

The Dax Law Firm, P.C.

54 State Street, Suite 805
Albany, New York 12207
www.daxlawfirm.com

Telephone: (518) 432-1002
Facsimile: (518) 432-1028

John W. Dax

William F. McLaughlin*

**Also Admitted in Massachusetts & District of Columbia*

January 27, 2016

Electronic Mail secretary@dps.ny.gov

Hon. Kathleen H. Burgess
Secretary to the Commission
New York State Public Service Commission
Agency Building 3
Albany, New York 12223-1350

Re: Case 16-E-_____ Verified Petition of Fastrac Markets, L.L.C. for a Declaratory Ruling That Its Facility Located in the City of Rochester is Entitled to Receive Electric Service From Rochester Gas and Electric Corporation.

Dear Secretary Burgess:

Enclosed for filing on behalf of Fastrac Markets, L.L.C. (Fastrac) is a verified petition with exhibits for a declaratory ruling regarding Fastrac's facility located in the City of Rochester and its entitlement to receive electric service from Rochester Gas and Electric Corporation.

Copies of the enclosed are being served by email on counsels to RED-Rochester, LLC and Rochester Gas and Electric Corporation.

Respectfully submitted,

THE DAX LAW FIRM, P.C.

John W. Dax

JWD:lmd

Enclosures

cc (via email): Noelle M. Kinsch, Esq., Iberdrola USA
Myra Karegianes, Esq., Recycled Energy Development LLC
Craig E. Bennett, Esq., Recycled Energy Development LLC

**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

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In the Matter of :
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Verified Petition of Fastrac Markets, L.L.C. for a : Case 16-E-____
Declaratory Ruling That Its Facility Located in the City :
of Rochester is Entitled to Receive Electric Service :
From Rochester Gas and Electric Corporation. :
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**VERIFIED PETITION OF FISTRAC MARKETS, L.L.C. FOR A
DECLARATORY RULING THAT ITS FACILITY LOCATED IN THE
CITY OF ROCHESTER IS ENTITLED TO RECEIVE ELECTRIC SERVICE
FROM ROCHESTER GAS AND ELECTRIC CORPORATION.**

Dated: January 26, 2016
Albany, New York

John W. Dax
William F. McLaughlin
The Dax Law Firm, P.C.
Attorneys for Fastrac Markets, L.L.C.
54 State Street, Suite 805
Albany, New York 12207
Telephone: (518) 432-1002
Email: jdax@daxlawfirm.com

**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

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In the Matter of :
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Verified Petition of Fastrac Markets, L.L.C. for a : Case 16-E-____
Declaratory Ruling That Its Facility Located in the City :
of Rochester is Entitled to Receive Electric Service :
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INTRODUCTION

Fastrac Markets, L.L.C. (FASTRAC) petitions the New York State Public Service Commission (Commission) for a declaratory ruling pursuant to Part 8 of the Commission’s Rules (16 NYCRR Part 8) and Section 204 of the State Administrative Procedure Act that (i) FASTRAC is entitled to receive electric service for its newly-constructed store in the City of Rochester, New York, from Rochester Gas and Electric Corporation (RG&E) as an RG&E customer and (ii) RG&E, as the franchised electric utility, is required to provide such electric service pursuant to its electric tariff (RG&E Schedule for Electric Service, PSC No. 19).

BACKGROUND AND SUMMARY OF RULING REQUESTED

FASTRAC is a limited liability company that owns and/or operates small retail markets and convenience stores throughout upstate New York. In 2014, FASTRAC constructed a new store at 375 West Ridge Road in Rochester, New York 14675 (Site), situated on the perimeter of the former Kodak Park, as more fully depicted in the layout attached as **Exhibit A**. FASTRAC is the owner of the Site. The Kodak Park is an area consisting of multiple tracts of land formerly owned by the Eastman Kodak Company (Kodak), separated by intervening parcels and by public roads and streets in the City of Rochester and the Town of Greece. Some, but not all, properties

within the geographic boundary of Kodak Park are served by one or more utility distribution systems formerly owned and operated by Kodak. FASTRAC's Site is not served by any such facilities nor is it proximate to the Kodak Park utility lines.

RG&E is an electric and gas utility regulated by the Commission that holds a franchise to provide electric service in the City of Rochester. RG&E owns facilities located in the public roads and streets in its service territory, including in the public streets adjoining and abutting the Site.

RED-Rochester LLC (RED-Rochester) is the owner and operator of the electric generation and distribution system formerly owned by Kodak and located within the Kodak Park. On May 30, 2013, the Commission approved the transfer to RED-Rochester from Kodak of the utility facilities located within Kodak Park (Case 13-M-0028, *RED-Rochester LLC and Eastman Kodak Company, Order Approving Transfer Subject to Conditions, Providing for Lightened Ratemaking Regulation, and Making Other Findings [Transfer Order]*). On June 13, 2013, the Commission granted RED-Rochester a Certificate of Public Convenience and Necessity (CPCN) and confirmed its authority to operate the Kodak Park utility facilities in accordance with the previously issued orders (Case 13-M-0028, *Order Confirming Prior Order and Granting Certificate of Public Convenience and Necessity [RED CPCN Order]*). RED-Rochester is authorized to "provide retail electric, gas, and steam service" to customers within Kodak Park pursuant to the terms and conditions of its CPCN, which replaced a CPCN originally issued to Kodak by the Commission on August 2, 2004 (Case 04-M-0388, *Eastman Kodak Company, Order Granting Certificates of Public Convenience and Necessity and Providing For Lightened and Incidental Regulation (Kodak CPCN Order)*).

After acquiring the Site and in the process of site development, FASTRAC requested information regarding the provision of electric utility service and was informed that it would be required to take service from RED-Rochester. Discussions with RED-Rochester, however, revealed that RED-Rochester's electric distribution infrastructure was not in reasonably close proximity to the Site and that RED-Rochester was unable to provide the requested service directly to the Site without first constructing significant infrastructure upgrades. RED-Rochester indicated that FASTRAC would be responsible for the cost of the infrastructure upgrades needed to extend RED-Rochester's infrastructure to the Site, estimated to be in excess of one hundred thousand dollars (\$100,000.00). Accordingly, FASTRAC sought information regarding the provision of electric service directly from RG&E, as the utility franchised to serve the public in the City of Rochester.

The Site, being situated on both Derby Avenue and West Ridge Road in the City of Rochester, abuts on and has access to two public roads in which FASTRAC determined that RG&E maintains electric facilities from which it could supply electric service to the Site. FASTRAC determined that connecting to RG&E's distribution system would require significantly less expense than interconnection to RED-Rochester's distribution system and could be accomplished in compliance with the terms of RG&E's tariff for extending service to new customers. FASTRAC also became aware that the restaurant located on the parcel adjoining the Site is an RG&E electric customer.

In an email dated January 15, 2015, RED-Rochester asserted that FASTRAC was "required to use RED-Rochester for its electric utility service" pursuant to orders issued by the Commission. *See* email dated Thursday, January 15, 2015 from Craig Bennett to Camille T.

Kahler (**Exhibit B**). Mr. Bennett's email stated that Commission orders required FASTRAC "to use RED for transmission [service] (hence the need to install the wires)."

By letter dated January 25, 2015, FASTRAC submitted a completed General Service Application Form (Application) to RG&E. *See* letter from John Dax to James A. Lahtinen dated February 25, 2015 (**Exhibit C**). The letter informed RG&E that FASTRAC did not accept RED-Rochester's position that FASTRAC was obligated to become a customer of RED-Rochester. By separate letter dated February 25, 2015, FASTRAC informed RED-Rochester that it had submitted an application to RG&E because of the "significant disparity in the cost that would be incurred to connect to the systems of RED-Rochester and RG&E." *See* letter from John Dax to Craig Bennett dated February 25, 2015 (**Exhibit D**). Thereafter, RED-Rochester continued to assert that it was authorized to be the exclusive supplier of electric service to FASTRAC.

By letter dated March 6, 2015 (**Exhibit E**), RG&E's counsel informed FASTRAC that "before RG&E can act on Fastrac's application, the dispute between RED and FASTRAC must be resolved." To date RG&E has not acted on Fastrac's Application.

From and after February 2015, FASTRAC engaged in negotiations with both RG&E and RED-Rochester to obtain the requested service and avoid the substantial costs associated with being a customer of RED-Rochester. On April 29, 2015, the three parties participated in informal mediation with staff of the Department of Public Service, where it was agreed that (i) RED-Rochester and RG&E would execute a two-party "borderline agreement" to "allow" RG&E to provide electric delivery service to the Site directly from its existing facilities located in the abutting streets; and (ii) RED-Rochester and FASTRAC would negotiate an agreement

under which FASTRAC would pay RED-Rochester the appropriate RG&E tariff rate plus a modest premium to cover RED-Rochester's minimal administration costs.

On or about July 22, 2015, RG&E filed with the Federal Energy Regulatory Commission a Borderline Service Agreement (BSA), which would allow RG&E to connect FASTRAC to its electric distribution system so RG&E could provide electric delivery service with FASTRAC being a nominal customer of RED-Rochester.¹ According to the BSA, RED-Rochester would be required to pay RG&E for services "in accordance with the rates, terms and conditions set forth in Service Classification No. 7 or 3 of RG&E's Rate Schedule: PSC. No. 19 – Schedule for Electric Service as applicable," as well as to reimburse RG&E for the cost of any required line extension (BSA at 1). Thereafter, and without taking any action on FASTRAC's Application, RG&E extended service to the Site and has been supplying electric energy and commodity service during the pendency of this dispute.

Throughout this dispute, FASTRAC has continuously negotiated with RED-Rochester in good faith to develop an appropriate agreement for electric service, but has reserved all rights. To date RED-Rochester has not invoiced FASTRAC for the electric service RG&E has supplied to the Site. On or about June 9, 2015, RED-Rochester presented FASTRAC with its standard Utility Services Agreement (USA) that included a rate schedule, which would impose, *inter alia*, an "Overhead Charge" consisting of a twenty-five percent (25%) markup added to RG&E's invoiced amounts for both delivery and commodity services (USA at Schedules C and D). A copy of the USA is attached as **Exhibit G**. The USA would also impose on FASTRAC an obligation to bear responsibility for a portion of any Remediation Costs related to future

¹ See FERC Docket ER15-2234, Rochester Gas and Electric Corporation submits tariff filing per 35.13(a)(2)(iii): RGE-RED Borderline Service Agreement, July 21, 2015 (**Exhibit F**).

environmental cleanup expenses potentially required to address contamination within Kodak Park based on FASTRAC's proportionate electric utility usage (USA at 14). The USA would also impose a term of twenty (20) years (USA at 17). Following several exchanges with Red-Rochester discussing potential rate impacts and comparisons to rates paid by FASTRAC at its other installations, FASTRAC made a counteroffer that would reduce the Overhead Charge to five percent (5%) of RG&E's commodity charges, reduce the contract term to five (5) years, and eliminate all liability for remediation costs. *See* email from Dax to Bennett dated November 19, 2015 (**Exhibit H**). On January 7, 2016, RED-Rochester rejected FASTRAC's counter offer. *See* email from Bennett to Dax dated January 7, 2016 (**Exhibit I**).

As a result, FASTRAC has concluded that it is in its economic interest to become a direct customer of RG&E, thereby paying a lower rate for service and avoiding any liability for future remediation costs incurred by RED-Rochester for contamination within Kodak Park.

Based on the foregoing, Petitioner requests that the Commission issue a ruling declaring that, on these facts, FASTRAC is entitled to be an electric customer of RG&E and that RG&E is obligated to provide service to FASTRAC in accordance with its electric tariff.

DISCUSSION

I. RG&E IS REQUIRED TO PROVIDE ELECTRIC SERVICE TO FASTRAC.

As a franchised electric utility, RG&E is obligated to serve customers within its franchised territory. Transportation Corporations Law Section 12. RG&E's obligation to provide service to FASTRAC is set forth in the Commission's rules and regulations. 16 NYCRR §13.1(a). RG&E must extend service to all qualified applicants and make "reasonable efforts to eliminate conditions preventing extensions of service and shall pursue completion of any

facilities it must construct with due diligence.” 16 NYCRR § 13.2(a)(2). The only preconditions for an applicant’s eligibility are: (i) filing an application, (ii) complying with the utility’s tariff and applicable laws; (iii) fulfilling applicable requirements of Parts 98 and 230; and (iv) making all required payments. 16 NYCRR 13.2(a)(3). FASTRAC submitted a General Services Application to RG&E on February 25, 2015, and has stood ready to meet its obligations. Once presented within an application from a qualified applicant, the Commission’s rules establish RG&E’s obligation, as follows:

(a) Obligation to provide electric service. When a written request for service is made to a utility by an applicant whose property abuts on, or has access to, any public R/W (other than a controlled access highway) in which the government authority having jurisdiction will permit the utility to install and maintain facilities, the utility shall:

(1) render the services requested in accordance with the provisions of this Part and Parts 99 and 100 of this Title;

(2) furnish, place, construct, operate, maintain and (when determined to be necessary by the utility or Commission) reconstruct, or replace all electric facilities within public R/W and other R/W when the utility elects to use such R/W in lieu of construction facilities within public R/W, at its own cost and expense, subject to the provisions of this Part, and Parts 99 and 100 of this Title, which cost and expenses shall include the amounts paid to government authorities for permits to do the work required and any additional amounts paid for the right(s) to make such elective use of other R/W; and

(3) grant the appropriate footage allowance required by the provisions of this Part.

16 NYCRR §98.2(a). RG&E’s Electric Tariff confirms its obligation to provide service to FASTRAC. The company must render the requested services whenever “a written request for electric service is made to the Company by an applicant whose property abuts on or has access to any public right-of-way (other than a controlled access highway) in which the governmental authority having jurisdiction will permit the utility to install and maintain facilities...” (RG&E

Schedule for Electric Service, PSC No. 19, Part II, Section 3, Leaf No., 37, Revision 0, June 1, 2003).

FASTRAC meets all of the requirements for receiving service from RG&E. The Site abuts and has access to two separate public roads in which RG&E maintains facilities and from which it is authorized to extend service. Given that RG&E has already extended a service line to the Site, it is clear that RG&E acknowledges that it has the franchise authority to provide service to the Site and is capable of installing the necessary infrastructure. Therefore, in compliance with the Commission's rules, RG&E is obligated to provide the requested service to FASTRAC so long as FASTRAC agrees to be bound by the terms and conditions set forth in RG&E's Electric Tariff.

II. NOTHING CONTAINED IN THE COMMISSION'S ORDERS GRANTING A CPCN TO RED-ROCHESTER DIMINISHES RG&E'S OBLIGATION TO PROVIDE SERVICE TO QUALIFIED APPLICANTS.

RG&E cannot refuse to accept FASTRAC as a customer for reasons not identified within its tariff. In the Commission orders granting first Kodak, then RED-Rochester, authority to provide utility services to Kodak Park occupants, the Commission did not diminish RG&E's pre-existing obligation to provide electric delivery service to qualified customers, like FASTRAC, who are able to obtain direct service from RG&E without use of the utility distribution system within Kodak Park.

The relevant Commission orders make clear that RG&E retains its authority to provide electric service, including both the sale of commodity and the provision of delivery service to customers within and without Kodak Park. This is most clearly expressed in the *RED CPCN Order* at 4-5:

The CPCNs issued here are non-exclusive beyond permitting access to alternative commodity suppliers... As a result, the [CPCN] shall be non-exclusive to the extent that customers within the [Kodak Park] may seek out alternative utility suppliers, including Rochester Gas and Electric Corporation (RG&E) as a provider of gas and electric delivery and other services...

There is nothing in the Commission's orders authorizing RED-Rochester to serve customers in Kodak Park that implies any intention to restrict or limit RG&E's franchise obligations to serve customers who seek service from RG&E, are located within RG&E's franchised territory, and do not require use of RED-Rochester's utility infrastructure.

This is not a surprising outcome. In RED-Rochester's effort to secure a CPCN to own and operate the Kodak Park utility systems, the Joint Petitioners expressly acknowledged that the authority to serve being sought would be non-exclusive. The Joint Petition submitted by Kodak and RED-Rochester for approval of the transfer of the Kodak system and the grant of a CPCN to RED-Rochester expressly stated:

Joint Petitioners are not proposing to alter the existing condition that the CPCNs for electric and gas are non-exclusive.

(Joint Petition at note 21, p. 21).² Indeed, a premise for the Commission's grant of lightened regulation to RED-Rochester was that its customers have competitive alternatives (*Transfer Order* at 34-35). RG&E is the obvious competitive alternative in the case of an owner of property abutting city streets in RG&E's service territory.

² The "existing condition" to which Kodak and RED-Rochester referred is described in note 10, p. 10 of the Commission's *Kodak CPCN Order*:

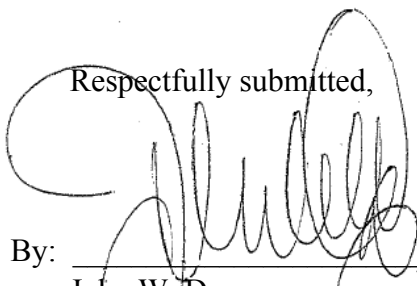
The CPCNs are non-exclusive and adhere only to the provision of retail utility services to non-residential customers within the existing confines of Kodak Park.

If one considers RED-Rochester's CPCN to be equivalent to a municipal franchise, then the FASTRAC Site must be seen as being located in a dual franchise territory. Dual franchise territories are far from uncommon. In the Commission's long history of addressing disputes over providing service to new customers in dual franchise areas, the Commission's overriding objective has been to award the new customer to the utility that can most reliably and economically provide the required service.³ FASTRAC's location makes RG&E the overwhelmingly more economically advantageous provider of delivery service.

CONCLUSION

For the reasons stated herein, FASTRAC requests that the Commission grant the requested Declaratory Ruling affirming FASTRAC's right to be served directly by RG&E as an RG&E customer.

Dated: January 26, 2016
Albany, New York

Respectfully submitted,

By: _____
John W. Dax
William F. McLaughlin
THE DAX LAW FIRM, P.C.
Attorneys for Fastrac Markets, L.L.C.
54 State Street, Suite 805
Albany, New York 12207
Email: jdax@daxlawfirm.com

³ See e.g., Cases 05-E-0264 and 05-E-0265, *Order Amending Certificates* (2005 N.Y. PUC Lexis 214); Case 88-E-050, *Order Denying Requests*, (1988 N.Y. PUC Lexis 60).


STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

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In the Matter of :
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Verified Petition of Fastrac Markets, L.L.C. for a : Case 16-E-____
Declaratory Ruling That Its Facility Located in the City :
of Rochester is Entitled to Receive Electric Service :
From Rochester Gas and Electric Corporation. :
:
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VERIFICATION

STATE OF NEW YORK)
) SS:
COUNTY OF ONEIDA)

I, TOMMY V. WADDLE, being duly sworn, deposes and says: I am the President and Chief Executive Officer of FASTERAC MARKETS, L.L.C., a New York limited liability company, the petitioner herein; I have read the foregoing Verified Petition and know the facts presented therein with respect to FASTERAC MARKETS, L.L.C., to be true and accurate based on the information and records available to me as the President of the company.



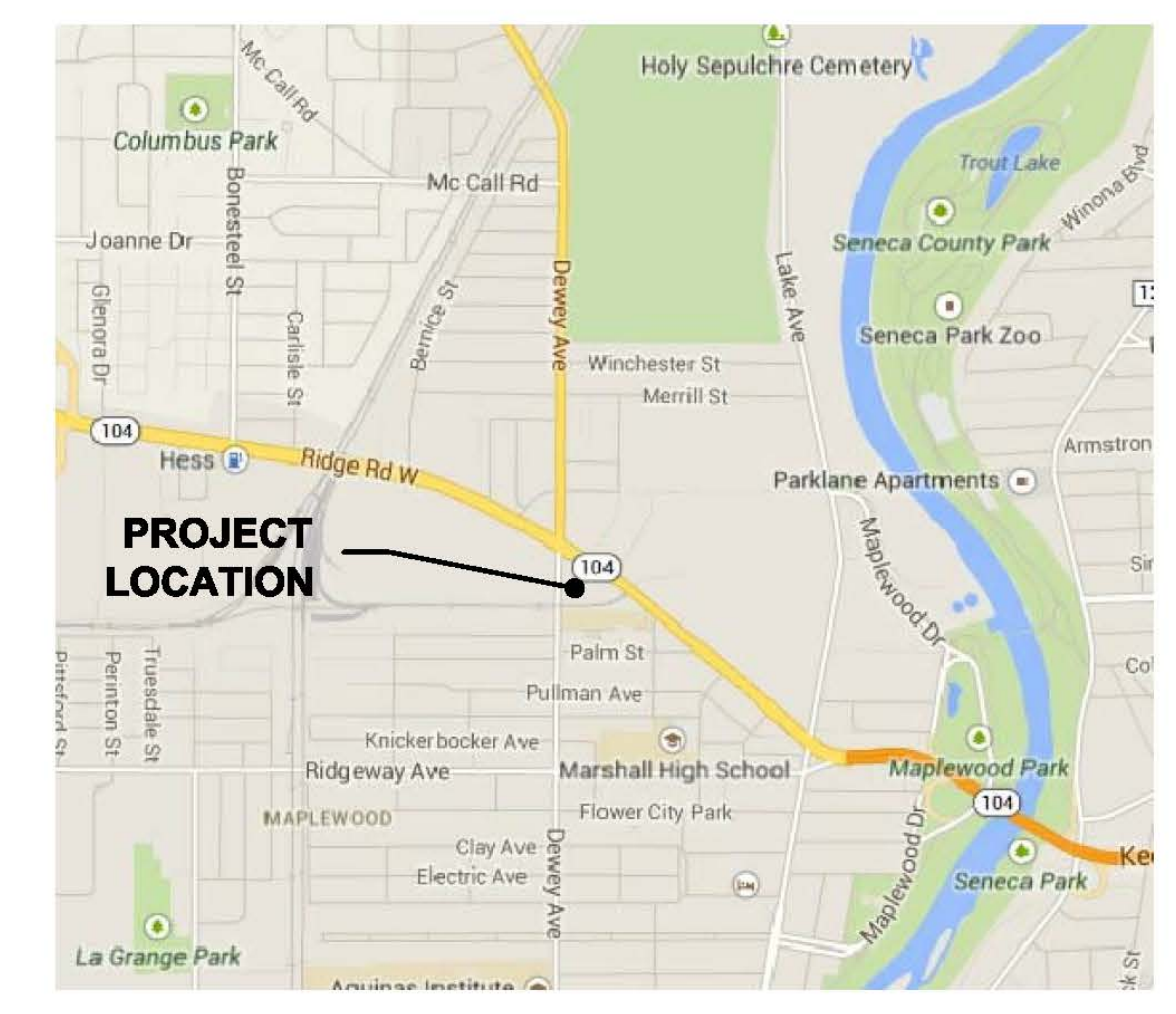
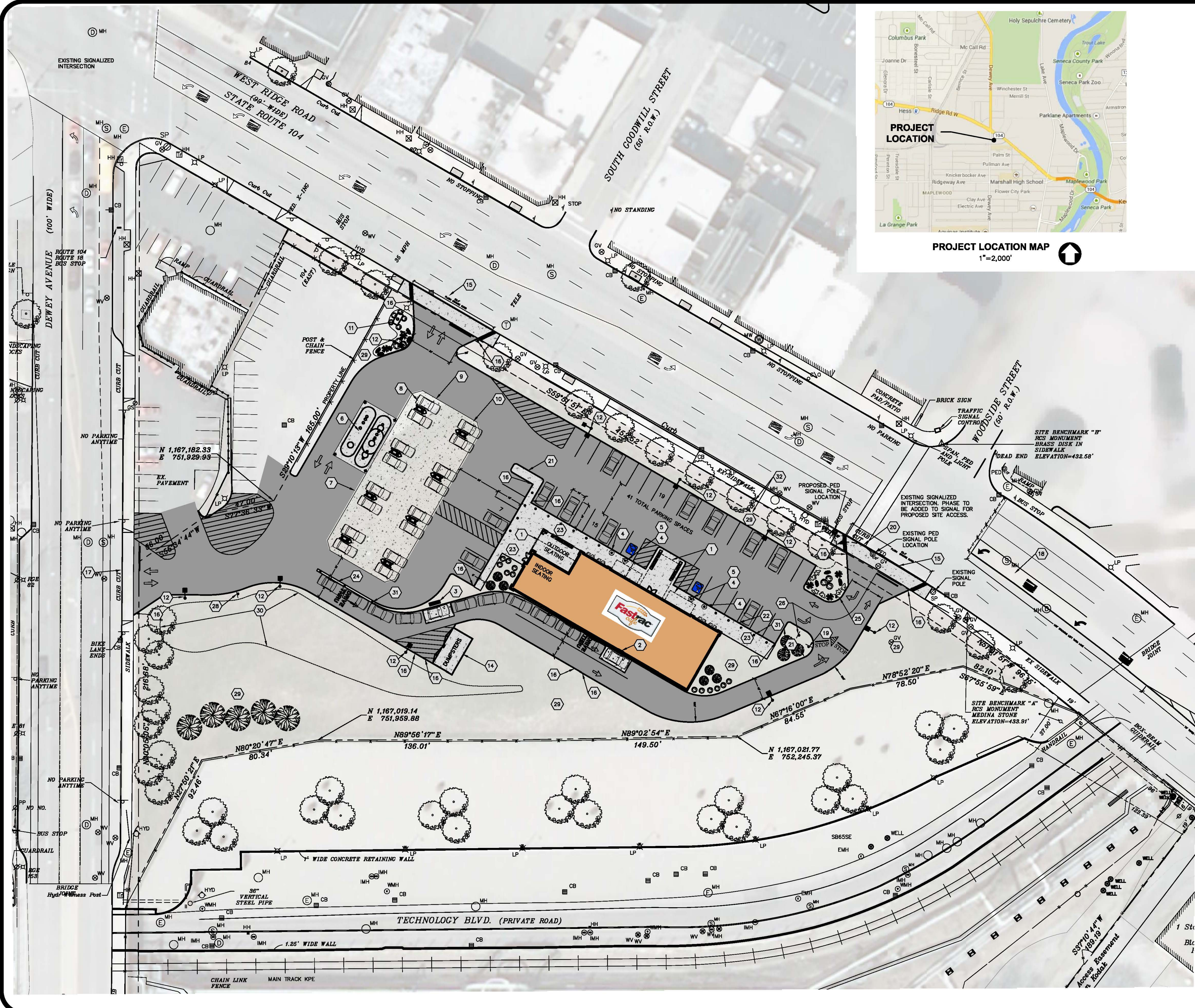
TOMMY V. WADDLE

Sworn to before me this
27 day of January, 2016



Notary Public

SHARON J. BARKER
Notary Public in the State of New York
Qualified in Herkimer County 01PA6065882
My Commission Expires Oct. 28, 2017



PROJECT LOCATION MAP
1"=2,000'

LAYOUT PLAN KEYED NOTES:

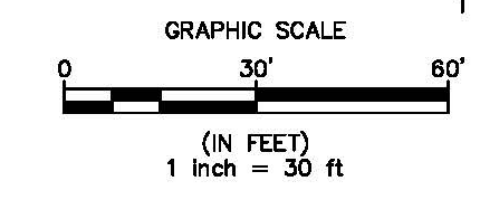
- 1 BUILDING CANOPY
- 2 DRIVE-THRU WINDOW
- 3 MENU/ORDER BOARD
- 4 SPHERICAL CONCRETE BOLLARD SEE DETAIL 9/C-10
- 5 ACCESSIBLE SIGN SEE DETAIL 9/C-10
- 6 CONCRETE PAD OVER UNDERGROUND STORAGE TANKS SEE DETAIL SHEETS PS-2 AND PS-3
- 7 CONCRETE PAD UNDER FUEL CANOPY DETAIL SHEETS PS-2 AND PS-3
- 8 FUEL CANOPY SEE ARCHITECTURAL PLANS
- 9 FUEL DISPENSER
- 10 FUEL CANOPY COLUMN SEE ARCHITECTURAL PLANS
- 11 MONUMENT SIGN SEE DETAIL 4/C-8
- 12 LIGHT POLE BASE SEE DETAIL 12/C-10
- 13 PREVIEW BOARD
- 14 DUMPSTER PAD AND TRASH ENCLOSURE SEE DETAIL 4/C-10
- 15 NEW FULL ACCESS CURB CUT ON WEST RIDGE ROAD SEE DOT PERMIT PLANS
- 16 TRANSITION FROM 6" REVEAL TO FLUSH CURB
- 17 EXISTING CURB CUT TO REMAIN ON DEWEY AVENUE
- 18 NEW DEDICATED LEFT TURN LANE SEE DOT PERMIT PLANS
- 19 DO NOT ENTER SIGN SEE DETAIL 11/C-10
- 20 RELOCATE PEDESTRIAN SIGNAL POLE SEE DOT PERMIT PLANS
- 21 CONCRETE CURB 6 INCH REVEAL SEE DETAIL 3/C-10
- 22 CONCRETE CURB FLUSH ALONG FRONT OF BUILDING
- 23 CONCRETE SIDEWALK SEE DETAIL 7/C-10
- 24 MOUNTABLE CONCRETE CURB SEE DETAIL 3/C-10
- 25 RIGHT TURN ONLY SIGN
- 26 LEFT TURN ONLY SIGN
- 27 DRIVE-THRU TURN LEFT
- 28 DRIVE-THRU TURN RIGHT
- 29 GRASS SEE SHEET C-2 FOR SEED MIX, TOPSOIL, AND MULCH SPECIFICATIONS
- 30 STORMWATER DETENTION BASIN
- 31 4" CONCRETE FILLED STEEL BOLLARD WITH PLASTIC COVER
- 32 EXISTING 8' WIDE GRAVEL LANDSCAPE BED TO REMAIN

PROJECT SUMMARY

PROJECT SUMMARY:
CITY OF ROCHESTER
CURRENT ZONING: PD#12
PROPOSED ZONING: C-3, BUSINESS DISTRICT
PROPOSED USE:
+/- 6,000 SF CONVENIENCE STORE WITH CAFE,
DRIVE-THRU, OUTDOOR SEATING, AND GASOLINE SALES.

ZONING	REQUIRED	PROVIDED
MIN. LOT FRONTAGE:	N/A	
MIN. LOT AREA:	N/A	±2.46 AC
MAX. BUILDING COVERAGE:	70%	±5%
MAX. LOT COVERAGE:	80%	±52%
BUILDING SIZE		
MAX HEIGHT:	N/A	
BUILDING SETBACK		
MIN. FRONT:	N/A	
MIN. REAR:	0	
MIN. SIDE:	0	
PARKING SUMMARY:		
STALL SIZE:	10'X18'	
SPACES:	41 SPACES	

THIS PLAN IS NOT FOR CONSTRUCTION UNTIL SUCH TIME AS ALL AGENCIES RESPONSIBLE FOR ISSUING PERMITS FOR THE PROJECT HAVE DONE SO.



PROJECT TITLE: **PROPOSED FASTRAC MARKET**
375 WEST RIDGE ROAD
TAX ID NO. 090.26-2-14.003
CITY OF ROCHESTER
MONROE COUNTY

LAYOUT PLAN

REVISIONS	DATE	REVISION/ISSUE
3	06-16-14	REVISED PER CITY REVIEW COMMENTS
2	06-07-14	GENERAL REVISIONS
1	04-29-14	REVISED PER CITY COMMENTS

PREPARED BY:
NAPIERALA CONSULTING
PROFESSIONAL ENGINEER, P.C.
SITE • DESIGN • ENGINEERING
110 FAYETTE STREET
MANHATTAN, NEW YORK 10014
email: MNA@NAPCON.COM
PH: (315) 682-5580 FAX: (315) 682-5544

PROJECT NO. 13-1203
DATE 31 JAN 2014
SCALE 1"=30'
SHEET C-5

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ALL RIGHTS RESERVED. NO PART OF THIS DOCUMENT MAY BE REPRODUCED OR TRANSMITTED IN ANY FORM OR BY ANY MEANS, ELECTRONIC OR MECHANICAL, WITHOUT THE WRITTEN PERMISSION OF NAPIERALA CONSULTING.

Camille T. Kahler

From: Craig Bennett <cbennett@recycled-energy.com>
Sent: Thursday, January 15, 2015 5:29 PM
To: Camille T. Kahler
Subject: Certificate of Public Convenience and Necessity and a few other questions

Camille,

You requested an explanation for why per the PSC Order that FastTrack is required to use RED for its electric utility service. Note that under the PSC's Order FastTrack is required to use RED for transmission (hence the need to install the wires), but FastTrack could buy the commodity (the electrons) from either RED or any other certified energy provided (RG&E, Integrys, etc.). Whether buying the electrons from a party other than RED is prudent is something FastTrack will have to evaluate after comparing the respective rates/offering.

RED-Rochester and Kodak filed a joint Petition with the PSC on February 4, 2013 requesting that Kodak's Certificates of Public Convenience and Necessity (CPCNs) authorizing Kodak to "provide services regulated under the PSL within the Eastman Park be transferred to RED". (RED Order, p. 1).

On July 28, 2004, the PSC entered an order granting CPCNs to Kodak authorizing Kodak to "provide retail electric, gas and steam service described in the body of this Order within the Kodak Park located in the City of Rochester and the Town of Greece, New York" (Kodak Order, p. 21). In describing Kodak Park, the PSC stated, "Kodak Park is Kodak's industrial and manufacturing site located within the City of Rochester and Town of Greece, covering an area roughly four miles long by one mile wide" (Kodak Order, p. 1). The PSC also stated: "Kodak's proposal for providing electric, gas, steam, and water service within Kodak Park falls within the ambit of prior, similar approvals granted in the Griffiss Order...a diminution of economic activity at the Park could adversely affect the economy of the Rochester area, while prompt approval of Kodak's plans to provide utility services will encourage full use of the Park, (Kodak Order, page 8). The PSC also ordered that Kodak allow its electric and gas customers opportunities to obtain commodity supply from Kodak's competitors, including RG&E. To the extent that any competitive commodity supplier, including RG&E, requests, Kodak will develop appropriate rates for delivery-only services, permitting competitors to make their commodity offerings to Kodak's customers within the Park. (Kodak Order, pages 15-16).

The Kodak Order authorizes the sale of regulated services within Kodak Park, a geographic area.

On May 30, 2013, the PSC entered a one Commissioner Order authorizing the transfer of gas, electric, steam and water utility facilities sited as the Eastman Business Park, from Kodak Corporation to RED-Rochester, LLC, as described in the Petition.

On June 13, 2013, the PSC entered a Confirming Order granting the Certificates of Public Convenience and Necessity to permit the operation of the gas, electric and steam facilities. In the discussion portion of the Order, the PSC stated, "RED...shows that it should be able to satisfactorily provide the services in the future within the Eastman Park to the customers located there." (Confirming Order, p.3). The PSC further stated, "The ambit of these CPCNs is limited to the provision of service within existing boundaries of the Eastman Park. If RED desires to serve additional customers outside of the Park, it must obtain an amendment to the relevant CPCN" (Confirming Order, p. 4). In discussing the non-exclusive nature of the services with regards to gas and electric commodity, the PSC stated, "RED states it will offer customers the same opportunity, albeit no customer ever requested Kodak to develop the delivery rate that would be a prerequisite for accessing alternative commodity suppliers. Like Kodak, RED need not develop the delivery rate until a request to furnish the delivery service is received." (Confirming Order, p. 4).

The PSC Order in 2004, granted to Kodak and in June 2013, transferred to RED the CPCNs which authorized the provision of regulated services within Kodak Park, with the proviso that third party suppliers could provide commodity over the distribution system within Kodak Park.

Please let me know if you have any questions.

Dick Beers is reviewing the easement docs and I hope to have them back in the AM.

I will have the RED Utility Services Agreement to you tomorrow as well.

One question for you is does anyone at FastTrack have a read on what your electrical demand will be?

Thanks,
Craig

This email and any files transmitted with it are confidential and intended solely for the use of the individual or entity to whom they are addressed. If you have received this email in error please notify the system manager. Please note that any views or opinions presented in this email are solely those of the author and do not necessarily represent those of the company.

The Dax Law Firm, P.C.

54 State Street, Suite 805
Albany, New York 12207
www.daxlawfirm.com

Telephone: (518) 432-1002
Facsimile: (518) 432-1028

John W. Dax

William F. McLaughlin*

**Also Admitted in Massachusetts & District of Columbia*

February 25, 2015

Via Electronic Mail and First Class Mail

James A. Lahtinen
Vice President Rates and Regulatory Economics
Rochester Gas and Electric Corporation
89 East Avenue
Rochester, New York 14649-0001

Re: Fastrac Markets, L.L.C.

Dear Mr. Lahtinen:

We represent Fastrac Markets, L.L.C. (Fastrac) and have been providing advice on securing electric service for its new installation at 375 West Ridge Road in Rochester. That property is located within, but on the perimeter of, the Kodak Park. Fastrac has had discussions with representatives of both Rochester Gas and Electric Corporation (RG&E) and RED-Rochester, LLC (RED-Rochester) about obtaining electric service.

As a legal matter it is my opinion Fastrac could take electric delivery service from either RED-Rochester or RG&E. In light of the fact that the property Fastrac will occupy abuts several public streets in the City of Rochester in which RG&E has existing electric lines and in light of the significant cost RED-Rochester has estimated would be incurred to extend its distribution lines to serve Fastrac, Fastrac has elected to become an electric customer of RG&E as provided for in RG&E's electric tariff. (See RG&E Schedule for Electric Service, PSC No. 19, Part II, Sections 2 and 3.) A General Service Application Form with the customer information completed is attached. We look forward to receiving the information concerning RG&E's charges and deposits from you and to completing the electric service arrangements.

From my client's prior contacts with Peter Dawes, I understand that there may be some question about whether Fastrac is obliged to take service from RED-Rochester. Based on my review of the relevant orders of the New York Public Service Commission (PSC) concerning the authorization granted, first to Eastman Kodak Company, and more recently to RED-Rochester, to supply utility services to properties in Kodak Park, it is clear that RED-Rochester does not have the exclusive authority to provide electric service, including both the sale of energy and the

James A. Lahtinen, Vice President Rates and Regulatory Economics
Rochester Gas and Electric Corporation
February 25, 2015
Page 2 of 2

provision of delivery services. This is most clearly expressed in the PSC's *Order Confirming Prior Order and Granting Certificates of Public Convenience and Necessity*, dated June 13, 2013 in PSC Case 13-M-0028 at page 5:

As a result, the [Certificates of Public Convenience and Necessity] shall be non-exclusive to the extent that customers within the Eastman Park may seek out alternative utility suppliers, including Rochester Gas and Electric Corporation (RG&E) as a provider of gas and electric delivery and other services, as permitted under the default contract option.

In any event, there is nothing in the PSC's orders authorizing RED-Rochester to serve customers in Kodak Park that implies any intention to restrict or limit RG&E's franchise obligations to serve customers who seek service from RG&E and are located within RG&E's franchised territory.

I gather that for most property owners in Kodak Park, RED-Rochester is the logical and economic choice to provide electric delivery service. But where, as in the case of Fastrac, a customer's location makes RG&E the overwhelmingly more economically advantageous provider of delivery service, the PSC orders do not limit a customer's flexibility to choose RG&E.

We look forward to hearing from RG&E concerning Fastrac's Application for service. Please contact Jason Baleno in that regard, whose contact information is included in the attached Application. You need not contact me unless you have concerns about RG&E's obligation to serve Fastrac.

Very truly yours,

THE DAX LAW FIRM, P.C.

John W. Dax

JWD:lmd

Enclosure

cc: Camille T. Kahler, Esq., Saunders Kahler, L.L.P.
Tom Waddle, Fastrac Markets, L.L.C.
Jason Baleno, Fastrac Markets, L.L.C.

PSC No: 19 - Electricity
Rochester Gas and Electric Corporation
Initial Effective Date: January 1, 2005
Issued in compliance with order in Cases 03-E-0765, 02-E-0198, and 03-G-0766 dated May 20, 2004

Leaf No. 107
Revision: 1
Superseding Revision: 0

GENERAL INFORMATION

7. FORMS (Cont'd)

B. GENERAL SERVICE APPLICATION FORM

NON-RESIDENTIAL SERVICE AGREEMENT

INSTRUCTIONS: Applicants, complete the following sections of this form: Information, Service Location, Service Type Requested, and Signature sections. This information is required as a condition of obtaining service from RG&E. If this application is for more than one service location, then please provide a separate signed list of additional service addresses requested.

INFORMATION (Completed by Applicant)				
Account Name: FASTRAC MARKETS			Suite / Store #: 296	
Service Address: 375 WEST RIDGE ROAD		City: ROCHESTER	State: NY	Zip: 14615
Mailing Address: 6500 NEW VENTURE GEAR DR.		City: E. SYRACUSE	State: NY	Zip: 13057
Day Phone #: 315-552-6800	Evening Phone #	Fax #: 315-552-6801		
Address of Prior / Existing RG&E Service Using Same Account Name: 672 E. MAIN ST		City: ROCHESTER	State: NY	Zip: 14605
Primary Contact Person: SHARON PARKER		Phone # (if different):		
For Partnerships & DBAs, enclose a copy of the filed DBA or Partnership papers: <input type="checkbox"/> Required <input type="checkbox"/> Not required (on file)				
<input type="checkbox"/> Individual <input checked="" type="checkbox"/> Partnership - LLC <input type="checkbox"/> Corporation <input type="checkbox"/> DBA (specify name)				
Name:		Social Security #:	Employer Tax ID #: 161540724	
Home Address:				
Name:		Social Security #:	Employer Tax ID #:	
Home Address:				
For Corporations, enclose a copy of the certificate of incorporation, which lists principal officers: <input type="checkbox"/> Required <input type="checkbox"/> Not required (on file)				
Employer Tax ID #:				
Tax Exempt Status: <input type="checkbox"/> Taxable <input type="checkbox"/> Exempt <input type="checkbox"/> Partial Exempt. If partial or exempt, enclose a copy of exemption certificate				
SERVICE LOCATION INFORMATION (Completed by Applicant)			Additional Protections may be available under Part 11 of 16 NYCRR for residential uses.	
If residential, specify the number of residential units: N/A				
Do you control access to the meter? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No. List name, address, and phone number of the person controlling access below:				
Name:		Phone:		
Address:		City:	State:	Zip:
Will this service be used exclusively for religious purposes by a religious corporation or association? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No				
Will this service be used by a post or hall owned or leased by a not-for-profit corporation that is a veterans' organization? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No				
Will this service be used exclusively by a not-for-profit corporation in a community residence for the mentally disabled? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No				
SERVICE TYPE REQUESTED (Completed by Applicant)				
The questions that follow are designed to assist RG&E in placing you on the proper and most beneficial service classification. The information you supply will be used to determine your service classification. A complete description of all service classifications and their terms are listed in RG&E's Gas and Electric Tariffs, which are available for inspection at any RG&E office as well as on RG&E's website (www.rge.com).				
<input checked="" type="checkbox"/>	ELECTRIC SERVICE Will consumption be similar to prior customer?	Requested Effective Date: _____ <input type="checkbox"/> Yes, same service classification as prior. <input checked="" type="checkbox"/> No. Has Electric Service Request Form been completed? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No Contact RG&E Marketing and Sales Department at (585) 771-6040 for an Electric Service Request Form.		
<input type="checkbox"/>	AREA LIGHTING			
<input checked="" type="checkbox"/>	GAS SERVICE Will consumption be similar to prior customer?	Requested Effective Date: _____ <input type="checkbox"/> Yes, same service classification as prior. <input checked="" type="checkbox"/> No. Has Gas Service Request Form been completed? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No Contact RG&E Marketing and Sales Department at (585) 771-6040 for Gas Service Request Form.		
<input type="checkbox"/>	OTHER SERVICE	Requested Effective Date: _____		
	<input type="checkbox"/> Facility Relocation (Describe) _____			
	<input type="checkbox"/> Disconnect / Reconnect			
	<input type="checkbox"/> Other (specify) _____			

ISSUED BY: James A. Lahtinen, Vice President Rates and Regulatory Economics, Rochester, New York

PSC No: 19 - Electricity
Rochester Gas and Electric Corporation
Initial Effective Date: January 1, 2010

Leaf No. 108
Revision: 2
Superseding Revision: 1

GENERAL INFORMATION

7. FORMS (Cont'd)

B. GENERAL SERVICE APPLICATION FORM

NON-RESIDENTIAL SERVICE AGREEMENT Page 2

CONNECTION / OTHER CHARGES (Completed by RG&E)

Electric Connection Charge	\$ _____	
Gas Connection Charge	\$ _____	
Other Service Charge	\$ _____	
Sales Tax @ <u> </u> 0 <u> </u> %	\$ _____	
TOTAL	\$ _____	Attach payment with application

Remarks _____

DEPOSIT REQUEST (Completed by RG&E)

INSTRUCTIONS: RG&E completes this section to determine deposit requirement.

Is a deposit required? Yes, in the amount \$ _____ Attach payment with this application.
 No, (Specify reason) _____

RG&E will also accept deposit alternatives, such as a bank irrevocable letter of credit or a surety bond. The terms and conditions upon which consumer's deposits are collected, held, and refunded are explained in RG&E's Tariffs and a brochure explaining customer's rights and responsibilities. (See attachment for RG&E's Deposit Policy)

SERVICE CLASSIFICATION (Completed by RG&E)

Service will be billed under the Account(s) and Service Classification (SC) Number(s) listed below. If different service addresses, then complete and sign the attached Blanket Addendum.

Service Type = (E)lectric or (G)as Class = Service Classification (e.g., 1, 2, 3, etc.) Supply Service = (R) RG&E Supply, or (E)ESCO Supply


Effective Date	Account #	Service Address	Meter #	Service Type/Class	Supply Service (R or E)

REMARKS / SPECIAL CONDITIONS (Completed by RG&E)

SIGNATURE (Completed by Applicant)

APPLICANT: I have accurately completed this application to the best of my knowledge and ability. I agree to comply with all the applicable provisions of RG&E's Tariffs and agree to pay for the charges under the appropriate service classification(s) as determined by this application.

By signing below, I am accepting responsibility for all usage on the meter assigned to the stated address. For multi-metered buildings, RG&E recommends that I verify the accuracy of the wiring connected to my electric meter through a licensed electrician; and/or that I verify the accuracy of the gas fuel line piping through a qualified heating/plumbing contractor.

Applicant Name (Print) **Tom Waddle, President** Date _____
 Applicant Title _____
 Applicant Signature  _____
 RG&E Name (Print) _____ Date _____
 RG&E Signature _____

ISSUED BY: James A. Lahtinen, Vice President Rates and Regulatory Economics, Rochester, New York

The Dax Law Firm, P.C.

54 State Street, Suite 805
Albany, New York 12207
www.daxlawfirm.com

Telephone: (518) 432-1002
Facsimile: (518) 432-1028

John W. Dax

William F. McLaughlin*

**Also Admitted in Massachusetts & District of Columbia*

February 25, 2015

Via Electronic Mail cbennett@recycled-energy.com
and U.S. Postal Service First Class Mail

Craig E. Bennett
Vice President and Associate General Counsel
Recycled Energy Development LLC
640 Quail Ridge Drive
Westmont, Illinois 60559

Re: Fastrac Markets, L.L.C.

Dear Mr. Bennett:

I have been asked by Fastrac Markets, L.L.C. (Fastrac), to assist it in securing electric service for the new facility to be located at 375 West Ridge Road in the City of Rochester. In that connection I have reviewed your email of January 15, 2015 to Camille Kahler as well as the New York Public Service Commission's orders issued to Eastman Kodak Company and to RED-Rochester, LLC concerning the provision of utility services in Kodak Park and relevant portions of Rochester Gas & Electric Corporation's (RG&E) electric service tariff.

I agree with your email that RED-Rochester was granted the authority to provide utility services within Kodak Park. I do not agree that RED-Rochester's authority is exclusive, *i.e.*, that a property owner within Kodak Park is limited to taking electric delivery service only from RED-Rochester, at least in the circumstances present here. Those circumstances include that: the Fastrac property abuts public streets in the City of Rochester in which RG&E has utility lines; the Fastrac property is on the edge of Kodak Park; and there is significant disparity in the costs that would be incurred to connect to the systems of RED-Rochester and RG&E.

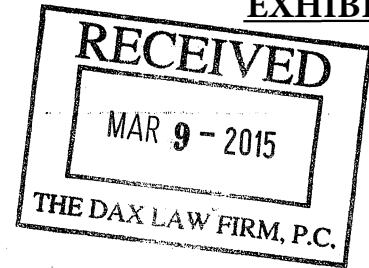
I am enclosing a copy of a letter I have sent to RG&E that further explains my conclusions. Feel free to call me to discuss this matter.

Very truly yours,


John W. Dax

JWD:lmd
Enclosure

cc: Camille T. Kahler, Esq., Saunders Kahler, L.L.P.
Tom Waddle, Fastrac Markets, L.L.C.
Jason Baleno, Fastrac Markets, L.L.C.



**IBERDROLA
USA**

Noelle M. Kinsch
Deputy General Counsel

March 6, 2015

VIA E-MAIL AND FIRST CLASS MAIL

JDax@DaxLawFirm.com

John W. Dax
The Dax Law Firm, P.C.
54 State Street, Suite 805
Albany, NY 12207

Re: Fastrac Request for Electric Service at 375 West Ridge Road

Dear Mr. Dax:

Thank you for contacting Rochester Gas and Electric Corporation ("RG&E") regarding electric service for Fastrac Markets, L.L.C. ("Fastrac") at 375 West Ridge Road in Rochester, NY, 14615 ("375 West Ridge Road"). As you know, Recycled Energy Development, LLC ("RED") disputes RG&E's right to provide service to Fastrac at 375 West Ridge Road. Before RG&E can act on Fastrac's application, the dispute between RED and Fastrac must be resolved.

We understand that Fastrac is discussing this matter with RED. We also understand that Department of Public Service Staff Counsel, Len Van Ryn, is aware of the dispute. Please let us know when Fastrac and RED have reached a resolution.

If you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in cursive script that reads "Noelle M. Kinsch".

Noelle M. Kinsch
Deputy General Counsel

cc: Justin Atkins, Esq.

One Commerce Plaza, Suite 2018, Albany, NY 12210
Telephone 518.434.4977, Fax 518.434.5989



July 21, 2015

Hon. Kimberly D. Bose, Secretary
 Federal Energy Regulatory Commission
 888 First Street N.E.
 Washington, D.C. 20426

Re: *Rochester Gas and Electric Corporation*, Docket No. ER15-____-____

Dear Secretary Bose:

Pursuant to Section 205 of the Federal Power Act¹ and Part 35 of the Federal Energy Regulatory Commission's ("FERC" or "Commission") regulations,² Rochester Gas and Electric Corporation ("RG&E") hereby submits for filing an agreement (the "Borderline Service Agreement"), which provides the arrangements by which RG&E will make sales electric delivery services and possibly electric energy at distribution voltage ("Borderline Service") to RED-Rochester, LLC ("RED") at 375 West Ridge Road in Rochester, NY, 14615 ("375 West Ridge Road"). Pursuant to the attached Borderline Service Agreement, RG&E will be using its distribution system to effectuate a wholesale function because RED will be providing retail service to a third party at the point of delivery. For the reasons set forth below, RG&E respectfully requests that the Commission accept the Borderline Service Agreement effective July 22, 2015.

I. BACKGROUND AND THE AGREEMENT

RG&E is providing Borderline Service to RED at 375 West Ridge Road because RED's facilities are not readily available to provide electric service to a retail customer at the end of RG&E's distribution line. Borderline sales involve transactions that are considered sales for resale subject to the Commission's jurisdiction; however, in recognition of the character of the service provided, the Commission has adopted as the wholesale rate the retail rate approved by the applicable state commission.³ RG&E is providing Borderline Service to RED in accordance with the rates, terms and conditions set forth in Service Classification Nos. 7 or 3 of RG&E's Rate Schedule: PSC No. 19 – Schedule for Electric Service, as applicable, which is currently on file with the New York State Public Service Commission ("NYPSC Tariff"). Additionally, RED will pay RG&E for the line extension, and any related facilities, necessary to provide the

¹ 16 U.S.C. § 824d.

² 18 C.F.R. Part 35.

³ See *Mass. Elec. Co.*, 61 FERC ¶ 61,278 at 62,064 (1992).

The Honorable Kimberly D. Bose, Secretary

July 21, 2015

Page 2

Borderline Service, and any associated facility costs (including design work), as applicable, in accordance with the NYPSC Tariff provisions. Metering costs will also be charged to RED in accordance with the NYPSC Tariff. The Commission's policy is to permit the rate under a borderline sales agreement to track the rate approved by the selling utility's state commission upon notice to FERC.⁴ RG&E is providing notice through the instant filing.

II. REQUESTED EFFECTIVE DATE

Pursuant to Section 35.11 of the Commission's regulations,⁵ RG&E respectfully requests waiver of the Commission's 60-day notice requirement. Such waiver will have no adverse effect on the parties. Good cause exists to grant this request, as the Borderline Service Agreement does not change any FERC-approved rates, terms or conditions because the Borderline Services are being provided pursuant to rates, terms and conditions contained in a tariff on file with the NYPSC. Consistent with Commission precedent,⁶ RG&E requests that the Commission grant any waiver necessary for the Borderline Service Agreement to become effective on the requested effective date, July 22, 2015.

III. CONTENTS OF THE FILING

In addition to this transmittal letter, this filing contains the following:

1. A clean copy of the executed Borderline Service Agreement in PDF format for inclusion as the Tariff Record for the Commission's eTariff Viewer and for publication in eLibrary.⁷
2. List of Recipients.

IV. COMMUNICATIONS

Please direct all correspondence and communications in this proceeding to the individual indicated below:

Noelle M. Kinsch
Deputy General Counsel

⁴ See *id.*, cited in *Northwestern Wisconsin Elec. Co.*, 65 FERC ¶ 61,302 at 62,293 (1993) (stating that "consistent . . . with our decisions involving borderline agreements – where the transactions at issue are Commission-jurisdictional, but the power is provided directly to the purchasing utility's retail customers [,] [f]or borderline agreements, the Commission has adopted as the wholesale rate a state commission-approved retail rate."

⁵ 18 C.F.R. § 35.11.

⁶ See *e.g.*, *Central Vermont Pub. Serv. Comm'n*, Docket No. ER07-101-000 (Dec. 21, 2006) (delegated letter order accepting rate change adjustments for borderline sales agreements effective as requested by Central Vermont in its request for waiver of the Commission's notice requirements) and *United Power, Inc.*, 89 FERC ¶ 61,034 (1999) (granting waiver of the 60-day prior notice requirement for borderline service agreement filing).

⁷ In accordance with Order No. 714, RG&E is submitting the Borderline Service Agreement under the entire document option in searchable PDF format. *Electronic Tariff Filings*, Order No. 714, FERC Stats. & Regs. ¶ 31,276, at P 36 & n.29 (2008) (stating "[t]ariffs filed under the entire document option may be filed either in RTF or PDF.").

The Honorable Kimberly D. Bose, Secretary

July 21, 2015

Page 3

Iberdrola USA Management Corporation
99 Washington Avenue, Suite 2018
Albany, New York 12210
(518) 434-4977
noelle.kinsch@iberdrolausa.com

V. SERVICE

A List of Recipients is attached. RG&E is serving a copy of the filing to RED-Rochester, LLC at 640 Quail Ridge Drive, Westmont, IL 60559 and to the New York Public Service Commission at Empire State Plaza, Agency Building 3, Albany, NY 12223-1350.

VI. CONCLUSION

For the foregoing reasons, RG&E respectfully requests that the Commission accept the Borderline Service Agreement without modification or condition, effective July 22, 2015.

Should you have any questions, please contact the undersigned.

Respectfully Yours,

/s/ Noelle Kinsch

Noelle Kinsch

Copies: RED-Rochester, LLC
New York State Public Service Commission



LIST OF RECIPIENTS

Myra Karegianes
Senior Vice President & General Counsel
RED-Rochester, LLC
640 Quail Ridge Drive
Westmont, IL 60559
mkaregianes@recycled-energy.com

Hon. Kathleen H. Burgess
Secretary to the Commission
New York State Public Service Commission
Empire State Plaza
Agency Building 3
Albany, NY 12223-1350

**Rochester Gas and Electric Corporation
submits
RGE-RED Borderline Service Agreement
between
Rochester Gas and Electric Corporation
and
RED-Rochester, LLC**

**Tariff Program Code: E
Option Code: A
Tariff Record Title:
RGE-RED Borderline Service Agreement
to be effective July 22, 2015**



July 17, 2015

VIA E-MAIL AND FIRST CLASS MAIL

Scasten@Recycled-Energy.com
MKaregianes@Recycled-Energy.com

Sean Casten
President & CEO
RED-Rochester, LLC
640 Quail Ridge Drive
Westmont, IL 60559

Re: Electric Service at 375 West Ridge Road

Dear Mr. Casten:

Rochester Gas and Electric Corporation ("RG&E") and RED-Rochester, LLC ("RED," and together with RG&E, the "Companies") have made arrangements for the sale of electric delivery services and possibly electric energy services at distribution voltage by RG&E to RED at 375 West Ridge Road in Rochester, NY, 14615 ("375 West Ridge Road") ("Borderline Service"). The Borderline Service is being provided by RG&E for the convenience of RED given RG&E's electricity delivery infrastructure is closer to the delivery points identified in Schedule A than RED's and utilizing RG&E's electricity delivery infrastructure avoids significant delivery connection costs that would be passed on to each delivery point customer. Accordingly, this agreement formalizes the terms and conditions of such Borderline Service (the "Agreement").

RG&E agrees to provide present and future Borderline Service as requested by RED at agreed upon delivery points set forth in Schedule A of this Agreement in accordance with the following terms and conditions:

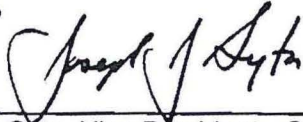
- (1) RG&E shall provide Borderline Service at 375 West Ridge Road, and RED shall pay RG&E for such service in accordance with the rates, terms and conditions set forth in Service Classification No. 7 or 3 of RG&E's Rate Schedule: PSC. No. 19 – Schedule for Electric Service as applicable, which is currently on file with the New York State Public Service Commission, or superseding issuances thereof ("Tariff").
- (2) RED shall pay RG&E for any line extension, and any related facilities, necessary to provide the Borderline Service, and any associated facility costs (including design work), as applicable, in accordance with RG&E's Tariff provisions. RED shall also bear, and shall pay RG&E for, any future costs associated with relocating or rearranging said facilities. RG&E will invoice RED for any such connection, relocation and/or rearrangement costs, and RED shall pay RG&E such invoiced amount within thirty (30) days of receipt of invoice.
- (3) RG&E shall furnish and maintain a meter at an appropriate point adequate to measure the

maximum demand for service and energy flow at each delivery point set forth in Schedule A of this Agreement, and associated costs for metering shall be charged to RED, in accordance with the RG&E Tariff. Billing for service rendered hereunder will be based upon metered demand and energy flow plus estimated losses over RG&E's system.

- (4) If RED desires RG&E to provide electric energy, RED shall provide RG&E with advanced written notice in accordance with the RG&E Tariff provisions. Energy may be provided by a third party supplier. RED will purchase supply from Constellation Energy Services of New York, Inc., a third party supplier.
- (5) The Companies may add or modify the delivery points set forth in Schedule A of this Agreement through mutual agreement of the Companies. Future service at other points will be governed by the applicable RG&E tariff.
- (6) Service at any delivery point may be discontinued by either party in accordance with RG&E's Tariff provisions. In the event that Borderline Service at any delivery point is discontinued, and RED requests that the electricity delivery infrastructure at such delivery point be removed or RG&E determines that as a matter of public safety there is a need to remove the electricity delivery infrastructure to said delivery point, RED shall bear, and shall pay RG&E for, the cost of removal, minus the amounts received through salvage and insurance, of the facilities used to provide Borderline Service at the delivery point. RG&E will invoice RED for any such removal costs, and RED shall pay RG&E such invoiced amount within thirty (30) days of receipt of invoice.
- (7) This Agreement shall be effective on the date on which the Agreement is executed by the Companies subject to acceptance by the Federal Energy Regulatory Commission ("Commission") or if filed unexecuted, upon the effective date specified by the Commission and shall continue in full force and effect until Borderline Service to all delivery points under this Agreement has been discontinued in accordance with the terms of this Agreement.
- (8) RG&E will provide continuous and reliable service hereunder in accordance with the Tariff.
- (9) This Agreement (as well as any claim or controversy arising out of or relating to this Agreement) will be governed by and construed in accordance with the laws of the State of New York, without regard to the conflicts of laws rules thereof that would otherwise require the laws of another jurisdiction to apply. All complaints, suits and any other disputes not otherwise settled by the parties arising out of or related to this Agreement shall be filed first with the Federal Energy Regulatory Commission.
- (10) The Companies may by mutual agreement amend this Agreement by a written instrument duly executed by the Companies. Such amendment will become effective and a part of this Agreement upon satisfaction of applicable law.

If the foregoing is satisfactory to RED, please execute the acceptance below. This letter, including your acceptance, will constitute an agreement between RG&E and RED regarding Borderline Service at the delivery points set forth in Schedule A of this Agreement.

Sincerely,



Joseph J. Syta, Vice President - Controller & Treasurer

cc: Noelle M. Kinsch, Deputy General Counsel

ACCEPTED: Rochester Gas and Electric Corporation

Signed: 

Printed: Joseph J. Syta

Title: VP, Controller & Treasurer

Date: 7/17/15

Signed: 

Printed: MARK O. MARINI

Title: DIRECTOR-REGULATORY

Date: JULY 17, 2015

ACCEPTED: RED-Rochester, LLC

Signed: 

Printed: SEAN CASTEN

Title: PRESIDENT & CEO

Date: JULY 20, 2015

Schedule A – Delivery Points

375 West Ridge Road
Rochester, NY, 14615

FERC rendition of the electronically filed tariff records in Docket No. ER15-02234-000

Filing Data:

CID: C000617

Filing Title: RGE-RED Borderline Service Agreement

Company Filing Identifier: 610

Type of Filing Code: 10

Associated Filing Identifier:

Tariff Title: RG&E Agreements

Tariff ID: 735

Payment Confirmation:

Suspension Motion:

Tariff Record Data:

Record Content Description, Tariff Record Title, Record Version Number, Option Code:

RGE-RED, RGE-RED Borderline Service Agreement, 0.0.0, A

Record Narrative Name:

Tariff Record ID: 2

Tariff Record Collation Value: 1100000 Tariff Record Parent Identifier: 0

Proposed Date: 2015-07-22

Priority Order: 500

Record Change Type: NEW

Record Content Type: 2

Associated Filing Identifier:

This is a PDF section and we cannot render PDF in a RTF document.

Document Content(s)

610-36fba2e9-e141-49ac-9e3a-2744bc490416.PDF.....1-4

610-66d8eb57-b5f1-453f-a5d5-68670dfe183e.PDF.....5-9

FERC GENERATED TARIFF FILING.RTF.....10-10

**EASTMAN BUSINESS PARK
UTILITY SERVICES AGREEMENT**

THIS UTILITY SERVICES AGREEMENT, (this Agreement) dated as of this [REDACTED] day of May, 2015 (“Contract Date”) is entered into by and between:

RED-ROCHESTER, LLC, a New York limited liability company having offices at 1200 Ridgeway Ave, Suite 2121, Rochester, New York 14615 (herein “**SUPPLIER**”);

And

[REDACTED], a [REDACTED] having offices at [REDACTED] (“**CUSTOMER**”).

WHEREAS, SUPPLIER provides certain Utility Services (as defined below) in the EBP Utility Services Territory; and

WHEREAS, SUPPLIER is authorized by order of the Public Service Commission of the State of New York (“**Public Service Commission**”) in Case 13-M-0028, effective May 30, 2013 together with the Confirming Order entered on June 13, 2013 (collectively, the “PSC Order”) to provide Services to the “EBP Utility Services Territory” (as defined below); and

WHEREAS, SUPPLIER and Rochester Gas and Electric Corporation (RG&E) have made arrangements for the sale of natural gas distribution service and electric distribution service by RG&E to SUPPLIER for delivery at CUSTOMER’s place of business at 375 West Ridge Road in Rochester, New York 14615 (collectively, the “**Services**”) pursuant to a borderline agreement (the “**Borderline Agreement**”); and

WHEREAS, SUPPLIER shall make arrangements with Constellation [CONFIRM LEGAL ENTITT] for the sale of electric energy and with UGI Utilities, Inc. [CONFIRM LEGAL ENTITY] for the sale of natural gas commodity (or successor companies as SUPPLIER may elect from time-to-time); and

WHEREAS, CUSTOMER owns property located within the EBP Utility Services Territory; and

WHEREAS, CUSTOMER acknowledges it has been advised by SUPPLIER that CUSTOMER has certain rights to acquire Regulated Services from providers other than SUPPLIER; and

WHEREAS, CUSTOMER desires to purchase the Services from SUPPLIER; and

WHEREAS, SUPPLIER desires to sell the Services to CUSTOMER; and

WHEREAS, the Parties desire to set forth the terms and conditions that will apply to SUPPLIER’s sale of the Services to CUSTOMER under this Agreement;

NOW THEREFORE, in consideration of the foregoing and the mutual covenants and agreements contained herein, the Parties hereby agree as follows:

ARTICLE I — DEFINITIONS

- 1.1 “**Affected Party**” means a Party claiming that a Force Majeure Event has occurred and affects such Party’s ability to perform its obligations under this Agreement.
- 1.2 “**Agency**” has the meaning given to that term in **Section Error! Reference source not found.**
- 1.3 “**Agreement**” has the meaning given to that term in the preamble.
- 1.4 “**Applicable Laws**” means all statutes, laws, ordinances, regulations, rules, licenses, permits, decrees, directives and other requirements.
- 1.5 “**Applicable Requirements**” has the meaning given to that term in **Section Error! Reference source not found.**
- 1.6 “**Asset Purchase Agreement**” means the Asset Purchase Agreement dated December 21, 2012 between SUPPLIER and Eastman Kodak Company.
- 1.7 “**Billing Month**” means the period commencing at the time on the day the Meters are read in one month and terminating at the time on the day the Meters are read in the following month.
- 1.8 “**Blanket Amendment**” has the meaning given to that term in **Section 14.4.**
- 1.9 “**Building**” means a building located in the EBPUS T and listed on **SCHEDULE A** attached hereto as a location to which one or more Services are provided or any new building to which SUPPLIER provides services pursuant to **Section 4.1.**
- 1.10 “**Compliance Date:** means December 31, 2016; provided, (i) if as of any time from or after the date that the MACT Rules are effective but are not stayed, the date by which the Facilities and their operation must comply with the MACT Rules is before or after December 31, 2016, after giving effect to any extension thereof to which RED-Rochester is legally entitled at such time (whether by the terms of the MACT Rules or a binding DEC commitment), the Compliance Date shall be such earlier or later date, respectively, and (ii) the Compliance Date may be extended by Park Owner (as defined in the Utility Rights Agreement) in its sole discretion.
- 1.11 “**Confidential Information**” has the meaning given to that term in **Section 9.1.**
- 1.12 “**Conforming Contract**” means (i) this Agreement, (ii) any contract resulting from a partial assignment of this Agreement, and (iii) a contract with respect to the delivery of Services by SUPPLIER between SUPPLIER and an EBPUS T Customer where under such contract (a) the EBPUS T Customer participates in the quarterly cash flow sharing as described in **Section 4** of **SCHEDULE C.**
- 1.13 “**Contract Date**” has the meaning given to that term in the Preamble.

1.14 “Control Center” means SUPPLIER’s 24 hour control room that can currently be reached at telephone number (585) 327-2022, which number may be changed by SUPPLIER from time to time by giving written notice of the new number to CUSTOMER.

1.15 “Coordination Committee” has the meaning given to that term in **Section 4.2**.

1.16 “Covered Real Property” means (i) the Permanent Easement Area (as defined in the Asset Purchase Agreement) and that portion of Blanket Utility Easement Area (as defined in the Asset Purchase Agreement) (a) on which Facilities are located as of the Effective Time, or (b) adjacent to the land described in clause (a) and reasonably required to be accessed by SUPPLIER to operate, maintain, repair or replace the Facilities as they exist as of the Effective Time, and (ii) any land required to be accessed by SUPPLIER in connection with the construction or installation of any New or Modified Facilities, including the surface and subsurface elements of such properties and the soils and groundwater present at the Covered Real Property, and any references to items “on the Covered Real Property” shall include all items at, in, on, upon, over, across, under and within the Covered Real Property.

1.17 “CUSTOMER” has the meaning given to that term in the preamble.

1.18 “CUSTOMER Indemnified Parties” has the meaning given to that term in **Section 13.5.1**.

1.19 “Delivery Point” means the point at which CUSTOMER takes responsibility for the receipt of Utility Services at a Service Location. Unless otherwise noted in **SCHEDULE A** attached hereto, the Delivery Point for each Utility Service provided to a particular Service Location shall be at the point of connection on CUSTOMER’s side of the applicable Meter for such Utility Service at such Service Location. Each Delivery Point provides a single Service, and for clarity, all terms that include the words “Delivery Point” refer to one specific Service unless otherwise stated.

1.20 “Eastman Kodak Company” means Eastman Kodak Company, a New Jersey corporation with offices at 343 State Street, Rochester, New York 14650.

1.21 “EBP Utility Service Territory” or “**EBPUST**” means the manufacturing and industrial park to which SUPPLIER is authorized by the PSC Order to provide electric, steam, natural gas and potable water commodity and distribution services, which is located in the Town of Greece and the City of Rochester, New York, and is more particularly depicted on a map that was filed with the Public Service Commission in Case 04-M-0388.

1.22 “EBPUST Customer” means any owner or tenant of property, other than SUPPLIER in their capacity as a utility provider, within the EBPUST to whom SUPPLIER provides Services, whether or not such owner or tenant is a Participating Customer.

1.23 “Effective Date” shall mean the Closing Date as such term is defined in the Asset Purchase Agreement.

1.24 “Effective Time” has the meaning given that term in the Asset Purchase Agreement.

Date.

1.25 “Environment” means all soil, real property, air, water (including surface waters, streams, ponds, drainage basins and wetlands), groundwater, water body sediments, drinking water supply, stream sediments or land, including land surface or subsurface strata, including all fish, plant, wildlife, and other biota and any other environmental medium or natural resource.

1.26 “Environmental Disturbance” means any planned construction or maintenance activity by SUPPLIER that has the potential to result in an environmental liability or require Remediation.

1.27 “Environmental Laws” means all Applicable Laws regarding pollution or protection of the Environment, public health, the conservation and management of land, natural resources and wildlife or human health or the Occupational Safety and Health Act (only as it relates to Hazardous Substances), including Applicable Laws regarding Releases or threatened Releases of Hazardous Substances or otherwise relating to the manufacture, processing, distribution, use, treatment, storage, Release, transport, disposal or handling of Hazardous Substances. “Environmental Laws” include the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. §§ 9601 et seq.), the Hazardous Materials Transportation Act (49 U.S.C. §§ 1801 et seq.), the Resource Conservation and Recovery Act (42 U.S.C. §§ 6901 et seq.) (“RCRA”), the Federal Water Pollution Control Act (33 U.S.C. §§ 1251 et seq.), the Clean Air Act (42 U.S.C. §§ 7401 et seq.), the Toxic Substances Control Act (15 U.S.C. §§ 2601 et seq.), the Oil Pollution Act (33 U.S.C. §§ 2701 et seq.), the Emergency Planning and Community Right-to-Know Act (42 U.S.C. §§ 11001 et seq.), and the Occupational Safety and Health Act (29 U.S.C. §§ 651 et seq.) (only as it relates to Hazardous Substances).

1.28 “Extended Force Majeure Event” has the meaning given to that term in **Section 14.9.7.**

1.29 “Force Majeure Event” means any event or circumstance that is unforeseeable, is beyond the reasonable control of the Affected Party, and prevents the Affected Party from performing its obligations under this Agreement, including, to the extent they satisfy such standard, the following: acts of God, acts of the public enemy, wars, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, volcanoes, storms, floods, civil disturbances, sabotage and strikes, lockouts, labor disturbances, any interruption in the quantity or quality of natural gas or electricity deliveries to SUPPLIER that compromises SUPPLIER’s ability to fulfill its obligations under this Agreement, or any Shortfall caused by the act or failure to act of any EBPUS Customer.

1.30 “Governmental Authority” means any United States federal, state or local governmental, regulatory or administrative authority, agency or commission or any court, tribunal, or judicial or arbitral body.

1.31 “Hazardous Substances” means (a) any petroleum, petroleum products, asbestos or asbestos-containing material, radioactive materials or substances, urea formaldehyde foam insulation, polychlorinated biphenyls, transformers or other equipment that contains

polychlorinated biphenyls; and (b) any chemicals, materials, substances or waste defined as or included in the definition of “hazardous substances,” “hazardous wastes,” “hazardous materials,” “hazardous constituents,” “restricted hazardous materials,” “extremely hazardous substances,” “toxic substances,” “contaminants,” “pollutants,” “toxic pollutants” or “hazardous air pollutants” or words of similar meaning and regulatory effect under any applicable Environmental Law.

1.32

1.33 “**MACT RULES**” means the National Emission Standards for Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units issued by the United States Environmental Protection Agency on February 16, 2012, as such standards may be amended, supplemented, replaced, stayed or implemented from time to time.

1.34 “**Meter**” means the device, and associated totalizing equipment and appurtenances, that is used to measure CUSTOMER’s consumption of one or more of the Services.

1.35 “**New or Modified Facilities**” means pipes, wires, lines, Meters, and related fixtures and facilities and any other utilities equipment (including generating equipment) that are used to produce or supply the Services to the Premises and that are constructed, installed, modified, or repaired by SUPPLIER after the date hereof.

1.36 “**Operating Dividend**” means the quarterly billing credit to be provided to Participating Customers pursuant to **Section 4.9** of **SCHEDULE C**.

1.37 “**Participating Customers**” means EBPUST Customers who are parties to Conforming Contracts.

1.38 “**Party**” or “**Parties**” means CUSTOMER or SUPPLIER individually or collectively.

1.39 “**Premises**” means each of the Service Locations, and the land owned or leased by CUSTOMER on which the Service Locations are situated, in the EBPUST; provided, the Premises shall not include any land over which SUPPLIER has a permanent easement.

1.40 “**PSC Order**” has the meaning given to that term in the Recitals.

1.41 “**RED**” means Recycled Energy Development, LLC, a Delaware limited liability company, with offices located at 640 Quail Ridge Drive, Westmont, Illinois 60559 or an affiliate thereof, excluding RED-Rochester, LLC.

1.42 “**RED Management Fee**” has the meaning given to that term in **Section 5.3.1**.

1.43 “**Regulated Services**” means electric services, steam services and delivery of potable water services and natural gas from third party suppliers.

1.44 “**Regulated Services Specifications**” has the meaning given to that term in **Section 2.2**.

1.45 “Release” means any release, deposit, migration, dispersal, spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing of a Hazardous Substance on or into the Environment or within any building, structure, facility or fixture, provided, however, that “Release” shall not include any release that is in compliance with applicable Environmental Laws or an applicable environmental permit which has been issued by a Governmental Authority.

1.46 “Remediation” means action of any kind required by any Applicable Law or order of a Governmental Authority to address a Release, the threat of a Release or the presence of Hazardous Substances at the Covered Real Property or at an off-site location as a result of migration from the Covered Real Property including any or all of the following activities to the extent they relate to or arise from the presence of a Hazardous Substance at the Covered Real Property or such off-site location: (a) monitoring, investigation, assessment, treatment, cleanup, containment, removal, mitigation, response or restoration work; (b) obtaining any permits, consents, approvals or authorizations of any Governmental Authority necessary to conduct any such activity; (c) preparing and implementing any plans or studies for any such activity; (d) obtaining a written notice from a Governmental Authority with jurisdiction over the Covered Real Property or such off-site location under Environmental Law that no additional work is required by such Governmental Authority; (e) the use, implementation, application, installation, operation or maintenance of remedial action on the Covered Real Property or such off-site location, remedial technologies applied to the surface or subsurface soils, excavation and off-site treatment or disposal of soils, systems for long term treatment of surface water or ground water, engineering controls or institutional controls; and (f) any other activities required under Applicable Law to address the presence or Release of Hazardous Substances at the Covered Real Property or such off-site location.

1.47 “Remediation Costs” means reasonable out-of-pocket costs incurred by SUPPLIER associated with any requirement to test, manage or conduct Remediation at/on the Covered Real Property which arises from any disturbance after the Effective Time of any soil or other environmental condition existing at the Effective Time to the extent that (i) SUPPLIER is not obligated to bear such costs pursuant to **Section 5.9(b)(iv) or (vi)** of the Asset Purchase Agreement, and (ii) such costs exceed any insurance proceeds to which SUPPLIER is entitled with respect to such activities or Remediation.

1.48 “Remediation Allocation Percentage” means, with respect to each Participating Customer for Remediation Costs incurred in any Billing Month, the percentage obtained by dividing (i) the total amounts billed to such Participating Customer before taxes for the immediately preceding three Billing Months, excluding any amounts billed pursuant to **Section 4.1**, by (ii) the total amounts billed to all Participating Customers before taxes for the immediately preceding three Billing Months, excluding any amounts billed pursuant to **Section 4.1** or any corresponding provision of any Conforming Contract **“Service Location”** means a Building or Stand-Alone Service Location.

1.49 “Services” means Utility Services and Sewer Services.

1.50 “Stand-Alone Service Location” means a location in the EBPUST and listed on **SCHEDULE A** attached hereto as a “Stand-Alone Service Location” to which one or more Utility Services are provided.

1.51 “SUPPLIER” has the meaning given to that term in the preamble.

1.52 “SUPPLIER EHS” means SUPPLIER’s Environmental Health and Safety Organization at the following address: 1200 Ridgeway Avenue, Suite 2121, Rochester, New York, NY 14615, Attention: Karin Klock – Phone (585) 327-2058, which address may be changed by SUPPLIER from time to time by giving written notice of the new address to CUSTOMER.

1.53 “SUPPLIER Indemnified Parties” has the meaning given to that term in **Section 13.5.2**.

1.54 “Term” means the term of this Agreement, consisting of the “Initial Term”, the “First Renewal Term”, the “Second Renewal Term” and any “Renewal Term”, as each of such terms are defined in **Section 11.1** hereof, subject to the rights of the Parties to terminate this Agreement set forth in **ARTICLE XI** and elsewhere herein.

1.55 “Transferred Delivery Points” has the meaning given to that term in **Section 12.2**.

1.56 “Unregulated Services” means chilled water, Industrial Water, demineralized water, high purity water, fire protection water, compressed air, nitrogen, 9°F brine, and -95°F brine.

1.57 “Unregulated Services Specifications” has the meaning given to that term in **Section 2.4**.

1.58 “Utility Rights Agreement” means the Utility Rights Agreement dated as of the Effective Date between SUPPLIER and Eastman Kodak Company, as such Utility Rights Agreement may be amended from time to time.

1.59 “Utility Services” means Regulated Services and Unregulated Services.

ARTICLE II — UTILITY SERVICES TO BE PROVIDED

2.1 Regulated Service. Except as otherwise provided in **Section 4.1** hereof, as described in **SCHEDULE B** attached hereto, CUSTOMER agrees to purchase CUSTOMER’s full requirements for Regulated Services at the Premises during the Term from SUPPLIER. Subject to the terms of this Agreement, SUPPLIER agrees to arrange for the supply and delivery CUSTOMER’s full requirements for Regulated Services at the Premises.

2.2 Regulated Services Specifications. The specifications for the Regulated Services to be provided by SUPPLIER to the Premises are set forth in **SCHEDULE D** attached hereto (the “Regulated Services Specifications”).

2.3 Unregulated Services. Except as otherwise provided in **Section 4.1.1** hereof, as described in **SCHEDULE E** attached hereto, CUSTOMER agrees to purchase CUSTOMER’s full requirements for Unregulated Services at the Premises during the Term from SUPPLIER.

SUPPLIER agrees to supply and deliver CUSTOMER's full requirements for Unregulated Services at the Premises. CUSTOMER acknowledges and agrees that Industrial Water shall not be used for drinking or food preparation purposes. CUSTOMER acknowledges that, notwithstanding any provision in this **Section 2.3** or **SCHEDULE F**, SUPPLIER's provision of any Unregulated Service is not subject to the supervision and oversight of the Public Service Commission.

2.4 Unregulated Services Specifications. The specifications for the Unregulated Services to be provided by SUPPLIER to the Premises are set forth in **SCHEDULE F** (the "**Unregulated Services Specifications**").

2.5 Delivery Points. Title to and control of the commodities represented by the Utility Services will transfer from SUPPLIER to CUSTOMER at the Delivery Point.

2.5.1 Delivery Infrastructure: CUSTOMER hereby agrees to reimburse SUPPLIER for the full costs to connect CUSTOMER's facility at 375 West Ridge Road in Rochester, New York 14615 to RG&E's electrical and natural gas delivery infrastructure and any required facilities (to include, but not be limited to design and engineering work) necessary for the safe delivery of the same. SUPPLIER shall pass on the aforementioned costs to CUSTOMER without any surcharge, markup or Overhead Charge. CUSTOMER shall, at its sole cost and expense, be responsible to maintain in good working order and repair, and consistent with the reasonable or necessary delivery requirements of SUPPLIER, all elements of the delivery infrastructure for each of the Utility Services which are located on the CUSTOMER side of the Delivery Points.

2.5.2 SUPPLIER's Right to Install New or Modified Distribution Facilities at the Premises: In the event that SUPPLIER reasonably determines (in order to accommodate operation of SUPPLIER's existing utility distribution system or to accommodate increased demands of CUSTOMER as contemplated in **Section 4.1** hereof) that it is necessary to modify the distribution system to the Premises for any Service, CUSTOMER shall enter good faith negotiations to grant to SUPPLIER any additional easement or permanent access rights and shall cooperate with SUPPLIER to make available space in the Building or elsewhere on the Premises to accommodate the necessary modifications, provided that such modifications to the distribution system do not materially adversely affect CUSTOMER's use of the Premises or the operation of CUSTOMER's business. In the case of electric service, CUSTOMER shall make available to SUPPLIER space in the Building to be reasonably agreed upon by CUSTOMER and SUPPLIER to locate a new load center, transformer or other installation if determined to be necessary by SUPPLIER.

2.6 Interruption and Restoration of Service. Electric and/or natural gas service may be interrupted or curtailed at any time by reason of, but not limited to, Force Majeure Events, accident, repairs, alterations or improvements as necessary to ensure the safety, reliability and integrity of the utility distributions systems owned and operated by RG&E. In the event there is

an interruption in the delivery of CUSTOMER's electricity and/or natural gas service, CUSTOMER shall notify SUPPLIER immediately by contact SUPPLIER's Control Room, which is manned 24/7 at (585) 327-2022. SUPPLIER shall immediately thereafter notify RG&E to request corrective action. Since SUPPLIER doesn't own or operate any of the delivery/distribution infrastructure associated with the delivery of electricity or natural gas under this Agreement, CUSTOMER's recourse for interruption of electric or natural gas service is limited to the protections RG&E makes available to all its customers under the tariffs identified in **Section 3.1** and **Section 3.2** of **SCHEDULE C** as exercised by SUPPLIER on behalf of CUSTOMER by and through SUPPLIER's Borderline Agreement with RG&E. Under no circumstances shall SUPPLIER be liable for damages of any kind (direct, indirect, special, consequential or otherwise) for interruption of electricity or natural gas services hereunder.

2.7 Use of Manufacturing Wastes. Notwithstanding anything to the contrary in this Agreement, CUSTOMER shall have the right to recover and re-use those otherwise wasted byproducts of CUSTOMER's normal manufacturing operations for any purpose, including the production of Utility Services. However, should CUSTOMER consider investments in capital projects for the purpose of such waste recovery, SUPPLIER shall be given reasonable opportunity to review and make such investment for the purpose of meeting CUSTOMER's needs and/or providing such Utility Services for the use of other Participating CUSTOMERS.

2.8 Right to Maintain Backup Supply. Notwithstanding anything to the contrary in this Agreement, CUSTOMER shall have the right to take such self-help measures as are deemed required, by CUSTOMER, so long as such measures provide Utility Services only during those periods when SUPPLIER is unable to meet CUSTOMER requirements pursuant to **Sections 2.1** and **2.3**.

2.9 The Parties acknowledge that over the Term of the Agreement, it may be possible to deploy one or more capital projects on the CUSTOMER side of the meter that would generate Utility Services at a lower cost than is provided by SUPPLIER. To the extent that such capital projects are not covered by the self-help provisions found in **Sections 2.8** and **2.9**, SUPPLIER shall be obligated to work reasonably, expeditiously, and in good faith with CUSTOMER to negotiate and enter into a contract external to this Agreement wherein SUPPLIER would provide all capital, ownership, and operation of the projects and would share 50% of the resulting savings, after capital recovery, with CUSTOMER. For the avoidance of a doubt, if SUPPLIER and CUSTOMER fail to come to a mutually acceptable agreement on this new contract, subject to the obligation to work reasonably, expeditiously, and in good faith with each other, then CUSTOMER shall not be entitled to build such capital project independent of SUPPLIER unless otherwise permitted by the provisions of **Sections 2.8, 2.9, or 14.9.7**, or unless SUPPLIER consents in writing.

ARTICLE III — SEWER SERVICES TO BE PROVIDED

[ARTICLE III INTENTIONALLY OMMITTED]

ARTICLE IV — COVENANTS RELATING TO SERVICES

4.1 Installation of New or Modified Facilities. If CUSTOMER in good faith wants to increase CUSTOMER's Contract Demand of any Service or obtain any Service at additional Delivery Point(s), CUSTOMER may request that SUPPLIER increase its contractual obligations to provide the relevant Service to the relevant existing or proposed Delivery Point(s) by submitting a written request to SUPPLIER pursuant to the notice provisions of this Agreement. Within five (5) business days after receipt of such request, SUPPLIER shall respond in writing and either (i) accept CUSTOMER's request, in which case the Contract Demand shall be immediately increased or Service shall be immediately available to the requested additional Delivery Point(s) or (ii) indicate that meeting the request may require SUPPLIER to construct, install and operate New or Modified Facilities. In the latter case, SUPPLIER will advise CUSTOMER in writing within sixty (60) days if it is technically feasible to construct, install and operate the requested New or Modified Facilities. If it is technically feasible, SUPPLIER will provide to CUSTOMER a written, good faith estimate of the costs to construct and install the New or Modified facilities, which costs will include Remediation Costs and other environmental compliance costs required by such construction and installation. Upon receipt of SUPPLIER's written estimate, if CUSTOMER determines to proceed with the construction or installation of the New or Modified Facilities, SUPPLIER and CUSTOMER shall finalize and execute a separate written and binding agreement that will provide that CUSTOMER shall pay the entire cost of such New or Modified Facilities, including related Remediation Costs and other environmental compliance costs, if any, regardless of whether such cost exceeds SUPPLIER's good faith estimate thereof, all or a portion of which costs may be subject to pre-payment by CUSTOMER, and will describe the other terms and conditions under which the New or Modified Facilities will be constructed and installed.

4.1.1 Supplemental Service. If (i) SUPPLIER determines that the construction and installation of New or Modified Facilities requested by CUSTOMER to provide an increase in Contract Demand and/or new Delivery Points are not technically feasible; or (ii) CUSTOMER has disclosed a written offer from another provider to provide and/or has disclosed projections relating to the self-generation of the Services represented by CUSTOMER's request to increase Contract Demand and/or new Delivery Points at a lower lifecycle cost than offered by SUPPLIER inclusive of likely Operating Dividends and projected costs for which CUSTOMER would be responsible pursuant to **Section 4.1**, and such disclosed offer is subject to comparable or superior standards of delivery to those found in this Agreement (to the extent provided by another provider), including but not limited to reliability standards, and SUPPLIER has been given a reasonable opportunity to match that lower cost and failed to do so, then CUSTOMER shall have the right to obtain and/or self-generate up to the quantity of such Service by which CUSTOMER requested to increase the Contract Demand and/or serve additional Delivery Points from a source other than SUPPLIER or by producing such Service itself, provided that if obtained from another source such source provides supply on terms substantially similar to those disclosed to SUPPLIER. If CUSTOMER actually contracts with another source of supply for the provision of such Service, CUSTOMER shall have the right, subject to SUPPLIER's consent, to terminate this Agreement to the extent that it relates to such Service in

its entirety. Otherwise, CUSTOMER shall have no obligation to purchase its full requirements for such Service from SUPPLIER so long as the Services used and not purchased from SUPPLIER (i) does not exceed the quantity of such Service by which CUSTOMER requested to increase the Contract Demand, or (ii) are consumed at the proposed Delivery Point(s) that are not served by SUPPLIER.

4.2 Coordination Committee. A committee (the “**Coordination Committee**”) shall be established and shall be composed of at least one representative (or a proxy) appointed by each Participating Customer who has the experience and training to be able to understand the interface between SUPPLIER and SUPPLIER’s utility infrastructure and CUSTOMER’s operations and the operational complexities of each. The Coordination Committee shall be the forum for the respective representatives to receive information about any potential changes to the system, any planned outages, updated forecasts of likely Operating Dividends, and other general information about the system. SUPPLIER will also use the Coordination Committee meetings as a forum to discuss plans to improve system reliability and efficiency and seek non-binding ideas from Participating Customers regarding such improvements. The Parties acknowledge that the Coordination Committee shall act in an advisory role only and that nothing herein shall restrict SUPPLIER from taking any specific action or require SUPPLIER to take any specific action in connection with the provision of the Services or related to the operations of its business, except that SUPPLIER shall not without approval of the Coordination Committee: (i) pay RED to provide any services not covered by the RED Management Fee (and, in such case, the Coordination Committee must approve the scope of the services to be provided and the cost thereof), (ii) adopt or amend the Load Shedding Schedule, (iii) enter into any contract to provide Services at the EBPUST other than a Conforming Contract, or (iv) undertake any investments which are primarily intended to increase the fuel or operating efficiency within the EBPUST if SUPPLIER projects that Remediation Costs related to such investment that would not be excepted from **Section 6.2** by any of **Section 6.2.1**, **6.2.2** or **6.2.3** would reasonably be greater than twenty-five percent (25%) of the total anticipated capital expenditures for such investment.

4.2.1 SUPPLIER shall, upon the reasonable request of the Coordination Committee, provide each member of the Coordination Committee with information concerning SUPPLIER’s operations, costs, fuel purchases, routine maintenance schedules, major maintenance schedules, emergency plans and measures to mitigate disruptions and improve the efficiency with which Services are provided. SUPPLIER shall periodically provide suggestions to the Coordination Committee identifying how Participating Customers can positively impact the Operating Dividend. SUPPLIER shall, at SUPPLIER’s cost, provide audited financial statements of SUPPLIER (which shall include reasonable assurance with respect to the accuracy of the billing in accordance with **Section 3.4** of **SCHEDULE C**) to the Coordination Committee on an annual basis within one hundred twenty (120) days after the end of SUPPLIER’s fiscal year. Designated representatives of the Coordination Committee or professional advisers retained by the Coordination Committee shall have the right, not more frequently than once per year, to audit the books, records and operating data of SUPPLIER used to determine the Operating Dividends or any charges or Remediation Costs billed to Participating Customers.

- 4.2.2** Subject to the express duties and obligations set forth in this Agreement, the Coordination Committee shall provide for effective cooperation and interchange of information between Participating Customers as a group and **SUPPLIER**. The establishment of the Coordination Committee and the duties, functions and responsibilities assigned to it herein shall not constitute the authority to modify any of the terms, covenants or conditions of this Agreement except as expressly provided in **Section 14.4**.
- 4.2.3** The Coordination Committee shall meet on an as needed basis, but not less than quarterly. The Coordination Committee shall adopt by-laws incorporating voting requirements providing for in **Section 4.2.4** hereof, together with other provisions, in consultation with **SUPPLIER** and institute rules and policies for the conduct of business by the Coordination Committee.
- 4.2.4** If any action taken by the Coordination Committee shall be deemed to require a vote, approval shall require a vote of the greater of a majority of the voting power of all representatives or fifteen percent more than the voting power of the representative(s) of the Participating Customer having the greatest voting power except where a greater vote is otherwise provided in this Agreement. For purposes of any action taken by the Coordination Committee, the representative (or representatives collectively) of each Participating Customer shall have voting power equal the Allocation Percentage (as defined in **SCHEDULE C**) of such Participating Customer.

ARTICLE V — CHARGES FOR SERVICES

5.1 Pricing. CUSTOMER agrees to pay SUPPLIER for the Services associated with its Delivery Points requested by CUSTOMER as provided for in **Section 4.1**. CUSTOMER acknowledges that the method of determining the charges for Services described in such **SCHEDULE C** has been negotiated at arms' length and represents the agreement of the Parties with respect to the determination of the price for the Services provided hereunder by SUPPLIER. Accordingly, CUSTOMER agrees that CUSTOMER shall not challenge, before the Public Service Commission or any court or other administrative or governmental tribunal or any arbitrator, as unfair or inappropriate the method set forth in such **SCHEDULE C** of determining the amounts to be paid by CUSTOMER for the Services. SUPPLIER agrees not to make any Non-Compliance Investment (as defined in **SCHEDULE C**) unless SUPPLIER projects in good faith that such Non-Compliance Investment will result in an increase of the Operating Dividend (as defined in **SCHEDULE C**) on a cumulative basis over the three (3) year period following the commercial operation date of the improvement funded by such Non-Compliance Investment. SUPPLIER agrees to use commercially reasonable efforts to minimize the actual, delivered price per MMBtu of all fuel purchased by SUPPLIER for use in providing the Services, taking into account safety, reliability, maintenance and backup concerns related to the amount and nature of fuel consumed and applicable regulatory requirements.

5.2 Taxes. Any and all sales taxes, utility gross receipts taxes or similar taxes or charges imposed on the delivery and/or sale of the Services or on SUPPLIER's revenues or income derived from the sale, transportation, transmission or distribution of the Services, whether

imposed by law upon SUPPLIER or CUSTOMER, shall be the responsibility of CUSTOMER; it being understood and agreed that if CUSTOMER qualifies for an exemption from sales tax, CUSTOMER shall not be liable for payment of any sales tax under this provision. Such taxes shall be paid by CUSTOMER either within twenty (20) days after invoice thereof from SUPPLIER or, if possible, directly by CUSTOMER to the appropriate taxing jurisdiction. Notwithstanding the foregoing, SUPPLIER, RED and their affiliates shall be solely responsible for any and all income taxes payable by them in connection with the delivery and/or sale of the Services or any profit therefrom.

5.3 RED Management Fee.

5.3.1 CUSTOMER acknowledges that SUPPLIER will obtain certain management services from RED, which will be paid monthly by SUPPLIER and reset at the beginning of each calendar year as an annual amount equal to one million three-hundred thousand dollars (\$1,300,000) multiplied by the Inflation Index Amount with respect to such calendar year as defined in **SCHEDULE C** (the “**RED Management Fee**”).

5.3.2 RED will provide SUPPLIER with general management, accounting services, management of the annual audit of financial records, support for human resources management, corporate information technology management, environmental health and safety management, engineering and operations review, internal legal review, insurance sourcing and management, sourcing and management of outside professional services, public affairs support, support in interfacing with governmental agencies, marketing support, investor and lender relationship management and such other general management support as required for efficient dispatch of SUPPLIER obligations. RED shall not be obligated to provide detailed engineering, outside legal advice, conduct of the annual audit or other outside professional services. In the event that RED does not provide any services required to be provided by it pursuant to this **Section 5.3.2**, RED shall reimburse SUPPLIER for any costs incurred by SUPPLIER to perform such services itself or obtain such services from a third party and such reimbursement shall not constitute “Revenues” for purposes of **SCHEDULE C**.

5.4 New or Modified Facilities. CUSTOMER shall bear the costs for construction or installation of any New or Modified Facilities requested by CUSTOMER pursuant to **Section 4.1** and approved by SUPPLIER in accordance with **Sections 1.1, 2.1, 3.1, 4.1, 5.1, 6.1, 7.1 or 8.1** of **SCHEDULE D** or **Sections 1.1, 2.1, 3.1, 4.1, 5.1, 6.1, 7.1, 8.1, 9.1, 10.1, 11.1, 12.1 or 13.1** of **SCHEDULE F** to serve CUSTOMER’s operations at the Premises. Prior to constructing, installing or operating any New or Modified Facilities requested by CUSTOMER pursuant to **Section 4.1**, CUSTOMER and SUPPLIER shall execute a separate written agreement that provides for their respective rights and obligations as described in **Section 4.1** hereof.

ARTICLE VI — REMEDIATION COSTS

6.1 Remediation Costs. Remediation Costs resulting from SUPPLIER's construction and installation of New or Modified Facilities for CUSTOMER pursuant to **Section 4.1** will be paid by CUSTOMER.

6.2 Payment of Other Remediation Costs. CUSTOMER shall pay its share of any other Remediation Costs as calculated in **Section 6.4** incurred by SUPPLIER, except for:

6.2.1 Remediation Costs paid by, or for which SUPPLIER is entitled to reimbursement from any EBPUS Customer pursuant to a provision corresponding to **Section 4.1** in a Conforming Contract or such similar provisions as may be contained in contracts of EBPUS Customers who are not Participating Customers;

6.2.2 Remediation Costs incurred in connection with the modification or expansion of SUPPLIER's facilities for the purpose, in whole or in part, of providing revenue-generating Utility Services outside the EBPUS;

6.2.3 Remediation Costs resulting from SUPPLIER's repair or maintenance activities for which SUPPLIER has been reimbursed pursuant to **Section 5.9** of the Asset Purchase Agreement; and

6.2.4 Remediation Costs incurred in connection with an investment requiring Coordination Committee approval if such approval was not obtained prior to entering into any commitment to make such investment.

6.3 Notice of Environmental Disturbance. Prior to any Environmental Disturbance on any property owned or leased by CUSTOMER, SUPPLIER shall notify CUSTOMER of the affected property to be disturbed and shall comply with any applicable soil management requirements and/or Environmental Laws in connection with activities related to such Environmental Disturbance and shall provide detailed description of such compliance to CUSTOMER before any such Environmental Disturbance.

6.4 Allocation of Remediation Costs. CUSTOMER's share of the Remediation Costs payable pursuant to **Section 6.2** shall be based upon its respective Remediation Allocation Percentage with respect to such Remediation Costs. SUPPLIER shall invoice CUSTOMER for its share of the Remediation Costs incurred as a part of normal monthly bills in the invoice for the Billing Month immediately following the Billing Month in which such Remediation Costs were incurred.

6.4.1 If SUPPLIER intends to allocate to EBPUS Customers any Remediation Costs which would otherwise be the responsibility of Kodak or its successors (whether by trust or otherwise) under **Section 6.2.3**, then prior to allocating any such cost to EBPUS Customers in accordance with this **ARTICLE VI**, SUPPLIER must (i) be able to reasonably demonstrate based on an engineering analysis that no practicable alternative exists to installing such facilities in such environmentally sensitive areas, (ii) secure the prior written consent of the Coordination Committee pursuant to **Section 4.2.4** and DEC to conduct such work and such

work is executed in accordance with the plan approved by the Coordination Committee (e.g. SUPPLIER will not exceed cost authority without Coordination Committee approval).

6.5 Limitation on Direct Liability for Remediation. Except as provided in this **ARTICLE VI**, CUSTOMER shall have no liability under this Agreement for any Remediation Costs incurred by SUPPLIER; provided, CUSTOMER acknowledges such costs may affect the amount of the Operating Dividend available.

ARTICLE VII — METERING

7.1 Metering. Consumption of each of the Utility Services by CUSTOMER shall be determined based on the measurements logged by Meters that are installed by RG&E. SUPPLIER will install, own, operate and maintain a separate Meter for each type of Utility Service that is provided to each Delivery Point. Each Meter will measure the amount of each Service delivered by SUPPLIER to the Delivery Point for that Utility Service. SUPPLIER will be responsible for reading each Meter except as provided for in **Section** Error! Reference source not found.. SUPPLIER will use commercially reasonable efforts to install accurate Meters by the end of calendar year 2014. CUSTOMER shall be deemed to have consumed Sewer Services in an amount equal to the metered amount of Industrial Water consumed by CUSTOMER.

7.2 CUSTOMER Information. SUPPLIER agrees to provide CUSTOMER with such reports as may reasonably be requested by CUSTOMER summarizing in reasonable detail CUSTOMER's consumption of Services and any relevant characteristics thereof.

ARTICLE VIII — PAYMENT

8.1 Billing Period. SUPPLIER and CUSTOMER agree that each Billing Month shall constitute a billing cycle.

8.2 Invoices. Invoices for Services rendered shall be issued after each billing cycle. Each invoice shall itemize the amount of each Service rendered during the applicable Billing Month and may not be issued prior to the end of such Billing Month. Such itemization shall reflect the fees identified in **Section 3.1** and **Section 3.2** of **SCHEDULE C** herein.

8.3 Payment. All payments for Services provided by SUPPLIER under this Agreement shall be made net twenty (20) days from the invoice date. In the event that CUSTOMER fails to make payment of all or any part of an invoice as described in this **Section 8.3**, SUPPLIER may, but shall not be obligated to, issue a second invoice for any outstanding amount.

8.4 Late Payment. Any amount not paid by twenty (20) days from the invoice date for such Service or Services shall be late, and shall be subject to a late charge equal to one and a half percent (1.5%) per month of any unpaid amount.

8.5 Discontinuance of Services for Late Payment. In the event that CUSTOMER fails to make payment within ninety (90) days after the invoice date for any Service or Services ,

SUPPLIER may, in its discretion, discontinue provision of any or all Services to the Premises on three (3) business days' notice if such payment is not made within such three (3) day period; provided, no Service or Services may be discontinued based on a failure by CUSTOMER to pay any amount being disputed by CUSTOMER in good faith. If SUPPLIER discontinues any Service or Services pursuant to this **Section 8.5**, SUPPLIER shall not thereby be deemed to have breached SUPPLIER's obligations to CUSTOMER under this Agreement or under the Public Service Law or its implementing regulations, or to have otherwise harmed or caused harm to CUSTOMER in any regard. In addition, SUPPLIER's discontinuance of any Service pursuant to this **Section 8.5** shall not relieve CUSTOMER of CUSTOMER's duties and obligations under this Agreement, and such discontinuance shall be in addition to any other legal or equitable remedies available to SUPPLIER. In the event that SUPPLIER has discontinued any Service or Services pursuant to this **Section 8.5**, SUPPLIER shall resume such Service or Services promptly following payment by CUSTOMER of any amounts due for Services that have been invoiced by SUPPLIER prior to such discontinuance of such Service or Services inclusive of any interest due on late charges pursuant to **Section 8.4**; provided, if SUPPLIER has discontinued any Service or Services to CUSTOMER pursuant to this **Section 8.5** two or more times in any twenty-four (24) month period, SUPPLIER may also require, as a condition to resumption of the provision of Services, that Customer prepay for a period of twelve (12) Billing Months commencing with the Billing Month in which the Services are resumed on or prior to the first day of each such Billing Month an amount equal to the projected charges for Services that will be incurred during such Billing Month (in which case SUPPLIER shall have the right to discontinue Services on or after the first day of each such Billing Month if the projected charges for such Billing Month are not paid to SUPPLIER on or before the first day of such Billing Month and prior to such discontinuance).

ARTICLE IX — CONFIDENTIAL INFORMATION

9.1 During the Term, certain information that is considered proprietary or confidential may be disclosed or exchanged between the Parties. The term "**Confidential Information**" shall mean information disclosed hereunder by one Party to the other Party in accordance with the following procedure:

- 9.1.1** When disclosed in writing, Confidential Information shall be labeled as being confidential;
- 9.1.2** When disclosed orally, Confidential Information shall be identified as confidential at the time of disclosure, with subsequent confirmation to the other Party in writing within thirty (30) days after disclosure, identifying the date and type of information disclosed.
- 9.1.3** In addition, the existence and terms and conditions of this Agreement (including without limitation the amount of the charge rates and total charges for Services) shall be deemed to be Confidential Information and shall be treated as such by each Party.

9.2 The rights and obligations of the Parties with respect to Confidential Information shall survive termination or expiration of this Agreement for one (1) year. Each Party shall hold in

confidence the other's Confidential Information, shall disclose such information only to those persons whose work in connection with this Agreement requires such disclosure, and shall not, without the prior written consent of the other Party, disclose such information to any person except its own employees, contractors, attorneys, accountants and consultants who have a need to know and are bound to keep such information confidential, and shall not use the other's Confidential Information for any purpose except to perform its obligations under this Agreement; provided, however, CUSTOMER may disclose, to the extent that such disclosure is reasonably necessary, the Confidential Information to any person with whom CUSTOMER is discussing any sale, lease or other transaction concerning the Premises, and to such person's employees, contractors, attorneys, accountants and consultants, so long as such person has agreed in writing to comply with this **Section 9.2** and to cause its employees, contractors, attorneys, accountants and consultants who receive Confidential Information to comply with this **Section 9.2**. These obligations shall not apply to any Confidential Information to the extent that it:

- 9.2.1** is or becomes a matter of public knowledge through no fault of the receiving Party;
- 9.2.2** is lawfully in the possession of the receiving Party in written or other recorded form before the time of disclosure by the disclosing Party;
- 9.2.3** is lawfully acquired by the receiving Party from a source that is not under obligation to the disclosing Party regarding disclosure of such information;
- 9.2.4** is disclosed by the disclosing Party to any third party on a non-confidential basis; or;
- 9.2.5** is required to be disclosed by operation of law, including, without limitation, regulatory or governmental rules requiring approval prior to marketing products, or is developed by the receiving Party independently of the providing or receiving of the Services.

ARTICLE X — REPRESENTATIONS AND WARRANTIES

10.1 CUSTOMER acknowledges that pursuant to the PSC Order, CUSTOMER has been advised by SUPPLIER that CUSTOMER has the right to request electric and natural gas commodity service from providers of utility services other than SUPPLIER utilizing SUPPLIER's transmission and distribution facilities within EBPUS. Notwithstanding this right CUSTOMER, subject to the other terms and conditions of this Agreement, represents and warrants that CUSTOMER has elected to purchase CUSTOMER's full Regulated Service requirements for the Premises from SUPPLIER and SUPPLIER agrees to provide those requirements in accordance with the terms of this Agreement for each Regulated Service to each Delivery Point as specified in **SCHEDULE D** and any amendments thereto.

ARTICLE XI — TERM AND TERMINATION RIGHTS

11.1 Term. This Agreement shall become effective on the Contract Date and, unless sooner terminated as provided herein, shall continue for a period of twenty (20) years following the Contract Date (the "**Initial Term**"). Upon the expiration of the Initial Term and each

subsequent Renewal Term (as hereinafter defined), as applicable, this Agreement shall be automatically renewed for an additional period of five (5) years (each, a “**Renewal Term**”) unless either Party gives notice to the other Party at least two (2) years prior to the expiration of the Initial Term or Renewal Term, that it elects to cause this Agreement not to renew. If this Agreement is not renewed at the expiration of the Initial Term or any Renewal Term pursuant to this **Section 11.1**, the cost of obtaining alternative services shall be the sole responsibility of CUSTOMER, except that SUPPLIER shall be responsible, at SUPPLIER’s sole cost and expense, for disconnecting the Premises from SUPPLIER’s utility delivery systems and shall cooperate with CUSTOMER and any replacement provider to effect a smooth and efficient transition of the provision of Services by SUPPLIER to such replacement provider.

11.2 CUSTOMER’s Termination Rights. CUSTOMER shall have the right to cease obtaining any one or more of the Services from SUPPLIER if an interruption in Service attributable to a Force Majeure Event has occurred with respect to such Service. In addition to the right to cease obtaining a Service affected by any of the conditions in this **Section 11.2**, CUSTOMER shall have the right to cease to obtain any other Service or Services if the replacement of the Service affected by any of the conditions in this **Section 11.2** and such other Service or Services in the aggregate can be achieved more efficiently by replacing such other Service or Services in conjunction with the replacement of the Service affected by any of the conditions in this **Section 11.2**.

11.3 Termination Mechanics. CUSTOMER may exercise its right to cease to obtain a Service pursuant to **Section 11.2** by giving notice of such termination to SUPPLIER, which notice shall specify each Service that is ceasing to be provided or obtained and the basis therefor. CUSTOMER or SUPPLIER, as applicable, may exercise its right to terminate this Agreement pursuant to **Section 14.9** by giving notice of such termination to the other Party, which notice shall specify that such termination is based on an Extended Force Majeure Event. Upon the giving of such notice, this Agreement shall terminate with respect to the affected Service or Services (or in its entirety if terminated pursuant to **Section 14.9**), subject to the obligations of the Parties under this **Section 11.3**. If this Agreement is terminated in whole or in part pursuant to **Section 11.2** or **14.9**:

11.3.1 the cost of obtaining alternative services shall be the sole responsibility of CUSTOMER, except that SUPPLIER shall be responsible, at SUPPLIER’s sole cost and expense, for disconnecting the Premises from SUPPLIER’s utility delivery systems;

11.3.2 SUPPLIER shall, upon the request of CUSTOMER, use commercially reasonable efforts to continue to provide in accordance with the terms of this Agreement all or any part of the affected Services for a period of up to twenty-four months (as requested by CUSTOMER) to allow CUSTOMER to find suitable replacement for the Services and shall cooperate with CUSTOMER and any replacement provider to effect a smooth and efficient transition of the provision of such Services by SUPPLIER to such replacement provider; and

11.3.3 All obligations accrued by either Party under this Agreement that relate to the period prior to such termination or for Services provided after such termination

pursuant to **Section** Error! Reference source not found. shall survive such termination and shall be paid or performed in accordance with the terms and conditions of this Agreement as though no such termination had occurred.

ARTICLE XII — ASSIGNMENT OF THIS AGREEMENT

12.1 Assignment of Agreement or Transfer of Delivery Points by CUSTOMER. Without the consent of SUPPLIER, CUSTOMER may assign this Agreement or its rights and obligations hereunder with respect to one or more of the individual Delivery Points (i) to an unrelated third party, or (ii) to any parent, subsidiary or affiliate of CUSTOMER, provided, in each case, that the assignee assumes in writing all of the obligations and duties of CUSTOMER corresponding to the assignment. CUSTOMER shall give SUPPLIER written notice of any assignment of this Agreement or any of its rights and obligations hereunder at least ten (10) days preceding such assignment. Upon the effective date of any assignment by CUSTOMER (other than an assignment pursuant to clause (ii) above), SUPPLIER agrees that SUPPLIER shall look solely to the assignee for performance of the obligations assumed by such assignee, and CUSTOMER shall be automatically released without any further action by CUSTOMER or SUPPLIER from any and all liability for the continued performance of such obligations. Any attempted assignment by CUSTOMER in contravention of the above shall be null and void and of no force or effect.

12.2 In the case of an assignment by CUSTOMER of its rights and obligations under this Agreement with respect to less than all of CUSTOMER's Delivery Points, CUSTOMER shall designate each Delivery Point of CUSTOMER for each Service being assigned to the assignee in connection with such partial assignment (the "**Transferred Delivery Points**"). From and after such partial assignment, CUSTOMER's Contract Demand shall be reduced by the Contract Demand associated with the Transferred Delivery Points and assignee's Contract Demand shall equal (or, if assignee is already a Participating Customer, increased by) the Contract Demand associated with the Transferred Delivery Points. Concurrently with the effective date of such assignment, assignee and SUPPLIER shall execute an agreement reflecting the assignment of the Transferred Delivery Points and amendments to **SCHEDULES A, D and F** as applicable, which agreement will have the same terms and conditions as this Agreement with the exception that (i) the assignee will be identified as the party to the agreement and (ii) Schedules A, D and F to this Agreement will be modified to delete matters not relating to the Transferred Delivery Points. Concurrently with the effective date of such assignment, CUSTOMER and SUPPLIER shall execute an amended and restated Agreement that will only be updated to reflect the deletion from **SCHEDULES A, D and F** of matters related to the Transferred Delivery Points.

12.3 Assignment by SUPPLIER. SUPPLIER may assign this Agreement without CUSTOMER's consent to any third party which acquires all or substantially all of SUPPLIER's assets, whether by merger, reorganization, acquisition, sale or otherwise, provided that SUPPLIER has provided at least ninety (90) prior written notice of the proposed assignment to CUSTOMER, CUSTOMER is put on notice of all hearings for an approval of such transfer with the Public Service Commission and the acquisition of such assets shall have been approved by the Public Service Commission and provided that the assignee assumes in writing all of SUPPLIER'S obligations under this Agreement. In addition, SUPPLIER may partially assign this Agreement with respect to one or more, but less than all, of the Services provided hereunder

to any third party which acquires all or substantially all of that portion of the business assets of SUPPLIER used to provide such Service or Services, provided that either: (i) the acquisition of such assets shall have been approved by the Public Service Commission and provided that the assignee assumes in writing all of SUPPLIER'S obligations under this Agreement; or (ii) SUPPLIER agrees not to be released from its liability for the performance of this Agreement. Upon the effective date of any such partial assignment by SUPPLIER, CUSTOMER agrees that (except in the case of an agreement to the contrary by SUPPLIER pursuant to clause (ii) of the preceding sentence) CUSTOMER shall look solely to SUPPLIER's assignee for performance of the Services to which the assignment applies, and CUSTOMER shall release SUPPLIER from any and all liability for the continued performance of this Agreement with respect thereto; provided that CUSTOMER shall have received written confirmation from the proposed assignee that it shall assume all of the obligations and duties under this Agreement accruing thereafter. Without the consent of CUSTOMER, SUPPLIER (a) may assign this Agreement to a direct or indirect subsidiary of RED, or (b) may make a collateral assignment, pledge, mortgage or grant of a security interest to any lender (or collateral agent or similar fiduciary for the benefit thereof) in connection with the financing of capital improvements to assets used by SUPPLIER to provide Services.

ARTICLE XIII — LIABILITY, INSURANCE AND INDEMNIFICATION

13.1 Insurance.

13.1.1 SUPPLIER and CUSTOMER shall each, at their own cost and expense, maintain and keep in force at all times during the Term:

- (i) Commercial General Liability Insurance, including coverage for Products/Completed Operations and Contractual Liability, covering all claims for personal injury, death or property damage occurring on, in or about the Buildings, Premises and, in the case of SUPPLIER, EBPUST, with a limit of liability of not less than ten million dollars (\$10,000,000) per occurrence and aggregate combined single limit for bodily injury and property damage; and
- (ii) Worker's Compensation Insurance covering all claims under applicable Workers' Compensation statutes or any similar statutes or requirements.

13.1.2 If either SUPPLIER or CUSTOMER contracts with any third party to perform maintenance activities or any other activity, or permits such party to conduct any of maintenance activities or any other activity of any kind on the Premises or in the Buildings, SUPPLIER or CUSTOMER, as the case may be, shall be responsible for the acts of such party in accordance with the provisions of this Agreement, and SUPPLIER and CUSTOMER, as the case may be, shall bear all responsibility for assuring the adequacy of any insurance carried by such party. The amount of such insurance carried by such Person shall not limit SUPPLIER's or CUSTOMER's respective liability hereunder.

13.1.3 CUSTOMER and SUPPLIER shall also maintain and keep in force at all times during the Term, all risk property damage insurance covering all property of

CUSTOMER or SUPPLIER, respectively, located at or serving the Premises, including equipment, machinery, stock supplies and leasehold improvements, for the full replacement value of such property.

13.1.4 CUSTOMER and SUPPLIER shall be required to name each other as an “Additional Insured” on each of the applicable policies named herein.

13.2 Mutual Release and Waiver of Subrogation. SUPPLIER and CUSTOMER hereby waive on behalf of themselves and their respective insurers, any claims that either actually may have against the other for loss or damage covered under the respective insurance policies required under **Section 13.1**. It is understood that this waiver is intended to extend to all such loss or damage whether or not the same is caused by the fault, neglect or negligence of either SUPPLIER or CUSTOMER and whether or not insurance is in force. If required by policy conditions, each Party shall secure from its insurer a waiver of subrogation endorsement to its policy, and deliver a copy of such endorsement to the other Party.

13.3 Limitation of SUPPLIER’s Liability. SUPPLIER shall not be liable for any personal injury, death, or property damage to any person or entity (including CUSTOMER or any other Customer Indemnified Parties) resulting in any way from: (i) the interruption or failure of SUPPLIER to provide any Service hereunder, or (ii) CUSTOMER’s use of any Service on the Premises on the downstream, CUSTOMER-side of the applicable Delivery Points, unless and only to the extent caused by the gross negligence or willful misconduct of SUPPLIER, and provided that the limitations of **Section 13.4** of this Agreement shall apply to and limit the liability of SUPPLIER under this **Section 13.3**.

13.4 Consequential Damages. It is specifically agreed and understood that neither Party will be responsible to the other for any indirect, special, incidental or consequential loss or damage whatsoever (including lost profits and opportunity costs) arising out of this Agreement or anything done in connection herewith in contract or in tort (including negligence), under any warranty, or otherwise, including without limitation CUSTOMER’s failure to accept or SUPPLIER’s failure to deliver, Services at any time. This **Section 13.4** shall apply whether any such indirect, special, incidental or consequential loss or damage is based on a claim brought or made in contract or in tort (including negligence and strict liability), under any warranty, or otherwise. Nothing in this **Section 13.4** shall affect any right of CUSTOMER under **Section 3.6** of **SCHEDULE C**.

13.5 Indemnification.

13.5.1 By SUPPLIER. Subject to the limitations set forth in **Sections 13.2, 13.3** and **13.4**, SUPPLIER shall indemnify, defend, and hold harmless CUSTOMER, its members, directors, officers, shareholders, employees, contractors and agents (together, the “**Customer Indemnified Parties**”) from and against any and all claims, demands, administrative or judicial proceedings, costs, expenses (including reasonable attorneys’ fees and expenses), liabilities, damages, judgments, or awards (together, “**Losses**”) asserted against, resulting from, imposed upon or incurred by any Customer Indemnified Party by reason of or resulting from: (i) Losses of any person or entity (including Customer

Indemnified Parties) arising directly or indirectly, out of the negligence or willful misconduct of SUPPLIER or any Supplier Indemnified Party in connection with the Services or this Agreement, or the default of SUPPLIER under this Agreement (other than interruptions of Services or Customer's use of Services, SUPPLIER's responsibilities for which are specifically and solely addressed by **Section 3.6 of SCHEDULE C**); or (ii) Losses of third parties or its contractors or agents, for personal injury, death, or property damage arising, directly or indirectly, out of the provision of the Services under this Agreement on or after the Contract Date, except in the case of either (i) or (ii) above, to the extent caused by the negligence or willful misconduct of CUSTOMER, any other Customer Indemnified Party or the person or entity suffering the Losses.

13.5.2 By CUSTOMER. Subject to the limitations set forth in **Sections 13.2 and 13.4**, CUSTOMER shall indemnify, defend, and hold harmless SUPPLIER, its members, managers, officers, employees, contractors and agents (together, the "**Supplier Indemnified Parties**") from and against any and all Losses asserted against, resulting from imposed upon or incurred by any Supplier Indemnified Party by reason of or resulting from: (i) Losses of any person or entity (including the Supplier Indemnified Parties) arising, directly or indirectly out of the negligence or willful misconduct of CUSTOMER or any Customer Indemnified Party in connection with the Services or the default by CUSTOMER under this Agreement; or (ii) Losses of third parties or its contractors or agents, for personal injury, death, or property damage, arising directly or indirectly, out of the ownership, management, operation or maintenance of the Premises other than distribution systems for the Services on the CUSTOMER side of the applicable Delivery Points, except in the case of either (i) or (ii) above to the extent caused by the negligence or willful misconduct of SUPPLIER, any other Supplier Indemnified Party or the person or entity suffering the Losses.

ARTICLE XIV — GENERAL TERMS AND CONDITIONS

14.1 Notice and Communications. All notices and other communications required or permitted under this Agreement must be in writing and will be delivered personally or sent by commercial courier, or by postage prepaid certified mail return receipt requested or by registered mail or by facsimile, at the option of the sending Party. All communications must be sent to, and shall be effective on the date of the delivery at, the receiving Party's address indicated below. Such addresses may be changed by submitting a notice as provided in this **Section 14.1** to the other Party.

Communications to SUPPLIER:

RED-Rochester, LLC

123 Main Street

Rochester, NY 14652-3709

Attn:

Facsimile: () -

Communications to CUSTOMER:

Attn:

Facsimile: () -

With a copy to:

RED-Rochester, LLC

640 Quail Ridge Drive

Westmont, IL 60559

Attn: General Counsel

Facsimile: (630) 590-6037

With a copy to:

Attn:

Facsimile: () -

14.2 Survival. The following provisions shall survive termination of this Agreement: **ARTICLE IX**, Confidential Information; **ARTICLE X**, Representations and Warranties; **ARTICLE XI**, Term and Termination Rights; **ARTICLE XIII**, Liability, Insurance and Indemnification; and this **ARTICLE XIV**, General Terms and Conditions.

14.3 Conflicts in Documentation. In the event that a conflict arises between this Agreement and any purchase order, separate agreement or schedule implementing this Agreement, the terms of this Agreement shall prevail, unless such purchase order, agreement or schedule by its terms modifies this Agreement, describes the scope of such modification, and is agreed to in a separate writing by a duly authorized representative of each Party.

14.4 Amendments. No addition to, deletion from or modification of any of the provisions of this Agreement shall be binding upon the Parties unless such deletion, addition or modification is made in writing and is signed by a duly authorized representative of each Party; provided, however, if an amendment (which may include an amendment to the Spreadsheet as defined in **SCHEDULE C**) has been approved with respect to all Conforming Contracts by (i) SUPPLIER, (ii) representatives of the Coordination Committee representing at least two-thirds of the voting power of all representatives of the Coordination Committee, and (iii) the then-current beneficiary of the rights granted by SUPPLIER under the Utility Rights Agreement (a **“Blanket Amendment”**), then this Agreement shall be amended as provided in the Blanket Amendment;

provided further, that (a) unless approved by at least ninety percent (90%) of the voting power of all representatives of the Coordination Committee, no Blanket Amendment may be adopted prior to the later of (1) the fifth (5th) anniversary of the Effective Date, or (2) the date by which SUPPLIER has made new capital investments after the Effective Date of at least thirty million dollars (\$30,000,000) in the Facilities for the purpose of insuring the long-term viability of the Facilities; (b) a Blanket Amendment may only become effective on January 1st of a calendar year and must be approved by all necessary parties no later than June 30th of the preceding calendar year; (c) a Blanket Amendment may not become effective earlier than two (2) years after the last Blanket Amendment became effective; (d) each Blanket Amendment must amend each Conforming Contract in an identical manner; (e) no Blanket Amendment may have a materially disproportionate adverse impact on any Participating Customer or group of Participating Customers as compared to the impact of such Blanket Amendment on all Participating Customers taken as a whole except that a change to the manner in which charges for Services are calculated may have such a disproportionate impact so long as (1) the change is reasonably designed to (A) address unintended anomalies in the rates for Services due to changes over time in volumes, the composition of EBPUST Customers, developments in technology, the cost of providing the Services and other similar factors, (B) align the respective costs of Services more closely with both (x) prevailing rates in the Rochester, New York area for comparable services, and (y) SUPPLIER's costs in providing the Services, or (C) increase the efficiency of the provision of Services as measured by an increase in the total projected Operating Dividend as defined in **SCHEDULE C** hereto not attributable to an increase in total charges to EBPUST Customers, or (2) the adversely affected Participating Customer or group of Participating Customers can substantially mitigate the disproportionate impact of such change by taking actions that are commercially reasonable; and (f) for avoidance of doubt, any charges for Remediation Costs pursuant to **Section 6.1** do not constitute an amendment to this Agreement and are therefore subject to neither this **Section 14.4** nor any Blanket Amendment approval as provided for herein.

14.4.1 Required Blanket Amendment Proposal. SUPPLIER shall be obligated to propose a Blanket Amendment (and to approve such Blanket Amendment pursuant to Section 14.4 if approved by the Coordination Committee) following the earlier of (i) the Compliance Date associated with the MACT Rules or (ii) completion of the installation of the gas turbines associated with Non-Compliance Investments. In proposing such Blanket Amendment, SUPPLIER shall endeavor to reallocate the total charges in a manner more consistent with the operational characteristics associated with the Facilities in operation at that time and in an equitable manner between and among Regulated Service and Unregulated Services based on EBPUST Customer needs at that time. The approval of such Blanket Amendment shall require approval of the Coordination Committee pursuant to **Section 14.4** and nothing in this Section 14.4.1 shall obligate any representatives of CUSTOMER to vote in favor of such Blanket Amendment.

14.5 Entire Agreement. This Agreement constitutes the entire agreement between the Parties with respect to the subject matter hereof and supersedes all previous discussions, representations, understandings, and agreements of the Parties with respect thereto.

14.6 Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed an original, and both of which shall together constitute but one and the same instrument which may be sufficiently evidenced by one counterpart.

14.7 Complaints and Dispute Resolution Procedures. Complaints about any Service, Services, or other issues shall first be made in writing and submitted pursuant to the notice provisions of **Section 14.1** hereof. Any such written complaints shall be brief and shall state the nature of the dispute, the relevant facts, and the desired relief. SUPPLIER shall promptly investigate any such complaint in a fair manner, and report the results in writing to CUSTOMER. If SUPPLIER's investigation resolves the complaint in whole or in part in SUPPLIER's favor, and if the complaint involves a Regulated Service, SUPPLIER shall inform CUSTOMER of the availability of the Public Service Commission's complaint handling procedures. SUPPLIER will not terminate service to CUSTOMER during the pendency of a complaint before SUPPLIER or the Public Service Commission, provided that CUSTOMER shall pay the undisputed portion of any outstanding bill as well as all bills for current or subsequent usage during such pendency. If either party is unsatisfied by the results of this dispute resolution procedure, then the affected Party has the right to petition to the Public Service Commission for relief with respect to disputes involving Regulated Services (subject to **Section 5.1**) or to pursue its other legal remedies with respect to disputes involving Unregulated Services or Sewer Services.

14.8 Choice of Law and Venue. This Agreement shall be governed by and construed in accordance with the laws of the State of New York, without consideration of the conflicts of laws principles thereof. The Parties expressly consent to the jurisdiction of the Public Service Commission or its successor agency (except to the extent otherwise provided herein with respect to pricing methodology, Unregulated Services or Sewer Services) as well as of the courts of the State of New York as to any issues related to this Agreement, including the validity, enforceability or interpretation thereof. The Parties expressly consent and agree that any dispute under this Agreement involving Regulated Services other than pricing methodology, after the dispute resolution procedures set forth in **Section 14.7** of this Agreement have been exhausted, shall be brought initially in a formal proceeding before the Public Service Commission or any successor agency.

14.9 Force Majeure.

14.9.1 No Party shall be liable for, or be in default under this Agreement as a result of such Party's failure or inability to perform any of its obligations hereunder, other than any obligation to pay money, to the extent that (i) such failure or inability is caused by a Force Majeure Event; and (ii) the Affected Party complies with the provisions of this **Section 14.9**.

14.9.2 The Affected Party shall give notice to the other Party promptly after becoming aware of a Force Majeure Event, giving details of the circumstances constituting the Force Majeure Event and the likely adverse effect and duration thereof, if reasonably known, and shall keep the other Party informed of any changes in such circumstances, including when such Force Majeure Event ends and, if different, when the Affected Party ceases to be affected by such Force Majeure Event.

Each Party shall attempt in good faith to give the other Party notice of any events of which the notifying Party is aware which may be reasonably expected, with the lapse of time or otherwise, to become a Force Majeure Event. Following the receipt of a notice given pursuant to this **Section 14.9.2**, the Parties shall consult in good faith to assess the Force Majeure Event and any ways in which it may be mitigated or avoided.

14.9.3 The rights and obligations of the Parties under this Agreement shall be suspended in whole or in part, as the circumstances may require, to the extent that the ability of a Party to perform its relevant obligations hereunder is materially and adversely affected by a Force Majeure Event.

14.9.4 Suspension of any obligation as a result of a Force Majeure Event shall be of no greater extent than reasonably required considering the nature and extent of the Force Majeure Event, and shall not affect any rights or obligations which may have accrued prior to such suspension.

14.9.5 The Affected Party shall make all commercially reasonable efforts to remedy the circumstances constituting the Force Majeure Event and to mitigate the adverse effects of the Force Majeure Event. If the Force Majeure Event affects only some rights and obligations of an Affected Party, any other rights or obligations of such Affected Party shall not be affected by the Force Majeure Event. In addition:

14.9.5.1 The Affected Party shall prepare as soon as practicable, but no later than five days following the Affected Party's notice to the other Party of the Force Majeure Event, a detailed plan to be provided to the other Party for the other Party's review and comment setting forth Affected Party's mitigation actions undertaken to date, and any additional or continuing mitigation actions proposed to be taken by the Affected Party;

14.9.5.2 The Affected Party shall furnish weekly reports to the other Party regarding its progress in overcoming the adverse effects of such Force Majeure Event; and

14.9.5.3 The Affected Party shall afford the other Party reasonable facilities for obtaining further information about the Affected Party's progress in overcoming the Force Majeure Event.

14.9.6 When the Affected Party is able, or would have been able if it had complied with its obligations under **Section 14.9.5**, to remedy or otherwise terminate the Force Majeure Event, the Affected Party promptly shall give Notice to the other Party that the period of force majeure relating to the Force Majeure Event shall be deemed to have ended and that the Affected Party is able to resume its performance of the suspended obligation, and shall resume such performance.

14.9.7 If, notwithstanding the efforts of the Affected Party to mitigate the adverse effects of the Force Majeure Event as described in **Section 14.9.5**: (i) the adverse effects of such Force Majeure Event render the Affected Party substantially unable to

comply with its material obligations hereunder, or to obtain the benefits of the transactions contemplated hereby, so that the commercial purposes of this Agreement are substantially frustrated, and (ii) such adverse effects continue for a period in excess of twelve (12) months, then an “**Extended Force Majeure Event**” shall be deemed to have occurred. Upon the occurrence of an Extended Force Majeure Event, regardless of whether CUSTOMER or SUPPLIER is the Affected Party, then, by thirty (30) days notice to the other Party, (a) CUSTOMER may terminate this Agreement, or (b) if such Extended Force Majeure Event continues for an additional six (6) months (for a total of eighteen (18) months), SUPPLIER may terminate this Agreement, in each case pursuant to the procedures set forth in **Section 11.3**.

14.10 Use of Other Party’s Name. Except as necessary to perform their obligations under this Agreement, neither Party may make any reference to the other Party, its trademarks or trade names in advertising, public announcements or promotional materials without express written permission from the other Party.

14.11 Severability. If any provision of this Agreement is held to be unenforceable under then current laws, the enforceability of the remaining provisions shall not be affected thereby, and in lieu of each such unenforceable provision the parties shall negotiate to add a provision as similar terms to such unenforceable provision as may be possible.

14.12 Independent Contractor. SUPPLIER and CUSTOMER shall act as independent contractors and nothing herein shall be construed to make either party or any of their employees, officers, directors or representatives, the agent, employee, partner or servant of the other party.

14.13 Non-Waiver. Failure by either Party at any time to require strict performance of any of the provisions herein shall not waive or diminish a Party’s right thereafter to demand strict compliance therewith or with any other provision. Waiver of any obligation, term or condition of this Agreement shall not be deemed as a further or continuing waiver of any other term, provision or condition of this Agreement. A Party shall not be deemed to have waived any rights hereunder unless such waiver is in writing and signed by a duly authorized representative of the Party making such waiver.

14.14 Article and Section Headings. Headings for articles and sections are for convenience only and shall not affect the interpretation of this Agreement.

14.15 Agreement Binding on Parties. This Agreement shall be binding upon and shall inure to the benefit of the Parties, their successors and permitted assigns.

Accepted and Agreed:

RED-ROCHESTER, LLC

By _____

Title _____

-

Date _____

-

Accepted and Agreed:

[INSERT LEGAL ENTITY]

By _____

Title _____

-

Date _____

-

SCHEDULE A

Service Locations and Delivery Points

<u>Service</u>	<u>To Building</u>	<u>Delivery Point/ Supply Valve Number</u>	<u>Acceptance Point/ Return Valve Number</u>	<u>Approx. Valve Location</u>	<u>Comments</u>
Natural Gas					
[TO BE POPULATED]					
Electric					
[TO BE POPULATED]					

<u>Service</u>	<u>To Building</u>	<u>Delivery Point/ Supply Valve Number</u>	<u>Acceptance Point/ Return Valve Number</u>	<u>Approx. Valve Location</u>	<u>Comments</u>
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<u>Service</u>	<u>To Building</u>	<u>Delivery Point/ Supply Valve Number</u>	<u>Acceptance Point/ Return Valve Number</u>	<u>Approx. Valve Location</u>	<u>Comments</u>
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<u>Service</u>	<u>To Building</u>	<u>Delivery Point/ Supply Valve Number</u>	<u>Acceptance Point/ Return Valve Number</u>	<u>Approx. Valve Location</u>	<u>Comments</u>
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SCHEDULE B

Exceptions for Purchase of Regulated Services

[NOT APPLICABLE]

SCHEDULE C

Service Rate Calculations

1. **OVERVIEW.** For the provision of the Services by SUPPLIER to CUSTOMER, CUSTOMER shall pay to SUPPLIER the amounts determined pursuant to **Section 3** of this **SCHEDULE C** with respect to each Billing Month. On a quarterly basis, SUPPLIER will calculate the amount of cash available, if any, for distributions as Preferred Returns and Operating Dividends pursuant to **Section 4** of this **SCHEDULE C**.
2. **DEFINITIONS.** For purposes of this **SCHEDULE C** (and where referenced in the Agreement) the following terms shall have the meanings set forth below. If a defined term is not defined in this **SCHEDULE C**, it shall have the meaning given to it in the Agreement.

“Allocation Percentage” means, with respect to each Participating Customer for each calendar quarter, the percentage obtained by dividing (i) the total payments received from such Participating Customer under such Participating Customer’s Conforming Contract excluding those payments made pursuant to **Sections 4.1, 6.1** and **8.4** of such Conforming Contract (or provisions corresponding thereto, as applicable) for the Billing Months included in such calendar quarter, by (ii) the total payments received from all Participating Customers for the Billing Months excluding those payments subject to **Sections 4.1, 6.1** and **8.4** of such Participating Customers’ Conforming Contracts (or provisions corresponding thereto, as applicable) for the Billing Months included in such calendar quarter.

“Arrears Balances” means the sum of: (i) any Preferred Return Shortfall from a prior calendar quarter to the extent not previously paid pursuant to **Section 4.8**, of **SCHEDULE C** and (ii) any payments made by SUPPLIER Owners or affiliated companies to cover any shortfall in operating costs and/or debt service obligations during periods prior to the current calendar quarter to the extent not previously reimbursed by SUPPLIER or paid pursuant to **Section 4.8** of **SCHEDULE C**, together with interest on the amounts described in clauses (i) and (ii) outstanding from time to time at a rate of seven percent (7%) per year. If any payments described in clause (ii) of this definition have not been reimbursed or paid within six (6) months after the date on which such payments were made, SUPPLIER may, at SUPPLIER’s sole discretion, at any time thereafter elect to treat such payments and any interest accrued thereon as a capital investment (which shall thereafter constitute a Compliance Investment or Non-Compliance Investment, as applicable) as of the date of such election, in which case such amount shall then cease to be an Arrears Balance.

“Compliance Capital Investment” means any investment in the Facilities by SUPPLIER for the purpose of complying with present or future governmental requirements, improving safety or improving reliability and that is not a Non-Compliance Investment.

“Compliance Investments” means Compliance Capital Investments and the contributions made by SUPPLIER Owners to (i) provide funding of working capital; (ii) fund any investments or escrow amounts required by government agencies; and (iii) provide initial funding for any debt service reserves or maintenance reserves required by and funded from proceeds of Facility Loans. Compliance Investments expressly exclude Non-Compliance Investments.

“Debt Service Payments” means, with respect to any calendar year, the total interest and principal, plus any fees and/or penalties, paid by SUPPLIER on any Facility Loans during such calendar year, including payments funded with releases from any debt service reserve accounts and including amounts distributed to another person for the purpose of making such payments.

“Debt Service Reserve Payments/Releases” means, with respect to any calendar quarter, any increase or decrease during such calendar quarter in the balance of any debt reserve account reasonably required to be established and maintained by any Facility Loans, including any payments made during such calendar quarter to fund any prior shortfalls in such debt service reserve accounts and any cash released from debt service reserve accounts.

“Facility Loans” means any loans (i) that are (a) debt obligations of SUPPLIER, and (b) are secured by SUPPLIER’s assets used in whole or in part to provide Services to EBPUST Customers and/or cash flows from EBPUST Customers, and (ii) the proceeds of which are used solely for the capital improvements to the Facilities and associated transaction costs, funding of reserves and required escrow accounts, maintenance of the Facilities, working capital and/or to reduce Net Equity PP&E.

“Inflation Index Amount” with respect to any calendar year means the amount obtained from the following formula:

$$[0.35 * (\text{PPI} / 179.9)] + [0.65 * (\text{CPI} / 248.494)] - (1.01^{(y-2012)}) + 1$$

where:

y = the year for which the Inflation Index Amount is being calculated

PPI = the Producer Price Index-Commodities, not seasonally adjusted, finished goods less food and energy, 1982 = 100, Series ID#WPUSOP3500, as reported by the United States Department of Labor, Bureau of Labor Statistics, as replaced or revised in accordance with **Section 5.3** of this **SCHEDULE C**, published in December of the calendar year prior to calendar year y (which will contain data for the month of November of such prior calendar year)

CPI = the Consumer Price Index for all Urban Consumers (CPI-U), not seasonally adjusted, Northeast urban, all items less food and energy, 1982-1984=100, Series ID #CUUR0100SA0L1E, as reported by the United States Department of Labor, Bureau of Labor Statistics, as replaced or revised in accordance with **Section 5.3** of this **SCHEDULE C**, published in December of the calendar year prior to calendar year y (which will contain data for the month of November of such prior calendar year)

“Maintenance Reserve Payments/Releases” means, with respect to any calendar quarter, any increase or decrease during such calendar quarter in the balance of any maintenance reserve account reasonably required to be established and maintained by any Facility Loans, including any payments made during such calendar quarter to fund any prior shortfalls in such maintenance reserve accounts and any cash released from such maintenance reserve accounts.

“MMBtus” means millions of British thermal units. Where used to describe a quantity of fuel, this is on a lower heating value (LHV) basis (as applicable) unless otherwise noted.

“Net Compliance PP&E” means, for any calendar quarter, the difference between (i) the sum of the Un-depreciated Amount of all Compliance Investments made prior to such calendar quarter, minus (ii) the cumulative proceeds, if any, received by SUPPLIER and distributed to SUPPLIER Owners from the sale of Facilities acquired with Compliance Investments, but only to the extent that the proceeds from such sale have not been recognized as Revenue.

“Net Equity PP&E” means, for any calendar quarter, (i) the sum of (a) the Total Depreciable Capital, and (b) the weighted average during such calendar quarter of all cash contributed by SUPPLIER Owners from the Effective Time forward to fund working capital, maintenance or debt service reserves, vendor deposits or escrow accounts, minus (ii) the weighted average during such calendar quarter of all Facility Loans outstanding during such quarter, minus (iii) the weighted average during such calendar quarter of all distributions by SUPPLIER to SUPPLIER Owners from the Effective Time forward other than pursuant to **Sections 4.2** through **4.12** inclusive of **SCHEDULE C** or payments representing a reimbursement of any payments described in clause (ii) of the definition of Arrears Balances.

“Non-Compliance Investment” means any investment in the Facilities by SUPPLIER projected to have, at the time of the commitment to make such investment, an inherent economic return to SUPPLIER, without regard to any economic return that would be generated if such investment were treated as a Compliance Investment. For avoidance of doubt, gas turbines have intrinsic economics, and any installation of any gas turbine, together with any necessary gas-line upgrades to the extent paid by SUPPLIER, will be deemed a Non-Compliance Investment, even a gas turbine installed to facilitate compliance with Environmental Laws.

“Operating Cost” means, with respect to any calendar quarter, (i) all cash expenses reasonably incurred by SUPPLIER in the course of operating the Facilities including (a) fuel expenses, (b) other non-fuel consumable expenses, (c) operations labor expenses, (d) insurance expenses, (e) property and gross receipts taxes, (f) a management fee payable to RED pursuant to **Section 5.3** of the Agreement, and (g) expenses associated with any third party professional services reasonably required for SUPPLIER to fulfill its legal and contractual obligations to its customers, investors, and Governmental Authorities, and (ii) any liquidated damages credits given by SUPPLIER to any Participating Customer with respect to Billing Months during such calendar quarter.

“Overhead Charge” has the meaning given to that term in **SCHEDULE I**.

“Overhead Percent” means the amount calculated pursuant to **SCHEDULE I**.

“Preferred Return” means, with respect to any calendar quarter, one-twenty-fourth (1/24th) of the Net Equity PP&E for such calendar quarter.

“Preferred Return Shortfall” means, with respect to any calendar quarter, the amount, if any, by which the cash remaining after collections and payments provided for under **Sections 4.1** through **4.6** inclusive of this **SCHEDULE C** is less than the Preferred Return for such calendar quarter.

“Revenues” means, with respect to any calendar quarter, the sum of (i) all cash received by SUPPLIER during such calendar quarter from (a) Participating Customers, (b) EBPUS Customers who are not Participating Customers, and (c) other third parties in connection with

the sale of services (including, for clarity, sales of electricity to the grid) or environmental attributes by SUPPLIER, plus (ii) all proceeds received by SUPPLIER during such calendar quarter in connection with the sale of any assets to the extent that such proceeds have not been (a) reinvested in the Facilities, (b) used to repay Facility Loans, (c) used to satisfy a senior lien that results in a reduction of Net Equity PP&E or (d) distributed to SUPPLIER Owners.

“**SUPPLIER Owners**” means the holders of the membership interests or other equity interests in SUPPLIER.

“**Total Depreciable Capital**” means, for any calendar quarter, the sum of (i) the Un-depreciated Amount of the total payment made by SUPPLIER to Eastman Kodak Company pursuant to the Asset Purchase Agreement allocated to Purchased Assets (as defined in the Asset Purchase Agreement) that are depreciable under United States generally accepted accounting principles, and (ii) the weighted average balance of the Un-depreciated Amounts of all Compliance Capital Investments and Non-Compliance Investments made by SUPPLIER (determined by dividing the sum of the Un-depreciated Amounts of Compliance Capital Investments and Non-Compliance Investments as of the beginning and the end of such calendar quarter by two (2)).

“**Un-depreciated Amount**” means, at any time, the portion of a Compliance Capital Investment or Non-Compliance Investment that has not then been depreciated. Compliance Capital Investments and Non-Compliance Investments shall be depreciated on a quarterly, straight line basis over sixty (60) quarters, with the depreciation for the calendar quarter in which the Compliance Capital Investment or Non-Compliance Investment is made being prorated based on the date the investment is made.

“**Unit**” means, with respect to each Service, the unit of measurement set forth in column B of the Annual Calculation Worksheet of the Spreadsheet with respect to such Service.

3. **DETERMINATION OF PRICE PAYABLE FOR SERVICES.** The amount payable by CUSTOMER to SUPPLIER for Services shall be determined as follows:

3.1 **Purchased Electricity:** CUSTOMER shall pay SUPPLIER for the sale of electric energy and/or electric delivery services at distribution voltage at 375 West Ridge Road, Rochester, NY 14615 by adding the following:

- a. The rates set forth in RG&E’s Service Classification No. 3 or 7 (based on consumption) of RG&E’s Rate Schedule for distribution delivery; **plus**
- b. The rate set forth in Constellation’s [Legal Name of Entity] [Full Name of Applicable Tariff] for the electric energy (or any successor as may be elected by SUPPLIER from time-to-time); **plus**
- c. All applicable additional taxes and fees as shown on the RG&E invoice; **plus**
- d. The Overhead Charge as calculated in **SCHEDULE I** herein.

3.2 Purchased Natural Gas: CUSTOMER shall pay SUPPLIER for the sale of natural gas and natural gas delivery services to 375 West Ridge Road, Rochester, NY 14615 by adding the following:

a. The rates set forth in RG&E's [Insert applicable tariff]; **plus**b. The rate set forth in UGI's [Legal Name of Entity] [Full Name of Applicable Tariff]; **plus**c. All applicable additional taxes and fees as shown on the RG&E invoice; **plus**

d. The Overhead Charge as calculated in SCHEDULE I herein.

d. **3.3 Invoicing and Monthly True-Ups:** SUPPLIER shall be invoiced as identified in **ARTICLE VIII** above. In the event that SUPPLIER has not received an invoice from one or more of the Service providers identified in **Section 3.1** and/or **Section 3.2** above at the time SUPPLIER invoices CUSTOMER, then SUPPLIER shall estimate CUSTOMER's invoice based on the last invoice received from the applicable Service provider. SUPPLIER's invoice in the month immediately following the estimated invoice shall reflect a true-up of the previous month's estimated invoice as against the actual, assuming the actual has been provided to SUPPLIER at such time. **QUARTERLY CASH FLOW SHARING PAYMENT.** All Participating Customers will participate in a cash flow sharing structure that aligns the interest of Participating Customers and SUPPLIER to minimize the total cost of the Services. Such participation will be determined via a "waterfall" formulation, with each sequential payment made only to the extent that cash is available after repayment of all prior (senior) payments, and will be payable in the form of a quarterly billing credit. The priority of distributions in the waterfall is as follows:

4.1 First, SUPPLIER will collect all Revenues;

4.2 Second, SUPPLIER will pay all Operating Costs;

4.3 Third, SUPPLIER will pay Debt Service Payments;

4.4 Fourth, SUPPLIER will deposit or receive Debt Service Reserve Payments/Releases;

4.5 Fifth, SUPPLIER will deposit or receive Maintenance Reserve Payments/Releases;

4.6 Sixth, SUPPLIER will, in its reasonable discretion, determine how much cash should be on hand to cover near term working capital needs, and then either (i) obtain additional contributions from SUPPLIER Owners to cover any projected shortfall or distribute to SUPPLIER Owners any excess cash from reducing the working capital requirement, in which case the Net Equity PP&E will be increased or decreased, respectively; provided, SUPPLIER may not make distributions to SUPPLIER Owners that would reduce Net Equity PP&E below zero, or (ii) retain needed extra cash from operating cash flow or release extra cash from reduced working capital needs into this waterfall, in which case the Net Equity PP&E will not be changed;

4.7 Seventh, SUPPLIER will distribute the Preferred Return to SUPPLIER Owners;

- 4.8 Eighth, SUPPLIER will pay any outstanding Arrears Balances;
- 4.9 Ninth, SUPPLIER will provide an aggregate Operating Dividend in the form of billing credits to all Participating Customers equal to fifty percent (50%) of any cash remaining after the actions contemplated by **Sections 4.1** through **4.8** inclusive have been completed, which amount shall be credited pro rata to the Participating Customers in accordance with their respective Allocation Percentages for the calendar quarter to which such Operating Dividend relates; and
- 4.10 Any cash remaining after the actions contemplated by **Sections 4.1** through **4.9** inclusive have been completed (after reducing such cash amount by billing credits to be given by SUPPLIER pursuant to **Section 4.9** and corresponding provisions of the Conforming Contracts) shall be distributed to SUPPLIER Owners.
- 4.11 The amount of any billing credit to which CUSTOMER is entitled pursuant to **Section 4.9** of this **SCHEDULE C** shall be determined no later than fifteen (15) days immediately following the calendar quarter to which it relates.
- 4.12 Any billing credit pursuant to **Section 4.9** of this **SCHEDULE C** shall be applied to the invoice for the Billing Month immediately following the calendar quarter to which such billing credit relates and, if such billing credit exceeds the amount otherwise includable in such invoice, the invoice(s) for the next successive Billing Month(s) until such billing credit has been fully utilized.
- e. **Miscellaneous Calculations.** For purposes of implementing the provisions of this **SCHEDULE C**:
- 5.2 A Billing Month that straddles two calendar quarters shall be deemed to occur in the calendar quarter in which the majority of the days comprising such Billing Month fall.
- 5.3 If the PPI or CPI (as defined in the definition of Inflation Index Amount) at any time becomes unavailable, whether as a result of such index no longer being published or the material alteration of the basis for calculating such index, then the Parties shall negotiate in good faith to agree upon a substitute index or indices which most closely approximate the unavailable index.
- f. **Other Matters**
- 6.1 None of the financial terms used in this document shall be assumed to have meanings consistent with generally accepted accounting principles or other national or international accounting standards except as provided in the definition of Total Depreciable Capital.
- 6.2 Any cash expended by SUPPLIER in providing Services to EBPUST Customers shall be treated as an expense or a capital investment, but in no case may any expenditure be treated as both an expense and a capital investment. If treated as an expense, those charges will be recovered by SUPPLIER as an operating expense during the period incurred to the extent cash is available for reimbursement or during later periods, plus interest earned pursuant to the definition of Arrears Balances if applicable. If treated as a capital investment, those charges will constitute a Compliance Investment or Non-

Compliance Investment, as applicable, and be recovered through an increase in the Preferred Return.

- 6.3 SUPPLIER shall not incur, guarantee or encumber the Facilities or its cash flows to secure any debt other than Facility Loans, and shall not incur, guarantee or encumber the Facilities or its cash flows to secure any Facility Loans to the extent such Facility Loans would reduce the Net Equity PP&E below zero. SUPPLIER agrees to cause any reserves maintained by it to be invested as required by the loan documents requiring such reserves or, if the loan documents do not contain any such requirements, SUPPLIER agrees to maintain such reserves only in United States government obligations or investment grade securities.
- 6.4 No capital investment shall constitute a Compliance Investment or Non-Compliance Investment except to the extent it is funded with contributions from SUPPLIER Owners, proceeds from the sale of assets or proceeds of Facility Loans.

SCHEDULE D

Specifications for Delivery of Regulated Services

Delivery Point	Regulated Service	Specifications (B)=Binding Specification (N)=Nominal Specification		Units	Type metering (Continuous, monthly read, estimated)
Describe	Electricity				
Describe	Natural gas				

[COMPLETE MATRIX RE SRV SPECIFICATIONS]

Electric Service. Electric service will be provided to the Premises at the electric Delivery Points at a nominal ___ volt, three phase alternating current, approximately 60 Hz, with a voltage range of minimum of ___ volts and a maximum of ___ volts, or such other voltage or other conditions as mutually agreed by SUPPLIER and CUSTOMER. **[INSERT FASTRAC'S NEEDS]**
Natural Gas Service. SUPPLIER will provide continuous service to the natural gas Delivery Point at a nominal gauge pressure of ___ pounds per square inch (___psig). **[INSERT FASTRAC'S NEEDS]**

SCHEDULE E

Exceptions for Purchase of Unregulated Services

[NOT APPLICABLE]

SCHEDULE F

Specifications for Delivery of Unregulated Services

[NOT APPLICABLE]

SCHEDULE G

**SUPPLIER'S Rights of Access and
CUSTOMER'S Restricted Access Areas within the Premises**

[NOT APPLICABLE]

SCHEDULE H

Specifications for Condensate and Chilled Water Return Services

[NOT APPLICABLE]

SCHEDULE I

Overhead Charge Calculation

- 1. OVERVIEW.** This **Schedule I** defines the manner in which the Overhead Charge is calculated for the purposes of monthly bill calculations pursuant to **Section 3.4** of **SCHEDULE C**.
- 2. DEFINITIONS.** For the purposes of this Schedule I (and where referenced in the Agreement) the following terms shall have the following definitions:

“**First Block Tier**” means \$500,000 divided by 12 and then multiplied by the Inflation Index Amount.

“**Inflation Index Amount**” shall have the meaning given to that term in **SCHEDULE C**.

“**Second Block Tier**” means \$1,500,000 divided by 12 and then multiplied by the Inflation Index Amount.

“**Third Block Tier**” means \$3,500,000 divided 12 and then multiplied by the Inflation Index Amount.

- 3. OVERHEAD CHARGE.** The Overhead Charge is calculated on a block basis, based on the total monthly invoices for electricity and natural gas as defined in **Section 3.1** and **Section 3.2** of Schedule C above. The total monthly invoices for electricity and natural gas shall expressly exclude (i) any additional charges pursuant to **Sections 4.1, 6.1** and **8.4** of the Agreement, and (ii) any credits due to CUSTOMER pursuant to **Section 4.9** of **SCHEDULE C**. The Overhead Charge for a given month shall equal:
 - 3.1.** All amounts in the total monthly invoices for electricity and natural gas for such month up to the First Block Tier multiplied by 25%, which amount will be added to
 - 3.2.** Any amounts in the total monthly invoices for electricity and natural gas for such month in excess of the First Block Tier up to the Second Block Tier multiplied by 22.5%, which will be added to

- 3.3.** Any amounts in the total monthly invoices for electricity and natural gas for such month in excess of the Second Block Tier up to the Third Block Tier multiplied by 20%, which will be added to
- 3.4.** Any amounts in the total monthly invoices for electricity and natural gas for such month in excess of the Third Block Tier multiplied by 10%.

From: John Dax <jdax@daxlawfirm.com>
Sent: Thursday, November 19, 2015 10:35 AM
To: 'Craig Bennett'
Cc: ckahler@saunderskahler.com; Parker, Sharon (sparker@fastracmarkets.com)
Subject: Fastrac counter offer

Craig,

We propose the following terms to resolve the negotiations concerning the USA:

Length of term – 5 years

Eliminate all Remediation Cost exposure in light of the fact that Fastrac will not be served by RED-owned infrastructure
Rate – RED to pass through RG&E delivery charge with no premium; Fastrac to pay for commodity at RED's commodity cost + 5%.

Please let me know if these terms are acceptable to RED.

John

John W. Dax
The Dax Law Firm, P.C.
54 State St. Suite 805
Albany, NY 12207
518 432 1002

From: Craig Bennett <cbennett@recycled-energy.com>
Sent: Thursday, January 07, 2016 1:33 PM
To: John Dax; ckahler@saunderskahler.com; Parker, Sharon
Cc: Craig Bennett
Subject: RED Response to Fastrac's Counter Offer

Importance: High

John,

1. RED is not willing to agree to a 5 year term. That said we would add that the term shouldn't matter to Fastrac because even though it's a 20 year agreement, Fastrac is only obligated to purchase those utility services that it needs. In other words, if its demand is reduced it only has to pay for what it need per the terms of the agreement. That also means that if for some reason that Fastrac location is shut down and has no demand for Utility Services then Fastrac doesn't have to buy anything from RED.
2. RED is not willing to eliminate remediation exposer costs. As we have previously discussed, RED's USA is not unlike any utilities tariff wherein the rates that are charged reflect the utilities overall cost to service its utility service territory. Based on the robust arrangements that are in place between RED, Kodak the NYDEC and EPA, we believe the chances of Fastrac or any Customer incurring these costs has been significantly mitigated. That said, the risk has not been entirely eliminated.
3. RED is not willing to pass through the RG&E delivery charge with no premium and allow Fastrac to pay for commodity at RED's cost plus 5%. We believe the rate structure we provided you in our last communication is fair.

Thanks,
Craig

Craig E. Bennett
VP & Associate General Counsel
Recycled Energy Development LLC
640 Quail Ridge Drive
Westmont, Illinois 60559
Office: 630.590.6046
Cell: 630.310.4500
cbennett@recycled-energy.com

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