

June 26, 2012

MEMORANDUM TO THE TRUSTEES

FROM THE PRESIDENT and CHIEF EXECUTIVE OFFICER

**SUBJECT: Release of Funds in Support of the Western
New York Power Proceeds Allocation Act**

SUMMARY

The Trustees are requested to approve the release of funds into the Western New York Economic Development Fund (“WNYEDF”) representing net earnings from unallocated Expansion Power and Replacement Power sold into the wholesale energy market during the period August 30, 2010 through December 31, 2012 as set forth in Chapter 58 of the Laws of 2012.

BACKGROUND

On March 30, 2012, Governor Cuomo signed into law the Western New York Power Proceeds Allocation Act (the “Act”) which directs net earnings from the sale of unallocated Expansion Power and Replacement Power from the Authority’s Niagara power project to be deposited into the WNYEDF. The Act repeals Chapter 436 of the Laws of 2010, which had amended the Public Authorities Law and the Economic Development Law, to create a somewhat similar program authorizing unallocated Expansion Power and Replacement Power to be utilized for WNYEDF benefits.

As part of the Act, the Authority is directed to deposit the net earnings from unallocated Expansion Power and Replacement Power into the WNYEDF as deemed feasible and advisable by the Trustees. The effective date for calculating the net earnings is August 30, 2010, the original effective date of Chapter 436 of the Laws of 2010. Net earnings are defined as “the aggregate excess of revenues received by the power authority of the state of New York from the sale of expansion and replacement power and energy produced at the Niagara project that was sold in the wholesale energy market over what revenues would have been received had such energy been sold on a firm basis to an eligible expansion power or replacement power customer under the applicable tariff or contract.”

The net earnings deposited into the WNYEDF will be utilized to fund economic development projects (“eligible projects”) by private businesses, including not-for-profits, which are physically located within New York State and within a thirty-mile radius of the Niagara power project. Eligible projects are to support the growth of business in the state and thereby lead to increased tax revenues and job creation or retention. Eligible projects may include capital investment in buildings, equipment and associated infrastructure; research and development that benefits New York State; support for tourism and marketing and advertising for Western New

York State tourism and business; and energy related projects as authorized under §1005(17) of Public Authorities Law.

The Act also establishes the Western New York Power Proceeds Allocation Board (“Allocation Board”) to consist of five members appointed by the Governor. The Allocation Board’s responsibilities include establishing written procedures for reviewing applications and making recommendations to the Authority for the allocation of fund benefits to eligible projects. In reviewing applications for benefits, the Allocation Board shall employ the same criteria used for determining eligibility for Expansion, Replacement and Preservation Power allocations as provided in §1005 of Public Authorities Law including, but not limited to, the number of jobs and type of jobs created as measured by wage and benefit levels; business’ long-term commitment to the region; amount of capital investment; and impact on competitiveness in the region. Upon recommendation of the Allocation Board, the Authority shall award fund benefits to an applicant, provided however, that upon a showing of good cause, the Authority shall have the discretion as to whether to adopt the Allocation Board’s recommendation, or to award benefits in a different amount or on different terms and conditions.

DISCUSSION

The Authority is requested, from time to time, to provide financial support for various State programs, including rebates to customers of the Power for Jobs program, the provision of below-cost energy to the beneficiaries of the State’s Energy Cost Savings Benefits program, and the Residential Consumer Discount Program payments related to ReCharge New York.

Any such transfer of funds must (1) be authorized by the Legislature; (2) be approved by the Trustees “as feasible and advisable,” (3) satisfy the requirements of the Authority’s General Resolution Authorizing Revenue Obligations dated February 24, 1998, as amended and supplemented (“Bond Resolution”) and (4) as set forth in the Trustees’ Policy Statement dated May 24, 2011, a debt service coverage ratio of 2.0 shall be used as a reference point in considering any such payments or transfers.

The Bond Resolution’s requirements to withdraw monies “free and clear of the lien and pledge created by the [Bond] Resolution” are such that withdrawals (a) must be for a “lawful corporate purpose as determined by the Authority,” and (b) the Authority must determine, taking into account, among other considerations, anticipated future receipt of revenues or other moneys constituting part of the Trust Estate, that the funds to be so withdrawn are not needed for (i) payment of reasonable and necessary operating expenses, (ii) an Operating Fund reserve for working capital, emergency repairs or replacements, major renewals or for retirement from service, decommissioning or disposal of facilities, (iii) payment of, or accumulation of a reserve for payment of, interest and principal on senior debt or (iv) payment of interest and principal on subordinate debt.

Based on the amount of unallocated Expansion Power and Replacement Power, and Western New York wholesale energy prices during the period August 30, 2010 through May 31, 2012, staff has determined the amount of net earnings, calculated in accordance with the legislation, to be \$15.4 million. If deemed feasible and advisable by the Trustees, the \$15.4

million will be deposited into the WNYEDF no later than ninety days after enactment of the Act. The WNYEDF will be a separate fund residing within the Authority's Operating Fund.

In addition, staff is seeking authorization to deposit into the WNYEDF the net earnings for the period June 1, 2012 through December 31, 2012, estimated to be less than \$4.6 million based upon projected unallocated Expansion Power and Replacement Power and projected wholesale energy prices. If authorized by the Trustees, such net earnings would be deposited into the WNYEDF on a quarterly basis.

Staff has reviewed the effects of the transfer of up to \$20 million into the WNYEDF on the Authority's projected financial position and reserve requirements. In addition, in accordance with the Board's Policy Statement, staff calculated the impact of this transfer on the Authority's debt service coverage ratio and determined it would not fall below the 2.0 reference point level. Given the current financial condition of the Authority, its estimated future revenues, operating expenses, debt service and reserve requirements, staff is of the view that it will be feasible for the Authority to make the deposit of up to \$20 million at this time.

FISCAL INFORMATION

Since the passage of the initial legislation related to the WNYEDF (Chapter 436 of the Laws of 2010), the Authority has been accruing for this potential liability on a monthly basis. Provisions for this program were also included in the 2012 Operating Forecast approved by the Trustees in December 2011.

Staff has determined that sufficient funds are available to provide up to \$20 million in support for WNYEDF benefits for the period August 31, 2010 through December 31, 2012 and that such Authority funds are not needed for any of the purposes specified in Section 503(1)(a)-(c) of the Authority's Bond Resolution. Net earnings to be deposited into the WNYEDF for periods beyond December 31, 2012 will be requested of the Trustees at a later date.

RECOMMENDATION

The Treasurer recommends that the Trustees affirm the deposit of up to \$20 million into the Western New York Economic Development Fund is feasible and advisable and to authorize such deposit.

For the reasons stated, I recommend the approval of the above-requested action by adoption of a resolution in the form of the attached draft resolution.

Gil C. Quiniones
President and Chief Executive Officer

Att.
WNY PPAA

RESOLUTION

RESOLVED, That the Trustees hereby authorize the release of up to \$20 million from the Operating Fund to the Western New York Economic Development Fund as authorized by Chapter 58 of the Laws of 2012 and as discussed in the attached memorandum of the President and Chief Executive Officer; and be it further

RESOLVED, That the amount of up to \$20 million to be used for the Western New York Economic Development Fund benefits described in the foregoing resolution is not needed for any of the purposes specified in Section 503(1)(a)-(c) of the Authority's General Resolution Authorizing Revenue Obligations, as amended and supplemented; and be it further

RESOLVED, That as a condition to making the releases specified in the foregoing resolutions, on the day of such payment the Treasurer or the Deputy Treasurer shall certify that such monies are not then needed for any of the purposes specified in Section 503(1)(a)-(c) of the Authority's General Resolution Authorizing Revenue Obligations, as amended and supplemented; and be it further

RESOLVED, That the Chairman, the Vice Chairman, the President and Chief Executive Officer, the Chief Operating Officer, the Executive Vice President and General Counsel, the Executive Vice President and Chief Financial Officer, the Corporate Secretary, the Treasurer and all other officers of the Authority be, and each of them hereby is, authorized and directed, for and in the name and on behalf of the Authority, to do any and all things and take any and all actions and execute and deliver any and all certificates, agreements and other documents that they, or

any of them, may deem necessary or advisable to effectuate the foregoing resolutions, subject to approval as to the form thereof by the Executive Vice President and General Counsel.