

STEPHENTOWN PROJECT

**ENGINEERING, PROCUREMENT &
CONSTRUCTION SERVICES
AGREEMENT**

BETWEEN

**NIAGARA MOHAWK POWER
CORPORATION**

AND

BEACON POWER CORPORATION

CONSTRUCTION SERVICES AGREEMENT

THIS ENGINEERING PROCUREMENT and CONSTRUCTION SERVICES AGREEMENT ("Agreement"), made and entered into this day of July, 2010 (the "Effective Date"), by and between BEACON Power Corporation ("BEACON"); a corporation organized and existing under the laws of the State of Massachusetts, and Niagara Mohawk Power Corporation d/b/a "National Grid" (the "COMPANY"), a corporation organized and existing under the laws of the State of New York. BEACON or COMPANY shall be referred to either individually as a "Party" or collectively as the "Parties".

WITNESSETH

WHEREAS, BEACON is interconnecting a new 20 MW flywheel generation facility to NYSEG's 115kV system at Stephentown Station; and

WHEREAS, the interconnection of BEACON will require transmission system upgrades at COMPANY's Greenbush Station; and

WHEREAS, COMPANY has conducted and provided to BEACON a Facility Study describing the work necessary to accomplish the system upgrades (Project); and

WHEREAS, COMPANY will provide, at BEACON's sole cost and expense, design, engineering, procurement, construction, and project management for the Project ("Services"); and

NOW, THEREFORE, in consideration of the premises and the mutual covenants set forth herein, the Parties agree as follows:

1.0 Definitions

Wherever used in the Agreement with initial capitalization, whether in the singular or the plural, these terms shall have the following meanings:

"Agreement" means this signed Engineering, Procurement and Construction Services Agreement including all annexes, appendices, and any subsequent amendments, supplements or modifications thereto, as mutually agreed upon by the Parties.

"Contract Price" means the total amount paid by BEACON to the COMPANY as set forth in Section 6.0 of the Agreement.

"Day" means a calendar day, except that if an obligation of the Agreement falls due on a Saturday, Sunday or legal holiday, it shall be due the next day worked.

"Dollars" and "\$" mean United States of America dollars.

"Drawings" means those drawings listed in the Specification for the Project. Said Drawings are incorporated by reference as if fully set forth in this Agreement.

"Final Acceptance" for the Project means that date when the COMPANY asserts that the Work for the Project has been completed.

"Good Utility Practice" means any of the practices, methods and acts engaged in or approved by a significant portion of the electric utility industry during the relevant time period, or any of the practices, methods and acts which, in the exercise of reasonable judgment in light of the facts known at the time the decision was made, could have been expected to accomplish the desired consistent with good business practices, reliability, safety and expedition. Good Utility Practice is not intended to be limited to the

optimum practice, method, or act, to the exclusion of all others, but rather to be acceptable practices, methods, or acts generally accepted in the region in which the Project is located. Good Utility Practice shall include, but not be limited to, NERC (defined below) criteria, rules, guidelines and standards, NPCC (defined below) criteria, rules, guidelines and standards, NYSRC (defined below) criteria, rules, guidelines and standards, and NYISO (defined below) criteria, rules, guidelines and standards, where applicable, as they may be amended from time to time including the rules, guidelines and criteria of any successor organization to the foregoing entities. When applied to BEACON, the term Good Utility Practice shall also include standards applicable to a utility generator connecting to the distribution or transmission facilities or system of another utility.

“NPCC” shall mean the Northeast Power Coordinating Council (a reliability council under Section 202 of the Federal Power Act) or any successor organization.

“NERC” shall mean the North American Electric Reliability Council or any successor organization

“NYISO OATT” shall mean the FERC-approved Open Access Transmission Tariff for the NYISO and/or the FERC-approved Service Tariff for the NYISO, as applicable, and as it may be amended from time to time.

“NYSRC” shall mean the New York State Reliability Council or any successor organization.

“Project Manager” means the respective representative of BEACON and the COMPANY.

“Project” means the Work to be performed under the Agreement by the COMPANY.

“Services” means all the COMPANY’s costs and expenses for any and all equipment, materials, labor and services in connection with the Work provided by COMPANY to BEACON in connection with the Project.

“Site” means the portion of the COMPANY’s Greenbush Station.

“Specification” means the technical requirements and procedures for a Project including any accompanying appendices contained in the Agreement and incorporated by reference as if fully set forth therein.

“Subcontractor” means any organization, firm or individual, regardless of tier, which the COMPANY retains during the term of the Agreement to provide labor, materials, Services, and/or equipment in connection with the Agreement.

“Supplemental Conditions” means those terms and conditions, *if* included in the Agreement by mutual written agreement of the Parties, which add to or modify the Agreement and are incorporated by reference as if fully set forth in the Agreement. In the case of a conflict between the Supplemental Conditions and the Agreement, the Supplemental Conditions shall prevail.

“Work” means all duties, responsibilities, and obligations to be performed by the COMPANY more fully described in Section 3.0 of the Agreement.

20 Term

2.1 The Agreement shall become effective when executed by both Parties and shall remain in full force and effect until Final Payment is received by the COMPANY.

3.0 **Scope of Work**

- 3.1 The COMPANY's scope of Work for the Project, as described in the June 2010 Facility Study (see Attachment #1), includes the following:
 - 3.1.1 Coordination as needed with BEACON, NYSEG and the NYISO
 - 3.1.2 Prior to its release, COMPANY shall review the specification for the RFL-9745 Communication Unit with unidirectional, dual channel Direct Transfer Trip (Unit), to be purchased by BEACON.
 - 3.1.3 COMPANY shall install and test the Unit at COMPANY's Greenbush Station. COMPANY will supply, install, and test associated On/Off Switch and auxiliary tripping relays.
 - 3.1.4 Any other reasonable work necessary to complete the Project
- 3.2 For the Scope of Work, the estimated Contract Price is \$195,500. The estimated price does not include any applicable taxes. The total actual Contract Price will be adjusted for any changes in the Scope of Work requested by BEACON under Section 4.0 of the this Agreement or reasonable increases of in-scope costs.
- 3.3 With the delivery of the Unit, BEACON also shall provide to the COMPANY any and all related equipment warranties, certified drawings and operating instructions.
- 3.4 Telephone communication circuits for the Project will be provided by others.

4.0 **Changes in the Work**

- 4.1 Each Party shall inform the other at the start of Work in writing the name and contact information for the respective Project Managers per Section 28.1 of this Agreement.
- 4.2 If the Parties agree to a change in the Work, such change will be set forth in writing, as set forth in this Article 4.0, the schedule shall be adjusted and/or extended as mutually agreed by the Parties. The estimated Contract Price shall be adjusted accordingly.
- 4.3 Any requests for additional or a modification of the Work as set forth in this Agreement shall be put in writing and agreed to by the Parties and performed in accordance with the terms and conditions of the Agreement, unless otherwise agreed to in a writing signed by the Project Managers of the COMPANY and BEACON.

5.0 **Performance and Schedule**

- 5.1 The COMPANY shall use Good Utility Practices to complete performance of the Work in accordance with the schedule set forth in Section 5.4 of the Agreement.
- 5.2 The COMPANY shall attempt to reasonably limit Work performed by its direct employees to normal working hours. Extended hours shall be subject to additional compensation to the COMPANY.

5.3 If the Parties fail to reach an agreement to adjust and/or extend the Project Milestone Schedule provided in Section 5.4 to accommodate alterations in, additions to, or deductions from the Work, under Article 4, as the case may be, then the COMPANY shall continue to perform the Work in a manner consistent with Good Utility Practice, but shall have no liability or obligation to complete the Work as of the dates specified in Section 5.4. If BEACON requests, and COMPANY agrees, to work outside normal working hours due to delays in the Project schedule resulting from either (i) the occurrence of an event of Force Majeure or (ii) the actions or inactions of BEACON or any of its employees, agents, contractors, or subcontractors, then COMPANY shall be entitled to an adjustment and extension of time, if appropriate in the opinion of both Parties, to cover such delay beyond the date fixed in Paragraph 5.4 .

5.4 Projected Project Milestone Schedule:

Effective Date (ED) + 1 week - COMPANY start engineering/procurement
ED + 10 weeks — Station Construction Begins
ED + 12 weeks — Station Construction Completed
ED + 14 weeks — Energization
ED + 22 weeks - Project Close-out by Parties

The dates above represent the Parties preliminary schedule, which is subject to adjustment, alteration, and extension in accordance with the terms of this Agreement.

60 Contract Price

61 The Estimated Contract Price, as set forth in Section 3.2 of this Agreement, is an estimate. BEACON shall pay all Actual Costs of the Project.

70 Payment

7.1 Prior to the COMPANY's commencement of any Services under this Agreement, and within thirty Days of the Effective Date of this Agreement, the COMPANY shall invoice BEACON for an initial prepayment of One Hundred Ninety-Five Thousand Five Hundred Dollars (\$195,500) ("Initial Prepayment") and BEACON shall provide the COMPANY with such Initial Prepayment.

7.2 Except as otherwise expressly provided for in the Agreement, all invoices shall be due and payable thirty (30) Days from date of invoice. If any BEACON payment due under this Agreement is not received within five (5) Days of invoice due date, a monthly charge equivalent to 1/12 of the maximum prime commercial rate per annum prevailing during that particular billing period and announced by Chase Manhattan at its principal office in New York, New York, or by any other bank agreed to by the COMPANY and BEACON, plus two (2) percent shall be added to the amount overdue and shall be payable by BEACON to the COMPANY; such charge shall be calculated on the unpaid balance, beginning on the invoice due date until payment of the overdue amount is received.

7.3 The COMPANY shall invoice BEACON for all sums owed under this Agreement including Initial Prepayment to the following individual or such other individual as BEACON may designate upon written notice to the COMPANY

Name: Mr. Robert Rounds
Address: Beacon Power Corporation
65 Middlesex Road.
Tyngsboro, MA 01879

7.4 Payments to the COMPANY shall be made by wire transfer to:

FISBC Bank
ABA: 021001088
Title of Account Niagara Mohawk Power Corporation Acct. No.:
204891787

8.0 Final Payment

8.1 Final payment shall be made within thirty (30) Days after invoice date. Within ninety (90) Days of the Energization of the Stephentown Project, the COMPANY shall perform an overall reconciliation of the actual COMPANY's Project costs to the Project costs previously invoiced to BEACON, and the COMPANY shall provide a final invoice for an amount due to the COMPANY or credit owed to BEACON, as the case may be. Any credit owed by the COMPANY to BEACON shall be due and payable upon final reconciliation but no later than sixty (60) Days after such reconciliation. Any amount remaining unpaid to the COMPANY after that time shall be subject to interest as calculated pursuant to Section 7.2.

9.0 Meetings

9.1 The COMPANY's Project Manager shall attend Project meetings at times and places mutually agreed to by the Parties.

10.0 Disclaimers

10.1 Except as provided in Section 5.1, COMPANY MAKES NO WARRANTIES, REPRESENTATIONS, OR GUARANTEES IN CONNECTION WITH THE AGREEMENT, ANY PROJECT, OR ANY WORK OR SERVICES PERFORMED IN CONNECTION THEREWITH, WHETHER EXPRESS OR IMPLIED, INCLUDING, WITHOUT LIMITATION, THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. THIS DISCLAIMER SHALL SURVIVE ANY TERMINATION OR EXPIRATION OF THE AGREEMENT. BEACON ACKNOWLEDGES AND AGREES THAT ANY WARRANTIES PROVIDED BY ORIGINAL MANUFACTURERS, LICENSORS, OR PROVIDERS OF MATERIAL, EQUIPMENT OR OTHER ITEMS PROVIDED OR USED IN CONNECTION WITH THE WORK, INCLUDING ITEMS INCORPORATED IN THE WORK ("THIRD PARTY WARRANTIES"), ARE NOT TO BE CONSIDERED WARRANTIES OF THE COMPANY AND THE COMPANY MAKES NO REPRESENTATIONS, GUARANTEES, OR WARRANTIES AS TO THE APPLICABILITY OR ENFORCEABILITY OF ANY SUCH THIRD PARTY WARRANTIES.

11.0 Liability and Indemnification

- 11.1 To the fullest extent permitted by law, BEACON shall indemnify and hold harmless, and at COMPANY's option, defend COMPANY, its affiliates and their respective contractors, officers, directors, servants, agents, representatives, and employees, from and against any and all claims and/or liability for damage to property or injury or death of any person, or any other liability incurred by COMPANY or its affiliates or their respective contractors, officers, directors, employees, servants, agents, or representatives, including expenses, legal or otherwise, to the extent caused by (i) any breach of this Agreement by BEACON, its affiliates, third party contractors, and their respective officers, directors, servants, agents, representatives, or employees, or (ii) the negligence or intentional misconduct of BEACON, its affiliates, third party contractors, and their respective officers, directors, servants, agents, representatives, and employees, arising out of or connected with the Agreement, Project, or any associated Work except to the extent such breach is directly caused by the negligence or unlawful act of the COMPANY.
- 11.2 Neither Party shall be liable to the other Party for consequential, indirect, special, incidental, multiple, or punitive damages (including attorney's fees or litigation costs) in connection with or related to the Agreement, including without limitation damage claims based on causes of action for breach of contract, tort (including negligence) or any other theory of recovery, whether or not such Party was, or should have been, aware that such damages might be incurred.
- 11.3 Except to the extent that an element of profit is included in the Contract Price for Work as determined under the Agreement and such amounts are past due and owing to the COMPANY, neither Party shall be liable to the other Party for claims of lost profits, whether such claims of lost profits are categorized under the Agreement as direct or consequential damages, or whatever the theory of recovery.
- 11.4 Notwithstanding any other provision of the Agreement, this Article 11.0 shall survive the Termination or expiration of the Agreement.

12.0 Passage of Title and Risk of Loss

- 12.1 Unless otherwise expressly stated herein or agreed to by both Parties in writing, title to all equipment or goods, or portions thereof, which are specified by the Agreement as deliverables to the COMPANY, if applicable, shall pass to the COMPANY upon its delivery to the carrier FOB or to the COMPANY, whichever occurs first. The COMPANY makes no warranty, guaranty, or representation with respect to ownership of or title to, goods, products, or equipment, in whole or in part, and the COMPANY does not purport to grant any license to BEACON or its affiliates, with respect to any third party trademark, patent, or other intellectual property right in connection with the goods, products, or equipment, whether or not such third party property is contained in or comprises such goods, products, or equipment, in whole or in part.
- 12.2 COMPANY shall bear no risk of loss or damage of any kind or nature whatsoever with respect to the cost of all packaging and shipment of equipment and material provided by BEACON to the Site, of all unloading, storage, protection and installation of said equipment and material at the Site, and of any insurance on the equipment prior to the Final Acceptance of the Project, regardless of whether title has passed to the COMPANY,

13.0 Insurance Requirements

- 13.1 Prior to commencing Work on the Project and during the term of the Agreement, each Party, at its own cost and expense, shall procure and maintain insurance in form and amounts set forth in Schedule 1 to the Agreement, or shall, at the Party's sole and absolute discretion, elect to self-insure provided that the Party electing to self-insure provides written notice to the other Party prior to commencing any Work under this Agreement. In the event that either Party uses subcontractors in connection with this Agreement, said Party shall require all subcontractors to provide the same insurance coverages set forth in Schedule 1.

13.2 Prior to commencing the Work, each Party, provided that such Party does not elect to self insure, shall have its insurer, if any, furnish to BEACON certificates of insurance, on forms approved by the Insurance Commissioner of the State of New York, evidencing the insurance coverage required by this Article 13.0.

13.3 Each Party shall be solely responsible for the claims of its respective employees and shall release, defend, and indemnify the other Party and its affiliates from and against such claims.

14.0 Assignment and Subcontracting

14.1 BEACON and the COMPANY may assign the Agreement or any part thereof to any affiliated COMPANY controlling, controlled by, or under common control with, the assignor. For purposes of this Section, "control" of an entity shall mean the ownership of, with right to vote, fifty percent (50%) or more of the outstanding voting securities or equity of such entity. Any assignment of the Agreement in violation of the foregoing shall be voidable at the option of the non-assigning Party.

15.0 Independent Contractor

15.1 The COMPANY is, and shall at all times remain, an independent contractor.

16.0 Examination, Inspection and Witnessing

16.1 The COMPANY shall inspect all Work and make or cause to be made all tests required by Good Utility Practice at BEACON's sole cost and expense.

16.2 At times and places mutually agreed to by the Parties, BEACON or its designated representative shall be entitled to: (1) witness any test required by the Agreement.

17.0 Safety

17.1 Each Party shall be responsible for the safety and supervision of its respective employees involved with the Work or on the Site. In connection with each Project, both Parties shall, and shall require their respective representatives, contractors, and employees to, comply with all applicable Federal, state and local safety requirements, rules, regulations, laws and ordinances, including without limitation, compliance with the safety regulations adopted under the Occupational Safety and Health Act of 1970 (OSHA), as amended from time to time.

18.0 Approvals, Permits and Easements

18.1 The actual cost of obtaining all permits, licenses, permissions, or consents obtained by COMPANY necessary for the Project and the Work shall be paid for by BEACON.

19.0 Environmental Protection; Hazardous Materials or Conditions.

19.1 The COMPANY shall in no event be liable to BEACON, its affiliates or contractors, their respective officers, directors, employees, agents, servants, or representatives or any third party with respect to, or in connection with, the presence of any hazardous wastes, conditions, or substances which may be present at or on any BEACON owned, occupied, used, or operated property or facility (including, without limitation, easements, rights-of way, or other third party property) or which the COMPANY may discover, release, or generate at or on such properties or facilities through no negligent or unlawful act of the COMPANY. BEACON agrees to hold harmless, defend, and indemnify the COMPANY, its affiliates and subcontractors, and their respective directors, officers, agents, servants, employees and representatives from and against any and all claims and/or liability in connection with, relating, to or arising out of (i) said presence, discovery, release or generation,

or (ii) the breach of any Federal, state, or local laws, rules, regulations, codes, or ordinances relating to the environment, including, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act, as amended, 42 U.S.C. §§ 9601 et seq., the Resource Conservation and Recovery Act, as amended, 42 U.S.C. §§ 6901 *et seq.*, except to the extent such breach is directly and solely caused by the negligent or unlawful act of the COMPANY. The obligations under this Section 19.1 shall not be limited in any way by any limitation on BEACON's insurance. The provisions of this Section 19 shall survive the expiration or earlier termination of this Agreement.

- 19.2 BEACON shall promptly inform the COMPANY, in writing, of any hazardous materials or substances, or unsafe, dangerous, or potentially dangerous, conditions or structures, whether above-ground or underground, that are present on, under, over, or in BEACON owned, occupied, used, or operated facilities or property (including, without limitation, easements, rights-of-way, or other third party property) to be used or accessed in connection with the Work or Project. Prior to commencement of the Work, BEACON shall be obligated to use its best efforts (including, without limitation, the use of DIGSAFE or other similar services) to adequately investigate the presence and nature of any such hazardous materials or substances, or unsafe, dangerous, or potentially dangerous, conditions or structures, and to promptly, fully, and in writing, communicate the results thereof to the COMPANY. BEACON's provision to the COMPANY of the information contemplated in this Section 19.2 shall in no event give rise to any liability or obligation on the part of the COMPANY, nor shall BEACON's obligations under Section 19.1, above, or under law, be decreased or diminished thereby.

20.0 BEACON's Right to Suspend Work

- 20.1 Subject to Section 20.2, below, BEACON may interrupt, suspend or delay execution of the Project upon written notice to the COMPANY specifying the nature and expected duration of the interruption, suspension or delay. If, in the COMPANY's opinion, such interruption would result in increased cost, the COMPANY shall notify BEACON in writing.
- 20.2 As a precondition to the COMPANY resuming Work, the estimated schedule and price as determined under the Agreement shall be revised as mutually agreed by the Parties to compensate for the interruption, suspension or delay. Adjustments to the estimated price shall compensate the COMPANY for any costs or expenses the COMPANY reasonably incurs as a result of the interruption, suspension or delay.

21.0 Right to Terminate Agreement

- 21.1 Notwithstanding any other provision of the Agreement, if either Party { 1) fails to comply with any of the material terms or conditions of the Agreement; (2) sells or transfers all or substantially all of its assets; (3) enters into any voluntary or involuntary bankruptcy proceeding or receivership; or (4) makes a general assignment for the benefit of its creditors, then the other Party shall have the right, without prejudice to any other right or remedy and after giving five (5) Days' written notice and a reasonable opportunity for cure, to terminate the Agreement, in whole or part, and thereupon the COMPANY shall immediately discontinue its Work to the extent feasible.

22.0 Removal of Equipment

- 22.1 In the case of termination of the Agreement, the COMPANY, if notified to do so by BEACON, shall, within a reasonable time, remove any part or all of its equipment, material, and supplies from the Site at BEACON's sole cost and expense.

23.0 Force Majeure

- 23.1 A "Force Majeure Event" shall include fire, flood, windstorm, adverse weather

conditions, emergencies, explosion, riot, war, sabotage, acts of God, strikes or labor slowdowns, court injunction or order, federal and/or state law or regulation, delays by governmental authorities in approving license and permit requests necessary to the Project, or order by any federal or state regulatory agency, or other similar causes beyond the affected Party's reasonable control, Without limiting the foregoing, a "Force Majeure Event" shall also include unavailability of personnel, equipment, supplies, or other resources ("Resources") due to diversion of such Resources for other utility-related duties in connection with an emergency, including, without limitation, storms or other adverse weather condition. If a Force Majeure Event should occur and impair the ability of either or both Parties to perform its, or their respective, obligations hereunder, then, to the extent affected by such Force Majeure Event, the performance of this Agreement, with the exception of payment obligations, shall be suspended for the duration of such Force Majeure Event, At the conclusion of a Force Majeure Event, the price and time for performance under this Agreement shall be adjusted as reasonably necessary to overcome the effect of the delay occasioned by such Force Majeure Event, The foregoing notwithstanding and with the exception of payment obligations, if, as the direct or indirect result of any Force Majeure Event, the Parties' continued performance hereunder becomes irreparably impaired or prevented, the Parties may mutually agree to terminate this Agreement, in whole or in part, with no further obligation or liability; provided, however, that, notwithstanding any such terminations, BEACON shall pay the COMPANY all of the COMPANY's costs and expenses incurred, and fees earned, up to the effective date of such termination.

- 232 Within thirty Days after the termination of any delay occasioned by a Force Majeure Event, the affected. Party shall give written notice to the other Party specifying the estimated impact of the delay.

24.0 Extensions of Time

- 24.1 BEACON may reasonably request an extension to the schedule for changes in the Project, as provided in Article 4.0, and for events of Force Majeure, as provided in Article 23.0.

25.0 Proprietary and Confidential Information

- 25.1 Each Party acknowledges that in the course of the performance of this Agreement it may have access to Proprietary Information, as hereinafter defined, of the other Party. Proprietary Information shall include (i) all, technical and other non-public or proprietary information which is furnished or disclosed by the Disclosing Party (as such term is defined below), or its affiliates (or its or its affiliates' agents, servants, contractors, or employees) to the Receiving Party or its Representatives (as such terms are defined below) in connection with the Project and which, if in tangible form, is marked with the words "Confidential" or "Proprietary" or markings of similar import, or, if disclosed orally, is identified as confidential at the time of disclosure and in a written memorandum provided to Receiving Party by the Disclosing Party promptly following its disclosure; and (ii) memoranda, notes, reports, files, copies, extracts, inventions, discoveries, improvements or any other thing prepared or derived from the information described herein. In order to be entitled to protection under this Section 25, all Propriety Information shall be marked as proprietary with an appropriate legend, marking, stamp or other obvious written identification prior to disclosure ("Proprietary Information"). All Proprietary Information in tangible form of expression which has been delivered (or thereafter created by copy or reproduction pursuant to this Agreement) shall be and remain the property of the person which is disclosing such Proprietary Information (the "Disclosing Party").
- 25.2 General Restrictions. Upon receiving Proprietary Information, such Party (the "Receiving Party") or its Representative shall keep in strict confidence and not disclose to any person. (with the exception of employees, officers, directors, representatives, and affiliates of the Receiving Party, to the extent each such person or entity has a need to know in connection herewith) any of the Disclosing Party's Proprietary Information except as otherwise provided by the terms and conditions of this

Agreement. The Receiving Party shall not use such Proprietary Information except for the purposes identified herein without the prior written approval of the Disclosing Party. The Receiving Party shall be solely liable for any breach of this Section to the extent caused by its or its affiliates' employees, officers, directors, affiliates. For purposes of this Section 25, the term "Representative(s)" shall mean the affiliates of a Recipient and the officers, directors, employees, contractors, and representatives of such Recipient and its affiliates.

- 25.3 Additional Marking Requirements. In the event either Party discloses its Proprietary Information to the other Party unmarked or in oral or visual form, the Disclosing Party shall notify the Receiving Party in writing that such Information is deemed proprietary within 48 hours of its disclosure. Such Proprietary Information shall be treated in the manner set forth above from the date such written notice is received.
- 25.4 Exceptions. The Receiving Party shall not be precluded from, nor liable for, disclosure or use of any Proprietary Information if:
- 25.4.1 the Proprietary Information is in or enters the public domain, other than by a breach of this Section; or
- 25.4.2 the Proprietary Information is known to the Receiving Party at the time of first receipt, or thereafter becomes known to the Receiving Party prior to or subsequent to such disclosure without similar restrictions from a source other than the Disclosing Party, as evidenced by written records; or
- 25.4.3 the Proprietary Information is developed by the Receiving Party independently of any disclosure under this Agreement as evidenced by written records; or
- 25.4.4 the Proprietary Information is disclosed more than three (3) years after the date of first receipt of the disclosed Proprietary Information, or three (3) years after the termination or expiration of this Agreement, whichever occurs later; or
- 25.3.5 disclosure of the Proprietary Information is compelled or required by a government authority, including, but not limited to any court or regulatory body, whether or not a protective order is sought or granted; or
- 25.4.6 the Disclosing Party consents to the disclosure or use of the Proprietary Information; or
- 25.4.7 the Receiving Party has a reasonable belief that disclosure of the Proprietary Information is necessary for public safety reasons and has attempted to provide as much advance notice of the disclosure as is practicable.

26.0 Rights of Various Interests

- 26.1 The Parties shall be responsible for promptly notifying each other in the event that it should become necessary to coordinate Work between the Parties and others..
- 27.1 The Agreement is made and shall be interpreted, construed, governed, and enforced in accordance with the laws of the State of New York.
- 27.2 The COMPANY and BEACON agree to submit to the personal jurisdiction of the New York courts, or the Federal District courts, as permitted by law, with respect to any matter or dispute arising out of the Agreement. All lawsuits filed to enforce any provisions of the Agreement or to litigate any claims arising in connection with the Agreement shall be filed in either Onondaga County or the Northern District of New York, if applicable.

28.0 Miscellaneous

- 28.1 **Project Managers.** Each Party shall designate a Project Manager. Whenever either Party is entitled to approve a matter, the Project Manager for the Party responsible for the matter shall notify the Project Manager of the other Party of the nature of such matter. The Project Managers shall discuss such matter, and each Project Manager shall confer on such matter on behalf of his/her COMPANY. The foregoing notwithstanding, in no event shall Project Managers be authorized to amend the provisions of this Agreement.
- 28.2 **Form and Address.** All notices, invoices and other communications from either Party to the other hereunder shall be in writing and shall be deemed received (1) upon actual receipt when personally delivered, (ii) upon acknowledgment of receipt if sent by facsimile, (iii) upon the expiration of the third business Day after being deposited in the United States mails, postage prepaid, certified or registered mail, or (iv) upon the expiration of one business Day after being deposited during the regular business hours for next-day delivery and prepaid for overnight delivery with a national overnight courier COMPANY, addressed to the other Party. Each Party may change its addresses by giving the other Party notice thereof in conformity with this Section. Any payments made under this Agreement, if made by mail, shall be deemed to have been made on the date of receipt thereof.
- 28.3 **Exercise of Right.** No failure or delay on the part of either Party in exercising any right, power or privilege hereunder and no course of dealing between the Parties shall operate as a waiver thereof; nor shall any single or partial exercise of any right, power or privilege hereunder preclude any other or further exercise thereof or the exercise of any other right, power or privilege.
- 28.4 **Additional Actions and Documents.** Each of the Parties hereby agrees to take or cause to be taken such further actions, to execute, acknowledge, deliver and file or cause to be executed, acknowledged, delivered and filed, such further documents and instruments, and to use its commercially reasonable efforts to obtain such consents, as may be necessary or as may be reasonably requested in order to fully effectuate the purposes, terms and conditions of this Agreement, whether at or after the execution of this Agreement.
- 28.5 **Headings.** The descriptive headings of the several sections and paragraphs of this Agreement are inserted for convenience only and do not constitute a part of this Agreement. Such headings shall not in any way define or affect the meaning, construction or scope of any of the provisions hereof.
- 28.6 **Incorporation of Schedules and Exhibits.** The schedules and exhibits referenced in and attached to this Agreement shall be deemed an integral part hereof to the same extent as if written in whole herein. In the event that any inconsistency exists between the provisions of this Agreement and any schedules or exhibits attached hereto, the provisions of this Agreement shall supersede the provisions of any such schedules or exhibits.
- 28.7 **Counterparts.** This Agreement may be executed in several counterparts, each of which shall be deemed an original, and all such counterparts together shall constitute but one and the same instrument. This Agreement may also be executed via counterpart facsimiles upon (a) the telecopy by each Party of a signed signature page thereof to the other Party, with return receipt by telecopy requested and received and (b) the Parties' agreement that they will each concurrently post, by overnight courier, a fully executed original counterpart of the Agreement to the other Party.
- 28.8 **Prior Agreements; Modifications.** This Agreement and the schedules and exhibits hereto constitute the entire agreement between the Parties with respect to the subject matter hereof, and supersede all previous understandings, commitments or representations concerning the subject matter. Each Party acknowledges that the other Party has not made any representations other than those that are contained herein. This Agreement may not be amended or modified in any way, and none of its provisions may be waived, except by a writing signed by an authorized officer of the Party

against whom the amendment, modification or waiver is sought to be enforced.

- 28.9 **Severability**. Nothing contained in this Agreement shall be construed so as to require the commission of any act contrary to law, and wherever there is any conflict between any provision of this Agreement and any law, such law shall prevail; provided, however, that in such event, the provisions of this Agreement so affected shall be curtailed and limited only to the extent necessary to permit compliance with the minimum legal requirement, and no other provisions of this Agreement shall be affected thereby and all such other provisions shall continue in full force and effect.
- 28.10 **Nouns and Pronouns**. Whenever the context may require, any pronouns used in this Agreement shall include the corresponding masculine, feminine or neuter forms, and the singular forms of nouns and pronouns shall include the plural, and vice versa.
- 28.11 **No Third Party Beneficiaries**. Nothing in this Agreement, express or implied, is intended to confer on any person, other than the Parties, any rights or remedies under or by reason of this Agreement.
- 28.12 **Validity**. Each Party hereby represents that (a) the provisions of this Agreement constitute valid and legally binding obligations of such Party and are enforceable in accordance with their terms, and (b) such Party holds all necessary approvals, authorizations, permits, licenses, consents, and other permissions, whether state, municipal, corporate, regulatory, or otherwise required to perform all obligations of such Party hereunder.

IN WITNESS WHEREOF, the PARTIES have executed this AGREEMENT by their duly authorized representatives as of the date first written above.

BEACON POWER, LLC

**NIAGARA MOHAWK POWER
CORPORATION**

/s/ Judith F. Judson
By: _____
Name: Judith F. Judson
Title: Vice President

Date: 7/28/10_____

/s/ Mary Ellen Paravalos
By: _____
Name: Mary Ellen Paravalos
Title: Vice President

Date: 8/5/10_____