

ATTACHMENT 1

**Binding Term Sheet Agreement for Reliability Support Services Agreement for Dunkirk Power
Generating Units**

Date: July 20, 2012

Buyer: Niagara Mohawk Power Corporation, d/b/a National Grid

Seller: NRG Power Marketing LLC on behalf of Dunkirk Power LLC ("Dunkirk")

Product: Reliability Support Services

Facility: Dunkirk Units 1 and 2 (the "RSS Units") located at 106 Point Drive North, Dunkirk, NY 14048

UNIT NAME	NYISO PTID	ICAP MW
Dunkirk 1	23563	75.0
Dunkirk 2	23564	75.0

Term: From the start of hour ending 0100 Eastern Prevailing Time ("EPT") on September 1, 2012, through the end of hour ending 2400 EPT on May 31, 2013 (the "Minimum Term").

Termination: No earlier than midnight on May 31, 2013, except pursuant to the provisions relating to Additional Expenditures, Force Majeure Events, and Necessary Approvals.

Termination by Either Party: Either Party may terminate this Term Sheet Agreement ("Agreement") if any of the following events or circumstances materially and adversely affect either Party during the term of this Agreement because of: (1) a Change in Law; (2) a change to the NYISO Tariff or other NYISO policy or rule; or (3) an order of any commission or a court on a complaint or other action initiated by a third party.

For the purposes of this clause, "Change in Law" shall mean a change in federal or state environmental or other law, policy, regulation or rule, or a change in the interpretation of the same, that has a material effect on the operations of Dunkirk, as determined by Dunkirk in a commercially reasonable manner, or that shall require additional expenditures that are not reimbursed as Additional Expenditures.

Contract Extension: Buyer agrees to notify Seller in writing of any finding of a reliability need past May 31, 2013 ("Necessary Extension"), or no reliability need, as soon as practicable, but no later than January 1, 2013.

Such Necessary Extension will not exceed 90 days in duration. Upon receiving

notice of a Necessary Extension, Buyer and Seller will engage in good faith negotiations to determine a reasonable level of compensation to be paid by Buyer to Seller based on the length of the additional period of operation required by Buyer, in addition to the reasonably projected incremental cost to Seller of providing service during the period of the Necessary Extension.

If Buyer and Seller are unable to agree on such compensation, they agree to seek the assistance of the New York State Department of Public Service Staff ("DPS") to help facilitate the resolution of said differences and shall at all times negotiate in good faith; provided, however, that each party at any time shall be free to pursue any legal remedies available to it by law.

Buyer agrees to provide an update on the reliability need, on a monthly basis, for any units at Dunkirk expected to be necessary for providing reliability service beyond May 31, 2013, consistent with applicable laws and regulations.

Planned Outages

Seller shall be permitted to take one or more RSS Units out of operation or reduce the capability of one or more of the RSS Units during planned outages as permitted by the NYISO Tariff.

Forced Outages

In the event Seller needs to take one or more RSS Units out of operation or reduce the capability of one or more of the RSS Units upon the occurrence of a Forced Outage, as defined in the NYISO Tariff, Seller shall notify Buyer in writing of the nature and expected duration of a Forced Outage as soon as practicable.

Seller shall continue to receive the Monthly Fixed-Price Charge during a Forced Outage. However, if a Unit or its Automatic Voltage Regulator is not available for service for 50 percent or more of any particular month due to a Forced Outage, the Monthly Fixed-Price Charge for that month shall be reduced by \$100,000 per Unit that meets these criteria. However, if a Unit or its Automatic Voltage Regulator is not available for service for 75 percent or more of any particular month due to a Forced Outage, the Monthly Fixed-Price Charge for that month shall be reduced by \$250,000 per Unit that meets these criteria. If a Unit or its Automatic Voltage Regulator is not available for service for 90 percent or more of any particular month due to a Forced Outage, the Monthly Fixed-Price Charge for that month shall be reduced by \$500,000 per Unit that meets these criteria. However, if both Units and their Automatic Voltage Regulators are not available for service for 90 percent or more of any particular month due to a Forced Outage or Outages, the Monthly Fixed-Price Charge for that month shall be reduced by \$1.5 million.

**Additional
Expenditures**

Any period of time in which Buyer is considering whether to authorize Additional Expenditures shall not count towards any availability calculation for purposes of determining the Monthly Fixed-Price Charge reduction.

“Additional Expenditures” shall mean incremental costs in excess of \$450,000 over those items to be defined in the final contract based on this Agreement. The costs for any project budgeted for less than \$50,000 shall not be deemed an additional expenditure.

(a) Seller shall not be required or otherwise obligated to incur any Additional Expenditures, except as permitted by this Section.

(b) If Seller is required to incur any Additional Expenditure, Seller will provide written notice to Buyer as soon as possible, but in no event greater than 10 days from the start of the relevant Forced Outage, whether expenses not recovered in the Monthly Fixed-Price Charge are required to return the RSS Unit or Units to service. This notice will indicate the amount of Additional Expenditures expected to be required to return the RSS Unit or Units to service.

(i) If within 30 days of receipt of such notice, Buyer provides Seller with written notification that it will pay for the Additional Expenditures, Seller will incur such Additional Expenditures and, with reasonable promptness, restore the RSS Unit or Units to service.

(ii) Payment of Additional Expenditures, to the extent they are agreed to by Buyer, shall be included in the Monthly Fixed-Price Charge on a pro-rata basis based on the remaining term of this Agreement.

(iii) Buyer shall have the right to dispute the amount of Additional Expenditures identified as necessary by Seller, in which case the Parties will engage in good faith negotiations to attempt to reach a resolution of the appropriate level of Additional Expenditures required. If Buyer and Seller are unable to agree on such compensation, they agree to seek the assistance of the New York State Department of Public Service Staff (“DPS”) to help facilitate the resolution of said differences and shall at all times negotiate in good faith.

(iv) Seller is obligated to use commercially reasonable efforts to minimize Additional Expenditures and agrees that any Additional Expenditures shall be offset by any proceeds from any third-party sources, including insurance proceeds, paid to Seller to return the RSS Unit or Units from the Forced Outage. Seller shall refund to Buyer any payments for Additional Expenditures paid to Seller that exceed the amount actually expended by Seller, after offsets.

(v) In the event that Buyer does not provide written notification of its commitment to fund the Additional Expenditures and Seller does not make the voluntary election described in clause (vi) below, Seller shall no longer have any obligation to provide RSS Service from such unit or units. If Additional Expenditures are necessary to restore both of the RSS Units from Forced Outage, then this Agreement will be considered terminated as of the expiration of Buyer’s notice period. However, if Additional Expenditures are only necessary to restore

one of the RSS Units from a Forced Outage, this Agreement shall remain in full force and effect with respect to the remaining Unit. If Buyer and Seller are unable to agree on the appropriate compensation for one RSS Unit, they agree to seek the assistance of the DPS Staff to facilitate the resolution of said differences and shall at all times negotiate in good faith; provided, however, that each party at any time shall be free to pursue any legal remedies available to it by law.

(vi) Nothing in this Section shall prevent Seller for voluntarily electing to make any repair necessary to allow the affected unit(s) to return to service, without additional compensation, after being informed by Buyer that it does not intend to fund the Additional Expenditures.

Scheduling and Bidding:

- Seller will interface and comply with NYISO scheduling deadlines and requirements for maintaining the unit as an eligible energy and capacity provider, as well as Buyer's dispatch instructions.
- Energy and Ancillary Services – Units bid in compliance with existing NYISO market rules and Seller retains revenues.
- Capacity – Units will be offered into the NYISO's ICAP spot market auction at a price no higher than their going-forward costs. Any capacity revenues shall be credited to Buyer by Seller.
- Seller shall offer the RSS Units into the NYISO-administered Day-Ahead Energy market, regardless if the Seller's capacity bid is accepted in the NYISO capacity market or not, whenever those units are not out of service. Seller shall comply with any dispatch instruction issued by the Buyer or NYISO under established NYISO protocols, consistent with the operating parameters of the RSS Units and in accordance with the NYISO Tariff.
- Buyer shall not be responsible for any penalties or fines that relate to the bidding, scheduling, and operation of the RSS Units during the term of this Agreement.
- Parties agree to negotiate in good faith regarding the recovery of bad debt losses assessed to Seller under the NYISO OATT for purposes of preparing a final contract reflecting this Agreement.

Pricing:

Monthly Fixed Price Charge: Monthly Fixed-Price Charge of \$2,924,324/month for the period September 1, 2012 through May 31, 2013.

Other Pricing Terms:

- **Property Tax True-Up** – At any time between the effective date of this Agreement and the date that is 30 days after the end of the Minimum Term, Seller may provide documentary evidence to Buyer showing the amount of property tax payments (or payments in lieu of taxes) that Seller has made to local taxing jurisdictions or the Chautauqua County Industrial Development Authority during the term of this Agreement. Such documentary evidence will be in the form of a receipt or other verification received from the taxing authority and must show that the tax obligation satisfied relates to the term of this contract. Within 30 days of the date Seller submits such evidence to Buyer, Buyer will reimburse Seller for any such documented payments, up to a maximum amount for all payments of \$6,681,084.
- **Capacity Revenue True-Up** – Within 30 days of the date on which this Agreement terminates, Seller will make a payment to Buyer in an amount equal to all capacity revenues earned by the RSS Units during the term of this Agreement.
- **Take or Pay Coal Contract True-Up** – Buyer will make payments to Seller based on pro-rated costs as calculated based on the pre-determined minimum volume allocation to the Dunkirk plant, prorated to nine months, of 868,597 tons at \$5.00/ton. Within 30 days of the date on which this Agreement terminates, Seller will provide Buyer with an accounting of the pro-rated Take or Pay costs, and within 30 days of receiving such accounting, Buyer will make payment to Seller of that amount. The determination of the final payment to be made by Buyer to Seller under this provision will be based on actual coal deliveries to the Dunkirk plant during the term of this Agreement.

Refund Based on Future Operations

A refund of up to 20% per year of the \$4.2 million debt related allowance included in the calculation of the Monthly Fixed-Price Payment will be triggered in one or more of the first five full calendar years after the term of the Agreement ("Refund Period") if the Dunkirk plant has a positive EBITDA in excess of \$2 million in any year during the Refund Period. An annual refund payment will be made to

Buyer during the Refund Period as follows.

If the Dunkirk plant has positive EBITDA in excess of \$2 million during any year of the Refund Period, then Seller shall pay Buyer 50 percent of the first \$1,680,000 in revenue earned by Seller in excess of \$2 million. The maximum amount payable in any single year in the Refund Period shall be \$840,000.

For purposes of calculating refunds under this provision:

- A senior officer or director of Seller shall attest to whether Seller has earned more than \$2 million in EBITDA on or before April 30 after the end of any year during the Refund Period.
- If Seller attests that it has earned more than \$2 million in EBITDA, but less than \$3,680,000, then it shall provide a Certified EBITDA Determination describing Seller's EBITDA earnings, as described below.
- If Buyer disagrees with the attestation by Seller's senior officer or director, in its sole discretion, then it shall have the right to present Seller's attestation that EBITDA is less than \$2 million to DPS Staff to facilitate resolution of any disagreement between Buyer and Seller. Should DPS Staff so request, Seller will provide a Certified EBITDA Determination.

A "Certified EBITDA Determination" shall mean: An outside auditor, acceptable to both parties, attests, at Seller's expense that the Dunkirk plant produced positive EBITDA earnings, as defined below, in excess of \$2 million for the related calendar year. The attest will be provided by April 30 of the following calendar year, or thirty days after being directed to provide a Certified EBITDA Determination by DPS Staff. Any payment will be made within 45 days of the delivery of the attest.

EBITDA shall mean: Earnings Before Interest, Taxes, Depreciation and Amortization, less appropriately allocated regional and corporate general and administrative costs, to be specified in the final contract based on this Agreement.

The maximum refund payment per year will be 1/5 of the \$4.2 million debt-related allowance included in the calculation of the Monthly Fixed-Price Charge. No refund payment will be made for any year after the Refund Period following the termination of the original term of the bilateral Agreement.

Operations and Maintenance

Seller to operate and maintain Facility within standards of accepted electric industry practice.

Force Majeure

"Force Majeure Event" means any act of God, labor disturbance, act of the public enemy, war, insurrection, riot, fire, storm or flood, explosion, any order, regulation or restriction imposed by a Governmental Authority, breakage or accident of machinery or equipment not directly caused by a lack of proper care or maintenance, or any other cause beyond a Party's control.

If the availability of any of the RSS Units is reduced by reason of a Force Majeure Event, such Force Majeure Event shall be deemed to create a Forced Outage, and shall be resolved pursuant to the provisions herein relating to Forced Outages and Additional Expenditures.

The Party unable to perform by reason of a Force Majeure Event shall use reasonable efforts to remedy its inability to perform and to mitigate the consequences of the Force Majeure Event as soon as reasonably practicable; provided that (i) no Party shall be required to settle any strike, walkout, lockout, or other labor dispute on terms which, in the Party's sole discretion, are contrary to its interests and (ii) subject to the Additional Expenditure provision, the Party unable to perform shall, as soon as practicable, advise the other Party of the reason for its inability to perform, the nature of any corrective action needed to resolve performance, and its efforts to remedy its inability to perform and to mitigate the consequences of its inability to perform and shall advise the other Party of when it estimates it will be able to resume performance of its obligations under this Agreement.

Limitations of Liability:

- (a) Buyer, its affiliates, successors and assigns shall not be liable to Seller, its affiliates, successors and assigns, for actions or omissions by Buyer or Buyer's affiliates, officers, employees or agents in performing its obligations under this Agreement, provided it has not willfully breached this Agreement or engaged in willful misconduct. To the extent Seller has claims against Buyer, Seller may only look to the assets of Buyer for the enforcement of such claims and may not seek to enforce any claims against the directors, members, officers, employees or agents of Buyer who, Seller acknowledges and agrees, have no personal liability for obligations of Buyer by reason of their status as directors, members, officers, employees or agents of Buyer.
- (b) Seller, its affiliates, successor and assigns, shall not be liable to Buyer, its affiliates, successors and assigns, for actions or omissions by Seller, or Seller's affiliates, officers, employees or agents in performing its obligations under this Agreement, provided that Seller has not willfully breached this Agreement or engaged in willful misconduct. To the extent Buyer has claims against Seller, Buyer may only look to the assets of Seller for the enforcement of such claims and may not seek to enforce any claims against the directors, members, officers, employees or agents of Seller who, Buyer acknowledges and agrees, have no personal liability for obligations of Seller by reason of their status as directors, members, officers, employees or agents of Seller.
- (c) In no event shall Seller be liable to Buyer or Buyer be liable to Seller for any incidental, consequential, multiple or punitive damages, loss of revenues or profits, attorneys fees or costs arising out of, or connected in any way with the performance or nonperformance of this Agreement.

**Final Non-Appealable
NYPSC Order
Required; FERC
Effective Date
Maintained**

- (a) The parties shall jointly request that FERC defer action on the filing in Docket No. ER12-2237-000 and extend the deadline for submission of comments, protests and motions to intervene or for other relief until after the NYPSC has an opportunity to consider this Agreement at its August 16, 2012 meeting.
- (b) Should the NYPSC approve this Agreement, as proposed, along with permission for Buyer to recover the costs of this Agreement, pursuant to a mechanism reasonably acceptable to Buyer, at its August 16, 2012 meeting or during a special session of the NYPSC prior to that date, then the parties shall jointly request that FERC defer action on the filing in Docket No. ER12-2237-000 and the deadline for submission of comments, protests and motions to intervene or for other relief until such time as the NYPSC approval becomes final and non-appealable. Once the NYPSC order becomes final and non-appealable, Seller will withdraw its filing in Docket No. ER12-2237-000.
- (c) If the NYPSC order is: (i) stayed, (ii) enjoined, or (iii) appealed and overturned, Buyer agrees to not oppose Seller's request for a September 11, 2012 effective date for any RMR Agreement established by FERC. Seller agrees not to oppose as untimely the submission by Buyer of comments, a protest and/or motion to intervene or for other relief.
- (d) The Parties agree to not file any rehearing request of any NYPSC decision approving this agreement without material modification, nor recommend to the PSC that any rehearing be granted.
- (e) The Parties agree not to file any judicial appeal and further agree to oppose any request for judicial review filed by another party of any NYPSC decision approving this agreement without material modification.
- (f) The Parties agree that this Agreement shall be submitted for approval to NYPSC for consideration and approval no later than the PSC's August 16, 2012 meeting. The Parties agree that any PSC order approving the this Agreement may direct the Parties to submit a final contract to demonstrate compliance with the PSC's August 16 order approving this Agreement . Any disapproval of, or a material change directed, by the NYPSC, to the Final Contract, shall allow either party to avail itself of the rights afforded it under this section as if the NYPSC disapproved, or directed a material change, to the Agreement.
- (g) If the NYPSC does not approve this Agreement without material

modification at its August 16, 2012 meeting, or if the NYPSC does not approve a mechanism reasonably acceptable to Buyer to recover the costs of this Agreement at that meeting, or should any NYPSC order approving this Agreement without material modification not become final and non-appealable, Dunkirk may request that FERC act on Docket No. ER12-2237-000 as soon as possible, and the parties agree not to oppose a Dunkirk request to establish a September 11, 2012 effective date.

Confidentiality:

Buyer and the New York Public Service Commission will be permitted to release the price per month to be paid under the agreement, as well as the identified elements that comprise the pricing. Amounts attributable to each pricing element, unless they are included in this Agreement or the final contract based on this Agreement, will not be released.

Binding Nature:

It is the Parties' expectation that this Agreement will be filed on July 20, 2012 with, and approved on August 16, 2012 by, the NYPSC. This Agreement shall be signed by both Seller and Buyer and will be binding, unless this Agreement is not approved by the NYPSC.

Necessary Approvals:

Parties will engage in good faith negotiations aimed at completing a final contract based on this Agreement as soon as possible and will file that contract with the NYPSC in compliance with the PSC's proposed August 16, 2012 order.

Should the NYPSC not approve this binding Agreement, or a mechanism reasonably acceptable to Buyer to recover the costs of this Agreement, either party may terminate this Agreement and pursue any legal remedy.

DUNKIRK POWER LLC

By: William Lee Davis

Name: William Lee Davis

Title: President

NIAGARA MOHAWK POWER CORPORATION d/b/a NATIONAL GRID

By: _____

Name: _____

Its: _____

DUNKIRK POWER LLC

By: _____

Name: _____

Title: _____

NIAGARA MOHAWK POWER CORPORATION d/b/a NATIONAL GRID

By: William I Makee

Name: William I Makee

Its: Director, Transmission Commercial