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August 16, 2012

By Electronic Mail

Hon. Kimberly Harriman
Hon. Rudy Stegemoeller
Administrative Law Judges
NYS Public Service Commission
3 Empire State Plaza
Albany, New York 12223-1350

**Re: Case No. 12-E-0201 and 12-G-0202 - Niagara Mohawk Power Corporation d/b/a
National Grid - Electric and Gas Rates**

Dear Judge Harriman and Judge Stegemoeller:

In accordance with 16A NYCRR Section 3.6(b) and 5.4 or in the alternative 16A NYCRR Section 6-1.3, the Retail Energy Supply Association (RESA)¹ hereby objects to the Information Requests codified in Public Utility Law Project of New York, Inc. (PULP) No. 107 and No. 91.²

¹ RESA's members include: Champion Energy Services, LLC; ConEdison *Solutions*; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; Energetix, Inc.; Energy Plus Holdings LLC; GDF SUEZ Energy Resources NA, Inc.; Green Mountain Energy Company; Hess Corporation; Integrys Energy Services, Inc.; Just Energy; Liberty Power; MC Squared Energy Services, LLC; Mint Energy, LLC; NextEra Energy Services; Noble Americas Energy Solutions LLC; PPL EnergyPlus, LLC; Reliant; Stream Energy; TransCanada Power Marketing Ltd. and TriEagle Energy, L.P.. The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of RESA.

² Copies thereof are annexed hereto as Exhibit "A"

The information sought in these interrogatories relates to private confidential billing information compiled by Niagara Mohawk Power Corporation (Niagara Mohawk or Company) on behalf of each Energy Service Company (ESCO) participating in the consolidated billing program. As such is should not be publicly disseminated or disclosed in this proceeding and should, at a minimum, be afforded trade secret status.³

A. The Information Requested Should Not Be Subject to Disclosure

In these interrogatories, PULP seeks disclosure of prices and charges made by ESCOs or natural gas and electricity during a historical period.

In PULP IR No. 91 the request is made that the Company provide "...any internal analysis of whether residential customers receiving commodity service from ESCOs whose charges are billed by Niagara Mohawk paid more or less than full (bundled) service customers for their electric or gas service for 2008 through 2011 and monthly for 2012 to date."⁴

In PULP IR No. 107 the request, in part, is made that Niagara Mohawk provide "...a price comparison of single bill residential ESCO natural gas and electric service with residential bundled service from National Grid for the most recent 24 month period....."⁵

As part of the retail access program, the Company provides a consolidated billing service under which it bills customers for the ESCO charges and the utility charges. This service is conducted pursuant to a written agreement between the Company and each ESCO entitled "Agreement for Billing Services and For the Purchase of Electric/Accounts Receivable..."⁶ (BSA). As noted in the BSA the ESCO provides the Company with its private billing information for each customer and the Company then issues the bill to the customer. The BSA does not authorize the Company to release or disclose any of the billing information provided to Niagara Mohawk by the ESCO.

All of the billing data provided by an ESCO is obviously private confidential information that is only intended to be conveyed by the ESCO through the Company to the individual

³ The data sought by PULP was provided to the Company by each individual ESCO, and in total is in the possession of Niagara Mohawk.

⁴ The Company did provide a response to this Interrogatory on August 13, 2012 which included a written response and an attachment.

⁵ This Interrogatory was sent out by PULP on August 14, 2012.

⁶ A copy of the sample BSA is annexed hereto as Exhibit "B".

customer. It is not meant to be disseminated in a public manner. It is important to underscore that the Company only obtains this information through its capacity as a billing vendor for the ESCO pursuant to the terms of the BSA. It is not obtained from the ESCO for any material public or non-private purpose.

Thus, the BSA specifically states in Section 14.7 that it “is not intended to confer any rights whatsoever on any third parties.”⁷ This type of provision precludes sharing of information and data obtained through the billing process to or for the benefit of any third party without the concurrence of the ESCO. It is therefore reasonable to conclude that disclosure of the contractually protected data would be inappropriate.

Moreover, this pricing information data and compilation concerning ESCO activities has the potential to provide an unfair economic advantage to other entities as it presents pricing data for individual entities currently in the market. This information is not known by other competitors and remains solely within the province of the ESCO and the customer. Consequently, it meets the definition of a trade secret pursuant to 16A NYCRR Section 6-1.3 (a) (2), which renders this information protected from disclosure.

It is well established that individual data concerning ESCO market activities and operations obtained by the utility from the ESCOs should be treated in a confidential manner and not be subject to disclosure. See, Case 05-E-1222 – Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of New York State Electric & Gas Corporation for Electric Service, Ruling Granting Trade Secret Protection For ESCO Market Data (Issued February 2, 2006), William Bouteiller, Administrative Law Judge. The Commission has also accepted the view that market data compiled by the utilities concerning ESCO operations are to be treated in a confidential manner,⁸ and would not even be disclosed under the Freedom of Information Law (FOIL).⁹ In these instances, the Commission and an Administrative Law Judge have recognized that ESCO market data is highly proprietary, underscored the trade secret nature

⁷ Exhibit “B”, BSA, p. 24.

⁸ Case 98-M-1343 – In the Matter of Retail Access Business Rules; Order Adopting Amendments To The Uniform Business Practices, Granting In Part Petition On Behalf Of Customers And Rejecting National Fuel Gas Distribution Corporation’s Tariff Filing (issued October 27, 2008) at p. 26.

⁹ Request for Certain Information in Unredacted Gas-flow Reports for November and December 2005, Trade Secret 06-01, Letter dated October 20, 2006 from Hon. Jaclyn A. Brillling, Secretary (“2006 FOIL Ruling”); Trade Secret 09-1, May 5, 2009; Trade Secret 08-1 (May 19, 2008), p. 5.

of this information and acknowledged that its disclosure can be harmful from a competitive framework.

There is also no rationale supporting the materiality or relevance of this data to the issues under review in this proceeding which involves setting the prospective rates of Niagara Mohawk. The billing and pricing of ESCO services through the Company consolidated billing program does not implicate or relate to the just and reasonable nature of Niagara Mohawk's future distribution or commodity rates.¹⁰

In sum, disclosure of the information sought in PULP Interrogatories 107 and 91 is inconsistent with the contractual obligations codified in the BSA as well as established Commission precedent. Moreover it would involve the disclosure of highly confidential and market sensitive information.

B. Conclusion

In view of the foregoing, it is requested that the Judges determine that the challenged PULP Interrogatories are not subject to disclosure; direct Niagara Mohawk not to reply to the interrogatories; direct the Company to retract its previous response to PULP Interrogatory No.91; and rule that any information or documentation related to said Interrogatories is not admissible in this proceeding.

Respectfully submitted,

Retail Energy Supply Association

By: *Usher Fogel, Counsel*

Usher Fogel, Counsel

Cc: Active Party List (by electronic mail)

¹⁰ The ESCOs are assessed a separate billing charge by the Company for the billing service, Exhibit "B", BSA, p. 9.

EXHIBIT "A"

PUBLIC UTILITY LAW PROJECT OF NEW YORK, INC.

Third Set of Information Requests to Niagara Mohawk

PSC CASE NO. 12-E-0201 and CASE NO. 12-G-0202

August 14, 2012

107. Provide a price comparison of single bill residential ESCO natural gas and electric service with residential bundled full service from National Grid for the most recent 24 month period, in the same or similar format as the information that was provided for two months in response to PULP IR #91, in Excel spreadsheet form.

108. Provide an estimate of the incremental cost of adding to the National Grid website a bill calculator, generally analogous in function to the examples listed below, which enable a user to see what a Niagara Mohawk natural gas or electric bill for full (bundled) service would be, based on usage, zip code (for tax calculations), historic billing period and other relevant inputs entered by the user; and, what would be the annual incremental cost of updating and maintaining online gas and electric bill calculators at the National Grid website as monthly rate adjustments occur?

Examples of online utility bill calculators:

Golden Valley Electric Association (Alaska) at <http://www.gvea.com/rates/bill-calculator>

PG&E (California) link to bill calculator at <http://www.pgecurrents.com/2011/06/20/pge-changes-residential-electric-rates-today/>

Lincoln (Nebraska) Electric Service, at http://www.les.com/your_home/bill_calculator.aspx

Lakeland (Florida) Electric, at <http://www.lakelandelectric.com/Residential/RateInformation/ElectricBillCalculator/tabid/502/Default.aspx>

Nebraska Public Power District, at <http://www.nppd.com/electric-usage-in-your-home/calculators/residential-electric-bill-calculator/>

Blue Ridge (North Carolina) Electric Membership Corporation, at <http://www.blueridgeemc.com/your-bill/onlinecalculator.aspx>

Kootenai Electric (Idaho) at <http://www.kec.com/calculator.php>

Cuyahoga Falls (Ohio) electric bill calculator, at <http://cfo.cityofcf.com/web/utilities/electric/rate-calculator>

Ohio Power Company (AEP Ohio), downloadable bill calculator spreadsheet at <https://www.aepohio.com/account/bills/rates/AEPOhioRatesTariffsOH.aspx>

GreyStone Power Corporation (Georgia), at <http://www.greystonepower.com/ratecalculator/ratecalculato>

McPherson (Kansas) Board of Public Utilities, at <http://www.mcpbpu.com/ratecalc/AERESDCALC.htmlrresidential.asp>

Liberty Utilities Mobile Home Park (California) Tenant Bill Calculator at http://libertyutilities.com/west/saving/mobile_home.html

San Diego Gas & Electric (Sempra) at <http://sdge.com/baseline-allowance-calculator>

Anaheim (CA) electric bill calculator, http://www.anaheim.net/utilities/epay/ElecticBillCalculator/Default_new.aspx

Colorado Springs (CO), TOU Bill Calculator at http://www.csu.org/wa/rate/elec_ratecalc.jsp?rate_code=ETL

Portland (OR) TOU Bill Calculator at http://www.portlandgeneral.com/residential/your_account/billing_payment/time_of_use/calculator.aspx

Peru (Indiana) Utilities, at <http://www.peruutilities.com/billcalc.htm>

NVEnergy (Southern Nevada) at https://www.nvenergy.com/home/customercare/calculator_south.cfm

Tenaga Nasional Berhad (Malaysia) at <http://www.tnb.com.my/residential/billing/bill-calculator.html>

Ontario (Canada) Energy Board, at <http://www.ontarioenergyboard.ca/OEB/Consumers/Electricity/Your+Electricity+Utility>

The Public Utilities Commission of Sri Lanka, at <http://www.pucsl.gov.lk/cal/ebcalculator.php>

Bodrum Bulletin (Turkish TOU Electricity Bill Calculator) at <http://www.bodrubulletin.com/community/calculators/electricity-bill-calculator>

The Georgia Public Service Commission, at <http://www.psc.state.ga.us/calc/electric/GPcalc.asp>

Date of Request: August 6, 2012
Due Date: August 16, 2012

NYPULP No. 91 (GN-91)
NMPC Req. No. 729

NIAGARA MOHAWK POWER CORPORATION d/b/a National Grid

Case 12-E-0201 – Niagara Mohawk Power Corporation d/b/a National Grid

Request For Information

FROM: Public Utility Law Project of New York, Inc. – Gerald Norlander

TO: Shared Services and Customer Panel

Request:

16. Provide any internal analysis of whether residential customers receiving commodity service from ESCOs whose charges are billed by Niagara Mohawk paid more or less than full (bundled) service customers for their electric or gas service for 2008 through 2011 and monthly for 2012 to date.

EXHIBIT "B"

**AGREEMENT FOR BILLING SERVICES AND
FOR THE PURCHASE OF ELECTRIC ACCOUNTS
RECEIVABLE
BY AND BETWEEN**

NIAGARA MOHAWK POWER CORPORATION

And

[ESCO – Insert Legal Name]

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**AGREEMENT FOR BILLING SERVICES AND
FOR THE PURCHASE OF ELECTRIC ACCOUNTS RECEIVABLE**

THIS AGREEMENT ("Agreement"), effective the ____ day of _____, 2006 ("Effective Date"), is by and between Niagara Mohawk Power Corporation ("NMPC"), a corporation organized and existing under the laws of the State of New York with its principal place of business at 300 Erie Blvd. West, Syracuse, New York 13202, and _____ *[specify ESCO full legal name]* ("ESCO"), a _____ *[specify corporation / limited liability company / partnership]* organized and existing under the laws of the State of _____ *[specify state of organization]* with its principal place of business at _____ *[specify legal mailing address]*. NMPC and ESCO may be hereinafter referred to individually as "Party" and collectively as the "Parties."

WHEREAS, NMPC has implemented a retail access program for electric retail customers in NMPC's service territory ("Program"), in accordance with its tariffs on file with the New York State Public Service Commission ("PSC"), P.S.C. No. 207 – Electricity and P.S.C. No. 214 - Electric Service, Street, Highway, Roadway and Other Outdoor Lighting ("Tariffs"); and

WHEREAS, the Agreement was approved by the PSC as part of the joint proposal in Case No. 05-M-0333 ("Joint Proposal"); and

WHEREAS, ESCO is participating in such Program as a provider of the Energy Commodity to Customers as such terms are hereinafter defined; and

WHEREAS, NMPC and ESCO desire to enter into this Agreement whereby NMPC agrees to bill ESCO's supply of the Energy Commodity to Customers, and ESCO agrees to sell to NMPC, and NMPC agrees to purchase, all Accounts Receivable, as such term is hereinafter defined.

NOW, THEREFORE, in consideration of the covenants herein set forth, the Parties, intending to be legally bound, agree as follows:

ARTICLE 1 - DEFINITIONS

Account(s) Receivable. With respect to any Customer, shall mean ESCO's Energy Commodity revenue and associated charges determined by NMPC under Articles 2 and 3 of the Agreement based upon the applicable Billing Price Determinants in effect (including, but not limited to, any applicable state or federal taxes and/or surcharges) that are billed under this Agreement that represent an account of such Customer.

Accounts Receivable Purchase Price. In respect of any Account Receivable purchased hereunder, shall mean the Account Receivable less applicable Purchase Discount and ESCO Charges as applicable.

ACH. Shall mean automated clearing house transaction which is part of the Electronic Funds Transfer Act and Federal Reserve Board's fedwire system, consisting of a collection of regional electronic interbank networks used to process transactions electronically.

Affiliate(s). Shall mean with respect to a Person, any other Person that, directly or indirectly, controls, is controlled by or is under common control with such Person or is a director or officer of such Person. For purposes of this definition, the term "control" (including the terms "controlling," "controlled by" and "under common control with") of a Person means the possession, direct or indirect, of the power to vote 10% or more of the Voting Stock of such Person or to direct or cause the direction of the management and policies of such Person, whether through the ownership of Voting Stock, by contract or otherwise.

Billed Amounts. Shall be any and all amounts billed by NMPC to Customers, including Accounts Receivable, exclusive of applicable sales tax imposed thereon.

Billing Cycle. Shall correspond to the meter reading schedule published by NMPC located at www.niagaramohawk.com/enrgmkt/mktctrinfo/meterread.html.

Billing Date. Shall mean, with respect to any Account Receivable the date on which NMPC's billing system calculates such Account Receivable.

Billing Price Determinant(s). Shall mean either a Flat Rate price or Fixed Adder amount and such other information submitted by ESCO more fully described in Attachment A, attached hereto and made a part hereof, required to calculate Accounts Receivable for the Energy Commodity supplied by ESCO and billed by NMPC to Customers under this Agreement.

Billing Services. The billing services provided to ESCO by NMPC under Article 2.

BSA/Security Agreement. Shall mean any and all existing agreement for billing services and purchase of electric accounts receivable by and between the Parties in effect on or before the Effective Date.

Business Day. Business Day shall mean any day that is not a Sunday, Federal holiday or other day on which commercial banking institutions in New York City are authorized or obligated by law or executive order to be closed.

Collateral. Shall have the meaning set forth in Section 3.7.

Contract. Shall have the meaning set forth in Section 5.5.

Customer. Shall mean any qualified residential and/or non- residential retail customer in NMPC's service territory under the Program that is receiving the Energy Commodity. All of ESCO's customers purchasing Energy Commodity within NMPC's service territory will be subject to this Agreement and included in the definition of Customer, unless ESCO and NMPC agree to exclude the customers from this Agreement. Those customers, if any, who have been excluded from this Agreement are set forth in Attachment B.

Customer Payment. Shall mean the Customer payment for the Energy Commodity and any and all NMPC Tariff charges and surcharges for energy services provided by NMPC inclusive of applicable sales tax imposed thereon.

Default. Shall mean any event which, but for the passage of time or the giving of notice, or both, would constitute an Event of Default.

Deposit. Shall mean any deposit required pursuant to Section 10.1.

Document(s). Shall include Financing Statement(s), this Agreement or other documents, instruments and/or statements.

DPA. Shall mean a joint deferred payment agreement that meets the requirements of HEFPA or is otherwise voluntarily agreed to by a Customer and NMPC that allows the Customer to pay an overdue amount.

EDI. Shall mean electronic data interchange standards established in PSC Case Number 98-M0667 .

Effective Price Change Date. Shall have the meaning set forth in Section 2.3.

EFT. Shall mean electronic funds transfer provided under the Electronic Funds Transfer Act and Federal Reserve Board Regulation E which is a transfer of funds other than a transaction originated by check, draft, or similar paper instrument, that is initiated electronically to order, instruct, or authorize a financial institution to debit or credit an account.

Energy Commodity. Shall mean Customer's supply of electricity that is provided by ESCO under the Program.

ESCO Charges. Shall have the meaning set forth in Section 3.3 and in addition shall include other similar charges or amounts or ESCO costs and expenses required under this Agreement, the Tariff, UCC, UBP, as may be amended or modified from time to time.

Event of Default. Shall have the meaning set forth in Section 9.2.

FERC. Shall mean the Federal Energy Regulatory Commission or any successor agency

thereto.

Financing Statements. Shall mean any and all financing statements and amendments thereto, required in connection with ESCO's grant of security interest in the Collateral under Section 3.7 to be filed in accordance with requirements of the UCC.

Fixed Adder. Shall mean Billing Price Determinants as submitted by ESCO that are based solely upon a fixed amount to be added to the Electricity Supply Cost that would have otherwise been charged to the same Customer if the Electricity Supply Service had been provided by NMPC, to determine the Accounts Receivable, *exclusive* of any applicable sales taxes imposed on ESCO's revenues.

Flat Rate. Shall mean Billing Price Determinants as submitted by ESCO that are based solely upon a price applied to Customer's Energy Commodity required to determine the Accounts Receivable. Such price is all-inclusive of ESCO's cost of service components, including but not limited to all revenue taxes imposed upon ESCO, such as any gross receipt or revenue taxes *exclusive* of any applicable sales taxes imposed on ESCO's revenues.

FTN. Shall mean the final termination notice required under HEFPA.

HEFPA. Shall mean the Home Energy Fair Practices Act.

Law. Shall have the meaning specified in Section 5.5.

Lesser Amount. Shall mean the amount paid by a residential Customer of the amount necessary to end the suspension of Tariff delivery service pursuant to the requirements of Public Service Law § 32 (5)(d), which amount shall be the lesser of (i) the total amount the Customer would have owed NMPC for the period of non-payment if the entire service (i.e. Energy Commodity and Tariff delivery service) had been obtained from NMPC, or (ii) the actual sum of the amount of arrears owed to ESCO and NMPC.

NYISO. Shall mean the New York Independent Systems Operator or any successor organization thereto.

Person. Shall mean an individual, partnership, corporation, business trust, joint stock company, trust, unincorporated association, joint venture, limited liability company or other entity, or a government or any political subdivision or agency thereof.

Program. Shall mean the NMPC-implemented retail access program under its Tariff for electric retail customers in its service territory.

PSC. New York State Public Service Commission or any successor agency thereto.

Purchase Discount. With respect to any Account Receivable within any particular service classification, shall mean the discount rate for such service classification multiplied by the face amount of such Accounts Receivable excluding any applicable state sales tax for such Account Receivable.

Reconnect Chargeback Amount. Shall mean any difference between the amount billed and the amount paid by Customer to reconnect service pursuant to the requirements of Public Service Law § 32 (5)(d).

Representatives. Shall mean the Subsidiaries, Affiliates, directors, officers, employees, agents, auditors, attorneys, consultants or advisors by and on behalf of the Parties.

Sales Tax Adjustment Charge. Shall mean the amount of sales tax included in the Accounts Receivable Purchase Price that is deemed uncollectible by NMPC.

Submission Date. Shall mean the date NMPC receives initial or revised Billing Price Determinants from ESCO.

Subsidiary. Shall mean any corporation, partnership, joint venture, limited liability company, trust or estate of which (or in which) more than 50% of (a) the Voting Stock, (b) the interest in the capital or profits of such limited liability company, partnership or joint venture, or (c) the beneficial interest in such trust is, in each case, at the time directly or indirectly owned or controlled by such Person, by such Person and one or more of its other Subsidiaries, or by one or more of such Person's other Subsidiaries.

Tariff. Shall mean NMPC's Tariff No. 207 - Electricity and 214 - Electric Service, Street, Highway, Roadway and Other Outdoor Lighting on file with the PSC.

Term. Shall have the meaning set forth in Article 8.

Third Party Financing Statements. Shall have the meaning set forth in Section 6.4.

Transition Fee. Shall mean the fee paid by ESCO to NMPC that is determined in accordance with the fee schedule set forth in Attachment C established pursuant to the methodology set forth in the Joint Proposal.

UBP. Shall mean the Uniform Business Practices adopted by the PSC as amended and modified from time to time.

UCC. Shall mean the Uniform Commercial Code as in effect in the jurisdiction under the laws of which the ESCO as a "registered organization", as such term is defined in the UCC.

Unbilled Accounts Receivable. Shall mean the amount of ESCO's Energy Commodity

revenue and associated charges to be determined by NMPC under Article 2 of this Agreement based upon the applicable Billing Price Determinants in effect (including, but not limited to, any applicable state or federal taxes and/or surcharges) that remain unbilled until such time as such receivables are billed and purchased by NMPC under the terms of this Agreement.

Voting Stock. Shall mean capital stock issued by a corporation, or equivalent interests in any other Person, the holders of which are ordinarily, in the absence of contingencies, entitled to vote for the election of directors (or persons performing similar functions) of such Person, even if the right so to vote has been suspended by the happening of such a contingency.

All capitalized terms used in this Agreement and not otherwise defined have the meaning given to such terms in the Tariff.

ARTICLE 2 - BILLING

2.1 General. NMPC agrees to calculate the Accounts Receivable, based upon the Billing Price Determinants in effect, and include on NMPC bills to Customers such calculated amount along with any and all NMPC Tariff charges and surcharges, if applicable, for energy services provided by NMPC in connection with ESCO's supply of the Energy Commodity to Customers. NMPC charges and any applicable surcharges in connection with the Customer's Energy Commodity shall be separately identified on the NMPC bills prepared under this Agreement except for:

- (a) surcharges that may be included by ESCO as a component of the Billing Price Determinants provided to NMPC under this Agreement,
- (b) the net prior ESCO balance remaining (item m in Attachment 3 to Section 9, paragraph G. 4 of the UBPs) and
- (c) if a budget bill, the applicable billing information and resulting budget bill amount due (item p in Attachment 3 to Section 9, paragraph G.4 of the UB Ps)

With respect to (b) and (c) above, the general section of a consolidated bill will display the total net prior balance and, where applicable, the total budget installment due and total budget plan balances, for both delivery and commodity charges.

2.2 Submission of Initial Billing Price Determinants. ESCO shall submit its applicable initial Billing Price Determinants prior to NMPC's performance of any Billing Services under this Agreement. In the event that ESCO selects a billing option that provides for a Fixed Adder, NMPC shall apply the same Tariff surcharge(s) allowed under its Tariff to the resulting Electricity Supply Cost as would have otherwise been charged to the same customer if Electricity Supply Service had been provided by NMPC, unless ESCO includes the Tariff surcharges in the Fixed Adder.

- 2.3 Changes to Billing Price Determinants.** ESCO may change any and all Billing Price Determinants initially provided to NMPC at the commencement of the Term of this Agreement, but will be limited to two changes every 30 days, and in no event shall the changes be effective less than four Business Days after NMPC's actual receipt via NMPC's Web Site ("Effective Price Change Date"). There will be no retroactive application of revised Billing Price Determinants. Any revised Billing Price Determinants shall apply prospectively as of the Effective Price Change Date.
- 2.3.1 Flat Rate - Revised Billing Price Determinants.** The Flat Rate applied to the Energy Commodity for each Customer as of the Effective Price Change Date shall be based upon the Billing Price Determinant selections in effect as of such date.
- 2.3.2 Fixed Adder - Revised Billing Price Determinants.** Revisions to the Fixed Adder submitted in accordance with the requirements of Section 2.3 shall be effective for purposes of calculating the Accounts Receivable under Section 2.1 as of the Effective Price Change Date.
- 2.4 Calculation of Accounts Receivable.** Based on the applicable Billing Price Determinants in effect under this Agreement and on available metering data or estimated usage data, NMPC, applying its standard billing methods, will determine the Accounts Receivable under Article 2, and include such amounts on NMPC bills issued to Customers. NMPC's standard billing methods include, but shall not be limited to, a proration of Flat Rate based Billing Price Determinants.
- 2.5 Billing Services.** NMPC shall provide billing services which consist of billing and collecting Accounts Receivable and budget billing. ESCO shall be responsible for any and all ESCO Charges. NMPC agrees to print ESCO's name (provided that it does not exceed 36 characters) and telephone number and the respective Customer's Accounts Receivable, based upon the current Billing Price Determinants in effect, on each NMPC bill to such Customer provided that NMPC has received Billing Price Determinants in accordance with the terms of this Agreement. NMPC bills shall also contain a statement that directs Customers to make all checks payable to NMPC only.
- 2.6 Sales Tax.** The sales tax rates applied to ESCO portion of Billed Amounts hereunder shall be based solely upon the sales tax rates that would have otherwise been charged to the same Customer if the Electricity Supply Service had been provided by NMPC.
- 2.7 Environmental Disclosure Labels.** Subject to NMPC's mailing schedule, ESCO will provide and NMPC will send PSC approved environmental disclosure labels to Customers as may be required from time to time under applicable PSC rules and regulations. NMPC will invoice and ESCO agrees to pay all associated label printing costs.

ARTICLE 3 – PURCHASE AND MANAGEMENT OF ACCOUNTS RECEIVABLE

- 3.1 General.** Pursuant to the terms of this Agreement, ESCO agrees to sell and NMPC agrees to purchase each Account Receivable as of the Billing Date in respect of such Account Receivable, and in consideration of such purchase ESCO grants to NMPC a security interest in the Collateral under this Article 3. As of the Billing Date, title to such Account Receivable shall pass to NMPC and ESCO shall have no rights in or to such Account Receivable, and shall not seek to collect in any manner such amount from any Customer. Any Accounts Receivable, or portion thereof, that are billed by NMPC under this Agreement and for which payment is received by ESCO from Customers shall be held by ESCO in trust as the property of NMPC and shall be remitted in full to NMPC immediately, and in any event within 5 Business Days of receipt, without any deduction or setoff by ESCO. NMPC shall have the right to endorse the name of ESCO on any and all remittances by Customers received by NMPC that are payable to ESCO, and the right to collect the same from Customers. In addition, ESCO assigns to NMPC any and all payments received from state federal or other agencies associated with the Accounts Receivable including without limitations Heating Emergency Assistance Program (HEAP), emergency HEAP, Section 131s payments from social service programs.
- 3.2 Accounts Receivable Purchase Price.** NMPC shall pay to ESCO the Accounts Receivable Purchase Price in the manner and at the time set forth in Section 3.4. For each Account Receivable purchased under this Agreement, if the ESCO Charges in respect thereof exceed the face amount of such Account Receivable, such that the Accounts Receivable Purchase Price is less than zero (0), NMPC shall have the right to either (i) set off and apply any and all ESCO Charges, payments, or amounts owing to NMPC by ESCO under this Agreement to or for the credit on the account of NMPC against any and all of the obligations of NMPC including but not limited to the Accounts Receivable Purchase Price to any affected sums, deposits, fees and charges under this Agreement, now or hereafter existing under this Agreement, or (ii) require ESCO to pay such ESCO Charges to NMPC in full, without any deduction or setoff, within ten days after receipt of NMPC's invoice of any amounts due. NMPC may request payments by check, ACH or EFT from ESCO. NMPC has the right to impose a continuing late payment penalty each month in the amount of 1.5% of any unpaid sums previously invoiced and any objections to payment must be made in writing to NMPC within 60 days after the date of the subject invoice. **ESCO'S FAILURE TO PRESENT AN INVOICE CLAIM WITHIN THIS 60-DAY PERIOD SHALL CONSTITUTE A WAIVER OF ANY CLAIM ESCO MAY HAVE WITH RESPECT TO THE ACCOUNTS RECEIVABLE PURCHASE PRICE SET FORTH IN THE SUBJECT INVOICE.** In the event NMPC determines that a refund is owed to ESCO with respect to any purchase of Accounts Receivable hereunder, NMPC will either make such refund, or credit ESCO's account, within 10 days after its determination.
- 3.3 Fees and Charges.** ESCO agrees that NMPC has the right to deduct from or to reduce the Accounts Receivable Purchase Price by, the following amounts (collectively the "ESCO

Charges”):

- 3.3.1 Billing Processing Fee.** NMPC will charge ESCO a processing fee which shall be \$.53 for each ESCO Customer account billed by NMPC pursuant to Article 2 or an allowable amount under the Tariff, whichever is greater.
- 3.3.2 Purchase Discount.** NMPC will charge ESCO a Purchase Discount. The discount rate for the Purchase Discount shall be consistent with the terms of the Joint Proposal.
- 3.3.3 Reconnect Amount Charge(s).** NMPC will determine and charge all Reconnect Chargeback Amounts to ESCO by deducting such amounts from the Accounts Receivable Purchase Price, if applicable. Each affected Customer account will be credited in the amount of the Reconnect Chargeback Amounts. NMPC charges for Reconnect Chargeback Amounts under this section may be deducted by NMPC from the Accounts Receivable Purchase Price at any time during the Term of this Agreement and the right to deduct Reconnect Chargeback Amounts shall survive termination of this Agreement.
- 3.3.4 Re-Billing Services Fee.** NMPC will charge ESCO a processing fee in the amount of \$5.00 for each account re-billed by NMPC only upon written request from ESCO, which written request must be received within 20 calendar days of the original billing date for such account. The written request shall include a list of the NMPC bill account numbers for the accounts to be re-billed and the number of re-billed accounts included in the subject list shall be used as the basis for the Re-Billing Services Fee.
- 3.3.5 Sales Tax Adjustment Charge.** NMPC will determine and charge all Sales Tax Adjustment Charges to ESCO.
- 3.3.6 Administrative Fee.** NMPC shall charge ESCO a pro rata share (except for those costs and expenses that are specifically identified to a particular energy service company) of any and all NMPC incremental costs and expenses associated with this Agreement, the purchase of receivable and billing services plan more fully set forth in the Joint Proposals that may be approved by the Commission in Case No.05-M-0333 concerning NMPC’s Competitive Opportunities Development Plan, or any further retail market development programs that may be approved by the Commission during the term of this Agreement.
- 3.3.7 Other Charges.** NMPC shall have the right to impose other fees and expenses in addition to the ESCO Charges provided in this Section 3 (“Other Charges”) by providing the ESCO with 20 days advance written notice of the implementation of such Other Charges. In the notice NMPC shall set forth the rationale with supporting documentation for such fees and charges. In the event ESCO disagrees with such

Other Charges ESCO shall have the right to dispute resolution with respect to the Other Charges only pursuant to Section 3.3 of the JP provided that ESCO provides NMPC with advance written notice that sets forth ESCO's specific objections to the Other Charges on or before the implementation of the Other Charges.

- 3.4 Payment by NMPC.** NMPC shall remit to ESCO the Accounts Receivable Purchase Price for each Billing Cycle 20 calendar days after NMPC has issued bills to Customers pursuant to Article 2. Payment to ESCO shall, at NMPC's option, be either by (a) check mailed to the address of ESCO first set forth above, or (b) ACH or (c) EFT. Except for the calendar days provided in this section, NMPC reserves the right to modify the payment procedure under this Article to accommodate any NMPC operational and/or system changes upon 30 days' prior written notice to ESCO.
- 3.5 ESCO Statements/Reports.** NMPC will provide ESCO with all necessary statements/reports through EDI transactions.
- 3.6 Right of Offset.** To the fullest extent permitted by law, NMPC is hereby authorized at any time and from time to time, to set off against and apply any and all payments or amounts owing to ESCO by NMPC under this Agreement to, or for the credit on the account of ESCO, against any and all of the obligations of ESCO including, but not limited to, any affected sums, deposits, fees and charges under this Agreement, now or hereafter existing under this Agreement, or any ESCO sums owed to the NYISO for related charges and expenses whether or not NMPC shall have made any demand under this Agreement *if* (a) (i) ESCO ceases doing business as a going concern for five or more days; (ii) ESCO makes an assignment for the benefit of creditors; (iii) ESCO admits in writing its inability to pay its debts as they become due; (iv) ESCO is generally not paying its debts as they mature; (v) ESCO files a voluntary petition in bankruptcy; (vi) ESCO files a petition seeking for itself any reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar arrangement under any present or future statute, law or regulation or files an answer admitting the material allegations of a petition filed against it in any such proceeding; (vii) ESCO consents to or acquiesces in the appointment of a custodian, trustee, receiver or liquidator of it or all or any substantial part of its assets or properties; (viii) ESCO or its shareholders shall take any action looking to its dissolution or liquidation; (ix) any order for relief is entered against ESCO under the federal bankruptcy laws; (x) ESCO fails to pay any sums required by this Article 3 when due or fails to provide any security deposits required by any NMPC Tariff or tariffs on file with the FERC or the PSC; (xi) ESCO has failed to pay when due any sums owed to NMPC or any other third party under this Agreement or under any other agreement in connection with the Program or under the Tariffs or UBP Section 7; or (xii) ESCO's membership in the NYISO is terminated; or (b) NMPC (i) has reasonable grounds for insecurity regarding the performance of ESCO of any obligations under this Agreement (whether or not then due); or (ii) has reasonable grounds to believe that the fees and/or charges owing from ESCO to NMPC under this Agreement may exceed any amounts due and owing or to become due and owing from NMPC to ESCO; or (c) if any amounts that remain due and owing to NMPC

after application of any indemnification proceeds due to NMPC from ESCO under Articles 4 and 13, which proceeds represent payment for Losses or BSA Losses under such Articles. The rights of NMPC under this Article 3 are in addition to other rights and remedies (including, without limitation, other rights of setoff) NMPC may have under this Agreement, its Tariff, the UCC, UBP, or the laws of the State of New York, and any applicable rules and regulations thereunder.

3.7 Security Interest. As collateral for all obligations now existing or hereafter arising from ESCO to NMPC, ESCO hereby grants to NMPC a first priority perfected security interest in all the following property of ESCO, wherever located, whether now owned, hereafter acquired, or created, and all proceeds and products thereof (the "Collateral"):

3.7.1 All Accounts Receivable purchased by NMPC under this Agreement;

3.7.2 The Deposit; and

3.7.3 All Unbilled Accounts Receivable to be purchased by NMPC under this Agreement.

3.8 Application of Customer Payment. NMPC agrees to calculate the fractional share of the Customer Payment (i.e., proration of Customer Payment) for each Party in accordance with HEFPA requirements except upon payment of the Lesser Amount, in which case the payment will be prorated to the Lesser Amount. Upon payment of the Lesser Amount, the unpaid portion of the Customer Accounts Receivable shall be identified and included in subsequent bills to Customer until either the unpaid amount is charged back under this Agreement or paid in full, whichever occurs first.

ARTICLE 4 – DISCONTINUANCE OF DELIVERY AND COMMODITY SERVICES

4.1 HEFPA Activities for Residential Customers.

4.1.1 NMPC, and not the ESCO, will be responsible for all HEFPA activities in relation to Accounts Receivable(s) of only those Customers that are eligible for HEFPA protections that are purchased from the ESCO under this Agreement, including without limitation, the following activities:

a. NMPC shall provide a joint FTN, consistent with NMPC collection policies.

b. NMPC will contact Customer to seek Customer's consent to a DPA.

c. ESCO shall agree to not offer its own deferred payment agreement to any HEFPA eligible Customer until such account has been charged back in accordance with

Section 3.3.3 of this Agreement.

d. NMPC shall provide an annual notice required under HEFPA summarizing rights and obligations of residential Customers under HEFPA.

4.1.2 NMPC shall indemnify and hold harmless the ESCO, except in cases of negligence or intentional misconduct or wrongdoing by ESCO, for any costs or liabilities to third parties arising out of NMPC's HEFPA actions under this Section 4.1, (any of the above being a "HEFPA Claim") provided that: (i) ESCO provides NMPC actual written notice of any HEFPA Claim by third parties within three days of ESCO's receipt of such HEFPA Claim, (ii) ESCO irrevocably appoints NMPC as its attorney-in fact in connection with the settlement, litigation, or other resolution of any HEFPA Claim, (iii) ESCO cooperates in all reasonable respects with NMPC and its attorneys in the investigation, trial, defense and settlement of such HEFPA Claim and any appeal arising therefrom, (iv) ESCO does not take any actions inconsistent with NMPC's rights under Section 4.1. ESCO shall not have any authority, either express or implied, to enter into any settlement negotiations regarding any HEFPA Claim or offer to settle or compromise any Claim. In no event shall any settlement of a HEFPA Claim by NMPC require consent of ESCO

4.1.3 Pursuant to the discontinuance of service requirements under HEFPA, applicable PSC rules and regulations thereto, and terms and conditions of ESCO's Customer contracts as applicable, ESCO, with respect to residential Customer Accounts Receivable purchased by NMPC hereunder, hereby grants, assigns and conveys to NMPC any and all ESCO's rights (or in the alternative if such rights are not available, ESCO appoints NMPC as ESCO's agent), to terminate Energy Commodity service and/or suspend NMPC Tariff delivery service of any ESCO residential Customer that fails to make full payment of any and all Energy Commodity and NMPC Tariff delivery service charges due in accordance with 16 NYCRR Part 11, (i.e. delivery and or commodity) that are set forth on a consolidated bills as required under Article 2.

4.2 Non-Payment and Discontinuance of Non- Residential Customer Service

4.2.1 ESCO, with respect to non-residential Customer Accounts Receivable purchased by NMPC hereunder, hereby grants assigns and conveys to NMPC any and all of ESCO's rights (or in the alternative if such rights are not available, ESCO appoints NMPC as ESCO's agent) to disconnect ESCO's non-residential Customer that fails to make full payment of any and all Energy Commodity and NMPC Tariff delivery service charges due in accordance with 16 NYCRR Part 13, (i.e. delivery and or commodity) that are set forth on a consolidated bills as required under Article 2. Pursuant to such assignment and/or appointment, NMPC shall be authorized to disconnect its Tariff delivery service and ESCO's Energy Commodity service in

accordance with 16 NYCRR Part 13, to non-residential Customers when (i) the Customer fails to make full payment of all amounts due on the consolidated bill as required under Article 2; (ii) NMPC has purchased the ESCO's Account(s) Receivable; and (iii) ESCO executes and furnishes NMPC with the affidavit, as set forth in Attachment D, from an officer of ESCO representing to NMPC that ESCO has notified its current non-residential Customers and will notify its future non-residential Customers that NMPC is permitted to disconnect the Customer for non-payment of ESCO Energy Commodity charges. The Company's receipt of such properly executed affidavit shall be condition of any service or NMPC obligations under this Agreement. ESCO will indemnify and hold harmless NMPC for any cost, expense, or penalty or unpaid Account(s) Receivable purchased by NMPC if the Customer's service is discontinued for non-payment and the Customer establishes that it did not receive such notification. ESCO waives the right to seek termination for non-payment of ESCO service and/or to request suspension of NMPC's Tariff delivery service.

ARTICLE 5 - ESCO REPRESENTATIONS AND WARRANTIES

- 5.1 ESCO warrants that it has the rights in, or the power to, transfer the Collateral to NMPC. Furthermore, ESCO warrants that its title to the Collateral is free of all adverse claims, liens, security interest and restrictions on transfer or pledge and are not and will not be subject to any other valid or existing billing, collection, or financing instrument, and have not been billed and will not be collected by or for the benefit of any other party except NMPC.
- 5.2 ESCO warrants that the Collateral is and will remain free from any and all liens, claims, encumbrances, security interests and restrictions on transfer or pledge, and that no Collateral will be assigned, financed, sold, pledged, hypothecated, or otherwise encumbered, except to NMPC.
- 5.3 ESCO warrants that the prices charged to Customers are in accordance with ESCO's agreements with these Customers.
- 5.4 ESCO warrants that its legal name and state of organization is as set forth in the preamble to this Agreement and ESCO (i) is a _____ *[specify state of organization]* _____ *[specify corporation / limited liability company / partnership]* duly organized, validly existing and in good standing under the laws of the jurisdiction of its organization, (ii) is duly qualified in New York and each other jurisdiction and in good standing as a foreign *[specify corporation / limited liability company / partnership]* in each other jurisdiction in which it owns or leases property or in which the conduct of its business requires it to so qualify or be licensed, and (iii) has all requisite *[specify corporation / limited liability company / partnership]* power and authority (including, without limitation, all governmental licenses, permits and other approvals) to own or lease and operate its properties and to carry on its business as now conducted. If ESCO is a non-New York

entity, ESCO is a registered organization as defined in Section 9-102 of the UCC in its state of organization. This applies only in the case of a non-New York entity qualified to do business and in good standing in the State of New York.

- 5.5 The execution, delivery and performance by ESCO of this Agreement and each Document to which it is or is to be a party, and the consummation of the transactions contemplated hereby and thereby, are within ESCO's corporate powers, have been duly authorized by all necessary corporate/organizational action(s), and do not (i) contravene ESCO's _____ *[specify governance documents, i.e., charter/bylaws/articles of limited partnership]*, (ii) violate any law, rule, regulation, order, writ, judgment, injunction, decree, determination or award (each a "Law"), (iii) conflict with or result in the breach of, or constitute a default under, any contract, loan agreement, indenture, mortgage, deed of trust, lease or other instrument (each a "Contract") binding on or affecting ESCO, or its Subsidiaries, or any of their properties, or (iv) result in or require the creation or imposition of any lien upon or with respect to any of the Collateral other than under this Agreement.
- 5.6 Neither ESCO nor any of its Subsidiaries is in violation or breach of any Contract or Law, the violation or breach of which is reasonably likely to have a material adverse effect on ESCO's ability to perform under this Agreement.
- 5.7 No authorization, consent or approval, license, exemption or filing or registration with any court or other action by, and no notice to or filing with any governmental authority or regulatory body or any other third party is required for the due execution, delivery, recordation, filing or performance by ESCO of this Agreement or any other Document to which it is a party, or for the consummation of the other transactions contemplated hereby.
- 5.8 This Agreement has been, and each other Document when delivered hereunder will have been, duly executed and delivered by ESCO except as otherwise provided in this Agreement. This Agreement is, and each other Document to which ESCO is a party when delivered hereunder will be, the legal, valid and binding obligation of ESCO, enforceable against ESCO in accordance with its respective terms.
- 5.9 There is no action, suit, investigation, litigation or proceeding affecting ESCO pending or threatened before any court, governmental agency or arbitrator that purports to affect the legality, validity or enforceability of this Agreement, any Document or the consummation of the transactions contemplated thereby, or by this Agreement.
- 5.10 ESCO warrants that Collateral is free of all tax liens claims and/or encumbrances and that ESCO will pay and remit on a timely basis all applicable state and federal tax levied or assessed upon the Accounts Receivable or the Collateral.
- 5.11 ESCO warrants that it is duly qualified and accepted as a member of the NYISO and is in compliance with the rules and regulations of the NYISO as of the Effective Date of this

Agreement.

ARTICLE 6 - ESCO COVENANTS AND OBLIGATIONS

- 6.1 Legal Identity.** During the Term of this Agreement and until all of ESCO's obligations under this Agreement are completed, ESCO agrees that it will:
- a. provide NMPC with 60 days prior written notice of any change in *[specify corporation / limited liability company / partnership]* existence and status as a registered organization, and NMPC shall have the right to terminate this Agreement on the effective date of any such change;
 - b. provide NMPC with 60 days' prior written notice, if ESCO merges into or consolidates with any other entity, or sells all or substantially all of its assets, and NMPC shall have the right to terminate this Agreement on the effective date of the merger, consolidation or sale;
 - c. provide NMPC with 30 days' prior written notice of any change in ESCO's state where it is located, incorporated or is registered, as the case may be;
 - d. not change its corporate name without providing NMPC with 30 days' prior written notice;
 - e. not grant any security interest in the Collateral except to NMPC; and
 - f. remain a duly qualified member of the NYISO and use its best efforts to maintain its membership status in accordance with the rules and regulations of the NYISO and notify NMPC within two Business Days of notification from the NYISO of any change in ESCO's membership status.
- 6.2 ESCO Cooperation.** ESCO agrees to cooperate with NMPC to the fullest extent possible under the law and to use its best efforts to facilitate the transactions under this Agreement. Such cooperation shall include, but not be limited to, supplying NMPC with all information and assistance that may be necessary or helpful to NMPC in establishing the accuracy of any Accounts Receivable or in correcting any errors.
- 6.3 ESCO Document Delivery.** ESCO hereby agrees to promptly execute and/or deliver to NMPC any and all Documents NMPC deems necessary to evidence NMPC's first priority security interest in the Collateral and satisfy ESCO's obligations under this Agreement. ESCO authorizes NMPC to file and/or record Documents, at ESCO's sole cost and expense, including Financing Statements deemed necessary by NMPC to perfect its interest in the Collateral under the UCC and put third parties on notice of NMPC's interest in the Collateral. ESCO further agrees that NMPC may execute, file and/or record any such other

documents at ESCO's sole cost and expense, if required, to evidence NMPC's interest in the Collateral, for and on behalf of ESCO.

6.4 Financing Statements. ESCO agrees to use its best efforts to:

- a. obtain any and all necessary amendments or terminations of financing statements, filed by any third party ("Third Party Financing Statements") before the commencement of the Term of this Agreement against ESCO as a debtor in the Collateral contemplated under this Agreement, specifically obtaining a release of the Collateral; and
- b. ensure that any and all Third Party Financing Statements filed subsequent to the commencement of the Term of this Agreement shall expressly except from the description of collateral the Collateral and specifically reference this Agreement to ensure continuation of NMPC's first priority perfected security interest in the Collateral.

6.5 Conditions Precedent. The commencement of the Term of this Agreement and the obligations of ESCO and NMPC under this Agreement are subject to the satisfaction of the following conditions precedent:

- a. ESCO shall deliver the information in (i)-(iii) below to NMPC to the attention and address of its representatives in Section 6.6 prior to the commencement of the Term of this Agreement. ESCO shall provide the following:
 - (i) complete list of any liens in favor of a third party, as creditor against ESCO, as debtor;
 - (ii) copies of all documents evidencing such liens including any Third Party Financing Statements filed against ESCO as a debtor;
 - (iii) a certified copy of a lien search of ESCO from the UCC filing offices under the UCC or a report that is complete and satisfactory to NMPC, such that NMPC is satisfied that any Collateral that has been previously pledged by the ESCO, whether recorded or not, has been fully discharged and released, and that no lien currently is recorded against the Collateral. An uncertified lien search obtained from an internet based website from ESCO's state of organization shall not satisfy requirements under this section. The lien search obtained shall be at ESCO's sole cost and expense; and
 - (iv) An original or certified copy of a certificate of good standing with respect to ESCO issued by the Secretary of State of ESCO's jurisdiction of organization and, if such jurisdiction is not the State of New York, then an original

certificate of authority evidencing that ESCO is duly qualified and in good standing as a foreign organization in the State of New York.

- b. If the information provided by ESCO under Section 6.5 (a)(i)-(iii) is not, in the opinion of NMPC, satisfactory, complete and acceptable in form and substance, and such information does not provide adequate evidence that NMPC's interest in the Collateral is superior to any third party's interest, then NMPC shall provide written notice to ESCO that the Term of this Agreement shall not commence and this Agreement shall be null and void.

6.6 Notification. In addition to the requirements in Section 6.5, ESCO agrees to provide copies to NMPC of any Third Party Financing Statements filed after the commencement of the Term of this Agreement prior to the filing of any such statements to allow NMPC to review such Third Party Financing Statements. After its receipt of the Third Party Financing Statements, NMPC shall have three Business Days to object to such statements on the ground that the execution of the Financing Statement would grant a security interest in the Collateral or otherwise affect NMPC's security interest in the Collateral. ESCO shall deliver the Third Party Financing Statements by a nationally recognized courier service **and** by facsimile to NMPC at the following address and facsimile numbers:

Niagara Mohawk Power Corporation
300 Erie Boulevard West
Syracuse, New York 13202

ATTENTION: MANAGER, SUPPLIER SERVICES
Facsimile No. (315) 460-8927 and

Third Party Financing Statements delivered by facsimile shall be deemed given on the day of receipt provided that the statements delivered by a nationally recognized courier service are received by NMPC before noon New York time on the next Business Day following the receipt of the facsimile.

6.7 Suspension of Tariff Delivery Service. During the Term of this Agreement, ESCO assigns to NMPC any and all rights to request NMPC to suspend its Tariff delivery service or collect Accounts Receivable and ESCO waives all of its rights to exercise these activities without NMPC's consent.

ARTICLE 7 - TAXES

7.1 Certificate of Authority. At or prior to the date of its execution of this Agreement, ESCO shall provide NMPC with a copy of its State of New York Certificate of Authority as a sales

tax vendor. At all times during the Term of this Agreement, ESCO shall maintain current its Certificate of Authority.

- 7.2 Payment of Taxes.** In accordance with Section 3.5, the amount of sales and use taxes invoiced to Customers in connection with ESCO's portion of Billed Amounts will be provided in ESCO's Statements/Reports. ESCO shall be considered the vendor for purposes of liability for taxes related to Billed Amounts. Nothing in this Agreement shall be construed as imposing upon NMPC the obligation of remitting to any federal, state, or local taxing authority those taxes that are the collection and remittance responsibility of ESCO with respect to any Billed Amounts or with respect to NMPC's purchase of Accounts Receivable from ESCO. ESCO shall be liable for and shall pay all such taxes, and shall further indemnify, defend, and save harmless NMPC from and against any and all liability for such taxes, and any interest or penalties thereon.

ARTICLE 8 - TERM OF AGREEMENT

- 8.1** The initial term of this Agreement ("Term") shall commence on either the (i) Effective Date or (ii) the date that ESCO submits the initial Billing Price Determinants to NMPC, whichever is later, provided, however, that ESCO fulfills its condition precedents under Article 6 to NMPC's satisfaction. If ESCO does not fulfill the obligations under Article 6 as determined by NMPC, in its sole and absolute discretion, the Term of this Agreement shall not commence and no obligations will arise with respect to NMPC and this Agreement shall be null and void except as otherwise set forth in this Section 8.1. The Term of this Agreement shall only commence in accordance with express terms and conditions of this Agreement, and continue in full force and effect for the duration of the Program, unless earlier terminated in accordance with Article 9.

ARTICLE 9 – TERMINATION \ EVENTS OF DEFAULT

- 9.1 Termination for Convenience.** Either Party may terminate this Agreement upon 60 days' prior written notice to the other Party.
- 9.2 Termination for Default.** Except as otherwise provided in this Article 9, this Agreement may be terminated by either Party (the "Terminating Party") upon the occurrence of any of the following events ("Events of Default") with respect to the other Party (the "Defaulting Party"):
- 9.2.1** The Defaulting Party's failure to make any payment required under this Agreement when or before due which such failure continues for five days after receipt of written notice from the Terminating Party; or
 - 9.2.2** Any representation or warranty made or deemed made by the Defaulting Party herein or in connection with this Agreement proves to have been incorrect in any respect

when made or deemed made; or

- 9.2.3 The Defaulting Party's failure to perform or observe any other term, covenant or agreement contained in this Agreement on its part to be performed or observed if such failure shall remain unremedied for a period of 30 days after written notice thereof shall have been given to the Defaulting Party; or
- 9.2.4 The Defaulting Party's ceasing to do business for five or more days, or generally not paying its debts as such debts become due, or admitting in writing its inability to pay its debts generally, or making an assignment for the benefit of creditors; or the institution of any proceeding by or against the Defaulting Party seeking to adjudicate it a bankrupt or insolvent, or seeking liquidation, winding up, reorganization, arrangement, adjustment, protection, relief, or composition of it or its debts under any law relating to bankruptcy, insolvency or reorganization or relief of debtors, or seeking the entry of an order for relief or the appointment of a receiver, trustee, custodian or other similar official for it or for any substantial part of its property and, in the case of any such proceeding instituted against it (but not instituted by it), either such proceeding shall remain undismissed or unstayed for a period of 60 days, or any of the actions sought in such proceeding (including, without limitation, the entry of an order for relief against, or the appointment of a receiver, trustee, custodian or other similar official for, it or for any substantial part of its property) shall occur; or the Defaulting Party or any of its Subsidiaries or Affiliates shall take any corporate/organizational action to authorize any of the actions set forth or the appointment of a receiver, trustee or custodian over, or an execution, attachment or levy upon, all or any material part of the property of the Defaulting Party; or
- 9.2.5 Upon termination for default, the Terminating Party shall have the additional right to declare all amounts owing under this Agreement from the Defaulting Party to be immediately due and payable.

9.3 Additional NMPC Rights. In addition to the termination rights set forth in Section 9.1 and 9.2 above, NMPC has the following additional rights under the Agreement:

- 9.3.1 In the event of the issuance of an order by a court of competent jurisdiction staying the implementation of or overturning the orders of the PSC regarding the Program, NMPC shall have the right to immediately terminate this Agreement;
- 9.3.2 In the event of ESCO's failure to comply with the Tariff, or with any tariffs on file with the FERC that may be applicable to the Program, or with any PSC requirements applicable to the Program, NMPC shall have the right to exercise any such rights authorized and provided in the Tariff or tariffs or by any PSC requirements applicable to the Program including the right to immediately terminate this Agreement;

9.3.3 In the event of ESCO's failure to maintain in place at all times, any and all governmental approvals, if required, for ESCO to receive service from NMPC under this Agreement or to sell the Energy Commodity to Customers, whether such approvals are issued by the PSC or other state or federal regulatory authority of competent jurisdiction, NMPC shall have the right to immediately terminate this Agreement upon the expiration of any applicable cure period provided to ESCO by such state or regulatory authority; and

9.3.4 In the event of ESCO's breach of this Agreement, or any other written agreement with NMPC, in connection with the Program, NMPC shall have the right to terminate this Agreement in the event such breach continues uncured for ten days after written notice by NMPC.

9.4 Payment Obligations. At the end of the Term or upon the earlier termination of this Agreement, whether for convenience or for default, the Parties shall remain responsible for their respective payment or reimbursement obligations of any and all sums due or owing under this Agreement. NMPC shall have the right to set off such sums against amounts otherwise payable to ESCO in accordance with the provisions of this Agreement. In the event such sums exceed the amount of the Deposit, ESCO shall remit to NMPC such additional amounts in accordance with the provisions under Article 3.

9.5 Cumulative Remedies. The rights and remedies set forth in this Article 9 are in addition to any and all rights allowed by this Agreement, the Tariff or any other applicable tariff, the UCC, UBP, the applicable laws of the State of New York, and any applicable rules and regulations thereunder or the common law. All rights and remedies shall be cumulative and may be exercised separately or concurrently.

ARTICLE 10 - DEPOSIT

10.1 Deposit. ESCO acknowledges, agrees and understands that payment for ESCO Charges in Article 3 to NMPC shall be ESCO's sole responsibility. To ensure such payments, NMPC shall, upon the occurrence of any Event of Default, withhold from sums payable to ESCO under this Agreement, or require an immediate payment from ESCO of, a Deposit equal to 5% of the total sums received by ESCO under this Agreement during the preceding 180-day period. The Deposit shall be used by NMPC to offset ESCO Charges and any other sums or amounts due or owing by ESCO under this Agreement. After 90 days following the payment of the Deposit, NMPC will re-examine the security amount and make such adjustments as NMPC estimates may be necessary to satisfy the aforementioned charges attributable to ESCO on the same and consistent method as NMPC determines such charges for all energy services companies participating in the Program. At the end of six months from the expiration or termination date of the Agreement, NMPC will return the unused portion of the Deposit to ESCO except those sums subject to payment arrangements required by either the

laws of the state of New York or any governmental authority, including the PSC. NMPC shall pay interest on the unused portion of the Deposit at the variable rate per annum equal to the "prime rate" quoted in the "Money Rates" section of the Wall Street Journal from time to time minus 1%.

- 10.2 No Waiver.** Notwithstanding the foregoing, the deposit of such amounts does not relieve or waive ESCO's responsibility and obligation to pay its obligations to NMPC including, without limitation, ESCO Charges, and other sums due or owing by ESCO under this Agreement.

ARTICLE 11 - FORCE MAJEURE

- 11.1** Any delays in or failure of performance by the Parties, other than the payment of monies, shall not constitute a Default or Event of Default and shall be excused under this Agreement, if and to the extent such delays or failures of performance are caused by occurrences that are both: (1) beyond the reasonable control of the Parties, including, but not limited to, acts of God, compliance with any order or request of any governmental or judicial authority, compliance with NMPC's public service obligations, riots or strikes or other concerted acts of workers, storms, fires, floods, and accidents; and (2) beyond the ability of the Parties to prevent, by the exercise of reasonable diligence. ESCO understands and agrees that NMPC shall have no obligation to ESCO to add personnel, equipment, or facilities in order to perform any activities under this Agreement.

ARTICLE 12 - LIMITATION OF LIABILITY

- 12.1 Liability Limitations.** Except for NMPC's obligation to pay the Accounts Receivable Purchase Price in respect of Accounts Receivable purchased by NMPC from time to time pursuant to Section 3.1 and its obligations under Section 4.1.2, NMPC's total cumulative liability to ESCO for all claims of any kind, whether based upon contract, tort (including negligence and strict liability) or otherwise, for any loss, injury, or damage connected with, or resulting from, this Agreement or any acts or omissions of NMPC in connection with this Agreement or its activities hereunder, shall in no case exceed \$10,000 in the aggregate. In no event shall NMPC be liable to ESCO for any special, indirect, incidental, penal, punitive or consequential damage of any kind, including, but not limited to, lost profits or revenues and expenses involving cost of capital.
- 12.2 Survival.** The provisions of this Article 12 shall survive the expiration, cancellation, or termination of this Agreement. As of the expiration of this Agreement or, if earlier, its termination, the Parties shall no longer be bound by the terms and provisions hereof, except (a) to the extent necessary to enforce the rights and obligations of the Parties arising under this Agreement before such expiration or termination or (b) such terms and provisions that expressly or by their operation survive the termination or expiration of this Agreement.

ARTICLE 13 - INDEMNIFICATION

- 13.1 Scope.** ESCO, to the fullest extent of the law, shall indemnify, defend, and save harmless and shall reimburse NMPC, and its Representatives, from and against any and all losses, damages, liabilities, obligations, judgments, orders, writs, injunctions, decrees, fines, penalties, taxes, costs, suits, charges, expenses (including attorneys' fees), claims, investigations, proceedings, or causes of action (collectively "Losses"), which may at any time be imposed on, incurred by or asserted against NMPC by third parties (including Customers) that are directly or indirectly caused by, arise out of or under, associated with, incident to or in connection with this Agreement including but not limited to any of the following: (i) ESCO's acts or omissions regarding the Accounts Receivable or Billing Price Determinants; (ii) ESCO's failure to remit to the appropriate taxing jurisdiction any sales and use taxes remitted to ESCO by NMPC as provided under Article 7.2; (iii) any claim, demand, cause of action, litigation, suit, proceeding, hearing or investigation (collectively "Claims") by any Person for payments based upon any agreement or understanding alleged to have been made by such Person, directly or indirectly, with ESCO or any of its Representatives in connection with any of the transactions contemplated by this Agreement; (iv) any Claims with respect to the action or inaction of ESCO or its Representatives which is contrary to the requirements of this Agreement or the operating procedures of the Program; (v) any inaccuracy in any Document or affidavit provided to NMPC under this Agreement or other breach of any representation or warranty or affidavit made by ESCO in this Agreement; (vi) any failure by ESCO to perform or comply, in whole or in part, with any covenant, agreement or provision of this Agreement; and (vii) all costs and expenses, including reasonable fees and expenses of counsel and other advisors, associated with any Losses incurred by NMPC or its Representatives in connection with any Claims subject to indemnification rights as provided under this Article.
- 13.2 Defense.** ESCO shall take action to defend, indemnify and hold NMPC harmless against all Claims, actual or threatened, promptly, but in no event later than the service of a notice, summons, complaint, petition, or other service of process with respect to such Claims. ESCO shall defend all such Claims including, as applicable, the engagement of legal counsel, to respond to, defend, or settle, or compromise any claim or threatened claim.
- 13.3 Enforcement.** ESCO shall pay any and all costs and expenses (including reasonable attorneys' fees) incurred by NMPC to enforce the provisions of this Article 13.
- 13.4 Survival.** The obligations of ESCO set forth in this Article 13 shall survive the expiration, cancellation, or termination of this Agreement.

ARTICLE 14 - MISCELLANEOUS

- 14.1 Entire Agreement /Integration / Merger / Survivability.** This Agreement, as may be amended in accordance with Article 14.4, constitutes and expresses the entire understanding

between the Parties with respect to the subject matter hereof. The Parties agree that there are no understandings, agreements, or representations, expressed or implied, other than those expressed herein. This Agreement supersedes and merges all prior and contemporaneous agreements, discussions, understandings, inducements, or conditions, whether expressed or implied, written or oral. This Agreement shall not merge with or be terminated or suspended by any future agreement between the Parties which does not specifically and in writing so provide. Upon execution of this Agreement by the Parties, except as otherwise provided in this Agreement, the Parties shall no longer be bound by the terms and provisions of any previous definitive billing service agreements between the Parties and such agreements shall be terminated and superseded by this Agreement except for such terms and provisions that expressly or by their operation survive the termination or expiration of such definitive billing services agreement. The Parties understand and agree that there may be other written agreements executed by the Parties in connection with other services provided by NMPC to ESCO under the Program. The terms on which NMPC supplies such other services to ESCO shall not be affected in any way by the provisions of this Agreement. As of the expiration of this Agreement or, if earlier, its termination, the Parties shall no longer be bound by the terms and provisions hereof, except (a) to the extent necessary to enforce the rights and obligations of the Parties arising under this Agreement before such expiration or termination or (b) for such terms and provisions that expressly or by their operation survive the termination or expiration of this Agreement.

- 14.2 Transition Fee.** NMPC shall charge ESCO a Transition Fee and ESCO shall grant to NMPC a right to offset and reduce any and all amounts (i) due and owing ESCO from NMPC under a BSA/Security Agreement and (ii) due and owing from NMPC to ESCO under this Agreement until the Transition Fee is paid in full.
- 14.3 Dual Billing.** Upon expiration, cancellation, or termination of this Agreement, each Party shall present separate bills to Customers for the respective services provided by the Parties. NMPC shall thereafter have no obligation to include ESCO's Accounts Receivable on its bills to Customers.
- 14.4 Modifications.** This Agreement, and any provision thereof, shall not be superseded, modified, amended, waived, or otherwise changed, except in a writing duly signed by both Parties.
- 14.5 Assignment.** ESCO shall not assign all or any part of the monies payable by NMPC under this Agreement without the prior written consent of NMPC, which consent NMPC may grant or withhold within its sole and absolute discretion, except ESCO may, upon 20 days' prior written notice to NMPC, assign such monies to any lender, Energy Commodity supplier or financial institution of ESCO for financing or credit purposes excluding any assignment of the Collateral. ESCO, to the fullest extent of the law, shall indemnify and hold NMPC harmless from any loss, damage or claim which may at any time be imposed on, incurred by or asserted against NMPC by ESCO or any third parties (including Customers) that are

directly or indirectly caused by, arise out of or under or are associated with, incident to or in connection with any assignment under this Section 14.5. Notwithstanding anything to the contrary herein, under no circumstances shall ESCO sell, assign, transfer, pledge or otherwise dispose of any of the Collateral.

- 14.6 Successors Bound.** This Agreement shall be binding upon and inure to the benefit of each Party and its respective legal representatives, successors, and permitted assigns, and shall survive any acquisition, merger, reorganization or other business combination to which it is party.
- 14.7 No Third-Party Beneficiaries.** This Agreement is solely between the Parties and is not intended to confer any rights whatsoever on any third parties.
- 14.8 Notices.** Except as otherwise provided in this Agreement, each Party hereby designates the following individuals to be its duly authorized representative for the receipt of any legal or contractual notices required to be sent to such Party. Such notices shall be deemed duly sent when personally delivered or mailed by registered or certified mail, return receipt requested, postage prepaid, to the intended Party's designated representative at the addresses set forth hereafter or to such other address as the Party to whom the same is intended shall have specified in conformity with the following:

NMPC: Niagara Mohawk Power Corporation
 Attn: Senior Vice President, Customer Services
 300 Erie Boulevard West
 Syracuse, NY 13202

ESCO: _____ *[specify ESCO name]*
 Attn: _____ *[specify title and/or individual name]*
 _____ *[specify ESCO address]*

- 14.9 Choice of Law.** This Agreement shall be interpreted and enforced according to the laws of the State of New York, without regard to the choice of law provisions thereof. Venue in any legal action shall lie exclusively in the County of Onondaga of the State of New York. ESCO hereby consents to the personal jurisdiction of courts in the State of New York in any litigation or proceeding concerning any issues related to this Agreement, including the validity, enforceability, or interpretation of this Agreement.
- 14.10 Severability.** To the extent that any provision of this Agreement shall be held to be invalid, illegal or unenforceable, it shall be severed from this Agreement without affecting the validity, legality or enforceability of the remaining provisions of the Agreement.
- 14.11 Headings.** The headings contained in this Agreement are provided solely for the

convenience of the Parties and shall neither expand nor restrict the rights and obligations created herein.

14.12 Conflict/Order of Precedence. In the event of conflict between the terms of this Agreement as executed or amended and the provisions of the Tariff, UBP and HEFPA, including, without limitation, the definitions set forth in this Agreement, this Agreement will prevail except for NMPC's modifications to the Tariff to reflect changes in the UBP and HEFPA. Such modifications may be implemented by Niagara Mohawk subject to the Commission's approval.

14.13 No Waiver. No failure on the part of any Party to exercise, or delay in exercising, any right hereunder shall operate as a waiver thereof; nor shall any single or partial exercise of any such right preclude any other or further exercise thereof or the exercise of any other right. The remedies herein provided are cumulative and not exclusive of any remedies provided by law.

14.14 Additional Service(s) and Opt-In Programs.

14.14.1 Additional Services.

In the event that ESCO requests additional service(s) from NMPC that are not provided under this Agreement, NMPC will provide ESCO with a price quote(s) for service(s) so requested. If ESCO accepts NMPC's price quote(s) and NMPC agrees to provide such service(s), then the associated prices for each service shall be more fully set forth on Attachment E, annexed hereto and made a part hereof. The additional service(s) set forth on Attachment E shall be in addition to any service(s) under this Agreement and shall be at ESCO's sole cost and expense. ESCO shall pay NMPC for the additional service(s) in accordance with the price and upon terms set forth on Attachment E. The price for the additional service(s) may consist of a price associated with the implementation of the requested additional service(s) that shall be paid to NMPC prior to providing ESCO such services and/or a recurring price per bill associated with such service(s) that will be paid to NMPC as an adjustment, increasing the per bill amount by the price of the additional service(s), to the Billing Processing Fee in Article 3 Section 3.3.1, which shall be payable for the Term of the Agreement or such lesser period as shall have elapsed from the commencement of the Term of the Agreement.

14.14.2 Opt-In Programs.

In the event that ESCO is notified in writing by NMPC of any future ESCO programs offered by NMPC and ESCO elects to participate in any such future programs ("Opt-In Program"), the applicable terms and conditions for any such Opt-In Program shall be more fully set forth hereto as Attachment F to this

Agreement by amendment. ESCO shall provide NMPC with 60 days prior written notice of its desire to participate in any future Opt-In Program. The applicable Opt-In Program shall then become effective within 60 days of receipt of such ESCO notice ("Opt-In Program Effective Date). As of the Opt-In Program Effective Date, the terms and conditions for the applicable Opt-In Program set forth in any attachment to this Agreement shall be incorporated in this Agreement by reference as if fully stated herein.

14.15 Execution in Counterparts. This Agreement may be executed in any number of counterparts and by different parties hereto in separate counterparts, each of which when so executed shall be deemed to be an original and all of which taken together shall constitute one and the same agreement. Delivery of an executed counterpart of a signature page to this Agreement by telecopier shall be as effective as delivery of a manually executed counterpart of this Agreement.

14.16 Amendment and Restatement of BSA/Security Agreement; Pre-Filing. This Agreement amends and restates the BSA/Security Agreement. As of the date hereof, this Agreement shall supersede the BSA/Security Agreement in its entirety, and the rights and obligations of the parties under the BSA/Security Agreement shall be subsumed within and governed by this Agreement. The security interest granted by this Agreement is an extension of the security interest granted in the BSA/Security Agreement. The ESCO hereby acknowledges that any and all UCC financing statements filed in connection with the BSA/Security Agreement, naming NMPC as secured party and ESCO as debtor, shall be effective to perfect NMPC's security interest granted by ESCO pursuant to this Agreement to the extent that such security interest may be perfected by the filing of UCC financing statements and amendments thereto. Until all of the obligations under the Agreement have been finally paid and satisfied in full, the provisions of this section shall continue to apply, and such pre-filings shall continue to be effective and not subject to any right of termination in respect of the security interests granted herein

IN WITNESS WHEREOF, the parties hereto agree to the terms and conditions of this Agreement, and agree to be bound by the same, and represent that their signatories have complete authority to sign and accept this Agreement.

_____ *[specify ESCO legal name]*

By: _____ *[signature]*

Typed Name: _____ *[specify name]*

Title: _____ *[specify title]*

Date: _____

NIAGARA MOHAWK POWER CORPORATION

By: _____
Typed Name: Anthony C. Pini
Title: Senior Vice President, Customer Service
Date: _____

ATTACHMENT A

(SPECIMEN FORM)

BILLING PRICE DETERMINANTS

The following table of information must be provided by ESCO to NMPC prior to the commencement of any Billing Services under the Agreement.

Program Code	Pricing Group (1)	Billing Option (2)	Prorate (3)	ISO Req (4)	Include GRT(5)	GRT Rate (6)	Rate (7)
820							
821							
822							
823							
824							
825							
Street Lighting							
826							
827							
828							
829							
830							
831							

- (1) Designate as any two digit alpha numeric combination
- (2) "P"- Flat Rate; "F" - Fixed Adder to NM Daily Price
- (3) 01 = No Proration; 02=Proration
- (4) "Y" - ISO Zone prices are required, different zones will have different prices;
"N" - prices by ISO are not required - all zones will use the same price
- (5) "N" - default to NM rate and print separate line item for GRT on Bill; "I" – GRT is included in price provided;
"Y" - ESCO provides own GRT rate that is not included as a separate line item
- (6) Only needed if there is a "Y" in the "Incl GRT" field
- (7) Initial Price to be charged for pricing group

ATTACHMENT B

EXCLUDED CUSTOMERS

ESCO has with NMPC's consent excluded the following Customers or classes of Customers from this Agreement:

[List individual customers or define class of customers excluded from the Agreement]

ATTACHMENT C

TRANSITION FEE

[To Be Provided]

ATTACHMENT D

**OFFICER AFFIDAVIT DISCONNECTION OF NON-RESIDENTIAL
CUSTOMERS FOR NON-PAYMENT**

(to be executed by ESCO Officer)

I, _____ [name of officer], the _____ [title of officer] of _____ [legal name of ESCO], hereby swear and affirm under penalty of perjury that all current non-residential ESCO Customers that will be billed under the terms and conditions of an Agreement For Billing Services and For The Purchase Of Electric Accounts Receivable By And Between Niagara Mohawk Power Corporation and [Esco – Insert Legal Name] (the “BSA”) have been notified that failure to make full payment of ESCO charges due on any consolidated bills prepared for ESCO by NMPC will be grounds for disconnection of utility services in accordance with NYPSC rules and regulations on the termination of service to non-residential customers, 16 NYCRR §13.3. In addition, ESCO will notify each new non-residential ESCO Customer that failure to make full payment of ESCO charges when due on any consolidated bill prepared pursuant to the BSA will be grounds for disconnection of service in accordance with NYPSC rules on the termination of service to non-residential customers, 16 NYCRR §13.3.

Officer’s Signature

Officer’s Name [Print]

Date

Sworn to before me this _____ day of _____ 2005

ATTACHMENT E

ADDITIONAL SERVICES

The following is a list of Additional Services, as described in Article 14, not included in the Billing Processing Fee.

Printing of ESCO Logo on Customer Bill

Other Additional Services

ATTACHMENT F

FUTURE OPT-IN PROGRAMS

[Terms and conditions to be determined by Amendment]