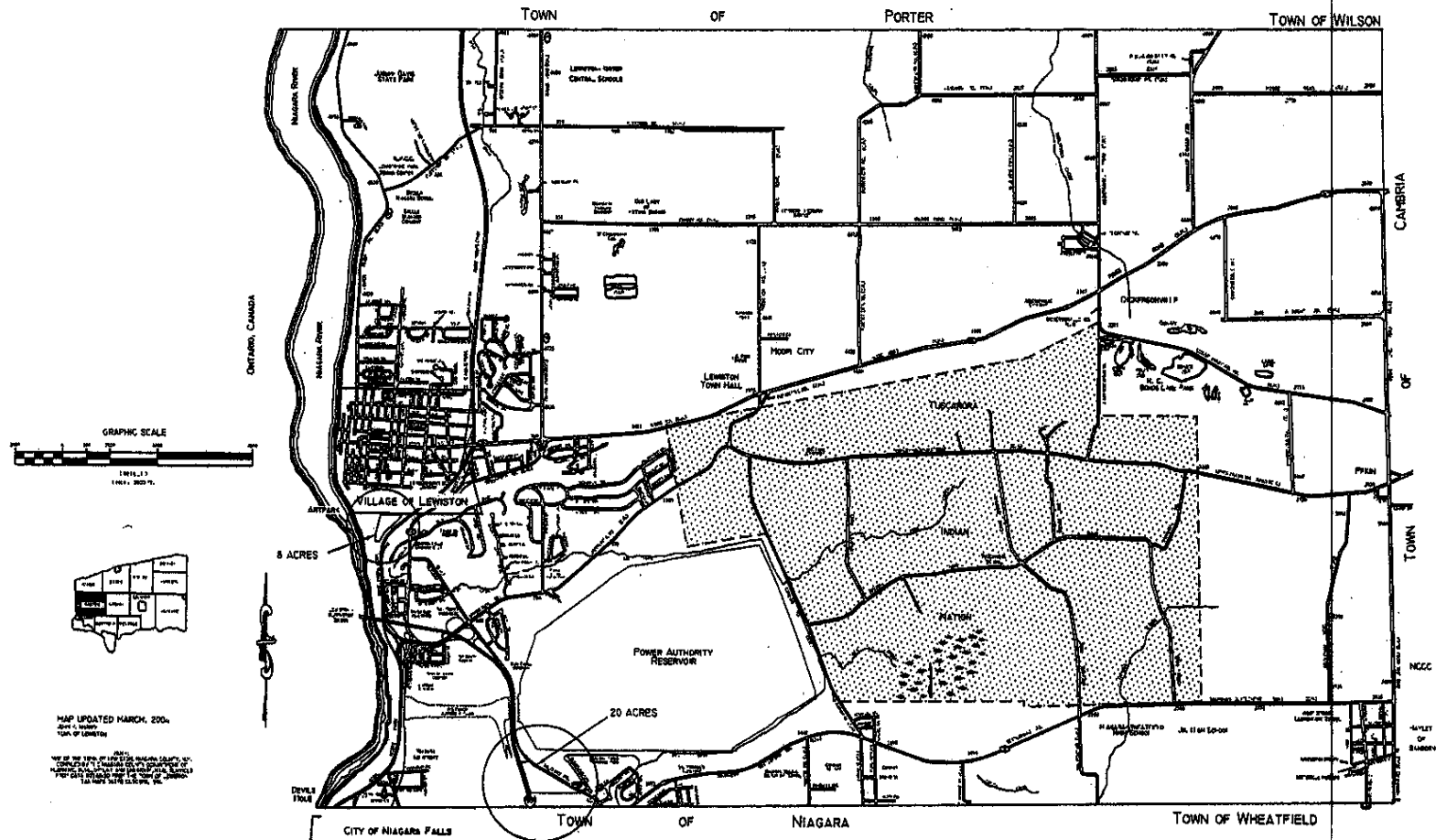
NYPA has already identified a block of 24 MW for sale in 2007 if needed in order to meet its obligation to the Host Communities. Current market forecasts, however, suggest that NYPA may be able to sell less than 24 MW in 2007 in order to fund the \$5 million initial payment to the Host Communities. If this assumption is correct, NYPA may have excess power available. For example, if NYPA only has to sell 22 MW of power in 2007 in order to realize \$5 million to support the Host Community Fund, 2 MW might become available to NYPA.

If the Town of Lewiston executes the Host Community Settlement Agreement, NYPA agrees that any excess power – up to 3 MW – that becomes available (*i.e.*, that portion of the 24 MW that is not required to be sold into the market in order to meet its \$5 million obligation) will be provided to the Town of Lewiston by NYPA in the form of a power allocation as provided for under the terms of Section 6 of the Host Community Settlement Agreement.

While it may be necessary for NYPA to sell all 24 MW to meet its funding obligation, it is NYPA's belief that current market trends suggest less than that amount will be required. Consequently, under our proposal, additional power would be available to Lewiston, pursuant to the same terms and conditions set forth in Section 6 of the Host Community Relicensing Settlement Agreement, throughout the term of the new license as long as NYPA sells less than 24 MW into the NYISO market in 2007.

**APPENDIX D**  
**MAP OF ADDITIONAL POTENTIAL CONVEYANCES**

**TOWN OF LEWISTON**  
**NIAGARA COUNTY, NEW YORK**



**RECEIVED** AUG 2 2005

**NIAGARA POWER PROJECT  
FERC PROJECT NO. 2216**

**RELICENSING SETTLEMENT AGREEMENT  
BETWEEN THE POWER AUTHORITY  
OF THE STATE OF NEW YORK  
AND THE TUSCARORA NATION**

**NIAGARA POWER PROJECT  
FERC PROJECT NO. 2216**

**RELICENSING SETTLEMENT AGREEMENT  
BETWEEN THE POWER AUTHORITY  
OF THE STATE OF NEW YORK  
AND THE TUSCARORA NATION**

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**THIS RELICENSING SETTLEMENT AGREEMENT BETWEEN THE POWER AUTHORITY OF THE STATE OF NEW YORK AND THE TUSCARORA NATION** ("Agreement") is made and entered into this \_\_\_\_ day of \_\_\_\_\_, 2005 by and between the Power Authority of the State of New York ("Power Authority") and the Tuscarora Nation ("Nation") (collectively referred to herein as "Parties").

**WITNESSETH:**

WHEREAS, the Power Authority owns and operates the Niagara Power Project ("Project"), located on the Niagara River in Niagara County, New York; and

WHEREAS, the Nation is a federally recognized sovereign Indian Nation with a traditional government consisting of Chiefs in Council and Clanmothers and is the sixth member nation of the Six Nations; and

WHEREAS, the Power Authority, pursuant to the original license issued by the Federal Power Commission, condemned Nation lands to construct a portion of the Project's Lewiston Reservoir, which borders the Nation's remaining lands; and

WHEREAS, the Power Authority, on or before August 31, 2005, will file an application with the Federal Energy Regulatory Commission ("FERC") seeking a 50-year New License for the continued operation and maintenance of the Project; and

WHEREAS, the Memorandum of Agreement ("MOA") between the Parties entered into January 27, 2003 (included at Appendix A), sets forth the principles governing the unique working relationship between the Nation and the Power Authority during the relicensing process; and

WHEREAS, pursuant to the MOA, the Parties have worked together to establish a framework for settlement of the relicensing of the Project; and

WHEREAS, the Nation has a responsibility to protect future generations of the Tuscarora people and the health and well-being of Mother Earth and to pursue peaceful relationships in the spirit of the Two-Row Wampum.

NOW THEREFORE, in consideration of the mutual covenants set forth herein, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Power Authority and the Nation agree as follows:

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**SECTION 1  
GENERAL PROVISIONS**

**1.1 ACRONYMS AND DEFINITIONS**

"1950 Treaty" shall mean the 1950 Niagara River Water Diversion Treaty Between the United States and Canada, codified at 1 U.S.T. 694.

**"Acceptance Date"** shall mean the date upon which the Power Authority files its acceptance of the New License with FERC, or the date of the expiration of the existing original license, August 31, 2007, whichever occurs later.

**"ACHP"** shall mean the Advisory Council on Historic Preservation.

**"Agencies"** shall mean, collectively, the Federal Energy Regulatory Commission, U.S. Department of the Interior, the Advisory Council on Historic Preservation, the New York State Department of Environmental Conservation, the New York State Department of State, and the New York State Office of Parks, Recreation, and Historic Preservation.

**"Breach"** shall mean the failure of a Party to perform or observe any material term or condition of this Agreement.

**"Breaching Party"** shall mean a Party that is in Breach of this Agreement.

**"CUP"** shall mean Customary Use Plan.

**"CWA"** shall mean the Clean Water Act.

**"CZMA"** shall mean the Coastal Zone Management Act.

**"DEC"** shall mean the New York State Department of Environmental Conservation.

**"Default"** shall mean the failure of a Breaching Party to cure its Breach in accordance with Section 10 of this Agreement.

**"DOI"** shall mean the United States Department of the Interior, including any and all of its agencies, offices, services, and bureaus.

**"DOS"** shall mean the New York State Department of State.

**"ESC"** shall mean the Ecological Standing Committee.

**"FERC"** shall mean the Federal Energy Regulatory Commission.

**"FPA"** shall mean the Federal Power Act.

**"HPMP"** shall mean Historic Properties Management Plan.

**"IJC"** shall mean the International Joint Commission.

**"License"** shall mean the regulatory authorization for construction, maintenance, and operation of a hydroelectric project subject to the jurisdiction of FERC pursuant to the Federal Power Act ("FPA"), 16 U.S.C. § 791 *et seq.*

**"License Provision"** shall mean any term, condition, prescription, requirement, holding, reservation of authority, or article appearing in the New License for the Niagara Power Project by FERC, or any condition, term, reservation or other License requirement adopted or otherwise included into the New License for the Project, including, but not limited to, a water quality certificate issued by DEC pursuant to Section 401 of the Clean Water Act ("CWA").

**"License Terms and Conditions"** shall mean the entirety of the terms, prescriptions, conditions, and articles set forth in Section 3 of this Agreement, including the Proposed License Articles set forth in Appendix A of the Relicensing Agreement and incorporated herein by reference, which the Parties agree that FERC should include, without modification or expansion, in the New License issued to the Power Authority for the continued operation of the Project.

**"LMP"** shall mean Land Management Plan.

**"Nation"** shall mean the Tuscarora Nation.

**"New License"** shall mean the first new License, not including any annual license, issued by FERC to the Power Authority for the continued operation and maintenance of the Project, pursuant to Section 15 of the FPA, effective after expiration of the Project's original license issued on January 30, 1958.

**"NPV"** shall mean net present value. All NPV figures in this Agreement assume a 50-year New License term.

**"NPV 2007"** shall equal the  $\sum_{i=1}^{n=50} \frac{Value_i \times (1 + EscalationRate)^{YearSpent - BaseYear_i}}{(1 + DiscountRate)^{YearSpent_i - 2007}}$  based on the following inputs: O & M Escalation Rate = 3.5%; Capital Cost Escalation Rate = 4.5%; and Discount Rate = 6.25%.

**"Offer of Settlement"** shall mean an offer of settlement to be filed with FERC pursuant to 18 C.F.R. § 385.602, which offer shall include this Agreement, the Relicensing Settlement Agreement Addressing License Terms and Conditions, the Host Community Relicensing Settlement Agreement Addressing Non-License Terms and Conditions, and the Relicensing Settlement Agreement Addressing Allocation of Niagara Project Power and Energy to Neighboring States.

**"OPRHP"** shall mean the New York State Office of Parks, Recreation, and Historic Preservation.

**"Party" or "Parties"** shall, in context, mean the signatories to this Agreement, which are as follows: the Power Authority of the State of New York and the Tuscarora Nation. The use of the term "Party" or "Parties" in this Agreement shall *not* refer to any "party" (specifically defined in 18 C.F.R. § 385.102) that has formally intervened in the Niagara

Power Project's relicensing proceeding, which FERC will establish after the Power Authority files its application for new license.

**"Power Authority"** shall mean the Power Authority of the State of New York.

**"Project"** shall mean the Niagara Power Project, licensed to the Power Authority as FERC Project No. 2216.

**"Project Boundary"** shall mean the external limits of the Project, as set forth in Exhibit G of the Power Authority's Application for New License for the Project, which encloses all Project lands, waters, works and other features that are necessary for Project purposes and subject to FERC jurisdiction.

**"Proposed License Articles"** shall mean the measures set forth in Appendix A of the Relicensing Agreement, which are incorporated by reference herein under Section 3 of this Agreement and which the Parties agree that FERC should include, without modification or expansion, in the New License issued to the Power Authority for the continued operation of the Project.

**"Relicensing Agreement"** shall mean the Relicensing Settlement Agreement Addressing License Terms and Conditions, including all Appendices, dated July 18, 2005, by and among the Power Authority and other signatories in settlement of the relicensing of the Project.

## **1.2 SCOPE OF AGREEMENT**

- (a) The Parties agree that this Agreement resolves between the Parties all their issues associated with, and constitutes a comprehensive settlement between the Parties of, the relicensing of the Project.
- (b) The Parties agree that the License Terms and Conditions establish the entirety of the Power Authority's obligations for the protection, mitigation and enhancement of ecological, environmental, cultural, and recreational resources that may be affected by the Project under a New License issued by FERC.
- (c) FERC's approval of the Offer of Settlement and issuance of a New License for the Project that incorporates, without modification or expansion, the License Terms and Conditions satisfies its trust obligations to the Nation in the relicensing of the Project, ~~with regard to the issues resolved in the Offer of Settlement.~~

## **1.3 COMPLIANCE WITH STATUTES AND REGULATIONS**

Each Party represents that this Agreement, together with the Relicensing Agreement, is consistent with, and fully satisfies, any and all currently applicable statutory and regulatory rights and responsibilities under Federal and State law pertaining to the New License for the Project. The Parties agree that no License Provision, other than the

License Terms and Conditions set forth in Section 3 herein, is necessary or appropriate to satisfy any currently applicable Federal or State law pertaining to the relicensing of the Project. If FERC imposes any objectionable License Provision(s), the Parties recognize that such objectionable License Provision(s) may trigger the rights of the Parties under the Withdrawal and Termination provisions of Section 12 of this Agreement.

#### **1.4 LIMITATION OF APPLICABILITY**

This Agreement is made with the express understanding that it constitutes a negotiated settlement of issues specific to the Project. No Party shall be deemed, by virtue of execution of this Agreement, to have established precedent or admitted or consented to any approach, methodology, or principle, except as expressly provided herein. In the event this Agreement is approved by FERC, such approval shall not be deemed precedential or controlling regarding any particular issue or contention in any other proceeding. Further, by entering into this Agreement, the Power Authority shall not be deemed to have admitted to any liability for any action arising from the construction, operation, and maintenance of the Project, and this Agreement shall not be evidence of, or otherwise construed as, liability for any action arising from the construction, operation, and maintenance of the Project.

#### **1.5 EFFECTIVE DATE AND TERM OF AGREEMENT**

This Agreement shall become effective upon its execution by the Nation and the Power Authority. Except as provided for in Section 10 and Section 12 herein, this Agreement shall remain in effect for the term of the New License issued by FERC for the Project and for any annual License issued subsequent thereto. This Agreement shall be binding on and inure to the benefit of the Nation and the Power Authority (and the Power Authority's successors and assigns), unless otherwise specified in this Agreement.

#### **1.6 EFFECTIVE DATE OF POWER AUTHORITY OBLIGATIONS**

Unless otherwise expressly provided for in this Agreement, the obligations of the Power Authority under this Agreement shall become effective upon the Acceptance Date of the New License; *provided, however*, that with respect to any License Term or Condition that is subject to a rehearing request, the Nation will not oppose the Power Authority's request to stay such License Term or Condition until the date on which resolution of the issue for which rehearing is sought becomes final and non-appealable following FERC or judicial action.

#### **1.7 ENFORCEABILITY**

- (a) It is the intent of the Parties that the License Terms and Conditions set forth in Section 3 herein shall be enforced by FERC and other regulatory agencies that have concurrent jurisdiction to enforce such License Terms and Conditions. The Offer of Settlement shall request FERC to incorporate all License Terms and Conditions into

the New License for the Project, without modification or expansion, and to identify all License Terms and Conditions, if any, that are unenforceable by FERC.

- (b) All terms of this Agreement that are outside FERC's jurisdiction shall not be incorporated into the New License for the Project and shall be enforced through remedies available under applicable State or Federal law, as set forth in Section 14.2.

## **1.8 EVIDENTIARY SUPPORT FOR LICENSE TERMS AND CONDITIONS**

The Parties agree that the administrative record developed as of the date of their signatures on this Agreement, including, among other things, the completed relicensing studies, supports and justifies the License Terms and Conditions set forth in Section 3 of this Agreement.

## **SECTION 2 SETTLEMENT COMMITMENTS**

### **2.1 COMMITMENTS OF THE POWER AUTHORITY**

#### **2.1.1 Offer of Settlement**

The Parties agree that, concurrent with the filing of an application for a New License for the Project, the Power Authority shall file this Agreement as part of an Offer of Settlement with FERC pursuant to Rule 602 of the Rules of Practice and Procedure, 18 C.F.R. § 385.602.

#### **2.1.2 Implementation of Settlement Commitments**

The Power Authority agrees that it will comply with, carry out, and implement all commitments in this Agreement, according to the effective date of such commitments, as set forth in Section 1.6 herein; *provided, however*, that FERC adopts, without modification or expansion, the License Terms and Conditions.

### **2.2 COMMITMENTS OF THE NATION**

#### **2.2.1 Submittal of Additional Study Requests, Recommendations, Terms and Conditions, and Prescriptions**

The Nation agrees that the License Terms and Conditions set forth in Section 3 herein constitute its complete and final recommendations for the New License including, but not limited to, recommendations submitted under Section 10(a) of the FPA. Should FERC adopt, without modification or expansion, the License Terms and Conditions, the Nation agrees further that it shall not submit to FERC any request for additional studies after the Power Authority files its Application for New License for the Project with FERC. Notwithstanding the foregoing, the

Nation reserves its rights under applicable law to fully participate in any future license amendment or re-opener proceedings.

#### **2.2.2 Support of Application and Offer of Settlement**

The Nation supports the Power Authority's application for a New License for the Project for a term of 50 years and the Commission's approval of the Offer of Settlement. The Nation agrees that this Agreement may be filed with FERC as evidence of that support. Notwithstanding, the Nation reserves its right to protest the license application, seek rehearing of the New License, or otherwise seek additional measures in the event this Agreement is terminated or rendered null and void as provided herein or in the event any necessary approvals pursuant to Sections 5.3 and 6.1(e) of this Agreement are not granted.

### **2.3 COMMITMENTS OF BOTH PARTIES**

#### **2.3.1 Filings and Submittals Consistent with Agreement and Relicensing Agreement**

The Parties shall ensure that, throughout the term of this Agreement and New License for the Project, any and all of the Parties' filings or other submittals with FERC, DEC, or any other administrative entity or court are consistent with this Agreement, and said Parties shall not support, propose, or advocate any License Provision that is in any way contrary to, or inconsistent with, this Agreement; *provided, however*, that nothing in this Agreement shall preclude the Nation from petitioning FERC to ensure the Power Authority's compliance with its New License for the Project.

## **SECTION 3 LICENSE TERMS AND CONDITIONS**

### **3.1 PROPOSED LICENSE ARTICLES**

Appendix A of the Relicensing Agreement is incorporated herein by reference. The Parties agree that FERC should include all Proposed License Articles set forth in Appendix A of the Relicensing Agreement in the New License for the Project without modification or expansion, as set forth in Section 11 of this Agreement.

### **3.2 LICENSE TERM**

The Parties agree that FERC should grant the Power Authority a New License for the Project for a term of fifty (50) years.

### **3.3 PROJECT BOUNDARY**

The Parties agree that the Power Authority's implementation of this Agreement, as set forth in Section 2.1.2 herein, as well as its implementation of the Relicensing Agreement, should not effectuate any change in the proposed Project Boundary, as set forth in Exhibit G of the Power Authority's Application for New License for the Project. The Parties agree further that FERC, when issuing a New License to the Power Authority for the continued operation and maintenance of the Project, should adopt the proposed Project Boundary for the Project set forth in Exhibit G of the Application for New License, without expansion or any other modification.

### **3.4 PROJECT OPERATION**

The Parties agree that FERC, when issuing a New License to the Power Authority for its continued operation and maintenance of the Project, should not impose or otherwise require any changes to existing Project operations.

## **SECTION 4 PAYMENTS TO THE TUSCARORA NATION**

### **4.1 POWER AUTHORITY OBLIGATION TO MAKE PAYMENTS TO THE TUSCARORA NATION**

During the term of the New License for the Project, the Power Authority shall make a single payment or a series of payments to the Nation, which payments shall have a total value of \$21,824,176 (NPV 2007). Such payments will commence within sixty (60) days after the Acceptance Date and will adhere to a schedule determined by the Nation in its sole discretion and provided to the Power Authority by the Nation, pursuant to the requirements of Section 18.1 herein; *provided, however*, that the Power Authority may elect to make a single payment of up to \$5,000,000 earlier than sixty (60) days after the Acceptance Date, after consultation with the Nation. For all payments made under this Section 4, the Nation shall have sole and absolute discretion over all expenditures and investments of the Fund, as well as all management and administrative responsibilities associated therewith.

### **4.2 METHOD OF PAYMENTS**

Unless specifically agreed to in writing by the Parties, all payments to the Nation ~~required under this Section 4 shall be completed via electronic transfer.~~ Prior to any payment by the Power Authority, the Nation shall submit written notification to the Power Authority, pursuant to Section 18.1 herein, that provides the financial institution, account number, and all other information necessary to complete the electronic transfer. After completing each payment, the Power Authority shall provide written notification to the Nation of such payment, pursuant to Section 18.1 herein. Upon any payment made under this Section 4, the Power Authority shall surrender all claim or right, interest or entitlement to such amounts paid to the Nation. The Parties agree and acknowledge that



the Power Authority's only obligation under Section 4 of this Agreement is to provide the requisite payments to the Nation according to the schedule provided by the Nation, as provided in Section 4.1, and that the Power Authority shall not have any fiduciary duties associated with such payments and that any failure by the Nation, its assigns, agents, fund managers, trustees or other fiduciaries associated with payments made under this Section 4 shall not, in any way, create new duties or obligations for the Power Authority.

#### **4.3 NON-LICENSE MEASURE**

The Parties agree that the Power Authority's obligations under this Section 4 are not subject to FERC's jurisdiction and shall not be included within any License Provision under the New License for the Project.

### **SECTION 5 LOW-COST POWER**

#### **5.1 PROVISION OF POWER AND ENERGY TO THE NATION**

For the term of the New License for the Project, the Power Authority shall make available an allocation of firm power and associated energy to the Nation, the purposes of which are to meet the Nation's current electricity requirements and accommodate reasonable increased electricity requirements of the Nation during the term of the New License; *provided, however*, that under no circumstances shall the Power Authority allocate more than a total of one (1) megawatt (with associated energy at the Nation's actual load factor) to the Nation under this Section 5.

#### **5.2 TERMS AND CONDITIONS FOR THE PROVISION OF POWER AND ENERGY**

Following the effective date of this Agreement, as set forth in Section 1.5 herein, the Parties shall negotiate an initial contract for the sale of the firm power and associated energy made available to the Nation under Section 5.1 herein. Such contract shall include, *inter alia*, the following terms and conditions:

- (a) *Amount and Cost of Power and Energy:* The Power Authority shall provide up to one (1) megawatt of firm power and associated energy to the Nation, which shall be sold at the Power Authority's cost-based rate for Niagara Project power and energy.
- (b) *Delivery of Power and Energy:* The point of delivery for sale of all power and energy sold to the Nation pursuant to this Agreement shall be at the Project Switchyard.
- (c) *Transmission and Delivery of Power and Energy:* It shall be the Nation's sole responsibility to arrange for the transmission and distribution of all power and energy sold to the Nation pursuant to this Agreement, including any and all charges imposed by Niagara Mohawk, the New York Independent System

Operator or any successors; *provided, however*, that the Power Authority shall cooperate with the Nation in making arrangements for the transmission and distribution of power and energy sold pursuant to this Agreement.

(d) *Resale of Power and Energy*: All power and energy sold to the Nation pursuant to this Agreement shall be for the sole purpose of serving, without mark-up, consumers within the Nation, as designated by the Nation. The Power Authority shall cooperate with the Nation in making arrangements for the sale and resale of power and energy sold pursuant to this Agreement.

(e) *Consistent with Applicable Law*: The Power Authority's sale of power and energy to the Nation pursuant to this Agreement shall at all times be consistent with the New License for the Project, the Niagara Redevelopment Act, the New York Public Authorities Law, and any other applicable law, license, precedent or regulation.

### **5.3 APPROVAL OF CONTRACT FOR THE SALE OF POWER AND ENERGY**

Following the negotiation of the contract for the sale of power and energy between the Parties, as set forth in Section 5.2 herein, the Power Authority staff shall recommend to the Power Authority's Trustees that, pursuant to New York's statutory approval process (New York Public Authorities Law § 1009), such contract be approved and submitted to the Governor of the State of New York for approval. Upon approval pursuant to such process, the Nation and the Power Authority shall execute such contract.

### **5.4 EFFECTIVE DATE OF OBLIGATION FOR SALE OF POWER AND ENERGY**

Notwithstanding any other provision of this Agreement, the Power Authority's obligation to sell power and energy to the Nation pursuant to this Agreement shall become effective upon the later of: (1) the first day after the Acceptance Date or (2) the date upon which the Power Authority and the Nation execute contracts for the sale of power and energy, as set forth in Section 5.3 herein.

### **5.5 NON-LICENSE MEASURE**

The Parties agree that the Power Authority's obligations under this Section 5 are not subject to FERC's jurisdiction and shall not be included within any License Provision under the New License for the Project.

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## **SECTION 6 LANDS**

### **6.1 CONVEYANCE OF 52-ACRE PARCEL TO THE NATION**

The Power Authority shall offer to the Nation an approximately 52-acre parcel, identified as "Parcel 1" on the maps in Appendix B, which is located within the Town of Lewiston,

immediately north of the Lewiston Reservoir and southeast of Upper Mountain Road. Parcel 1 is outside the proposed Project Boundary for the Project as set forth in Exhibit G of the Power Authority's Application for New License for the Project. The conveyance of Parcel 1 shall be subject to a purchase and sale agreement to be negotiated and executed between the Power Authority and the Nation, which shall include, but will not be limited to, the following terms and conditions:

- (a) *Quitclaim Deed:* The instrument of conveyance from the Power Authority to the Nation shall be a quitclaim deed containing no general or special warranties to the Nation.
- (b) *Environmental Investigations:* The Power Authority shall conduct Phase I and Phase II environmental site investigations prior to conveyance to the Nation. The results of such environmental site investigations shall be provided to the Nation prior to execution of the purchase and sale agreement.
- (c) *Environmental Indemnification:* The Power Authority shall agree to indemnify the Nation for environmental liabilities associated with Parcel 1 that resulted from the Power Authority's failure to comply with any applicable federal or state environmental law applicable to Parcel 1 during the period in which the Power Authority owned such parcel.
- (d) *Retention of Easement for Project Purposes:* The Power Authority shall retain an easement in Parcel 1 that allows the Power Authority to use the same, as necessary and appropriate to respond to Project-related emergencies; *provided, however,* that the Power Authority shall provide notice of its use of Parcel 1 to the Nation, to the extent such notice is reasonably practical under the circumstances and in any event not later than five days following the commencement of such use.
- (e) *Approval of Board of Trustees:* If deemed appropriate at the sole discretion of the Power Authority, the purchase and sale agreement shall condition the conveyance upon proper approval by the Power Authority's Board of Trustees.

## **6.2 NATION'S INTEREST IN LEWISTON RESERVOIR**

The Parties agree that if the Power Authority, at any time during the term of the New License for the Project, determines in its sole discretion and subject to FERC approval as necessary that it no longer needs, for its purposes or other public purposes, the lands occupied by the Lewiston Reservoir that were previously owned by the Nation and condemned by the Power Authority, the Power Authority will convey fee title to such lands to the Nation for nominal consideration, notwithstanding Ordering Paragraph 1 of the February 9, 1961 Decree of the United States District Court of the Western District of New York in *Power Authority of the State of New York v. 557.921 Acres of Land in the Town of Lewiston, Niagara County, New York, Civil Action No. 7934*.

### **6.3 CONSULTATION IN OTHER POSSIBLE LAND TRANSACTIONS**

If the Power Authority, at any time during the term of the New License for the Project, determines in its sole discretion and subject to FERC approval as necessary to surplus, dispense, or otherwise convey any real property interest in the vicinity of the Project, the Power Authority shall provide notice of that determination and consult with the Nation at its earliest opportunity prior to any such conveyance and in any event prior to obligating itself to third parties respecting such conveyances. With regard to a parcel in Artpark that has been offered to the Village of Lewiston pursuant to Section 5.1(h) of the Host Community Relicensing Settlement Agreement Addressing Non-License Terms and Conditions, the Power Authority will consult with the Nation regarding historic properties prior to conveying the interest to the Village. The Power Authority will also adhere to the consultation requirements of this Section 6.3 regarding the parcels referenced in Section 5.3 of the Host Community Relicensing Settlement Agreement Addressing Non-License Terms and Conditions.

### **6.4 NON-LICENSE MEASURE**

The Parties agree that the Power Authority's obligations under this Section 6 are not subject to FERC's jurisdiction and shall not be included within any License Provision under the New License for the Project.

## **SECTION 7 CULTURAL INITIATIVES**

### **7.1 PROGRAMS AND EVENTS OF THE NATION**

#### **7.1.1 Power Authority Support for Nation Programs and Events**

For the term of the New License for the Project, the Power Authority at the request of the Nation shall fund programs and events sponsored by the Nation that promote the arts, history, cultural heritage, and historic preservation of the Nation and the Tuscarora people, up to \$5,000 per calendar year; *provided, however*, such annual funding requirement does not preclude the Nation from seeking, or the Power Authority from providing, any additional funding consistent with the Power Authority's long-standing practice of public outreach and support to communities in the vicinity of the Project.

#### **7.1.2 Non-License Measure**

The Parties agree that the Power Authority's obligations under this Section 7.1 are not subject to FERC's jurisdiction and shall not be included within any License Provision under the New License for the Project.

## **7.2 CUSTOMARY USES OF PROJECT LANDS**

### **7.2.1 Development and Implementation of Customary Use Plan**

The Land Management Plan ("LMP") for the New License for the Project shall include a Customary Use Plan ("CUP") that recognizes customary uses of Project lands by the Tuscarora People. The Nation and Power Authority shall work together in developing the CUP, which will, as reasonably and practicably possible, include such uses as fishing, hunting, and gathering. The CUP shall be subject to the following conditions:

- (a) In no event shall the CUP effectuate any change in the Project Boundary or the operations of the Project.
- (b) The CUP shall be consistent with the Project's Recreation Plan, Historic Properties Management Plan ("HPMP"), FERC's policies on recreation at licensed hydroelectric projects, and considerations of public safety and Project security.
- (c) The CUP shall not supersede applicable New York State requirements pertaining to hunting and fishing licenses or applicable local ordinances, regulations, or other requirements regarding the possession and use of firearms.

### **7.2.2 License Measure**

The Parties agree that the Power Authority's obligations to include a CUP as part of the LMP under this Section 7.2 shall be included as a Proposed License Article submitted for FERC's approval as part of the Relicensing Agreement.

## **7.3 MANAGEMENT OF NON-PROJECT LANDS**

### **7.3.1 Facilitating Dialogue Between the Nation and OPRHP**

During the term of the New License for the Project, the Power Authority, upon request of the Nation, shall make a good faith effort to facilitate open communication and consultation between the Nation and OPRHP regarding OPRHP's management of lands outside the Project Boundary.

### **7.3.2 Non-License Measure**

The Parties agree that the Power Authority's obligations under this Section 7.3 are not subject to FERC's jurisdiction and shall not be included within any License Provision under the New License for the Project.

## **7.4 POWER VISTA EXHIBIT**

### **7.4.1 Development of Power Vista Exhibit**

The Power Authority shall work with the Nation and other parties in the development, implementation, and maintenance of a new exhibit at its Power Vista facility that is devoted to the Haudenosaunee people and their associations with the Project. The Power Authority shall contribute up to \$150,000 (NPV 2007) for the development and implementation of this exhibit, and the Power Authority shall be responsible for the cost of ongoing maintenance of the exhibit.

### **7.4.2 Non-License Measure**

The Parties agree that the Power Authority's obligations under this Section 7.4 are not subject to FERC's jurisdiction and shall not be included within any License Provision under the New License for the Project.

## **7.5 INTERNSHIP PROGRAM**

### **7.5.1 Establishment and Implementation of Internship Program**

The Power Authority shall develop and implement, in consultation with the Nation and other parties, an internship program. The specific details regarding eligibility requirements, selection criteria, and the Power Authority's implementation of the internship program shall be established in consultation between the Power Authority, the Nation and others; *provided, however*, that the program shall be subject to the following conditions:

- (a) Notwithstanding the requirements of Section 1.6 of this Agreement, the Power Authority's obligation to implement the internship program shall commence in the academic year following the Acceptance Date and shall extend through the remainder of the New License term.
- (b) The internship program shall accommodate, on an annual basis through the term of the New License for the Project, up to three (3) matriculated, degree-seeking university students. Participation in the internship program is restricted to citizens of the Nation, the Seneca Nation of Indians and the Tonawanda Seneca Nation.
- (c) The Nation shall have sole discretion in selecting its participants for the internship program based upon criteria established by the Nation, the Power Authority, and other parties in the development of the internship program.

- (d) Interns shall receive no monetary compensation for time spent with the Power Authority, nor shall interns receive a stipend for housing accommodations, living expenses or other expenditures during the duration of the internship.

#### **7.5.2 Non-License Measure**

The Parties agree that the Power Authority's obligations under this Section 7.5 are not subject to FERC's jurisdiction and shall not be included within any License Provision under the New License for the Project.

### **7.6 SCHOLARSHIP PROGRAM**

#### **7.6.1 Establishment and Implementation of Scholarship Program**

The Power Authority shall develop and implement, in consultation with the Nation, a scholarship program. The specific details regarding eligibility requirements, selection criteria, and the Power Authority's implementation of the scholarship program shall be established in consultation between the Power Authority and the Nation; *provided, however*, that the program shall be subject to the following conditions:

- (a) Notwithstanding the requirements of Section 1.6 of this Agreement, the Power Authority's obligation to implement the scholarship program shall commence in the academic year following the Acceptance Date and shall extend through the remainder of the New License term.
- (b) The scholarship program shall provide, on an annual basis through the term of the New License for the Project, two (2) undergraduate full-tuition scholarships to Nation citizens matriculating at any community college or university in the State University of New York system.
- (c) Only citizens of the Nation shall be eligible to participate in the scholarship program, and the Nation shall have sole discretion in selecting scholarship recipients based upon criteria established by the Nation and the Power Authority in the development of the scholarship program.
- (d) Except as provided in Section 7.6.1(e), each scholarship awarded under this Agreement will be extended for up to four (4) academic years, provided that the recipient: (1) remains a matriculated, degree-seeking student at a community college or university in the State University of New York system and (2) continues to meet

eligibility criteria to be developed in consultation between the Power Authority and the Nation.

- (e) For each academic year during the term of the New License for the Project, the Power Authority shall provide no more than eight (8) scholarships pursuant to this Section 7.6 unless otherwise agreed to by the Parties to accommodate individuals that may require more than four years to graduate.
- (f) When developing the scholarship program, the Power Authority and the Nation shall establish criteria for selecting alternative scholarship recipients to ensure, as reasonably as practicable, that each of the eight (8) available scholarships is utilized each academic year.

#### **7.6.2 Non-License Measure**

The Parties agree that the Power Authority's obligations under this Section 7.6 are not subject to FERC's jurisdiction and shall not be included within any License Provision under the New License for the Project.

### **SECTION 8 ONGOING RELATIONSHIP BETWEEN THE PARTIES**

#### **8.1 CONTINUING DIALOGUE FOLLOWING RELICENSING**

Commencing with the effective date of this Agreement, as set forth in Section 1.5 herein, the Power Authority and the Nation shall maintain an ongoing dialogue regarding the Project and the Power Authority's implementation of, and compliance with, the New License.

#### **8.2 CONSULTATION REQUIREMENTS**

The Power Authority shall consult with the Nation during its development or amendment of the HPMP, LMP, and Recreation Plan. During such consultation, the Nation may seek to discuss with the Power Authority its interest in exploring expansive uses of Lewiston Reservoir; *provided, however*, that in pursuing such discussions the Nation shall not seek from FERC any additional measures under the FPA, as precluded under Sections 1.2 and 3.1 of this Agreement and *provided further* that the Nation shall not seek operational changes to the Project, as precluded under Section 3.4 of this Agreement.

The Power Authority shall consult with the Nation prior to any revisions to the Project's Emergency Action Plan that could potentially affect the Nation; *provided, however*, that such consultation shall adhere to the requirements of Part 12 of FERC's regulations.



### **8.3 TRESPASS ON NATION LANDS**

The Power Authority and the Nation shall work together to develop reasonable and prudent measures to reduce and prevent, as practicably as possible, trespass on Nation lands by users of the Project's recreational facilities.

### **8.4 CAYUGA CREEK STREAM RESTORATION**

Section 4 of Appendix E to the Relicensing Agreement, which requires the Power Authority to provide funding for Cayuga Creek stream restoration, is incorporated herein by reference.

### **8.5 FISH TISSUE SAMPLING**

Pursuant to a letter agreement among the Nation, Power Authority, DOI and DEC, the Power Authority will fund a post-licensing fish tissue sampling study in Lewiston Reservoir to provide additional data for the Nation, DOI and DEC. Notwithstanding the Power Authority's commitment to fund such a study, the Nation shall not seek from FERC additional PM&E measures under the FPA as a result of this study.

### **8.6 ENERGY AUDIT AND ENERGY PLAN FOR THE NATION**

At the request and expense of the Nation, the Power Authority shall work with the Nation in conducting an energy audit and developing an energy plan for the Nation, including the identification of energy efficiency opportunities, new technologies, and applicable existing public programs offered by the Power Authority.

### **8.7 GENERAL PUBLIC OUTREACH PROGRAMS**

Nothing in this Agreement is intended to preclude, and this Agreement shall not be construed as precluding, the Nation from availing itself of any public outreach programs offered from time to time by the Power Authority.

### **8.8 LICENSE MEASURES**

The Parties agree that the following obligations under this Section 8 shall be included as Proposed License Articles submitted for FERC's approval as part of the Relicensing Agreement: (1) consultation in the development or amendment of the LMP, HPMP and Recreation Plan under Sections 8.2, and (2) development of reasonable and prudent measures to reduce and prevent trespass on Nation lands under Section 8.3. The Parties agree further that all other provisions of this Section 8 are not subject to FERC's jurisdiction and shall not be included within any License Provision under the New License for the Project.

**SECTION 9  
NATION PARTICIPATION IN POST-LICENSING COMMITTEES**

**9.1 ECOLOGICAL STANDING COMMITTEE**

**9.1.1 Nation Participation in Ecological Standing Committee**

The Nation shall be invited to serve on the Ecological Standing Committee ("ESC"), pursuant to Section 4.1 of the Relicensing Agreement, which Section 4.1 is incorporated herein by reference.

**9.1.2 License Measure**

The Parties agree that the Power Authority's obligation to include the Nation as a member of the ESC shall be included as a Proposed License Article submitted for FERC's approval as part of the Relicensing Agreement.

**9.2 GREENWAY ECOLOGICAL STANDING COMMITTEE**

**9.2.1 Nation Participation in Greenway Ecological Standing Committee**

The Nation shall be invited to serve on the Greenway Ecological Standing Committee, established under Section 1 of Appendix E of the Relicensing Agreement, which Section 1 of Appendix E is incorporated herein by reference.

**9.2.2 Non-License Measure**

The Parties agree that the Power Authority's obligations to establish the Niagara River Greenway Ecological Fund and Greenway Ecological Standing Committee are not subject to FERC's jurisdiction and shall not be included within any License Provision under the New License for the Project.

**SECTION 10  
DEFAULT**

**10.1 GENERAL**

Upon a Breach, the non-Breaching Party shall give written notice of such Breach to the Breaching Party. If the Breaching Party does not agree that a Breach has occurred, the dispute will be resolved in accordance with the dispute resolution procedures set forth in Section 14. If the Breaching Party acknowledges the Breach, the Breaching Party shall have thirty (30) days from receipt of the Default notice within which to cure such Breach; *provided, however*, if such Breach is not capable of cure within thirty (30) days, the Breaching Party shall commence such cure within thirty (30) days after notice and continuously and diligently complete such cure within ninety (90) days from receipt of Default notice and, if cured within such time, the Breach specified in such notice shall

cease to exist. No Default shall exist where such failure to discharge an obligation is the result of *Force Majeure* as defined herein in Section 15.

## **10.2 RIGHT TO TERMINATE**

If an acknowledged Breach is not cured as provided for in Section 10.1, or if a Breach is not capable of being cured within the period provided for herein, the non-Breaching Party shall have the right to declare a Default and, notwithstanding the requirements of Section 12 and Section 14 herein, immediately withdraw from this Agreement, be relieved of any further obligation hereunder, and recover from the Breaching Party all amounts due, plus all other damages and remedies provided for in law or equity; *provided, however*, that nothing in this Agreement shall be construed as, or is intended to constitute, a waiver of sovereign immunity of the Nation or the State of New York. The provisions of this Section 10 will survive termination of this Agreement.

## **SECTION 11 ADOPTION BY FERC**

The Parties have entered into this Agreement with the express expectation and condition that FERC approves the Offer of Settlement and issues a New License for the Project that incorporates, without modification or expansion, the License Terms and Conditions set forth in Section 3 herein, including the Proposed License Articles as numbered license articles. In addition, the Parties have entered into this Agreement with the express expectation and condition that: (1) DEC will issue a water quality certification under Section 401 of the CWA that is consistent with the terms of this Agreement and the Relicensing Agreement and (2) DOS will issue a Consistency Certification pursuant to the Coastal Zone Management Act ("CZMA") that is consistent with the terms of this Agreement and the Relicensing Agreement.

The Parties agree that if FERC approves the Offer of Settlement and incorporates all License Terms and Conditions, including the Proposed License Articles, into the New License without modification or expansion, the Parties will not seek rehearing of the FERC order granting a New License for any and all issues covered by this Agreement or support in any way any such request for rehearing by any non-Party to this Agreement.

The Parties reserve the right, even if FERC approves the Offer of Settlement and incorporates the License Terms and Conditions into the New License without modification or expansion, to seek rehearing or other administrative or judicial review in connection with: (1) any and all License Provisions included in the New License that are not set forth in Section 3 herein or (2) any and all provisions of the water quality certification issued by DEC pursuant to Section 401 of the CWA or Consistency Certification issued by DOS pursuant to the CZMA that are inconsistent with the terms of this Agreement or the Relicensing Agreement.

## **SECTION 12 WITHDRAWAL AND TERMINATION**

### **12.1 PROCESS FOR WITHDRAWAL**

Should any action by any of the Agencies materially and directly affect the provisions of this Agreement, including the License Terms and Conditions, and aggrieve the interests of any Party, the Parties agree to adhere to the following process for amending or withdrawing from this Agreement.

#### **12.1.1 Notification**

Within ten (10) days of issuance of an order containing the objectionable License Provision(s), the Party whose interests are directly and materially aggrieved by such License Provision(s) shall provide written notification, pursuant to the requirements of Section 18.1 of this Agreement, to the other Party of its intent to withdraw from the Agreement.

#### **12.1.2 Administrative Appeals**

Following notification as set forth in Section 12.1.1, the aggrieved Party shall file a request for rehearing and/or pursue all appropriate administrative appeals, requesting the agency responsible for the objectionable License Provision(s) to amend such License Provision(s) to conform to this Agreement.

#### **12.1.3 Good-Faith Negotiation**

Following the submittal of administrative appeal(s) as set forth in Section 12.1.2, the Parties agree that the aggrieved Party shall engage the other Party in good-faith negotiations in an attempt to amend this Agreement by making it conform to the objectionable License Provision(s). The Parties agree to a one hundred twenty (120) day period to conduct good-faith negotiations under this Section, with a minimum of three (3) meetings to be held during a ninety (90) day period.

If, during the pendency of the good-faith negotiations, an order is issued that alleviates the aggrieved Party's concerns, the Parties shall discontinue the negotiation process. If, however, an order is issued during the pendency of the good-faith negotiations that denies the Parties' joint administrative appeal or does not reverse the objectionable License Provision(s), the Parties shall continue the negotiations under this Section, but the aggrieved Party may pursue judicial review, pursuant to Section 12.1.4 of this Agreement.

If the good-faith negotiations result in an agreement between the Parties to amend this Agreement to conform it to the objectionable License Provision(s), the aggrieved Party shall withdraw any administrative appeal(s) filed pursuant to

Section 12.1.2 or petition for review filed pursuant to Section 12.1.4, and this Agreement shall be deemed modified to conform to said order.

#### **12.1.4 Judicial Review**

If, as a result of an administrative appeal(s) filed pursuant to Section 12.1.2 of this Agreement, a final order is issued denying the merits of the appeal by not reversing the objectionable License Provision(s), the aggrieved Party may file a petition for review by the appropriate reviewing court. The other Party may intervene in the proceeding, but said Party shall not take a position adverse to the terms of this Agreement.

#### **12.1.5 Withdrawal**

The Party whose interests are materially and directly aggrieved by any License Provision may withdraw from this Agreement, but only after: (1) the Parties comply with Sections 12.1.1 through 12.1.4 of this Agreement and (2) the aggrieved Party exhausts all available avenues for review of the order(s) imposing the objectionable License Provision(s) by filing timely requests for rehearing, petitions for review, and other required filings to continue the review process. Following the final, non-appealable order or ruling that fails to remedy the objectionable License Provision(s), the aggrieved Party may provide written notification to the other Party of its withdrawal from this Agreement, pursuant to the notification requirements of Section 18.1. Upon notification, the provisions of Section 12.2 of this Agreement shall apply.

If the aggrieved Party fails to comply with Sections 12.1.1 through 12.1.4 of this Agreement or exhaust all available avenues for review of the order(s) imposing the objectionable License Provision(s), then the Party may not withdraw from this Agreement, and, upon expiration of the time period to continue the review process, this Agreement shall be deemed amended with the final order issued by an administrative agency or court.

### **12.2 EFFECT OF WITHDRAWAL**

#### **12.2.1 Withdrawal from this Agreement**

Withdrawal by any Party, pursuant to Section 12.1 of this Agreement, shall render this Agreement null and void, and the Parties shall not have any rights or obligations under this Agreement, nor shall any Party receive any benefits under this Agreement. Notwithstanding this Agreement being rendered null and void, the Parties shall continue to be bound by Section 10 and Section 13 of this Agreement. If this Agreement is rendered null and void, the Parties agree that FERC cannot consider this Agreement as part of the record of the relicensing proceeding when issuing a New License for the Project.

### **12.2.2 Effect of Termination of the Relicensing Agreement**

If the Relicensing Agreement is terminated for any reason, the Power Authority may elect, in its sole discretion, to let this Agreement stand, thereby obligating the Power Authority and the Nation to continue to be bound by the terms of this Agreement, or to unilaterally withdraw from this Agreement, notwithstanding the requirements of Section 12.1 herein. If the Power Authority invokes this option to withdraw from this Agreement in response to the termination of the Relicensing Agreement, the provisions of Section 12.2.1 of this Agreement shall apply.

## **SECTION 13 SETTLEMENT NEGOTIATIONS PRIVILEGED**

The Parties have entered into the negotiations and discussions leading to this Agreement with the understanding that, to the fullest extent allowed by law, all discussions relating to this Agreement are privileged and confidential. This material shall not prejudice the position of any Party or participant taking part in such discussions and negotiations and are not to be used by any entity in any manner, including admission into evidence, in connection with these or any other proceedings related to the subject matter of this Agreement. In the event that this Agreement is terminated and/or rendered null and void as provided herein, the Agreement and all drafts, work papers, and notes related to its development, to the fullest extent allowed by law, shall be deemed settlement materials and shall not constitute a part of the record in any proceeding, nor be admissible into evidence in any proceeding related to the subject matter of this Agreement.

## **SECTION 14 RESOLVING DISPUTES AMONG THE PARTIES**

### **14.1 DISPUTE RESOLUTION FOR LICENSE PROVISIONS**

The Parties agree to utilize the following alternative dispute resolution mechanism to resolve all disputes related to the compliance with, or the performance of, obligations set forth in this Agreement and incorporated into the FERC-issued New License:

#### **14.1.1 Notice of Dispute**

Any Party who believes that a dispute has arisen shall provide written notice pursuant to Section 18.1 to the other Party describing the matter(s) in dispute, ~~including the proposed relief or resolution to address the dispute.~~

#### **14.1.2 Consultation**

The Parties shall commence a one hundred twenty (120) day Consultation period (measured from the date of the notice of the dispute) to engage in good faith negotiations to resolve the dispute(s). During the Consultation period, the Parties shall hold at least three meetings. At any time during this one hundred and twenty

(120) day Consultation period, the Parties may, by mutual consent, initiate Facilitated Mediation as set forth in Section 14.1.3.

#### **14.1.3 Facilitated Mediation**

If a disagreement persists at the conclusion of the Consultation period, or if the Participating Parties mutually consent during the Consultation period, an aggrieved Party may, within fifteen (15) days after the conclusion of the Consultation period, initiate Facilitated Mediation through a mutually agreed upon organization. The mediation process shall continue until the dispute is settled or until the mediator makes a finding that there is no possibility of settlement through Facilitated Mediation. At any time during Facilitated Mediation, the Parties may, by mutual consent, initiate proceedings before FERC as set forth in Section 14.1.4.

#### **14.1.4 FERC Proceedings**

If a disagreement persists at the conclusion of the Facilitated Mediation, or if the Parties mutually consent during Facilitated Mediation, an aggrieved Party may, within fifteen (15) days after the conclusion of Facilitated Mediation, initiate proceedings before FERC as set forth in its Rules of Practice and Procedure.

### **14.2 DISPUTE RESOLUTION PROCESS FOR NON-LICENSE PROVISIONS**

The Parties agree to utilize the following alternative dispute resolution mechanism to resolve all disputes related to the compliance with, or the performance of, obligations set forth in this Agreement which are not incorporated into the FERC-issued New License:

#### **14.2.1 Notice**

Any Party who believes that a dispute has arisen shall provide written notification pursuant to Section 18.1 to the other Party describing the matter(s) in dispute, the circumstances under which it arises, and the proposed relief or resolution to address the dispute.

#### **14.2.2 Consultation**

The Parties shall commence a one hundred twenty (120) day Consultation period (measured from the date of the notice of the dispute) to engage in good faith negotiations to resolve the dispute(s). During the Consultation period, the Parties shall hold at least three meetings. At any time during the Consultation period, the Parties may, by mutual consent, initiate Facilitated Mediation as set forth in Section 14.2.3.

#### **14.2.3 Facilitated Mediation**

If disagreement persists at the conclusion of the Consultation period, or if the Parties mutually consent during the Consultation period, an aggrieved Party may, within fifteen (15) days after the conclusion of Consultation, initiate Facilitated Mediation through a mutually-agreed upon organization. The mediation process shall continue until the dispute is settled or until the mediator makes a finding that there is no possibility of settlement through Facilitated Mediation.

#### **14.2.4 Further Proceedings**

If the Parties choose not to engage in Facilitated Mediation, or if a disagreement persists at the conclusion of the Facilitated Mediation, or if the Parties mutually consent during Facilitated Mediation, the Parties may commence further proceedings to resolve the dispute, as provided under Section 17 of this Agreement.

### **SECTION 15 FORCE MAJEURE**

An event of *Force Majeure* as used herein means any event beyond the reasonable control of and which occurs without the fault or negligence of the Power Authority or any entity controlled by the Power Authority, including its contractors and subcontractors (to the extent said contractor was acting under the control or direction of the Power Authority), which events may include but are not limited to: any delay or failure to grant a permit or other regulatory authorization required by law to be granted by any Federal, State, or local government authority, or any regulation, law, or prohibitory or mandatory action of any Federal or State governmental authority; acts of God or sudden actions of the elements, including fire; drought or critically high or low flows and levels in the Lake Erie/Lake Ontario/Niagara River watershed; strikes, lockouts or other similar industrial disturbances; acts of the public enemy, including terrorist acts, wars, civil disturbances, blockades, military actions, insurrections or riots; landslides, floods, washouts, lightning, earthquakes, tornadoes, hurricanes, blizzards or other storms or storm warnings; explosions, fires, sabotage, or vandalism; breakage, defects, malfunctioning, or accident to machinery, equipment, materials, or lines of pipe or wires; freezing of machinery, equipment, materials, or lines of pipe or wires; inability or delay in the obtaining of materials or equipment; inability to obtain or utilize any permit, approval, easement, license or right-of-way. The settlement of strikes, lockouts, or other similar such industrial disturbances shall be entirely within the discretion of the Power Authority. The requirement herein that any event of *Force Majeure* shall be remedied with all reasonable dispatch shall not require the settlement of strikes, lockouts or other similar such industrial disturbances when such course is, in the opinion of the Power Authority, inadvisable.

If any event of *Force Majeure* directly renders the Power Authority unable, wholly or in part, to perform any obligations under this Agreement which are not included as License Provisions in the New License, it is agreed that, upon giving notice and full particulars of such event of *Force Majeure* to other Parties, as soon thereafter as practicable, the Power Authority is authorized to



suspend performance under such obligations during the continuance of any inability or incapacity so caused, but for no longer period; *provided, however*, the Power Authority shall not be relieved from: (1) any obligations of this Agreement not directly affected by the event of *Force Majeure* or (2) any obligation to make payment to another Party for pre-existing obligations. The Power Authority shall use best efforts to remedy the cause of such inability or incapacity with all reasonable dispatch, including, but not limited to, the prompt commencement and prosecution of litigation. When the Power Authority is able to resume performance of its obligations, it shall give the other Parties notice to that effect. The occurrence of a *Force Majeure* that results in impossibility of performance of an obligation, however, shall excuse the Power Authority's performance.

## **SECTION 16 HEADINGS**

The descriptive headings of the various Sections of this Agreement have been inserted for convenience of reference only and are of no significance in the interpretation or construction of this Agreement. To the extent that there is any inconsistency between the heading of a Section of this Agreement and the text of the Section, the text shall govern.

## **SECTION 17 CHOICE OF LAW, SOVEREIGN IMMUNITY, AND VENUE**

All provisions of this Agreement that are addressed by and incorporated into the New License shall be enforceable solely through proceedings before FERC. With regard to any and all other matters, this Agreement is a binding contract between the Parties and shall be governed by and construed under New York law without reference to its conflicts of law principles; *provided, however*, that nothing in this Agreement shall be construed as, or is intended to constitute, a waiver of sovereignty of the Nation or the State of New York.

Any action at law, suit in equity, or other judicial proceedings for the enforcement of this Agreement or any of its provisions must be brought and maintained only in a court of competent jurisdiction located in Albany County, New York.

## **SECTION 18 NOTICE AND COMMUNICATION**

### **18.1 NOTIFICATION REQUIREMENTS**

All written notices to be provided pursuant to this Agreement shall be mailed by U.S. certified mail, or overnight express service, postage prepaid, to each Party at the addresses listed below in Section 18.2 or at a subsequent address, as a Party shall identify. Notices shall be deemed to be given five (5) business days after the date of mailing or on date of receipt if overnight express or other receipt-notification service is used.

## **18.2 NOTIFICATION CONTACT INFORMATION**

For purposes of implementing this Agreement, the Parties agree that the following individuals shall be designated the primary contact persons and all written notices shall be posted to these individuals at the addresses listed below. Notification of changes in the contact persons must be made in accordance with Section 18.1 to the other contact person:

Keith Silliman  
Director, Niagara Relicensing  
Power Authority of the State of New York  
30 South Pearl Street, 10th Floor  
Albany, NY 12207  
Telephone: (518) 433-6735  
Facsimile: (518) 433-6781  
E-mail: keith.silliman@nypa.gov

Neil Patterson, Jr.  
Tuscarora Environment Program  
2045 Upper Mountain Road  
via Sanborn, NY 14132  
Telephone: (716) 609-3818

## **18.3 OTHER COMMUNICATIONS**

Notices and other communications not required to be made to all Parties or not required to be made in a specific manner under the terms of this Agreement need not be in writing and may be made by telephone, electronic mail, or facsimile.

## **SECTION 19 COSTS**

Except as provided in this Agreement, both Parties shall bear their own costs of participating in this Agreement.

## **SECTION 20 MERGER CLAUSE**

This Agreement, including all Appendices attached hereto and those provisions and Appendices of the Relicensing Agreement which have been explicitly incorporated herein by reference, constitutes the entire agreement between the Parties with reference to the subject matter hereof and supersedes all prior and contemporaneous understandings or agreements, oral or written, between the Parties with respect to the subject matter of this Agreement.

## **SECTION 21 WAIVER**

The failure of any Party to this Agreement to insist, on any occasion, upon strict performance of any provision of this Agreement will not be considered a waiver of any obligation, right, or duty of, or imposed upon, such Party.

**SECTION 22  
AMENDMENT**

The Parties may, by mutual agreement, amend this Agreement by a written instrument duly executed by the Parties.

**SECTION 23  
RESERVATION OF RIGHTS**

The Power Authority reserves all of its rights under the FPA to unilaterally petition FERC to, among other things, amend or otherwise modify the New License; *provided, however*, that the Power Authority shall not seek amendments or modifications inconsistent with the provisions of this Agreement.

**SECTION 24  
EXECUTION**

Each signatory to this Agreement represents that: (1) he or she is authorized to execute this Agreement and legally bind the Party he or she represents and (2) the Party he or she represents will be fully bound by the terms hereof. This Agreement may be executed in any number of counterparts, and each executed counterpart shall have the same force and effect as an original instrument as if all the signatory parties had signed the same instrument. Any signature page of this Agreement may be detached from any counterpart of this Agreement without impairing the legal effect of any signature(s) thereon and may be attached to another counterpart of this Agreement identical in form hereto but having attached to it one or more signature pages.

Intending to be legally bound, the Parties have executed this Agreement through their duly authorized representatives.

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed as of the date set forth in this Agreement.

**POWER AUTHORITY OF THE STATE OF NEW YORK**

By: Eugene W. Zeltmann Date: 7/27/05  
Eugene W. Zeltmann, President and Chief Executive Officer  
Power Authority of the State of New York

**TUSCARORA NATION**

By: Chief Leo R. Henry Date: 8/1/05  
Chief Leo R. Henry  
Tuscarora Nation

**APPENDIX A**  
**MEMORANDUM OF AGREEMENT**

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Memorandum of Agreement  
between the  
New York Power Authority  
and the  
Tuscarora Nation

Parties

The Tuscarora Nation (Nation) is a federally recognized sovereign Indian Nation with a traditional government consisting of Chiefs in Council and Clanmothers. The Tuscarora are the sixth member nation of the Six Nations.

The New York Power Authority (Power Authority) is a governmental entity formed by the State of New York, a sovereign State of the United States, to provide low-cost power and energy to private and public customers in New York State.

Background

In 1957, the Federal Power Commission (Commission) issued a license to the Power Authority for the construction of a non-federal hydropower development, the Niagara Power Project, on the Niagara River. In 1960, the United States Supreme Court ruled in *Federal Power Commission v. Tuscarora Indian Nation*, that the license gave the Authority the power to condemn 497 acres of Tuscarora land in fee simple absolute and approximately 60 acres of easement for the development of the Niagara Power Project. [362 U.S. 99 (1960)]. Specifically, the Court held that because the lands in question were owned by the Nation, rather than held in trust for the Nation by the United States, "a Commission finding . . . that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired is not necessary to the issuance of a license embracing . . . Tuscarora lands." [362 U.S. at 115]. Pursuant to that ruling, the Power Authority instituted an action in the United States District Court for the Western District of New York to acquire the Tuscarora lands. In February 1961, the Court so ordered the condemnation and the parties in February 1961 and in January of 1963 entered into stipulations settling the condemnation action. The lands acquired by the Power Authority were then developed as part of the Niagara Power Project, which borders the Tuscarora Nation's remaining lands.

The Power Authority's license to operate the Niagara Power Project will expire on August 31, 2007. The Power Authority intends to notify the Federal Energy Regulatory Commission (FERC) of its intent to apply for a new license for the Niagara Power Project and will conduct pre-filing consultation with the Nation, resource agencies and other stakeholders, including the development of environmental data required for relicensing.

Purpose

The purpose of this Memorandum of Agreement is to set forth the principles governing the unique working relationship between the Nation and the Power Authority during the relicensing process and to establish a communications protocol which will facilitate coordination of the efforts of both parties to protect the area's natural resources.

Articles of Agreement

- 1) In the Spirit of the Treaty of Canandaigua (1794), the peace and friendship of the aforesaid parties is firmly established and shall be perpetual between them.
- 2) The Tuscarora Nation's role in the relicensing of the Niagara Power Project is based upon:
  - (a) Its status as a sovereign Indian Nation;
  - (b) The government-to-government relationship existing today between the Tuscarora Nation and the United States and between the Tuscarora Nation and the State of New York;
  - (c) The consultation requirements of the Federal Power Act and the regulations promulgated thereunder; and
  - (d) The Nation's interests retained pursuant to the Decree of the United States District Court for the Western District of New York (Civil Action No. 7934), dated February 9, 1961, and annexed stipulation.
- 3) Consistent with the Nation's role in the relicensing process, the parties agree:
  - (a) That the Power Authority will timely inform the Nation of non-privileged substantive communications pertaining to the alternative relicensing process it has with FERC, with federal or state resource agencies, or with other stakeholders;
  - (b) That the Power Authority will inform the Nation prospectively of those undertakings by the Power Authority, its contractors or agents, relative to relicensing, which impact the Nation's interests; and
  - (c) That the Power Authority and the Nation will continue to work together on environmental studies and on other matters of mutual concern.
- 4) Nothing in this memorandum in any way diminishes the sovereignty of the State of New York or the Tuscarora Nation. This memorandum may be modified in writing with the consent of both parties or terminated by either party upon notice to the other.

**NEW YORK POWER AUTHORITY**

By: 

Louis P. Ciminelli  
Chairman

1/27/03  
Date

**TUSCARORA NATION**

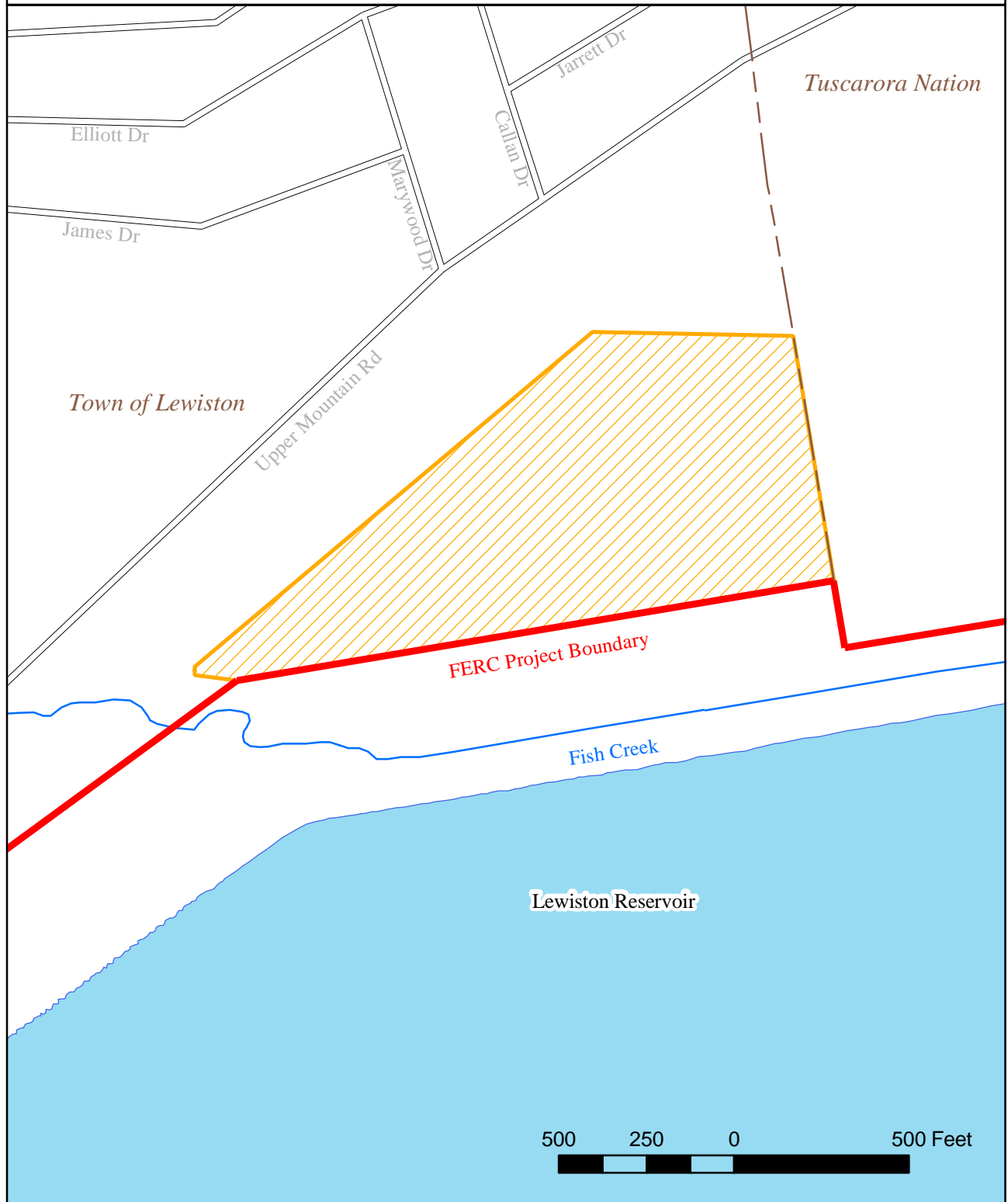
By: 

Chief Leo R. Henry  
Clerk

1/27/03  
Date

**APPENDIX B**  
**MAP OF CONVEYED PARCEL**

## APPENDIX B: PARCEL 1



NIAGARA POWER PROJECT (FERC NO. 2216)





**NIAGARA POWER PROJECT  
FERC PROJECT NO. 2216**

**RELICENSING SETTLEMENT AGREEMENT  
ADDRESSING ALLOCATION OF NIAGARA  
PROJECT POWER AND ENERGY TO  
NEIGHBORING STATES**

**This RELICENSING SETTLEMENT AGREEMENT ADDRESSING ALLOCATION OF NIAGARA PROJECT POWER AND ENERGY TO NEIGHBORING STATES ("Agreement"), by and among the Power Authority of the State of New York ("Power Authority"), and the bargaining agents for the State of Connecticut, Commonwealth of Massachusetts, State of New Jersey, State of Ohio, Commonwealth of Pennsylvania, State of Rhode Island, and State of Vermont (collectively, the "Parties").**

**WITNESSETH:**

**WHEREAS, the Power Authority owns and operates the Niagara Power Project ("Project") located on the Niagara River in Niagara County, New York;**

**WHEREAS, the 50-year original license for the Project, issued to the Power Authority by the Federal Power Commission on January 30, 1958, expires on August 31, 2007;**

**WHEREAS, the Power Authority, pursuant to the requirements of the federal Niagara Redevelopment Act ("NRA") and Articles 20 and 21 of the original license for the Project, has provided Project power and energy to the neighboring states of Connecticut, Massachusetts, New Jersey, Ohio, Pennsylvania, Rhode Island and Vermont (collectively, "Neighboring States"), which power and energy have been procured by the designated bargaining agents for their respective Neighboring States;**

**WHEREAS, the Parties recognize the importance of reliable, low-cost, Project power to the Power Authority's customers, the region, the State of New York and the Neighboring States;**

**WHEREAS, the Power Authority, on or before August 31, 2005, will file an application with the Federal Energy Regulatory Commission ("Commission" or "FERC") seeking a 50-year New License for the continued operation and maintenance of the Project; and**

**WHEREAS, the Parties, in recognition of the requirements of the NRA as they relate to the Neighboring States, have negotiated and resolved the manner in which such requirements should be addressed in the New License issued by the Commission.**

**NOW THEREFORE, in consideration of the mutual covenants set forth herein, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:**

**SECTION 1  
GENERAL PROVISIONS**

**1.1 Definitions**

**"Agreement" shall mean this Relicensing Settlement Agreement Addressing Allocation of Niagara Project Power and Energy to Neighboring States.**

**"Commission" or "FERC" shall mean the Federal Energy Regulatory Commission.**

**"Contracts"** shall mean those contracts substantially in the form of Attachment A, as described in Section 4.1 of this Agreement.

**"FPA"** shall mean the Federal Power Act, 16 U.S.C. § 791 *et seq.*

**"License"** shall mean the regulatory authorization for construction, maintenance, and operation of a hydroelectric project subject to the jurisdiction of the Commission pursuant to the FPA.

**"Licensee"** shall mean the Power Authority of the State of New York, the legal entity to which the Commission issues the New License for the Project.

**"License Provision"** shall mean any term, condition, prescription, requirement, holding, reservation, or article included in the New License for the Project by the Commission, or any condition, term, reservation or other License requirement adopted or otherwise included into the New License for the Project.

**"License Terms and Conditions"** shall mean the terms, prescriptions, conditions, and articles set forth in Section 3.

**"Neighboring States"** shall mean the State of Connecticut; Commonwealth of Massachusetts; State of New Jersey; State of Ohio; Commonwealth of Pennsylvania; State of Rhode Island; and State of Vermont.

**"New License"** shall mean the first new License issued by the Commission to the Power Authority for the continued operation and maintenance of the Project, pursuant to Section 15 of the FPA, effective after expiration of the Project's original license issued on January 30, 1958.

**"NRA"** shall mean the federal Niagara Redevelopment Act, 16 U.S.C. §§ 836-836a.

**"Offer of Settlement"** shall mean an offer of settlement to be filed with the Commission pursuant to 18 C.F.R. § 385.602, which offer shall include this Agreement.

**"Party" or "Parties"** shall mean the Power Authority of the State of New York, and the bargaining agents for the State of Connecticut, Commonwealth of Massachusetts, State of New Jersey, State of Ohio, Commonwealth of Pennsylvania, State of Rhode Island, and State of Vermont.

**"Power Articles"** shall mean the two Articles set forth in Section 3.1 of this Agreement.

**"Power Authority"** shall mean the Power Authority of the State of New York.

**"Project"** shall mean the Niagara Power Project, licensed to the Power Authority as FERC Project No. 2216.

## **1.2 Full and Final Resolution**

This Agreement is a full and final resolution of all issues among the Power Authority and Neighboring States that were raised or that could have been raised in FERC Docket No. P-2216, relating to the Neighboring States' interests in the relicensing of the Project. As evidenced by this Agreement, all Neighboring States support the Power Authority's Application for New License for the Project, to be filed on or before August 31, 2005, as supplemented and revised by the Offer of Settlement filed with the Commission by the Power Authority, as set forth in Section 2.1.1 herein.

## **1.3 Compliance with Statutes and Regulations**

The Parties represent that as to the interests of the Neighboring States in the relicensing of the Project, this Agreement is consistent with statutory and regulatory requirements under Federal and New York State law concerning the preference power terms of the New License. No License Provision, other than the License Terms and Conditions set forth in Section 3 herein, is necessary to satisfy any Federal or New York State law pertaining to the Neighboring States' interests concerning the preference power terms of the New License.

## **1.4 Effective Date and Term of Agreement**

This Agreement shall become effective upon execution by all Parties. Except as provided herein, this Agreement shall remain in effect for the term of the New License issued by the Commission for the Project and for any annual license issued subsequent thereto. This Agreement shall be binding on and inure to the benefit of the Parties and their successors, unless otherwise specified in this Agreement.

## **1.5 Enforceability**

- (a) It is the intent of the Parties that the Power Articles set forth in Section 3.1 herein shall be enforced by the Commission.
- (b) Nothing in this Agreement shall be construed as conferring, foreclosing, or otherwise defining the jurisdiction, authorities and obligations of the Commission under the NRA.

## **SECTION 2 SETTLEMENT COMMITMENTS**

### **2.1 Commitments of the Power Authority**

#### **2.1.1 Offer of Settlement**

Concurrent with the filing of an application for a New License for the Project, the Power Authority shall file this Agreement as part of an Offer of Settlement with the Commission.

#### **2.1.2 Implementation of Settlement Commitments**

Except as set forth in Section 5.2 below, the Power Authority shall comply with, carry out, and implement all commitments in this Agreement, according to the effective date of such commitments.

### **2.2 Commitments of the Neighboring States**

#### **2.2.1 Submittal of Additional Study Requests and Recommendations**

In connection with the Power Authority's Application for a New License, the Neighboring States shall not submit to the Commission any request for additional studies or measures or make any further recommendations concerning the New License Application after the Power Authority files its Application for New License with the Commission.

#### **2.2.2 No Opposition to Application or Offer of Settlement**

The Neighboring States shall not oppose the Power Authority's Application for New License or the Offer of Settlement. Nothing in this Section 2.2.2 shall be construed as prohibiting any of the Neighboring States from submitting comments to the Commission, either individually or collectively, in support of the Offer of Settlement, as provided under 18 C.F.R. § 385.602(f).

### **2.3 Commitments of All Parties**

#### **2.3.1 Filings and Submittals Consistent with Agreement**

All Parties shall ensure that, throughout the term of this Agreement, any and all of the Parties' filings or other submittals with the Commission or any other administrative entity or court are consistent with this Agreement. The Parties shall not support, propose, or advocate, any measure, condition, provision or remedy that is in any way contrary to, or inconsistent with, this Agreement. Notwithstanding the foregoing, the Neighboring States reserve their rights under applicable law to (1) participate fully in any future license amendment

proceedings initiated by the Power Authority, its successors or others, and (2) enforce this Agreement and the Contracts.

### **2.3.2 Support Adoption of License Terms and Conditions**

All Parties shall support, in all relevant regulatory proceedings, the incorporation of the License Terms and Conditions into the New License issued by the Commission.

## **SECTION 3 LICENSE TERMS AND CONDITIONS**

### **3.1 Provision of Project Power and Energy to Neighboring States**

The New License for the Project shall include the following two Power Articles, without modification:

*Article A. In order to assure that at least 50 per centum of the project power shall be available for sale and distribution primarily for the benefit of the people as consumers, particularly domestic and rural consumers, to whom such power shall be made available at the lowest rates reasonably possible and in such manner as to encourage the widest possible use, the Licensee in disposing of 50 per centum of the project power shall give preference and priority to public bodies and non-profit cooperatives within economic transmission distance. In any case in which project power subject to the preference provisions of this Article is sold to utility companies organized and administered for profit, the Licensee shall make flexible arrangements and contracts providing for the withdrawal upon reasonable notice and fair terms of enough power to meet the reasonably foreseeable needs of the preference customers.*

*Article B. The Licensee shall make a reasonable portion of the project power subject to the preference provisions of Article A available for use within reasonable economic transmission distance in neighboring States, defined herein as the State of Connecticut, Commonwealth of Massachusetts, State of New Jersey, State of Ohio, Commonwealth of Pennsylvania, State of Rhode Island, and State of Vermont, but this Article shall not be construed to require more than 20 per centum of the project power subject to such preference provisions to be made available for use in such States. The Licensee shall cooperate with the appropriate agencies in such States to ensure compliance with this requirement. In the event of disagreement between the Licensee and the power marketing agencies of any of such States, the Federal Energy Regulatory Commission may, after public hearings, determine and fix the applicable portion of power to be made available and the terms applicable thereto: Provided, That if any such State shall have designated a bargaining agency for the procurement of such power on behalf of such State, the Licensee shall deal only with such agency in that State. The arrangements made by the Licensee for the sale of power to or in such States shall include observance of the preferences in Article A.*

### **3.2 License Term**

The New License granted to the Power Authority shall be for a term of fifty (50) years.

## **SECTION 4 NON-LICENSE CONTRACTUAL TERMS**

### **4.1 Contracts for Project Power and Energy for the Period Through September 1, 2025**

Within ninety (90) days of the effective date of this Agreement, the Staff of the Power Authority shall recommend to the Power Authority's Trustees that, subject to New York's statutory approval process (New York Public Authorities Law § 1009), Contracts substantially in the form annexed to this Agreement as Attachment A for the sale of Project power and energy at cost-based rates for the period September 1, 2007 through September 1, 2025, be approved and submitted to the Governor for approval. Upon approval of Contracts substantially in the form annexed to this Agreement as Attachment A pursuant to such process, the Neighboring States and the Power Authority shall execute such Contracts.

Nothing in this Agreement shall be construed as conferring, foreclosing, or otherwise defining the jurisdiction or authority of the Commission to construe or otherwise enforce the Contracts.

### **4.2 Failure to Approve Contract**

In the event that New York's statutory approval process for the Contracts does not result in approval by the Governor of any Neighboring State's Contract, without modification, within twelve (12) months of the effective date of this Agreement, any Neighboring State may withdraw from this Agreement as provided in Section 5.2, at its sole discretion, by providing written notice of such withdrawal to the Power Authority.

## **SECTION 5 PROCEDURAL MATTERS**

### **5.1 Rehearing and Further Proceedings Related to Allocation of Project Power**

The Power Authority and the Neighboring States have entered into this Agreement with the express expectation and condition that the Commission approves this Agreement as part of an Offer of Settlement and issues the Power Authority a New License for the Project that incorporates, without modification the Power Articles set forth in Section 3.1 herein, as license articles in the New License. Upon Commission approval of the Offer of Settlement and incorporation of the Power Articles into the New License without modification, none of the Parties will seek rehearing at the Commission with respect to any and all issues associated with the Power Articles.

## **5.2 Termination**

### **5.2.1 Rejection or Modification of Agreement or License Terms and Conditions by the Commission**

In the event that the Commission issues any licensing order, including its order granting a New License for the Project, which:

- (a) declines to adopt either of the Power Articles; or
- (b) adopts any License Provision that materially and directly affects either of the Power Articles; or
- (c) materially expands or modifies either of the Power Articles upon adoption; or
- (d) rejects, modifies, or imposes conditions on approval of this Agreement, unless such modification or conditions are acceptable to all Parties,

this Agreement shall be considered amended to conform to the Commission order, unless any Party whose interests are materially and directly aggrieved by such order withdraws from this Agreement by providing written notification to all other Parties of its withdrawal within 21 days of the Commission's order rejecting or modifying this Agreement or the License Terms and Conditions. If any Party fails to provide such written notification to all other Parties within 21 days of the Commission's order, its right pursuant to this section to withdraw from this Agreement shall be deemed waived. However, regardless of the failure to provide the notification set forth in the immediately preceding sentence, any Party materially and directly aggrieved by such order shall have the right to seek rehearing or judicial review of the portion of such order which materially and directly aggrieves it.

### **5.2.2 Termination of All Other Settlement Agreements Included in the Offer of Settlement**

In the event that the Commission issues any licensing order, including its order granting a New License for the Project, which declines to adopt or materially expands or modifies any of the proposed license articles set forth in the Offer of Settlement, the Power Authority may elect, in its sole discretion, to withdraw from this Agreement by providing written notification to all other Parties of its withdrawal within 21 days of the Commission's order; *provided, however*, that the Power Authority also withdraws from all other settlement agreements included in the Offer of Settlement.



### **5.2.3 Effect of Withdrawal from Agreement**

If the Power Authority withdraws from this Agreement, as provided in Sections 5.2.1 and 5.2.2, this Agreement shall be terminated and rendered null and void, and the Parties shall not have any rights or obligations under this Agreement, nor shall any of them receive any benefits under this Agreement. Notwithstanding this Agreement being rendered null and void, the Parties shall continue to be bound by Section 5.3 of this Agreement. If this Agreement is rendered null and void the Commission cannot consider this Agreement as part of the record of the relicensing proceeding when issuing a New License for the Project.

If any of the Neighboring States withdraw from this Agreement, as provided in Section 4.2 or Section 5.2.1, this Agreement shall not be terminated or rendered null and void. Such withdrawal, however, shall render this Agreement null and void as to the withdrawing Party, and the withdrawing Party shall have no rights or obligations under this Agreement, nor shall the withdrawing Party receive any benefits under this Agreement. Notwithstanding, the withdrawing Party shall continue to be bound by Section 5.3 of this Agreement.

Notwithstanding the termination of this Agreement or the withdrawal from this Agreement by any Neighboring State, nothing in this Agreement shall be construed as, or is intended to constitute, an obviator or extinguishment of the Power Authority's obligations under the NRA.

### **5.3 Settlement Negotiations Privileged**

The Parties have entered into the negotiations and discussions leading to this Agreement and the Contracts with the understanding that, to the fullest extent allowed by law, all discussions relating to this Agreement and the Contracts are privileged and confidential. The information exchanged by the Parties in the course of these negotiations and discussions shall not prejudice the position of any Party or participant taking part in such discussions and negotiations, and is not to be used by any entity in any manner, including admission into evidence, in connection with this or any other proceeding related to the subject matter of this Agreement or the Contracts, except a proceeding to enforce the terms of this Agreement or the Contracts. In the event that this Agreement or any of the Contracts are rendered null and void as provided herein, the Agreement, the Contracts, and all drafts, work papers, and notes related to their development, to the fullest extent allowed by law, shall be deemed settlement materials and shall not constitute a part of the record in this or any other proceeding, nor be admissible into evidence in any proceeding.

### **5.4 Limitation of Applicability**

This Agreement is made with the express understanding that it constitutes a negotiated settlement of issues specific to the Project. No Party shall be deemed, by virtue of execution of this Agreement, to have established precedent or admitted, approved, accepted, agreed to or otherwise or consented to any issue in any proceeding regarding

the Project, including the Commission's obligations and authorities under the NRA and the extent or limitation of its jurisdiction to regulate the Power Authority's rates, charges and services for power and energy. In addition, none of the Parties shall be deemed to have relinquished, abandoned, consented to, or otherwise conceded on any issue regarding any principle of law underlying, or supposed to underlie, any of the claims advanced or the matters resolved under this Agreement. In the event this Agreement is approved by the Commission, such approval shall not be deemed precedential or controlling regarding any particular issue or contention in any other proceeding. Further, by entering into this Agreement, the Power Authority shall not be deemed to have admitted to any liability for any action arising from the construction, operation, and maintenance of the Project, and this Agreement shall not be evidence of, or otherwise construed as, liability for any action arising from the construction, operation, and maintenance of the Project.

#### **5.5 Titles**

To the extent that there is any inconsistency between the title of a section of this Agreement and the text of the section, the text shall govern.

#### **5.6 Choice of Law**

This Agreement shall be governed by and construed under New York law without reference to its conflicts of laws principles to the extent New York law is not inconsistent with the New License and the NRA.

### **SECTION 6 EXECUTION**

Each Party to this Agreement represents that: (1) the person executing the Agreement on behalf of the Party is authorized to execute this Agreement and legally bind such Party ; and (2) such Party represents it will be fully bound by the terms hereof. This Agreement may be executed in any number of counterparts, and each executed counterpart shall have the same force and effect as an original instrument as if all the Parties had signed the same instrument. Any signature page of this Agreement may be detached from any counterpart of this Agreement without impairing the legal effect of any signature(s) thereon, and may be attached to another counterpart of this Agreement identical in form hereto but having attached to it one or more signature pages.

IN WITNESS WHEREOF, the Parties, intending to be legally bound, have voluntarily caused their duly authorized representatives to execute this Agreement as of the date set forth in this Agreement.

POWER AUTHORITY OF THE STATE OF NEW YORK

By: Eugene W. Zeltmann Date: 8/5/05  
Eugene W. Zeltmann, President and Chief Executive Officer  
Power Authority of the State of New York

CONNECTICUT MUNICIPAL ELECTRIC ENERGY COOPERATIVE

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Gabriel B. Stern, Director, Planning and Project Development  
Connecticut Municipal Electric Energy Cooperative

MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Raymond R. Shockey, Acting General Manager  
Massachusetts Municipal Wholesale Electric Company

PUBLIC POWER ASSOCIATION OF NEW JERSEY

By: \_\_\_\_\_ Date: \_\_\_\_\_  
James A. Jablonski, Executive Director  
Public Power Association of New Jersey

CITY OF CLEVELAND, OHIO

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Teresa M. Beasley, Director of Law  
City of Cleveland, Ohio

IN WITNESS WHEREOF, the Parties, intending to be legally bound, have voluntarily caused their duly authorized representatives to execute this Agreement as of the date set forth in this Agreement.

**POWER AUTHORITY OF THE STATE OF NEW YORK**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Eugene W. Zeltmann, President and Chief Executive Officer  
Power Authority of the State of New York

**CONNECTICUT MUNICIPAL ELECTRIC ENERGY COOPERATIVE**

By: Gabriel B. Stern Date: July 25, 2005  
Gabriel B. Stern, Director, Planning and Project Development  
Connecticut Municipal Electric Energy Cooperative

**MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Raymond R. Shockey, Acting General Manager  
Massachusetts Municipal Wholesale Electric Company

**PUBLIC POWER ASSOCIATION OF NEW JERSEY**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
James A. Jablonski, Executive Director  
Public Power Association of New Jersey

**CITY OF CLEVELAND, OHIO**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Teresa M. Beasley, Director of Law  
City of Cleveland, Ohio

IN WITNESS WHEREOF, the Parties, intending to be legally bound, have voluntarily caused their duly authorized representatives to execute this Agreement as of the date set forth in this Agreement.


**POWER AUTHORITY OF THE STATE OF NEW YORK**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Eugene W. Zeltmann, President and Chief Executive Officer  
Power Authority of the State of New York

**CONNECTICUT MUNICIPAL ELECTRIC ENERGY COOPERATIVE**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Gabriel B. Stern, Director, Planning and Project Development  
Connecticut Municipal Electric Energy Cooperative

**MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY**

By:  \_\_\_\_\_ Date: 8-5-05  
Raymond R. Shockey, Acting General Manager  
Massachusetts Municipal Wholesale Electric Company

**PUBLIC POWER ASSOCIATION OF NEW JERSEY**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
James A. Jablonski, Executive Director  
Public Power Association of New Jersey

**CITY OF CLEVELAND, OHIO**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Teresa M. Beasley, Director of Law  
City of Cleveland, Ohio

IN WITNESS WHEREOF, the Parties, intending to be legally bound, have voluntarily caused their duly authorized representatives to execute this Agreement as of the date set forth in this Agreement.

**POWER AUTHORITY OF THE STATE OF NEW YORK**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Eugene W. Zeltmann, President and Chief Executive Officer  
Power Authority of the State of New York

**CONNECTICUT MUNICIPAL ELECTRIC ENERGY COOPERATIVE**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Gabriel B. Stern, Director, Planning and Project Development  
Connecticut Municipal Electric Energy Cooperative

**MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Raymond R. Shockey, Acting General Manager  
Massachusetts Municipal Wholesale Electric Company

**PUBLIC POWER ASSOCIATION OF NEW JERSEY**

By:  \_\_\_\_\_ Date: July 29, 2005  
James A. Jablonski, Executive Director  
Public Power Association of New Jersey

**CITY OF CLEVELAND, OHIO**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Teresa M. Beasley, Director of Law  
City of Cleveland, Ohio

IN WITNESS WHEREOF, the Parties, intending to be legally bound, have voluntarily caused their duly authorized representatives to execute this Agreement as of the date set forth in this Agreement.

**POWER AUTHORITY OF THE STATE OF NEW YORK**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Eugene W. Zeltmann, President and Chief Executive Officer  
Power Authority of the State of New York

**CONNECTICUT MUNICIPAL ELECTRIC ENERGY COOPERATIVE**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Gabriel B. Stern, Director, Planning and Project Development  
Connecticut Municipal Electric Energy Cooperative

**MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Raymond R. Shockey, Acting General Manager  
Massachusetts Municipal Wholesale Electric Company


**PUBLIC POWER ASSOCIATION OF NEW JERSEY**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
James A. Jablonski, Executive Director  
Public Power Association of New Jersey

**CITY OF CLEVELAND, OHIO**

WMS By: Teresa M. Beasley Date: August 4, 2005  
Teresa M. Beasley, Director of Law  
City of Cleveland, Ohio

**ALLEGHENY ELECTRIC COOPERATIVE, INC.**

By:  Date: 8/2/05  
Richard W. Osborne, Vice President - Power Supply & Engineering  
Allegheny Electric Cooperative, Inc.

**RHODE ISLAND PUBLIC UTILITIES COMMISSION**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Elia Germani, Chairman,  
Rhode Island Public Utilities Commission

**VERMONT DEPARTMENT OF PUBLIC SERVICE**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
David O'Brien, Commissioner  
Vermont Department of Public Service



ALLEGHENY ELECTRIC COOPERATIVE, INC.

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Richard W. Osborne, Vice President - Power Supply & Engineering  
Allegheny Electric Cooperative, Inc.

RHODE ISLAND PUBLIC UTILITIES COMMISSION

By: Elia Germani Date: 7/28/2005  
Elia Germani, Chairman,  
Rhode Island Public Utilities Commission

VERMONT DEPARTMENT OF PUBLIC SERVICE

By: \_\_\_\_\_ Date: \_\_\_\_\_  
David O'Brien, Commissioner  
Vermont Department of Public Service


**ALLEGHENY ELECTRIC COOPERATIVE, INC.**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Richard W. Osborne, Vice President - Power Supply & Engineering  
Allegheny Electric Cooperative, Inc.

**RHODE ISLAND PUBLIC UTILITIES COMMISSION**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Elia Germani, Chairman,  
Rhode Island Public Utilities Commission

**VERMONT DEPARTMENT OF PUBLIC SERVICE**

By:  \_\_\_\_\_ Date: 2/25/05  
David O'Brien, Commissioner  
Vermont Department of Public Service

**ATTACHMENT A**

Final Draft  
July 21, 2005

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POWER AUTHORITY  
OF THE  
STATE OF NEW YORK  
30 South Pearl Street  
Albany, New York

AGREEMENT FOR THE SALE  
OF NIAGARA PROJECT POWER AND ENERGY  
TO NEIGHBORING STATES

Service Tariff No. NS-1 - Firm Hydroelectric Power and Energy  
Service Tariff No. NS-2 - Firm Peaking Hydroelectric Power and Energy  
Service Tariff No. NS-3 - Non-Firm Hydroelectric Energy Service

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[Date]

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**POWER AUTHORITY OF THE STATE OF NEW YORK**

**30 South Pearl Street**

**Albany, New York 12207**

**AGREEMENT FOR THE SALE OF HYDROPOWER AND ENERGY**

\_\_\_\_\_, which is the bargaining agent for the [Commonwealth] State of \_\_\_\_\_, hereby enters into this Agreement with the Power Authority of the State of New York (hereinafter called the "Parties"), for electric service as follows:

**I. Definitions**

- a. **Agreement** means this Agreement.
- b. **Authority** is the Power Authority of the State of New York.
- c. **Contract Demand** will be the amounts set forth in Section II or such other amount as may be determined in accordance with the provisions of this Agreement.
- d. **Customer** is the bargaining agent identified above.
- e. **Electric Service** is any type of output, including, but not limited to Power and Energy available to Customer in accordance with applicable Service Tariffs, Rules and other contract documents.
- f. **FERC** means the Federal Energy Regulatory Commission (or any successor organization).
- g. **FERC License** means the first new license issued by FERC to the Authority for the continued operation and maintenance of the Project, pursuant to Section 15 of the Federal Power Act, which new license will become effective after expiration of the Project's original license issued on January 30, 1958.
- h. **Firm Hydroelectric Power and Energy** are firm power and associated energy from the Authority's Niagara Power Project, intended to be available at all times except for limitations provided in this Agreement, the Rules, applicable Service Tariff or in other contract documents.
- i. **Firm Hydroelectric Peaking Power and Energy** are firm Power and Energy from the Authority's Niagara Power Project, intended for use primarily in Customer's peak load periods and limited as to the Energy to be supplied as set forth in this Agreement, the Rules, an applicable Service Tariff or in other contract documents.

- j. **Non-firm Hydroelectric Energy** is all Energy from the Authority's Niagara Power Project that is in addition to the Energy associated with Firm Hydroelectric Power and Energy and Firm Peaking Hydroelectric Power and Energy, that is available from time to time, and that is subject to interruption for extended periods because of decreased water flow or other system conditions.
- k. **Neighboring State Customers** means Customer and all other neighboring state bargaining agents that receive service from the Niagara Power Project.
- l. **NRA** means the federal Niagara Redevelopment Act (18 USC §§836, 836a)
- m. **NYISO** means the New York Independent System Operator or any successor organization.
- n. **Project** means the Niagara Power Project, FERC Project 2216.
- o. **Project Power and Energy** means Firm Hydroelectric Power and Energy, Firm Peaking Hydroelectric Power and Energy, Non-firm Hydroelectric Energy, and such additional services as may be sold to Customer at any time during the term of this Agreement produced by the Project; as set forth in Article II (d) below, this shall not be construed as limiting Customer's right to claim entitlement to other Project products and services under the terms of the NRA and the FERC License.
- p. **Relicensing Settlement Agreement** means the Niagara Power Project, FERC Project No. 2216 Relicensing Settlement Agreement addressing allocation of Niagara Project Power and Energy to the Neighboring States dated \_\_\_\_.
- q. **Rules** are the applicable provisions of the Authority's Rules and Regulations for Power Service (Part 454 of Chapter X of Title 21 of the Official Compilation of Codes, Rules and Regulations of the State of New York).
- r. **Service Tariffs** are schedules establishing rates and other conditions for sale of Electric Services to Customer.

## II. Electric Service to be Provided

- a. The Authority shall provide Electric Service pursuant to Service Tariffs for Power and/or Energy to enable the Customer to receive its allocations from the Project in accordance with the provisions of the FERC License, in the amounts set forth below:

Firm Hydroelectric Power and Energy Service pursuant to  
Service Tariff No. NS-1      -      \_\_\_\_\_ KiloWatts (Contract Demand)

Firm Peaking Hydroelectric Power and Energy Service pursuant to

Service Tariff No. NS-2 - \_\_\_\_\_ KiloWatts (Contract Demand)

Non-Firm Hydroelectric Energy Service pursuant to  
Service Tariff No. NS-3 - As available

- b. The Contract Demands for Project Power and Energy may be modified by the Authority if the amounts of such Project Power and Energy available for sale from the Project are modified as required to comply with any ruling, order or decision of any regulatory or judicial body having jurisdiction, provided that in the event of such a modification, the aggregate percentage of the Project Power and Energy allocated to Neighboring State Customers shall be ten percent (10%) of all Project Power and Energy, as modified, or such other percentage as may be established in accordance with Article III below. In the event the capability of the Project is modified, the Authority shall conduct a study to determine the effect of such capability change on the amount of Project Power and Energy.

Separately and additionally, when the Authority conducts a discrete program of changes or upgrades to the Project, such as a program of upgrades to the Project's generating units, including the current Niagara Upgrade Project, the study referred to in the foregoing sentence shall be conducted at the completion of such program. If additional quantities of Project Power and Energy are produced from the Project as a result of such capability changes or upgrades, the aggregate percentage of such additional quantities of Project Power and Energy to be offered to Neighboring State Customers shall be such that the total amount of each category of Project Power and Energy offered to Neighboring State Customers shall be ten percent (10%) of each category of Project Power and Energy, as modified, or such other percentage as may be established in accordance with Article III below. Customer's share of any additional quantities of Project Power and Energy, which it has no obligation to purchase, shall be based on its proportional share of the allocation among the Neighboring State Customers of Project Power and Energy, as applicable.

- c. Except as otherwise provided in Article III below, ten percent (10%) of all Project Non-Firm Hydroelectric Energy shall be made available pursuant to Service Tariff No. NS-3 to Neighboring State Customers on a cumulative basis effective on the commencement of service under this Agreement. Non-Firm Hydroelectric Energy from the Project shall be offered to all Neighboring State Customers in proportion to their respective firm power allocations (i.e., based on the Project capacity existing as of the effective date of this Agreement as it may be subsequently modified pursuant to Article II b). More specifically, the Customer's Non-Firm Hydroelectric Energy allocation from the Project will be equal to the Customer's Contract Demand for Firm Hydroelectric Power and Energy (in kW) divided by the sum of the Neighboring State Customers' Contract Demands for Firm Hydroelectric Power and Energy (in kW) times the total Project Non-Firm Hydroelectric Energy available to all Neighboring State Customers). To the extent that there is a balance of Project Energy owed to either the Customer or the

Authority on the effective date of service under this Agreement, arising out of service under a prior agreement for the sale of Project Non-Firm Hydroelectric Energy, that balance shall be carried over and maintained as the balance as of the effective date of service under this Agreement. The Authority shall make available periodically, but at least semi-annually, a tabulation showing cumulative comparisons between total actual Non-Firm Hydroelectric Energy sales to each Neighboring State Customer and the amount of Energy the Authority has contracted to make available. The Authority shall provide backup documentation for said tabulations at the request of Customer.

- d. Neither the identification of the Electric Service to be provided under this Article or other provisions of this Agreement shall be construed as limiting either Customer's or the Authority's rights under the NRA or the FERC License with respect to whether there are now or will be in the future additional products or services ("Additional Products") from the Project that are required to be offered to Customer. Nothing in this Agreement shall preclude Customer from requesting a ruling from FERC or taking any other action to require the Authority to provide Additional Products from the Project to Customer.

### **III. Modification of Neighboring State Allocations**

Nothing in this Agreement shall preclude the Authority from requesting a ruling from FERC, no earlier than two years after the initiation of service pursuant to this Agreement, and on at least 30 days written notice to the Neighboring State Customers that the aggregate amount of Project Power and Energy sold hereunder to Neighboring State Customers as a group, and the portion thereof sold to Customer hereunder may, under the terms of the NRA and the FERC License, be reduced to less than ten percent (10%), but in no event shall such aggregate amount be less than seven and one-half percent (7.5%) of each class of Project Power and Energy. Nothing in this Agreement shall preclude Customer from opposing any such request by the Authority. In addition, any such reduction shall be only as allowed by a final, non-appealable FERC order and shall be prospective only from the date that is the first day of a month that is at least 90 days following the date upon which such order becomes final and non-appealable. Nothing in this Article or this Agreement shall be construed as an admission by the Authority or Customer as to the amount of Project Power and Energy required to be sold to the Neighboring State Customers under the NRA and the FERC License. Upon the issuance of written notice by the Authority of its intent to seek such a ruling from FERC, Customer may prospectively, from the date of such notice, by written notice to the Authority elect not to be bound by the terms of Article X below, concerning Rates.

### **IV. Rules, Regulations and Service Tariffs**

The Rules, Service Tariff No. NS-1, Service Tariff No. NS-2 and Service Tariff No. NS-3, as now in effect and/or such superseding tariffs or other tariffs as the Authority

may later promulgate, all as such Rules and Service Tariffs may be later amended from time to time by the Authority, are hereby incorporated into this Agreement with the same force and effect as if herein set forth at length. In the event of any inconsistencies, conflicts or differences between the provisions of the Service Tariffs and the Rules, the provisions of the Service Tariffs shall govern. In the event of any inconsistencies, conflicts or differences between the provisions of this Agreement and the Service Tariffs, the provisions of this Agreement shall govern. The Authority shall provide at least thirty (30) days prior written notice to Customer of any proposed change in the above Rules and Service Tariffs, but in no event shall Authority provide less notice than that provided to similarly affected customers within New York State.

#### **V. Resale of Project Power and Energy**

In reselling and distributing Project Power and Energy purchased from Authority, Customer shall: 1) do so pursuant to the appropriate laws of the State or Commonwealth in which Customer operates, 2) do so without profit other than reasonable compensation for administrative and service costs, 3) resell such Project Power and Energy only to the distributing entities designated in Appendix A of the Application for Electric Service filed by Customer with Authority and maintained on a current basis, and which are "public bodies or nonprofit cooperatives" under the NRA ("Distributing Entities"), 4) to the extent it is capable of doing so, not permit such Distributing Entities to sell such Project Power and Energy for resale except as designated in Appendix A of the Application for Electric Service, 5) to the extent it is capable of doing so, require such Distributing Entities to resell the Project Power and Energy without profit except for administrative and services costs of the Customer and reasonable compensation (as allowed by the regulatory agencies authorized by law to regulate the rates and practices of the Distributing Entities) for use of facilities and for services furnished in the transmission and distribution of such power, and 6) comply with the provisions of the NRA, the FERC License and the New York Power Authority Act (N.Y. Pub. Auth. Law Section §1000 et seq.), to the extent such Power Authority Act is not inconsistent with the FERC License.

Customer shall keep its books, accounts and records pertaining to the purchase, delivery and sale of Authority Power and Energy according to procedures reasonably deemed necessary by Authority to ensure compliance with applicable statutes, licenses, the Rules and shall require its Distributing Entities to do likewise. It shall provide such information and permit such inspection of its books and records as Authority may reasonably request and shall require its Distributing Entities as identified in Appendix A to the Agreement to do likewise.

#### **VI. Determination of Monthly Energy Allocations and Distributing Entities**

Energy allocations for a given month shall be determined based on the monthly load factors set forth in Appendix A for such month. Except in the case of a substantial



reallocation within a state, the monthly load factor, and resulting Energy allocation, shall not be adjusted for the term set forth in Article XVI of this Agreement.

Appendix A, attached hereto contains, inter alia, the monthly load factor that determines the monthly Energy allocation and a list of all Distributing Entities on whose behalf Customer has contracted for Project Power and Energy.

Customer may at any time, on written notice to the Authority, modify its Appendix A to redistribute its then existing allocation among Distributing Entities in its state. The quantities of Project Power and Energy referred to herein are established by the Authority as part of an allocation of Project Power and Energy to New York's Neighboring State Customers in order to fulfill statutory and/or license obligations.

If the Authority determines that Customer, or any Distributing Entity is engaged in resale of Project Power and Energy in a manner inconsistent with this Agreement, Authority may require Customer to cease the resale of Project Power and Energy to such Distributing Entity.

## **VII. Transmission and Delivery of Power and Energy**

Customer understands that delivery of Project Power and Energy to the New York State border ("Border") will be made over transmission facilities under the control of the NYISO. At the request of and upon the approval of Customer, the Authority shall arrange for the transmission of the Project Power and Energy supplied hereunder to the Border consistent with Customer's request and the terms of the Open Access Transmission Tariff (OATT) or other applicable tariff of the NYISO. The Authority shall provide Customer with a copy of the Authority's transmission agreement or any other agreement with the NYISO related to such arrangements. It is the Customer's responsibility to compensate the Authority for all net costs, including any applicable NYISO related charges (net of credits) associated with transmission to the Border pursuant to the NYISO OATT or other applicable tariff of the NYISO. In addition, the Authority shall offer Customer flexibility to settle for transmission losses either financially or physically (in kind), consistent with the NYISO OATT.

If the Authority acts as Customer's transmission agent with the NYISO for delivery of Customer's Project Power and Energy allocation, the Authority shall maintain, for a period of at least three (3) calendar years, records of billings and supporting data received from the NYISO for such delivery services to the Border. Upon request, such billing data shall be provided to Customer in a mutually agreed upon electronic format.

In lieu of the Authority arranging transmission service to the Border, Customer may elect, in its sole discretion, to arrange necessary transmission on its own behalf. In that instance, Customer must provide the Authority with sixty (60) days advance written notice in order to cancel all preexisting transmission (or delivery) arrangements subject to the terms of such arrangements and waive, for such noticed period, any rights it might have obligating the Authority to provide

transmission (or delivery) to the Border. Delivery of Project Power and Energy from the Border to the Distributing Entities' consumers in Customer's State or Commonwealth is the responsibility of Customer or the Distributing Entity, and Customer or Distributing Entity shall make the necessary arrangements to accomplish said delivery. Furthermore, absent good cause, the Authority will not object and will cooperate with Customer if it seeks to establish a new or additional point of delivery for its Project Power and Energy allocation to the Border.

Customer and the Authority recognize that the structure of the marketplace has and continues to undergo change. Certain provisions contained herein may need to be amended, or additional provisions added to conform service hereunder to the rules and regulations of the NYISO, particularly with respect to scheduling, delivery and reliability. The Parties shall negotiate in good faith any such revisions or additions to this Agreement, while maintaining the relative benefits and burdens of this Agreement concerning Project Power and Energy. Customer and Authority also recognize that industry restructuring is underway in New York and in the neighboring states and that certain provisions to this Agreement may need to be amended, or additional provisions added, to provide for such changes and to maintain the relative benefits and burdens of this Agreement, and the Parties shall negotiate in good faith to do so.

The Authority shall endeavor to accommodate Customer's request(s) to meet the requirements of other transmission and/or reliability organizations affecting the delivery of Project Power and Energy under this Agreement.

#### **VIII. Scheduling Procedures**

The Scheduling Procedures as provided in Service Tariff Nos. NS-1, NS-2 and NS-3 reflect the scheduling requirements of the Authority. The Authority may implement modified procedures for scheduling Project Power and Energy sold hereunder from time to time upon sixty (60) days' prior written notice to Customer, but if such changes are required to be put into effect on less than sixty (60) days' notice to conform to the requirements of the NYISO, NYPA shall promptly notify Customer of such changes in writing as soon as they are known to NYPA.

#### **IX. Dispatching Agent**

Customer may elect to designate one or more dispatching agents ("Dispatching Agent") for the purpose of administering the scheduling provisions of Service Tariff Nos. NS-1, NS-2 and NS-3 for the term thereof. The Authority may require Customer or its Dispatching Agent to schedule Project Energy in general accordance with Customer's system load shape. Customer may substitute the load shape of the Dispatching Agent or another load shape as agreed upon by the Customer and the Authority.

## **X. Rates**

Unless Customer provides written notice to the Authority pursuant to Article III above of its election to not be bound by this Article, the rates charged by the Authority under this Agreement shall be established in accordance with this Article.

Project Power and Energy shall be sold to Customer hereunder at cost-based rates equivalent to rates charged to in-state preference customers receiving preference power under the NRA. The Authority shall charge and Customer shall pay the preference power rates adopted by the Authority on April 29, 2003, during the period through April 30, 2007, and thereafter for as long as those rates remain in effect during the term of this Agreement. Customer waives any and all objections, suits, appeals or other challenges to the preference power rates adopted by the Authority on April 29, 2003 except as otherwise provided for below.

Customer waives any challenges to any of the following methodologies and principles<sup>1</sup> to the extent that one or more of such methodologies and principles are used by the Authority to set rates different than those adopted by the Authority's Trustees in their meeting on April 29, 2003 based on the "January 2003 Report on Hydroelectric Production Rates" and as modified by the April 2003 "Staff Analysis of Public Comments and Recommendations":

- (i) The principles set forth in the March 5, 1986 Settlement Agreement (Appendix B to this Agreement) settling *Auer v. Dyson*, No. 81-124 (Sup. Ct. Oswego Co.), *Auer v. Power Authority*, Index No. 11999-84 (Sup. Ct. N.Y. Co.) and *Delaware County Electric Cooperative, Inc. v. Power Authority*, 82 Civ. 7256 (S.D.N.Y.) (the "Auer Settlement").
- (ii) Recovery of capital costs using Trended Original Cost and Original Cost methodologies.
- (iii) Treatment of sales to third parties, including the New York Independent System Operator.
- (iv) Allocation of Indirect Overheads.
- (v) Melding of costs of the Niagara Power Project and St. Lawrence-FDR Power Project for ratemaking.
- (vi) Post-employment benefits other than pensions (*i.e.*, retiree health benefits).

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<sup>1</sup> These methodologies and principles were employed in and explained by the Authority's January 2003 Report on Hydroelectric Production Rates and the Staff Analysis of Public Comments and Recommendations adopted by the Authority's Trustees on April 29, 2003, and in the Rate Stabilization Reserve explanatory statement attached hereto as Appendix B.

- (vii) Rate Stabilization Reserve (RSR) methodology as supplemented by the explanatory statement attached hereto as Appendix B.

In the event the Authority ceases to employ any of the methodologies and principles enumerated above, the Customer shall have the right to take any position whatsoever with respect to such methodology or principle, but shall not have the right to challenge any of the remaining methodologies and principles that continue to be employed by the Authority.

#### **XI. Additional Sales**

In the event additional Project Power and Energy or any other Additional Products are available for sale, the Authority shall notify Customer, and Customer may purchase such Additional Products hereunder at the rate schedule or schedules then or to be in effect for such Additional Products, in such amounts and subject to such terms and conditions as shall then be agreed upon between the Authority and Customer.

#### **XII. Reallocation of Project Power and Energy**

If Customer is, or becomes unable or chooses not to receive any or all of the Project Power and Energy allocated to it, such Project Power and Energy shall be reallocated by the Authority pro-rata among all Neighboring State Customers. Customer shall provide written notice to the Authority and all Neighboring State Customers of such inability or election within 30 days of its becoming aware of such inability or election. Upon receipt of such notice by the Authority, any required changes in the allocations of Project Power and Energy among the Neighboring State Customers shall become effective as soon as practicable.

If a Distributing Entity included on Customer's Appendix A is, or becomes ineligible to receive preference power pursuant to the NRA, Customer shall cease its resale and distribution of Project Power and Energy to such Designated Entity as soon as practicable after Customer becomes aware of such ineligibility. Customer shall provide written notice to the Authority and all Neighboring State Customers of such ineligibility as soon as practicable upon its becoming aware of such ineligibility. Moreover, in such event, the quantities of Project Power and Energy sold to the Neighboring State Customers shall be reallocated by the Authority pro-rata among all Neighboring State Customers using each state's Appendix A used to establish the initial Contract Demand for the Neighboring State Customers pursuant to this Agreement, modified to eliminate the impact of the ineligible Distributing Entity. Any changes in the allocations of Project Power and Energy among the Neighboring State Customers resulting from application of this paragraph shall become effective as soon as practicable.

### **XIII. Environmental Attributes**

In the event the Niagara Project output sold to Customer hereunder can, at any time, be claimed by Customer in its market area to have renewable characteristics in connection with a renewable portfolio, or renewable attributes or similarly intended program, Customer shall have the right to acquire such attributes upon such terms and conditions to be negotiated between Authority and Customer, provided however that nothing in this Agreement shall be construed as a waiver of the rights of Customer to assert that Customer is entitled to such renewable characteristics or attributes at no additional cost by having purchased Project Power and Energy, and provided further that in no event will Customer be charged more than the rate Authority charges its in-state preference customers for such attributes, if such customers acquire such attributes.

### **XIV. Reports**

The Authority shall make available annually tabulations showing, on a calendar year basis, the disposition of i) Firm Hydroelectric Power and Energy (in kW and MWh and as a percentage of firm sales), ii) Firm Hydroelectric Peaking Power and Energy (in kW and MWh and as a percentage of firm peaking sales), and iii) any non-firm energy sold during the year to all Niagara Project customer groups, including investor owned utilities, in-state preference customers, Neighboring State Customers, Replacement power customers, Expansion power customers, the NYISO, and any other customers, with such disposition accounting for the total Niagara Project output. The Authority shall provide backup documentation for said tabulations at the request of Customer, provided such information shall not include confidential customer billing information.

### **XV. Appointment of Customer Agent**

Upon reasonable prior written notice to the Authority, Customer shall have the right to delegate to an agent any or all duties under this Agreement ("Customer's Agent") and the Authority acknowledges that such duties may be performed by Customer's Agent. Such duties delegated to Customer's Agent may include the keeping of all records required by Authority, the payment of any or all amounts due to the Authority under this Agreement and any or all such other duties contained in this Agreement as may be specified by Customer; provided that the Customer may choose to assume and perform any or all of the duties previously delegated to Customer's Agent and provided further that nothing herein, including Customer's designation of such an agent, shall be deemed to be approval by the Authority of an assignment of any of Customer's duties and obligations under its Agreement with the Authority. Customer further reserves the right, on reasonable prior written notice to the Authority, to designate a different party as Customer's Agent at any time during the term of this Agreement.

## **XVI. Term and Termination of Service**

Once initiated, service shall continue until the earliest of (a) termination by Customer with respect to all or part of its allocation upon ninety (90) days prior written notice, (b) termination by the Authority pursuant to the Rules upon required notice, or (c) September 1, 2025. The Authority may cancel service hereunder or modify the quantities of Project Power and Energy allocated to Customer only (a) if such cancellation or modification is required to comply with any final ruling, order or decision of any regulatory or judicial body of competent jurisdiction (including any licensing or re-licensing order or orders of the FERC or its successor agency), or (b) as otherwise provided herein or in the Rules.

Notwithstanding the foregoing, upon mutual agreement this Agreement may be extended beyond such date on a month to month basis pending execution of any successor agreement between the Customer and Authority or renewal of the Project License.

## **XVII. Notification**

Correspondence involving the administration of this Agreement shall be addressed as follows:

To: The Authority  
Manager – Power Contracts  
New York Power Authority  
123 Main Street  
White Plains, NY 10601

To: Customer

## **XVIII. Applicable Law**

This Agreement shall be governed by and construed in accordance with the laws of the State of New York to the extent that such laws are not inconsistent with the FERC License and the Niagara Redevelopment Act.

## **XIX. Successors and Assigns**

This Agreement shall be binding upon, shall inure to the benefit of, and may be performed by, the legal successors and assigns of either Party hereto; provided,

however, that no assignment by either Party or any successor or assignee of such Party of its rights and obligations hereunder shall be made or become effective without the prior written consent of the other Party in each case obtained, which consent shall not be unreasonably withheld.

## **XX. Previous Agreements and Communications**

This Agreement, together with the Relicensing Settlement Agreement, shall constitute the sole and complete agreement of the Parties hereto with respect to the matters herein set forth. Such agreement supersedes all previous agreements and communications between the Parties hereto, either oral or written, with reference to the subject matter of this Agreement.

No modifications of this Agreement shall be binding upon the Parties hereto or either of them unless such modification is in writing and is signed by a duly authorized officer of each of them.

## **XXI. Acceptance and Approvals**

Upon approval of the Governor of the State of New York pursuant to Section 1009 of the Power Authority Act, and upon execution by the Parties, this Agreement, the provisions of which shall survive for the term hereof, together with the Service Tariffs and Rules both as they may be amended, shall constitute the contract between the Parties for Electric Service hereunder.

## **XXII. Severability and Voidability**

If any term or provision of this Agreement shall be invalidated, declared unlawful or ineffective in whole or in part by an order of the FERC or a court of competent jurisdiction, such order shall not be deemed to invalidate the remaining terms or provisions hereof.

Notwithstanding the preceding paragraph, if any provision of this Agreement or the Relicensing Settlement Agreement is rendered void or unenforceable or otherwise modified by a court or agency of competent jurisdiction, the entire Agreement shall, at the option of either Party and only in such circumstances in which such Party's interests are materially and adversely impacted by any such action, be void and unenforceable.

## **XXIII. Effectiveness of Agreement**

This Agreement shall take effect only after: (i) the effective date of the FERC License and (ii) the date of this Agreement's execution under Article XXI above; *provided, however*, that in the event this Agreement does not take effect as of September 1, 2007, but is executed under Article XXI above prior to such date, the Parties shall commence performance of the terms of this Agreement on a month-to-

month basis on September 1, 2007, and shall continue such performance until this Agreement takes effect.

**CUSTOMER**

BY \_\_\_\_\_

Title \_\_\_\_\_

Date \_\_\_\_\_

(Seal)

Attest by: \_\_\_\_\_

Accepted:

**POWER AUTHORITY OF THE STATE OF NEW YORK**

BY \_\_\_\_\_

Title \_\_\_\_\_

Date \_\_\_\_\_

(Seal)

Attest by: \_\_\_\_\_



**POWER AUTHORITY OF THE STATE OF NEW YORK**

**30 South Pearl Street, Albany, NY 12207**

**Service Tariff No. NS -1**

**Schedule of Rates for Firm Hydroelectric Power  
and Energy Service**

**EFFECTIVE:**

**September 1, 2007**

**APPLICABLE:**

**To sale of Niagara Firm Hydroelectric Project Power and Energy to Neighboring State Customers.**

**CHARACTER OF SERVICE:**

**Alternating current, 60 hertz, three-phase.**

**RATES:**

**Capacity Rate: per kilowatt per month of Billing Demand at the Project switchyard.**

<b>12-Month Period Commencing</b>	<b>Demand Rate \$/kW-month</b>
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<b>5/1/2006</b>	<b>2.38</b>
<b>Future rates to be determined.</b>	

**Base Energy Rate: 4.92 mills per kilowatt-hour**

**The Energy charge set forth herein shall be subject to a monthly adjustment in accordance with a flow adjustment computation (FAC) as described in Exhibit I**

**MINIMUM MONTHLY CHARGE:**

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**The product of the Capacity Rate and the Billing Demand.**

**DEFINITIONS:**

**Billing Demand: The Billing Demand shall be the Customer's Contract Demand.**

**Billing Period: Any period of approximately thirty (30) days, generally ending with the last day of each calendar month.**

**SPECIAL PROVISION:**

**Special Provision for service supplementing or modifying the Rules and Regulations for Power Service and Service Tariff No. NS - 1 with regard to deliveries to Customer is as follows:**

**A Availability of Energy**

Unless otherwise agreed upon by the Parties, Authority shall normally provide in any Billing Period firm Energy to Customer in an amount equal to the product of (A) the number of hours in such billing Period, (B) the Contract Demand applicable in such Billing Period and (C) the applicable monthly load factor, as shown on Appendix A. In the event that hydraulic conditions at the Project require the Authority to reduce the amount of Energy provided to Customer under this Service Tariff to an amount below such normal level, reductions as a percentage of the otherwise required Energy deliveries will be the same for all firm Authority hydropower customers. The offer of Energy for delivery pursuant to Section B.1. of Exhibit I shall fulfill Authority's obligations for purposes of this Special Provision whether or not the Energy is taken by Customer.

**POWER AUTHORITY OF THE STATE OF NEW YORK  
30 South Pearl Street, Albany, NY 12207**

**Service Tariff No. NS-2**

**Schedule of Rates for Firm Peaking Hydroelectric Power  
and Energy Service**

**EFFECTIVE:**

**September 1, 2007**

**APPLICABLE:**

**To sale of Niagara firm peaking hydroelectric Power and Energy to Neighboring State Customers.**

**CHARACTER OF SERVICE:**

**Alternating current, 60 hertz, three-phase.**

**RATES:**

**Capacity Rate: per kilowatt per month of Billing Demand at the Project switchyard.**

<b>12-Month Period Commencing</b>	<b>Demand Rate \$/kW-month</b>
<b>5/1/2006</b>	<b>2.38</b>
<b>Future rates to be determined</b>	

**Base Energy Rate: 4.92 mills per kilowatt-hour**

**The Energy charge set forth herein shall be subject to a monthly adjustment in accordance with a flow adjustment computation (FAC) as described in Exhibit I.**

**MINIMUM MONTHLY CHARGE:**

**~~The product of the Capacity Rate and the Billing Demand.~~**

**DEFINITIONS:**

**Billing Demand: The Billing Demand shall be the Contract Demand.**

**Billing Period:** Any period of approximately thirty (30) days, generally ending with the last day of each calendar month.

**SPECIAL PROVISION:**

**Firm Hydroelectric Peaking Power and Energy:** Firm Peaking Power and Energy are firm Power and Energy intended for use primarily during peak load periods and limited as to the Energy to be supplied.

Special Provision for service supplementing or modifying the Rules and Regulations for Power Service and Service Tariff No. NS-2 with regard to deliveries to Customer is as follows:

**A. Availability of Energy**

Authority shall normally supply Firm Hydroelectric Peaking Power & Energy to Customer at 12.5 percent (12.5%) monthly load factor with no more than five kilowatt hours per kilowatt of Contract Demand supplied in any single calendar day, unless otherwise agreed upon by the Parties. In the event that hydraulic conditions at Authority's hydroelectric generating stations require the Authority to reduce the amount of Energy provided to Customer under this Service Tariff No. NS-2 to an amount below such normal level, reductions shall be applied to all Customers served under Service Tariff No. NS-2 in proportion to their relative allocations of Firm Hydroelectric Peaking Power and Energy. In the event Firm Hydroelectric Peaking Energy is supplied at less than 12.5 percent (12.5%) load factor, Customer may supply to Authority pumping power and Energy in amounts which after adjustment for losses associated with use of the Authority's facilities will increase the supply of Firm Hydroelectric Power & Energy hereunder to 12.5 percent (12.5%) monthly load factor.

In the event that Customer desires Energy in excess of 12.5 percent (12.5%) monthly load factor, Customer may, with the consent of Authority, supply to Authority pumping power and energy in such amounts as Authority determines it can accept. Upon request by Customer, Authority may purchase pumping power and Energy on behalf of Customer and at Customer's expense. The ratio of firm energy produced to pumping energy supplied shall be taken as 0.90, both as measured at Authority's Niagara Switchyard.

Pumping energy may be provided either at the Project switchyard or at the Border, at ~~the Customer's option, subject to Customer agreeing to pay any NYISO costs for~~ delivery of pumping energy from the Border to the Project switchyard.

The offer of Firm Peaking Power and Energy for delivery pursuant to Section B.1. of Exhibit I shall fulfill Authority's obligations for purposes of this Special Provision whether or not the Energy is taken by Customer.

**POWER AUTHORITY OF THE STATE OF NEW YORK**  
30 South Pearl Street, Albany, NY 12207

**Service Tariff No. NS-3**

**Schedule of Rates for Non-Firm Hydroelectric  
Energy Service**

**EFFECTIVE:**

September 1, 2007

**APPLICABLE:**

To sale of Niagara Non-Firm Hydroelectric Energy to Neighboring State Customers.

**CHARACTER OF SERVICE:**

Alternating current, 60 hertz, three-phase.

**RATES:**

Base Energy Rate: 4.92 mills per kilowatt-hour.

The Energy charges set forth herein shall be subject to a monthly adjustment in accordance with a flow adjustment computation (FAC) as described in Exhibit I

**MINIMUM MONTHLY CHARGE:**

None.

**DEFINITIONS:**

**Billing Period:** Any period of approximately thirty (30) days, generally ending with the last day of each calendar month.

**SPECIAL PROVISION:**

Special Provision for service supplementing or modifying the Rules and Regulations for Power Service and Service Tariff No. NS-3 with regard to deliveries to Customer is as follows:

**A Availability of Energy**

Non-Firm Hydroelectric Energy will be subject to its availability as determined by Authority. The offer of Energy for delivery pursuant to Section B.1. of Exhibit I shall fulfill Authority's obligations for purposes of this Special Provision whether or not the Energy is taken by Customer.

**Exhibit I****Common Adjustments to Service Tariffs Nos. NS-1, NS-2 and NS-3****1. For Flow Adjustment Computation ("FAC")**

The Energy charges under these Service Tariffs and the applicable Service Tariffs associated with the St. Lawrence Hydroelectric Project, in the aggregate, are subject to a credit or surcharge pursuant to an FAC in any rate year following a calendar year for which the Hydroelectric Project Rate Stabilization Reserve ("RSR") is greater than \$+25 million, or less than \$-25 million, respectively. The RSR will be used to ensure rate stability and cost recovery and its level will be determined and any credit or surcharge for the succeeding rate year will be calculated after the prior calendar year's costs and generation levels are known. Any credit or surcharge will be applied on a uniform basis to the monthly billing statements rendered pursuant to Service Tariffs NS-1, NS-2, and NS-3 during the succeeding rate year.

The FAC is inapplicable in any rate year succeeding a calendar year at the end of which the RSR is within the \$+25 million to \$-25 million range. If at the end of any calendar year, the RSR is determined to exceed \$+25 million, such excess amount will be credited pro-rata to Customers during the succeeding rate year pursuant to the FAC. If the RSR at the end of any calendar year is determined to be less than \$-25 million, the difference below \$-25 million will be surcharged pro-rata to Customers during the succeeding rate year pursuant to the FAC.

To the extent that there is a balance in the RSR (positive or negative) on the effective date of service under this Agreement, arising out of service under a prior agreement for the sale of Project Power and Energy, that RSR balance shall be carried forward and maintained as the balance as of the effective date of service under this Agreement.

**Common Provisions to Service Tariffs Nos. NS-1, NS-2 and NS-3****A Adjustment of Rates**

To the extent not inconsistent with the attached Agreement for the Sale of Hydropower and Energy, the rates contained in this Service Tariffs NS-1, NS-2, and NS-3 ~~may be revised from time to time on not less than thirty (30) days written~~ notice to Customer.

**B Delivery**

1. Power and/or Energy supplied under Service Tariffs NS-1, NS-2, and NS-3 shall be delivered by Authority at the Project switchyard to the NYISO for delivery to Customer's or Designated Entities' Transmission Agent at the Border.

For the purpose of these Service Tariffs, Power and/or Energy shall be deemed to be offered when Authority is able to supply Power and Energy and NYISO transmits it to its designated points of interconnection with Customer's Transmission Agent(s). If, despite such offer, there is a failure of delivery by Customer or Designated Entities' Transmission Agents, such failure shall not be subject to a billing adjustment pursuant to Section 454.6(d) of the Rules.

#### **C Scheduling Procedures**

1. Authority will advise Customer or its Dispatching Agent by the tenth (10<sup>th</sup>) Business Day of the preceding month of the estimated quantity of Energy expected by Service Tariff to be made available from the Project.
2. Authority may require that such Energy from the Project be scheduled in general accordance with the load shape of Customer or its Dispatching Agent or as otherwise agreed upon by the Customer and Authority.
3. Customer or its Dispatching Agent shall file with Authority pursuant to procedures established by Authority, a daily schedule setting forth the Customer's requested amounts from the Project on a clock hour basis.
4. Subsequent to Authority approval of schedules for any day, Authority and Customer or its Dispatching Agent may agree on changes in such schedules subject to NYISO scheduling requirements and procedures Authority shall establish such that an efficient dispatch of Authority facilities will be accomplished.

#### **D Payment by Customer for Power and/or Energy**

1. Customer shall pay for Power and/or Energy during any Billing Period the sum of a) and b) below:
  - a. For Firm Hydroelectric Power and Energy and Firm Peaking Hydroelectric Power & Energy, the capacity rate per kilowatt for Firm and Peaking Power & Energy specified in the applicable Service Tariff or any modification thereof applied to Customer's Billing Demand for the Billing Period: and
  - b. The Energy rate specified in the applicable Service Tariff or any modification thereof applied to the amount of firm and non-firm Energy delivered by Authority to Customer during such Billing Period.
2. Bills computed under Service Tariffs NS-1, NS-2, and NS-3 are due and payable by electronic wire transfer in accordance with the Rules. Such wire transfer shall be made to J P Morgan Chase NY, NY / ABA021000021 / NYPA A/C # 008-030383, unless otherwise indicated in writing by Authority. In the event that there is a dispute on any items of a bill rendered by Authority, Customer shall pay such bill and adjustments, if necessary, will be made thereafter.

**E Supplementary Provision**

Sections 454.2 (c) and 454.5 of the Rules are inapplicable to this Service Tariff.



## **Appendix A**

**List of Distributing Entities and their monthly Load Factors.**

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App\_A\_Ltr\_Agmt 3<sup>rd</sup> Revised 7-21-05

Date]

Dear :

The New York Power Authority ("NYPA") and \_\_\_\_\_ ("Customer") are parties to a March 28, 1990 contract ("the 1990 Contract") under which NYPA sells several categories of hydropower and energy to Customer for resale within the State/Commonwealth of \_\_\_\_\_. Pursuant to various letter agreements, the 1990 Contract was extended until October 31, 2003.

The 1990 Contract was further extended by letter agreement dated September 24, 2003 to August 31, 2007 solely with respect to the sale of Niagara Project power and energy. That letter agreement also required Customer and the other Neighboring State Bargaining Agents to update the list of preference entities on whose behalf Customer has contracted for Niagara Project power and energy and to update for each such preference entity, the number of rural and domestic customers served and their average monthly load factor. This information was used to develop new allocations of Niagara Project firm and firm peaking power and energy to the Neighboring States beginning February 2004.

Unless any or all Neighboring States party to the proposed NYPA Agreement for the Sale of Niagara Project Power and Energy amends Appendix A as provided in this letter agreement, NYPA and Customer agree that the allocations developed for the September 24, 2003 letter agreement will be carried forward as Appendix A to the proposed NYPA Agreement for the Sale of Niagara Project Power and Energy to Neighboring States starting September 1, 2007 ("2007 Niagara Contract").

NYPA and Customer further agree that Customer, at its sole discretion, may provide to NYPA and the other Neighboring State Bargaining Agents an amended Appendix A of its 2007 Niagara Contract. Such amended Appendix A shall include a further update to the list of preference entities on whose behalf Customer has contracted for Niagara Project power and energy and for each such preference entity, the number of rural and domestic customers served on December 31, 2005 and the average monthly load factor for each month of calendar year 2005. Customer shall include in any such amendment to Appendix A any preference entity within such state which, as of December 31, 2005, will be ready, willing and able to receive delivery of Niagara Project power and energy under the proposed NYPA Agreement for the Sale of Niagara Project Power and Energy starting September 1, 2007. Amendments must be received by NYPA not later than December 31, 2006. If Customer does not provide amendments by that date, Customer will be deemed to waive its right to revise the data on which its allocation for the 2007 Niagara Contract is based. NYPA will notify all Customers, not later than April 1, 2007, of the change in allocations to each Customer necessitated by amendments submitted. Modification of allocations among the Neighboring State Customers as required by amended Appendix A will become effective September 1, 2007.

This letter agreement shall become effective only on execution of similar letter agreements by each of the Neighboring State Customers. This letter agreement may be executed in counterparts, each of which shall be deemed an original and shall be

deemed to have been executed as of the date listed first above, but all of which together shall constitute one and the same instrument.

Very truly yours,

Signature blocks for NYPA and Customer to be provided

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## **Appendix B**

### **NEW YORK POWER AUTHORITY RATE STABILIZATION RESERVE METHODOLOGY**

The Rate Stabilization Reserve (RSR) is calculated consistent with Service Tariff provisions regarding the Flow Adjustment Computation (FAC), which was not altered in the January 2003 Report on Hydroelectric Production Rates or the Staff Analysis of Public Comments and Recommendations adopted by the Trustees of the Power Authority on April 29, 2003. The calculation (an example of which is attached) is described below:

1. Calculate the total cost of service (CoS) for the Niagara/St. Lawrence projects.  
  
Costs include: Operations and Maintenance, amortized roadwork, Indirect Overheads (Shared Services, Research and Development, debt service) and Capital Costs (using TOC for equity funded and OC for debt funded).
2. Credit the CoS by any excess capacity (ICAP) sales to the ISO.
3. Allocate costs to the demand function by multiplying the sum of the customers' billed demands by the preference demand charge, which has been inflated to include ancillary services production costs. This larger demand charge is used only for the purposes of the RSR.
4. Calculate the cost-based energy rate by dividing the remaining energy assigned costs by the annual metered generation.
5. Calculate the difference between the cost-based energy rate and the billed preference energy rate.

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6. Multiply the difference in the rates by the actual annual billed preference energy sales to determine the annual change in the RSR.
7. Add the annual change to the RSR balance from the prior year-end to get the current year-end RSR balance.

8. If the current year-end balance is in excess of +/- \$25 million, the excess would be subject to a credit or a surcharge in the subsequent rate year.

**THIS GOOD NEIGHBOR AGREEMENT** (this "Agreement") made and entered into as of the 23 day of May, 2006 (the "effective date") between the Power Authority of the State of New York ("NYPA") and Niagara University (the "University")

**WITNESSETH THAT:**

WHEREAS, NYPA owns and operates the Niagara Power Project ("Project"), located on the Niagara River in Niagara County, New York and partially located on lands acquired from the University;

WHEREAS, the campus of the University, for the last 45 years, has abutted the Project, and various issues and claims arising out of this proximity have been amicably resolved by the parties over that period;

WHEREAS, NYPA and the University (the "Parties," or, individually, a "Party") now desire to make certain further arrangements in this regard and to resolve certain issues and claims of the parties; and

WHEREAS, such arrangements will entail the relocation of certain outdoor athletic facilities of the University; and

WHEREAS, such arrangements also will entail an exchange of certain parcels of real property which, because of a number of circumstances, are unique and uniquely suited to the accomplishment of the goals of the parties; and

WHEREAS, the aforementioned exchange of real property is intended to further the public health, safety, or welfare or an economic development interest of the State of New York and/or NYPA;

NOW THEREFORE, in consideration of the mutual covenants set forth herein, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

**SECTION 1  
CONVEYANCE OF LANDS**

**1.1 PARCELS TO BE CONVEYED BY THE UNIVERSITY**

The University agrees to convey to NYPA in accordance with the terms stated herein, two parcels of land generally identified as follows:

- (a) *Parcel 1.* A parcel of land, approximately six acres in size, owned by the University that is to be sufficient in area and otherwise suitable in the sole opinion of NYPA for the construction thereon of the project described in the Scope of Work attached as Appendix A to this Agreement (the "NYPA Work"); provided, however, that such parcel shall (i) include all lands owned by the University within an approximately 50-foot radius of the Project's

surveyed Corner Monument 5-32 (ii) abut that segment of the Project Boundary that extends between such Corner Monument and Corner Monument 5-31 (approximately 1100 linear feet), and (iii) exclude the lands currently dedicated for use as the University's baseball and softball fields. A map generally showing the area in which this parcel will be located is attached as Appendix B to this Agreement.

- (b) *Parcel 2.* A parcel of land, approximately six acres in size, owned by the University that is to be sufficient in area and otherwise suitable in the sole discretion of NYPA for the construction thereon of a new warehouse for the Project replacing the warehouse currently used by NYPA together with necessary and appropriate associated facilities such as a parking lot, outbuildings, and other similar improvements and structures; provided, however that the University's obligation pursuant to this section 1.1(b) of this Agreement shall include the obligation to convey any easements or rights of way over, under, or through lands of the University that are necessary to enable NYPA to construct, install, operate, and maintain underground connections linking the newly-constructed facilities with existing utility installations (subject to NYPA's agreement to restore any University property disturbed in making or maintaining such connections to a condition as much as possible resembling the original condition). A map generally showing the area in which this parcel will be located is attached as Appendix B to this Agreement.

Final identification of the boundaries of the aforesaid parcels shall be undertaken by the Parties as a cooperative effort, and, as part of that effort, NYPA may perform or contract for the performance of whatever site investigations it deems appropriate, including Phase I and a Phase II environmental investigations with respect to such parcels, and the University will fully cooperate with any associated investigation. NYPA shall provide the University with copies of any reports generated as a result of any such investigation, and NYPA acknowledges and agrees that the University makes no warranties or representations regarding the condition of either parcel of property.

## **1.2 COMMITMENTS OF NYPA**

In return and as consideration for all consideration furnished by the University, including, without limitation, the conveyances described in section 1.1 of this Agreement, NYPA agrees to:

- (a) Undertake and complete the NYPA Work in a diligent manner and, thereafter, operate and maintain the NYPA Work;
- (b) Make available to the University a fund in the amount of \$2,000,000 to be used to defray expenses incurred by the University arising out of the project described in the Scope of Work attached as Exhibit C to this Agreement (the "NU Work");
- (c) In accordance with the provisions of section 1.3 of this Agreement, offer to convey the parcels of land identified as Parcel 3 and Parcel 4 on Exhibit B attached to this Agreement to the University, and,
- (d) Advise the University at regular intervals and upon reasonable request of the progress of the conduct of any and all activities undertaken in connection with the petroleum contamination on Parcel 4 that is the subject of Spill Number 0551698 described in the letter dated March

7, 2006 from Gregory Sutton of the New York State Department of Environmental Conservation ("DEC") to William Slade of NYPA (the "Parcel 4 Clean-up").

- (e) Amend Project Permit NPP-89-3P to reflect the fact that any transfer of Parcel 3 and/or Parcel 4 pursuant to this Agreement will facilitate a substantial reorientation of the University Campus and that the aforesaid permit will need to afford the University continuous, unimpeded access over certain roads providing access to such parcel or parcels and, more specifically, amend such permit so that it provides that it only can be terminated or cancelled upon the mutual agreement of the Parties and that, on or before the date of any conveyance of Parcel 4, Exhibit A thereto shall be replaced by a revised exhibit adding to the areas covered by such permit the road that is contiguous with the southern edge of such parcel.

Notwithstanding any other provision of this Agreement, NYPA's obligations pursuant to this section 1.2 of this Agreement shall become effective on the date that is thirty days after the later of the date upon which NYPA files a letter with the Federal Energy Regulatory Commission ("FERC") accepting the new license for the Project or August 31, 2007 (the "Acceptance Date").

### **1.3 TERMS AND CONDITIONS OF CONVEYANCES**

All conveyances described herein shall be subject to purchase and sale agreements between NYPA and the University, which agreements shall include, but will not be limited to, the following terms and conditions:

- (a) *Deeds:* The purchase and sale Agreements shall provide that any instruments of conveyance with respect to Parcels 3 and 4 shall be quitclaim deeds containing no general or special warranties to the purchaser, the instrument of conveyance with respect to Parcel 2 shall be a quitclaim deed with lien covenant, and the instrument of conveyance with respect to Parcel 1 shall be a warranty deed with standard covenants.
- (b) *Environmental Issues:* Each purchase and sale agreements shall provide that (1) the grant by the conveying party and the acceptance by the purchaser shall be "as is" and "with all faults," (2) the conveying party shall not make any representation or warranty regarding the absence or presence of environmental hazards or the compliance of prior uses on or present conditions of the conveyed parcel under any and all applicable federal, state, and local environmental laws, and (3) the aforementioned provisions relating to environmental issues shall survive the transfers of title. Notwithstanding the foregoing, the purchase and sale agreements may obligate the conveying party to cooperate with the purchaser with respect to any application to DEC, the United States Environmental Protection Agency, or any other appropriate governmental agency for relief from potential strict liability that could be imposed pursuant to federal, state, or local law on the purchaser in connection with pre-existing environmental contamination affecting the property to be conveyed.
- (c) *Environmental Assessments.* Any purchase and sale agreement with respect to Parcel 4 shall contain an acknowledgement by the University that NYPA has conducted Phase I and Phase II environmental assessments with respect to such parcels and provided such assessments to



the University. Any purchase and sale agreement with respect to Parcel 3 shall provide that NYPA will conduct such assessments with respect to Parcel 3 and will provide the same to the University sufficiently in advance of the date set for the transfer of title therein. In addition, each purchase and sale agreement shall include an acknowledgement by the conveying party that whatever statutory or common law causes of action, claims, or remedies the purchaser may have or come to have against the conveying party that (1) arise out of latent environmental hazards or latent failures to comply with applicable federal or state environmental laws at or on the conveyed parcel or parcels and (2) are shown to be attributable to activities undertaken by the conveying party or its representatives at or on such parcel or parcels during the conveying party's period of ownership shall be unimpaired and unaffected by the mere transfer of title to the purchaser and shall not be deemed to be a Claim (as hereinafter defined) subject to the provisions of section 3 of this Agreement. Furthermore, each such purchase and sale agreement shall provide that the aforementioned acknowledgement itself shall survive the transfer the title.

- (d) *Timing of Conveyances.* The purchase and sale agreements shall establish mutually acceptable times and locations for the transfers of title; *provided, however*, that any purchase and sale agreement with respect to Parcel 3 shall provide that the transfer of title to such parcel may not be scheduled for a date earlier than December 31, 2011 and any purchase and sale agreement with respect to Parcel 4 shall provide that the transfer of title to such parcel may and will be deferred pending completion of any and all remedial activities relating to such parcel deemed necessary or appropriate by NYPA and/or DEC, including, without limitation, the Parcel 4 cleanup and a reasonable period not to exceed six months thereafter.
- (e) *FERC Approval.* The purchase and sale agreement with respect to parcel 1 shall provide that, in the event NYPA decides, in its sole discretion, to seek approval from the Federal Energy Regulatory Commission ("FERC") of the incorporation of Parcel 1 or any part thereof within the boundary established by FERC for the Project, the University shall fully support NYPA's pursuit of such approval in all relevant administrative and judicial forums and proceedings.
- (f) *Compliance with Law.* The purchase and sales agreements shall provide that the conveyances in all respects shall conform and comply with applicable laws and regulations, including, without limitation, Title 1 of Article V of the Public Authorities Law and the Public Authorities Accountability Act of 2005. In addition, any purchase and sales agreement or agreements with respect to Parcel 3 and/or Parcel 4 shall provide that NYPA may submit the proposed deeds to the Attorney General for review and approval prior to the transfer of title.
- (g) *Additional Provisions.* Any purchase and sale agreement with respect to Parcel 3 shall provide that (1) NYPA shall continue to perform ordinary lawn and landscape maintenance thereon, remove snow from entrances and parking areas when appropriate, and maintain the warehouse currently used by NYPA and located on Parcel 3 in a condition substantially similar to its current condition throughout the period leading up to the transfer of title to the University, and (2) the conveyance shall include the existing warehouse currently used by NYPA and located thereon and all fixtures and other real property attached or appurtenant to such warehouse (excluding any and all personal property located therein). In addition, any

purchase and sale agreement or agreements with respect to Parcels 3 and 4 shall provide that NYPA shall remove all debris, construction materials, and equipment from the surface of the parcel prior to the transfer of title. The purchase and sale agreement or agreements with respect to Parcels 1 and 2 shall provide that the University shall continue to provide ordinary lawn and landscape maintenance thereon throughout the period leading up to the transfer of title to NYPA.

## **SECTION 2 RELEASE AND REMEDIES**

From and after the Acceptance Date, NYPA and the University, for themselves and their respective successors, assigns, executors, administrators, trustees, regents, agents, personal or legal representatives, affiliates, and subsidiaries, do hereby absolutely and unconditionally forever remise, release, and discharge one another and their respective successors, assigns, executors, administrators, trustees, agents, personal or legal representatives, affiliates, and subsidiaries from any and all manner of: actions, causes of action, liability, suits, regulatory complaints, and rights of intervention and comment in any proceeding of any nature; rights to initiate, intervene in, support, or join in any action or proceeding or seek any administrative, legal, or equitable remedies of any nature or description whatsoever before any court or governmental or regulatory authority (including but not limited to any and all United States and Canadian federal, state, or local courts or governmental authorities or regulatory bodies); and debts, dues, offsets, recoupments, counterclaims, liens, charges, accounts, accountings, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, violations, liabilities, obligations, demands, costs, expenses, set-offs, or any other claims of any nature whatsoever, in law or in equity ("Claims"). The parties agree that, in the event of any breach of this Agreement by the University, NYPA could suffer damages which are both irreparable and difficult to ascertain. NYPA may obtain injunctive relief against any breach without being required to post any bond or security. Remedies provided in this Agreement are in addition to any remedy set forth herein and both parties shall be entitled to any remedies available in law or equity. Notwithstanding the foregoing, this Release shall not be deemed to apply to any Claim a Party may have that arises from a future occurrence, as hereinafter defined. For purposes of this Agreement, an "occurrence" shall mean an event that has an impact or effect on a Party that is different in kind from impacts or effects heretofore experienced as of the effective date of this Agreement in connection with the construction, ownership, operation, or maintenance of the Project or the University Campus other than an event that, as of the effective date of this Agreement, was reasonably likely to occur and was anticipated or reasonably should have been anticipated by such Party in connection with the construction, ownership, operation, or maintenance of the Project or the University Campus. NYPA acknowledges that it has been apprised of the University's plan to reorient the University Campus and that currently it anticipates that such plan will involve no occurrence within the meaning of this Agreement.

## **SECTION 3 LIMITATION OF APPLICABILITY**

This Agreement is made with the express understanding that it constitutes a negotiated settlement of issues specific to the Project. No Party shall be deemed, by virtue of execution of this Agreement, to have established precedent or admitted or consented to any approach, methodology, or principle, except as expressly provide herein. Further, by entering into this Agreement, NYPA shall not be

deemed to have admitted to any liability for any action arising from the construction, operation, and maintenance of the Project, and this Agreement shall not be evidence of, or otherwise construed as, liability for any action arising from the construction, operation, and maintenance of the Project.

#### **SECTION 4 SETTLEMENT NEGOTIATIONS PRIVILEGED**

The Parties have entered into the negotiations and discussions leading to this Agreement with the understanding that, to the fullest extent allowed by law, all prior discussions relating to this Agreement and the negotiation of the terms thereof are privileged and confidential. This material shall not prejudice the position of any Party or participant taking part in such discussions and negotiations and are not to be used by any entity in any manner, including admission into evidence, in connection with these or any other proceedings related to the subject matter of this Agreement.

#### **SECTION 5 FORCE MAJEURE**

An event of *Force Majeure* as used herein means any event beyond the reasonable control of and which occurs without the fault or negligence of a Party or any entity controlled by such Party, including its contractors and subcontractors (to the extent said contractor was acting under the control or direction of such Party), which events may include but are not limited to: any delay or failure to grant a permit or other regulatory authorization required by law to be granted by any Federal, State, or local government authority, or any regulation, law, or prohibitory or mandatory action of any Federal or State governmental authority; acts of God or sudden actions of the elements, including fire; drought or critically high or low flows and levels in the Lake Erie/Lake Ontario/Niagara River watershed; strikes, lockouts or other similar industrial disturbances; acts of the public enemy, including terrorist acts, wars, civil disturbances, blockades, military actions, insurrections or riots; landslides, floods, washouts, lightning, earthquakes, tornadoes, hurricanes, blizzards or other storms or storm warnings; explosions, fires, sabotage, or vandalism; breakage, defects, malfunctioning, or accident to machinery, equipment, materials, or lines of pipe or wires; freezing of machinery, equipment, materials or lines of pipe or wires; inability or delay in the obtaining of materials or equipment; inability to obtain or utilize any permit, approval, easement, license, or right-of-way. The settlement of strikes, lockouts, or other similar such industrial disturbances shall be entirely within the discretion of the Party affected by same. The requirement herein that any event of *Force Majeure* shall be remedied with all reasonable dispatch shall not require the settlement of strikes, lockouts or other similar such industrial disturbances when such course is, in the opinion of the Party affected by same, inadvisable. If any event of *Force Majeure* directly renders the Party affected by same unable, wholly or in part, to perform any obligation under this Agreement, it is agreed that, upon giving notice and full particulars of such event of *Force Majeure* to the other Party and, as soon thereafter as practicable, such Party is authorized to suspend performance under such obligations during the continuance of any inability or incapacity so caused, but for no longer period; *provided, however*, such Party shall not be relieved from: (1) any obligations of this Agreement not directly affected by the event of *Force Majeure* or (2) any obligation to make payment for pre-existing obligations. The Party affected by an event of *Force Majeure* shall use best efforts to remedy the cause of such inability or incapacity with all reasonable dispatch, including, but not limited to, the prompt commencement and prosecution of litigation. When a Party affected by an Event of *Force Majeure* is able to resume performance of its obligations, it shall give the other

Party notice to that effect. The occurrence of a *Force Majeure* event that results in impossibility of performance of an obligation, however, shall excuse the non-performance of the Party affected by same.

## **SECTION 6 HEADINGS**

The descriptive headings of the various Sections of this Agreement have been inserted for convenience of reference only and are of no significance in the interpretation or construction of this Agreement. To the extent that there is any inconsistency between the heading of a Section of this Agreement and the text of the Section, the text shall govern.

## **SECTION 7 CHOICE OF LAW AND FORUM**

This Agreement, as a binding contract between the Parties, shall be governed by and construed under New York law without reference to its conflicts of law principles. Any action at law, suit in equity, or other judicial proceedings for the enforcement of this Agreement or any of its provisions must be brought in and maintained only in a court of competent jurisdiction located in Niagara County, New York.

## **SECTION 8 RESOLVING DISPUTES AMONG THE PARTIES**

The Parties agree to utilize the following alternative dispute resolution mechanism to resolve all disputes, other than a dispute constituting a breach, related to the compliance with, or the performance of, obligations set forth in this Agreement:

### **8.1 NOTICE**

Any Party who believes that a dispute has arisen shall provide written notification pursuant to Section 9.1 to the other Party describing the matter(s) in dispute, the circumstances under which it arises, and the proposed relief or resolution to address the dispute.

### **8.2 CONSULTATION**

The Parties shall commence a one hundred twenty (120) day Consultation period (measured from the date of the notice of the dispute) to engage in good faith negotiations to resolve the dispute(s). During the Consultation period, the Parties shall hold at least three (3) meetings unless and until the dispute is resolved. At any time during the Consultation period, the Parties may, by mutual consent, initiate Facilitated Mediation as set forth in Section 8.3.

### **8.3 FACILITATED MEDIATION**

If disagreement persists at the conclusion of the Consultation period or if the Parties mutually consent during the Consultation period, an aggrieved Party may, within fifteen (15) days after the conclusion of the consultation period, initiate Facilitated Mediation through a mutually-agreed upon organization. If the Parties do not otherwise agree upon an organization, then it is understood that

such dispute will be heard and governed by the rules of the American Arbitration Association ("AAA"). The mediation process shall continue until the dispute is settled or until the mediator makes a finding that there is no possibility of settlement through Facilitated Mediation. At any time during Facilitated Mediation, the Parties may, by mutual consent, initiate Court Proceedings as set forth in Section 8.4.

#### **8.4 COURT PROCEEDINGS**

If the Parties choose not to engage in Facilitated Mediation, if a disagreement persists at the conclusion of the Facilitated Mediation, or if the Parties mutually consent during Facilitated Mediation, an aggrieved Party may commence Court Proceedings in New York State Supreme Court located in Niagara County, New York, as set forth in Section 7 of this Agreement. The final disposition of the Court Proceedings shall be binding upon the Parties to this Agreement.

### **SECTION 9 NOTICE AND COMMUNICATION**

#### **9.1 NOTIFICATION REQUIREMENT**

All written notices to be provided pursuant to this Agreement shall be mailed by U.S. certified mail, or overnight express service, postage prepaid, to each Party at the addresses listed in the attached Appendix D or at a subsequent address, as a Party shall identify. Notices shall be deemed to be given five (5) business days after the date of mailing or on date of receipt if overnight express or other receipt-notification service is used.

#### **9.2 NOTIFICATION CONTACT INFORMATION**

For purposes of implementing this Agreement, the Parties agree that the individuals listed in the attached Appendix D shall be designated the primary contact persons and all written notices shall be posted to these individuals at the addresses listed in the attached appendix. Notification of changes in the contact persons must be made in accordance with Section 9.1 of this Agreement.

#### **9.3 OTHER COMMUNICATIONS**

Notices and other communications not required to be made to all Parties or not required to be made in a specific manner under the terms of this Agreement need not be in writing and may be made by telephone, electronic mail, or facsimile.

### **SECTION 10 COSTS**

Except as provided in this Agreement, the Parties shall bear their own costs of participating in this Agreement.

## **SECTION 11 MERGER CLAUSE**

This Agreement, including all Appendices attached hereto, constitutes the entire agreement between the Parties with reference to the subject matter hereof and supersedes all prior understandings or agreements, oral or written, between the Parties with respect to the subject matter of this Agreement.

## **SECTION 12 WAIVER**

The failure of any Party to this Agreement to insist, on any occasion, upon strict performance of any provision of this Agreement will not be considered a waiver of any obligation, right, or duty of, or imposed upon, such Party.

## **SECTION 13 AMENDMENT**

The Parties may, by mutual agreement, amend this Agreement by a written instrument duly executed by the Parties. To the extent that the review of impacts described in Section 1 of this Agreement imposes on NYPA an obligation to mitigate impacts in such a way that performance in conformity with the terms of this Agreement would be inconsistent with such required mitigation, the parties will negotiate in good faith in an effort to amend this Agreement as necessary to remove such inconsistency.

## **SECTION 14 ENVIRONMENTAL REVIEW**

This Agreement is subject to the State Environmental Quality Review Act ("SEQRA") and all other laws imposing on NYPA an obligation to conduct or participate in review of impacts to the environment (including, without limitation, coastal, cultural, and historic resources and/or properties) and, to the extent any action to be taken pursuant to this Agreement gives rise to an obligation to conduct and/or participate in such review or to consult with federal, state, or local agencies or authorities with respect to any such impacts, NYPA may and shall defer the taking of such action pending completion of the required review and/or consultation. Following the effective date, NYPA shall undertake and diligently pursue a review pursuant to the aforementioned laws of the actions described in this Agreement to be taken by NYPA and, to the extent relevant to such review, by the University. The scope of such review shall be determined by NYPA in accordance with SEQRA and all other applicable laws and regulations and it is anticipated that NYPA will prepare a Generic Environmental Impact Statement pursuant to SEQRA that will address impacts arising from the conveyances described in sections 1.1 and 1.2 of this Agreement, the NYPA Work, the NU Work, and any other project or activity related to the carrying out of this Agreement, including, without limitation, the design, construction, equipping, operation, and maintenance of a new warehouse for the Project replacing the warehouse currently used by NYPA, together with necessary and appropriate associated facilities.

**SECTION 15  
EXECUTION**

Each signatory to this Agreement represents that: (1) he or she is authorized to execute this Agreement and legally bind the Party he or she represents and (2) the Party he or she represents will be fully bound by the terms hereof. This Agreement may be executed in any number of counterparts, and each executed counterpart shall have the same force and effect as an original instrument as if all the signatory parties had signed the same instrument. Any signature page of this Agreement may be detached from any counterpart of this Agreement without impairing the legal effect of any signature(s) thereon and may be attached to another counterpart of this Agreement identical in form hereto but having attached to it one or more signature pages.

Intending to be legally bound, the Parties have executed this Agreement through their duly authorized representatives.

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed as of the date set forth in this Agreement.

IN WITNESS WHEREOF:

**POWER AUTHORITY OF THE STATE OF NEW YORK**

By:   
Timothy Carey, President and Chief Executive Officer

Date: May 23, 2006

**NIAGARA UNIVERSITY**

By:   
Rev. Joseph L. Levesque, C.M., President

Date: May 3, 2006

## **APPENDIX A**

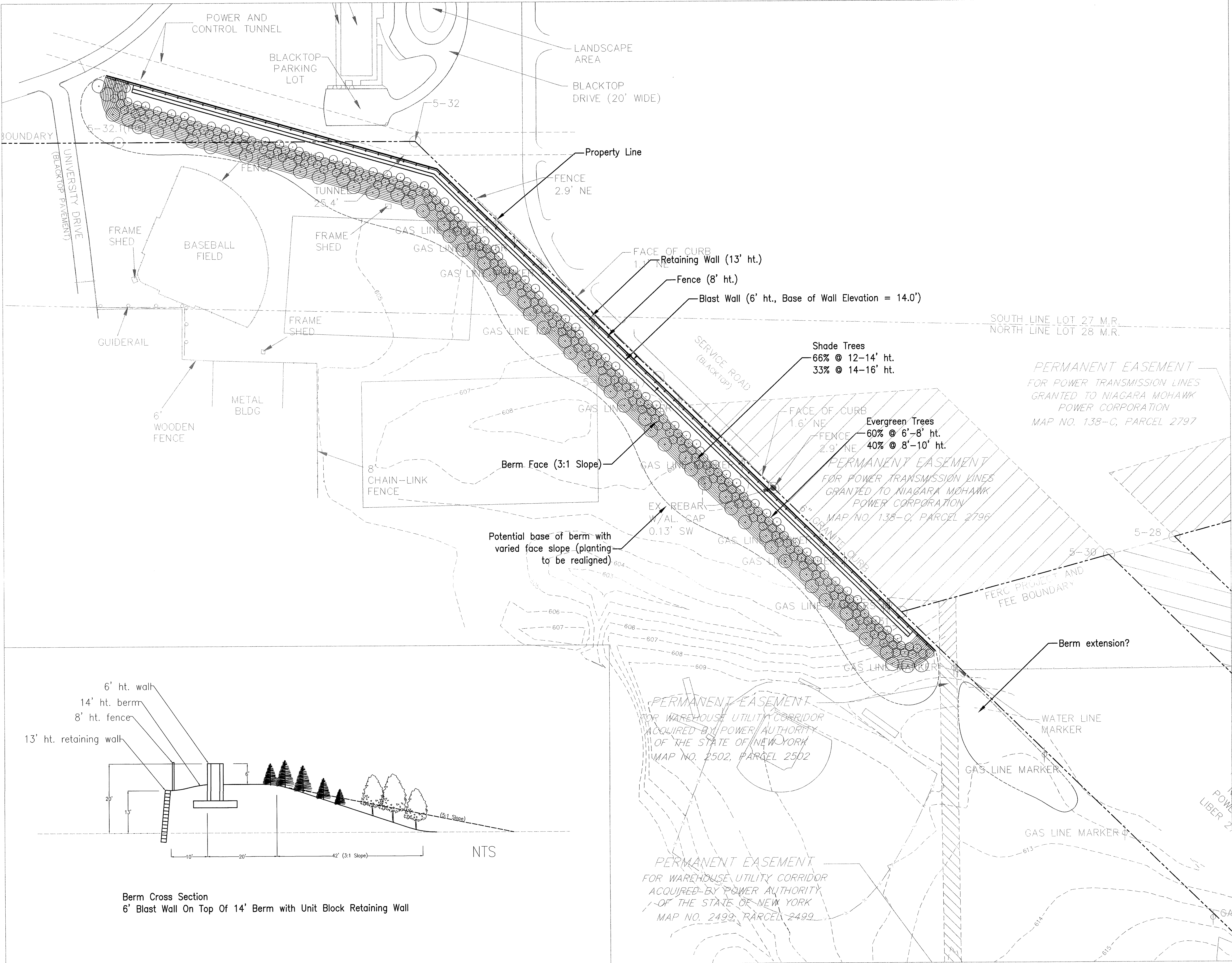
### **THE NYPA WORK**

Following the transfer of title to Parcel 1, NYPA shall construct on Parcel 1 and, if deemed appropriate by NYPA, on other adjacent lands owned by NYPA, a berm and wall that will enhance the physical and visual separation of the Project switchyard and related facilities from the campus of the University. NYPA shall set aside \$3.5 million for this purpose and shall consult with the University throughout all phases of the siting, design, construction, development, and installation of the new berm and wall.

In furtherance of the consultation requirement, the University has prepared a possible configuration of the wall and berm as shown on the drawing which follows and which is made a part of this Exhibit A solely for the purpose providing an example of a preliminary and conceptual design. It is understood and agreed by the parties that, in operating and maintaining the NYPA work, NYPA will give due regard to its operational and aesthetic impact on the University Campus.

Proposed substantial modifications to the NYPA Work shall be submitted to the University for review of the changes to the facilities except in instances when the security of the Project is in imminent peril or FERC directs NYPA to modify the facilities in a particular manner. The University shall have the right to submit comments to NYPA within 30 days of receipt of plans regarding the proposed facility modifications. NYPA will consider the University comments and shall notify the University within 30 days of receipt of the University comments as to what extent the University comments will be incorporated into the proposed modification plans. In instances of an imminent threat to the security of the Project or changes required by FERC, NYPA will inform the University as soon as practicable.











## **APPENDIX C**

### **THE NU WORK**

Following the final identification of Parcel 1 in accordance with section 1.1 of this Agreement and prior to the transfer of title to Parcel 1, the University may construct new athletic fields and install related outdoor facilities, including parking lots, lighting, and incidental structures such as concession stands and dugouts at a new location on the campus of the University (such location to be selected by the University after consultation with the NYPA) for the purpose of replacing those facilities displaced by such transfer of title. The University shall provide NYPA with a plan for the NU Work within six months following final identification of the boundary of Parcel 1. In addition, the University will provide to NYPA receipts for expenditures associated with the NU Work no later than the date that is two years after the date upon which the fund is made available to the University.

**APPENDIX D**  
**CONTACT INFORMATION**

**NEW YORK POWER AUTHORITY**

President and Chief Executive Officer  
123 Main Street  
White Plains, New York 10601-3170

**NIAGARA UNIVERSITY**

President  
Alumni Hall  
Niagara University, New York 14109-2014

**VanNess  
Feldman**  
ATTORNEYS AT LAW

A PROFESSIONAL CORPORATION  
1050 Thomas Jefferson Street N.W.  
Washington, D.C. 20007-3877  
(202) 298-1800 Telephone  
(202) 338-2416 Facsimile  
www.vnf.com

Seattle, Washington  
(206) 623-9372

May 26, 2006

The Honorable Magalie Roman Salas  
Secretary  
Federal Energy Regulatory Commission  
888 First Street, N.E.  
Washington, DC 20426

**Charles R. Sensiba**  
(202) 298-1801  
crs@vnf.com

RE: Niagara Power Project, FERC Project No. 2216-066;  
Filing of Supplement to Offer of Settlement and Explanatory Statement

Dear Secretary Salas:

Pursuant to Rule 602 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("Commission"), 18 C.F.R. § 385.602, the Power Authority of the State of New York ("Power Authority") hereby files the "Supplement to the Niagara Power Project Relicensing Offer of Settlement and Explanatory Statement." This Supplement to the Offer of Settlement consists of an agreement between the Power Authority and Niagara University, and supplements the Offer of Settlement filed in the above-referenced proceeding on August 19, 2005. Because this agreement addresses issues outside the scope of the Commission's jurisdiction, it is filed with the Commission only on an informational basis. The agreement, however, resolves all of the University's issues regarding the Commission's relicensing of the Niagara Power Project.

As set forth in Rule 602(f), comments on the Supplement to the Offer of Settlement must be filed on or before June 15, 2006, unless otherwise provided by the Commission. Reply comments must be filed on or before June 25, 2006.

If you need additional information regarding this filing, please contact the undersigned at (202) 298-1801.

Sincerely,



Charles R. Sensiba  
Counsel to the Power Authority  
of the State of New York

cc: Official Service List

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

**POWER AUTHORITY OF THE  
STATE OF NEW YORK**

)  
)

**PROJECT NO. 2216-066  
NIAGARA POWER PROJECT**

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**SUPPLEMENT TO THE NIAGARA POWER  
PROJECT RELICENSING OFFER OF  
SETTLEMENT AND EXPLANATORY STATEMENT**

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Pursuant to Rule 602 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("FERC" or "Commission"),<sup>1</sup> the Power Authority of the State of New York ("Power Authority") hereby submits the "Niagara University Relicensing Settlement Agreement" ("NU Agreement") as a supplement to the Offer of Settlement filed previously with the Commission in the above-referenced docket.<sup>2</sup> The Power Authority is filing the NU Agreement on an informational basis, inasmuch as the settlement agreement addresses issues outside the scope of the Commission's jurisdiction and does not include any proposed license terms and conditions. The Power Authority respectfully requests, however, that the Commission address the provisions of the settlement as part of the cumulative impacts section of the draft environmental impact statement ("DEIS").

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<sup>1</sup> 18 C.F.R. § 385.602 (2005).

<sup>2</sup> Niagara Power Project Relicensing Offer of Settlement and Explanatory Statement, Project No. 2216-066 (filed Aug. 19, 2005).

## **I. INTRODUCTION**

Niagara University was an active participant in the alternative licensing process (“ALP”) for the Niagara Power Project (“Niagara Project”). Since the conclusion of the ALP, and the filing of the license application and Offer of Settlement, the Power Authority has been working with Niagara University to address concerns articulated during the relicensing process. These efforts resulted in the NU Agreement which, by its terms, resolves all of Niagara University’s issues regarding the relicensing of the Niagara Project. The NU Agreement – consistent with the Power Authority’s other settlement agreements – is contingent on the issuance of a new fifty (50) year license that incorporates the settlement parties’ proposed license terms and conditions without expansion or modification.<sup>3</sup>

## **II. EXPLANATORY STATEMENT**

This Explanatory Statement provides an overview of the Power Authority’s settlement commitments in the NU Agreement. The provisions outlined below do not implicate the Power Authority’s obligations under the Federal Power Act or the Niagara Redevelopment Act. Instead, these commitments primarily reflect the Power Authority’s desire, as a corporate municipal instrumentality and political subdivision of the State of New York, to support the communities within which the Niagara Project is located.

The Power Authority has entered into an agreement with Niagara University to address a number of issues that were raised by Niagara University during the scoping process related to socioeconomics, aesthetics, land use, and low-cost power. As long-

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<sup>3</sup> These proposed license conditions are set forth in Appendix A of the Relicensing Settlement Agreement Addressing New License Terms and Conditions (“Relicensing Agreement”).

standing neighbors, the Power Authority and the University believe this agreement will establish a foundation for future cooperation and improved communication, thereby strengthening their relationship throughout the new license term.

Pursuant to the terms of the NU Agreement, the Power Authority has agreed to establish a University Capital Fund ("Capital Fund") with a value of \$9.5 million.<sup>4</sup> The Capital Fund will be available to the University's Board of Trustees for any purpose consistent with the Charter of the University. The Power Authority also has agreed to establish a Landscape Development Fund ("Landscape Fund") with a value of \$1.0 million.<sup>5</sup> The Landscape Fund may be expended, at the discretion of the University, to enhance the aesthetic appearance of the campus. Additionally, the Power Authority has agreed to convey a 24-acre parcel to the University.<sup>6</sup>

Finally, the Power Authority has agreed to make available three (3) MW of firm Niagara Project power and associated energy to the University during the term of the new license.<sup>7</sup> All power and energy sold to the University would be at a cost equivalent to the lowest production rate charged to an entire class of Western New York hydropower business customers plus any charges assessed or imposed by the New York Independent System Operator.

### **III. CONCLUSION**

This NU Agreement represents a negotiated resolution of the issues raised by Niagara University during the ALP. While the NU agreement is submitted for

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<sup>4</sup> Niagara University Agreement § 3.2.

<sup>5</sup> Id. § 3.3.

<sup>6</sup> Id. § 3.5.

<sup>7</sup> Id. § 3.4.

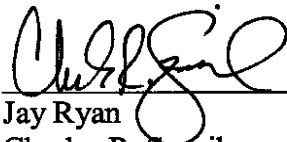


information purposes only, it provides further evidence of the Power Authority's commitment to the communities surrounding the Niagara Project. As with all of the settlement agreements that comprise the Offer of Settlement, the Power Authority believes the NU Agreement will provide a solid foundation upon which the University and the Power Authority may further strengthen their relationship throughout the term of the new license.

WHEREFORE, for the reasons stated above, the Power Authority respectfully requests that the Commission: (1) accept the Offer of Settlement as supplemented by the NU Agreement; (2) analyze the benefits of the NU Agreement in the cumulative effects section of the DEIS; and (3) issue a new fifty (50) year license for the Niagara Project and incorporate – without modification or expansion – the proposed license articles set forth in the Appendix A of the Relicensing Agreement.

William S. Helmer  
Special Licensing Counsel  
Legal Department  
New York Power Authority  
30 South Pearl Street  
Albany, NY 12207-3425  
Telephone: (518) 433-6724  
Facsimile: (518) 433-6781

Respectfully submitted,



Jay Ryan  
Charles R. Sensiba  
Van Ness Feldman, P.C.  
1050 Thomas Jefferson Street, NW  
Suite 700  
Washington, D.C. 20007-3877  
Telephone: (202) 298-1800  
Facsimile: (202) 338-2416

Counsel to the Power Authority  
of the State of New York

DATE: May 26, 2006

**NIAGARA POWER PROJECT,  
FERC PROJECT NO. 2216**

**NIAGARA UNIVERSITY RELICENSING  
SETTLEMENT AGREEMENT**

**May 23, 2006**

NIAGARA POWER PROJECT,  
FERC PROJECT NO. 2216

NIAGARA UNIVERSITY  
RELICENSING SETTLEMENT AGREEMENT

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**THIS NIAGARA UNIVERSITY RELICENSING SETTLEMENT AGREEMENT**  
("Agreement") is made and entered into this \_\_ day of May \_\_, 2006 by the Power Authority  
of the State of New York ("Power Authority") and Niagara University ("University")

**WITNESSETH THAT:**

WHEREAS, the Power Authority owns and operates the Niagara Power Project  
("Project"), located on the Niagara River in Niagara County, New York;

WHEREAS, the 50-year original license for the Project, issued to the Power Authority by  
the Federal Power Commission on January 30, 1958, expires on August 31, 2007;

WHEREAS, the Power Authority on August 18, 2005 filed an application with the  
Federal Energy Regulatory Commission ("Commission" or "FERC") seeking a 50-year New  
License for the continued operation and maintenance of the Project;

WHEREAS, the campus of the University abuts the boundary established for the Project  
by the original license issued by the Federal Power Commission for the Project and the boundary  
proposed in the aforementioned application;

WHEREAS, the Parties have negotiated and resolved all issues associated with the  
Commission's issuance of a New License for the Project to the Power Authority;

WHEREAS, the Parties anticipate that NYPA will file this Agreement with FERC as a  
supplement to the Offer of Settlement filed in connection with the relicensing of the Project on  
August 19, 2005; and

WHEREAS, the Parties agree that the Commission should adopt, without modification,  
all of the License Terms and Conditions into the New License for the Project;

NOW THEREFORE, in consideration of the mutual covenants set forth herein, and other  
good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged,  
the Parties agree as follows:

## **SECTION 1 GENERAL PROVISIONS**

### **1.1 ACRONYMS AND DEFINITIONS**

**"Acceptance of the New License"** shall mean the date upon which the Power Authority files its acceptance of the New License with FERC, or the date of the expiration of the existing original license, August 31, 2007, whichever occurs later.

**"Breach"** shall mean the failure of a Party to perform or observe any material term or condition of this Agreement.

**"Breaching Party"** shall mean a Party that is in Breach of this Agreement.

**"Commission"** shall mean the Federal Energy Regulatory Commission.

**"Default"** shall mean the failure of a Breaching Party to cure its Breach in accordance with Section 4 of this Agreement.

**"FERC"** shall mean the Federal Energy Regulatory Commission.

**"License"** shall mean the regulatory authorization for construction, maintenance, and operation of a hydroelectric project subject to the jurisdiction of FERC pursuant to the Federal Power Act, 16 U.S.C. § 791 *et seq.* ("FPA")

**"License Provision"** shall mean any term, condition, prescription, requirement, holding, reservation of authority, or article included into the New License for the Niagara Power Project by the Commission, or any condition, term, reservation or other License requirement adopted or otherwise included into the New License for the Project, including, but not limited to, a water quality certificate issued by DEC pursuant to Section 401 of the CWA.

**"License Terms and Conditions"** shall mean the entirety of the terms, prescriptions, conditions, and articles set forth in Appendix A to this Agreement.

**"New License"** shall mean the License, not including any annual license, issued by the Commission to the Power Authority for the continued operation and maintenance of the Project, pursuant to Section 15 of the Federal Power Act, effective after expiration of the Project's original license issued on January 30, 1958.

**"Offer of Settlement"** shall mean the offer of settlement filed with FERC on August 19, 2005 pursuant to 18 C.F.R. § 385.602, as supplemented by this Agreement and the Erie County/City of Buffalo Relicensing Settlement Agreement.

**"Party"** shall mean a signatory to this Agreement.

**"Parties"** shall mean all signatories to this Agreement.

**"PM&E"** shall mean protection, mitigation, and enhancement.

**"Project"** shall mean the Niagara Power Project, licensed to the Power Authority as FERC Project No. 2216.

**"Project Boundary"** shall mean the external limits of the Project, as set forth in Exhibit G of the Power Authority's Application for New License for the Project, which encloses all Project lands, waters, works, and other features that are necessary for Project purposes and subject to FERC jurisdiction.

**"Relicensing Agreement"** shall mean the Relicensing Settlement Agreement Addressing New License Terms and Conditions, including all Appendices, dated as of July 18, 2005, by and among the Power Authority and other signatories in settlement of the relicensing of the Project.

## **1.2 SCOPE OF AGREEMENT**

- (a) The Parties agree that this Agreement resolves all issues between the Parties associated with the relicensing of the Project in FERC Docket No. P-2216.
- (b) The Parties agree that the License Terms and Conditions establish the entirety of the Power Authority's FERC-jurisdictional obligations for the PM&E of ecological, environmental, cultural, aesthetic, and recreational resources that may be affected by the Project under a New License issued by FERC.
- (c) The Parties agree that the administrative record developed to date, including, *inter alia*, the relicensing studies, support and justify the License Terms and Conditions.
- (d) The Parties agree that the Power Authority shall file this Agreement with FERC in a timely manner as a supplement to the Offer of Settlement.

## **1.3 COMPLIANCE WITH STATUTES AND REGULATIONS**

Each Party represents that this Agreement is consistent with and fully satisfies any and all applicable statutory and regulatory requirements and obligations under Federal and State law pertaining to the relicensing of the Project. Each Party represents, further, that no PM&E measure or other License Provision, other than the License Terms and Conditions, is necessary or appropriate to satisfy any and all Federal or State law pertaining to the relicensing of the Project. If FERC imposes objectionable License Provision(s), the Parties recognize that such objectionable License Provision(s) may trigger the rights of the Parties under the Withdrawal and Termination provisions of Section 6 of this Agreement.



#### **1.4 LIMITATION OF APPLICABILITY**

This Agreement is made with the express understanding that it constitutes a negotiated settlement of issues specific to the Project. No Party shall be deemed, by virtue of execution of this Agreement, to have established precedent or admitted or consented to any approach, methodology, or principle, except as expressly provided herein. In the event the Offer of Settlement is approved by FERC, such approval shall not be deemed precedential or controlling regarding any particular issue or contention in any other proceeding. Further, by entering into this Agreement, the Power Authority shall not be deemed to have admitted to any liability for any action arising from the construction, operation, and maintenance of the Project, and this Agreement shall not be evidence of, or otherwise construed as, liability for any action arising from the construction, operation, and maintenance of the Project.

#### **1.5 EFFECTIVE DATE AND TERM OF AGREEMENT**

This Agreement shall become effective upon its execution by the Power Authority. Except as provided for herein, this Agreement shall remain in effect for the term of the New License issued by the Commission for the Project and for any annual License issued subsequent thereto. This Agreement shall be binding on and inure to the benefit of the Parties and their successors and assigns unless otherwise specified in this Agreement and shall terminate when a subsequent new license becomes effective following the end of the term of the New License.

#### **1.6 EFFECTIVE DATE OF POWER AUTHORITY OBLIGATIONS**

Unless otherwise expressly provided for in this Agreement, the obligations of the Power Authority under this Agreement shall become effective after the Acceptance of the New License; *provided, however*, that with respect to any License Provision that is subject to a rehearing request, the Parties agree to support the Power Authority's request to stay such License Provision until the date on which resolution of the issue for which rehearing is sought becomes final and non-appealable following FERC or judicial action.

### **SECTION 2 COMMITMENTS OF THE UNIVERSITY**

#### **2.1 SUPPORT OF POWER AUTHORITY PROPOSAL**

The University shall support the Power Authority's entire relicensing proposal set forth in its Application for the New License and the Offer of Settlement, including the Commission's issuance of a 50-year New License for the Project.

## **2.2 SUBMITTAL OF ADDITIONAL STUDY REQUESTS AND RECOMMENDATIONS**

The University shall not submit to any administrative or governmental entity or court any request for additional studies or recommendations for PM&E in the context of the FERC review of the Power Authority's Application for New License.

## **2.3 SUPPORT FOR OFFER OF SETTLEMENT**

The University shall submit to FERC a statement in support of the Application for the New License and the Offer of Settlement within two weeks of the effective date of this Agreement. To whatever extent the University shall have submitted to FERC any interventions, protests, requests, recommendations, or other pleadings or papers not consistent with such statement in support prior to the filing of same, the statement so filed shall advise FERC that any such prior filing is superseded, withdrawn, and retracted and is to be treated as a nullity.

## **2.4 FILINGS AND SUBMITTALS CONSISTENT WITH AGREEMENT**

The University shall ensure that, throughout the term of this Agreement and New License, any and all of its filings or other submittals with or to FERC, DEC, or any other administrative entity or court are consistent with this Agreement and shall not support, propose, or advocate any License Provision that is in any way contrary to or inconsistent with this Agreement. To whatever extent the University shall have filed or submitted with or to any administrative or governmental entity (other than FERC) or court any interventions, protests, requests, recommendations, or other pleadings or papers that are inconsistent with this Agreement, the University shall withdraw the same in a prompt manner.

## **2.5 SUPPORT FOR ADOPTION OF LICENSE TERMS AND CONDITIONS**

The University shall actively support, in all relevant regulatory proceedings, the incorporation of the License Terms and Conditions, including, without limitation, the establishment of a term of 50 years, into the New License and incorporation of consistent terms into any other governmental permit or authorization applied for by the Power Authority in connection with the Application for a New License.

# **SECTION 3 COMMITMENTS OF THE POWER AUTHORITY**

## **3.1 IMPLEMENTATION OF SETTLEMENT COMMITMENTS**

The Power Authority shall comply with, carry out, and implement all commitments in this Agreement, in accordance with Section 1.6 herein; *provided, however*, that the adoption by FERC of the License Terms and Conditions, including, without limitation,

the establishment of a 50-year term for the New License, is expressly made a condition precedent to the Power Authority's obligations hereunder.

### **3.2 UNIVERSITY CAPITAL FUND**

#### **3.2.1 Establishment of University Capital Fund**

Within ninety (90) days after the Acceptance of the New License, the Power Authority shall establish a University Capital Fund ("Capital Fund") in the amount of \$9,500,000. The Capital Fund may be used, at the discretion of the University's Board of Trustees, for any purpose consistent with the Charter of the University.

#### **3.2.2 Effect of Termination of the Agreement**

If this Agreement is terminated as set forth in Section 4 or Section 6.1 herein, the entire Capital Fund, plus any accrued interest and less any administrative costs, shall be completely refunded to the Power Authority.

#### **3.2.3 Non-License Measure**

The Parties agree that the Power Authority's obligation to establish and contribute to the Capital Fund is not subject to FERC's jurisdiction and shall not be included within any license article, condition, or other provision of the New License for the Project.

### **3.3 LANDSCAPE DEVELOPMENT FUND**

#### **3.3.1 Establishment Of Landscape Development Fund**

Within ninety (90) days after the Acceptance of the New License, the Power Authority shall establish a Landscape Development Fund in the amount of \$1,000,000. The Landscape Development Fund shall be expended for projects designed to enhance the aesthetic appearance of the Campus, such as construction of a new campus entrance, contouring, plantings, and similar projects, in the University's discretion.

#### **3.3.2 Effect of Termination of This Agreement**

If this Agreement is terminated as set forth in Section 4 or Section 6.1 herein, the entire Landscape Development Fund, plus any accrued interest and minus any administrative costs, shall be completely refunded to the Power Authority.

#### **3.3.3 Non-License Measure**

The Parties agree that the Power Authority's obligation to establish the Landscape Development Fund is not subject to FERC's jurisdiction and shall not be included within any license article, condition, or other provision of the New License.

### **3.4 POWER ALLOCATION**

#### **3.4.1 Provision of Power and Energy to the University**

The Power Authority shall supply all of the University's power and associated energy requirements up to and including three megawatts (3 MW) of firm Project power and associated energy to the University (at a load factor no higher than the University's overall load factor for a billing period ) at a cost equivalent to the lowest production rate charged by the Power Authority (directly or indirectly) to an entire class of Western New York hydropower business customers (including, for example, Replacement or Expansion Power customers) plus any charges assessed or imposed in connection with such supply by the New York Independent System Operator ("ISO").

#### **3.4.2 Contracts for the Sale of Power and Energy**

Following the effective date of this Agreement, as set forth in Section 1.5, herein, the University and the Power Authority shall negotiate a contract for the sale of up to and including 3 MW of firm Project power and associated energy as set forth in Section 3.4.1 above, which contract shall contain commercial provisions similar to those included in other contracts for the sale of Niagara Project power, including, *inter alia*, the following terms and conditions:

- (a) *Use of Power and Energy:* All power and energy sold to the University pursuant to this Agreement shall be for the sole purpose of serving the load arising on the campus of the University without mark up, and no resale of such power and energy shall be made by the University. Notwithstanding the foregoing, such power and energy may be used by the University and/or by third parties in, on, or at University facilities within one-half (1/2) mile of the campus boundary to the extent such facilities are engaged in the furtherance of the University's academic mission; provided, however, that the University shall be responsible for arranging for the transmission and distribution of power and energy to such facilities and shall bear any and all costs associated with such transmission and distribution.
- (b) *Consistent with Federal and State Law:* The Power Authority's sale of power and energy to the University, pursuant to this Agreement and the contract for sale, shall at all times be consistent with the New License, the Niagara Redevelopment Act, the New York Public Authorities Law, and any other applicable law, license, precedent, or regulation.
- (c) *Delivery of Power and Energy:* The point of delivery and sale of all power and energy sold to the University, pursuant to this Agreement and the contract for sale, shall be at the Project Switchyard.

- (d) *Service in Excess of Authority Allocation.* Electricity supply for the University's facilities in excess of the 3 MW provided by the Authority hereunder shall be the sole responsibility of the University, and the University shall make whatever arrangements with respect to such supply, delivery thereof, and payment for such supply and delivery as it deems necessary or appropriate.
- (e) *Other Costs and Charges.* The University will be responsible for any costs imposed by other parties in connection with the service to be provided by NYPA to the University pursuant to the contract for sale, including any and all charges assessed by the ISO.

### **3.4.3 Approval of Contracts for the Sale of Power and Energy**

Following the negotiation of the contract for the sale of power and energy between the Power Authority and University, as set forth in Section 3.4.2 herein, the Power Authority shall recommend to the Power Authority's Trustees that, pursuant to New York's statutory approval process (New York Public Authorities Law § 1009), such contract be approved and submitted to the Governor of the State of New York for approval. Upon approval pursuant to such process, the University and the Power Authority shall execute such contract.

### **3.4.4 Effective Date of Obligation for the Sale of Power and Energy**

Notwithstanding any other provision in this Agreement or the contract for sale, the Power Authority's obligation to sell power and energy to the University pursuant to this Agreement shall become effective upon the later of: (1) the first day after the date of the Acceptance of the New License or (2) the date upon which the Power Authority and the University execute a contract for the sale of power and energy, as set forth in Section 3.4.2 herein.

### **3.4.5 Effect of Termination of this Agreement**

If this Agreement is terminated as set forth in Section 4 or Section 6.1 herein, the Power Authority's obligation to supply power to the University shall terminate.

### **3.4.6 Non-License Measure**

The Parties agree that the Power Authority's obligation to supply power to the University is not subject to FERC's jurisdiction and shall not be included within any license article, condition, or other provision of the New License.

### 3.5 CONVEYANCE OF LAND

The Power Authority shall agree to convey to the University an approximately 24-acre parcel of land, identified on the map attached to this agreement as Appendix C, pursuant to a purchase and sale agreement that will contain appropriate terms and conditions, including, without limitation, that:

- (a) *Deed:* The instrument of conveyance shall be a quitclaim deed.
- (b) *Approval of Board of Trustees:* The Power Authority may condition the agreement upon approval of its Board of Trustees.
- (c) *Environmental Issues:* The grant by the Power Authority and the acceptance by the university shall be "as is" and "with all faults," and the Power Authority shall not make any representation or warranty regarding the absence or presence of environmental hazards or the compliance of prior uses on or present conditions of the conveyed parcel under any and all applicable federal, state, and local environmental laws.
- (d) *Environmental Assessments.* The University shall acknowledge that the Power Authority has conducted Phase I and Phase II environmental assessments with respect to the parcel and has provided such assessments to the University.
- (e) *Timing of Conveyances.* The parties shall establish a mutually acceptable time and location for the transfer of title and shall use their best efforts to complete such transfer no later than 120 days after the acceptance of the New License.
- (f) *Maintenance.* The Power Authority shall perform appropriate maintenance of the parcel, generally preserving the same in its current condition until the transfer of title; *provided, however,* that the Power Authority shall remove all debris, construction materials, and equipment from the surface of the parcel prior to the transfer of title.
- (g) *Compliance with Law.* The agreement shall in all respects conform and comply with applicable laws and regulations, including, without limitation, the Public Authorities Accountability Act of 2005.

## **SECTION 4 DEFAULT**

### **4.1 GENERAL**

Upon a Breach, the non-Breaching Party shall give written notice of such Breach to the Breaching Party. If the Breaching Party does not agree that a breach has occurred, the dispute will be resolved in accordance with the dispute resolution procedures set forth in Section 8 of this Agreement. If the Breaching Party acknowledges the Breach, the Breaching Party shall have thirty (30) days from receipt of the Default notice within which to cure such Breach; *provided, however*, if such Breach is not capable of cure within thirty (30) days, the Breaching Party shall commence such cure within thirty (30) days after notice and continuously and diligently complete such cure within ninety (90) days from receipt of Default notice and, if cured within such time, the Breach specified in such notice shall cease to exist. No Default shall exist where such failure to discharge an obligation is the result of *Force Majeure* as defined herein in Section 9 of this Agreement.

### **4.2 RIGHT TO TERMINATE**

Notwithstanding any other provision of this Agreement, if any material Breach including, without limitation, a failure of the Power Authority to carry out its commitments pursuant to Section 3 of this Agreement, is not cured as provided for in Section 4.1 of this Agreement, or if a material Breach is not capable of being cured within the period provided for herein, the non-Breaching Party shall have the right to declare a Default, withdraw from this Agreement, be relieved of any further obligation hereunder, and recover from the Breaching Party all amounts due, plus all other damages and remedies provided for in law or equity. The provisions of this Section will survive termination of this Agreement.

## **SECTION 5 ADOPTION BY FERC**

The Parties have entered into this Agreement with the express expectation and condition that FERC approves the Offer of Settlement, as supplemented by this Agreement, and issues a New License for the Project that incorporates, without modification or expansion, the License Terms and Conditions. The Parties agree that if FERC approves the Offer of Settlement and incorporates all License Terms and Conditions into the New License without modification or expansion, the Parties will not seek rehearing of the FERC order granting a New License for any and all issues covered by this Agreement or support in any way any such request for rehearing by any non-Party to this Agreement. The Power Authority reserves the right, even if FERC approves the Offer of Settlement and incorporates the License Terms and Conditions into the New License without modification or expansion, to seek rehearing or other administrative or judicial review in connection with: (1) any and all License Provisions included in the New License other than, in addition to, or in derogation of the License Terms and Conditions or (2) any and all provisions included in any other governmental permit, certification, or authorization

issued in connection with FERC's consideration of and action with respect to the Application for the New License.

## **SECTION 6 WITHDRAWAL AND TERMINATION**

### **6.1 PROCESS FOR WITHDRAWAL**

Should FERC or any other agency take any action related to the issuance of the new License that materially and directly affects the proposed License Terms and Conditions or aggrieves the interests of any Party, the Parties agree to adhere to the following process for amending or withdrawing from this Agreement.

#### **6.1.1 Notification**

Within ten (10) days of issuance of an order containing objectionable License Provision(s), the Party whose interests are directly and materially aggrieved by such License Provision(s) shall provide written notification, pursuant to the requirements of Section 12.1 of this Agreement, to the other Party of its intent to withdraw from the Agreement.

#### **6.1.2 Administrative Appeals**

Following notification as set forth in Section 6.1.1, both Parties shall file a joint request for rehearing and/or pursue all appropriate administrative appeals, requesting the agency responsible for the objectionable License Provision(s) to amend such License Provision(s) to conform to this Agreement.

#### **6.1.3 Good-Faith Negotiation**

Following the submittal of administrative appeal(s) as set forth in Section 6.1.2, the Parties agree that the aggrieved Party shall engage the other Party in good-faith negotiations in an attempt to amend this Agreement by making it conform to the objectionable License Provision(s). The Parties agree to a one hundred twenty (120) day period to conduct good-faith negotiations under this Section, with a minimum of three (3) meetings to be held during a ninety (90) day period. If, during the pendency of the good-faith negotiations, an order is issued that alleviates the aggrieved Party's concerns, the Parties shall discontinue the negotiation process. If, however, an order is issued during the pendency of the good-faith negotiations that denies the Parties' joint administrative appeal or does not reverse the objectionable License Provision(s), the Parties shall continue the negotiations under this Section, but the aggrieved Party may pursue judicial review, pursuant to Section 6.1.4 of this Agreement. If the good-faith negotiations result in an agreement between the Parties to amend this Agreement to conform it to the objectionable License Provision(s), the Parties shall withdraw the joint administrative



appeal(s) filed pursuant to Section 6.1.2 or petition for review filed pursuant to Section 6.1.4, and this Agreement shall be deemed modified to conform to said order.

#### **6.1.4 Judicial Review**

If, as a result of an administrative appeal(s) filed pursuant to Section 6.1.2 of this Agreement, a final order is issued denying the merits of the joint appeal by not reversing the objectionable License Provision(s), the aggrieved Party may file a petition for review by the appropriate reviewing court. The other Party may intervene in the proceeding, but said Party shall not take a position adverse to the terms of this Agreement.

#### **6.1.5 Withdrawal**

The Party whose interests are materially and directly aggrieved by any License Provision may withdraw from this Agreement, but only after: (1) the Parties comply with Sections 6.1.1 through 6.1.4 of this Agreement and (2) the aggrieved Party exhausts all available avenues for review of the order(s) imposing the objectionable License Provision(s) by filing timely requests for rehearing, petitions for review, and other required filings to continue the review process. Following the final, non-appealable order or ruling that fails to remedy the objectionable License Provision(s), the aggrieved Party may provide written notification to the other Party of its withdrawal from this Agreement, pursuant to the notification requirements of Section 12.1. Upon notification, the provisions of Section 6.2 of this Agreement shall apply. If the aggrieved Party fails to comply with Sections 6.1.1 through 6.1.4 of this Agreement or exhaust all available avenues for review of the order(s) imposing the objectionable License Provision(s), then the Party may not withdraw from this Agreement, and, upon expiration of the time period to continue the review process, this Agreement shall be deemed amended with the final order issued by an administrative agency or court.

### **6.2 EFFECT OF WITHDRAWAL**

Withdrawal pursuant to Section 4 or Section 6.1 of this Agreement shall render this Agreement null and void, and the Parties shall not have any rights or obligations or receive any benefits under this Agreement. Notwithstanding this Agreement being rendered null and void, the Parties shall continue to be bound by Section 4.2 and Section 7 of this Agreement. If this Agreement is rendered null and void, the Parties agree that the Commission cannot consider this Agreement as part of the record of the relicensing proceeding when issuing a New License for the Project.

## **SECTION 7 SETTLEMENT NEGOTIATIONS PRIVILEGED**

The Parties have entered into the negotiations and discussions leading to this Agreement with the understanding that, to the fullest extent allowed by law, all discussions relating to this Agreement are privileged and confidential. This shall not prejudice the position of any Party or participant taking part in such discussions and negotiations and are not to be used by any entity in any

manner, including admission into evidence, in connection with these or any other proceedings related to the subject matter of this Agreement. In the event that this Agreement is rendered null and void pursuant to Section 4 or Section 6 herein, the Agreement, and all drafts, work papers, and notes related to its development, to the fullest extent allowed by law, shall be deemed settlement materials, shall not constitute a part of the record in any proceeding, and shall be inadmissible as evidence in any proceeding related to the subject matter of this Agreement.

## **SECTION 8 RESOLVING DISPUTES AMONG THE PARTIES**

The Parties agree to utilize the following alternative dispute resolution mechanism to resolve all disputes, other than a dispute constituting a breach, related to the compliance with, or the performance of, obligations set forth in this Agreement:

### **8.1 NOTICE**

Any Party who believes that a dispute has arisen shall provide written notification pursuant to Section 12.1 to the other Party describing the matter(s) in dispute, the circumstances under which it arises, and the proposed relief or resolution to address the dispute.

### **8.2 CONSULTATION**

The Parties shall commence a one hundred twenty (120) day Consultation period (measured from the date of the notice of the dispute) to engage in good faith negotiations to resolve the dispute(s). During the Consultation period, the Parties shall hold at least three (3) meetings unless and until the dispute is resolved. At any time during the Consultation period, the Parties may, by mutual consent, initiate Facilitated Mediation as set forth in Section 8.3.

### **8.3 FACILITATED MEDIATION**

If disagreement persists at the conclusion of the Consultation period or if the Parties mutually consent during the Consultation period, an aggrieved Party may, within fifteen (15) days after the conclusion of the Consultation period, initiate Facilitated Mediation through a mutually-agreed upon organization. If the parties do not otherwise agree upon an organization, then it is understood that such dispute will be heard and governed by the rules of the American Arbitration Association ("AAA"). The mediation process shall continue until the dispute is settled or until the mediator makes a finding that there is no possibility of settlement through Facilitated Mediation. At any time during Facilitated Mediation, the Parties may, by mutual consent, initiate Court Proceedings as set forth in Section 8.4.

#### 8.4 COURT PROCEEDINGS

If the Parties choose not to engage in Facilitated Mediation, if a disagreement persists at the conclusion of the Facilitated Mediation, or if the Parties mutually consent during Facilitated Mediation, an aggrieved Party may commence Court Proceedings in New York State Supreme Court located in Albany County, New York, as set forth in Section 11 of this Agreement. The final disposition of the Court Proceedings shall be binding upon the Parties to this Agreement.

#### SECTION 9 *FORCE MAJEURE*

An event of *Force Majeure* as used herein means any event beyond the reasonable control of and which occurs without the fault or negligence of the Power Authority or any entity controlled by the Power Authority, including its contractors and subcontractors (to the extent said contractor was acting under the control or direction of the Power Authority), which events may include but are not limited to: any delay or failure to grant a permit or other regulatory authorization required by law to be granted by any Federal, State, or local government authority, or any regulation, law, or prohibitory or mandatory action of any Federal or State governmental authority; acts of God or sudden actions of the elements, including fire; drought or critically high or low flows and levels in the Lake Erie/Lake Ontario/Niagara River watershed; strikes, lockouts or other similar industrial disturbances; acts of the public enemy, including terrorist acts, wars, civil disturbances, blockades, military actions, insurrections or riots; landslides, floods, washouts, lightning, earthquakes, tornadoes, hurricanes, blizzards or other storms or storm warnings; explosions, fires, sabotage, or vandalism; breakage, defects, malfunctioning, or accident to machinery, equipment, materials, or lines of pipe or wires; freezing of machinery, equipment, materials or lines of pipe or wires; inability or delay in the obtaining of materials or equipment; and inability to obtain or utilize any permit, approval, easement, license, or right-of-way. The settlement of strikes, lockouts, or other similar such industrial disturbances shall be entirely within the discretion of the Power Authority. The requirement herein that any event of *Force Majeure* shall be remedied with all reasonable dispatch shall not require the settlement of strikes, lockouts, or other similar such industrial disturbances when such course is, in the opinion of the Power Authority, inadvisable

If any event of *Force Majeure* directly renders the Power Authority unable, wholly or in part, to perform any obligation under this Agreement, it is agreed that, upon giving notice and full particulars of such event of *Force Majeure* to the University, as soon thereafter as practicable, the Power Authority is authorized to suspend performance under such obligations during the continuance of any inability or incapacity so caused, but for no longer period; *provided, however*, the Power Authority shall not be relieved from: (1) any obligations of this Agreement not directly affected by the event of *Force Majeure* or (2) any obligation to make payment to the University for pre-existing obligations. The Power Authority shall use best efforts to remedy the cause of such inability or incapacity with all reasonable dispatch, including, but not limited to, the prompt commencement and prosecution of litigation. When the Power Authority is able to resume performance of its obligations, it shall give the University notice to that effect. The

occurrence of a *Force Majeure* event that results in impossibility of performance of an obligation, however, shall excuse the Power Authority's performance.

## **SECTION 10 HEADINGS**

The descriptive headings of the various Sections of this Agreement have been inserted for convenience of reference only and are of no significance in the interpretation or construction of this Agreement. To the extent that there is any inconsistency between the heading of a Section of this Agreement and the text of the Section, the text shall govern.

## **SECTION 11 CHOICE OF LAW AND FORUM**

This Agreement, as a binding contract between the Parties, shall be governed by and construed under New York law without reference to its conflicts of law principles. Any action at law, suit in equity, or other judicial proceedings for the enforcement of this Agreement or any of its provisions must be brought in and maintained only in New York State Supreme Court located in Albany County, New York.

## **SECTION 12 NOTICE AND COMMUNICATION**

### **12.1 NOTIFICATION REQUIREMENTS**

All written notices to be provided pursuant to this Agreement shall be mailed by U.S. certified mail, or overnight express service, postage prepaid, to each Party at the addresses listed in Appendix B or at a subsequent address, as a Party shall identify. Notices shall be deemed to be given five (5) business days after the date of mailing or on date of receipt if overnight express or other receipt-notification service is used.

### **12.2 NOTIFICATION CONTACT INFORMATION**

For purposes of implementing this Agreement, the Parties agree that the individuals listed in Appendix B shall be designated the primary contact persons and all written notices shall be posted to these individuals at the addresses listed in Appendix B. Notification of changes in the contact persons must be made in accordance with Section 12.1 of this Agreement.

### **12.3 OTHER COMMUNICATIONS**

Notices and other communications not required to be made to all Parties or not required to be made in a specific manner under the terms of this Agreement need not be in writing and may be made by telephone, electronic mail, or facsimile.

### **SECTION 13 COSTS**

Except as provided in this Agreement, the Parties shall bear their own costs of participating in this Agreement.

### **SECTION 14 MERGER CLAUSE**

This Agreement, including all Appendices attached hereto, constitutes the entire agreement between the Parties with respect to the subject matter hereof and supersedes all prior and contemporaneous understandings or agreements, oral or written, between the Parties with respect to such subject matter.

### **SECTION 15 WAIVER**

The failure of any Party to this Agreement to insist, on any occasion, upon strict performance of any provision of this Agreement will not be considered a waiver of any obligation, right, or duty of, or imposed upon, such Party.

### **SECTION 16 AMENDMENT**

The Parties may, by mutual agreement, amend this Agreement by a written instrument duly executed by the Parties.

### **SECTION 17 RESERVATION OF RIGHTS**

The Power Authority reserves all of its rights under the FPA to unilaterally petition FERC to, among other things, amend or otherwise modify the New License; *provided, however*, that the Power Authority shall not seek amendments or modifications inconsistent with the provisions of this Agreement.

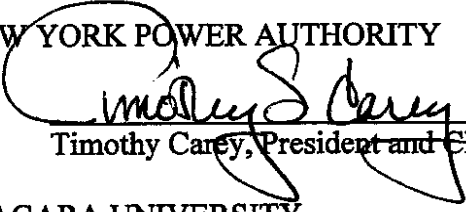
### **SECTION 18 EXECUTION**

Each signatory to this Agreement represents that: (1) he or she is authorized to execute this Agreement and legally bind the Party he or she represents and (2) the Party he or she represents will be fully bound by the terms hereof. This Agreement may be executed in any number of counterparts, and each executed counterpart shall have the same force and effect as an original instrument as if all the signatory parties had signed the same instrument. Any signature page of this Agreement may be detached from any counterpart of this Agreement without impairing the legal effect of any signature(s) thereon and may be attached to another counterpart of this Agreement identical in form hereto but having attached to it one or more signature pages.

Intending to be legally bound, the Parties have executed this Agreement through their duly authorized representatives.

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed as of the date set forth in this Agreement.

NEW YORK POWER AUTHORITY

By:   
Timothy Carey, President and Chief Executive Officer

Date: May 23, 2006

NIAGARA UNIVERSITY

By:   
Rev. Joseph L. Levesque, C.M., President

Date: May 3, 2006

**APPENDIX A  
PROPOSED LICENSE TERMS  
AND CONDITIONS**

**PRESCRIPTION ARTICLE OF THE SECRETARY OF THE INTERIOR  
UNDER SECTION 18 OF THE FEDERAL POWER ACT**

**Article \_\_\_\_.** Pursuant to Section 18 of the Federal Power Act, authority is reserved to the Commission to require the Licensee to construct, operate, and maintain, or provide for the construction, operation, and maintenance, of such fishways as may be prescribed by the Secretary of the Interior.

**ECOLOGICAL STANDING COMMITTEE**

**Article \_\_\_\_.** The Licensee shall convene an Ecological Standing Committee ("ESC"), comprised of a representative from the Licensee, the New York State Department of Environmental Conservation, the U.S. Fish and Wildlife Service, the Seneca Nation of Indians, the Tuscarora Nation, the Tonawanda Seneca Nation, New York Rivers United, and the Niagara Relicensing Environmental Coalition to establish: (1) the organization and administration of the Habitat Improvement Projects Fund and the Fish and Wildlife Habitat Enhancement and Restoration Fund established in Articles \_\_\_\_; (2) a cash flow schedule for fund expenditures; (3) measures to track and recover fund administrative costs; (4) associated auditing and reporting requirements; and (5) all other necessary and appropriate tasks, including the development of a schedule for future ESC meetings. The Licensee shall serve as the coordinator of the ESC and provide for its administrative support, and shall report annually to the Commission on the activities of the ESC.

**FUND FOR PROPOSED HABITAT IMPROVEMENT PROJECTS**

**Article \_\_\_\_.** (a) Within ninety (90) days of the effective date of the New License or license issuance, whichever is later, the Power Authority shall establish a Habitat Improvement Projects Fund ("HIPS Fund") in the amount of \$12,000,000 (NPV 2007), in an interest bearing account at an accredited bank in the State of New York. The HIPS Fund, including any accrued interest, shall be used for the following proposed Habitat Improvement Projects ("HIPS"):

- (i) Strawberry Island Wetland Restoration
- (ii) Frog Island Restoration
- (iii) Motor Island Shoreline Protection
- (iv) Beaver Island Wetland Restoration
- (v) Control of Invasive Species-Buckhorn and Tifft Marshes
- (vi) Osprey Nesting
- (vii) Common Tern Nesting
- (viii) Installation of Fish Habitat /Attraction Structures

Utilizing monies from the HIPs Fund, the Power Authority shall construct the proposed HIPs, consistent with the relicensing study entitled "Investigation of Habitat Improvement Projects for the Niagara Power Project" (June 2005) and the proposed implementation schedule set forth in Appendix B of the Relicensing Settlement Agreement. Prior to undertaking any construction-related activities, the Licensee shall consult with appropriate landowners, including consulting with OPRHP for the Strawberry Island, Buckhorn Marsh, and Tift Marsh HIPs. Pursuant to the Relicensing Settlement Agreement, the Licensee shall ensure that the balance of the HIPs Fund is made available to the New York State Department of Environmental Conservation to undertake monitoring, operation and maintenance of the HIPs. Should the cost of the HIPs exceed the amount in the HIPs Fund, the Power Authority will cover additional expenses.

For any HIPs that the New York State Department of Environmental Conservation determines should not be constructed, or otherwise cannot be constructed, the Licensee shall transfer the proposed funding for those particular HIPs to the Fish and Wildlife Habitat Enhancement and Restoration Fund established pursuant to Article \_\_\_\_\_. The Licensee shall determine, with the agreement of the Ecological Standing Committee ("ESC"), the amount to be transferred based on cost data available at the time of the transfer. Further, should any matching funds or resources provided in-kind reduce the amount of expenditures needed to construct a particular HIP, the Licensee shall transfer, with the agreement of the ESC, an equivalent amount of funds to the Fish and Wildlife Habitat Enhancement and Restoration Fund; *provided, however*, the total cost of the HIP does not exceed the estimate set forth in Appendix C of the Relicensing Settlement Agreement.

#### **FISH AND WILDLIFE HABITAT ENHANCEMENT AND RESTORATION FUND**

**Article \_\_\_\_\_.** Within ninety (90) days of the effective date of the New License or license issuance, whichever is later, the Licensee shall establish a Fish and Wildlife Enhancement and Restoration Fund ("HERF"), in the amount of \$16,179,645 (NPV 2007), in an interest-bearing account at an accredited bank in the State of New York. The HERF, including any accrued interest, shall be used exclusively to fund projects identified and selected by the Ecological Standing Committee ("ESC"), including but not limited to future HIPs, land acquisition, habitat improvement, habitat research, fish, wildlife, and indigenous plant species restoration, and stewardship activities throughout the Niagara River Basin including within the Niagara Gorge, its headwaters at Lake Erie, the mouth of the river at Lake Ontario, its tributaries between these two points, and their associated watersheds. The ESC shall, in consultation with technical advisors as necessary, identify and select projects and activities to be funded by the HERF.

While projects do not have to meet all of the below-listed criteria to be eligible for funding under the HERF, the Licensee shall ensure that the following criteria are considered by the ESC when determining whether to fund proposed projects under the HERF:

- Projects that address a demonstrated Project impact
- Projects that preserve RTE plant, aquatic, terrestrial species and/or their habitat in the Niagara Basin
- Projects with a strong scientific foundation



- Projects that contribute to long-term protection and enhancement of RTE plant, aquatic, and terrestrial species and/or their habitat in the Niagara Basin
- Projects that achieve multiple ecological goals
- Projects that preserve and restore Haudenosaunee cultural, religious, and historic features
- Projects that involve multi-stakeholder collaboration
- Projects consistent with applicable local, State, and Federal resource management plans
- Projects that feature matching resources
- Projects that are time-sensitive
- Projects that have documented municipal, county and tribal support
- Projects that are feasible from a cost/probability of success perspective

#### **ANNUAL REPORT FOR THE HABITAT IMPROVEMENT PROJECTS FUND AND THE FISH AND WILDLIFE HABITAT AND RESTORATION FUND**

The Licensee shall prepare and submit to the Commission an annual report for the Habitat Improvement Projects Fund ("HIPs Fund") and the Fish and Wildlife Habitat and Restoration Fund ("HERF"). The annual report, at a minimum, shall include:

- (a) A summary, including progress reports, of: (1) all HIPs; and (2) projects funded, in whole or in part, by the HERF;
- (b) A project-by-project listing of HIPs as well as all expenditures from the HIPs Fund and the HERF during the previous fiscal year;
- (c) A detailed listing of all planned expenditures during the current fiscal year in which the report is issued;
- (d) An updated balance sheet for the HIPs Fund and the HERF, which includes HIPs Fund and HERF expenditures, administrative expenses, and accrued interest; and
- (e) Any material changes or deviations from proposed implementation schedules.

If the Commission, after notice and opportunity for comment, determines based on this reporting requirement that modifications to the implementation of the HIPs Fund or the HERF are required, the Licensee shall implement such changes as directed by the Commission.

#### **PUBLIC ACCESS IMPROVEMENTS**

**Article \_\_\_\_.** Within two (2) years of the effective date of the New License, the Licensee shall: (1) undertake the following recreational improvements, as provided for in Section 4.2 of the Relicensing Settlement Agreement; and (2) submit annual reports to the Commission on the status of the recreational improvements until such improvements are completed:

- (a) Upper Mountain Parking Lot / Fishing Access. The Licensee shall construct: (1) a parking area for sixteen vehicles; (2) a gravel trail across the Niagara Mohawk Power Company transmission right-of-way for pedestrian use; and (3) a gravel path to traverse the reservoir dike in an area located on the northwest side of Lewiston Reservoir near the Upper Mountain Fire Company Station. The Licensee also shall implement measures, including the placement of

signage and large boulders, to discourage vehicle access and use of the Upper Mountain gravel trail.

(b) Robert Moses Fishing Pier Parking Area. Adjacent to the main gate of the Robert Moses Niagara Power Plant, the Licensee shall provide for up to six (6) additional angled parking spaces at the Robert Moses Fishing Pier parking area.

(c) Bulkhead Fence at Upper River Intakes. At the Project's intake structure area, the Power Authority shall; (1) resurface the asphalt in the parking lot and along the walkways; (2) designate ADA parking spaces and install curb cuts to allow ADA access to walkways; and (3) install a removable 7-foot chain link fence parallel to the retaining wall approximately twenty-five (25) feet from the Niagara River's edge. The fence should be installed when icebreakers are dry-docked for repairs; at all other times, the fence should be removed and stored to provide unimpeded access to the Niagara River along the intake structure bulkhead railing.

#### **ESTABLISHMENT OF PARKS AND RECREATION FUND**

**Article \_\_\_\_.** In accordance with Section 5.1.1 of the Relicensing Settlement Agreement, the Licensee shall, within ninety (90) days of the effective date of the New License or license issuance, whichever is later, establish a Parks and Recreation Fund for capital improvements to recreation facilities within the Project boundary. Specific recreation projects, and more detailed cost information, shall be submitted for Commission approval as part of the Licensee's Recreation Plan as required by Article \_\_\_\_\_. The Licensee shall submit annually to the Commission a report of fund expenditures, as well as a progress report on the proposed capital improvements to facilities within the Project Boundary.

#### **NIAGARA FALLS WATER BOARD FALLS STREET TUNNEL REMEDIATION**

**Article \_\_\_\_.** Within ninety (90) days of the effective date of the New License or license issuance, whichever is later, the Power Authority shall establish the Niagara Falls Water Board Capital Improvement Fund in an amount of \$19,000,000 (NPV 2007) for capital improvements to minimize groundwater infiltration into the Falls Street Tunnel ("FST") in the area of the conduits. The Capital Improvement Fund will be managed and administered by the Niagara Falls Water Board ("Water Board") and the Licensee is directed to work with the Water Board to ensure that capital improvements are implemented consistent with Section 6.1 of the Relicensing Settlement Agreement. These improvements may include: (i) construction of access shafts in the FST; (ii) sediment removal; (iii) 860 lineal feet of "Cured in-place" repair of existing 7-foot diameter concrete pipe over the conduits and concrete bypass pipes; (iv) 1,100 lineal feet of slip-lined FST rock tunnel lining; and (v) other miscellaneous construction elements (e.g., mob / demob, structural removal, structural sealing, testing, etc.) and related costs. The Capital Improvement Fund also will cover future costs incurred by the Water Board over the term of the New License in connection with management or treatment of groundwater infiltration into the FST in the area of the conduits attributable to the influence of the conduits as well as repairs or maintenance associated with the capital improvements. The Licensee shall provide annual reports to the Commission on the status of the capital improvements until such time as the improvements are completed.

## **HISTORIC PROPERTIES**

**Article \_\_\_\_.** The Licensee shall implement the *"Programmatic Agreement Among the Federal Energy Regulatory Commission, the Advisory Council on Historic Preservation, and the New York State Historic Preservation Officer for Managing Historic Properties that may be Affected by a License Issuing to the Power Authority of the State of New York For the Continued Operation and Maintenance of the Niagara Power Project in Niagara County, New York"* executed on \_\_\_\_\_, 2005, including the development of a Historic Properties Management Plan ("HPMP") within one year of license issuance. In the event the Programmatic Agreement is terminated, the Licensee shall implement the provisions of its approved HPMP. The Commission reserves the right to require changes to the HPMP at any time during the term of the license. If the Programmatic Agreement is terminated prior to Commission approval of the HPMP, the Licensee shall obtain approval before engaging in any ground-disturbing activities or taking any other action that may affect any historic properties within the Project's area of potential effect.

## **LAND MANAGEMENT PLAN**

**Article \_\_\_\_.** Within one (1) year of the effective date of the New License or license issuance, whichever is later, the Licensee shall file for Commission approval a Land Management Plan for the Project. The Land Management Plan shall identify and explain the policies, standards, guidelines, and land use designations utilized to enhance safety and protect and manage environmental resources, public use, aesthetics, and Tuscarora Nation customary uses. In preparing the Land Management Plan, the Licensee shall consult with, at a minimum, the United States Fish and Wildlife Service, the Bureau of Indian Affairs, the National Park Service, the New York State Department of Environmental Conservation, the New York State Office of Parks, Recreation and Historic Preservation, the Tuscarora Nation, Niagara Relicensing Environmental Coalition, and adjacent landowners. The Licensee shall include with the Land Management Plan documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the consulted entities, and specific descriptions of how the entities' comments and recommendations are accommodated by the plan. The Licensee shall allow a minimum of thirty (30) days for entities to comment and make recommendations before filing the plan with the Commission. If the Licensee does not adopt a recommendation, the filing shall include the Licensee's reasons based on project-specific information.

The Commission reserves the right to require changes to the plan. The plan shall not be implemented until the Commission notifies the Licensee that the plan is approved. Upon approval of the plan, the Licensee shall implement the plan, including any changes required by the Commission.

## **RECREATION PLAN**

**Article \_\_\_\_.** Within one (1) year of the effective date of the New License or license issuance, whichever is later, the Licensee shall file with the Commission, for approval, a Recreation Plan

for the Project that includes a description of the proposed recreational enhancements located within the Project Boundary as agreed to in the Relicensing Agreement. Additionally, the Recreation Plan should include the following provisions:

- (a) Final designs, estimated costs, and a proposed implementation schedule for proposed recreational enhancements, including those that will be funded by the Parks and Recreation Fund.
- (b) Soil erosion and sedimentation control measures for the above enhancements.
- (c) A map showing the upgraded or new facilities in relation to existing recreation facilities.
- (d) A discussion on how each Project recreation facility will be operated and maintained during the term of the license, including a discussion of existing management agreements and plans for amendment, revision, and/or extension thereof.
- (e) A description of reasonable and prudent measures, developed in consultation with the Tuscarora Nation, to reduce and prevent, as practicably as possible, trespass on Nation lands by users of the Project's recreational facilities.
- (f) A program for monitoring recreational use and updating the Recreation Plan on a twelve (12) year cycle.

The Recreation Plan shall be prepared in consultation with, at a minimum, the United States Fish and Wildlife Service, the Bureau of Indian Affairs, the National Park Service, the New York State Department of Environmental Conservation, the New York State Office of Parks, Recreation and Historic Preservation, a representative from the Tuscarora Nation, a representative from the Niagara Relicensing Environmental Coalition, and a representative of the Niagara Power Coalition. The Licensee shall include with the Recreation Plan documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the consulted entities, and specific descriptions of how the entities' comments and recommendations are accommodated by the plan. The Licensee shall allow a minimum of thirty (30) days for entities to comment and make recommendations before filing the plan with the Commission. If the Licensee does not adopt a recommendation, the filing shall include the Licensee's reasons based on project-specific information.

The Commission reserves the right to require changes to the plan. The plan shall not be implemented until the Commission notifies the Licensee that the plan is approved. Upon approval of the plan, the Licensee shall implement the plan, including any changes required by the Commission.

#### **CONSOLIDATED ANNUAL REPORT**

**Article \_\_\_\_.** With the exception of any reports required by statute or the Commission's regulations, the reporting requirements herein shall constitute the totality of the Licensee's reporting requirements and shall supersede any prior reporting requirements imposed on the

Licensee either by Commission order or the original license. For all compliance reports required under this license to be filed with the Commission, the Licensee shall prepare a single compliance report that consolidates all required reporting information for each calendar year. The consolidated annual report shall be filed with the Commission on or before June 1 of each year.

#### **NIAGARA REDEVELOPMENT ACT REQUIREMENTS**

**Article \_\_\_\_.** In order to assure that at least 50 per centum of the project power shall be available for sale and distribution primarily for the benefit of the people as consumers, particularly domestic and rural consumers, to whom such power shall be made available at the lowest rates reasonably possible and in such manner as to encourage the widest possible use, the Licensee in disposing of 50 per centum of the project power shall give preference and priority to public bodies and non-profit cooperatives within economic transmission distance. In any case in which project power subject to the preference provisions of this Article is sold to utility companies organized and administered for profit, the Licensee shall make flexible arrangements and contracts providing for the withdrawal upon reasonable notice and fair terms of enough power to meet the reasonably foreseeable needs of the preference customers.

**Article \_\_\_\_.** The Licensee shall make a reasonable portion of the project power subject to the preference provisions of Article \_\_\_\_ available for use within reasonable economic transmission distance in neighboring States, defined herein as the States of Connecticut, Massachusetts, New Jersey, Ohio, Pennsylvania, Rhode Island, and Vermont, *but* this Article shall not be construed to require more than 20 per centum of the project power subject to such preference provisions to be made available for use in such States. The Licensee shall cooperate with the appropriate agencies in such States to ensure compliance with this requirement. In the event of disagreement between the Licensee and the power marketing agencies of any of such States, the Federal Energy Regulatory Commission may, after public hearings, determine and fix the applicable portion of power to be made available and the terms applicable thereto: Provided, That if any such State shall have designated a bargaining agency for the procurement of such power on behalf of such State, the Licensee shall deal only with such agency in that State. The arrangements made by the Licensee for the sale of power to or in such States shall include observance of the preferences in Article \_\_\_\_.

**APPENDIX B  
CONTACT  
INFORMATION**

**NEW YORK POWER AUTHORITY**

President and Chief Executive Officer  
123 Main Street  
White Plains, New York 10601-3170

**NIAGARA UNIVERSITY**


President  
Alumni Hall  
Niagara University, New York 14109-2014





***Niagara University  
Relicensing  
Settlement  
Agreement  
  
Appendix C***

**Legend**

 Potential Conveyance



Scale: 1 inch = 60 feet

NURSA\_Exhibit\_Final.PDF  
JGW 4/27/06

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**CERTIFICATE OF SERVICE**

Pursuant to Rule 2010 of the Commission's Rules of Practice and Procedure, I hereby certify that I have this day caused the foregoing document to be served upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C., this 26th day of May 2006.

A handwritten signature in black ink, appearing to read "Charles Sensiba", written over a horizontal line.

Charles Sensiba  
Van Ness Feldman, P.C.  
1050 Thomas Jefferson Street, NW  
Seventh Floor  
Washington, D.C. 20007-3877  
(202) 298-1800



**Via Federal Express**

June 26, 2006

Thomas Kelly, Esq.  
Executive Vice President and General Counsel  
New York Power Authority  
123 Main Street  
White Plains, New York 10601-3170

**Erie County / City of Buffalo Relicensing Settlement Agreement**

Dear Mr. Kelly:

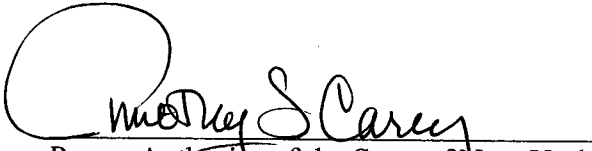
At the request of Bill Helmer, enclosed are six signature pages for the above-captioned agreement. The agreement has been fully executed by all parties except for the NYPA. Upon approval by the NYPA Board, please have the Agreement signed by the appropriate individual from NYPA and circulate fully executed copies.

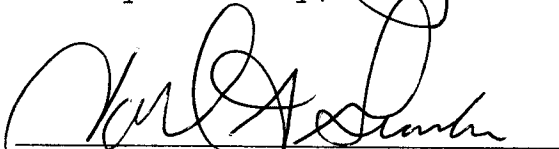
Very truly yours,



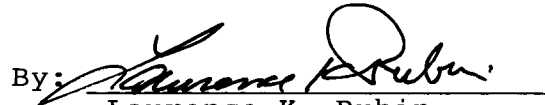
Steven J. Matlin  
Senior Counsel

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed as of the date set forth in this Agreement.

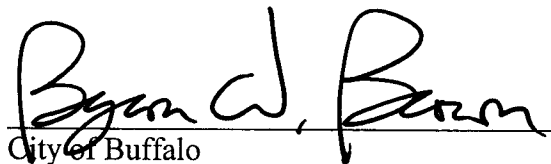
  
Power Authority of the State of New York  
Timothy S. Carey, President and CEO


  
County of Erie By: Joel A. Giambra  
Erie County Executive

APPROVED AS TO FORM

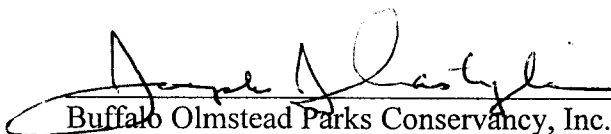
By:   
Laurence K. Rubin  
Erie County Attorney

Document No.: 06-644-La  
Date: 6/15/06

  
City of Buffalo 6/22/06

  
New York State Urban Development  
Corporation, doing business as  
the Empire State Development Corporation

  
Erie Canal Harbor Development  
Corporation 6-14-06

  
Buffalo Olmstead Parks Conservancy, Inc. Chairman 6-13-06

**NIAGARA POWER PROJECT,  
FERC PROJECT NO. 2216**

**ERIE COUNTY/CITY OF BUFFALO  
RELICENSING  
SETTLEMENT AGREEMENT**

**June 27, 2006**

**NIAGARA POWER PROJECT,  
FERC PROJECT NO. 2216**

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## **APPENDICES**

<b>APPENDIX A</b>	<b>LICENSE TERMS AND CONDITIONS</b>
<b>APPENDIX B</b>	<b>MAP OF ICE BOOM PARCEL</b>
<b>APPENDIX C</b>	<b>LIST OF CONTACT NAMES AND ADDRESSES</b>

**THIS ERIE COUNTY/CITY OF BUFFALO RELICENSING SETTLEMENT AGREEMENT** ("Agreement") is made and entered into this 27th day of June, 2006 by the Power Authority of the State of New York ("Power Authority"), Erie County (the "County"), the City of Buffalo (the "City"), the Buffalo Olmstead Parks Conservancy (the "Conservancy"), the New York State Erie Canal Harbor Development Corporation (the "ECHDC"), and the New York State Urban Development Corporation d/b/a the Empire State Development Corporation (the "ESDC")

**WITNESSETH THAT:**

WHEREAS, the Power Authority owns and operates the Niagara Power Project ("Project"), located on the Niagara River in Niagara County, New York;

WHEREAS, the 50-year original license for the Project, issued to the Power Authority by the Federal Power Commission on January 30, 1958, expires on August 31, 2007;

WHEREAS, the Power Authority on August 18, 2005 filed an application with the Federal Energy Regulatory Commission ("Commission" or "FERC") seeking a 50-year New License for the continued operation and maintenance of the Project;

WHEREAS, the Parties have negotiated and resolved all issues associated with the Commission's issuance of a New License for the Project to the Power Authority;

WHEREAS, the Power Authority will file this Agreement with FERC as a supplement to the Offer of Settlement filed in connection with the relicensing of the Project on August 19, 2005; and

WHEREAS, the Parties agree that the Commission should adopt, without modification, all of the License Terms and Conditions, including the Proposed License Articles, into the New License for the Project;

NOW THEREFORE, in consideration of the mutual covenants set forth herein, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

## SECTION 1 GENERAL PROVISIONS

### 1.1 ACRONYMS AND DEFINITIONS

**“Acceptance of the New License”** shall mean the date upon which the Power Authority files its acceptance of the New License with FERC or the date of the expiration of the existing original license, August 31, 2007, whichever occurs later.

**“Breach”** shall mean the failure of a Party to perform or observe any material term or condition of this Agreement.

**“Breaching Party”** shall mean a Party that is in Breach of this Agreement.

**“Commission”** shall mean the Federal Energy Regulatory Commission.

**“Default”** shall mean the failure of a Breaching Party to cure its Breach in accordance with Section 4 of this Agreement.

**“FERC”** shall mean the Federal Energy Regulatory Commission.

**“License”** shall mean the regulatory authorization for construction, maintenance, and operation of a hydroelectric project subject to the jurisdiction of FERC pursuant to the Federal Power Act, 16 U.S.C. § 791 *et seq.* ("FPA").

**“License Provision”** shall mean any term, condition, prescription, requirement, holding, reservation of authority, or article included into the New License for the Niagara Power Project by the Commission, or any condition, term, reservation or other License requirement adopted or otherwise included into the New License for the Project, including, but not limited to, a water quality certificate issued by the New York Department of Environmental Conservation ("DEC") pursuant to Section 401 of the federal Clean Water Act ("CWA").

**“License Terms and Conditions”** shall mean the entirety of the terms, prescriptions, conditions, and articles set forth in Appendix A to this Agreement.

**“Municipal Communities”** shall mean the County and the City.

**“New License”** shall mean the License, not including any annual license, issued by the Commission to the Power Authority for the continued operation and maintenance of the Project, pursuant to Section 15 of the Federal Power Act, effective after expiration of the Project’s original license issued on January 30, 1958.



**“Offer of Settlement”** shall mean the offer of settlement filed with FERC on August 19, 2005 pursuant to 18 C.F.R. § 385.602, as supplemented by this Agreement and the Niagara University Relicensing Settlement Agreement.

**“Party”** shall mean a signatory to this Agreement.

**“PM&E”** shall mean protection, mitigation, and enhancement.

**“Project”** shall mean the Niagara Power Project, licensed to the Power Authority as FERC Project No. 2216.

**“Project Boundary”** shall mean the external limits of the Project, as set forth in Exhibit G of the Power Authority’s Application for New License for the Project, which encloses all Project lands, waters, works, and other features that are necessary for Project purposes and subject to FERC jurisdiction.

**“Proposed License Articles”** shall mean the PM&E measures set forth in the License Terms and Conditions attached as Appendix A to this Agreement and which the Parties agree that the Commission should include, without modification or expansion, in the New License issued to the Power Authority for the continued operation of the Project.

**“Relicensing Agreement”** shall mean the Relicensing Settlement Agreement Addressing New License Terms and Conditions, including all Appendices, dated as of July 18, 2005, by and among the Power Authority and other signatories in settlement of the relicensing of the Project.

**“Settlement Parties”** shall mean the County, the City, the Conservancy, the ECHDC, and the ESDC.

## **1.2 SCOPE OF AGREEMENT**

- (a) The Parties agree that this Agreement resolves all issues between the Parties associated with the relicensing of the Project in FERC Docket No. P-2216.
- (b) The Parties acknowledge that the License Terms and Conditions establish the entirety of the Power Authority’s FERC-jurisdictional obligations for the PM&E of ecological, environmental, cultural, aesthetic, and recreational resources that may be affected by the Project under a New License issued by FERC.
- (c) The Parties acknowledge that the administrative record developed to date, including, *inter alia*, the completed relicensing studies, support and justify the License Terms and Conditions.

- (d) The Parties agree that the Power Authority shall file this Agreement with FERC in a timely manner as a supplement to the Offer of Settlement.

### **1.3 COMPLIANCE WITH STATUTES AND REGULATIONS**

Each Party represents that, to the best of its knowledge, this Agreement is consistent with and fully satisfies any and all applicable statutory and regulatory requirements and obligations under Federal and State law pertaining to the relicensing of the Project. Each Party represents, further, that, to the best of its knowledge, no PM&E measure or other License Provision, other than the License Terms and Conditions, is necessary or appropriate to satisfy any and all Federal or State law pertaining to the relicensing of the Project. If FERC imposes objectionable License Provision(s), the Parties recognize that such objectionable License Provision(s) may trigger the rights of the Parties under the Withdrawal and Termination provisions of Section 6 of this Agreement.

### **1.4 LIMITATION OF APPLICABILITY**

This Agreement is made with the express understanding that it constitutes a negotiated settlement of issues that have been or could have been raised in connection with the Power Authority's application for the New License. No Party shall be deemed, by virtue of execution of this Agreement, to have established precedent or admitted or consented to any approach, methodology, or principle, except as expressly provided herein. In the event the Offer of Settlement is approved by FERC, such approval shall not be deemed precedential or controlling regarding any particular issue or contention in any other proceeding. Further, by entering into this Agreement, the Power Authority shall not be deemed to have admitted to any liability for any action arising from the construction, operation, and maintenance of the Project, and this Agreement shall not be evidence of, or otherwise construed as, liability for any action arising from the construction, operation, and maintenance of the Project.

### **1.5 EFFECTIVE DATE AND TERM OF AGREEMENT**

This Agreement shall become effective upon its execution by the Power Authority and the Settlement Parties. Except as provided for herein, this Agreement shall remain in effect for the term of the New License issued by the Commission for the Project. This Agreement shall be binding on and inure to the benefit of the Parties and their successors and assigns unless otherwise specified in this Agreement.

### **1.6 EFFECTIVE DATE OF POWER AUTHORITY OBLIGATIONS**

Except as set forth in Section 3.4.1 of this Agreement or otherwise expressly provided for herein the obligations of the Power Authority under this Agreement shall become effective upon the Acceptance of the New License.

## **SECTION 2**

### **COMMITMENTS OF THE SETTLEMENT PARTIES**

#### **2.1 SUPPORT OF POWER AUTHORITY PROPOSAL**

The Settlement Parties shall support the Power Authority's entire relicensing proposal set forth in its application for the New License and the Offer of Settlement, including the Commission's issuance of a 50-year New License for the Project.

#### **2.2 SUBMITTAL OF ADDITIONAL STUDY REQUESTS AND RECOMMENDATIONS**

The Settlement Parties shall not submit to any administrative or governmental entity or court any request for additional studies or recommendations for PM&E in the context of the FERC review of the Power Authority's application for the New License.

#### **2.3 FILING OF STATEMENT IN SUPPORT**

The Settlement Parties shall submit to FERC a statement in support of the Power Authority's application for the New License and the Offer of Settlement within two weeks of the effective date of this Agreement. To whatever extent any of the Settlement Parties shall have submitted to FERC any protests, requests, recommendations, or other pleadings or papers not consistent with such statement prior to the filing of same, the statement in support so filed by such party shall advise FERC that any such prior filing is superseded.

#### **2.4 FILINGS AND SUBMITTALS CONSISTENT WITH AGREEMENT**

Each party shall ensure that, throughout the term of this Agreement and New License, any and all of its filings or other submittals with or to FERC, DEC, or any other administrative or governmental entity or court are consistent with this Agreement and shall not support, propose, or advocate any License Provision or additional settlement measure that is in any way contrary to or inconsistent with this Agreement. To whatever extent any Party shall have filed or submitted with or any administrative governmental entity (other than FERC) or court any, protests, requests, recommendations, or other pleadings or papers that are inconsistent with this Agreement, such party shall withdraw the same in a prompt manner.

#### **2.5 SUPPORT FOR ADOPTION OF LICENSE TERMS AND CONDITIONS**

In all relevant regulatory proceedings, the Settlement Parties shall support, as appropriate, the incorporation of the License Terms and Conditions, including the establishment of a term of 50 years, into the New License and incorporation of consistent terms into any other governmental permit or authorization applied for the Power Authority in connection with the Power Authority's application for the New License.

**SECTION 3  
COMMITMENTS  
OF THE POWER AUTHORITY**

**3.1. IMPLEMENTATION OF SETTLEMENT COMMITMENTS**

The Power Authority shall comply with, carry out, and implement all commitments in this Agreement, in accordance with Section 1.6 herein; *provided, however*, that, except for the Power Authority's obligations pursuant to Section 3.4.1 of this Agreement, the adoption by FERC of the License Terms and Conditions without material modification or expansion, including, without limitation, the establishment of a 50-year term for the New License, is expressly made a condition precedent to the Power Authority's obligations hereunder. Upon satisfaction of such condition precedent, the Power Authority will act in a timely fashion to file its acceptance of the New License with FERC and will use its best efforts to make such filing within sixty (60) days of the date of FERC's order issuing the New License.

**3.2 ERIE COUNTY GREENWAY FUND**

**3.2.1 ESTABLISHMENT OF ERIE COUNTY GREENWAY FUND**

In accordance with the provisions of Section 3.2.2 of this Agreement, the Power Authority shall provide funds dedicated to the support of construction and/or rehabilitation of parks, recreation, and related facilities for the purpose of redefining the Niagara riverfront, promoting tourism, enhancing the environment, and advancing the economic revitalization of the Niagara River Greenway within Erie County as set forth in the Niagara River Greenway Act of 2005, as the same may be amended from time to time (the "Erie County Greenway Fund"). Such funds shall be paid into the Erie County Greenway Fund and all interest earned thereon shall accrue and be utilized for the purposes set forth above.

**3.2.2 TIMING OF PAYMENTS TO ERIE COUNTY GREENWAY FUND**

Within sixty (60) days after the Acceptance of the New License, the Power Authority shall make its initial payment of \$2,000,000 to the Erie County Greenway Fund. Thereafter and throughout the term of the New License, payments in the amount of \$2,000,000 shall be made by the Power Authority on or before each and every anniversary of such date. Notwithstanding the foregoing, the Power Authority may, in its sole discretion, elect to adjust the schedule of payments to the Erie County Greenway Fund upon the request of the Greenway Fund Trustee, as hereinafter defined; provided, however: (1) the adjusted schedule of payments will not alter the present value of the remaining payments due the Erie County Greenway Fund (computed at a annual discount rate of 6.25%) as of the date of the commencement of such alternative payment schedule and (2) the adjusted schedule will provide for a refund schedule for all

unencumbered funds should this Agreement be terminated in accordance with Section 4 or amended in accordance with Section 6.2.1 of this Agreement.

### **3.2.3 GREENWAY FUND TRUSTEE**

Within thirty (30) days of the Acceptance of the License, duly authorized representatives of the County, the City, the Conservancy, and the Power Authority shall meet to select a party to serve as the Trustee of the Erie County Greenway Fund in accordance with the following procedure: either of the Municipal Communities may be selected by majority vote of the aforementioned representatives but selection of any party other than one of the Municipal Communities shall require a unanimous vote of such representatives. Within sixty (60) days of the Acceptance of the License, the trustee so selected (the "Greenway Fund Trustee") shall assume his, her, or its duties pursuant to a Trust Agreement signed by the Power Authority, the County, the City, and the Conservancy, which agreement shall include terms setting forth the protocols and procedures to be followed in connection with (1) the operations of the ECG Committee, as hereinafter defined, including, without limitation, the making of determinations regarding projects proposed to be funded through the Erie County Greenway Fund and (2) the administration of the Erie County Greenway Fund, including, without limitation, the provision of appropriate documentation to the Power Authority confirming that the Greenway Fund Trustee has the power and lawful authority to receive and disburse funds in accordance with the terms of this Agreement.

### **3.2.4 ERIE COUNTY GREENWAY FUND STANDING COMMITTEE**

The Power Authority shall facilitate the organization of the Erie County Greenway Fund Standing Committee ("ECG Committee") to administer and oversee projects financed by the Erie County Greenway Fund. The ECG Committee shall consist of one representative each from the following: the Power Authority, the City, the County, and the Conservancy. Projects may be proposed by ECG Committee members or by individuals and organizations with an interest in Erie County's section of the Niagara River Greenway as identified in accordance with the Niagara River Greenway Act of 2005 (the "Greenway Act"), provided that each proposal include written documentation: (1) evidencing consultation with the Greenway Commission (if in existence and operating) and the chief elected official, or a designated representative, of any affected municipal, county, and tribal entity and appropriate State and Federal agencies and (2) setting forth an operations and maintenance plan for each proposed project. The ECG Committee shall have sole responsibility for selecting projects to be financed, in whole or in part, by the Erie County Greenway Fund; *provided, however*, that prior to authorizing any project to be financed by the Erie County Greenway Fund, the ECG Committee shall ensure that the proposed project is: (1) consistent with the Greenway Act and the Niagara River Greenway Plan adopted pursuant to such law, as either or both may be amended from time to time, and (2) any State and Federal law or regulation, including New York State Coastal Zone policies, where applicable. The Parties agree that the ECG Committee shall work in a cooperative manner and shall make a concerted effort to achieve consensus in all decisions. All determinations by the ECG Committee shall be

based on consistency with the Greenway Act and the Niagara River Greenway Plan adopted pursuant to such law, as either or both may be amended from time to time, engineering feasibility, operation and maintenance feasibility, and cost effectiveness. In no event shall the Erie County Greenway Fund be utilized to: (1) meet the obligations, existing as of August 31, 2007, of any local municipality, school district, or the Conservancy or (2) pay for operation and maintenance of any projects existing as of August 31, 2007. To the extent practicable, the ECG Committee shall attempt to secure matching funds or other resources to offset the funding of Greenway projects. In the event the Niagara River Greenway Plan is not completed and/or approved by all involved agencies and/or entities prior to September 30, 2007, the Erie County Greenway Fund shall be made available by the Greenway Fund Trustee, as directed by the ECG Committee, for projects within the Erie County Greenway, provided that such projects are in the vicinity of the Niagara River waterfront within Erie County and are consistent with the spirit and intent of the Niagara River Greenway Act, as the same may be amended from time to time.

### **3.2.5 ADMINISTRATIVE COSTS AND REFUNDS**

Members of the ECG Committee shall serve without compensation and will not be reimbursed for their expenses. Any reasonable third-party administrative costs associated with the establishment and maintenance of the Erie County Greenway Fund shall be paid from any interest accrued on the Erie County Greenway Fund or, if adequate interest is not accrued, borne by the Erie County Greenway Fund. In no event shall the Erie County Greenway Fund be utilized to pay for personnel costs; *provided, however*, that the Erie County Greenway Fund may be utilized to hire a limited number of personnel to manage and oversee Greenway Projects. If this Agreement is terminated as set forth in Sections 4 or 6 of this Agreement, the balance of unused monies in the Erie County Greenway Fund, plus any accrued interest and minus any administrative costs, shall be completely refunded to the Power Authority; *provided, however*, that any funds already encumbered at the time this Agreement is terminated shall not be refunded to the Power Authority.

### **3.2.6 ANNUAL REPORT**

No later than sixty (60) days following the close of each calendar year during the term of the New License for the Project, the ECG Committee shall submit to the Power Authority and the Settlement Parties an annual report for the Erie County Greenway Fund. The annual report, at a minimum, shall include:

- (a) A summary of all active projects funded, in whole or in part, by the Erie County Greenway Fund;
- (b) A project-by-project listing of all expenditures from the Erie County Greenway Fund during the previous calendar year;

- (c) A detailed listing of all planned expenditures during the current calendar year in which the report is issued;
- (d) An updated balance sheet for the Erie County Greenway Fund, which includes Erie County Greenway Fund expenditures, administrative expenses, and accrued interest; and
- (e) A summary of significant correspondence with the Niagara River Greenway Commission.

### **3.2.7 NON-LICENSE MEASURE**

The Parties agree that the Power Authority's obligation to establish and contribute to the Erie County Greenway Fund is not subject to FERC's jurisdiction and shall not be included within any license article, condition, or other provision of the New License for the Project.

## **3.3 BUFFALO WATERFRONT DEVELOPMENT FUND**

### **3.3.1 ESTABLISHMENT OF BUFFALO WATERFRONT DEVELOPMENT FUND**

In accordance with the provisions of Section 3.3.2 and 3.3.3 of this Agreement, the Power Authority, the County, the City, the ESDC, and ECHDC shall establish the Buffalo Waterfront Development Fund ("Waterfront Development Fund").

### **3.3.2 PAYMENTS TO ESDC FOR WATERFRONT DEVELOPMENT**

Within sixty (60) days of the Acceptance of the New License, the Power Authority shall make an initial payment of \$1,000,000 to ESDC and, thereafter, on or before each anniversary of such date and throughout the term of the New License, the Power Authority shall make additional payments to ESDC of \$1,000,000 each. ESDC, within thirty (30) days of the receipt of any such payments, shall remit the same to ECHDC and ECHDC shall use such funds to support economic development and revitalization activities within the vicinity of the Buffalo Waterfront in a manner that is consistent with purposes for which the Waterfront Development Fund was established.

### **3.3.3 DEVELOPMENT FUND TRUSTEE**

Within thirty (30) days of the Acceptance of the License, duly authorized representatives of the City, the County, ESDC, ECHDC, and the Power Authority shall meet to select a party to serve as the Trustee of the Waterfront Development Fund in accordance with the following procedure: either of the Municipal Communities may be selected by majority vote of the aforesaid representatives but selection of any party other than one of the Municipal Communities shall require a unanimous vote of such representatives. Within sixty (60) days of the Acceptance of the License, the trustee so selected (the "Development Fund Trustee") shall assume his, her, or its duties pursuant to a Trust

Agreement signed by the Settlement Parties, which agreement shall include terms setting forth procedures to be followed in connection with the administration of the Waterfront Development Fund, including, without limitation, the provision of appropriate documentation to the Power Authority that the Development Fund Trustee has the power and lawful authority to receive and disburse funds in accordance with the terms of the Settlement Agreement.

### **3.3.4 PAYMENTS BY THE POWER AUTHORITY TO WATERFRONT DEVELOPMENT FUND**

Within sixty (60) days of the Acceptance of the New License, the Power Authority shall make an initial payment of \$2,500,000 to the Waterfront Development Fund. On or before each anniversary of the initial payment and throughout the term of the New License, the Power Authority shall make additional payments to the Waterfront Development Fund, each such payment equaling the sum of: (1) \$1,000,000 and (2) the greater of (x) an amount representing the "net value" of 5 megawatts of firm (at approximately 70% load factor) Niagara hydropower which shall be allocated by the Power Authority for this purpose, *i.e.*, the difference between Power Authority's cost-based rate for Niagara Project power and energy and the prevailing wholesale market price in the market administered by the New York Independent System Operator ("NYISO") or any successor or (y) \$1.5 million. To the extent the aforesaid "net value" (established upon issuance of the License to the Power Authority) increases over the term of the License, the Power Authority's payments to the Development Fund Trustee shall reflect this additional value; *provided, however*, in years in which the net value is less than \$1.5 million, the Power Authority will pay a total amount of \$2.5 million and will accrue the net value shortfall (the "Accrued Shortfall"). In years in which the net value is greater than \$1.5 million, the Power Authority will first retain any amounts above \$2.5 million to reduce the accumulated Accrued Shortfall, if any, and will pay the remainder to the Development Fund Trustee. At the time the Power Authority makes its annual payment to the Waterfront Development Fund as provided for under this Section 3.3.4, it shall also provide to ECHDC and the Development Fund Trustee a written determination as to the calculation of clause (x) above together with supporting documentation, as appropriate.

### **3.3.5 ISSUANCE OF BONDS**

The Waterfront Development Fund shall be utilized to support economic development and revitalization within the vicinity of the Buffalo Waterfront as determined by ECHDC. The Development Trustee shall remit the amounts paid into the Waterfront Development Fund to ECHDC unless the Development Trustee and ECHDC jointly agree to issue bonds secured, in whole or in part, by the payments called for by section 3.3.4 of this Agreement, in which case the Development Trustee shall remit the net proceeds from the sale of such bonds to ECHDC in accordance with the terms of a trust agreement to be entered into by ECHDC and the Development Trustee.



### **3.3.6 ADMINISTRATIVE COSTS AND REFUNDS**

Any reasonable third-party administrative costs associated with the establishment and maintenance of the Waterfront Development Fund shall be paid from any interest accrued on the Waterfront Development Fund or, if adequate interest is not accrued, borne by the Waterfront Development Fund.

### **3.3.7 NON-LICENSE MEASURE**

The Parties agree that the Power Authority's obligation to establish and contribute to the Waterfront Development Fund is not subject to FERC's jurisdiction and shall not be included within or, after the Acceptance of the New License, be affected in any way by any license article, condition, or other provision of the New License.

## **3.4 ADDITIONAL SUPPORT FOR WATERFRONT PROJECTS**

### **3.4.1 PAYMENTS TO ECHDC**

The Power Authority will pay to ECHDC a total of \$4 million to be used solely for waterfront development and revitalization activities, including, but not limited to, the further development of the Buffalo waterfront and planning and design activities with respect to waterfront development and revitalization activities. An initial payment of \$2 million will be made by the Power Authority within thirty (30) days of the effective date of this Agreement and a subsequent \$2 million payment will be made by the Power Authority on or before the first anniversary of the initial payment.

### **3.4.2 ICE BOOM PARCEL**

The Power Authority shall consult with ECHDC regarding relocation of its ice boom presently stored at a parcel of property owned by the Power Authority and shown on the map attached as Appendix B to this Agreement, shall commission a consultant to produce a feasibility study regarding such relocation (and shall provide a copy of the consultant's report with respect to such study to the Settlement Parties), and shall diligently seek to relocate the ice boom to an alternative site. Subject to the Power Authority obtaining all necessary approvals, including, without limitation, approvals by the International Joint Commission and Ontario Power Generation, and following the relocation of the ice boom, the Power Authority shall convey such parcel to ECHDC for nominal consideration, subject to any applicable state law or regulation, including, without limitation, the Public Authorities Accountability Act of 2005.

### **3.4.3 NON-LICENSE MEASURE**

The Parties agree that the Power Authority's obligations to provide additional support for waterfront projects pursuant to Sections 3.4.1 and 3.4.2 of this Agreement are not subject to FERC's jurisdiction and shall not be included within any license article, condition, or other provision of the New License.

## **SECTION 4 DEFAULT**

### **4.1 GENERAL**

Upon a Breach, the non-Breaching Party shall give written notice of such Breach to the Breaching Party and shall provide a copy of such notice to all other Parties to this agreement. The Breaching Party shall have thirty (30) days from receipt of such notice within which to cure such Breach; *provided, however*, if such Breach is not capable of cure within thirty (30) days, the Breaching Party shall commence such cure within thirty (30) days after receipt of the notice and continuously and diligently complete such cure within ninety (90) days and, if cured within such time, the Breach specified in such notice shall cease to exist. No Breach shall exist where such failure to discharge an obligation is the result of *Force Majeure* as defined herein in Section 9 of this Agreement.

### **4.2 RIGHT TO TERMINATE**

Notwithstanding any other provision of this Agreement, if a Breach is not cured as provided for in Section 4.1 of this Agreement or if a Breach is not capable of being cured within the period provided for herein, the non-Breaching Party shall have the right to declare a Default and withdraw from this Agreement subject to the following provisions:

- (a) Upon a Default occurring prior to the Acceptance of the New License, if the Breaching Party was any of the Settlement Parties, then, upon such Default, the Power Authority may terminate this Agreement and be relieved of any further obligation hereunder.
- (b) Upon a Default occurring after the Acceptance of the New License, if the Breaching Party was any of the Settlement Parties, then, upon such Default, the Power Authority may withdraw from this Agreement, and, upon such withdrawal, this Agreement shall be deemed to have been amended to omit Sections 3.2.1, 3.2.2, and 3.4.2 of this Agreement; *provided, however*, if the Breaching Party was ESDC, ECHDC, the City, or the County, then the Power Authority may terminate this Agreement and be relieved of any further obligation hereunder.

In addition to the foregoing, the non-Breaching Party shall be entitled to recover from the Breaching Party all amounts due, plus all other damages and remedies provided for in law or equity; *provided, however*, that any recovery of damages by the Power Authority

shall not exceed the total of any and all amounts paid by the Power Authority pursuant to Section 3 of this Agreement plus interest on amounts paid calculated at an annual rate of 6.25%. The provisions of this Section will survive termination of this Agreement.

## **SECTION 5 ADOPTION BY FERC**

The Parties have entered into this Agreement with the express expectation and condition that FERC approves the Offer of Settlement, as supplemented by this Agreement, and issues a New License for the Project that incorporates, without material modification or expansion, the License Terms and Conditions. The Parties agree that if FERC approves the Offer of Settlement and incorporates all License Terms and Conditions into the New License without modification or expansion, the Parties will not seek rehearing of the FERC order granting a New License for any and all issues covered by this Agreement or support in any way any such request for rehearing by any non-Party to this Agreement. The Power Authority reserves the right, even if FERC approves the Offer of Settlement and incorporates the License Terms and Conditions into the New License without modification or expansion, to seek rehearing or other administrative or judicial review in connection with: (1) any and all License Provisions included in the New License other than, in addition to, or in derogation of the License Terms and Conditions or (2) any and all provisions included in any other governmental permit, certification, or authorization issued in connection with FERC's consideration of and action with respect to the Application for the New License.

## **SECTION 6 WITHDRAWAL AND TERMINATION**

### **6.1 PROCESS FOR WITHDRAWAL**

Should FERC or any other agency take any action related to the issuance of the New License that materially and directly (1) affects the proposed License Terms and Conditions or (2) aggrieves the interests of any Party, the Parties agree to adhere to the following terms regarding amending or withdrawing from this Agreement.

### **6.2 NOTIFICATION**

Within ten (10) days of issuance of an order containing objectionable License Provision(s), the Party whose interests are directly and materially aggrieved by such License Provision(s) shall provide written notification, pursuant to the requirements of Section 12.1 of this Agreement, to all other Parties of its intent to withdraw from the Agreement.

### **6.3 ADMINISTRATIVE APPEALS**

Following notification as set forth in Section 6.2, all Parties shall file a joint request for rehearing and/or pursue all appropriate administrative appeals, requesting the agency responsible for the objectionable License Provision(s) to amend such License Provision(s) to conform to this Agreement.

#### **6.4 GOOD-FAITH NEGOTIATION**

Following the submittal of administrative appeal(s) as set forth in Section 6.3, the Parties agree that the aggrieved Party shall engage the other Parties in good-faith negotiations in an attempt to amend this Agreement by making it conform to the objectionable License Provision(s). The Parties agree to a one hundred twenty (120) day period to conduct good-faith negotiations under this Section, with a minimum of three (3) meetings to be held during a ninety (90) day period. If, during the pendency of the good-faith negotiations, an order is issued that alleviates the aggrieved Party's concerns, the Parties shall discontinue the negotiation process. If, however, an order is issued during the pendency of the good-faith negotiations that denies the Parties' joint administrative appeal or does not reverse the objectionable License Provision(s), the Parties shall continue the negotiations under this Section, but the aggrieved Party may pursue judicial review, pursuant to Section 6.5 of this Agreement. If the good-faith negotiations result in an agreement among all Parties to amend this Agreement to conform it to the objectionable License Provision(s), the Parties shall withdraw the joint administrative appeal(s) filed pursuant to Section 6.3 or petition for review filed pursuant to Section 6.5, and this Agreement shall be deemed modified to conform to said order.

#### **6.5 JUDICIAL REVIEW**

If, as a result of an administrative appeal(s) filed pursuant to Section 6.3 of this Agreement, a final order is issued denying the merits of the joint appeal by not reversing the objectionable License Provision(s), aggrieved Parties may file a petition for review by the appropriate reviewing court. Other Parties may intervene in the proceeding, but said Parties shall not take a position adverse to the terms of this Agreement.

#### **6.6 WITHDRAWAL**

The Party whose interests are materially and directly aggrieved by any License Provision may withdraw from this Agreement, but only after: (1) the Parties comply with Sections 6.2. through 6.5 of this Agreement and (2) the aggrieved Party exhausts all available avenues for review of the order(s) imposing the objectionable License Provision(s) by filing timely requests for rehearing, petitions for review, and other required filings to continue the review process. Following the final, non-appealable order or ruling that fails to remedy the objectionable License Provision(s), the aggrieved Party may provide written notification to the other Parties of its withdrawal from this Agreement, pursuant to the notification requirements of Section 12.1. Upon notification, the provisions of Section 6.7.2 of this Agreement shall apply. If the aggrieved Party fails to comply with Sections 6.2 through 6.5 of this Agreement or exhaust all available avenues for review of the order(s) imposing the objectionable License Provision(s) or if the aggrieved Party's

resort to the remedy of withdrawal provided for in this Agreement is arbitrary and capricious, then such Party may not withdraw from this Agreement, and, upon expiration of the time period to continue the review process, this Agreement shall be deemed amended with the final order issued by an administrative agency or court.

## **6.7 EFFECT OF WITHDRAWAL**

### **6.7.1 WITHDRAWAL BY THE POWER AUTHORITY**

Withdrawal by the Power Authority prior to the Acceptance of the New License, pursuant to Section 4 or Section 6 of this Agreement, shall render this Agreement null and void, and the Parties shall not have any rights or obligations or receive any benefits under this Agreement, except to whatever extent the Power Authority has made payments in accordance with section 3.4.1 of this Agreement. Withdrawal by the Power Authority after the Acceptance of the New License, pursuant to Section 6 of this Agreement, shall not render this Agreement null and void but shall amend this Agreement to omit Sections 2.1, 2.2, 2.3, 2.4, 2.5, 3.2.1, 3.2.2, and 3.4.2 of this Agreement. If this Agreement is rendered null and void, the Parties agree that the Commission cannot consider this Agreement as part of the record of the relicensing proceeding when issuing a New License for the Project.

### **6.7.2 WITHDRAWAL BY A PARTY OTHER THAN THE POWER AUTHORITY**

Withdrawal by any Party other than the Power Authority, pursuant to Section 4 or Section 6.1 of this Agreement, shall not render this Agreement null and void and shall not affect the enforceability of this Agreement. Withdrawal by any Party other than the Power Authority, however, shall: (1) render null and void provisions of this Agreement that are implicated by the objectionable License Provision(s) as they relate to the Party withdrawing and (2) amend this Agreement to omit the terms applicable to said Party. The withdrawing Party shall have no rights and receive no benefits under this Agreement or the Offer of Settlement. The withdrawing Party shall, however, continue to be bound by Section 4.2 and Section 7 of this Agreement. If a Party other than the Power Authority withdraws from this Agreement pursuant to Section 4 or Section 6, the Power Authority may at its option choose to let the Agreement stand, thereby obligating the Power Authority and the non-withdrawing Parties to continue to be bound by the terms of this Agreement, or to itself withdraw from this Agreement, notwithstanding the requirements of Section 6 herein. If the Power Authority invokes its option to withdraw in response to a withdrawal by another Party, the provisions of Section 6.7.1 shall apply.

## **SECTION 7 SETTLEMENT NEGOTIATIONS PRIVILEGED**

The Parties have entered into the negotiations and discussions leading to this Agreement with the understanding that, to the fullest extent allowed by law, all prior discussions relating to this Agreement are privileged and confidential. This material shall not prejudice the position of any Party or participant taking part in such discussions and negotiations and are not to be used by any entity in any manner, including admission into evidence, in connection with these or any other proceedings related to the subject matter of this Agreement. The Provisions of this Section will survive termination of this Agreement.

## **SECTION 8 RESOLVING DISPUTES AMONG THE PARTIES**

The Parties agree to utilize the following alternative dispute resolution mechanism to resolve all disputes, other than a dispute constituting a Breach, related to the compliance with, or the performance of, obligations set forth in this Agreement:

### **8.1 NOTICE**

Any Party who believes that a dispute has arisen shall provide written notification pursuant to Section 12.1 to the other Parties specifying the Parties with whom the dispute exists and describing the matter(s) in dispute, the circumstances under which it arises, and the proposed relief or resolution to address the dispute. Each Party that has an interest directly and substantially affected by the dispute may participate in the resolution of the dispute (collectively, "Participating Parties") by providing, within fifteen (15) days of receipt of such notice, written notification to the other Parties pursuant to Section 12.1 of its intention to do so.

### **8.2 CONSULTATION**

The Participating Parties shall commence a one hundred twenty (120) day Consultation period (measured from the date of the notice of the dispute) to engage in good faith negotiations to resolve the dispute(s). During the Consultation period, the Participating Parties shall hold at least three (3) meetings unless and until the dispute is resolved. At any time during the Consultation period, the Participating Parties may, by mutual consent, initiate Facilitated Mediation as set forth in Section 8.3.

### **8.3 FACILITATED MEDIATION**

If disagreement persists at the conclusion of the Consultation period or if the Participating Parties mutually consent during the Consultation period, an aggrieved Party may, within fifteen (15) days after the conclusion of the Consultation period, initiate Facilitated Mediation through a mutually-agreed upon organization. The mediation process shall continue until the dispute is settled or until the mediator makes a finding that there is no possibility of settlement through Facilitated Mediation. At any time during Facilitated Mediation, the Participating Parties may, by mutual consent, initiate Court Proceedings as set forth in Section 8.4.

### **8.4 COURT PROCEEDINGS**

If the Parties choose not to engage in Facilitated Mediation, if a disagreement persists at the conclusion of the Facilitated Mediation, or if the Participating Parties mutually consent during Facilitated Mediation, an aggrieved Participating Party may commence Court Proceedings in a court of competent jurisdiction located in Albany County, New York, as set forth in Section 11 of this Agreement. The final disposition of the Court Proceedings shall be binding upon all Parties to this Agreement.

## **SECTION 9 FORCE MAJEURE**

An event of *Force Majeure* as used herein means any event beyond the reasonable control of and which occurs without the fault or negligence of the Power Authority or any entity controlled by the Power Authority, including its contractors and subcontractors (to the extent said contractor was acting under the control or direction of the Power Authority), which event or events may include but are not limited to: any delay or failure to grant a permit or other regulatory authorization required by law to be granted by any Federal, State, or local government authority, or any regulation, law, or prohibitory or mandatory action of any Federal or State governmental authority; acts of God or sudden actions of the elements, including fire; drought or critically high or low flows and levels in the Lake Erie/Lake Ontario/Niagara River watershed; strikes, lockouts or other similar industrial disturbances; acts of the public enemy, including terrorist acts, wars, civil disturbances, blockades, military actions, insurrections or riots; landslides, floods, washouts, lightning, earthquakes, tornadoes, hurricanes, blizzards or other storms or storm warnings; explosions, fires, sabotage, or vandalism; breakage, defects, malfunctioning, or accident to machinery, equipment, materials, or lines of pipe or wires; freezing of machinery, equipment, materials or lines of pipe or wires; inability or delay in the obtaining of materials or equipment; and inability to obtain or utilize any permit, approval, easement, license, or right-of-way. The settlement of strikes, lockouts, or other similar such industrial disturbances shall be entirely within the discretion of the Power Authority. The requirement herein that any event of *Force Majeure* shall be remedied with all reasonable dispatch shall not require the settlement of strikes, lockouts, or other similar such industrial disturbances when such course is, in the opinion of the Power Authority, inadvisable.

If any event of *Force Majeure* directly renders the Power Authority unable, wholly or in part, to perform any obligation under this Agreement, it is agreed that, upon giving notice and full particulars of such event of *Force Majeure* to other Parties, as soon thereafter as practicable, the Power Authority is authorized to suspend performance under such obligations during the continuance of any inability or incapacity so caused, but for no longer period and only to the extent necessitated by, proportionate to, and commensurate with the scope of the Event of Force Majeure and its impact on the ability of the Power Authority to perform its obligations under this Agreement; *provided, further*, the Power Authority shall not be relieved from: (1) any obligations of this Agreement not directly affected by the event of *Force Majeure* or (2) any obligation to make payment to another Party for pre-existing obligations. The Power Authority shall use best efforts to remedy the cause of such inability or incapacity with all reasonable dispatch, including, but not limited to, the prompt commencement and prosecution of litigation. When the Power Authority is able to resume performance of its obligations, it shall give the other Parties notice to that effect. The occurrence of a *Force Majeure* event that results in impossibility of performance of an obligation, however, shall excuse the Power Authority's performance.

## **SECTION 10 HEADINGS**

The descriptive headings of the various Sections of this Agreement have been inserted for convenience of reference only and are of no significance in the interpretation or construction of this Agreement. To the extent that there is any inconsistency between the heading of a Section of this Agreement and the text of the Section, the text shall govern.

## **SECTION 11 CHOICE OF LAW AND FORUM**

This Agreement, as a binding contract between the Parties, shall be governed by and construed under New York law without reference to its conflicts of law principles. Any action at law, suit in equity, or other judicial proceeding for the enforcement of this Agreement or any of its provisions must be brought in and maintained only in a court of competent jurisdiction located in Albany County, New York.

## **SECTION 12 NOTICE AND COMMUNICATION**

### **12.1 NOTIFICATION REQUIREMENTS**

All written notices to be provided pursuant to this Agreement shall be mailed by U.S. certified mail, or overnight express service, postage prepaid, to each Party at the addresses listed in Appendix C or at a subsequent address, as a Party shall identify. Notices shall be deemed to be given five (5) business days after the date of mailing or on date of receipt if overnight express or other receipt-notification service is used.



## **12.2 NOTIFICATION CONTACT INFORMATION**

For purposes of implementing this Agreement, the Parties agree that the individuals listed in Appendix C shall be designated the primary contact persons and all written notices shall be posted to these individuals at the addresses listed in Appendix C. Notification of changes in the contact persons must be made in accordance with Section 12.1 to all other contact persons listed in Appendix C.

## **12.3 OTHER COMMUNICATIONS**

Notices and other communications not required to be made to all Parties or not required to be made in a specific manner under the terms of this Agreement need not be in writing and may be made by telephone, electronic mail, or facsimile.

## **SECTION 13 COSTS**

Except as provided in this Agreement, all Parties shall bear their own costs of participating in this Agreement.

## **SECTION 14 MERGER CLAUSE**

This Agreement, including all Appendices attached hereto, constitutes the entire agreement between the Parties with respect to the subject matter hereof and supersedes all prior and contemporaneous understandings or agreements, oral or written, between the Parties with respect to such subject matter.

## **SECTION 15 WAIVER**

The failure of any Party to this Agreement to insist, on any occasion, upon strict performance of any provision of this Agreement will not be considered a waiver of any obligation, right, or duty of, or imposed upon, such Party.

## **SECTION 16 AMENDMENT**

The Parties may, by mutual agreement, amend this Agreement by a written instrument duly executed by the Parties. In addition, the Parties acknowledge that, to the extent such an amendment is not inconsistent with the New License, approval by FERC of such amendment shall not be required.

## **SECTION 17 RESERVATION OF RIGHTS**

The Power Authority reserves all of its rights under the FPA to unilaterally petition FERC to, among other things, amend or otherwise modify the New License; *provided, however*, that the Power Authority shall not seek amendments or modifications inconsistent with the provisions of this Agreement.

## **SECTION 18 GENERAL COOPERATION**

Each of the Parties hereto agrees to cooperate with the other Parties to effectuate the intent of this Agreement. From time to time, upon not less than ten business day's prior notice, each of the Parties agree to execute and deliver to the other Parties a statement in writing certifying that the Agreement is in full force and effect and whether, to the best of its knowledge there is any default or breach under the Agreement.

## **SECTION 19 ECHDC SUCCESSOR**

In the event ECHDC is dissolved or is no longer able to perform its obligations hereunder, any funds held by ECHDC that it received pursuant to this Agreement shall be remitted to the Development Trustee and any future payments that would otherwise be made by the Power Authority or ESDC to ECHDC hereunder shall be made to the Development Trustee. Notwithstanding the foregoing, ECHDC may assign its rights hereunder to a successor public benefit corporation provided that such successor's corporate purpose is similarly limited to the development and revitalization of the Buffalo waterfront and that such successor assumes ECHDC's obligations hereunder and under any trust agreement that it may have entered into in furtherance of the objectives of this Agreement.

## **SECTION 20 EXECUTION**

Each signatory to this Agreement represents that: (1) he or she is authorized to execute this Agreement and legally bind the Party he or she represents and (2) the Party he or she represents will be fully bound by the terms hereof. This Agreement may be executed in any number of counterparts, and each executed counterpart shall have the same force and effect as an original instrument as if all the signatory parties had signed the same instrument. Any signature page of this Agreement may be detached from any counterpart of this Agreement without impairing the legal effect of any signature(s) thereon and may be attached to another counterpart of this Agreement identical in form hereto but having attached to it one or more signature pages.

Intending to be legally bound, the Parties have executed this Agreement through their duly authorized representatives.

## **APPENDIX A PROPOSED LICENSE ARTICLES**

### **PRESCRIPTION ARTICLE OF THE SECRETARY OF THE INTERIOR UNDER SECTION 18 OF THE FEDERAL POWER ACT**

**Article \_\_\_\_.** Pursuant to Section 18 of the Federal Power Act, authority is reserved to the Commission to require the Licensee to construct, operate, and maintain, or provide for the construction, operation, and maintenance, of such fishways as may be prescribed by the Secretary of the Interior.

### **ECOLOGICAL STANDING COMMITTEE**

**Article \_\_\_\_.** The Licensee shall convene an Ecological Standing Committee ("ESC"), comprised of a representative from the Licensee, the New York State Department of Environmental Conservation, the U.S. Fish and Wildlife Service, the Seneca Nation of Indians, the Tuscarora Nation, the Tonawanda Seneca Nation, New York Rivers United, and the Niagara Relicensing Environmental Coalition to establish: (1) the organization and administration of the Habitat Improvement Projects Fund and the Fish and Wildlife Habitat Enhancement and Restoration Fund established in Articles \_\_\_\_; (2) a cash flow schedule for fund expenditures; (3) measures to track and recover fund administrative costs; (4) associated auditing and reporting requirements; and (5) all other necessary and appropriate tasks, including the development of a schedule for future ESC meetings. The Licensee shall serve as the coordinator of the ESC and provide for its administrative support, and shall report annually to the Commission on the activities of the ESC.

### **FUND FOR PROPOSED HABITAT IMPROVEMENT PROJECTS**

**Article \_\_\_\_.** (a) Within ninety (90) days of the effective date of the New License or license issuance, whichever is later, the Power Authority shall establish a Habitat Improvement Projects Fund ("HIPS Fund") in the amount of \$12,000,000 (NPV 2007), in an interest bearing account at an accredited bank in the State of New York. The HIPS Fund, including any accrued interest, shall be used for the following proposed Habitat Improvement Projects ("HIPs"):

- (i) Strawberry Island Wetland Restoration
- (ii) Frog Island Restoration
- (iii) Motor Island Shoreline Protection
- (iv) Beaver Island Wetland Restoration
- (v) Control of Invasive Species-Buckhorn and Tift Marshes
- (vi) Osprey Nesting
- (vii) Common Tern Nesting
- (viii) Installation of Fish Habitat /Attraction Structures

Utilizing monies from the HIPS Fund, the Power Authority shall construct the proposed HIPs, consistent with the relicensing study entitled "Investigation of Habitat Improvement Projects for

the Niagara Power Project" (June 2005) and the proposed implementation schedule set forth in Appendix B of the Relicensing Settlement Agreement. Prior to undertaking any construction-related activities, the Licensee shall consult with appropriate landowners, including consulting with OPRHP for the Strawberry Island, Buckhorn Marsh, and Tifft Marsh HIPs. Pursuant to the Relicensing Settlement Agreement, the Licensee shall ensure that the balance of the HIPs Fund is made available to the New York State Department of Environmental Conservation to undertake monitoring, operation and maintenance of the HIPs. Should the cost of the HIPs exceed the amount in the HIPs Fund, the Power Authority will cover additional expenses.

For any HIPs that the New York State Department of Environmental Conservation determines should not be constructed, or otherwise cannot be constructed, the Licensee shall transfer the proposed funding for those particular HIPs to the Fish and Wildlife Habitat Enhancement and Restoration Fund established pursuant to Article \_\_\_\_\_. The Licensee shall determine, with the agreement of the Ecological Standing Committee ("ESC"), the amount to be transferred based on cost data available at the time of the transfer. Further, should any matching funds or resources provided in-kind reduce the amount of expenditures needed to construct a particular HIP, the Licensee shall transfer, with the agreement of the ESC, an equivalent amount of funds to the Fish and Wildlife Habitat Enhancement and Restoration Fund; *provided, however*, the total cost of the HIP does not exceed the estimate set forth in Appendix C of the Relicensing Settlement Agreement.

#### **FISH AND WILDLIFE HABITAT ENHANCEMENT AND RESTORATION FUND**

**Article \_\_\_\_\_.** Within ninety (90) days of the effective date of the New License or license issuance, whichever is later, the Licensee shall establish a Fish and Wildlife Enhancement and Restoration Fund ("HERF"), in the amount of \$16,179,645 (NPV 2007), in an interest-bearing account at an accredited bank in the State of New York. The HERF, including any accrued interest, shall be used exclusively to fund projects identified and selected by the Ecological Standing Committee ("ESC"), including but not limited to future HIPs, land acquisition, habitat improvement, habitat research, fish, wildlife, and indigenous plant species restoration, and stewardship activities throughout the Niagara River Basin including within the Niagara Gorge, its headwaters at Lake Erie, the mouth of the river at Lake Ontario, its tributaries between these two points, and their associated watersheds. The ESC shall, in consultation with technical advisors as necessary, identify and select projects and activities to be funded by the HERF.

While projects do not have to meet all of the below-listed criteria to be eligible for funding under the HERF, the Licensee shall ensure that the following criteria are considered by the ESC when determining whether to fund proposed projects under the HERF:

- Projects that address a demonstrated Project impact
- Projects that preserve RTE plant, aquatic, terrestrial species and/or their habitat in the Niagara Basin
- Projects with a strong scientific foundation
- Projects that contribute to long-term protection and enhancement of RTE plant, aquatic, and terrestrial species and/or their habitat in the Niagara Basin

- Projects that achieve multiple ecological goals
- Projects that preserve and restore Haudenosaunee cultural, religious, and historic features
- Projects that involve multi-stakeholder collaboration
- Projects consistent with applicable local, State, and Federal resource management plans
- Projects that feature matching resources
- Projects that are time-sensitive
- Projects that have documented municipal, county and tribal support
- Projects that are feasible from a cost/probability of success perspective

#### **ANNUAL REPORT FOR THE HABITAT IMPROVEMENT PROJECTS FUND AND THE FISH AND WILDLIFE HABITAT AND RESTORATION FUND**

The Licensee shall prepare and submit to the Commission an annual report for the Habitat Improvement Projects Fund ("HIPs Fund") and the Fish and Wildlife Habitat and Restoration Fund ("HERF"). The annual report, at a minimum, shall include:

- (a) A summary, including progress reports, of: (1) all HIPs; and (2) projects funded, in whole or in part, by the HERF;
- (b) A project-by-project listing of HIPs as well as all expenditures from the HIPs Fund and the HERF during the previous fiscal year;
- (c) A detailed listing of all planned expenditures during the current fiscal year in which the report is issued;
- (d) An updated balance sheet for the HIPs Fund and the HERF, which includes HIPs Fund and HERF expenditures, administrative expenses, and accrued interest; and
- (e) Any material changes or deviations from proposed implementation schedules.

If the Commission, after notice and opportunity for comment, determines based on this reporting requirement that modifications to the implementation of the HIPs Fund or the HERF are required, the Licensee shall implement such changes as directed by the Commission.

#### **PUBLIC ACCESS IMPROVEMENTS**

**Article \_\_\_\_.** Within two (2) years of the effective date of the New License, the Licensee shall: (1) undertake the following recreational improvements, as provided for in Section 4.2 of the Relicensing Settlement Agreement; and (2) submit annual reports to the Commission on the ~~status of the recreational improvements until such improvements are completed:~~

- (a) Upper Mountain Parking Lot / Fishing Access. The Licensee shall construct: (1) a parking area for sixteen vehicles; (2) a gravel trail across the Niagara Mohawk Power Company transmission right-of-way for pedestrian use; and (3) a gravel path to traverse the reservoir dike in an area located on the northwest side of Lewiston Reservoir near the Upper Mountain Fire Company Station. The Licensee also shall implement measures, including the placement of signage and large boulders, to discourage vehicle access and use of the Upper Mountain gravel trail.

(b) Robert Moses Fishing Pier Parking Area. Adjacent to the main gate of the Robert Moses Niagara Power Plant, the Licensee shall provide for up to six (6) additional angled parking spaces at the Robert Moses Fishing Pier parking area.

(c) Bulkhead Fence at Upper River Intakes. At the Project's intake structure area, the Power Authority shall; (1) resurface the asphalt in the parking lot and along the walkways; (2) designate ADA parking spaces and install curb cuts to allow ADA access to walkways; and (3) install a removable 7-foot chain link fence parallel to the retaining wall approximately twenty-five (25) feet from the Niagara River's edge. The fence should be installed when icebreakers are dry-docked for repairs; at all other times, the fence should be removed and stored to provide unimpeded access to the Niagara River along the intake structure bulkhead railing.

#### **ESTABLISHMENT OF PARKS AND RECREATION FUND**

**Article \_\_\_\_.** In accordance with Section 5.1.1 of the Relicensing Settlement Agreement, the Licensee shall, within ninety (90) days of the effective date of the New License or license issuance, whichever is later, establish a Parks and Recreation Fund for capital improvements to recreation facilities within the Project boundary. Specific recreation projects, and more detailed cost information, shall be submitted for Commission approval as part of the Licensee's Recreation Plan as required by Article \_\_\_\_\_. The Licensee shall submit annually to the Commission a report of fund expenditures, as well as a progress report on the proposed capital improvements to facilities within the Project Boundary.

#### **NIAGARA FALLS WATER BOARD FALLS STREET TUNNEL REMEDIATION**

**Article \_\_\_\_.** Within ninety (90) days of the effective date of the New License or license issuance, whichever is later, the Power Authority shall establish the Niagara Falls Water Board Capital Improvement Fund in an amount of \$19,000,000 (NPV 2007) for capital improvements to minimize groundwater infiltration into the Falls Street Tunnel ("FST") in the area of the conduits. The Capital Improvement Fund will be managed and administered by the Niagara Falls Water Board ("Water Board") and the Licensee is directed to work with the Water Board to ensure that capital improvements are implemented consistent with Section 6.1 of the Relicensing Settlement Agreement. These improvements may include: (i) construction of access shafts in the FST; (ii) sediment removal; (iii) 860 lineal feet of "Cured in-place" repair of existing 7-foot diameter concrete pipe over the conduits and concrete bypass pipes; (iv) 1,100 lineal feet of slip-lined FST rock tunnel lining; and (v) other miscellaneous construction elements (e.g., mob / demob, structural removal, structural sealing, testing, etc.) and related costs. The Capital Improvement Fund also will cover future costs incurred by the Water Board over the term of the New License in connection with management or treatment of groundwater infiltration into the FST in the area of the conduits attributable to the influence of the conduits as well as repairs or maintenance associated with the capital improvements. The Licensee shall provide annual reports to the Commission on the status of the capital improvements until such time as the improvements are completed.

## **HISTORIC PROPERTIES**

**Article \_\_\_\_.** The Licensee shall implement the "*Programmatic Agreement Among the Federal Energy Regulatory Commission, the Advisory Council on Historic Preservation, and the New York State Historic Preservation Officer for Managing Historic Properties that may be Affected by a License Issuing to the Power Authority of the State of New York For the Continued Operation and Maintenance of the Niagara Power Project in Niagara County, New York*" executed on \_\_\_\_, 2005, including the development of a Historic Properties Management Plan ("HPMP") within one year of license issuance. In the event the Programmatic Agreement is terminated, the Licensee shall implement the provisions of its approved HPMP. The Commission reserves the right to require changes to the HPMP at any time during the term of the license. If the Programmatic Agreement is terminated prior to Commission approval of the HPMP, the Licensee shall obtain approval before engaging in any ground-disturbing activities or taking any other action that may affect any historic properties within the Project's area of potential effect.

## **LAND MANAGEMENT PLAN**

**Article \_\_\_\_.** Within one (1) year of the effective date of the New License or license issuance, whichever is later, the Licensee shall file for Commission approval a Land Management Plan for the Project. The Land Management Plan shall identify and explain the policies, standards, guidelines, and land use designations utilized to enhance safety and protect and manage environmental resources, public use, aesthetics, and Tuscarora Nation customary uses. In preparing the Land Management Plan, the Licensee shall consult with, at a minimum, the United States Fish and Wildlife Service, the Bureau of Indian Affairs, the National Park Service, the New York State Department of Environmental Conservation, the New York State Office of Parks, Recreation and Historic Preservation, the Tuscarora Nation, Niagara Relicensing Environmental Coalition, and adjacent landowners. The Licensee shall include with the Land Management Plan documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the consulted entities, and specific descriptions of how the entities' comments and recommendations are accommodated by the plan. The Licensee shall allow a minimum of thirty (30) days for entities to comment and make recommendations before filing the plan with the Commission. If the Licensee does not adopt a recommendation, the filing shall include the Licensee's reasons based on project-specific information.

The Commission reserves the right to require changes to the plan. The plan shall not be implemented until the Commission notifies the Licensee that the plan is approved. Upon approval of the plan, the Licensee shall implement the plan, including any changes required by the Commission.

## **RECREATION PLAN**

**Article \_\_\_\_.** Within one (1) year of the effective date of the New License or license issuance, whichever is later, the Licensee shall file with the Commission, for approval, a Recreation Plan for the Project that includes a description of the proposed recreational enhancements located

within the Project Boundary as agreed to in the Relicensing Agreement. Additionally, the Recreation Plan should include the following provisions:

- (a) Final designs, estimated costs, and a proposed implementation schedule for proposed recreational enhancements, including those that will be funded by the Parks and Recreation Fund.
- (b) Soil erosion and sedimentation control measures for the above enhancements.
- (c) A map showing the upgraded or new facilities in relation to existing recreation facilities.
- (d) A discussion on how each Project recreation facility will be operated and maintained during the term of the license, including a discussion of existing management agreements and plans for amendment, revision, and/or extension thereof.
- (e) A description of reasonable and prudent measures, developed in consultation with the Tuscarora Nation, to reduce and prevent, as practicably as possible, trespass on Nation lands by users of the Project's recreational facilities.
- (f) A program for monitoring recreational use and updating the Recreation Plan on a twelve (12) year cycle.

The Recreation Plan shall be prepared in consultation with, at a minimum, the United States Fish and Wildlife Service, the Bureau of Indian Affairs, the National Park Service, the New York State Department of Environmental Conservation, the New York State Office of Parks, Recreation and Historic Preservation, a representative from the Tuscarora Nation, a representative from the Niagara Relicensing Environmental Coalition, and a representative of the Niagara Power Coalition. The Licensee shall include with the Recreation Plan documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the consulted entities, and specific descriptions of how the entities' comments and recommendations are accommodated by the plan. The Licensee shall allow a minimum of thirty (30) days for entities to comment and make recommendations before filing the plan with the Commission. If the Licensee does not adopt a recommendation, the filing shall include the Licensee's reasons based on project-specific information.

The Commission reserves the right to require changes to the plan. The plan shall not be implemented until the Commission notifies the Licensee that the plan is approved. Upon approval of the plan, the Licensee shall implement the plan, including any changes required by the Commission.

#### **CONSOLIDATED ANNUAL REPORT**

Article \_\_\_\_\_. With the exception of any reports required by statute or the Commission's regulations, the reporting requirements herein shall constitute the totality of the Licensee's reporting requirements and shall supersede any prior reporting requirements imposed on the Licensee either by Commission order or the original license. For all compliance reports required



under this license to be filed with the Commission, the Licensee shall prepare a single compliance report that consolidates all required reporting information for each calendar year. The consolidated annual report shall be filed with the Commission on or before June 1 of each year.

#### NIAGARA REDEVELOPMENT ACT REQUIREMENTS

Article \_\_\_\_\_. In order to assure that at least 50 per centum of the project power shall be available for sale and distribution primarily for the benefit of the people as consumers, particularly domestic and rural consumers, to whom such power shall be made available at the lowest rates reasonably possible and in such manner as to encourage the widest possible use, the Licensee in disposing of 50 per centum of the project power shall give preference and priority to public bodies and non-profit cooperatives within economic transmission distance. In any case in which project power subject to the preference provisions of this Article is sold to utility companies organized and administered for profit, the Licensee shall make flexible arrangements and contracts providing for the withdrawal upon reasonable notice and fair terms of enough power to meet the reasonably foreseeable needs of the preference customers.

Article \_\_\_\_\_. The Licensee shall make a reasonable portion of the project power subject to the preference provisions of Article \_\_\_\_\_ available for use within reasonable economic transmission distance in neighboring States, defined herein as the States of Connecticut, Massachusetts, New Jersey, Ohio, Pennsylvania, Rhode Island, and Vermont, *but* this Article shall not be construed to require more than 20 per centum of the project power subject to such preference provisions to be made available for use in such States. The Licensee shall cooperate with the appropriate agencies in such States to ensure compliance with this requirement. In the event of disagreement between the Licensee and the power marketing agencies of any of such States, the Federal Energy Regulatory Commission may, after public hearings, determine and fix the applicable portion of power to be made available and the terms applicable thereto: Provided, That if any such State shall have designated a bargaining agency for the procurement of such power on behalf of such State, the Licensee shall deal only with such agency in that State. The arrangements made by the Licensee for the sale of power to or in such States shall include observance of the preferences in Article \_\_\_\_\_.

## Appendix "B"

### NYPA Ice Boom Storage Site

 NYPA Parcel



0 100 200 400 600

Feet

1 inch equals 400 feet

**APPENDIX C  
CONTACT  
INFORMATION**

City of Buffalo  
City Hall  
Buffalo, New York 14202  
Attn: Mayor

Erie County  
95 Franklin Street  
Buffalo, New York 14202  
Attn: County Executive

Buffalo Olmsted Parks Conservancy  
Parkside Lodge  
84 Parkside Avenue  
Buffalo, New York 14202

Erie Canal Harbor Development Corporation  
420 Main Street, Suite 717  
Buffalo, New York 14202  
Attn: President

New York State Urban Development Corporation d/b/a  
Empire State Development Corporation  
633 Third Avenue  
New York, New York 10017  
Attn: General Counsel

Power Authority of the State of New York  
123 Main Street  
White Plains, New York 10601  
Attn: Chief Executive Officer