

**FIRM TRANSMISSION CAPACITY PURCHASE AGREEMENT**

**BETWEEN**

---

**AND**

**THE NEW YORK POWER AUTHORITY**

**FIRM TRANSMISSION CAPACITY PURCHASE AGREEMENT**

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**AND  
THE NEW YORK POWER AUTHORITY**

THIS AGREEMENT, entered into this \_\_\_\_ day of \_\_\_\_\_, 2007, by and between \_\_\_\_\_, a \_\_\_\_\_ organized and existing under the laws of the State of \_\_\_\_\_ and having its principal place of business located at \_\_\_\_\_ ("Seller"), and the New York Power Authority, a corporate municipal instrumentality of the State of New York with its headquarters at 30 South Pearl Street, Albany, New York 12207 ("Buyer").

**WITNESSETH:**

WHEREAS, Seller proposes to construct, Own or Lease, operate and maintain the Transmission Facility comprising a merchant transmission facility between \_\_\_\_\_, New York City and \_\_\_\_\_, and to provide Firm Transmission Capacity to the Buyer;

WHEREAS, Seller desires to sell Firm Transmission Capacity over the Transmission Facility to Buyer pursuant to the rates, terms, and conditions set forth in this Agreement, and Buyer desires to purchase such Firm Transmission Capacity pursuant to the rates, terms, and conditions set forth herein;

WHEREAS, Buyer is engaged in the sale of electricity in the State of New York as authorized in the New York Public Authorities Law, Sections 1000-1017, as it may be amended from time to time (the "PAL"); and

WHEREAS, Buyer intends to utilize Firm Transmission Capacity from the Transmission Facility for a number of purposes including, but not limited to, receiving Products into NYISO Zone J, maintaining reliable electric service in New York, and bidding Products into markets operated by the NYISO.

NOW, THEREFORE, in consideration of the foregoing and the promises and covenants hereinafter set forth, Buyer and Seller agree as follows:

## **ARTICLE 1**

### **DEFINITIONS**

#### 1.1 Definitions

Any term used in this Agreement not defined herein shall have the meaning customarily attributed to such term by the electric utility industry in New York State. Any references herein to this Agreement, or to any other agreement, shall include any exhibits, appendices, schedules, attachments and addenda thereto, as the same may be amended from time-to-time. When used with initial capitalization, unless otherwise defined herein, whether singular or plural, the following terms, as used in this Agreement, shall have the meanings as set forth below:

"Actual Input Energy" means, for any hour or portion thereof, the amount of Energy, measured in MWh by the Metering Devices at the Point of Receipt, actually supplied by or on behalf of Buyer at the Point of Receipt during such hour.

"Actual Output Energy" means, for any hour or portion thereof, the amount of Energy, measured in MWh by the Metering Devices at the Point of Delivery, actually delivered by Seller on behalf of Buyer at the Point of Delivery during such hour.

"Actual Transmission Capacity" means (for any hour) the amount of transmission capacity measured in MW and determined by the actual Energy that could have been delivered to the Point of Delivery (as determined in accordance with Good Utility Practice and in accordance

with the Operating Instructions), excluding any reductions due to (a) reductions or outages caused or directed by the NYISO or any other ISO [if applicable], (b) reduction due to Scheduled Outages approved in advance by Buyer, (c) reductions or outages arising from Connecting Utility A's or Connecting Utility B's isolation rights under the Connecting Utility A Interconnection Agreement or Connecting Utility B Interconnection Agreement, as applicable, or (d) reductions or outages arising from Buyer's failure to perform its obligations set forth in Section 3.2.4.

"Affiliate" shall mean any Person, directly or indirectly, through one or more intermediaries, Controlling, Controlled by, or under common Control with any other Person, as the case may be.

"Agreement" means this Firm Transmission Capacity Purchase Agreement, dated as of the date hereof, between Seller and Buyer, including all exhibits, appendices, schedules, attachments and addenda thereto as the same may be amended from time-to-time.

"Availability" means (for any Month) the arithmetic average of the Hourly Availability values for all hours in that Month.

"Availability Adjusted Contract Rate" means, for any Month, the final rate (in U.S. dollars per MW-Month) charged by Seller and paid by Buyer for each MW of Firm Transmission Capacity sold pursuant to the terms of this Agreement, as determined pursuant to Section 4.3.

"Base Term" means the term of this Agreement as set forth in Section 2.1.

"Bidding and Scheduling Instructions" has the meaning set forth in Section 9.3.

"Business Day" means any calendar day upon which the Federal Reserve Bank of New York is open for business from 9 AM through 5 PM, EPT.

"Buyer" is defined in the first paragraph of the Agreement.

"Buyer Delay" means any failure or delay by Buyer in performing Buyer's obligations under this Agreement that directly and adversely affects or delays Seller's ability to perform its obligations hereunder.

"Buyer's Meters" is defined in Section 7.1.

"Buyer's Taxes" is defined in Section 19.11.2.

"Capacity" means firm generation capacity that can be made available to Buyer at the Point of Delivery through use of the Project.

"Claiming Party" is defined in Section 12.6.

"COD Liquidated Damages" is defined in Section 5.2.3. [if applicable]

"COD Notice" is defined in Section 3.5.2. [if applicable]

"Commercial Operation" means the availability of the Firm Transmission Capacity on the Transmission Facility for scheduling and delivery of Products satisfying the requirements of Section 3.5. [if applicable]

"Commercial Operation Date" means the Day on which the Seller has met all conditions for Commercial Operation set forth in Section 3.5.2 of this Agreement. [If applicable]

"Connecting Utility" means either Connecting Utility A or Connecting Utility B, or both.

"Connecting Utility A" means \_\_\_\_\_ [the electric utility to which the Transmission Facility will interconnect at the Point of Receipt].

"Connecting Utility A Electric System" means all equipment and facilities now or hereafter comprising a Connecting Utility A's system for transmission and distribution of electricity as modified or expanded from time-to-time.

"Connecting Utility A Interconnection" means the electrical interconnection of the Transmission Facility with the Connecting Utility A's Electric System at the Connecting Utility Substation.

"Connecting Utility A Interconnection Agreement" has the meaning set forth in Section 3.1.13.

"Connecting Utility B" means \_\_\_\_\_ [the electric utility to which the Transmission Facility will interconnect at the Point of Delivery].

"Connecting Utility B Electric System" means all equipment and facilities now or hereafter comprising a Connecting Utility B's system for transmission and distribution of electricity as modified or expanded from time-to-time.

"Connecting Utility B Interconnection" means the electrical interconnection of the Transmission Facility with the Connecting Utility B's Electric System at the Connecting Utility Substation.

"Connecting Utility B Interconnection Agreement" has the meaning set forth in Section 3.1.12.

"Confidential Information" is defined in Section 18.1.

"Consent(s)" means any approval, consent, permit, license, decree, certificate or other authorization or agreement that is required to Own or Lease (as applicable), construct, operate and maintain the Project from any Governmental Authority having jurisdiction, in accordance with applicable Legal Requirements, including, without limitation, all applicable environmental certificates, licenses, permits and approvals, but excluding any consent, the absence of which will not substantially impede the ownership, lease, construction, operation or maintenance of the Project.

"Consents Application Date" means the date on which Seller has submitted to each Governmental Authority what Seller reasonably believes is a complete application for processing and issuance of each Development Permit. [If applicable]

"Consents Application Date Liquidated Damages" is defined in Section 5.2.1.

"Consents Approval Date" means the date on which each of the Development Permits has been issued to Seller by the appropriate Governmental Authority in final form without any conditions reasonably unacceptable to Buyer, Seller or Lenders. [If applicable]

"Construction Milestone" means the Target Consents Application Date, Target Notice to Proceed Date and Target Commercial Operation Date set forth in the Agreement by which Seller must achieve the conditions or performance specified for that date. [If applicable]

"Construction Permits" means those Consents necessary for the commencement of construction of the Project, all of which as of the date of this Agreement are set forth in Appendix VI, Schedule 2. [If applicable]

"Contract Capacity" means, as of any time, the least of (i) the Firm Transmission Withdrawal Rights [or equivalent] (in MW) awarded or assigned to Seller at the Point of Receipt at such time (as adjusted to account for System Losses), (ii) the Transfer Capability at such time, and (iii) \_\_\_ MW, which Seller agrees to sell and provide and Buyer agrees to purchase and receive pursuant to the terms of this Agreement.

"Contract Rate" means, for any Month, the rate (in dollars per MW-Month) specified in Appendix II.

"Control" (including the terms "controlling", "controlled by", and "under common control with") means the possession, directly or indirectly, of the power to direct or cause the direction of management and policies of a Person, whether through the ownership of voting securities, by

contract, or otherwise. A voting interest of ten percent (10%) or more in a Person shall create a rebuttable presumption of control.

"CPLR" is defined in Section 19.8.

"Day" means twenty-four (24) consecutive hours commencing with the hour ending 0100 through hour ending 2400 EPT on any calendar Day.

"Design" means the design for the Project set forth in Appendix I, Part A, including the proposed site and technical specifications. [If applicable]

"Design and Performance Verification Studies" means those system studies undertaken by Seller pursuant to Appendix I. [If applicable]

"Development Permits" means those Consents necessary for development of the Project, all of which as of the date of this Agreement are set forth in Appendix VI, Schedule 1. [If applicable]

"Disclosing Party" is defined in Section 18.1.

"Duration Estimate" is defined in Section 12.3.

"Effective Date" is defined in Section 2.3.

"Energy" means electrical energy delivered to, from, or on behalf of, Buyer, for transmission via the Transmission Facility.

"Environmental Attributes" means any and all credits (including without limitation renewable energy credits), benefits, emissions reductions, offsets, rights and allowances of any nature whatsoever and however entitled, attributable from any Products purchased or exchanged by Buyer utilizing the Project from and after the Effective Date, including: (i) any avoided emissions of pollutants to the air, soil or water such as sulfur oxides (SOx), nitrogen oxides (NOx), carbon monoxide (CO), other pollutants or particulates that are now or may in the future

be regulated under the pollution control laws of the United States or any state or political subdivision thereof; (ii) any avoided emissions of carbon dioxide (CO<sub>2</sub>), methane (CH<sub>4</sub>) and any other greenhouse gases (GHGs) that have been determined by the United Nations Intergovernmental Panel on Climate Change, Northeast Governors Regional Greenhouse Gas Initiative or other standard-setting entity with respect to any relevant market to contribute to the actual or potential threat of altering the Earth's climate by trapping heat in the atmosphere; and (iii) all reporting rights to these avoided emissions, including those rights known as "Green Tag Reporting Rights" that may be available from a legally-constituted or designated authority pursuant to which the purchaser may be entitled to report the ownership of accumulated usage of energy in compliance with Federal or state law, if applicable, and to a Federal or state agency or any other party at such purchaser's discretion, and include without limitation those rights accruing under Section 1605(b) of The Energy Policy Act of 1992 and any present or future Federal, state, or local law, regulation or bill, and any domestic, international or foreign emissions trading program.

"EPT" or "Eastern Prevailing Time" means Eastern Standard Time or Eastern Daylight Time, as applicable.

"Escrow Account" means a financial account held by a third party pursuant to an escrow agreement substantially in the form attached hereto as Appendix V, Part B.

"Event of Default" is defined Section 10.1.

"Excess System Losses Credit" means, for any Month, a credit to Buyer for excessive system losses calculated pursuant to Section 3.11.

"Export Charges" means any charges any ISO other than NYISO imposes on flows leaving or across its control area pursuant to its applicable rules. [If applicable]

"FERC" means the Federal Energy Regulatory Commission, or any successor regulatory agency.

"FERC Authority" means any FERC order, rate schedule, and/or other authorization from the FERC authorizing the Seller to sell Firm Transmission Capacity over the Project under this Agreement.

"Financial Transmission Rights" means any rights, including auction revenue rights, transmission congestion credits or other similar rights and benefits provided, offered, auctioned or otherwise made available in any applicable markets of any ISO other than NYISO authorizing the holder the right to receive all or a portion of congestion costs or similar amounts paid by grid users, collected by such operator per MW delivered from a specified point of receipt to a specified point of delivery, under its applicable rules. [If applicable]

"Financing" means each construction, interim, long-term debt, equity financing, refinancing, and/or credit support arrangement related to all or a portion of the development, construction, or operation of the Project, including any Lease pursuant to which Seller or its permitted assignee is the lessee of the Project (or any portion thereof).

"Financing Documents" means any and all loan agreements, notes, indentures, security agreements, subordination agreements, interest rate protection agreements, participation agreements, leases, agency agreements or other documents related to a Financing.

"Firm Transmission Capacity" means the non-interruptible transmission service up to the Contract Capacity over the Transmission Facility with the capability to deliver and/or provide Energy and Capacity from the Point of Receipt to the Point of Delivery.

"Firm Transmission Injection Rights" [or equivalent ISO term] has the meaning given in the applicable rules of any applicable ISO other than NYISO [If applicable].

"Firm Transmission Withdrawal Rights" [or equivalent ISO term] has the meaning given in the applicable rules of any applicable ISO other than NYISO [If applicable] .

"FOIL" is defined in Section 18.2.

"Force Majeure Event" is defined in Article 12 of this Agreement.

"Force Majeure Remedy Plan" is defined in Section 12.6.

"Good Utility Practice" means any of the practices, methods, or acts engaged in, or approved by, a significant portion of the electric utility industry in North America during the relevant time period, or any of the practices, methods, or acts which, in the exercise of reasonable judgment in light of the facts known at the time the decision was made could have been expected to accomplish the desired result at a reasonable cost consistent with good business practices, reliability, safety, and expedition. Good Utility Practice is not intended to be limited to the optimum practice, method, or act to the exclusion of all others, but rather to delineate acceptable practices, methods, or acts generally accepted in the region.

"Governmental Authority" means any unit, department, commission, board, bureau, agency, regulatory authority, instrumentality, or judicial or administrative body of a United States federal, state, municipal, local, territorial, or other government, excluding, for the avoidance of doubt, Buyer.

"Guarantor" means the entity providing a Guaranty.

"Guaranty" means an instrument substantially in the form attached hereto as Appendix V, Part A, provided by a Qualified Guarantor, obligating the Guarantor to guarantee unconditionally the payment obligations of Seller.

"Hourly Availability" means (for any hour) the availability of the Transmission Facility, determined as the lesser of (a) 1.0 and (b) a fraction, the numerator of which is (i) the Hourly

Transmission Capacity for that hour, seasonally weighted as provided in Section 4.3, and the denominator of which is (ii) the Contract Capacity applicable for that hour, provided, however, that if Contract Capacity for such hour is zero, the Hourly Availability for such hour shall be zero.

"Hourly Transmission Capacity" means (for any hour) the amount of transmission capacity measured in MW and determined by the actual Energy that could have been delivered to the Point of Delivery (as determined in accordance with Good Utility Practice and in accordance with the Operating Instructions), excluding any reductions due to (a) reductions or outages caused or directed by the NYISO, or any other applicable ISO, (b) reduction due to Scheduled Outages approved in advance by Buyer, (c) reductions or outages arising from Connecting Utility A's or Connecting Utility B's isolation rights under the Connecting Utility A Interconnection Agreement or Connecting Utility B Interconnection Agreement, as applicable, (d) reductions due to a Force Majeure Event, or (e) reductions or outages arising from Buyer's failure to perform its obligations set forth in Section 3.2.4.

"Incremental System Reinforcements" means, collectively, the Other Incremental System Reinforcements [if applicable] and the New York Incremental System Reinforcements.

"Incremental System Reinforcements Costs" means, collectively, the costs of the Other Incremental System Reinforcements [if applicable] and the New York Incremental System Reinforcements.

"Indemnified Party" is defined in Section 11.1.

"Indemnifying Party" is defined in Section 11.1.

"Initial Tests" means all testing required prior to the Commercial Operation Date pursuant to Section 3.7.1 that will be used to establish the Firm Transmission Capacity of the Project.

"Interconnection" means, as applicable, the Connecting Utility A Interconnection or Connecting Utility B Interconnection.

"Interconnection Agreement" means, as applicable, either or both of the Connecting Utility A Interconnection Agreement or the Connecting Utility B Interconnection Agreement.

"Interconnection Cost" means the cost and expense of designing, developing and constructing the Interconnections.

"Interconnection Facilities" means all the real property, real property rights, easements, materials, equipment, and facilities necessary for the purpose of interconnecting the Transmission Facility with the Connecting Utility A Electric System and the Connecting Utility B Electric System, as applicable. A drawing of the Interconnection Facilities is included in Appendix I.

"Interest Rate" means the prime rate per annum published in the Wall Street Journal as in effect during such period plus two hundred (200) basis points, or such other rate required by applicable Legal Requirements.

"ISO" means an independent transmission system operator or similar organization, including any regional transmission operator, that operates and schedules an electrical transmission system in accordance with FERC orders, including NYISO.

"ISO Tariffs and Rules" means the tariffs, manuals, procedures and market rules of the applicable ISO, and/or system operator responsible for (a) the operation of the bulk power supply system; (b) controlling the terms of access to the Transmission Facility; and (c) the

administration of applicable wholesale Capacity and Energy markets to which this Agreement refers, as such tariff and market rules may be approved by the FERC and amended from time-to-time.

"Issuer" means the issuer of any Letter of Credit.

"LD Escrow Account" is defined in Section 5.2.4. [If applicable]

"Lease" means leasing all or a portion of the Project for a specified period of time and consideration pursuant to a written agreement with the owner (or lessee) of such portion.

"Legal Requirements" means any applicable law, code, statute, regulation, rule, ordinance, judgment, injunction, order or other requirement of a Governmental Authority having jurisdiction over the matter in question.

"Lender(s)" means any Person or agent or trustee of such Person who agrees to provide Financing on the terms and conditions set forth in Financing Documents.

"Letter of Credit" means one or more irrevocable, transferable standby letters of credit issued by a Qualified Issuer, substantially in the form attached hereto as Appendix V, Part C.

"Liquidated Damages" means any or all of Consents Application Date Liquidated Damages, Notice to Proceed Liquidated Damages, COD Liquidated Damages and other liquidated damages payable pursuant to Section 5.2, as applicable. [If applicable]

"Metering Device(s)" is defined in Section 7.1.

"Metering Points" means the meter locations at the Connecting Utility A substation and Connecting Utility B substation shown in the applicable drawings set forth in Appendix I.

"Month or Monthly" means a period commencing with hour ending 0100 EPT on the first Day of a calendar month and closing at hour ending 2400 EPT on the last Day of that calendar month.

"Monthly Capacity Charge" is defined in Section 4.1, and means, for any Month, the product of (i) the Contract Capacity at the beginning of such Month (regardless of whether the Contract Capacity changes during the Month), and (ii) the applicable Availability Adjusted Contract Rate.

"Monthly Statement" is defined in Section 6.2.1.

"MW" means megawatt.

"MWh(s)" means megawatt-hour(s).

"New York Incremental System Reinforcements" means the additions and upgrades to the Connecting Utility A Electric System or any other transmission system dispatched by NYISO as set forth in the Connecting Utility A Interconnection Agreement, which additions and upgrades shall not, in any event, include excluding any transmission system upgrades effected pursuant to NYISO regional transmission expansion and maintenance plans or other similar construction, maintenance, operation or upgrading of the Connecting Utility A Electric System undertaken for the benefit of Buyer, Buyer's customers or NYISO customers.

"Non-Claiming Party" is defined in Section 12.6.

"Notice to Proceed" means the date on which Seller achieves all firm equipment orders and authorizes its general contractor to proceed with construction of the Transmission Facility.

[If applicable]

"Notice to Proceed Liquidated Damages" is defined in Section 5.2.2. [If applicable]

"NYISO" means the New York Independent System Operator, Inc., or any successor, as applicable.

"NYISO Markets" means markets administered by the NYISO, which include the Day Ahead Market, Hour Ahead Market and Capacity Markets, or any equivalents adopted by NYISO.

"NYISO Rules" means the NYISO Open Access Transmission Tariff, the NYISO Market Services Tariff and all NYISO manuals, rules, procedures, agreements or other documents relating to the operation of, reliability and purchase and sale of Products as such govern the participation of market participants with respect thereto in the NYISO Markets as in effect from time-to-time.

"Operating Instructions" is defined in Section 9.3.

"Operating Permits" means those Consents necessary for the operation of the Project, as set forth in Appendix VI, Schedule 3. [If applicable]

"Other Incremental System Reinforcements" means any additions and upgrades to the Connecting Utility B Electric System or any other transmission system dispatched by any ISO other than NYISO required to interconnect the Transmission Facility to the Connecting Utility B Electric System as set forth in the Connecting Utility B Interconnection Agreement, which additions and upgrades shall not, in any event, include any transmission system upgrades effected pursuant to the any general enhancement program not specifically arising as a result of the Interconnection with the Transmission Facility.

"Own" means maintaining no less than fifty-one percent (51%) direct ownership in the Project, including either as a majority partner, member or shareholder or as the majority general partner or majority limited partner as applicable.

"Party" or "Parties" means one or both of Buyer and Seller, together with any successor or assign of either.

"Periodic Tests" is defined in Section 3.7.2.

"Permits" means Development Permits, Construction Permits and Operating Permits as set forth in Appendix VI. [If applicable]

"Person" means any natural person, corporation, company, partnership, limited liability company, joint venture, trust, unincorporated organization, association, sole proprietorship, Governmental Authority, or other entity.

"Point of Delivery" means the point at which the Transmission Facility interconnects with the Connecting Utility A Electric System as illustrated in Figure 1-2a of Appendix I hereto.

"Point of Receipt" means the point where the Transmission Facility interconnects with the Connecting Utility B Electric System as illustrated in Figure I-2b of Appendix I hereto.

"Products" means, as applicable, either or both of Energy and Capacity.

"Project" means the Transmission Facility together with all equipment, facilities, materials, sites and controls used to operate the Transmission Facility and located between the Point of Delivery and the Point of Receipt.

"Qualified Guarantor" means a Guarantor having a senior debt credit rating of at least Standard & Poor's BBB or Moody's Baa2.

"Qualified Issuer" means a United States bank, or foreign bank with a United States branch, having a senior debt credit rating of at least Standard & Poor's A or Moody's A2.

"Receiving Party" is defined in Section 18.1.

"Records" are defined in Section 19.5.

"Scheduled Outage" means a planned interruption/reduction of the Transmission Facility's capability to provide Firm Transmission Capacity that (i) is coordinated in advance with the Buyer in accordance with Section 9.4 of the Agreement and NYISO or any successor, or

any other ISO, and (ii) is required for inspection, preventive maintenance, or corrective maintenance.

"Seller" is defined in the first paragraph of the Agreement.

"Seller Changes" is defined in Section 3.15.

"Seller Security" is defined in Section 5.1.

"Seller's Meters" is defined in Section 7.1.

"SEQRA" means the New York State Environmental Quality Review Act, New York Environmental Conservation Law, Sections 8-0101 et seq.

"Site" means any and all real property utilized by Seller for the Project on which the Transmission Facility and/or Interconnection Facilities are located.

"Standard Conditions" means climatological conditions of 37.8°C maximum dry bulb temperature and 27°C average dry bulb temperature.

"State Finance Law" means the New York State Finance Law.

"Statute" is defined in Section 19.5.

"Summer Availability Period" means June 1 through September 30.

"Summer Capability Period" means May 1 through October 31, or such other period as may be designated as such by NYISO from time to time.

"System Impact Study" means any study, conducted in accordance with the prevailing standards of the NYISO and/or any other applicable ISO, addressing the reliability of the Transmission Facility, impact of the Project upon applicable transmission systems, and need for any Incremental System Reinforcements.

"System Loss Determination" is defined in Section 3.11.

"System Loss Level" is defined in Section 3.11.

"System Loss Test" is defined in Section 3.11.

"System Losses" is defined in Section 3.11.

"Target Availability" means, for any calendar month, the target availability values shown in Appendix III.

"Target Commercial Operation Date" is defined in Section 3.5.1. [If applicable]

"Target Consents Application Date" is defined in Section 3.3. [If applicable]

"Target Notice to Proceed Date" is defined in Section 3.4. [If applicable]

"Taxes" means any income, gross or net receipts, property, sales, use, capital gain, transfer, excise, license, production, franchise, employment, social security, occupation, payroll, registration, governmental pension or insurance, withholding, royalty, severance, stamp or documentary, value added, or other tax, charge, assessment, duty, levy, compulsory loan, business or occupation tax (including any interest, additions to tax, or civil or criminal penalties thereon) of the United States or any state or local taxing jurisdiction therein, or of any other nation or any jurisdiction therein.

"Technical Specifications" means the specifications set forth in Appendix I, Part B.

"Transfer Capability" means the amount of Energy in MW that the Transmission Facility is able to transfer continuously from the Point of Receipt to the Point of Delivery as determined by a 24 hour test in accordance with Section 3.7.

"Transmission Facility" means the \_\_\_\_\_ electrical transmission facilities, installations and equipment and other improvements (including transformers) between the Point of Receipt and the Point of Delivery as more particularly described in Appendix I hereto.

"UDRs" means unforced capacity deliverability rights, as defined in the NYISO Rules.

"Winter Availability Period" means October 1 through May 31.

"Winter Capability Period" means November 1 through April 30, or such other period as may be designated as such by NYISO from time to time.

1.2 Construction of Agreement

In construing this Agreement:

1.2.1 No consideration shall be given to the captions of the articles, sections, subsections, clauses or any appendices or other attachments, which are inserted for convenience in locating the provisions of this Agreement and not as an aid in its construction;

1.2.2 No consideration shall be given to the fact or presumption that one Party had a greater or lesser hand in drafting this Agreement;

1.2.3 Examples shall not be construed to limit, expressly or by implication, the matter they illustrate;

1.2.4 The words "include" or "including" and their derivatives shall be construed to be followed by the words "but not limited to";

1.2.5 A defined term shall have its defined meaning throughout this Agreement, and each exhibit, appendix, attachment, and schedule to this Agreement, regardless of whether it appears before or after the place where it is defined;

1.2.6 The plural shall be deemed to include the singular, and vice versa;

1.2.7 Each gender shall be deemed to include the other gender;

1.2.8 All references to prices, value or monetary amounts refer to United States dollars, unless expressly provided otherwise;

1.2.9 All references to articles, sections, subsections, paragraphs, clauses, exhibits, appendices, attachments or schedules refer to articles, sections, subsections, paragraphs, and clauses of this Agreement, and to exhibits, appendices, attachments or schedules attached to this Agreement, unless expressly provided otherwise;

1.2.10 Each exhibit, appendix, attachment and schedule to this Agreement is a part of this Agreement, but if there is any conflict or inconsistency between the main body of this Agreement and any exhibit, appendix, attachment or schedule to this Agreement, the provisions of the main body of this Agreement shall prevail; and

1.2.11 The words "this Agreement", "herein", "hereof", "hereby", "hereunder" and words of similar import refer to this Agreement as a whole and not to any particular subdivision, unless expressly so limited.

## **ARTICLE 2**

### **TERM**

#### **2.1 Base Term**

This Agreement shall become effective on the Effective Date. This Agreement shall remain in full force and effect for a period ending [\_\_\_\_\_] (\_\_\_) years from the Commercial Operation Date ("Base Term"). The Base Term is subject to the termination provisions of Section 2.4, Article 10 and Section 12.7 of this Agreement. Applicable provisions of this Agreement shall continue in effect after the date of termination of this Agreement only to the extent necessary (i) to provide for final billings and adjustments related to the period prior to such date of termination or as may be otherwise applicable after such date and (ii) to give effect to a Party's surviving rights and remedies, including but not limited to protection of confidential information and resolution of disputes.

#### **2.2 Right of Renewal**

Buyer shall have the right of first offer to extend the term of this Agreement for an additional period, which period shall be the lesser of (a) \_\_\_\_\_ (\_\_\_) years at the option of Buyer, or (b) the remaining useful life of the Transmission Facility (as determined at the end of the Base Term); provided, however, that (i) such remaining useful life shall be deemed to be no less than

five (5) years, (ii) the terms of such extension, including a revised Contract Rate, shall be acceptable to both Parties and (iii) such extension shall be subject to the receipt of necessary state and federal approvals.

2.3 Effective Date of Agreement

The Effective Date shall be the date of execution of this Agreement by both Buyer and Seller.

2.4 Early Termination

2.4.1. Notwithstanding Section 2.1, if:

(i) Seller fails to post Seller Security pursuant to Section 5.1.1(ii) before the first to occur of (A) thirty (30) Business Days after the Effective Date or (B) fifteen (15) Business Days after the date on which Buyer provides its opinion of counsel pursuant to Section 3.2.3 below;

(ii) The Consent Application Date has not occurred within \_\_\_\_\_ (\_\_\_) Days of the Effective Date; [if applicable]

(iii) Seller has not achieved the Notice to Proceed within \_\_\_\_\_ (\_\_\_) Days following the Target Notice to Proceed Date; [if applicable]

(iv) Seller has not achieved the Commercial Operation Date within \_\_\_\_\_ (\_\_\_) Days following the Target Commercial Operation Date; [if applicable] or

(v) Seller has not obtained Firm Transmission Withdrawal Rights for Buyer of at least \_\_\_\_ MW within \_\_\_\_\_ (\_\_\_) Days following the Commercial Operation Date; [if applicable]

Buyer shall have the right to terminate this Agreement without payment of any kind to Seller, upon ten (10) Business Days' prior notice to Seller, provided that:

(a) if a Force Majeure Event or Buyer Delay delays the ability of Seller to achieve any event described in Sections 2.4.1(ii) through (v), and if Seller takes commercially reasonable efforts to mitigate such delay, the corresponding deadline set forth in Sections 2.4.1(ii) through (v) shall be extended by a reasonable period of time (except for purposes of Section 12.7(b)), such period of time not greater than that necessary to address the consequences of such Buyer Delay or Force Majeure Event ; and

(b) Buyer shall have no right to terminate this Agreement pursuant to this Section 2.4 as the result of a circumstance referred to in Sections 2.4.1(ii) through (v) if such circumstance has been cured by Seller or otherwise no longer exists prior to Buyer giving notice to Seller of Buyer's exercise of its termination right. [all if applicable]

For the avoidance of doubt, the foregoing early termination rights in this Section 2.4.1 are in addition to Buyer's rights to terminate this Agreement as set forth in Sections 10.3 and 12.7, or as otherwise expressly set forth in this Agreement.

2.4.2. If Seller does not achieve the Commercial Operation Date by the date \_\_\_\_\_ (\_\_\_) Days following the Target Commercial Operation Date, as such may be extended by reason of any Force Majeure Event or Buyer Delay, Buyer may, in its sole discretion, upon notice to Seller, terminate the Agreement and such failure shall constitute an Event of Default under Section 10.1.5.

Section 2.4.3. If Seller does not obtain the Consents by \_\_\_\_\_, 200\_, or achieve the Commercial Operation Date by \_\_\_\_\_, 20\_, and such delay is the result of a Force Majeure Event, including but not limited to inability of Seller to obtain the Consents or Firm Transmission Withdrawal Rights, Buyer may, upon notice to Seller, terminate

the Agreement, provided, such circumstances shall not constitute an Event of Default and no Party shall be required to make any payment of any nature whatsoever to the other Party.

### ARTICLE 3

#### **BASIC OBLIGATIONS**

##### 3.1 Seller's Obligations

3.1.1 Seller shall, at Seller's cost and expense, except as otherwise expressly provided herein, design, construct, Own or Lease (as applicable), operate and maintain the Project substantially in accordance with the terms of this Agreement.

3.1.2 Seller shall comply with the FERC Authority and the applicable ISO Tariffs and Rules.

3.1.3 Seller shall make available to Buyer Firm Transmission Capacity, up to the Contract Capacity, pursuant to the terms of this Agreement.

3.1.4 Seller shall employ or otherwise retain and make available sufficient qualified project permitting development and construction personnel to apply for and obtain the Consents on a timely basis, develop the Design, timely achieve the condition or performance required for each Construction Milestone, and engineer and construct the Project on a timely basis, and sufficient qualified operating personnel who are adequately experienced and trained to operate and maintain the Project and to provide to Buyer Firm Transmission Capacity, in accordance with Good Utility Practice and NYISO, and/or other applicable ISO requirements.

3.1.5 Seller shall construct the Project in accordance with the Design set forth in Appendix I, shall meet the conditions for the Commercial Operation Date set forth in Section 3.5 and maintain compliance in all material respects with all performance requirements and operating standards set forth in Appendix I. [if applicable]

3.1.6 Seller shall pay all Interconnection Costs and Incremental System Reinforcements Costs.

3.1.7 Seller shall operate and maintain all equipment comprising the Project in accordance with manufacturers' warranties for that equipment.

3.1.8 Seller shall apply for, obtain, maintain and comply with the requirements of all Consents required for Seller's Commercial Operation of the Project, including all Consents set forth in Appendix VI and otherwise to perform its obligations under this Agreement including, but not limited to, the receipt of a Certificate of Environmental Compatibility and Public Need under Article VII of the New York Public Service Law for the Project and present such Consents to Buyer within twenty (20) Business Days of Seller's receipt thereof. [if applicable]

3.1.9 Within fifteen (15) Business Days of the Effective Date, Seller shall provide its legal counsel's opinion to Buyer that Seller is in good standing and has the corporate power to enter into this Agreement, that this Agreement has been duly and validly executed and delivered by Seller, and that this Agreement constitutes a legal, valid, and binding obligation of Seller enforceable against it in accordance with its terms, subject to reasonable customary assumptions and exceptions. Seller may provide an opinion of Seller's in-house counsel as to good standing, corporate powers, due authorization and execution, but shall provide an opinion of Seller's outside counsel as to enforceability.

3.1.10 Seller shall procure and pay for station service energy required for operation of the Project.

3.1.11 Seller shall take all steps reasonably required to obtain all Financial Transmission Rights available from time-to-time with respect to the Project and the Other

Incremental System Reinforcements, and shall convey all right, title and interest therein to Buyer. [if applicable]

3.1.12 No later than \_\_\_\_\_, 200\_, Seller shall enter into an interconnection agreement with Connecting Utility B (the "Connecting Utility B Interconnection Agreement") pursuant to which the Connecting Utility B Interconnection Facilities and all Other Incremental System Reinforcements necessary for the provision of at least \_\_\_ MW of Capacity and Firm Transmission Withdrawal Rights to Seller at the Point of Receipt will be constructed, operated and maintained at no cost to Buyer.

3.1.13 No later than \_\_\_\_\_, 200\_, Seller shall enter into an interconnection agreement with Connecting Utility A (the "Connecting Utility A Interconnection Agreement") pursuant to which the Connecting Utility A Interconnection Facilities and New York Incremental System Reinforcements necessary for the operation of the Project and provision of at least \_\_\_ MW of Capacity to Seller at the Point of Delivery will be constructed, operated and maintained at no cost to Buyer.

3.1.14 Seller shall comply with the terms and provisions of the Interconnection Agreements in all material respects (provided, in any event, that remedies for Seller's failure to provide Firm Transmission Withdrawal Rights [if applicable] shall be as set forth in Section 3.6 below).

3.1.15 Seller shall take such further actions and provide and execute such further instruments as may be reasonably required to perform this Agreement and undertake the transactions set forth herein.

3.1.16 Seller shall actively cooperate with Buyer in developing Operating Instructions and Bidding and Scheduling Instructions for the Project, and coordinating Schedule Outages.

3.2 Buyer's Obligations

3.2.1 For any Month during the Base Term, Buyer shall accept and purchase all of the Firm Transmission Capacity made available to Buyer over the Transmission Facility pursuant to this Agreement (except as otherwise specifically contemplated by this Agreement).

3.2.2 To the extent permitted under New York law and specifically and reasonably requested by Seller, Buyer shall cooperate with Seller in its efforts to obtain all required Consents necessary for the construction, operation and maintenance of the Project.

3.2.3 Within fifteen (15) Business Days of the Effective Date, Buyer shall provide to Seller its legal counsel's opinion, that Buyer is in good standing and has the corporate power to enter into this Agreement, that this Agreement has been duly and validly executed and delivered by Buyer, and that this Agreement constitutes a legal, valid, and binding obligation of Buyer enforceable against it in accordance with its terms, subject to reasonable customary assumptions and exceptions. Buyer may provide an opinion of Buyer's in-house counsel as to good standing, corporate powers, due authorization and execution, but shall provide an opinion of Buyer's outside counsel as to enforceability.

3.2.4 Buyer shall take such further actions and provide and execute such further instruments as may be reasonably required to perform this Agreement and undertake the transactions set forth herein.

3.2.5 Buyer shall actively cooperate with Seller in developing the Operating Instructions and Bidding and Scheduling Instructions for the Project and coordinating Scheduled Outages.

3.3 Consents Application Date Close [if applicable]

The date on which Seller expects to complete submission of applications for all Consents is \_\_\_\_\_, 200\_ (the "Target Consents Application Date"). If a Force Majeure Event (subject to Sections 2.4 and 12.7) or Buyer Delay delays the ability of Seller to achieve such submission prior to the Target Consents Application Date, and if Seller takes commercially reasonable efforts to mitigate such delay, the Target Consents Application Date shall be extended by a reasonable period of time, such period of time not greater than that necessary to equitably address the consequences of such Buyer Delay or Force Majeure Event.

3.4 Notice to Proceed [if applicable]

The date on which the Notice to Proceed is scheduled to occur (the "Target Notice to Proceed Date") shall be [\_\_\_\_\_] Days following the Consents Approval Date. If a Force Majeure Event (subject to Sections 2.4 and 12.7) or Buyer Delay delays the ability of Seller to achieve the Notice to Proceed prior to the Target Notice to Proceed Date, and if Seller takes commercially reasonable efforts to mitigate such delay, the Target Notice to Proceed Date shall be extended by a reasonable period of time, such period of time not greater than that necessary to equitably address the consequences of such Buyer Delay or Force Majeure Event.

3.5 Commercial Operation Date [if applicable]

3.5.1 Target Commercial Operation Date

The date on which the Commercial Operation of the Project is scheduled to occur (the "Target Commercial Operation Date") shall be [\_\_\_\_\_] Days following Consents Approval Date. If a Force Majeure Event or Buyer Delay delays the ability of Seller to achieve the Commercial Operation Date by the Target Commercial Operation Date, and if Seller takes commercially reasonable efforts to mitigate such delay, the Target Commercial Operation Date shall be extended by a reasonable period of time (except for purposes of Sections 2.4 and 12.7(b)), such

period of time not greater than that necessary to address the consequences of such Buyer Delay or Force Majeure Event.

3.5.2 Requirements for Commercial Operation Date [if applicable]

Seller shall provide notice to Buyer of the expected Commercial Operation Date no later than the date which is sixty (60) Days prior to such expected Commercial Operation Date. As soon as the conditions to Commercial Operation set out in Sections 3.5.2.1 through 3.5.2.8 have been satisfied, Seller shall provide a notice to Buyer (a "COD Notice"). Absent the prior agreement or waiver of Buyer, Seller may not deliver such a COD Notice prior to \_\_\_\_\_, 20\_\_\_. Seller shall provide Buyer with supporting documentation and access to materials and information reasonably required for Buyer to audit and promptly verify that all requirements for the Commercial Operation Date have been achieved. Within ten (10) Business Days following the receipt of a COD Notice, Buyer shall either (i) deliver a certificate to Seller confirming that the conditions to Commercial Operation have been satisfied and the Commercial Operation Date shall be the date of Seller's COD Notice, or (ii) notify Seller of the reasons why it does not agree that the conditions to Commercial Operation have been satisfied and such disagreement shall be resolved pursuant to the provisions of Article 14. Buyer's failure to respond to a COD Notice in writing within ten (10) Business Days shall be deemed to be confirmation that the conditions to Commercial Operation have been satisfied. Conditions for the Commercial Operation Date are:

3.5.2.1 Successful completion of all required testing of the Transmission Facility pursuant to Section 3.7.1 including a demonstration of Transfer Capability equal to or greater than \_\_\_ MW.

3.5.2.2 Completion of such Incremental System Reinforcements and other requirements necessary for assignment or award a minimum of \_\_\_ MW Firm Transmission Withdrawal Rights to Seller; [if applicable]

3.5.2.3 Acknowledgement by each applicable ISO other than NYISO of the ability to interconnect and operate the Transmission Facility; [if applicable]

3.5.2.4 Approval by Buyer (which shall not be unreasonably withheld conditioned, or delayed) that the Transmission Facility complies in all material respects with all design criteria, system performance requirements and operating standards contained in Appendix I; [if applicable]

3.5.2.5 Acknowledgement from NYISO of the ability to interconnect and operate the Transmission Facility;

3.5.2.6 Delivery to Buyer by Seller of certificates of insurance coverage or proof of insurance policies, as required pursuant to Section 11.5.5 of this Agreement;

3.5.2.7 Delivery by Seller to Buyer of an opinion of legal counsel reasonably satisfactory to Buyer (which opinion may be delivered by in house counsel to Seller) that all Permits, licenses and approvals required to enable Seller to perform its obligations under this Agreement have been obtained; and

3.5.2.8 Posting by Seller of Seller Security in accordance with Section 5.1 below.

3.6 COD Prior to Assignment of \_\_\_ MW of Firm Transmission Withdrawal Rights [if applicable]

In the event that the condition to Commercial Operation set forth in Section 3.5.2.2 is not satisfied and Seller is consequently unable to achieve Commercial Operation on or before the

Target Commercial Operation Date, then Seller shall pay Liquidated Damages pursuant to Section 5.2.3. If, after \_\_\_\_\_ (\_\_\_) Days following the Target Commercial Operation Date, the condition to Commercial Operation set forth in Section 3.5.2.2 above remains unsatisfied (other than by reason of Seller's failure to take any action required under this Agreement), and if Buyer has not exercised its right to terminate the Agreement pursuant to Section 2.4.3, then (i) Buyer shall have no right to terminate this Agreement pursuant to Section 2.4.1(iv), (ii) the Commercial Operation Date shall nevertheless occur on the \_\_\_\_\_th (\_\_\_th) Day following the Target Commercial Operation Date, and (iii) the Contract Capacity shall be initially determined as of such date.

### 3.7 Capability Test and Line Rating

3.7.1 Prior to the Commercial Operation Date, Seller shall conduct tests ("Initial Tests") in accordance with the then-current procedures of the NYISO and any other applicable ISO or a mutually agreed upon procedure to demonstrate the Transfer Capability of the Transmission Facility as measured at the Point of Delivery and adjusted to climatological conditions of 37.8°C maximum dry bulb temperature and 27°C average dry bulb temperature over twenty-four (24) hours. Seller shall provide Buyer at least sixty (60) Days prior notice of the expected date of commencement of the Initial Tests.

3.7.2 Periodic tests and studies ("Periodic Tests") shall be conducted throughout the Base Term pursuant to applicable ISO requirements and standards, or upon material modification made to the Transmission Facility, or upon Buyer's request (provided that Buyer may request a Periodic Test in addition to such ISO requirements or test following material modifications no more frequently than once every calendar year). The Transfer Capability shall be established at the amount indicated by the test results as measured at the Metering Points and adjusted to Standard Conditions. Buyer shall be responsible for arranging for and the cost of

purchasing all test energy transmitted on the Transmission Facility in connection with such tests. Seller shall provide Buyer at least sixty (60) Days prior notice of the expected date of commencement of each Periodic Test.

3.8 Release of Firm Transmission Capacity [if applicable]

Upon the mutual written agreement of Buyer and Seller, Buyer may release a portion of its Firm Transmission Capacity to Seller on a permanent basis. If such release occurs, the Contract Capacity shall be commensurately adjusted and Buyer will no longer be liable for payment on such released Firm Transmission Capacity.

3.9 Right to Schedule Products and Financial Rights Thereto

3.9.1 Through its purchase of Firm Transmission Capacity from Seller, subject to and in accordance with all applicable ISO Tariffs and Rules and pursuant to the operating instructions to be jointly developed by Buyer and Seller under Section 9.3 below, Buyer is entitled to schedule, for any hour, transmission of Products over the Transmission Facility from the Point of Receipt to the Point of Delivery up to the Contract Capacity applicable for that hour (subject to Section 3.9.4). Buyer shall have the exclusive right to resell its rights to Firm Transmission Capacity under this Agreement pursuant to the applicable terms of the applicable ISO Tariffs and Rules, and to retain any proceeds of such a sale. Buyer shall own and have the right to resell or assign all Products transmitted by the Project for Buyer's account, and all Environmental Attributes associated with such Products. Seller shall have the right to sell, in accordance with the ISO Tariffs and Rules (including Buyer's right of recallability), any Firm Transmission Capacity that Buyer has purchased but neither schedules for its own use nor posts for resale (subject to FERC approval) or resells in any particular hour and shall be entitled to any proceeds collected by Seller for the use by third parties of any such Firm Transmission Capacity in that particular hour from Seller transactions. No reassignment or resale of Firm Transmission

Capacity by either Party shall relieve Buyer of its liabilities or obligations under this Agreement, including the obligation to make payments to Seller for the Firm Transmission Capacity when due, except with the prior written consent of Seller.

3.9.2 If any ISO other than NYISO creates or awards to Seller or the Transmission Facility any Financial Transmission Rights or physical transmission rights associated with the Transmission Facility or Other Incremental System Reinforcements, then Buyer shall be entitled to all such rights for the Base Term (and upon receipt thereof, Seller shall promptly transfer and convey such rights unconditionally to Buyer), and Seller shall be entitled to the balance of such rights, including any resale rights.

3.9.3 During the Base Term of this Agreement, Buyer shall be entitled to all UDRs or other rights granted under the NYISO Rules associated with the use of the Transmission Facility in accordance with this Agreement, together with any applicable rights of resale or exchange, and upon receipt thereof, Seller shall promptly transfer and convey such UDRs or other rights to Buyer, including any applicable resale rights. Seller shall be entitled to all rights granted under the applicable ISO Tariffs and Rules associated with the Transmission Facility (excluding Firm Transmission Withdrawal Rights allocated between Buyer and Seller pursuant to Section 3.9.4 below and Financial Transmission Rights allocated between Buyer and Seller pursuant to Section 3.9.2 above). [if applicable]

3.9.4 During the Base Term of this Agreement, Buyer shall be entitled to an amount not to exceed the Contract Capacity (in effect from time-to-time) of Firm Transmission Withdrawal Rights assigned or awarded by any ISO other than NYISO to Seller. Upon receipt thereof, and subject to the provisions of this Agreement (including Sections 3.5 and 3.6 above)

and the applicable ISO Tariffs and Rules, Seller shall transfer and convey such Firm Transmission Withdrawal Rights to Buyer. [if applicable]

3.9.5 For so long and to the extent that (i) Seller has not requested that any ISO provide Seller with Firm Transmission Injection Rights, or (ii) has not contracted for capacity service resulting from such Firm Transmission Injection Rights pursuant to the FERC open season rules, Buyer shall have the right to request that Seller initiate a supplemental request (Feasibility Study Level) for Firm Transmission Injection Rights at Buyer's sole expense for such request and subsequently to initiate an open season for the purpose of awarding capacity rights associated with Firm Transmission Injection Rights that may be granted to Seller by such ISO. In requesting Seller's initiation of such an open season, Buyer is not granted any rights or priorities with respect to the open season for such capacity rights. Any notice of open season required for the use of such service pursuant to the FERC open season rules shall make such service available to all qualified bidders and shall provide, inter alia, that a successful bidder in such open season shall be required to pay for all subsequent studies and any associated system upgrades related to the award of such Firm Transmission Injection Rights, and agree to business terms and conditions, for the use of such service as may be set forth in such notice. [if applicable]

3.9.6 In any instance in which Buyer utilizes Buyer's rights under this Agreement to procure, transmit and deliver any Products with which any Environmental Attributes are associated, Buyer shall have all right, title and interest to such Environmental Attributes. For the avoidance of doubt, Seller shall have all right, title and interest in any Environmental Attributes arising solely from the development, construction, financing, investment in or ownership of the Transmission Facility.

3.10 Availability

Seller shall operate and maintain the Transmission Facility in a manner by which it can provide an average Availability of \_\_\_\_\_ percent (\_\_\_%) in each Summer Availability Period of each year following the initial annual period. For the initial annual period beginning with the Commercial Operation Date, Seller shall operate and maintain the Transmission Facility in a manner by which it can provide (i) an average Availability of \_\_\_\_\_ percent (\_\_\_%) in the Summer Availability Period and (ii) an annual average Availability of \_\_\_\_\_ (\_\_\_%). For each succeeding annual period, Seller shall operate and maintain the Transmission Facility in a manner by which it can provide (i) an average Availability of \_\_\_\_\_ percent (\_\_\_%) in the Summer Availability Period and (ii) an annual average Availability of \_\_\_\_\_ percent (\_\_\_%). Failure to maintain the Availability of the Transmission Facility in accordance with this Section 3.10 shall result in reduction of Buyer's payment obligations for Firm Transmission Capacity pursuant to Section 4.3. Seller, in accordance with Good Utility Practice, shall plan and exert commercially reasonable efforts to ensure that Scheduled Outages for the Transmission Facility occur only during the Winter Capability Period, provided that with Buyer's approval, which approval shall not be unreasonably withheld, conditioned or delayed, Seller may conduct necessary Scheduled Outages overnight and on weekends during the Summer Capability Period.

3.11 System Losses

3.11.1 Not later than the Commercial Operation Date, and periodically thereafter pursuant to Section 3.11.2 below, Seller shall either conduct a system loss test of the Transmission Facility ("System Loss Test") in accordance with the then-current procedures of the NYISO and each other applicable ISO, or a mutually agreed upon procedure or calculate System Losses (such System Loss Test or calculation, a "System Loss Determination"), at a load

level of \_\_\_ MW at Standard Conditions and as adjusted for nominal voltage and frequency. System Losses shall be calculated if the System Loss Level as determined pursuant to a System Loss Test is in excess of \_\_\_\_\_ percent (\_\_\_%) using the methodology described in [*specify manual or technical standard source*] and an agreed upon cable loss calculation based upon factory test results. Each System Loss Determination shall either calculate or measure the positive difference, if any, between (i) the Actual Input Energy supplied by Buyer during such test and (ii) the Actual Output Energy during such test expressed as a percentage of Actual Input Energy (such adjusted difference, "System Losses"). The System Losses established by each System Loss Determination shall establish the level of System Losses over the Transmission Facility (the "System Loss Level") until the following System Loss Determination (subject to adjustment pursuant to Section 3.11.3).

3.11.2 Periodic System Loss Tests may be carried out by Seller upon notice to Buyer or at any reasonable time upon request by the Buyer, NYISO, any other applicable ISO or a successor organization to such ISO. If a System Loss Test is initiated by either Party with the result that the System Loss Level as determined in such test is found to be greater than the System Loss Level prior to such test, then the expense of such test shall be borne by Seller. If a System Loss Test is initiated by either Party with the result that the System Loss Level as determined in such test is found to be less than the System Loss Level prior to such test, then the expense of such test shall be borne by Buyer. If a System Loss Test is initiated by a Party with the result that the System Loss Level as determined in such test is found to be equal to the System Loss Level prior to such test, then the expense of such test shall be borne by the Party requesting such test. If a System Loss Test is initiated by any ISO or a successor organization to such ISO, then the expense of such test shall be shared equally between Buyer and Seller.

3.11.3 Following each System Loss Determination (i) the System Loss Level shall be adjusted to the tested level and (ii) the System Loss Level for one-half of the period since the immediately previous System Loss Determination shall be retroactively adjusted to the tested level. Any accumulated difference in payments due under the terms of this Agreement which are owing or to be refunded as a result of such retroactive adjustment to the System Loss Level will be reflected in bills for a future period of reasonable length, to be agreed upon by the Parties, but in no event over a period greater than the three (3) succeeding billing periods after the inaccuracy is verified. Such correction when made shall, in the absence of bad faith, fraud, or intentional wrongdoing, constitute a complete and final settlement of any claim arising between the Parties hereto out of such adjustment to the System Loss Level.

3.11.4 If the System Loss Level as determined in System Loss Determinations is in excess of \_\_\_\_\_ percent (\_\_\_%), Buyer shall receive from Seller a Monthly Excess System Losses Credit for each full or partial Month in which the System Loss Level exceeds \_\_\_\_\_ percent (\_\_\_%) calculated pursuant to the following formula:

$$ESLC = (PR \text{ MWhs}) * (\text{System Loss Level} - \text{Gtd Loss}) * (\text{Rate}) / (\text{Hours})$$

Where

ESLC = Excess System Losses Credit

PR MWh(s) = MWh(s) recorded at the Point of Receipt during such Month

Gtd Loss = \_\_\_\_\_ percent (\_\_\_%)

System Loss Level = percent loss recorded in the most recent System Loss Test

Rate = Applicable Contract Rate for that Month in \$/MW-Month

Hours = 720 (equivalent to the number of hours in a 30-Day Month)

3.12 Capacity in Excess of \_\_\_ MW

3.12.1 During the Base Term, Seller shall have the right to market and sell, and shall be entitled to any proceeds from the sale of, any transmission capacity on, or capability of

the Transmission Facility which Buyer is not obligated or has not elected to purchase and pay for pursuant to the terms of this Agreement including (i) capacity of the Transmission Facility associated with Firm Transmission Withdrawal Rights [if applicable] or Transfer Capability prior to the Commercial Operation Date, and (ii) transmission capacity associated with Transfer Capability which exceeds the Contract Capacity and as of any time, subject to any future rights of Buyer to acquire such Transfer Capability as set forth in Section 3.12.2. [if and as applicable]

3.12.2 In the event the Transfer Capability of the Transmission Facility exceeds \_\_\_ MW, Buyer shall have the option, exercisable on thirty (30) Days' notice, to acquire all or a portion of such excess Transfer Capability of the Contract Capacity on the same terms as provided in this Agreement for Contract Capacity.

3.13 NYISO and Other ISO Acknowledgements

The Parties shall use reasonable commercial efforts to obtain the expeditious acknowledgement by the NYISO and each other ISO, as applicable, to allow for the interconnection of the Transmission Facility to the Connecting Utility A Electric System and Connecting Utility B Electric System. To the extent permitted by Seller's FERC Authority and the applicable ISO Tariffs and Rules, the Parties shall work together in good faith with the NYISO and each other applicable ISO to allow Buyer to realize the full reliability and economic value and benefits intended under this Agreement.

3.14 Other Charges Associated with Transmission System

Buyer shall be responsible for transmission charges associated with the transmittal of Products from any source available in markets available to the Point of Receipt and transmission charges from the Point of Delivery pursuant to this Agreement. Seller shall be responsible for all costs associated with ownership and operation of the Project and participation in each applicable ISO resulting solely from ownership or operation of the Project. Seller shall also be responsible for all costs associated with integration of the Project into the applicable ISO scheduling software.

3.15 Seller Changes [if applicable]

3.15.1 Seller shall not make any material changes or substitutions to or in (i) the Design of the Project as set forth in Appendix I, (ii) the team of principal consultants and experts, principal vendors, equity participants and financial institutions selected for the development of the Project, identified in Appendix I, or (iii) the Consents identified in Appendix VI ("Seller Changes"), without Buyer's consent, which shall not be unreasonably withheld, delayed or conditioned. Seller shall give Buyer prompt notice of any proposed Seller Change, and in any case not less than five (5) Business Days' notice, providing a detailed explanation for such Seller Change, the reasons for such Seller Change and all anticipated material impacts on the schedule or performance of the Project. Seller shall afford Buyer a reasonable opportunity to make inquiries and review applicable documents and information before determining whether to grant consent to any Seller Change.

3.15.2 Seller shall provide Buyer with access and the ability to review complete copies of all material contracts, including all contracts for procurement (including manufacturer's warranties and exculpatory provisions), engineering and construction services, inspection and testing and other relevant technical matters, easements, leases or other agreements relating to real

property matters, all agreements for crossing rights with respect to other utilities or structures, operation or maintenance agreements and principal agreements with Lenders, including each Financing Document.

## **ARTICLE 4**

### **RATES**

#### **4.1 Payments from Buyer**

For each Month during the Base Term of this Agreement, Buyer shall pay Seller an amount for Firm Transmission Capacity sold to Buyer under this Agreement (the "Monthly Capacity Charge"), equal to the product of (i) the Contract Capacity at the beginning of such Month (regardless of whether the Contract Capacity changes during such Month), and (ii) the applicable Availability Adjusted Contract Rate. Seller shall calculate the Monthly Capacity Charge and present a Monthly Statement to Buyer within five (5) Days following the end of each Month in accordance with Section 6.2.1. Buyer shall make payment of billed amounts pursuant to Section 6.3.1.

#### **4.2 Rates for Firm Transmission Capacity During Base Term**

For each Month, the Contract Rate (in \$/MW-Month) will be the rate determined in accordance with Appendix II. The rates set forth in Appendix II are fixed and all-inclusive, based upon Seller's sole and exclusive acceptance of all risk of increases, decreases or fluctuations in Project cost, currency exchange rates, interest rates and Incremental System Reinforcement Costs and the costs of performing the Interconnection Agreements, System Impact Studies and constructing, owning, operating and maintaining the Project and Interconnection Facilities.

4.3 Firm Transmission Capacity Rate Adjustments Based on Availability

For each Month, the Availability Adjusted Contract Rate (in \$/MW-Month) applicable to that Month will be calculated in accordance with the following formula:

$$\text{Availability Adjusted Contract Rate} = E \times (F / G)$$

Where:

- E = The Contract Rate determined in accordance with Appendix II for the current Month (in \$/MW-Month);
- F = The lesser of (i) G and (ii) the average Availability for the twelve (12) Months preceding the current Month. The Availability for any Month prior to the Commercial Operation Date will be deemed to be equal to the Target Availability specified for that Month; and
- G = The average Target Availability for the twelve (12) Months preceding the current Month, as specified in Appendix III.

Hourly Transmission Capacity for the purposes of calculating Availability shall be seasonally weighted, with all values for outages or reductions used to determine Hourly Transmission Capacity during each Month during the Summer Availability Period being multiplied by \_\_\_\_\_ and all values for outages or reductions used to determine Hourly Transmission Capacity during each Month during the Winter Availability Period being multiplied by \_\_\_\_.

**ARTICLE 5**

**SECURITY AND LIQUIDATED DAMAGES**

5.1 Seller Security

5.1.1 As security for Seller to [each as applicable]:

(i) Meet its payment obligations under this Agreement, including (but not limited to) payment of Liquidated Damages pursuant to Section 5.2 [**See Appendix V.D for guidance on NYPA requirements for amount of Seller Security**];

(ii) Meet its obligations to provide, maintain, reinstate and replace Seller Security pursuant to this Agreement;

(iii) Meet its obligations to provide Firm Transmission Capacity for the Base Term; and

(iv) Meet its obligations upon an Event of Default under Article 10; Seller shall deliver to Buyer a Letter of Credit or a Guaranty ("Seller Security") by the following dates and maintain such security throughout the Base Term of this Agreement in the following amounts :

(x) Within eighteen (18) Business Days of the Effective Date, an amount equal to \$\_\_\_\_\_;

(y) As of the Target Consents Application Date, an amount equal to the positive difference between (a) \$\_\_\_\_\_ and (b) the amount of Seller Security delivered to Buyer pursuant to Section 5.1.1(w) which has not been drawn down or claimed by Buyer pursuant to this Agreement as of such date; and

(z) Upon the earlier of Commercial Operation Date or the Target Commercial Operation Date, an amount equal to the positive difference between (a) \$\_\_\_\_\_ and (b) the amount of Seller Security delivered to Buyer pursuant to Sections 5.1.1(x) and 5.1.1(y) which has not been drawn down or claimed by Buyer pursuant to this Agreement as of such date. For the avoidance of doubt, in no event shall Seller be required to post Seller Security pursuant to this Section 5.1.1(z) in excess of \$\_\_\_\_\_.

5.1.2 On the fifth anniversary of the Commercial Operation Date, and each fifth anniversary of such Commercial Operation Date thereafter during the Base Term, the amount of Seller Security shall be decreased by [\_\_\_\_\_ (\_\_\_%)] from the amount required to be provided during the immediately preceding annual period, subject to a minimum amount of Seller Security of \$\_\_\_\_\_. Seller shall have the right to replace such Letter of Credit or Guaranty subject to the prior approval of Buyer, which shall not be unreasonably withheld, conditioned or delayed, provided that any such replacement meets the terms and conditions of Seller Security under this Agreement.

5.1.3 Each Letter of Credit or Guaranty provided by Seller in fulfillment of its obligation to maintain Seller Security under this Agreement shall be substantially in the forms set forth in Appendix V, and with respect to any Guaranty, shall be accompanied by an opinion letter from counsel reasonably acceptable to Buyer.

5.1.4 Each Guarantor providing a Guaranty shall be a Qualified Guarantor, and each Issuer providing a Letter of Credit shall be a Qualified Issuer.

5.1.5 In the event the senior debt credit rating of any Guarantor that has issued a Guaranty to Buyer furnished by Seller shall drop below either Standard & Poor's BBB or Moody's Baa2, or in the event the senior debt credit rating of any Issuer shall drop below Standard & Poor's A or Moody's A2, Seller shall, within five (5) Business Days, replace such Guaranty or Letter of Credit with alternative Seller Security meeting the requirements of this Agreement.

5.1.6 In the event that following the Commercial Operation Date (i) Buyer draws upon Seller Security for any purpose allowed under this Agreement, and (ii) the total

amount of Seller Security outstanding is less than \$\_\_\_\_\_, Seller shall reinstate or replenish the amount of security required by Section 5.1.1 within ten (10) Business Days.

5.1.7 Seller shall pay Issuer all costs related to a Letter of Credit, including all application, issuance, maintenance and transfer fees. No less than thirty (30) Days prior to the date of expiration of a Letter of Credit delivered to Buyer as Seller Security, Seller shall cause Buyer to receive either an unqualified written confirmation from either (a) an Issuer that a renewal or replacement Letter of Credit issued by such Issuer will be delivered to Buyer no later than five (5) Business Days prior to such date of expiration in an amount equal to the amount of Seller Security to be provided hereunder, or (b) a Guarantor that a Guaranty issued by such Guarantor will be delivered to Buyer no later than five (5) Business Days prior to such date of expiration in an amount equal to the amount of Seller Security to be provided hereunder. No less than five (5) Business Days prior to the date of expiration of a Letter of Credit delivered to Buyer as Seller Security, Seller shall cause Buyer to receive a Letter of Credit or Guaranty in the form required hereunder in an amount not less than the amount of Seller Security to be provided hereunder.

5.2 Liquidated Damages

Seller Security shall secure, in accordance with Section 5.1 the following Seller's obligations [each if and as applicable]:

5.2.1 Consents Application Date Delay

If Seller has not achieved Consents Application Date by the Target Consents Application Date, then Seller shall pay Liquidated Damages into the LD Escrow Account in accordance with Section 5.2.4 below in the amount of Ten Thousand Dollars (\$10,000) per Day until the Consents Application Date is achieved, up to a maximum amount of Nine Hundred Thousand Dollars (\$900,000) in the aggregate ("Consents Application Date Liquidated Damages"). If

Seller has not achieved the Consents Application Date within \_\_\_\_\_ (\_\_\_) Days following the Target Consents Application Date, Buyer shall have the right to retain Liquidated Damages previously due, and at Buyer's option, and in addition to other remedies, terminate this Agreement without payment of any kind in accordance with Section 2.4.1(ii) above;

5.2.2 Notice to Proceed Delay

If Seller has not achieved Notice to Proceed by the Target Notice to Proceed Date, then Seller shall pay Liquidated Damages into the LD Escrow Account in accordance with Section 5.2.4 below in the amount of \$\_\_\_\_\_ per Day [\$50,000 per Day per 100 MW, or \$7.5M per 100 MW] until the Notice to Proceed is achieved, up to a maximum amount of \$\_\_\_\_\_ [150x the foregoing per diem amount] in the aggregate ("Notice to Proceed Liquidated Damages"). If Seller has not achieved Notice to Proceed within \_\_\_\_\_ (\_\_\_) Days following the Target Notice to Proceed Date, Buyer shall have the right to retain Liquidated Damages previously due, and at Buyer's option, in addition to other remedies, terminate this Agreement without payment of any kind in accordance with Section 2.4.1(iii) above;

5.2.3 Commercial Operation Delay

If the Commercial Operation Date has not been achieved by the Target Commercial Operation Date, then Seller shall pay to Buyer Liquidated Damages in the amount of \$\_\_\_\_\_ per Day [\$25,000 per Day per 100 MW] until the Commercial Operation Date is achieved, up to a maximum amount of \$\_\_\_\_\_ [225x the foregoing per diem amount, or \$5.625M per 100 MW] in the aggregate ("COD Liquidated Damages"). If Seller has not achieved the Commercial Operation Date within forty-five (45) Days following the Target Commercial Operation Date, then Buyer shall have the right to retain Liquidated Damages previously due, and at Buyer's

option, in addition to other remedies, terminate this Agreement without payment of any kind in accordance with Section 2.4.1(iv) above.

5.2.4 Payment of Liquidated Damages

Liquidated Damages owed pursuant to Sections 5.2.1 through 5.2.3 shall be due and payable in accordance with Section 6.2.2 of this Agreement. Liquidated Damages described in Sections 5.2.1 and 5.2.2 shall be deposited by Seller (or, if Seller's obligation to pay such Liquidated Damages is satisfied by drawing on a Letter of Credit, shall be deposited by Buyer) into an Escrow Account ("LD Escrow Account"). All interest accrued on funds in the LD Escrow Account shall be paid monthly to Buyer as liquidated damages, and such payments shall not diminish any other obligations of Seller hereunder. If Liquidated Damages are not paid in accordance with Section 6.2.2, Buyer shall satisfy such Liquidated Damages by drawing on Seller Security or the LD Escrow Account. All amounts deposited into the LD Escrow Account shall be returned to Seller if the Commercial Operation Date occurs on or prior to the Target Commercial Operation Date and Buyer has not previously exercised its early termination rights under Section 2.4 or Section 10.3.2. If the Commercial Operation Date does not occur on or prior to the Target Commercial Operation Date, (i) Buyer may make a claim on the LD Escrow Account or Seller Security to the extent required to satisfy Liquidated Damages payable pursuant to Section 5.2.3, and (ii) any funds in the LD Escrow Account not required to satisfy such Liquidated Damages shall, following the Commercial Operation Date, be promptly returned to Seller. If Buyer exercises its rights under Section 2.4 or Section 10.3.2, Buyer may retain all funds in the LD Escrow Account.

## ARTICLE 6

### BILLING AND PAYMENT

#### 6.1 Initiation of Payment Obligations for Firm Transmission Capacity

All payment obligations for the provision of Firm Transmission Capacity under the terms of this Agreement shall commence upon the Commercial Operation Date.

#### 6.2 General Billing

##### 6.2.1 Billing by Seller

Commencing with the Month in which the Commercial Operation Date occurs, Seller shall deliver to Buyer at Buyer's billing address (as set forth below) a statement for services (a "Monthly Statement") within \_\_\_\_\_ ( ) Days following the end of each Month. Such Monthly Statement shall state all charges to be paid by Buyer in respect of the provision of Firm Transmission Capacity during such prior Month, including the basis of the calculation of such charges, the Availability Adjusted Contract Rate applicable to that Month, the amount of Firm Transmission Capacity to be paid for by Buyer, any interest charges, and all adjustments pursuant to Sections 3.11 and 4.3 and Appendix II, including Excess System Losses Credits.

##### 6.2.2 Billing by Buyer

Commencing with the first Month after any Liquidated Damages are owed by Seller, Buyer shall deliver to Seller at Seller's billing address (as set forth below) a statement for any applicable Liquidated Damages on or before the \_\_\_\_\_ (\_\_\_<sup>th</sup>) Day of each Month. Such statement shall detail all Liquidated Damages which become owing by Seller during the preceding Month, and shall constitute proper notice of the demand for payment.

6.3 Payment

6.3.1 Payment by Buyer

Buyer shall cause to be paid to Seller an amount equal to charges invoiced by Seller in a Monthly Statement by wire transfer of immediately available funds to an account designated from time-to-time by Seller at a domestic office at a United States bank no later than the later to occur of (a) \_\_\_\_\_ (\_\_) Days after Buyer's receipt of such Monthly Statement and (b) the \_\_\_\_\_ th (\_\_th) Day of the Month in which the Monthly Statement is delivered.

6.3.2 Payment by Seller

Seller shall cause to be paid to Buyer amounts due and owing by Seller equal to such charges by wire transfer of immediately available funds to an account designated from time-to-time by Buyer at a domestic office at a United States bank on the later of the first Business Day after the \_\_\_\_\_ (\_\_)th Day of the Month in which notice of demand for payment with the statement is sent or \_\_\_\_\_ (\_\_) Days after Seller's receipt of such statement.

6.3.3 Payments to Transmission System Operators

Any payments owed directly by Seller to NYISO, and/or any other applicable ISO shall be made by Seller pursuant to the procedures established in the NYISO tariff, or other applicable ISO Tariff. Seller shall be solely responsible for making all such payments directly to NYISO, and/or the other applicable ISO without reimbursement by Buyer. Any payments or settlements owed directly by Buyer to NYISO, and/or any other applicable ISO shall be made by Buyer pursuant to the procedures established in the NYISO tariff, or other applicable ISO Tariff. Buyer shall be solely responsible for making all such payments directly to NYISO, and/or the other applicable ISO without reimbursement by Seller except to the extent expressly provided for herein.

6.4 Billing Disputes

6.4.1 Notice

Upon receipt of any statement, the recipient Party shall examine the accompanying statement to ensure that it has been calculated correctly, and shall promptly (and to the extent possible within \_\_\_\_\_ (\_\_) Days of receipt of a statement) notify the issuing Party of any errors therein which the recipient Party in good faith believes have been made together with the facts providing the basis for such belief. The issuing Party will promptly (and in any event within \_\_\_\_\_ (\_\_) Days of receipt of a complaint) review the recipient Party's complaint.

6.4.2 Resolution of Billing Disputes

If the Parties are unable to agree upon a settlement of the contested portion of any statement or bill, the dispute shall be addressed in accordance with Article 14.

6.4.3 Obligation to Pay Uncontested Amounts

The existence of a dispute with regard to any payment due shall not relieve the Party disputing the payment allegedly due of any obligation to pay any uncontested amounts due under this Agreement or from fulfilling any other obligation under this Agreement.

6.4.4 Payment of Disputed Amounts

A Party disputing any payment allegedly due shall pay any disputed amounts into a separate interest-bearing Escrow Account at a financial institution located in the State of New York pending resolution of the dispute. The Party disputing the payment allegedly due shall contemporaneously notify the other Party of the deposit, the account style and number, and the financial institution at which such account is located. Any interest which may accrue in such account shall be payable to the Party in whose favor the dispute is resolved. Any disputed

amount paid into an Escrow Account pursuant to this Section 6.4.4 shall be deemed to be paid when so deposited for purposes of Section 6.5.

6.4.5 Deadline for Disputing Amounts

Except in instances where it is demonstrated that fraud hindered the discovery of billing errors, any claims for adjustments on account of subsequently discovered errors must be made within two (2) years of the date on which the invoice was issued.

6.5 Interest

If either Party does not make a payment required by this Agreement when due, then interest at the Interest Rate shall be added to the due payment from the date such payment was due until such overdue payment (including interest then owed pursuant to Section 2880 of the Public Authorities Law) is paid. If either Party makes a payment pursuant to an invoice that is later determined to have been incorrect, the refund of such overpayment shall include interest on such overpayment at the Interest Rate for the period from the date such overpayment was made until the date upon which the refund is made.

6.6 Billing Addresses

For transmittal of all payments, notices and other correspondence related to this Article 6, the following billing addresses shall be used:

- (i) Buyer's billing address:

New York Power Authority  
123 Main Street  
White Plains, NY 10601  
Attn: Accounts Payable

- (ii) Buyer's notice address regarding billing:

New York Power Authority  
123 Main Street  
White Plains, NY 10601  
Attn: \_\_\_\_\_

(iii) Seller's billing address:

\_\_\_\_\_

Attn: \_\_\_\_\_

(iv) Seller's notice address regarding billing:

\_\_\_\_\_

Attn: \_\_\_\_\_

Each Party's initial payment account will be designated by such Party no less than \_\_\_\_\_ (\_\_\_) Days before the expected Commercial Operation Date. Each Party may specify as its proper address any other address in the United States upon notice to the other Party.

6.7 Survival

The provisions of this Article 6 shall survive termination, expiration, cancellation, suspension, or completion of this Agreement to the extent necessary to allow for final billing and payment.

**ARTICLE 7**

**METERING**

7.1 General

All electric meters and associated equipment for the measurement of Firm Transmission Capacity under the terms of this Agreement ("Metering Devices") which measure Capacity and Energy at the Point of Delivery ("Buyer's Meters") shall be owned, installed, operated and maintained, according to Good Utility Practice, by Buyer. All Metering Devices which measure Capacity and Energy at the Point of Receipt ("Seller's Meters") shall be owned, installed, operated and maintained, according to Good Utility Practice, by Seller. An adjustment will be made to account for transmission and transformation losses if any Metering Point or Metering Device is at a location other than the Point of Receipt or Point of Delivery.

7.2 Meter Standards

Any Metering Devices required for the fulfillment of this Agreement shall meet applicable requirements of the Technical Specifications, shall be of utility billing quality and shall conform to the requirements of the Interconnection Agreements, and shall conform to all NYISO and other applicable ISO metering standards. Such Metering Devices shall be of a type to record hourly readings and shall be capable of being remotely read by both Buyer and Seller. The costs associated with each Party's ability to read Metering Devices remotely will be borne by such Party.

7.3 Measurement

Real and reactive power shall be metered at the Metering Points. System Losses will be determined based on the use of Metering Devices at the Metering Points in accordance with Section 3.11.

7.4 Testing of Meters

The Buyer's Meters shall be sealed and the seals shall be broken by Buyer only upon occasions when the Buyer's Meters are to be inspected, tested, or adjusted, and representatives of Seller shall be afforded reasonable prior notice and opportunity to be present upon such occasions. Periodic tests of the Buyer's Meters will be made by Buyer at Seller's expense and additional tests will be made at any reasonable time upon request by Seller. If a test of the Buyer's Meters is made at the request of Seller with the result that such Metering Devices are found to be registering correctly or within plus or minus \_\_\_ percent (\_\_\_%), Seller shall bear the expense of such test; provided that, if such test shows an error greater than plus or minus \_\_\_ percent (\_\_\_%), Buyer shall bear the expense of such test unless such error was caused by Seller. The Seller's Meters shall be sealed and the seals shall be broken by Seller only upon occasions when the Seller's Meters are to be inspected, tested, or adjusted, and representatives of Buyer

shall be afforded reasonable prior notice and opportunity to be present upon such occasions. Periodic tests of the Seller's Meters will be made by Seller at Buyer's expense and additional tests will be made at any reasonable time upon request by Buyer. If a test of the Seller's Meters is made at the request of Buyer with the result that such Metering Devices are found to be registering correctly or within plus or minus \_\_\_ percent (\_\_\_%), Buyer shall bear the expense of such test; provided that, if such test shows an error greater than plus or minus \_\_\_ percent (\_\_\_%), Seller shall bear the expense of such test unless such error was caused by Buyer.

7.5 Adjustments

If any of the Metering Device tests disclose that the error for such equipment exceeds plus or minus \_\_\_ percent (\_\_\_%), then one-half (1/2) of the readings of such Metering Devices, taken during the measuring periods up to the lesser of: (i) six (6) Months before the test or (ii) the last test of such equipment was made, will be adjusted, either upward or downward, to correct for such error, unless there is verifiable information available upon which a more accurate adjustment can be made, including readings from Metering Devices owned by the other Party. Any accumulated difference in payments due under the terms of this Agreement which are owing or to be refunded as a result of such metering errors will be reflected in adjustments to bills for a future period of reasonable length, to be agreed upon by the Parties, but in no event over a period greater than the three (3) succeeding billing periods after the inaccuracy is verified. Such correction when made shall, in the absence of bad faith, fraud, or intentional wrongdoing, constitute a complete and final settlement of any claim arising between the Parties hereto out of such inaccuracy of the Metering Devices.

7.6 Additional Metering Devices

Seller shall have the right to install its own Metering Devices to measure at the Point of Delivery and shall maintain them according to Good Utility Practice. Buyer shall have the right

to install its own Metering Devices to measure at the Point of Receipt and shall maintain them according to Good Utility Practice. In the event such Metering Devices are used for any purpose under this Agreement and any metering point is at a location other than the point at which any Metering Device is required to be located, an adjustment for transmission and transformation losses to such required point will be made to such meter reading.

7.7 Telemetry Equipment

Prior to the Commercial Operation Date, Seller shall install adequate telephone and telemetry equipment pursuant to the Technical Specifications. Seller shall be responsible for the maintenance of such installed equipment as well as for the payment of any charges associated with such communication channel(s). Seller shall arrange for any billing of such communication charges to be made directly to Seller.

**ARTICLE 8**

**DESIGN AND CONSTRUCTION OF THE PROJECT AND SYSTEM UPGRADES**

8.1 Permitting [if applicable]

Seller shall proceed in an expeditious manner to obtain all Consents that will allow for development and Commercial Operation of the Project by the Target Commercial Operation Date. Seller shall perform the necessary analyses, studies, and other activities and make all necessary applications to obtain Consents to meet the Target Commercial Operation Date. Seller shall immediately notify Buyer of any events that may reasonably be expected to change in any material manner the Project or that adversely affect Seller's ability to meet the Target Commercial Operation Date. During the permitting phase of the Project, Seller shall include in the report to be delivered to Buyer pursuant to Section 8.3.2 below, a description of the progress of permitting activities of the Project, including any events of material significance to the Seller's ability to develop the Project or meet the Target Commercial Operation Date.

8.2 Design and Construction [if applicable]

The Project shall be designed and constructed substantially in conformance with the design specifications, construction standards, performance requirements, and operating standards set forth in Appendix I and in accordance with (i) all applicable Legal Requirements; (ii) Good Utility Practice; (iii) Consents; and (iv) Permits. The Project shall be designed and constructed in such a manner as to provide a reasonable likelihood that the useful life of the Project will be at least equal to the Base Term of this Agreement.

8.3 Coordination and Monitoring of Design and Construction by Buyer [if applicable]

8.3.1 Monitoring of Construction

Buyer and Buyer's representatives shall have the right at reasonable times and upon reasonable advance notice to monitor and physically inspect all aspects of development and construction of the Project and manufacturing of significant components, including engineering and production records, and to inspect the construction, testing and operation of the Project, provided that (i) Buyer shall comply with reasonable procedures established by Seller, (ii) Buyer shall comply with reasonable confidentiality provisions and (iii) Buyer shall be responsible for insuring all of Buyer's personnel and representatives conducting on-site visits at the Project or any vendor premises. Buyer shall not, by reason of inspection of the Project or any equipment related thereto, or failure to inspect the same, be responsible or liable for the strength, details of design, adequacy or capacity of the Project, the accuracy of any installation or elements of work or the adequacy of any workmanship, and disclaims all warranties with respect thereto. At Buyer's cost, Buyer or Buyer's representatives may establish an office or mobile office at the Project site. Seller shall provide reasonable access, parking, accommodations and utilities for such office.

### 8.3.2 Progress Reports

Seller shall submit progress reports for all Consents application and construction activities in a form reasonably satisfactory to Buyer prior to the \_\_\_\_\_rd (\_\_\_<sup>rd</sup>) Day of each Month.

### 8.3.3 Design and Performance Verification Studies [if applicable]

Seller shall undertake Design and Performance Verification Studies in accordance with Appendix I.

## 8.4 Interconnection Facilities and System Reinforcements

### 8.4.1 General

Seller is responsible for the construction of Interconnection Facilities, including the obtaining of all necessary Consents. The cost of design, installation, testing, construction, of Interconnection Facilities shall be borne by Seller in accordance with the terms of the Interconnection Agreements. The requirements and procedures governing the study, construction, and operation of the Interconnections and Interconnection Facilities are: (i) System Impact Studies and (ii) construction, commissioning, and periodic Design and Performance Verification Studies pursuant to the terms of Appendix I.

8.4.2 Responsibility for Incremental System Reinforcements and Interconnection Facilities

#### 8.4.2.1 Incremental System Reinforcements

Seller shall be responsible for the costs of all New York Incremental System Reinforcements and Other Incremental System Reinforcements and for obtaining acknowledgements from Connecting Utility A, Connecting Utility B and each applicable ISO of the ability to interconnect and operate the Transmission Facility.

8.4.2.2 Interconnection Facilities

Seller shall be responsible for constructing the Interconnection Facilities including receipt of all necessary regulatory permits, licenses, and Consents.

**ARTICLE 9**

**PROJECT OPERATION AND COORDINATION OF MAINTENANCE**

9.1 Responsibility for Operation and Maintenance

Seller shall be responsible for the operation and maintenance of the Project.

9.2 Operating Standards and Requirements

Seller shall manage, control, operate and maintain the Project in a manner:

- (i) Consistent with Good Utility Practices;
- (ii) In accordance with the Operating Instructions, Bidding and Scheduling Instructions and manufacturers' warranties;
- (iii) To provide Firm Transmission Capacity;
- (iv) In accordance with all Consents; and
- (v) To meet all of Seller's obligations of this Agreement.

Seller shall make commercially reasonable efforts to include in each agreement with any third party with respect to the Transmission Facility's crossing of any pipeline, cable or other facility and each agreement with any construction, maintenance or repair contractor engaged to lay, build, service, inspect, remove or repair the Transmission Facility, or any Person requesting Seller's consent to or accommodation of construction or repair activities in the vicinity of any underwater portions of the Transmission Facility, that Buyer shall be deemed an "owner" of the Transmission Facility and beneficiary of the work being performed. [if applicable]

9.3 Development of Operating Instructions and Bidding and Scheduling Instructions

The Parties shall jointly develop a set of operating instructions ("Operating Instructions") and bidding and scheduling instructions ("Bidding and Scheduling Instructions") no later than sixty (60) Days prior to the Commercial Operation Date. The Operating Instructions will be based on the design of the Project and will conform to the Connecting Utility A Electric System and Connecting Utility B Electric System operating standards and NYISO Rules and any other applicable ISO rules. Such instructions shall be in a level of detail reasonably required by NYISO, Buyer and each Connecting Utility. The Bidding and Scheduling Instructions will be based on \_\_\_\_\_. [if applicable]

9.4 Coordination of Scheduled Outages

Not later than the Commercial Operation Date, and on the anniversary of such date for the remainder of the Base Term, Seller shall provide to Buyer an indicative, non-binding written schedule of annual Scheduled Outages for the subsequent twelve (12) Month period or such other applicable period(s) as may be required by each applicable ISO. Buyer may request changes to the indicative schedules prepared by Seller and submit such changes to Seller. Seller shall cooperate with Buyer in developing a final schedule of Scheduled Outages, but, subject to the foregoing, Seller shall determine the final schedule of Scheduled Outages and may change such schedule from time-to-time upon thirty (30) Days advance notice to Buyer, subject to each applicable ISO's Tariffs and Rules, as applicable. Seller shall use commercially reasonable efforts to minimize Scheduled Outages of the Transmission Facility and shall, in any event, schedule and perform all Scheduled Outages in accordance with Good Utility Practice. Seller, in accordance with Good Utility Practice, shall plan and exert best efforts to ensure that Scheduled Outages for the Project occur only during the Winter Capability Period, provided that with Buyer's approval, which approval shall not be unreasonably withheld, conditioned or delayed,

Seller may conduct necessary Scheduled Outages overnight and on weekends during the Summer Capability Period. Notwithstanding the development of a final schedule of Scheduled Outages, Seller shall provide seventy-two (72) hours advance notice to Buyer prior to the commencement of each Scheduled Outage. Each Party shall make reasonable efforts to accommodate changes in the schedule of Scheduled Outages if the other Party requests such a change.

## **ARTICLE 10**

### **DEFAULT, TERMINATION, AND REMEDIES**

#### 10.1 Event of Default

The occurrence of any one or more of the following events shall constitute an "Event of Default" under this Agreement during the continuance of such event unless and to the extent excused by the provisions of this Agreement:

10.1.1 Subsequent to the Commercial Operation Date, failure by Seller, after a period of \_\_\_\_\_ (\_\_) consecutive Days after the Transmission Facility has ceased providing Firm Transmission Capacity of at least [\_\_\_] MW, to resume service with Firm Transmission Capacity of at least [\_\_\_] MW, except to the extent that such cessation of providing such Firm Transmission Capacity is directly caused by an action or inaction by Buyer, or a Force Majeure Event;

10.1.2 The failure of Seller to provide and maintain the Seller Security and comply with the other provisions of Section 5.1;

10.1.3 A representation or warranty made by either Party under Article 16 is proven to have been false or incorrect in any material respect at the time made and to have been made willfully, knowingly, or with a reckless disregard for its truth or correctness, and such error has a material and adverse effect on the ability of Seller or of Buyer to perform their respective material obligation under this Agreement or for the Project to deliver Products to Buyer;

10.1.4 Failure by either Party to make payments for undisputed amounts, after the same shall become due and payable;

10.1.5 Failure by either Party to substantially perform any obligation under this Agreement other than those set forth in Section 10.1.1 through 10.1.4 above;

10.1.6 Revocation by any Governmental Authority of any material license, Consent, or other governmental approval required for Seller's operation of the Project provided that it shall not be an Event of Default during the pendency of any diligently prosecuted appeal of such revocation;

10.1.7 The dissolution or liquidation of either Party; or the admission in writing of either Party of its inability to pay its debts as they become due; or the failure by either Party to lift any execution, garnishment, or attachment of such consequence as will impair such Party's ability to perform substantially its obligations pursuant to this Agreement; or the filing of a voluntary petition in bankruptcy by either Party under any provision of any federal or state bankruptcy law or the consenting to the filing of any bankruptcy or reorganization petition against such Party under similar law; or the adjudication of either Party as bankrupt; or the making of an assignment by either Party for the benefit of its creditors or the entry by either Party into an agreement of a composition with its creditors; or the approval by a court of competent jurisdiction of a petition applicable to either Party in any proceeding for the reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar proceeding instituted under the provisions of any bankruptcy act or under any similar act in any domestic or foreign jurisdiction which may not be in effect or hereafter enacted, or within sixty (60) Days after the commencement of any such proceeding against either Party such proceeding shall not have been dismissed or otherwise challenged in good faith, or the filing of an answer

admitting or not contesting the material allegations of a petition against it in such proceeding; or the appointment by either Party, without the consent or acquiescence of the other Party or the beneficiary of any Letter of Credit or Guaranty, of any trustee, receiver, or liquidator of the Party or of any material part of its properties, if within sixty (60) Days thereafter such appointment shall not have been vacated or otherwise challenged in good faith, or if the Party shall seek or consent or acquiesce in the appointment of any trustee, receiver, or liquidator of itself or of any material part of its properties;

10.1.8 The Project has not achieved Transfer Capability of at least [\_\_\_] MW within \_\_\_\_\_ (\_\_\_) Days following the Commercial Operation Date [if applicable];

10.1.9 Average Availability of the Transmission Facility for any period of \_\_\_\_\_ (\_\_\_) consecutive Months ending on or after the 24th Month following the Commercial Operation Date is below \_\_\_\_\_ percent (\_\_\_%); or

10.1.10 The System Loss Level for any period of three (3) consecutive Months exceeds \_\_\_\_\_ percent (\_\_\_%).

10.2 Notice and Opportunity to Cure Event of Default

If either Party claims that an Event of Default has occurred, such Party shall provide the defaulting Party with written notice thereof, specifying the claim of breach and the basis of such claim, within thirty (30) Days after actual knowledge of the breach by the non-defaulting Party. The alleged defaulting Party shall have a reasonable opportunity, not to exceed thirty (30) Days after receipt of notice, or ten (10) Days in the case of an Event of Default described in Section 10.1.2 or 10.1.4, to cure such alleged default. If any such default under Sections 10.1.1, 10.1.3, or 10.1.5 cannot be reasonably cured within such cure period, and the defaulting Party is making continuing diligent efforts to cure, then such cure period shall be extended by (i) in the case of Events of Default described in Sections 10.1.1, an additional period not to exceed \_\_\_\_\_

(\_\_\_) Days, and (ii) in the case of Events of Default described in the remaining provisions of Section 10.1, other than Section 10.1.2 or 10.1.4, an additional period not to exceed \_\_\_\_\_ (\_\_\_) Days, so long as the defaulting Party diligently pursues efforts to cure such breach or failure, provided, there shall be no additional cure period for failure to provide Seller Security under Section 10.1.2 or make a payment under Section 10.1.4. The cure periods provided in this Section 10.2 shall be tolled during the period in which an Event of Default cannot be cured due, through no fault of Seller, to the action or inaction of any Governmental Authority. Buyer's obligations to pay Monthly Capacity Charges shall be suspended during any cure period to the extent Seller is not providing Actual Transmission Capacity of at least [\_\_\_] MW to Buyer due to the Event of Default.

### 10.3 Remedies

#### 10.3.1 Seller's Remedies

This Agreement may be terminated by Seller where Seller is a non-defaulting Party and no cure of the Event of Default has occurred within the applicable cure period provided by Section 10.2 above.

10.3.1.1 Upon such termination, except and to the extent otherwise expressly provided herein, Seller shall be entitled to such damages as are available at law and equity.

10.3.1.2 Termination of this Agreement by Seller shall be subject to all required FERC filings and approvals.

#### 10.3.2 Buyer's Remedies

##### 10.3.2.1 Reduction of Monthly Capacity Payments

If the revocation by any Governmental Authority of any license, Consent, or other governmental approval required for Seller's operation of the Project prevents the

operation of the Project for more than one Month, then (i) during the pendency of any appeal of such revocation, the Monthly Capacity Charge shall be reduced by a rate of one-twelfth (1/12) per Month until such license, permit, Consent or other governmental approval is reinstated or reissued at which time the Monthly Capacity Charge shall be reinstated in full, and (ii) if the appeal of such revocation continues for more than twelve (12) Months, Buyer shall have the right to terminate this Agreement.

10.3.2.2 Buyer's Operation Right

Where Buyer is the non-defaulting Party and no cure of the Event of Default has occurred within the applicable cure period provided by Section 10.2 above, and Seller is able or willing to continue to provide service to Buyer over the Project for reasons other than the inoperability of the Project, then Buyer shall have the option to operate and maintain, or designate a third party to operate and maintain, the Project in order for Buyer to receive service over the Project and make payments pursuant to the terms of this Agreement. Buyer must notify the Seller at least fifteen (15) Days before exercising such option, that Buyer intends to exercise its option under this Section 10.3.2.2 to operate and maintain the Project. If Buyer, pursuant to its option under this Section 10.3.2.2, elects to operate and maintain the Project, Buyer's payments under this Agreement shall be reduced and offset by the amount of reasonable operation and maintenance costs actually incurred by Buyer to operate and maintain the Project.

10.3.2.3 Buyer Termination Right

If the Transmission Facility is inoperable, or Buyer does not exercise its option under Section 10.3.2.2 to operate and maintain the Project, then, subject to the cure and dispute resolution provisions referred to in this Article 10, and in addition to other remedies

(except and to the extent expressly limited), Buyer shall have a right to terminate this Agreement upon ten (10) Business Days' notice to Seller.

10.3.2.4 Buyer's Damages

Upon exercise of Buyer's option to operate and maintain the Project or terminate this Agreement following an Event of Default (both pursuant to Section 10.3.2), except and to the extent expressly limited herein, Buyer shall be entitled to such damages as are available under this Agreement and at law and equity.

10.3.2.5 Draw Upon Security

In addition to other remedies, Buyer shall also be entitled to draw upon any existing security obligation established pursuant to Article 5, as provided therein, to recover any amounts due and owing to Buyer hereunder, damages as provided in Section 10.3.2.4 or any costs of operating and maintaining the Project, as provided in Section 10.3.2.2.

10.4 Election of Remedies

The termination of this Agreement or exercise of Buyer's option to operate and maintain the Project under Section 10.3.2 shall not discharge either Party from any obligations which may have accrued under this Agreement prior to such termination or exercise.

**ARTICLE 11**

**INDEMNIFICATION AND INSURANCE**

11.1 Indemnification

11.1.1 General

Each Party (the "Indemnifying Party") shall indemnify, defend and save harmless the other Party, its parent, Affiliates, Lenders, contractors and subcontractors and successors, and their respective trustees, equity owners, agents, officers, directors, managers, employees, and representatives, and their heirs, successors and assigns (individually or collectively, the

"Indemnified Party"), against all claims, demands, losses, judgments, damages and associated costs and expenses (including, without limitation, reasonable fees, disbursements and expenses for attorneys and experts incurred by the Indemnified Party in any actions or proceedings between the Indemnified Party and a third party), related to property damage, personal injuries or death suffered by third persons resulting from any act or failure to act by such Indemnifying Party related to this Agreement, or from the execution by such Party of any activity contemplated by this Agreement, except to the extent such property damage, personal injuries or death result from the negligence, failure to act or willful misconduct of the Indemnified Party.

#### 11.1.2 Notice

In the event that a Party becomes aware of any event or circumstance which may reasonably be expected to give rise to indemnification under this Agreement, it shall provide the other Party with notification as promptly as reasonably practicable, and in each instance within the earlier of thirty (30) Days after discovery of the event or circumstance or ten (10) Days prior to the time any response regarding such event or circumstance is required by law to be made, provided, an Indemnified Party's failure or delay in giving notice shall not discharge an Indemnifying Party's liability hereunder unless and to the extent such failure or delay has caused actual material prejudice to the Indemnifying Party.

#### 11.1.3 Defense of Legal Actions

At the Indemnified Party's request, the Indemnifying Party shall defend any suit asserting a claim covered by this indemnity and shall pay as incurred and due all costs and expenses (including reasonable fees, disbursements and expenses for attorneys and experts) that may be incurred in enforcing this indemnity. The Indemnified Party may, at its own expense, retain separate counsel and participate in the defense of any such suit or action. The

Indemnifying Party shall not compromise or settle a claim hereunder without the prior written consent of the Indemnified Party; provided, however, that in the event such consent is withheld, delayed or conditioned, then the liability of the Indemnifying Party shall be limited to the aggregate of the amount of the proposed compromise or settlement, the amount of fees, disbursements and expenses for attorneys and experts outstanding at the time such consent shall have been withheld, delayed or conditioned, and the amount of any outstanding claim against which indemnification applies and which is not covered by the proposed compromise or settlement (together with all costs and expenses associated with such outstanding claim). Thereafter, the Indemnified Party shall hold harmless and reimburse the Indemnifying Party, upon demand, for the amount of any additional liability, fees, disbursements and expenses for attorneys and experts incurred by the Indemnifying Party over and above the amounts described above after the time such consent shall have been withheld, conditioned or delayed. The Indemnified Party shall make no admission or offer any judgment or compromise without the prior consent of the Indemnifying Party.

## 11.2 Survival

Each Party's indemnification and defense of action obligations under Sections 11.1.1 and 11.1.3 for acts or occurrences prior to the expiration, termination, completion, suspension or cancellation of this Agreement shall continue in full force and effect regardless of whether this Agreement expires, terminates, or is suspended, completed or canceled. Such obligations shall not be limited in any way by any limitation on insurance, by the amount or types of damages (except as specified in Section 11.1.1), or by any compensation or benefits payable by the Parties under worker's compensation acts, disability benefit acts or other employee acts, or otherwise.

11.3 Limitation on Damages

Except and to the extent expressly limited herein, all remedies are cumulative, and each Party shall be entitled to all relief available under the provisions of this Agreement, at law and in equity.

11.4 Exclusive Remedies; Liquidated Damages

11.4.1 Exclusive Remedies

Except and to the extent otherwise expressly provided, for breach of any provision for which either (i) an express remedy, (ii) measure of damages, or (iii) express modification of Buyer's purchase and payment obligations is provided, such express remedy, measure of damages, or express modification of Buyer's purchase and payment obligations shall be the sole and exclusive remedy. Each Party waives any other remedies or damages that may be available at law or in equity.

11.4.2 Liquidated Damages

The Parties understand and agree that: (a) Buyer's loss from a breach by Seller under Sections 3.10, 3.11, 3.12 or 5.2 of this Agreement would be uncertain and impossible to determine with precision; (b) the provisions set forth in Sections 3.10, 3.11, 3.12 and 5.2 limit the liability of Seller and establish agreed-upon compensation and damages; and (c) such provisions represent a reasonable endeavor on the part of Seller and Buyer to estimate fair and reasonable compensation as liquidated damages for the damages sustained in those circumstances and do not constitute a penalty imposed on Seller.

11.5 Insurance

11.5.1 General

With respect to this Agreement, Seller, at its own cost and expense, shall maintain and keep in full force and effect:

11.5.1.1 General comprehensive bodily injury and property damage insurance of at least five million dollars (\$5,000,000) per occurrence for bodily injury and at least one million dollars (\$1,000,000) per occurrence for property damage for damages resulting from the operations of Buyer or Seller, as the case may be;

11.5.1.2 Business interruption insurance, covering loss of revenues and/or the increased expense to resume operations attributable to the Project by reason of total or partial suspension or delay of, or interruption in, the operation of the Project as a result of damage to or mechanical failure of the Transmission Facility, provided that such coverage shall be in a minimum amount required to cover Seller's continuing or increased expenses for a period of at least six (6) Months; and

11.5.1.3 Statutory workers' compensation insurance and employer's liability insurance.

#### 11.5.2 Coverage of Buyer and Endorsement

Subject to Lenders' rights under any Financing Documents, Seller shall cause Buyer to be named as an additional insured on such insurance policy with regard to comprehensive bodily injury and property damage insurance and business interruption insurance with respect to the Project. Except as otherwise required by Lenders under any Financing Documents, such insurance shall be endorsed as follows:

*Such insurance as afforded by this policy for the benefit of [Buyer] shall be primary as respects any claims, losses, damages, expenses, or liabilities arising out of the Firm Transmission Capacity Purchase Agreement between [Seller and Buyer] dated [execution date] and any insurance carried by [Buyer] shall be excess of, and non-contributing with, the insurance afforded by this policy.*

### 11.5.3 Insurance Notices to Buyer

Seller shall arrange to have its insurance carriers send Buyer a copy of all notices affecting Seller's insurance coverage required under this Section 11.5.

### 11.5.4 Deductibles

Insurance policies required under this Section 11.5 may contain reasonable deductibles which are standard in the industry.

### 11.5.5 Provision of Certificates of Insurance to Buyer

As evidence of the above-required insurance, Seller shall provide Buyer with certificates of all outstanding insurance required by this Section 11.5. Such certificates shall name Buyer as an additional insured as required in Section 11.5.2 above, provided that Buyer shall receive thirty (30) Days prior notice of non-renewal, cancellation of or significant modification to any of the above policies and indicate that the comprehensive bodily injury and property damage insurance and business interruption insurance have been endorsed as described in Section 11.5.2 above. All insurance required to be taken out by this Section 11.5 shall be placed and maintained with insurers authorized to do business in the State of New York and who have an A.M. Best rating of "A" or better unless otherwise approved by Buyer, which approval shall not be unreasonably withheld.

### 11.5.6 Application of Property Insurance Proceeds

Subject to Lenders' rights under any Financing Documents, all proceeds of property insurance collected by Seller as a result of damage caused to the Project shall be applied to the reconstruction or repair of the Project.

11.5.7 Additional Insurance

Seller intends to procure insurance in addition to or in excess of the insurance required by this Section 11.5 including insurance covering physical damage to works, advanced loss of profit, delayed start up, third-party liability, terrorism physical damage, lost profit and environmental impairment liability. The foregoing list of policies Seller intends to procure is indicative only and may change depending on, among other things, market conditions and availability of insurance cover. Seller shall not, in any case, have any obligation to procure insurance policies identified in this Section 11.5.7 nor shall the provisions of Sections 11.5.1-11.5.6 apply to such policies. Seller shall present Buyer with copies of certificates evidencing insurance policies described in this Section 11.5.7 which Seller has taken out within fifteen (15) Business Days of Seller's receipt thereof.

**ARTICLE 12**

**FORCE MAJEURE**

12.1 Definition

The term "Force Majeure Event" as used herein, shall include but not be limited to any act, event, omission or circumstance occasioned by or in consequence of any act of God, act or threatened act of the public enemy, war (imminent, declared or otherwise) blockade, accidents of navigation or breakdown or injury of vessels, accidents to harbors, docks, canals or other assistances to, or adjuncts of, shipping or navigation, perils of the sea, air crash, shipwreck, train wrecks or other failures or delays of transportation, nuclear emergency, radioactive contamination, ionizing radiation, release of hazardous waste or materials, sabotage, act or threatened act of terrorism, invasion, riot, non-site specific boycott, strike or similar industrial disturbance by a union or organized labor, fire, storm, flood, ice, lightning, earthquake, naturally occurring epidemic, explosion or any similar cataclysmic occurrence, action or inaction by a

Governmental Authority or any other cause beyond the reasonable control of and without the fault or negligence of the affected Party, which temporarily or permanently prevents required performance under this Agreement. Neither Party may claim a Force Majeure Event for any delay or failure to perform or carry out any provision of this Agreement to the extent that such Party has been negligent or has engaged in intentional misconduct and such negligence or intentional misconduct contributed to that Party's delay or failure to perform or carry out its duties and obligations under this Agreement. Neither (i) economic hardship of a Party, (ii) unavailability of the Project due to maintenance outages, component or system failures or breakdowns (other than substantially caused by the foregoing circumstances otherwise constituting a Force Majeure Event), (iii) inability of Buyer to receive Products, (iv) Seller's ability to sell Firm Transmission Capacity at a price greater than that for which such is herein contracted, (v) Buyer's ability to purchase Firm Transmission Capacity at a price less than that for which such is herein contracted, (vi) any cost, interest rate or exchange rate increase, decrease or fluctuation (unless substantially caused by the foregoing circumstances otherwise constituting a Force Majeure Event), (vii) any supplier's or vendor's delay or unavailability of materials (unless substantially caused by the foregoing circumstances otherwise constituting a Force Majeure Event) nor (viii) inability of a Party to make payments or post Seller Security, shall, alone or in conjunction with any other such excluded occurrences or circumstances, constitute a Force Majeure Event.

#### 12.2 Force Majeure Event

Except as specifically provided elsewhere in this Agreement, if a Force Majeure Event causes either Party to be rendered wholly or partly unable to perform its obligations under this Agreement, that Party shall be excused from performance (other than payment obligations or obligations to post Seller Security) solely to the extent and during such period performance is

prevented and shall not be construed to be in default in respect of any obligation hereunder for so long as, but only to the extent that, failure to perform such obligation is due to a Force Majeure Event.

12.3 Due Diligence

A Party claiming a Force Majeure Event shall: (i) provide immediate oral notice followed by written notice to the other Party within three (3) Business Days after such Party becomes aware of such Force Majeure Event, giving a detailed written explanation of the event and an estimate of its expected duration and probable effect on the performance of that Party's obligations hereunder ("Duration Estimate"), (ii) use commercially reasonable efforts in accordance with Good Utility Practices to continue to perform its obligations under this Agreement, to remedy the condition that prevents performance and to mitigate the effects of the same, and (iii) keep the other Party informed in writing of all efforts to mitigate and remedy the Force Majeure Event including periodic updates to the Duration Estimate and, if applicable notice of the Force Majeure Event's cure.

12.4 Effect of Force Majeure on Buyer's Payment Obligations

If a Force Majeure Event that results in a continuing complete outage of the Project or reduction in Actual Transmission Capacity below [\_\_\_] MW continues for more than \_\_\_\_\_ (\_\_) Days and Seller is the Party claiming a Force Majeure Event, then commencing with the Month following the Month in which such Force Majeure Event first occurred, the Monthly Capacity Charges shall be reduced by a rate of one-twelfth (1/12) per Month as long as Actual Transmission Capacity remains below [\_\_\_] MW, and such Monthly Capacity Charges shall be reinstated in full effective with the Month following the Month in which Actual Transmission Capacity exceeds [\_\_\_] MW, provided that the Agreement has not been terminated pursuant to Section 12.7.

12.5 Suspension of Performance

The suspension of a Party's performance due to a Force Majeure Event shall be of no greater scope and of no longer duration than is required by such Force Majeure Event. No Force Majeure Event shall extend this Agreement beyond its stated Base Term.

12.6 Extended Force Majeure Events

12.6.1 If a Party ("Non-Claiming Party") has reason to believe that a Force Majeure Event, which is preventing the other Party ("Claiming Party") from performing its obligations hereunder, will result in a suspension of the Claiming Party's performance for more than thirty (30) Days, the Non-Claiming Party may request that the Claiming Party submit a "Force Majeure Remedy Plan". Such Force Majeure Remedy Plan shall set forth a course of repairs, improvements, changes to operations or other actions which should permit the Claiming Party to perform its obligations under this Agreement as soon as reasonably practicable. The Claiming Party shall submit such Force Majeure Remedy Plan to the Non-Claiming Party within ten (10) Business Days of the request.

12.6.2 If the Claiming Party has reason to believe that a Force Majeure Event will prevent it from performing its obligations required by the Agreement for thirty (30) Days or longer, it shall notify the Non-Claiming Party in writing within fifteen (15) Days from the beginning of said Force Majeure Event and shall submit a Force Majeure Remedy Plan to the Non-Claiming Party within ten (10) Business Days of such notification. The Non-Claiming Party shall review and comment on the Force Majeure Remedy Plan and shall be entitled to suggest alternatives in order to shorten the time period of the suspension of performance. The Claiming Party shall have no obligation to accept suggestions of the Non-Claiming Party which would increase the cost of complying with the Force Majeure Remedy Plan unless the Non-Claiming Party agrees to bear such increased costs. In the event that the Parties are unable to

agree on the amount of increased costs resulting from suggested changes by the Non-Claiming Party to the Force Majeure Remedy Plan, the Parties shall resolve such dispute through the use of an independent engineer selected from the list referred to below in this Section 12.6.2, or, if Buyer and Seller are unable to agree on such selection, chosen by lot from such list. Buyer and Seller shall submit all data, documents and other information supporting their respective positions to the independent engineer within ten (10) Days of its selection. The independent engineer shall render its determination within ten (10) Days following the submission of such information. Each Party shall bear its respective costs incurred in connection with such technical dispute resolution and shall each pay for one half of the costs incurred by the independent engineer. Any such determination by the independent engineer shall be final and binding on the Parties. The approved list of independent engineers shall be agreed between Buyer and Seller on or before the Target Notice to Proceed Date; provided that such list may be amended at any time upon the mutual agreement of the Parties.

12.6.3 While the Force Majeure Remedy Plan is in effect, the Claiming Party shall provide weekly status reports notifying the other Party of the steps which have been taken to remedy the Force Majeure Event and the expected remaining duration of the Claiming Party's inability to perform its obligations.

12.7 Right to Terminate

The Non-Claiming Party may at any time terminate this Agreement upon fifteen (15) Business Days prior written notice if: (a) the Claiming Party fails to provide a Force Majeure Remedy Plan as provided in this Article 12; (b) Seller is the Claiming Party, such Force Majeure Event occurs prior to the Commercial Operation Date and such Force Majeure Event causes delay of the Commercial Operation Date more than \_\_\_\_\_ (\_\_\_) Days following the date on which Buyer would have been entitled to terminate this Agreement pursuant to Section

2.4.1(iv) above, or (c) Seller is the Claiming Party, such Force Majeure Event occurs following the Commercial Operation Date and such Force Majeure Event causes continuing complete outage of the Project or reduction in Actual Transmission Capacity below an average of [\_\_\_] MW for more than \_\_\_\_\_ (\_\_) consecutive Days.

12.8 Liability Following Termination

Upon termination of this Agreement as provided in Section 12.7, the Parties shall have no further liability or obligation to each other except for any obligation arising prior to the date of such termination.

**ARTICLE 13**

**RESERVED**

**ARTICLE 14**

**DISPUTE RESOLUTION**

14.1 General

Any dispute arising out of, or relating to, this Agreement shall be subject to the dispute resolution procedures specified in this Article 14. Each Party retains the right, after making a good faith effort at resolving the dispute pursuant to the terms of this Article 14, to pursue such other actions and remedies otherwise permitted or authorized by law or equity.

14.2 Negotiation and Litigation

If any dispute shall arise between the Parties in connection with or under this Agreement, the Parties shall first attempt in good faith to resolve such dispute between themselves in the following manner. If any such dispute shall arise, either Party may give a notice of dispute to the other Party. Within ten (10) Business Days after the receipt of such notice, the Parties shall meet at the working level to discuss the dispute. If following such discussion the Parties have not

resolved such dispute, then within ten (10) Business Days after the conclusion of such meeting at the working level, members of the senior management of the Parties shall meet in person or by telephone to discuss the dispute. If following such discussion the Parties have not resolved such dispute, or if a meeting of senior management has not occurred within twenty (20) Business Days after a request has been made, then either Party may bring such action at law or in equity as it deems necessary or desirable. Each Party consents to the exclusive jurisdiction and venue of any state or federal court within or for the County of New York, New York for adjudication of any such suit, claim, action or other proceeding in law or equity relating to this Agreement or to any other transaction contemplated hereby. Each Party accepts, generally and unconditionally, the exclusive jurisdiction and venue of the aforesaid courts and waives any objection as to venue and any defense of forum non conveniens. Each Party irrevocably consents to the service of process from any of the aforementioned courts in any such action or proceeding by the mailing of copies thereof by registered or certified mail, postage prepaid, to the addresses set forth herein for the purpose of giving notices.

#### 14.3 Provisional Relief

Either Party may, without prejudice to any negotiation procedures, proceed in a federal or state court in the State of New York to obtain provisional judicial relief if, in such Party's sole discretion, such action is necessary to protect public safety, avoid imminent irreparable harm, to provide uninterrupted electrical and other services, address unauthorized disclosure of confidential information, or to preserve the status quo pending the conclusion of any dispute resolution procedures employed by the Parties or pendency of any action at law or equity.

#### 14.4 Continuity of Service

Unless otherwise agreed to in writing or prohibited by applicable law, the Parties shall continue to provide service, honor commitments under this Agreement and continue to make

payments in accordance with this Agreement during the course of any dispute resolution under this Article 14 and during the pendency of any action at law or in equity.

**ARTICLE 15**

**ASSIGNMENT OR TRANSFER**

15.1 Assignment by Seller

In accordance with Section 138 of the State Finance Law, this Agreement may not be assigned by the Seller or its right, title or interest therein assigned, transferred, conveyed, sublet or otherwise disposed of without the previous consent, in writing, of the Buyer, which consent shall not be unreasonably withheld, conditioned or delayed, and any attempts to assign this Agreement by Seller without Buyer's consent are null and void, provided, Seller may, without Buyer's prior written consent: (i) assign its right to receive payment (unless this Agreement concerns Certificates of Participation pursuant to Article 5-A of the State Finance Law) or (ii) assign, pledge, or otherwise encumber this Agreement to any Lender as collateral security for financing the Project under the Financing Documents, provided (y) there does not exist any circumstance as of the proposed date of assignment which does, or with the passage of time would, constitute an Event of Default as to Seller, and (z) such assignment does not materially prejudice Buyer. Seller shall provide prompt notice to Buyer of any such permitted assignment or transfer. At least thirty (30) Days prior to the effective date of the proposed assignment, Seller shall deliver to Buyer an assignment and assumption agreement, duly executed, in which the assignee unconditionally assumes, and agrees to be bound by, all of the terms and conditions of this Agreement, and whereby the assignee makes certain additional representations and warranties as appropriate for assignee consistent with those contained in Article 16.

15.2 Assignment by Buyer

This Agreement may not be assigned by the Buyer or its right, title or interest therein assigned, transferred, conveyed, sublet or otherwise disposed of without the previous consent of the Seller (which consent Seller shall not unreasonably withhold, condition, or delay) and any attempts to assign this Agreement by Buyer without Seller's written consent are null and void. At least thirty (30) Days prior to the effective date of the proposed assignment, Buyer shall deliver to Seller an assignment and assumption agreement, duly executed, in which the assignee unconditionally assumes, and agrees to be bound by, all of the terms and conditions of this Agreement, and whereby the assignee makes certain additional representations and warranties as appropriate for assignee consistent with those contained in Article 16.

15.3 Sale of Project

Seller shall not sell or lease the Project or any portion thereof to any Person without Buyer's prior approval which shall not be unreasonably withheld, conditioned or delayed. Seller shall make any such sale conditioned upon the purchaser's unconditional assumption of Seller's obligations hereunder.

**ARTICLE 16**

**REPRESENTATIONS AND WARRANTIES**

16.1 Seller's Representations and Warranties

Seller makes the following representations and warranties as the basis for the benefits and obligations contained in this Agreement:

16.1.1 Seller represents and warrants that it is a \_\_\_\_\_ duly organized, validly existing and in good standing under the laws of the State of \_\_\_\_\_, is qualified to do business under the laws of the State of \_\_\_\_\_ and the States of New York and \_\_\_\_\_ [if applicable], and has the necessary power and authority to carry on its

business as presently or contemplated to be conducted, to own or hold under lease its properties, and to enter into this Agreement and perform its obligations hereunder.

16.1.2 Seller represents and warrants that it is capable of suing and being sued in the State of New York, and that it will assert no legal defense(s) to the assertion of jurisdiction in the courts of the State of New York or the courts of the United States of America for the Southern District of New York having subject matter jurisdiction.

16.1.3 Seller represents and warrants that it has the legal power and authority to make and carry out this Agreement and to perform its obligations hereunder and all such actions have been duly authorized by all necessary proceedings on its part.

16.1.4 Seller represents and warrants that the execution, delivery, and performance of this Agreement will not conflict with its governing documents, any applicable laws, or any covenant, agreement, understanding, decree or order to which Seller is a party or by which it is bound or affected.

16.1.5 Seller represents and warrants that, for the Base Term of this Agreement, it is and will be in compliance in all material respects with all Consents (i) which govern Seller's ability to perform its obligations under this Agreement, or (ii) the non-compliance with which would have a material adverse effect on Seller's ability to perform its obligations under this Agreement.

16.1.6 Seller represents that Seller has duly and validly executed and delivered this Agreement, and that this Agreement, as of the Effective Date, constitutes a legal, valid, and binding obligation of Seller enforceable against it in accordance with its terms, except as (i) such enforceability may be limited by applicable bankruptcy, insolvency, reorganization, liquidation,

moratorium, or similar laws affecting creditors' or lessors' rights generally, and (ii) the application of general equitable principles may limit the availability of certain remedies.

16.1.7 Seller represents that neither the execution and delivery by Seller of this Agreement, nor the consummation by Seller of any of the transactions contemplated thereby, requires, with respect to Seller, the consent or approval of, the giving of notice to, the registration with, the recording or filing of any document with, or the taking of any other action in respect of any Governmental Authority, independent system operator, or regional transmission organization, except such as are not yet required, and that Seller has no reason to believe that the same will not be readily obtainable in the ordinary course of business upon due application therefor, or which have been duly obtained and are in full force and effect.

16.1.8 Seller represents that there is no action, suit, or proceeding, at law or in equity, or official investigation, before any court, Governmental Authority, or arbitral tribunal, or other body pending or, to the best knowledge of Seller, threatened against or affecting Seller or any of its properties, rights, or assets, that could reasonably be expected to result in a material adverse effect on Seller's ability to perform its obligations under this Agreement, or to affect the legality, validity, or enforceability of this Agreement.

16.1.9 Seller represents and warrants that it will have, from the Commercial Operation Date through the expiration of the Agreement, good and merchantable title to the Project, or any component part thereof, except as otherwise contemplated or permitted by this Agreement or any Financing Document (it being acknowledged by Buyer that depending on the financing structure utilized, the Project may be owned by a special purpose entity or an Affiliate of Seller and, in any event, that portions of the Project may be Leased by Seller).

16.2 Buyer's Representations and Warranties

Buyer makes the following representations and warranties as the basis for the benefits and obligations contained in this Agreement:

16.2.1 Buyer represents and warrants that it is a corporate municipal instrumentality duly organized, validly existing and in good standing under the laws of the State of New York, is qualified to do business under the laws of the State of New York, and has the necessary power and authority to carry on its electric utility business as presently conducted, to own its properties, and to enter into this Agreement and perform its obligations hereunder.

16.2.2 Buyer represents and warrants that it is capable of suing and being sued in the State of New York, and that it will assert no legal defense(s) to the assertion of jurisdiction in the courts of the State of New York or the courts of the United States of America for the Southern District of New York having subject matter jurisdiction;

16.2.3 Buyer represents and warrants that it has the legal power and authority to make and carry out this Agreement and to perform its obligations hereunder and all such actions have been duly authorized by all necessary proceedings on its part.

16.2.4 Buyer represents and warrants that the execution, delivery and performance of this Agreement will not conflict with its governing documents, any applicable laws, or any covenant, agreement, understanding, decree or order to which Buyer is a party or by which Buyer is bound or affected.

16.2.5 Buyer represents and warrants that, for the Base Term of this Agreement, it is and will be in compliance in all material respects with all applicable laws, judicial and administrative orders, rules and regulations, and Consents (i) which govern Buyer's ability to perform its obligations under this Agreement, or (ii) the non-compliance with which would have a material adverse effect on Buyer's ability to perform its obligations under this Agreement.

16.2.6 Buyer represents that Buyer has duly and validly executed and delivered this Agreement, and that this Agreement, as of the Effective Date, constitutes a legal, valid, and binding obligation of Buyer enforceable against it in accordance with its terms, except as (i) such enforceability may be limited by applicable bankruptcy, insolvency, reorganization, liquidation, moratorium, or similar laws affecting creditors' or lessors' rights generally, and (ii) the application of general equitable principles may limit the availability of certain remedies.

16.2.7 Buyer represents that neither the execution and delivery by Buyer of this Agreement, nor the consummation by Buyer of any of the transactions contemplated thereby, requires, with respect to Buyer, the consent or approval of, the giving of notice to, the registration with, the recording or filing of any document with, or the taking of any other action in respect of any Governmental Authority, independent system operator, or regional transmission organization, except such as are not yet required, and that Buyer has no reason to believe that the same will not be readily obtainable in the ordinary course of business upon due application therefor, or which have been duly obtained and are in full force and effect.

16.2.8 Buyer represents that there is no action, suit, or proceeding, at law or in equity, or official investigation, before any court, Governmental Authority, or arbitral tribunal, or other body pending or, to the best knowledge of Buyer, threatened against or affecting Buyer or any of its properties, rights, or assets, that could reasonably be expected to result in a material adverse effect on Buyer's ability to perform its obligations under this Agreement, or to affect the legality, validity, or enforceability of this Agreement.

**ARTICLE 17**

**AMENDMENTS; APPROVAL OF AMENDMENTS**

17.1 General

This Agreement shall not be amended unless such amendment is in writing and signed by the Parties.

17.2 FERC Filings

The Parties agree that transmission capacity sold under this Agreement shall be considered as sold pursuant to Seller's FERC Authority. The Parties further agree that Seller may file with the FERC a copy of this Agreement, or a summary of this Agreement, and/or a copy of the Interconnection Agreement, under the Seller's FERC Authority; provided, however, that Seller shall make any filing of the Interconnection Agreement no later than sixty (60) Days before the anticipated Commercial Operation Date. To the extent permitted by the FERC, such filing(s) with the FERC shall not disclose any confidential or proprietary information regarding the Firm Transmission Capacity sold by Seller to Buyer under this Agreement, including but not limited to, information regarding the specific rates and charges for Firm Transmission Capacity under the Agreement. Buyer agrees to cooperate with Seller in providing and releasing any information necessary for Seller to meet any reporting obligations established by the FERC. In the event that the FERC modifies Seller's FERC Authority or requires material changes to this Agreement, the Parties agree to negotiate in good faith to amend this Agreement to the extent necessary to conform to the FERC's requirements and to restore (to the maximum extent feasible) the economic benefits and burdens of this Agreement. Each Party hereby (i) waives the right to make any unilateral filing with the FERC under Section 205 of the Federal Power Act to change the rates under or any other provision of this Agreement; (ii) waives the right to submit any complaint under Section 206 of the Federal Power Act which seeks to modify or change this

Agreement without prior consent of the other Party; and (iii) agrees that, in any FERC proceeding, it shall support a position that no change to this Agreement should be imposed unless the FERC finds that this Agreement is contrary to the public interest.

17.3 Change in Legal Requirements

If after the date all Consents are received, there is any change in Legal Requirements that substantially alters the contractual relationship between the Parties as expressed herein, then, upon the request of either Buyer or Seller, the Parties shall meet and confer to determine whether the subject change requires further action, including amendment of this Agreement or such other commercially reasonable action, so as to maintain the benefit of this Agreement to each Party. No amendment to this Agreement shall be binding unless it is by the agreement of the Parties in writing pursuant to Section 17.1. In the event the nature of the change in Legal Requirements is such that the unaffected obligations of the Parties cannot reasonably be performed and continued in effect without depriving one or both Parties of a material aspect of their original bargain, the Agreement shall terminate as of the date of the change in Legal Requirements without any further payment obligation by either Party other than settlement of payments of adjustments due with respect to previous performance by the Parties, provided however, that for the avoidance of doubt, a change that increases the cost of performance fro a Party but otherwise does not prevent such Party from performing shall not entitle such Party to termination pursuant to this Section 17.3.

**ARTICLE 18**

**CONFIDENTIALITY**

18.1 Claim of Confidentiality

Any Party (the "Disclosing Party") that provides written confidential information to the other Party (the "Receiving Party") shall mark as "Confidential" information to be protected from

disclosure to third parties ("Confidential Information"). The Receiving Party shall protect the marked Confidential Information from disclosure to third parties consistent with the provisions of this Article and subject to applicable law; provided, however, that a Party may disclose Confidential Information to Affiliates, employees, agents and representatives, Lenders, potential Lenders and potential equity investors and their respective employees, agents and representatives who have a need to know such Confidential Information and agree to be bound by the terms of this Article 18. This Agreement is deemed to constitute and is marked as "Confidential Information."

18.2 Compliance with the Freedom of Information Law

Seller hereby expressly acknowledges that Buyer is subject to the requirements of New York's Freedom of Information Law ("FOIL") and must comply therewith. If Buyer is requested by a third party to disclose marked Confidential Information that it has received from Seller, Buyer will (i) notify Seller of the request, (ii) provide Seller the opportunity to provide information regarding the need for confidential treatment, (iii) evaluate the third party's request for disclosure and Seller's request for confidential treatment, and (iv) determine if the marked Confidential Information is subject to disclosure under FOIL. If Buyer determines that the marked Confidential Information is subject to disclosure, it will provide prompt written notice of such determination to Seller so that Seller may seek a protective order or other appropriate remedy. If Seller does not obtain a protective order or no formal proceeding has been initiated by Seller within a reasonable period of time after Buyer provides notice to Seller of its intent to make public the marked Confidential Information, then Buyer may disclose such information with no liability or further obligation to Seller.

18.3 Treatment of Otherwise Publicly Available Documents

Notwithstanding anything to the contrary in this Article 18, neither Party shall be required to hold confidential any information which (i) becomes publicly available other than through the Receiving Party; (ii) is required to be disclosed by applicable law or by a governmental or judicial order, rule or regulation; (iii) is independently developed by the Receiving Party; or (iv) becomes available to the Receiving Party without restriction from a third party. Should any person or entity seek to legally compel a Receiving Party (by oral questions, interrogatories, requests for information or documents, subpoena, civil investigative demands, regulation, statute or otherwise) to disclose any marked Confidential Information, the Receiving Party will provide the Disclosing Party prompt written notice so that the Disclosing Party may seek a protective order or other appropriate remedy.

18.4 Term of Confidentiality

The obligations set forth in this Article 18 shall survive expiration or termination of this Agreement for a period of two (2) years thereafter.

**ARTICLE 19**

**MISCELLANEOUS PROVISIONS**

19.1 Calculation of Time for Performance

19.1.1 Unless specifically required otherwise by the terms of this Agreement (e.g., scheduling and delivery), if any date on which action is to be taken under this Agreement, or date on which a period of time provided herein expires, is not a Business Day, the effective date for taking such action, or expiration of such time period, shall be the next Business Day.

19.1.2 For the avoidance of doubt, in any instance in which any amount of Liquidated Damages is due because a Party has failed or an event has not occurred by a certain date or Day (the time for occurrence or performance being 2400 hours EPT on such date or Day

if not otherwise expressly specified), then commencing with 0001 hours EPT on the Day following, whether or not such Day is a Business Day, one (1) Day's Liquidated Damages at the applicable per diem amount shall be due for each Day or portion of a Day thereafter to and including the Day on which such required performance or event has occurred.

19.2 Binding Effect

This Agreement shall inure to the benefit of and shall be binding upon the Parties and their respective successors and permitted assigns.

19.3 Counterparts

This Agreement may be executed in multiple original counterparts, each of which shall be an original and all of which together shall constitute a single instrument.

19.4 Governing Law and Jurisdiction

This Agreement shall be governed by and construed in accordance with the laws of the State of New York, except where the Federal supremacy clause requires otherwise, without regard to principles of conflicts of law. Actions arising from this Agreement shall be subject to the exclusive jurisdiction of the courts of the State of New York and the courts of the United States of America for the Southern District of New York having subject matter jurisdiction.

19.5 Recordkeeping Provisions

Each Party shall establish and maintain complete and accurate books, records, documents, accounts and other evidence directly pertinent to performance under this Agreement, including complete and accurate records of (i) all costs associated with any Interconnection Facilities or Incremental System Reinforcements associated with the provision of Firm Transmission Capacity under this Agreement; (ii) all measurements of the capability and line rating of the Transmission Facility; (iii) all other data and information necessary to calculate payments or evidence of the fulfillment of its obligations under this Agreement, including

invoices, receipts, charts, printouts, and other materials and documents; and (iv) all records relating to the operation of the Project pursuant to the terms of this Agreement which are required by the NYISO or any other ISO, as applicable, North American Electric Reliability Council, Northeast Power Coordinating Council, New York State Reliability Council and all other federal, state and local governmental authorities (hereinafter, collectively, the "Records"). The Records must be kept for the balance of the calendar year in which they were made and for six (6) additional years thereafter. New York State agency or agencies involved in this contract (including Buyer), shall have access to Seller's Records during normal business hours at Seller's offices within the State of New York or, if no such office is available, at a mutually agreeable and reasonable venue within the state, for the term specified above for the purposes of inspection, auditing and copying. Buyer shall take reasonable steps to protect from public disclosure any of the Records which are exempt from disclosure under Section 87 of the Public Officers Law (the "Statute") provided that: (i) Seller shall timely inform Buyer, in writing, that said records should not be disclosed; (ii) said records shall be sufficiently identified; and (iii) designation of said records as exempt under the Statute is reasonable. Nothing contained herein shall diminish, or in any way adversely affect, Buyer's right to discovery in any pending or future litigation.

19.6 Prior Agreements Superseded

This Agreement shall completely and fully supersede all other prior understandings or agreements, both written and oral, between the Parties relating to the subject matter hereof.

19.7 Set-Off Rights

Subject to Section 6.4.4 above, each Party shall have all of its common law, equitable and statutory rights of set-off. These rights shall include, but not be limited to, such Party's option to withhold for the purposes of set-off any moneys due to the other Party under this Agreement up

to any amounts due and owing to such other Party with regard to this Agreement, any other contract with such other Party, including any contract for a term commencing prior to the term of this Agreement, plus any amounts due and owing to such other Party for any other reason including, without limitation, tax delinquencies, fee delinquencies or monetary penalties relative thereto. Buyer shall exercise its set-off rights in accordance with normal state practices including, in cases of set-off pursuant to an audit, the finalization of such audit by Buyer or its representatives.

19.8 Service of Process

In addition to the methods of service allowed by the New York Civil Practice Law & Rules ("CPLR"), each Party hereby consents to service of process upon it by registered or certified mail, return receipt requested. Service hereunder shall be complete upon a Party's actual receipt of process or upon the other Party's receipt of the return thereof by the United States Postal Service as refused or undeliverable. Each Party must promptly notify the other Party, in writing, of each and every change of address to which service of process can be made. Service by a Party to the last known address shall be sufficient. Each Party will have thirty (30) Days after service hereunder is complete in which to respond.

19.9 Waiver

No delay or omission in the exercise of any right under this Agreement shall impair any such right or shall be taken, construed or considered as a waiver or relinquishment thereof, but any such right may be exercised from time-to-time and as often as may be deemed expedient. In the event that any agreement or covenant herein shall be breached and thereafter waived, such waiver shall be limited to the particular breach so waived and shall not be deemed to waive any other breach or default hereunder.

19.10 Severability

Except as otherwise stated herein, any provision, article, section or paragraph declared or rendered unlawful by a court of law or regulatory agency with jurisdiction over the Parties, or deemed unlawful because of a change in Legal Requirements, will not otherwise affect the lawful obligations that arise under this Agreement. If any term or provision of this Agreement or the application thereof to any Party, or circumstance, shall to any extent be invalid or unenforceable and if this results in one Party being disproportionately materially adversely affected, then the Parties shall negotiate in good faith to rebalance the benefits of this Agreement to those existing prior to the term or provision being determined to be invalid or unenforceable, provided, however that this Agreement shall be terminated if the Parties are unable to reach agreement and in the absence of such invalid or unenforceable provision, a Party would be deprived of a material element of its original bargain upon entry of the Agreement.

19.11 Taxes

19.11.1 General

Both Parties shall use commercially reasonable efforts to administer and implement this Agreement in accordance with their intent to minimize taxes.

19.11.2 Transfer Taxes

Buyer is liable for and shall pay, cause to be paid or reimburse Seller if Seller shall have paid, all transfer Taxes (excluding Taxes measured by gross receipts or net income), including sales, use, excise, permit, license, authorization and similar Taxes attributable to the sale or purchase of Firm Transmission Capacity pursuant to the Agreement ("Buyer's Taxes"). Buyer shall indemnify, defend and hold Seller harmless from any liability against all Buyer's Taxes.

19.12 Notices

Notices, consents, authorizations, approvals, instructions, waivers or other communications provided in this Agreement shall be in writing and shall be made if sent to the addresses specified in this Section 19.12 by (i) hand; (ii) U.S. Mail, first class postage pre-paid; (iii) courier, or (iv) facsimile with retention of a document confirming successful electronic transmission:

To Buyer:

New York Power Authority  
123 Main Street  
White Plains, NY 10601  
Fax: (914) \_\_\_\_\_ - \_\_\_\_\_  
Attn: \_\_\_\_\_

With a Copy To:

General Counsel  
New York Power Authority  
123 Main Street  
White Plains, NY 10601  
Fax: (914) \_\_\_\_\_ - \_\_\_\_\_  
Attn: \_\_\_\_\_

To Seller:

Attn: \_\_\_\_\_  
Fax: \_\_\_\_\_

With a Copy To:

Fax: \_\_\_\_\_  
Attention: \_\_\_\_\_

Notice by facsimile or hand delivery shall be effective on the Day actually received, if received before 5 p.m. EPT on a Business Day, and otherwise shall be effective on the next Business Day. Notice by overnight U.S. Mail or courier shall be effective on the next Business Day after it was sent. Each Party shall be entitled to specify as its proper address any other address in the United States upon written notice to the other Party.

19.13 Noninterference

Each Party agrees that it will not construct any facilities or structures at the Sites or on the Transmission Facility pathway or engage in any activities at the Sites that will materially interfere with the rights granted to the other Party under this Agreement.

19.14 Payment for Buyer's Personnel

Seller agrees to compensate Buyer for reasonable personnel (including attorneys, outside consultants, experts and advisers) and material utilized by Buyer in conjunction with Buyer's support of Seller's financing of the Project and any future amendments to this Agreement requested by Seller and not otherwise contemplated under this Agreement. Subject to the foregoing sentence, Buyer may charge for its employees at their actual salary, plus its standard markup for benefits and overhead. Buyer shall provide an invoice to Seller for reasonable charges with appropriate documentation, and Seller shall pay such invoice within thirty (30) Days of receipt of such invoice.

19.15 No Recourse

No recourse shall be had for the payment or performance of any of Seller's obligations, covenants or agreements under this Agreement, against any incorporator, direct or indirect shareholder, member, partner, officer, director or Affiliate (whether past, present or future) of the Seller or any Affiliate thereof or of any successor corporation thereto, whether by virtue of any constitutional provision, statute or rule of law, or by the enforcement of any assessment or penalty or otherwise, solely or as a result of the execution of this Agreement. The foregoing shall not limit the liability of a Guarantor under a Guaranty.

19.16 Discontinuation of Indices or Extrinsic References

In the event any index, indicator, published data source or similar external reference to which this Agreement refers shall be materially modified or discontinued, the Parties will

substitute such alternative reference as most closely approximates the discontinued reference. In the absence of any such available substitute reference, the Parties will confer in good faith to develop an alternative means of calculating or determining the information provided by such discontinued reference for the purposes of this Agreement.

(Signature Page to Follow)

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed effective the Day first written above by their duly authorized officers.

THE NEW YORK POWER AUTHORITY

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

Name: Roger Kelley

Title: President and Chief Executive Officer

\_\_\_\_\_ (Seller)

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

Name: \_\_\_\_\_

Title: \_\_\_\_\_

**APPENDIX I**

**Project Design and Technical Specifications**

[if applicable]

**APPENDIX I**

**Part A - Design**

**APPENDIX I**

**Part B - Technical Specifications**

**APPENDIX II**

**Contract Rates**

**Rate Tariff**

<i>Operating Year</i>	<i>MW</i>	<i>\$/MW-Month</i>
1		
2		
3		
4		
5		
6		
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
29		
20		

**APPENDIX III**  
**Target Availability**

**APPENDIX IV**

**Reserved**

**APPENDIX V**  
**Seller Security**

**APPENDIX V**

**Part A - Form of Guaranty**

**APPENDIX V**

**Part B - Form of Escrow Agreement**

**APPENDIX V**

**Part C - Letter of Credit**

[ENTITY NAME] IRREVOCABLE STANDBY  
LETTER OF CREDIT FORMAT  
SBLC \_\_\_\_\_

Date

New York Power Authority  
123 Main Street  
White Plains, NY 10601

Gentlemen:

At the request of \_\_\_\_\_ ("Seller") and for the account of Seller, we, [Bank Name]; [Bank Branch], hereby establish, effective immediately, in favor of you, New York Power Authority ("Beneficiary") Irrevocable Standby Letter of Credit Number SBLC \_\_\_\_\_ in the amount of USD \_\_\_\_\_ (Amount Written Out United States Dollars) (as such amount may be reduced from time-to-time by partial draws hereunder, the "Stated Amount"). This Letter of Credit is issued, presentable and payable at our offices at [Bank Street Address], [Bank City, State, Zip Code], Attention: [Bank Department], and expires with our close of business on \_\_\_\_\_ ("Expiry Date").

This Letter of Credit is being issued in connection with that certain Firm Transmission Capacity Purchase Agreement, dated as of \_\_\_\_\_, 2007, between Beneficiary and Seller (referred to as the "Agreement").

Funds under this Letter of Credit are available at sight against your draft drawn on us bearing upon its face the clause "Drawn under [Bank Name], [Bank Branch] Letter of Credit Number SBLC \_\_\_\_\_ and accompanied by the following documents:

1. A copy of this Letter of Credit and any subsequent amendments, if any (provided that the original shall be provided in the event the balance of the Stated Amount is drawn in its entirety); and
2. A statement signed by an officer of Beneficiary stating the amount to be drawn under this Letter of Credit and certifying either that (i) "An Event of Default under the Agreement has occurred and that Beneficiary is entitled to draw upon this Letter of Credit pursuant to Section 10.3.2.5 of the Agreement in the amount stated to be drawn", (ii) "Seller has failed to fulfill its payment obligations in accordance with the Agreement, and pursuant to the Agreement the amount claimed is due to the Beneficiary", (iii) "This letter of credit will expire in accordance with its terms within thirty (30) days following the date hereof and Seller has failed to provide evidence required by the Agreement that a replacement letter of credit will be delivered to Beneficiary prior to the expiration of this letter of credit", or (iv) "This letter of credit will expire in accordance with its terms within five (5) local business days following the date hereof and

Seller has failed to provide a replacement letter of credit to Beneficiary in the form required under the Agreement".

Partial drawings under this Letter of Credit are permitted, however, the aggregate amount of drawings shall not exceed the Stated Amount.

We hereby engage with you that drafts drawn under and in compliance with the terms and conditions of this Letter of Credit will be duly honored by us if presented at our offices specified above on or before the Expiry Date. Presentation of any drawing document under this Letter of Credit may be made in person or sent to us by courier, certified mail, or registered mail to the address set forth above, or such other address as may hereafter be furnished by us. We further agree that any charge or commission in respect to the negotiation of drafts under this Letter of Credit shall be the obligation of Seller.

Drafts presented before 11:00 a.m. (New York Time) on any Business Day shall be honored before 5:00 p.m. (New York Time) on the same Business Day by wire transfer in immediately available funds to any account designated in writing by an authorized representative of Beneficiary. Drafts presented after 11:00 a.m. (New York Time) on any Business Day shall be honored on the following Business Day by wire transfer in immediately available funds to any account designated in writing by an authorized representative of Beneficiary. As used in this Letter of Credit, the term "Business Day" shall mean a day other than Saturday or Sunday or any other day in which Banking Institutions in the State of New York are authorized or required by law to close.

Except as otherwise expressly stated herein, this credit is subject to the International Standby Practices 1998, International Chamber of Commerce No. 590, ("ISP98") and as to matters not addressed by the ISP98 shall be governed and construed in accordance with the laws of the State of New York, without regard to any applicable conflicts of laws principles thereof, and applicable U.S. Federal law. Notwithstanding Section 3.12(a) of the ISP98, we agree that a lost original credit shall be replaced by us with a new original credit upon your presentation of an affidavit of lost original and execution of a form of indemnification satisfactory

This Letter of Credit sets forth in full the terms of our undertaking and such undertaking shall not in any way be modified, amended amplified or revoked without the express written consent of the undersigned and Beneficiary, or by reference to any document, instrument or Agreement referred to herein other than the ISP98 or in which this Letter of Credit is referred to or to which this Letter of Credit relates, and any such reference shall not be deemed to incorporate herein by reference any document, instrument or Agreement other than the ISP98 .

This Letter of Credit is not transferable or assignable by you, except that this Letter of Credit may be transferred in its entirety to, and only to, any transferee who has succeeded you under the Agreement, as permitted thereunder, and notwithstanding any contrary provision in the ISP98 , such transferred Letter of Credit may be successively so transferred; provided however, that such transfer shall only become effective upon delivery to us of a written notice of such transfer signed by Seller and Beneficiary prior to such transfer.

Wherever possible, each provision of this Letter of Credit shall be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this Letter of Credit shall be prohibited by or invalid under applicable law, such provision shall be ineffective to the extent

of such prohibition or invalidating the remainder of such provision or the remaining provisions of this Letter of Credit.

By: \_\_\_\_\_  
Name:  
Title:

By: \_\_\_\_\_  
Name:  
Title:

**APPENDIX V**

**Part D – NYPA Seller Security Requirements**

**NYPA CREDIT SUPPORT REQUIREMENTS FOR PROJECTS INVOLVING NEW FACILITIES CONSTRUCTION**

*[Note – this information is provided for Bidder information only, and will not be included in any Agreement in this form.]*

<b><i>Bidder's Proposed New Facilities &amp; Projects</i></b>	<b><i>Credit Support Required Three (3) Days of Contract Execution</i></b>	<b><i>Unexcused Delays in Meeting Target Consents Application Date or Target Notice to Proceed Date</i></b>	<b><i>Unexcused Delays in Meeting the Target Commercial Operation Date</i></b>
Build New Generation (BNG) + Transmission (T) {New generation at location of new transmission facilities}	\$ 5 MM / 100 MW	\$100,000 / 100 MW { \$30 MM maximum; 60 days }	\$50,000 / 100 MW { \$15 MM maximum; 60 days }
BNG+ T+point-to-point (PtP) transmission rights from BNG location to T interconnect	\$ 7.5 MM / 100 MW	\$100,000 / 100 MW { \$30 MM maximum; 60 days }	\$50,000 / 100 MW { \$15 MM maximum; 60 days }
T+PtP+ Existing Generation to Provide UCAP or UCAP plus Associated Energy {Existing Generation NOT at location of new T interconnect}	\$750,000 / 100 MW	\$40,000 / 100 MW { \$12MN maximum; 60 days }	\$40,000 / 100 MW { \$12MN maximum; 60 days }

**APPENDIX VI**

**Consents**

[if applicable]

**APPENDIX VI**

**Schedule 1 - Development Permits**

**[if applicable]**

**APPENDIX VI**

**Schedule 2 - Construction Permits**

**[if applicable]**

**APPENDIX VI**

**Schedule 3 – Operating Permits**

[if applicable]

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