

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

INDECK CORINTH, L.P.,

Petitioner/Plaintiff,

- against -

DAVID A. PATERSON, as Governor, NEW YORK  
STATE DEPARTMENT OF ENVIRONMENTAL  
CONSERVATION, NEW YORK STATE ENERGY  
RESEARCH AND DEVELOPMENT AUTHORITY,  
NEW YORK STATE PUBLIC SERVICE  
COMMISSION, NEW YORK STATE  
DEPARTMENT OF PUBLIC SERVICE, and  
CONSOLIDATED EDISON COMPANY OF NEW  
YORK, INC.,

Respondents/Defendants.

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BROOKLYN NAVY YARD COGENERATION  
PARTNERS, L.P. and SELKIRK COGEN  
PARTNERS, L.P.,

Intervenors in Support of  
Petitioner/Plaintiff.

**CONSENT DECREE**

INDEX NO. 5280-09

Hon. Thomas J. McNamara

**WHEREAS**, petitioner/plaintiff Indeck Corinth, L.P. (“Indeck”), initiated this action by Notice of Petition and Verified Joint Petition and Complaint dated January 29, 2009 (“Petition”), naming David A. Paterson (“Paterson”), as Governor, the New York State Department of Environmental Conservation (“DEC”), the New York State Energy Research and Development Authority (“NYSERDA”), and the New York State Public Service Commission (“PSC”) as respondents/defendants;

**WHEREAS**, Indeck in its Petition alleged that the entry into the Memorandum of Understanding establishing New York’s participation in the Regional Greenhouse Gas Initiative (“RGGI”) was unconstitutional and *ultra vires*, and further alleged that DEC’s and NYSERDA’s promulgation of two state-wide rules implementing the RGGI program, the CO<sub>2</sub> Budget Trading

Program, 6 NYCRR Part 242 (“CO<sub>2</sub> Budget Trading Program rule”), and the CO<sub>2</sub> Allowance Auction Program, 21 NYCRR Part 507 (collectively, “RGGI Rules”), were *ultra vires*, arbitrary and capricious, and not supported by a proper record;

**WHEREAS**, the CO<sub>2</sub> Budget Trading Program establishes a cap-and-trade air pollution reduction program that is intended to reduce the overall emissions of carbon dioxide (“CO<sub>2</sub>”) from power plants by 10 percent by the end of 2018;

**WHEREAS**, Indeck operates a gas-fired, combined-cycle co-generation facility in Corinth, New York (the “Indeck facility”), the owner of which entered into a long-term contract (“LTC”) with Consolidated Edison Company of New York, Inc. (“Con Edison”) for the supply to Con Edison of the electricity produced by the Indeck facility;

**WHEREAS**, on May 15, 2009, Paterson, DEC and NYSERDA submitted a Verified Answer, Return, and Objections in Point of Law, supporting affidavits, and a Memorandum of Law, in which they: (i) assert, *inter alia*, that, in adopting the RGGI Rules, DEC and NYSERDA acted within the broad authority granted to them by the Legislature to address air pollution and properly exercised agency discretion based on their technical expertise and an extensive two-year rulemaking record; and (ii) seek dismissal of the Petition and summary judgment in favor of the Respondents, including a declaratory judgment that promulgation of the RGGI Rules was authorized and did not violate any Constitutional rights or prohibitions;

**WHEREAS**, on May 14, 2009, PSC filed a Motion to Dismiss the Petition asserting, *inter alia*, that dismissal of Indeck’s claims against the PSC was warranted because: (i) Indeck failed to join Con Edison as a necessary party; (ii) the PSC never issued a final decision with respect to Indeck’s rights under its contract with Con Edison; and (iii) the PSC has no jurisdiction to modify the terms of the contract between Indeck and Con Edison;

**WHEREAS**, staff of the Department of Public Service (“DPS”) advises the PSC;

**WHEREAS**, upon the consent of the parties, Indeck has filed contemporaneously with this Consent Decree an Amended Verified Joint Petition and Complaint (“Amended Petition”) adding Con Edison and DPS as respondents/defendants in the action;

**WHEREAS**, upon the consent of the parties, contemporaneously with the filing of this Consent Decree with the Court, Brooklyn Navy Yard Cogeneration Partners, L.P. (“BNYCP”) and Selkirk Cogen Partners, L.P. (“Selkirk”) have filed motions seeking to intervene as petitioners/plaintiffs in the action along with proposed complaints (“Complaints in Intervention”);

**WHEREAS**, similar to Indeck, BNYCP and Selkirk each operates a gas-fired combined cycle co-generation facility (BNYCP’s facility is located in Brooklyn, New York and Selkirk’s facility is located in Selkirk, New York) the owner of which entered into an LTC with Con Edison for the supply to Con Edison of all or a portion of the electricity produced by their respective facilities (such facilities, along with the Indeck facility, are collectively referred to herein as the “Facility” or “Facilities”);

**WHEREAS**, Indeck, BNYCP, and Selkirk each claim that the terms of their LTCs with Con Edison do not permit them to pass on costs associated with the purchase of allowances under the CO<sub>2</sub> Budget Trading Program;

**WHEREAS**, DEC’s policy and intent in circumstances where a CO<sub>2</sub> budget source has more than one “owner” under the terms of the CO<sub>2</sub> Budget Trading Program rule is to impose compliance obligations on the owner that is identified as the responsible party in the facility’s operating permit and not on the purchaser of the power generated by the facility under a LTC. If DEC changes this policy and intent regarding the CO<sub>2</sub> Budget Trading Program rule to impose compliance obligations on a purchaser of power from a CO<sub>2</sub> budget unit under a life-of-the-unit contractual arrangement in which the purchaser controls dispatch of the unit, DEC would only

make such change through a notice and comment rulemaking in accordance with the State Administrative Procedures Act;

**WHEREAS**, after public notice and comment, DEC provided in the CO<sub>2</sub> Budget Trading Program for 1.5 million allowances to be allocated to an LTC set-aside account to be distributed by DEC to LTC applicants that DEC determines meet the qualification requirements under subdivision 242-5.3(d) of the CO<sub>2</sub> Budget Trading Program rule;

**WHEREAS**, DEC published notice of and took and considered public comment upon two petitions for declaratory ruling regarding, *inter alia*, whether the inability to pass through allowance costs qualifies as a financial hardship under the LTC set-aside provision, subdivision 242-5.3(d) of the CO<sub>2</sub> Budget Trading Program rule, and, on November 5, 2009, DEC issued Declaratory Ruling No. 19-18, In the Matter of Bayswater Peaking Facility, LLC and Calpine Operative Services Company, Inc., in which DEC granted the petitioners' request that the financial hardship demonstration be satisfied by documentation demonstrating that the LTC applicant is unable to pass on the costs of CO<sub>2</sub> allowances to the purchasing party;

**WHEREAS**, DEC has finalized its allocations of allowances from the LTC set-aside account for 2009, and has determined that the number of allowances that are subject to DEC-approved requests for 2009 exceed the 1.5 million allowances available in the LTC set-aside account and, therefore, has distributed allowances from the LTC set-aside account to DEC-approved LTC applicants on a pro rata basis;

**WHEREAS**, although BNYCP's LTC with Con Edison does not expire until October 31, 2036, DEC expects that, beginning in 2017, the 1.5 million allowances available in the LTC set-aside account will be sufficient to cover BNYCP's allowance needs, and respondents/defendants acknowledge that, after 2016, BNYCP will rely on the LTC set-aside account to cover its allowance needs;

**WHEREAS**, in its July 27, 2009 Order in Case 09-E-0310, the PSC approved Con Edison's use of ratepayer funds for the non-federal portion of the costs of the programs approved in that Order;

**WHEREAS**, although respondents/defendants deny the allegations in the Petition, Amended Petition, and Complaints in Intervention that the RGGI Rules are unlawful, all of the parties to this lawsuit, including intervenors BNYCP and Selkirk and additional defendants Con Edison and DPS, have agreed on a joint resolution that will settle the litigation, provide relief to petitioner/plaintiff and intervenors, and end the challenges to the RGGI Rules;

**NOW THEREFORE, Indeck, BNYCP, Selkirk, Paterson, DEC, PSC, DPS, NYSERDA, and Con Edison (each a "Party" and collectively, the "Parties" hereto) hereby stipulate and agree to the following terms and conditions, to be entered by the Court as a Consent Decree, to resolve all claims raised in this case:**

**I. OBLIGATIONS OF DEC**

1. On November 5, 2009, DEC issued its final declaratory ruling on the petitions for declaratory ruling regarding whether the inability to pass through allowance costs qualifies as a financial hardship under the terms of subdivision 242-5.3(d) of the CO<sub>2</sub> Budget Trading Program rule.

2. Prior to lodging the Consent Decree under ¶ 17, DEC shall finalize pro rata allocations of allowances from the LTC set-aside account for qualifying LTC applicants, including Indeck, BNYCP, and Selkirk, under subdivision 242-5.3(d) of the CO<sub>2</sub> Budget Trading Program rule.

3. Subject to ¶ 34, DEC shall maintain the pool of allowances available for allocation as LTC set-aside allowances, pursuant to subdivision 242-5.3(d) of the CO<sub>2</sub> Budget Trading Program rule, of at least 1.5 million allowances annually through termination of this

Consent Decree pursuant to ¶ 36, infra, and shall distribute all allowances that have been applied and qualified for under the qualification and distribution terms of the CO<sub>2</sub> Budget Trading Program rule as in effect on the date this Consent Decree is executed, as interpreted by the declaratory ruling referenced in ¶ 1, in a manner consistent with the CO<sub>2</sub> Budget Trading Program rule and the final declaratory ruling referenced in ¶ 1.

## **II. OBLIGATIONS OF CON EDISON**

4. Upon entry of the Consent Decree by the Court, Con Edison hereby submits to the jurisdiction of the Court and hereby agrees to be bound as a party-respondent/defendant to the terms and conditions of this Consent Decree. Con Edison agrees to accept the pleadings and the record in this proceeding as they exist on the date of the filing of the Amended Petition, and shall be deemed to have neither admitted nor denied all allegations against it in the Amended Petition and Complaints in Intervention. Upon the execution by the parties of the Consent Decree, Con Edison shall join with Indeck, BNYCP, Selkirk, and the other respondents/defendants to lodge the Consent Decree with the Court and to move the Court for a stay of the proceeding to provide the government respondents/defendants with an opportunity to solicit and address public comments on the Consent Decree, as provided in ¶ 17.

5. Upon entry of the Consent Decree by the Court and satisfaction of the conditions specified in ¶ 6, Con Edison shall assume financial responsibility for the payment of CO<sub>2</sub> allowance costs as provided in, and subject to the terms and conditions of: Appendix 1, with respect to Indeck; Appendix 2, with respect to BNYCP; and Appendix 3, with respect to Selkirk. Appendices 1, 2 and 3 are each made part of this Consent Decree, the same as if fully set forth herein, and the Court shall have jurisdiction to enforce the obligations of Appendices 1, 2 and 3 as part of its continuing jurisdiction over this Consent Decree.

6. In addition to the conditions specified in Appendices 1 through 3, Con Edison's obligations set forth in ¶ 5, and Appendices 1 through 3, shall be conditioned upon and exist only so long as:

- a. DEC maintains an LTC set-aside account with at least 1.5 million allowances and fully distributes all allowances that have been applied and qualified for under the qualification and distribution terms of the CO<sub>2</sub> Budget Trading Program rule as in effect on the date of the execution of this Consent Decree, as interpreted by the declaratory ruling referenced in ¶ 1, provided, however, that, if DEC moves to modify the Consent Decree under ¶ 34, *infra*, to change the number of allowances in the LTC set-aside account, and upon entry of any order of this Court granting said motion, then Con Edison shall continue to fulfill its obligations under Appendices 1 through 3 as if Indeck, BNYCP, and Selkirk were receiving their pro rata share of the 1.5 million LTC set-aside allowances;
- b. Indeck, BNYCP, and/or Selkirk each apply for and is awarded LTC set-aside allowances by the DEC in accordance with the terms of the CO<sub>2</sub> Budget Trading Program rule as in effect on the date of the execution of this Consent Decree, provided, however, that failure by any of Indeck or BNYCP or Selkirk to apply for or be awarded allowances shall excuse Con Edison's obligation only with respect to the Party that has so failed to apply for or be awarded allowances;
- c. An appropriate portion of proceeds from the sale of RGGI allowances, by whatever mechanism, including, but not limited to, NYSERDA's RGGI Operating Plan or legislation, is used to provide "benefits to Con Edison customers" (as defined in ¶ 11 *infra*) that are "commensurate" (as calculated pursuant to the procedures set forth in Appendix 4 of this Consent Decree) with

the costs associated with Con Edison's obligation to pay for allowance costs as set forth in ¶ 5 of this Consent Decree;

- d. Con Edison is authorized to fully recover costs associated with its obligation to pay for allowance costs as set forth in ¶ 5 of this Consent Decree pursuant to tariffs approved by the PSC and Con Edison is authorized to spend the funds referenced in ¶¶ 9-12 on programs for which PSC has approved Con Edison's use of ratepayer funds pursuant to the PSC's July 27, 2009 Order in Case 09-E-0310 or subsequent orders.

7. Con Edison shall diligently participate in good faith in discussions with NYSERDA and the DPS to help facilitate NYSERDA's provision, pursuant to ¶¶ 9-12 and Appendix 4 of this Consent Decree, of benefits to Con Edison customers that are commensurate with the burdens to Con Edison's customers associated with Con Edison's obligation to pay allowance costs as set forth in ¶ 5 of this Consent Decree.

8. Within 30 days of the Parties' execution of this Consent Decree, but before entry of this Consent Decree by the Court, Con Edison shall prepare and file with the PSC a tariff amendment providing for full recovery of the payment of allowance costs as set forth in ¶ 5 of this Consent Decree.

### **III. OBLIGATIONS OF NYSERDA**

9. NYSERDA shall utilize an appropriate portion of proceeds from the sale of RGGI allowances to provide "benefits to Con Edison customers" (as defined in ¶ 11 below) that are "commensurate" (as calculated pursuant to the procedure set forth Appendix 4) with the costs associated with Con Edison's payment of allowance costs as set forth in ¶ 5 of this Consent Decree. NYSERDA is not obligated to use any funds other than proceeds from the sale of RGGI allowances for this purpose.

10. In order to estimate “commensurate” benefits over a projected three-year period (“Commensurate Benefit Period”), NYSERDA, in consultation with all Parties, shall utilize the procedure set forth in Appendix 4 for each Facility for which Con Edison is then obligated to pay allowance costs under ¶ 5. Appendix 4 is made part of this Consent Decree, the same as if fully set forth herein, and the Court shall have jurisdiction to enforce the obligations of Appendix 4 as part of its continuing jurisdiction over this Consent Decree.

11. NYSERDA shall provide “benefits to Con Edison customers” by providing incremental funding to Con Edison for investment by Con Edison in programs agreed to by NYSERDA and Con Edison as provided in Appendix 4. “Incremental funding” shall mean funding that would not have been provided to Con Edison but for this Consent Decree. Con Edison’s ability to otherwise compete along with other applicants for additional funding under the NYSERDA Operating Plan or under any other program funded from the proceeds of the sale of RGGI allowances shall not be prejudiced by its receipt of commensurate benefits under the Consent Decree.

12. NYSERDA shall calculate “commensurate” benefits for the 2009-2011 Commensurate Benefit Period and each subsequent Commensurate Benefit Period pursuant to the procedures set forth in Appendix 4. The initial calculation and each subsequent calculation shall remain in effect, respectively, for a maximum period of three years. At the conclusion of the initial Commensurate Benefit Period and of each subsequent such period, or more often as determined by NYSERDA, NYSERDA shall compare the benefits actually provided to Con Edison’s customers with the burdens assumed by Con Edison (using the actual payments made by Con Edison pursuant to ¶ 5), and update the calculation of “commensurate” benefits pursuant to Appendix 4 of this Consent Decree. To the extent that the benefits do not match the actual

burdens assumed by Con Edison, NYSEERDA shall make appropriate adjustments as indicated in Appendix 4.

#### IV. OBLIGATIONS OF DPS AS STAFF OF PSC

13. DPS hereby submits to the jurisdiction of the court and hereby agrees to be bound as a party-respondent/defendant to the terms and conditions of this Consent Decree. DPS agrees to accept the pleadings and the record in this proceeding as they exist on the date of the filing of the Amended Petition, and shall be deemed to have neither admitted nor denied all allegations against it, and to have joined in the PSC's motion to dismiss.

14. DPS shall diligently participate in good faith in the discussions referenced in ¶¶ 7, 10, and 11, *supra*, with Con Edison and NYSEERDA and promptly review the programs developed as a result of those discussions.

15. Within a reasonable time of (i) NYSEERDA's execution of the Consent Decree committing to provide benefits to Con Edison's customers as set forth in Appendix 4 hereto, (ii) DEC's issuance of a final declaratory ruling as identified in ¶ 1 herein, and (iii) Con Edison's submission of a proposed tariff amendment related thereto as provided in ¶ 8 herein, DPS shall support approval of a tariff amendment providing for Con Edison's full recovery from its customers of the costs of the allowances paid for by Con Edison, pursuant to ¶ 5, to Indeck, BNYCP, and Selkirk pursuant to the terms agreed upon in Appendices 1 to 3.

16. The PSC shall promptly act on the Con Edison proposed tariff amendment described in ¶ 8, as supported by DPS pursuant to ¶ 15, *supra*. The PSC shall, in acting upon the proposed tariff amendment, or thereafter in considering any modification to such amendment, make its determination through an order based upon the record before it and in accordance with the provisions of the Public Service Law and such determination shall be subject to the statutory provisions regarding review of PSC orders.

## **V. OBLIGATIONS OF INDECK, BNYCP, AND SELKIRK**

17. Upon execution of the Consent Decree by all of the Parties hereto, Indeck shall jointly with the respondents/defendants, lodge the Consent Decree with the Court and move the Court for a stay of the proceeding to provide the government respondents/defendants with an opportunity to solicit and address public comments on the Consent Decree. Contemporaneously with the lodging of the Consent Decree, Indeck shall file an Amended Petition adding Con Edison and DPS as respondents/defendants in the action and BNYCP and Selkirk shall each file with the Court a motion to intervene in support of petitioner/plaintiff Indeck along with Complaints in Intervention.

18. No earlier than 30 days after the Consent Decree is lodged with the Court pursuant to ¶ 17, Indeck, BNYCP, and Selkirk shall jointly with the respondents/defendants, move the Court to sign and enter the Consent Decree as an order of the Court, binding the Parties to performance thereof. As part of that motion, the Parties to this Consent Decree may jointly propose revisions to the lodged Consent Decree, provided that the Parties unanimously agree on such revisions, if any revisions are necessary to address: (i) timely comments made to the Parties in the period after the Consent Decree is lodged with the Court pursuant to ¶ 17; or (ii) any changed circumstances relating to DEC's issuance of a final declaratory ruling pursuant to ¶ 1, DEC's finalization of pro rata allocations of allowances from the LTC set-aside account for qualifying LTC applicants pursuant to ¶ 2, or Con Edison's submission of a proposed tariff amendment as provided in ¶ 8.

19. Upon entry of the final Consent Decree by the Court, BNYCP and Selkirk agree to submit to the jurisdiction of the Court and be bound, along with Indeck, to the terms and conditions of this Consent Decree. BNYCP and Selkirk accept the pleadings and the record in this proceeding as they exist on the date this Consent Decree was lodged. It is the intent of the

Parties that, upon entry of the final Consent Decree, the Court will grant the motions of each of BNYCP and Selkirk, if then pending, to intervene. Should this Consent Decree not be entered by the Court, BNYCP and/or Selkirk shall be permitted to withdraw its motion to intervene.

20. Upon (i) DEC's issuance of the final declaratory ruling and finalization of pro rata allocations from the LTC set-aside account as referenced in ¶¶ 1 and 2; (ii) approval by the NYSERDA Board of Directors of the Consent Decree, including Appendix 4; (iii) the PSC's approval of a tariff amendment providing for Con Edison's full recovery from its customers of the costs of the allowances paid for by Con Edison as referenced in ¶¶ 15 and 16, and (iv) the expiration of any periods by which any third party could bring an Article 78 proceeding to challenge any of the actions set forth in clauses (i) – (iii) of this ¶ 20 (or, if such a challenge is brought, final resolution (including appeals) of such challenge sustaining the legality of the actions taken pursuant to the Consent Decree), Indeck, BNYCP, and Selkirk shall promptly and jointly with the respondents/defendants (including, Con Edison) file a stipulation consenting to the dismissal of the proceedings, including the claims set forth in the Petition, Amended Petition and Complaints in Intervention, with prejudice, subject to the dispute resolution, reservation of rights and enforcement provisions contained in ¶¶ 22 through 25, *infra*, related to performance in future years.

21. Indeck, BNYCP, and Selkirk shall each abide by, and shall fully perform its respective obligations under, the agreements set forth in Appendices 1, 2, and 3, respectively.

## **VI. OTHER TERMS AND CONDITIONS**

22. **Dispute Resolution.** In the event that a Party determines that another Party has failed to perform its obligations under the Consent Decree, or any Party determines that a condition to performance of its obligations has not been met, such Party shall provide notice to the other Parties hereto within 10 days of such determination. The Parties involved in the

dispute shall use their best efforts to consult and negotiate with each other diligently and in good faith and, recognizing their mutual interests, attempt to reach a just and equitable solution satisfactory to all Parties. In the event the Parties do not reach a resolution within a period of 60 days from the date of notice, then any Party may pursue its rights and remedies, as provided in ¶ 23 or ¶ 24.

23. **Force Majeure.** A Party shall not be in default of compliance with this Consent Decree to the extent that the Party is unable to comply with any provision of this Consent Decree because of the enactment of any legislation or any other change in law or action on the part of the federal government, the State legislature, any agency of the State not named as a party in this action, any court, an act of God, war, strike, labor unrest, terrorism, sabotage, riot or catastrophe, as to any of which the negligence or willful misconduct on the part of such Party was not a proximate cause (each a “Force Majeure Event”); provided, however, that such Party shall use commercially reasonable efforts to comply with this Consent Decree despite a Force Majeure Event. To the extent that a Force Majeure Event prevents fulfillment of any of the conditions precedent contained in ¶ 6 to Con Edison’s obligations, Con Edison shall be excused from performing its obligations contained in ¶ 5 and Appendices 1 through 3. A Party’s relief from compliance as a result of the Force Majeure Event shall last no longer than the underlying condition. Unless the Force Majeure Event involves an obligation of a government entity contained in Sections I, III, or IV, a Force Majeure Event shall excuse the performance of obligations only of the Party or Parties directly affected by the event. Within 10 days of determining that a Force Majeure Event has occurred, a Party claiming Force Majeure shall give notice to all of the other Parties of its claim and identify those obligations that it claims to be affected by the Force Majeure Event. Any other Party, subject to the provisions of ¶ 22, may challenge a Party’s invocation of Force Majeure by applying to the Court for a ruling regarding

the rights and responsibilities of the Parties under the Consent Decree; provided, however, that the Party whose obligation is claimed to be excused by the Force Majeure Event, as well as any Party whose obligation is conditioned upon the performance of the excused obligation, shall be entitled to decline to perform such obligation, or the obligation that is so conditioned, pending a ruling by the Court on any motions for injunctive or other relief.

24. **Enforcement.** Should any Party fail to perform its obligations under the Consent Decree, or should any Party determine that a condition to performance of its obligations has not been met, for any reason other than the reasons set forth in ¶ 23 above, and the dispute resolution procedure in ¶ 22 does not resolve the issue, then any Party may exercise its rights and remedies under the Consent Decree, including rights and remedies set forth in Appendices 1 through 4, and including termination of its performance, by providing all other Parties at least 10 calendar days notice after expiration of the 60 day dispute resolution period provided for in ¶ 22, supra. Any Party may apply to the Court to enforce the terms of the Consent Decree or seek to prevent the termination of performance, including through injunctive relief.

25. **Reservation of Rights.** In the event that the condition in ¶ 6(d) making Con Edison's payment obligations contingent upon Con Edison's authority to fully recover the costs associated with its obligation to pay for allowance costs pursuant to tariffs approved by the PSC as referenced in ¶ 16 is not met and the Parties are not able to reach resolution pursuant to ¶ 22, and provided that Indeck is not then in breach of its obligations under Appendix 1, or BNYCP is not then in breach of its obligations under Appendix 2, or Selkirk is not then in breach of its obligations under Appendix 3, then, and only then, shall Indeck, BNYCP, and/or Selkirk have the right, upon notice to respondents/defendants, to re-file their non-Article 78 claims as contained in the Amended Petition and Complaints in Intervention as against the Governor, DEC, NYSERDA, and PSC. With respect to such claims only, the Governor, DEC, NYSERDA,

and PSC agree to waive assertion of the statute of limitations, the defense of laches, or any other similar defense related to the passage of time, as an affirmative defense to any such claims; provided, however, that the right to re-file shall be without prejudice to Indeck's, BNYCP's or Selkirk's right (or the right of any other Party to this Consent Decree) to proceed as set forth in ¶ 24. In the event that, after the termination of this Consent Decree on December 31, 2016, DEC reduces the size of or eliminates the LTC set-aside account, which such change DEC shall only make, if at all, through notice and comment rulemaking, then the sole remedy for BNYCP, other than challenging such rule change in an Article 78 proceeding, is that BNYCP will have the right, upon notice to respondents/defendants, to re-file its non-Article 78 claims as against DEC as contained in its Complaint in Intervention in this Court, and DEC agrees to waive assertion of the statute of limitations, the defense of laches, or any other similar defense related to the passage of time, as an affirmative defense to any such claims. Subject only to this reservation of rights, Indeck, BNYCP, and Selkirk hereby release DEC from any and all claims that were or could have been raised in this proceeding, including, but not limited to, claims related to DEC's issuance of the declaratory ruling as referenced in ¶ 1 and DEC's pro rata allocation of allowances as referenced in ¶ 2.

26. **Continuing Jurisdiction.** The Court shall maintain continuing jurisdiction over this matter for the purpose of enabling the Parties to apply to the Court for any further order that may be needed to carry out or enforce compliance with the commitments made by the Parties to this Consent Decree. This Consent Decree and the Court's continuing jurisdiction to enforce it shall not be deemed to provide any right or remedy, or any interest in any term hereof, to any other person not a signatory to this Consent Decree.

27. **Choice of Law.** This Consent Decree shall be administered, construed, and enforced according to the laws of the State of New York.

28. **Entire Agreement.** This Consent Decree shall constitute the entire agreement among the Parties hereto with respect to the subject matter of this Consent Decree and supersedes and replaces all prior negotiations, proposed agreements, consent orders, and agreements, whether written or unwritten, concerning such subject matter.

29. **Binding Effect of Consent Decree.** The provisions, terms and conditions of this Consent Decree shall, when entered by the Court, be binding by and between the Parties hereto, their successors and assigns, subject to the modification provision contained in ¶ 34. The Parties shall remain free to assert any and all claims and/or defenses in any other litigation involving any person or parties that are not a Party to this Consent Decree. Except for suits to enforce this Consent Decree and Appendices 1 through 3, Indeck, BNYCP, and Selkirk may not assert any claim or bring any suit or proceeding against Con Edison relating to compliance or lack of compliance with the CO<sub>2</sub> Budget Trading Program rule with regard to the Facilities covered by this Consent Decree.

30. **Compliance with Applicable Laws.** Except as expressly set forth herein, this Consent Decree does not grant Indeck, BNYCP or Selkirk any rights or privileges under law nor does it exempt them from any obligation or limitation imposed by law, including any program administered or regulated by DEC under the Environmental Conservation Law. As long as Con Edison has satisfied its obligations under the Consent Decree, as set forth in ¶ 5 and Appendices 1 through 3, then DEC shall not seek to hold Con Edison responsible for compliance with any provision of the CO<sub>2</sub> Budget Trading Program rule for the Facilities covered by this Consent Decree.

31. **Effective Date.** The effective date of this Consent Decree is the date it is entered by the Court.

32. **Notices.** Notices required under this Consent Decree shall be sent, by first class or express mail, to the following Party representatives:

Notice to petitioner/plaintiff Indeck shall be provided to:

INDECK Energy Services, Inc.  
Attn: President  
600 N. Buffalo Grove Road  
Suite 300  
Buffalo Grove, IL 60089  
847 520 3212

With a copy to:

Charles A. Patrizia, Esq.  
Paul, Hastings, Janofsky & Walker, LLP  
875 15<sup>th</sup> Street, NW  
Washington, DC 20005  
(202) 551-1710

Notice to petitioner/plaintiff BNYCP shall be provided to:

Virginia C. Robbins, Esq.  
Bond, Schoeneck & King, PLLC  
One Lincoln Center  
Syracuse, New York 13202-1355  
(315) 218-8182

With a copy to:

Sean P. Lane  
Olympus Power, LLC  
67 Park Place East  
Morristown, NJ 07960-7105  
(973) 753-0181

Notice to petitioner/plaintiff Selkirk shall be provided to:

Mary Beth Gentleman, Esq.  
Foley Hoag, LLP  
Seaport West  
155 Seaport Boulevard  
Boston, Massachusetts 02210-2600  
(617) 832-1199

With a copy to:

Cogentrix Energy, LLC  
9405 Arrowpoint Boulevard  
Charlotte, North Carolina 28273  
(704) 672-2816

Notice to respondents/defendants Governor Paterson, DEC and NYSERDA shall be provided to:

Morgan A. Costello, Assistant Attorney General  
New York State Office of the Attorney General  
Environmental Protection Bureau  
The Capitol  
Albany, New York 12224  
(518) 473-5843

Notice to respondents/defendants PSC and DPS shall be provided to:

Sean Mullany, Assistant Counsel  
New York State Public Service Commission  
Three Empire State Plaza  
Albany, New York 12223-1350  
(518) 474-7663

Notice to respondent/defendant Con Edison shall be provided to:

Peter Garam, Esq.  
Consolidated Edison Company of New York, Inc.  
4 Irving Place  
New York, New York 10003  
(212) 460-2985

33. **Change of Designee.** The Parties may change the address or designee for purposes of notice or exchange of information. Notice of such change shall be in writing to the then existing designees. It is the obligation of the Parties to update address information for this purpose within 10 days of any change in counsel or location.

34. **Modifications of Consent Decree.** The Parties, by written agreement, may modify the terms of this Consent Decree with approval of the Court. Upon motion by DEC, the Court shall allow modification of the Consent Decree to change or remove DEC's obligation to

maintain the LTC set-aside account at 1.5 million allowances, as provided in ¶ 3, upon DEC's demonstration to the Court that such change or removal in the LTC set-aside account is required to protect public health and the environment. The Parties to the Consent Decree agree not to contest such a modification to the Consent Decree; provided, however, that any change that DEC determines to make in the number of allowances contained in the LTC set-aside account shall be made through notice and comment rulemaking, and each Party reserves all rights regarding its positions during the notice and comment period, and further provided that the final promulgation of such rule change may be challenged by petitioner/plaintiff or the intervenors in an Article 78 proceeding.

35. **Dismissal.** Subject to the terms of this Consent Decree, and in particular the reservation of rights provision in ¶ 25, the claims set forth in the Petition, Amended Petition, and Complaints in Intervention in this action shall be dismissed, with prejudice, and without costs to any party.

36. **Termination.** The obligations of the Parties to the Consent Decree will terminate upon the earlier of: (1) December 31, 2016, provided, however, that the rights of and obligations with respect to Indeck, Selkirk, and/or BNYCP shall terminate earlier should its LTC be terminated or amended to provide pass through to Con Edison of the cost of the allowances required for compliance with the CO<sub>2</sub> Budget Trading Program rule; or (2) the termination of compliance obligations under the CO<sub>2</sub> Budget Trading Program, including, but not limited to, through implementation of federal CO<sub>2</sub> cap-and-trade legislation that pre-empts the RGGI program; provided, however, that, if such pre-emption is effective for a period of time less than provided in ¶ 36(1), then the obligations of the Parties hereto shall be suspended during the period of pre-emption, rather than terminated. Con Edison's obligations to Indeck, BNYCP, and Selkirk shall terminate no later than as provided in Appendices 1 through 3, respectively.

Notwithstanding the foregoing, the Parties acknowledge and agree that they will fulfill any obligation that may be outstanding as of such expiration or termination.

**CONSENTED TO:**

New York, NY  
December 17, 2009

FOR PETITIONER/PLAINTIFF INDECK  
CORINTH, L.P.

By:

  
David J. Freeman, Esq.  
Paul, Hastings, Janofsky & Walker LLP  
75 East 55<sup>th</sup> Street  
New York, New York 10022  
(212) 318-6555

Syracuse, NY  
December \_\_\_\_, 2009

FOR PETITIONER/PLAINTIFF  
BROOKLYN NAVY YARD  
COGENERATION PARTNERS, L.P.

By:

\_\_\_\_\_  
Virginia C. Robbins, Esq.  
Bond, Schoeneck & King, PLLC  
One Lincoln Center  
Syracuse, New York 13202-1355  
(315) 218-8182

Boston, MA  
December \_\_\_\_, 2009

FOR PETITIONER/PLAINTIFF  
SELKIRK COGEN PARTNERS, L.P.

By:

\_\_\_\_\_  
Kenneth S. Leonetti, Esq.  
Foley Hoag, LLP  
Seaport West  
155 Seaport Boulevard  
Boston, Massachusetts 02210-2600  
(617) 832-1000

Albany, NY  
December 22, 2009

FOR RESPONDENTS/DEFENDANTS  
DAVID A. PATERSON, AS GOVERNOR,  
NEW YORK STATE DEPARTMENT OF  
ENVIRONMENTAL CONSERVATION,  
AND NEW YORK STATE ENERGY  
RESEARCH AND DEVELOPMENT  
AUTHORITY

Notwithstanding the foregoing, the Parties acknowledge and agree that they will fulfill any obligation that may be outstanding as of such expiration or termination.

**CONSENTED TO:**

New York, NY  
December \_\_, 2009

FOR PETITIONER/PLAINTIFF INDECK  
CORINTH, L.P.

By:

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David J. Freeman, Esq.  
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75 East 55<sup>th</sup> Street  
New York, New York 10022  
(212) 318-6555

Syracuse, NY  
December 17, 2009

FOR PETITIONER/PLAINTIFF  
BROOKLYN NAVY YARD  
COGENERATION PARTNERS, L.P.

By:

\_\_\_\_\_  
*Virginia C. Robbins*  
Virginia C. Robbins, Esq.  
Bond, Schoeneck & King, PLLC  
One Lincoln Center  
Syracuse, New York 13202-1355  
(315) 218-8182

Boston, MA  
December \_\_, 2009

FOR PETITIONER/PLAINTIFF  
SELKIRK COGEN PARTNERS, L.P.

By:

\_\_\_\_\_  
Kenneth S. Leonetti, Esq.  
Foley Hoag, LLP  
Seaport West  
155 Seaport Boulevard  
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Albany, NY  
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NEW YORK STATE DEPARTMENT OF  
ENVIRONMENTAL CONSERVATION,  
AND NEW YORK STATE ENERGY  
RESEARCH AND DEVELOPMENT  
AUTHORITY

Notwithstanding the foregoing, the Parties acknowledge and agree that they will fulfill any obligation that may be outstanding as of such expiration or termination.

**CONSENTED TO:**

New York, NY  
December \_\_, 2009

FOR PETITIONER/PLAINTIFF INDECK  
CORINTH, L.P.

By:

\_\_\_\_\_  
David J. Freeman, Esq.  
Paul, Hastings, Janofsky & Walker, LLP  
75 East 55<sup>th</sup> Street  
New York, New York 10022  
(212) 318-6555

Syracuse, NY  
December \_\_, 2009

FOR PETITIONER/PLAINTIFF  
BROOKLYN NAVY YARD  
COGENERATION PARTNERS, L.P.

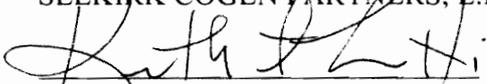
By:

\_\_\_\_\_  
Virginia C. Robbins, Esq.  
Bond, Schoeneck & King, PLLC  
One Lincoln Center  
Syracuse, New York 13202-1355  
(315) 218-8182

Boston, MA  
December \_\_, 2009

FOR PETITIONER/PLAINTIFF  
SELKIRK COGEN PARTNERS, L.P.

By:

  
\_\_\_\_\_  
Kenneth S. Leonetti, Esq.  
Foley Hoag, LLP  
Seaport West  
155 Seaport Boulevard  
Boston, Massachusetts 02210-2600  
(617) 832-1000

Albany, NY  
December \_\_, 2009

FOR RESPONDENTS/DEFENDANTS  
DAVID A. PATERSON, AS GOVERNOR,  
NEW YORK STATE DEPARTMENT OF  
ENVIRONMENTAL CONSERVATION,  
AND NEW YORK STATE ENERGY  
RESEARCH AND DEVELOPMENT  
AUTHORITY

ANDREW M. CUOMO  
Attorney General of the State of New York

By: Morgan Costello  
Morgan A. Costello  
Michael J. Myers  
Assistant Attorneys General  
Environmental Protection Bureau  
The Capitol  
Albany, New York 12224  
(518) 473-5843

Albany, NY  
December 17, 2009

FOR RESPONDENTS/DEFENDANTS  
NEW YORK STATE PUBLIC SERVICE  
COMMISSION and NEW YORK STATE  
DEPARTMENT OF PUBLIC SERVICE

By: Sean Mullany  
Sean Mullany  
Assistant Counsel  
New York State Public Service Commission  
Three Empire State Plaza  
Albany, New York 12223-1350  
(518) 474-7663

New York, NY  
December \_\_, 2009

FOR RESPONDENT/DEFENDANT  
CONSOLIDATED EDISON COMPANY  
OF NEW YORK, INC.

By: \_\_\_\_\_  
Peter Garam, Esq.  
Consolidated Edison Company of New  
York, Inc.  
4 Irving Place  
New York, New York 10003  
(212) 460-2985

**SO ORDERED:**

Saratoga Springs, New York  
\_\_\_\_\_, 2010

\_\_\_\_\_  
Honorable Thomas J. McNamara  
Justice State Supreme Court  
State of New York, Albany County

ANDREW M. CUOMO  
Attorney General of the State of New York

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

Morgan A. Costello  
Michael J. Myers  
Assistant Attorneys General  
Environmental Protection Bureau  
The Capitol  
Albany, New York 12224  
(518) 473-5843

Albany, NY  
December \_\_, 2009

FOR RESPONDENTS/DEFENDANTS  
NEW YORK STATE PUBLIC SERVICE  
COMMISSION and NEW YORK STATE  
DEPARTMENT OF PUBLIC SERVICE

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

Sean Mullany  
Assistant Counsel  
New York State Public Service Commission  
Three Empire State Plaza  
Albany, New York 12223-1350  
(518) 474-7663

New York, NY  
December 16, 2009

FOR RESPONDENT/DEFENDANT  
CONSOLIDATED EDISON COMPANY  
OF NEW YORK, INC.

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

  
Peter Garam, Esq.  
Consolidated Edison Company of New  
York, Inc.  
4 Irving Place  
New York, New York 10003  
(212) 460-2985

**SO ORDERED:**

Saratoga Springs, New York  
\_\_\_\_\_, 2010

\_\_\_\_\_  
Honorable Thomas J. McNamara  
Justice State Supreme Court  
State of New York, Albany County

# **APPENDIX 1**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

INDECK CORINTH, L.P.,

Petitioner/Plaintiff,

- against -

DAVID A. PATERSON, as Governor, NEW  
YORK STATE DEPARTMENT OF  
ENVIRONMENTAL CONSERVATION, NEW  
YORK STATE ENERGY RESEARCH AND  
DEVELOPMENT AUTHORITY, NEW YORK  
STATE PUBLIC SERVICE COMMISSION, NEW  
YORK STATE DEPARTMENT OF PUBLIC  
SERVICE, and CONSOLIDATED EDISON  
COMPANY OF NEW YORK, INC.,

Respondents/Defendants.

---

BROOKLYN NAVY YARD COGENERATION  
PARTNERS, L.P. and SELKIRK COGEN  
PARTNERS, L.P.,

Intervenors in Support of  
Petitioner/Plaintiff.

INDEX NO. 5280-09

Hon. Thomas J. McNamara

**APPENDIX 1 TO  
CONSENT DECREE**

**AGREEMENT BETWEEN CON EDISON AND INDECK**

This Agreement, dated as of December 17, 2009, is by and between Consolidated Edison Company of New York, Inc., a New York corporation ("Con Edison") and Indeck Corinth, L.P., a Delaware limited partnership ("Indeck"), and shall be effective as of the Effective Date set forth herein.

**WITNESSETH:**

WHEREAS, Con Edison and Indeck Energy Services of Corinth, Inc., a Delaware corporation and a wholly owned subsidiary of Indeck ("Indeck Energy Services"), are parties to that certain Revised Power Purchase Agreement, dated as of September 15, 1989 (constituting a revision to the Power Purchase Agreement of November 30, 1988), as amended by the First Amendment thereto, dated June 15, 1990, and Second

Amendment thereto, dated August 1, 1990, and as approved by the Public Service Commission of the State of New York (the "PSC") (together with all attachments and supplements thereto and as the same may hereafter be amended in accordance with the terms thereof, the "PPA"), pursuant to which Con Edison purchases capacity and energy produced by that certain gas-fired cogeneration power plant owned and operated by Indeck in Corinth, New York (the "Indeck Plant"); and

WHEREAS, by a joint petition and complaint, dated January 29, 2009, against David A. Paterson, as Governor (the "Governor"), New York State Department of Environmental Conservation (the "DEC"), New York State Energy Research and Development Authority ("NYSERDA") and the PSC, Indeck commenced a special proceeding and action in which it alleged that the entry by New York into, and the implementation by DEC, NYSERDA and the PSC of, the Regional Greenhouse Gas Initiative ("RGGI") is unlawful and imposes a discriminatory cost upon Indeck (the "Proceeding"); and

WHEREAS, Con Edison has received a copy of the First Amended Petition and Complaint filed by Indeck in the Proceeding, under which Con Edison would be an additional named defendant in the Proceeding; and

WHEREAS Brooklyn Navy Yard Cogeneration Partners, L.P. ("BNYCP") and Selkirk Cogen Partners, L.P. ("Selkirk") are proposing to intervene as additional petitioners and plaintiffs in support of Indeck; and

WHEREAS, DEC, NYSERDA, the New York State Attorney General (acting for DEC, NYSERDA and the Governor) (the "AG"), the PSC, the New York State Department of Public Service ("DPS"), as staff to the PSC, Con Edison and Indeck, BNYCP and Selkirk have determined to settle the Proceeding on terms described in that certain Consent Decree (the "Consent Decree"), to be entered into contemporaneously herewith, by and among such parties (collectively, the "Consent Decree Parties"); and

WHEREAS, pursuant to the terms of the Consent Decree, Con Edison has agreed, subject to execution of the Consent Decree, to subject itself to the jurisdiction of the Albany County Supreme Court of the State of New York (the "Court") and to waive service upon it of an amended complaint; and

WHEREAS, Indeck and Con Edison have agreed, pursuant to the terms of the Consent Decree, to enter into this Agreement on the terms and subject to the conditions set forth herein and in the Consent Decree.

NOW, THEREFORE, in consideration of the foregoing, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto, intending to be legally bound, do hereby agree as follows.

ARTICLE I  
DEFINITIONS

Section 1.1. Definitions. As used in this Agreement, the following terms shall have the following meanings:

“Allowance” means the limited authorization by DEC under the CO<sub>2</sub> Budget Trading Program to emit up to one ton of CO<sub>2</sub>, as described and subject to the limitations set forth in such program.

“Assumed Set-Aside Award” means, for the relevant year or other applicable measurement period under the RGGI Regulations, the number of Allowances DEC would have awarded to Indeck for the Indeck Plant, as determined by DEC, pursuant to the LTC Set-Aside Allocation Provisions as in effect on the date of the Consent Decree if the events described in the proviso to Section 3.2(b) had not taken place; provided, however, that if DEC does not timely make or communicate such determination, then the “Assumed Set-Aside Award” shall mean the product of (i) the Set-Aside Award requested by Indeck in its application to DEC in respect of that period, multiplied by (ii) a fraction, the numerator of which is 1,500,000 and the denominator of which is the total number of Allowances in the long term contract set-aside account for such period, unless the long term contract set-aside account is eliminated, in which event the “Assumed Set-Aside Award” shall mean the Set-Aside Award or the Assumed Set-Aside Award, as the case may be, applicable to the immediately preceding period.

“Auction” means the CO<sub>2</sub> allowance auctions administered by NYSERDA (or its designee) pursuant to the CO<sub>2</sub> Budget Trading Program.

“Business Day” means any day, other than a Saturday, Sunday or other day on which banks in New York, New York are authorized by Law to be closed.

“CO<sub>2</sub> Allowance Auction Program” means the New York statewide rule promulgated by NYSERDA implementing RGGI, set forth in 21 NYCRR Part 507.

“CO<sub>2</sub> Budget Trading Program” means the New York statewide rule promulgated by DEC implementing RGGI, set forth in 6 NYCRR Part 242.

“Con Edison Production” means energy production at the Indeck Plant, to the extent (and only to the extent) that such production is purchased by Con Edison pursuant to the PPA.

“Control Period” shall have the meaning set forth in Section 1.2(b)(40) of the CO<sub>2</sub> Budget Trading Program.

“EPA” means the United States Environmental Protection Agency.

“Governmental Authority” means any entity or body exercising executive, legislative, judicial, regulatory or administrative functions of or pertaining to United States federal,

state, multistate, local or municipal government, foreign, international, multinational or other government, including any department, commission, board, agency, bureau, subdivision, instrumentality, official or other regulatory, administrative or judicial authority thereof, and any non-governmental regulatory body to the extent that the rules and regulations or orders of such body have the force of Law.

“Law” means any statute, law (including common law), constitution, treaty, ordinance, code, order, decree, judgment, rule, regulation and any other binding requirement or determination of any Governmental Authority.

“LTC Set-Aside Allocation Provisions” means the long-term contract set-aside allocation provisions of the CO<sub>2</sub> Budget Trading Program, set forth in 6 NYCRR §242-5.3(d) as in effect on the date of the Consent Decree.

“Person” means an individual, corporation, partnership, limited partnership, limited liability company, trust, unincorporated association, Governmental Authority or other legal entity.

“RGGI Inc.” means Regional Greenhouse Gas Initiative, Inc., a not-for-profit organization that administers the Auctions on behalf of NYSERDA, and any other entity that hereafter performs such function.

“RGGI Regulations” means the CO<sub>2</sub> Allowance Auction Program and the CO<sub>2</sub> Budget Trading Program.

“Set-Aside Award” means, for the relevant year or other applicable measurement period, the actual number of Allowances DEC awards to Indeck for the Indeck Plant pursuant to, and in accordance with, the LTC Set-Aside Allocation Provisions.

Section 1.2 Other Definitions. As used in this Agreement, the following terms shall have the meanings assigned to them in the Sections of this Agreement set forth below:

Actual Quarterly	
Allowance Requirement .....	2.2(d)
Alternative Fuel Carbon	
Intensity Cap .....	2.2(b)
Applicable Quarterly Period	2.2(b)
Auction Purchase Credit .....	2.2(c)
Auction Purchase Volume .....	2.2(b)
Blended Carbon	
Intensity Cap .....	2.2(b)
Carbon Intensity Caps .....	2.2(b)
Carryover Amount .....	2.2(e)
Catch-Up Period .....	2.2(f)
Certified Emissions .....	2.2(b)
Con Edison Indemnities .....	6.1
Consent Decree .....	Recitals
Consent Decree Parties .....	Recitals
Court .....	Recitals
DEC .....	Recitals
DPS .....	Recitals
Effective Date .....	3.1
Emission Revision .....	2.2(f)
Estimated Quarterly	
Allowance Requirement.....	2.2(b)
First Auction .....	2.2(f)
Indeck Plant .....	Recitals
Losses .....	6.1

Natural Gas Carbon	Quarterly Carbon
Intensity Cap .....2.2(b)	Intensity Cap .....2.2(b)
NYSERDA .....Recitals	RGGI .....Recitals
PPA .....Recitals	Set-Aside Award Credit .....2.2(a)
Proceeding .....Recitals	Stub Period .....2.2(b)
PSC .....Recitals	True-up Amount .....2.2(d)
Purchase Notice .....2.2(b)	Year-End Carryover
	Amount .....2.2(e)

Section 1.3 Construction. For purposes of this Agreement, except as otherwise expressly provided herein or the context otherwise requires, (a) the terms “hereof”, “herein”, “hereunder”, “hereby”, “herewith” and words of similar import shall, unless otherwise stated, be construed to refer to this Agreement as a whole and not to any particular provision; (b) when a reference is made in this Agreement to an Article, Section, paragraph, Exhibit or Schedule, such reference is to an Article, Section, paragraph, Exhibit or Schedule of this Agreement, unless otherwise specified; (c) the words “include”, “includes” and “including”, when used in this Agreement, shall be deemed to be modified by the words “without limitation”, unless otherwise specified; (d) a reference to any Law, means such Law as lawfully amended, modified, codified, replaced or reenacted and in effect; and (e) words using the singular or plural number also include the plural or singular number, respectively.

## ARTICLE II OBLIGATIONS OF THE PARTIES

Section 2.1 Con Edison’s Payment Obligations. Con Edison agrees to pay Indeck, during the term of this Agreement and on the terms and subject to the conditions set forth herein (including, without limitation, the conditions set forth in Article III), for the number of Allowances and at the prices, both as specified herein. Con Edison shall make payment to Indeck by wire transfer of immediately available funds to an account designated in writing by Indeck, on a quarterly basis, within five (5) Business Days following the conclusion of each Auction.

Section 2.2 Determining Payment Obligations. The parties agree that Con Edison’s payment obligation will be estimated, true-up and paid in accordance with the methodology described immediately below, and as set forth on the illustrative example attached hereto as Schedule I.

(a) Calculating the Set-Aside Award Credits. Prior to January 15 of each calendar year during the term of this Agreement (or as soon as possible after Indeck is notified by DEC), Indeck shall notify Con Edison of the Set-Aside Award it has been granted for that year, together with such supporting documentation as Con Edison shall reasonably request. Con Edison shall allocate ninety-three percent (93%) of the Set-Aside Award (or, in the event that the proviso to Section 3.2(b) applies, ninety-three percent (93%) of the Assumed Set-Aside Award) among the 12 months in that year based upon the ratio (i.e., the applicable percentage) of Con Edison Production for each

corresponding month during the prior calendar year to total Con Edison Production for the prior calendar year; provided, however, that for the 2015 calendar year, 93% of the Set-Aside Award (or 93% of the Assumed Set-Aside Award, as applicable) shall be fully allocated, on an equal monthly basis, to the portion of such year during which this Agreement shall remain in effect. The product of 93% of the Set-Aside Award (or the Assumed Set Aside Award, as applicable) and the applicable percentage for the month, shall be reflected as the "Set-Aside Award Credit" for such month. Prior to February 15 of each calendar year (or as promptly as possible following notification from Indeck of the Set-Aside Award (or from DEC of the Assumed Set-Aside Award) for that year, as applicable), Con Edison shall deliver to Indeck a schedule of the Set-Aside Award Credit allocation for each month of that year. The schedule of the Set-Aside Award Credit allocation applicable to each month of the 2009 calendar year is set forth on Schedule I. Con Edison shall have no rights with regard to, and shall not include for any purpose related to this Agreement, the remaining 7% of the Set-Aside Award or Assumed Set-Aside Award.

(b) Estimating Quarterly Allowance Requirements; Calculating Auction Purchase Volume; Applying Carbon Intensity Caps. No later than five (5) Business Days prior to the date on which RGGI Inc. requires Auction participants to post funds, Con Edison shall estimate the amount of Allowances Indeck shall be required to purchase, subject to Carbon Intensity Caps (as defined below), to satisfy its RGGI obligations in respect of Con Edison Production for the calendar quarterly period (ending on March 31, June 30, September 30 or December 31, as applicable) during which the Auction occurs (the "Applicable Quarterly Period"), and provide written notice of the same (a "Purchase Notice") to Indeck. Such estimate shall be computed, to the greatest extent possible, based upon actual emissions data for Con Edison Production during the Applicable Quarterly Period (as measured by continuous emissions monitoring systems at the Indeck Plant or by any other method of measurement utilized by Indeck and accepted by EPA and DEC), as shall be provided to Con Edison and consistent with emissions ultimately certified by Indeck to EPA and DEC ("Certified Emissions"). No later than fifteen (15) Business Days prior to any Auction, Indeck shall provide to Con Edison year-to-date Certified Emissions data for Con Edison Production up to the most recent day for which such data is then available. Allowance requirements for Con Edison Production in any period during the Applicable Quarterly Period during which Certified Emissions data is not available at the time the Purchase Notice is sent (the "Stub Period") shall be estimated, in good faith, by Con Edison (after consultation with Indeck); provided, however, that Con Edison's estimate of Stub Period emissions and therefore its determination of Indeck's total Allowance requirements for Con Edison Production for the Applicable Quarterly Period, as set forth in the Purchase Notice (the "Estimated Quarterly Allowance Requirement"), shall be final and binding on the parties, subject to the further provisions of this Section 2.2. Notwithstanding the foregoing, the Estimated Quarterly Allowance Requirement shall in no event exceed, and shall (i) in all events of natural gas dispatch, be limited to the number of Allowances that would be required to be purchased for Con Edison Production if such natural gas generated production had associated with it carbon dioxide emissions at a rate of 891 lbs per megawatt hour during the Applicable Quarterly Period (such amount being, the "Natural Gas Carbon Intensity");

Cap”), and (ii) in all events of alternative fuel dispatch, be limited to the number of Allowances that would be required to be purchased for Con Edison Production if such alternative fuel generated production had associated with it carbon dioxide emissions at a rate of 1,300 lbs per megawatt hour during the Applicable Quarterly Period (such amount being, the “Alternative Fuel Carbon Intensity Cap”; and, together with the Natural Gas Carbon Intensity Cap, the “Quarterly Carbon Intensity Caps”); provided, further, that total Allowance requirements for all Con Edison Production during any calendar year shall not exceed the number of Allowances that would be required to be purchased if such production had associated with it carbon dioxide emissions at a rate of 1,021 lbs per megawatt hour (the “Blended Carbon Intensity Cap”; and, together with the Quarterly Carbon Intensity Caps, the “Carbon Intensity Caps”). The Purchase Notice shall set forth, in reasonable detail, the total amount of Allowances Indeck shall be obligated to purchase, which shall be calculated as the sum of (i) the Estimated Quarterly Allowance Requirement (after giving effect to the Quarterly Carbon Intensity Caps), less (ii) the Set-Aside Award Credits applicable to the Applicable Quarterly Period, less (iii) the Carryover Amount from the end of the prior quarterly period, if any (as defined below) (such sum being, the “Auction Purchase Volume”).

(c) Payment; Credits. Within five (5) Business Days following the completion of each Auction during the term of this Agreement, Con Edison shall pay to Indeck an amount equal to the product of (i) the clearing price per Allowance for current vintage Allowances in the Auction, and (ii) the Auction Purchase Volume (provided, however, that if the Auction Purchase Volume is negative, then Con Edison shall have no payment obligation for the Applicable Quarterly Period and the absolute value of such negative amount shall be reflected for such period as an “Auction Purchase Credit”).

(d) Quarterly True-ups. No later than fifteen (15) Business Days prior to each Auction, Indeck shall report its actual Certified Emissions for the Stub Period in the previous Applicable Quarterly Period and also for the previous Applicable Quarterly Period to Con Edison (the “Actual Quarterly Allowance Requirement”), and Con Edison and Indeck shall true-up and settle differences between the Estimated Quarterly Allowance Requirement and the Actual Quarterly Allowance Requirement, in each case subject to the respective Quarterly Carbon Intensity Caps, in the next succeeding Auction (the amount of such difference, after giving effect to the Quarterly Carbon Intensity Caps, being, the “True-up Amount”), such that (A) any amounts by which the Actual Quarterly Allowance Requirement (after giving effect to the respective Quarterly Carbon Intensity Caps) exceeds the Estimated Quarterly Allowance Requirement (after giving effect to the Quarterly Carbon Intensity Caps) shall be reflected as a deduct (a negative number), and (B) any amounts by which the Estimated Quarterly Allowance Requirement (after giving effect to the Quarterly Carbon Intensity Caps) exceeds the Actual Quarterly Allowance Requirement (after giving effect to the Quarterly Carbon Intensity Caps) shall be reflected as a credit (a positive number); provided, however, that if actual emissions in respect of Con Edison Production during any calendar year (or portion thereof ending upon the termination of this Agreement) exceed the Blended Carbon Intensity Cap, then the True-up Amount applicable to the final Applicable Quarterly Period in any calendar

year shall include any adjustments made necessary due to application of the Blended Carbon Intensity Cap.

(e) Carryovers; Annual True-ups. In the event that the sum of the Auction Purchase Credit and the True-Up Amount in any period is positive (whether on a single or cumulative basis), Con Edison shall carry forward such amount as a net credit (the "Carryover Amount") throughout the applicable calendar year(s) until such credit is used; provided, however, that if (i) there is a positive Carryover Amount remaining following the conclusion of the final Auction of any calendar year (the "Year-End Carryover Amount"), and (ii) Con Edison determines that there is no reasonable basis to believe that all or any portion of such Carryover Amount of Allowances will be required to satisfy Allowance requirements for Con Edison Production during the term of this Agreement, then Con Edison shall have the option to require that Indeck reimburse it in an amount equal to the monetary value of the Year-End Carryover Amount (or such portion thereof as Con Edison shall determine), calculated at the weighted average cost of purchasing such Year-End Carryover Amount of Allowances (or applicable portion thereof) at Auction during the applicable calendar year(s). If Con Edison elects to exercise such option, it shall provide written notice to Indeck of the same, specifying the portion of the Year-End Carryover Amount to be reimbursed, and the calculation of the dollar amount so owing. Indeck shall pay the amount set forth in such notice within ten (10) Business Days following its receipt thereof, and, upon such payment, the Carryover Amount for the first Applicable Quarterly Period in the next succeeding year shall be appropriately reduced. If, upon the conclusion of any calendar year, there is a negative Year-End Carryover Amount, then such negative Year-End Carryover Amount shall roll forward as a net debit into the next calendar year unless the applicable calendar year-end is also the end of a Control Period, in which event Con Edison shall, at its option, either (x) transfer from its own account the number of Allowances equal to the absolute value of the negative Year-End Carryover Amount, or (y) pay to Indeck, within ten (10) Business Days of its receipt of notice and supporting documentation from Indeck, the amount Indeck paid to purchase such number of Allowances in the secondary market. Not later than ten (10) Business Days following the final determination of the Year-End Carryover Amount, Con Edison shall effect the transfer specified in clause (x) above, or notify Indeck of Indeck's requirement to make additional Allowance purchases, as contemplated by clause (y) above.

(f) Periods Prior to the Effective Date. The parties agree that the cumulative obligation of Indeck to purchase Allowances for Con Edison Production during the period beginning on January 1, 2009 and ending on the last date of the calendar quarter immediately prior to the Effective Date (the "Catch-Up Period"), net of all cumulative Set-Aside Award Credits applicable to such Catch-Up Period (as set forth in Schedule I for 2009 and as otherwise calculated in accordance with Section 2.2(a) for all other periods), and Con Edison's obligation to pay for such Allowances in accordance with Section 2.2(c), shall be satisfied in full at the Auction next succeeding the Effective Date (provided that the Effective Date is at least five (5) Business Days prior to the date on which RGGI Inc. requires Auction participants to post funds; otherwise, at the Auction immediately thereafter) (such Auction being, the "First Auction"). Specifically, on the

Effective Date, Indeck shall report to Con Edison its actual Certified Emissions for Con Edison Production during the Catch-Up Period and up to the most recent day for which such data is then available. If the First Auction is more than fifteen (15) Business Days after the Effective Date, then Indeck shall provide an updated report of such Certified Emissions as of the fifteenth (15<sup>th</sup>) Business Day preceding the First Auction. On the tenth (10<sup>th</sup>) Business Day prior to the First Auction (or, if only a shorter period exists, then on the Business Day as far in advance of the First Auction as exists), Con Edison shall deliver a Purchase Notice to Indeck, which notice shall set forth the total Auction Purchase Volume for such Auction, calculated as set forth in Section 2.2(b); provided, however, that the Carryover Amount for purposes of the First Auction shall be calculated as (i) the sum of the Actual Quarterly Allowance Requirements applicable to each calendar quarter during the Catch-Up Period (subject to the Carbon Intensity Caps), less (ii) the sum of all applicable Set-Aside Award Credits applicable to the Catch-up Period.

(g) Reporting and Record Keeping. Indeck shall at all times maintain accurate and complete records reflecting CO<sub>2</sub> emissions data in respect of Con Edison Production in accordance with applicable Law and shall provide a summary of the Indeck Plant emissions data in spreadsheet form to Con Edison on a timely basis in accordance with the terms of this Agreement. In the event that Indeck revises any report provided to a Governmental Authority with respect to generation or emissions of CO<sub>2</sub> at the Indeck Plant (an "Emission Revision"), it shall promptly report the same to Con Edison, together with such evidence supporting the same as Con Edison shall reasonably require. Con Edison shall have the right to investigate any Emission Revision and, upon its agreement thereto, shall determine in its sole discretion the manner in which any overpayments or underpayments resulting therefrom shall be reconciled. Con Edison shall maintain accurate written records (which may be in spreadsheet form) of the Estimated Quarterly Allowance Requirement, Actual Quarterly Allowance Requirement, Set-Aside Award Credits, True-up Amounts, Carryover Amounts, Auction clearing prices, payments made and any other information with respect to each Applicable Quarterly Period as shall be necessary or appropriate to comply with the terms of this Agreement, and shall provide copies of the same to Indeck on such regular basis as the parties shall agree.

(h) Changes in the Auction Schedule. The foregoing provisions of this Section 2.2 assume that Auctions will continue to be conducted on a quarterly basis. If, at any time prior to the expiration or termination of this Agreement, there is a change in the frequency of Auctions, then (i) the Applicable Quarterly Period shall instead be deemed to be defined as the calendar period of Auction frequency, and (ii) the foregoing provisions of this Section 2.2 shall be deemed to be modified, to the extent necessary or appropriate, to ensure that Auction Purchase Volumes are calculated, purchased and reconciled with such frequency as is consistent therewith.

Section 2.3 Indeck's Obligations. During the term of this Agreement, Indeck covenants and agrees with Con Edison as follows:

(a) Auction Purchases. Indeck will participate in each Auction and make purchases therein in a manner reasonably calculated, in good faith, to ensure that it will

be able to satisfy the Auction Purchase Volume, as set forth in the Purchase Notice, for the relevant period. If, notwithstanding Indeck's good faith efforts, it was unable to purchase the required amounts in the Auction, Indeck shall be required to cover such shortfall, whether by Auction participation or by purchases in the secondary market, by the conclusion of the next succeeding Auction.

(b) Set-Aside Applications. Indeck will at all times maintain eligibility under the LTC Set-Aside Allocation Provisions, will timely apply for the maximum set-aside award thereunder, and will complete all requirements applicable thereto. Indeck will provide a copy of each application submitted under the LTC Set-Aside Allocation Provisions to Con Edison, and will keep Con Edison duly apprised of all communications with DEC, NYSERDA, or other Governmental Authorities concerning its participation in the program, and of all Set-Aside Awards received.

(c) Compliance with Law. Indeck shall comply in all material respects with all applicable provisions of the RGGI Regulations. Indeck shall keep and maintain accurate and complete records relating to its generation and emissions of CO<sub>2</sub> at the Indeck Plant, and shall make all purchases and deposits of Allowances into its RGGI compliance account, as required by applicable Law, whether or not paid for by Con Edison hereunder.

(d) Access to Information. Indeck shall, and shall cause Indeck Energy Services to, upon Con Edison's request, give Con Edison and its counsel, advisors, auditors and other authorized representatives reasonable access during normal business hours to such emissions and RGGI compliance data relating to the Indeck Plant as Con Edison or such representatives may reasonably request in order to ensure Indeck's compliance with the terms of this Agreement, provided, however, that Indeck and Indeck Energy Services shall be permitted to require Con Edison, and/or Con Edison's counsel, advisors, auditors and other authorized representatives, to enter into a confidentiality agreement in customary form to preserve any proprietary or confidential information of Indeck to which such persons may have access. Indeck acknowledges that Con Edison may request, with respect to the Indeck Plant, periodic statements of Indeck's RGGI compliance account holdings, confirmatory email correspondence concerning Indeck's Auction purchases, and/or other evidence of Indeck's compliance with the terms of this Agreement, all as certified as true and correct by a responsible officer of Indeck, and Indeck agrees to comply promptly with such request.

(e) Certain Agreements Regarding Regulatory, Legislative or Judicial Changes. Indeck acknowledges that (i) pursuant to the Consent Decree, Con Edison has agreed to assume certain financial obligations to assist Indeck in meeting Indeck's compliance obligations under RGGI and the RGGI Regulations during the term of this Agreement, and (ii) Con Edison has undertaken those obligations on the understanding that Con Edison would not be subject to any additional liability for RGGI compliance at the Indeck Plant. Accordingly, Indeck covenants and agrees that it will not, at any time, take any affirmative action to lobby or influence the decision of any Governmental Authority or representative thereof, or otherwise affirmatively seek to effect (or take any

action that could be reasonably expected to result in) any change in applicable Law, in each case for the purpose of shifting RGGI compliance obligations to Con Edison. Indeck further agrees that, in the event that the obligation to purchase, pay for and/or have Allowances is shifted to Con Edison (notwithstanding Indeck's compliance with the foregoing covenant), then the parties shall negotiate in good faith to reach a prompt and fair resolution that gives effect, as nearly as possible, to the economic intent of the parties and is consistent with the principles set forth herein and in the Consent Decree.

### ARTICLE III CONDITIONS

Section 3.1 Conditions to Effectiveness. This Agreement, and the obligations of the parties hereunder, shall take effect only upon the satisfaction, or waiver by Con Edison, of each of the following conditions (the date upon which all conditions have been satisfied or so waived being, the "Effective Date"):

(a) The Consent Decree Parties shall have entered into, and the Court shall have approved, the Consent Decree;

(b) NYSERDA, in accordance with the Consent Decree, shall have amended the RGGI operating plan, or otherwise approved programs, in a manner that offers benefits to Con Edison customers at least commensurate with the amounts Con Edison shall be obligated to pay to Indeck under this Agreement; for purposes of clarification and not otherwise by limitation, a NYSERDA amendment to the RGGI operating plan which complies with the Consent Decree (including Appendix 4 thereto) shall be deemed in all respects to satisfy this condition;

(c) PSC, in accordance with the Consent Decree, shall have authorized Con Edison to include in its schedule for electric service and to implement a tariff amendment, permitting Con Edison to fully recover, beginning as of January 1, 2009, the costs of performing its obligations under Article II hereof;

(d) DEC, in accordance with the Consent Decree, shall have acted favorably upon the petitions seeking a declaratory ruling regarding whether the inability to pass through Allowance costs qualifies as a financial hardship under the LTC Set-Aside Allocation Provisions and shall have awarded Indeck Set-Aside Awards at least for 2009; and

(e) All other conditions to the effectiveness of the Consent Decree, including any and all approvals of the Board of Directors or Board of Trustees, as applicable, of the Consent Decree Parties, shall have been obtained.

Section 3.2 Acknowledgement; Continuing Conditions. Con Edison and Indeck each acknowledges and agrees that the purpose of this Agreement is to assist Indeck with its compliance with RGGI and the RGGI Regulations. If the CO<sub>2</sub> Budget Trading Program is suspended or terminated for any reason (including if it becomes preempted by a federal

program) and/or RGGI and the RGGI Regulations no longer impose Allowance obligations on Indeck, then this Agreement shall, upon the occurrence of such event, automatically terminate and be of no further force or effect, subject only to the provisions of Article V; provided, however, that if RGGI and the RGGI Regulations are suspended and then become effective again and impose Allowance obligations on Indeck during the term hereof, then the obligations of each party shall automatically resume. The parties further acknowledge and agree that performance by Con Edison of its obligations under Article II hereof is subject to the continuing satisfaction of each of the following conditions throughout the term of this Agreement, and to the continuing authority of the Court in relation to the Consent Decree:

(a) DEC shall continue to administer the CO<sub>2</sub> Budget Trading Program and the LTC Set-Aside Allocation Provisions in the ordinary course, fairly and reasonably and the declaratory ruling shall remain in full force and effect;

(b) The regulations governing the CO<sub>2</sub> Budget Trading Program shall not be repealed, modified or amended (i) in a manner that would reduce the 1,500,000 Allowances presently allocated to the long term contract set-aside account, or (ii) in any other manner that would constitute a material modification in Con Edison's reasonable judgment; provided, however, that in the event that (x) DEC demonstrates to the Court that a reduction in or removal of the long term contract set-aside account is required to protect public health and the environment, (y) the Court allows modification of the Consent Decree to effect such change, and (z) the change is effected through notice and comment rulemaking, all as required by paragraph 34 of the Consent Decree, then the condition set forth in this Section 3.2(b) shall be deemed satisfied and references in this Agreement to the Set-Aside Award shall instead be read to refer to the Assumed Set-Aside Award.

(c) Indeck shall timely prepare, complete and submit its application for a Set-Aside Award and shall otherwise fulfill the requirements to make such application, as set forth in regulations or other pronouncements of the DEC or its designee, and shall be granted a Set-Aside Award of a quantity determined pursuant to the LTC Set-Aside Allocation Provisions;

(d) NYSERDA shall perform, and continue to perform, its obligations under the Consent Decree (including Appendix 4 thereto), including funding in full the amounts and programs set forth therein; and

(e) PSC shall continue to allow full recovery of costs incurred by Con Edison pursuant to the terms of this Agreement.

ARTICLE IV  
REPRESENTATIONS AND WARRANTIES

Section 4.1 Indeck Representations and Warranties. Indeck represents and warrants to Con Edison as follows:

(a) Indeck is duly organized, validly existing and in good standing under the laws of the State of Delaware;

(b) Indeck has the requisite power and authority to execute and deliver this Agreement and the Consent Decree and to perform its obligations hereunder and thereunder;

(c) the execution, delivery and performance of this Agreement and the Consent Decree by it and the consummation of the transactions contemplated hereby and thereby have been duly authorized by all necessary limited partnership or other action on the part of Indeck and no other action is necessary on its part to authorize this Agreement or the Consent Decree or the performance by it of its obligations hereunder or thereunder;

(d) this Agreement and the Consent Decree have been duly authorized, executed and delivered by it, and are enforceable against it in accordance with their terms; and

(e) the execution and the delivery of this Agreement and the Consent Decree by it, the performance by it of its obligations hereunder and thereunder, and the consummation by it of the transactions contemplated herein and therein will not (i) violate or conflict with any provisions of any of its organizational documents; (ii) violate, breach or constitute a default, an event of default or an event creating rights of acceleration, termination, cancellation, imposition of additional obligations or loss of rights under any contract, order, or permit to which it is a party or by which it or its properties are bound or affected, or (iii) require any consent from any Person that has not already been obtained.

Section 4.2 Con Edison Representations and Warranties. Con Edison represents and warrants to Indeck as follows:

(a) Con Edison is duly organized, validly existing and in good standing under the laws of the State of New York;

(b) Con Edison has the requisite power and authority to execute and deliver this Agreement and the Consent Decree and to perform its obligations hereunder and thereunder;

(c) the execution, delivery and performance of this Agreement and the Consent Decree by it and the consummation of the transactions contemplated hereby and thereby have been duly authorized by all necessary corporate or other action on the part of Con Edison and no other action is necessary on its part to authorize this Agreement or the Consent Decree or the performance by it of its obligations hereunder or thereunder;

(d) this Agreement and the Consent Decree will have been duly authorized, executed and delivered by it, and enforceable against it in accordance with its terms; and

(e) the execution and the delivery of this Agreement and the Consent Decree by it, the performance by it of its obligations hereunder and thereunder, and the consummation by it of the transactions contemplated herein and therein will not (i) violate or conflict with any provisions of any of its organizational documents; (ii) violate, breach or constitute a default, an event of default or an event creating rights of acceleration, termination, cancellation, imposition of additional obligations or loss of rights under any contract, order, or permit to which it is a party or by which it or its properties are bound or affected, or (iii) require any consent from any Person that has not already been obtained.

## ARTICLE V TERM; TERMINATION

Section 5.1 Term. This Agreement shall automatically terminate upon the earlier to occur of (i) June 30, 2015, (ii) the earlier termination of the PPA, (iii) the suspension or termination of the CO<sub>2</sub> Budget Trading Program for any reason (including if it becomes preempted by a federal program), or (iv) RGGI or RGGI Regulations no longer imposing Allowance obligations on Indeck, unless earlier terminated in accordance with Section 5.2; provided, however, that in the event that Allowance obligations under RGGI or the RGGI Regulations are suspended but are subsequently reinstated prior to the occurrence of any other termination event described in this Section 5.1 and in Section 5.2, then the effectiveness of this Agreement shall automatically resume in accordance with its terms; and provided, further, that any termination pursuant to the foregoing clause (ii), (iii) or (iv) shall be subject to compliance with the dispute resolution procedures and enforcement provisions set forth in paragraphs 22 and 24, respectively, of the Consent Decree.

Section 5.2 Termination. This Agreement may be terminated at any time prior to its expiration (subject only to compliance with the dispute resolution procedures and enforcement provisions set forth in paragraphs 22 and 24, respectively, of the Consent Decree) by:

- (a) mutual written agreement of the parties;
- (b) Con Edison, by written notice of termination delivered to Indeck, if the Effective Date has not occurred on or prior to December 31, 2010;
- (c) Either party, by written notice of termination delivered to the other, if the Consent Decree is no longer effective for any reason (other than as a result of a breach thereof by the party seeking termination);
- (d) Either party if there has been a material breach of any representation, warranty, covenant or agreement by the other party, which breach is not capable of being cured or shall not have been cured within ten (10) Business Days following receipt of

written notice thereof (it being expressly understood that any breach of Section 2.3 hereof shall constitute a material breach);

(e) Con Edison, if any of the conditions specified in Section 3.2 shall fail to be satisfied; and

(f) By either party, if (i) the other party (or Indeck Energy Services) (A) commences a voluntary case, or consents to the entry of a decree or order in respect of an involuntary case or proceeding, under applicable bankruptcy, insolvency or other similar laws, or (B) makes an assignment for the benefit of its creditors, or admits in writing its inability to pay its debts generally as they become due, or consents to the appointment of a receiver or liquidator or trustee or assignee in bankruptcy or insolvency of it or of a significant portion of its property or (ii) a decree or order shall be entered by a court in respect of that party (or Indeck Energy Services) in an involuntary case under applicable bankruptcy, insolvency or other similar laws, or appointing a receiver, liquidator, assignee, custodian, trustee or other similar official of such party (or Indeck Energy Services) or of a significant portion of such party's respective properties, or ordering the winding up or liquidation of such party's (or Indeck Energy Services's) affairs, and such decree or order shall remain unstayed and in effect for a period of 60 consecutive days.

**Section 5.3 Effect of Termination.** Upon expiration, or earlier termination of this Agreement, all rights and obligations of the parties hereunder shall immediately cease and be of no further force or effect; provided, that (i) the obligations of the parties under Section 2.3(e), this Article V, and under Articles VI and VII shall survive, and the parties hereto shall have any and all remedies to enforce such obligations provided at law or in equity or otherwise; and (ii) nothing herein shall relieve the parties from liability for any breach hereof, and the parties shall be entitled to any remedies at law or in equity for any such breach.

**Section 5.4 Tail Period True-up; Cooperation.** Following the expiration or termination of this Agreement in accordance with its terms, the parties shall cooperate with each other to reconcile Allowance payments through the date of such expiration or termination as promptly as practicable. Indeck agrees that it will report its Actual Quarterly Allowance Requirement for the last Applicable Quarterly Period (or portion thereof that terminates upon the expiration or termination of this Agreement) to Con Edison as promptly following the expiration or termination of this Agreement as is possible. Con Edison and Indeck shall calculate the True-up Amount with respect to such Applicable Quarterly Period (or portion thereof) as promptly after delivery of the Actual Quarterly Allowance Requirement report as possible. If, upon calculation of the final True-Up Amount, there is a positive Carryover Amount, then Indeck shall reimburse Con Edison the monetary value of such Carryover Amount at a price equal to the weighted average cost of purchasing such Carryover Amount of Allowances at Auction during the applicable period. Reimbursement will be received within ten (10) Business Days of its receipt of notice thereof from Con Edison. If, upon calculation of the final True-Up Amount, there is a negative Carryover Amount, then Con Edison shall, at its option, either (i) transfer to Indeck such Carryover Amount of Allowances, or (ii) reimburse

Indeck the monetary value of such Carryover Amount at a price equal to the actual amount paid by Indeck to purchase such Carryover Amount of Allowances in the secondary market. Within ten (10) Business Days following final determination of the Carryover Amount, Con Edison shall make the transfer described in clause (i), or notify Indeck of Indeck's requirement to make Allowance purchases as contemplated by clause (ii). In the event that Con Edison elects the option set forth in clause (ii) above, Con Edison shall reimburse Indeck the amount Indeck so paid, within ten (10) Business Days of Con Edison's receipt of notice from Indeck specifying such costs and including supporting documentation.

## ARTICLE VI OTHER AGREEMENTS

Section 6.1 Indemnification. Each Party shall indemnify and defend the other party, and their respective stockholders, officers, trustees, directors, employees, agents, affiliates, successors and assigns (collectively, the "Indemnitees") against, and shall hold them harmless from, any and all liabilities, damages, compliance obligations, fines, fees, penalties, deficiencies, losses, costs and expenses (including all interest assessed, court costs, fees and expenses of attorneys, accountants and other experts and other expenses of litigation or other proceedings or of any claim, default or assessment or pursuit of rights to indemnification (collectively, "Losses") resulting from, arising out of, or incurred by any Indemnitee in connection with or otherwise with respect to: (i) any breach of any representation or warranty of the other party contained in this Agreement or in the Consent Decree, (ii) any breach of any covenant or agreement of a party contained in this Agreement or in the Consent Decree, or (iii) any failure by a party to comply with applicable Law, whether (in the case of clause (ii) or this clause (iii), occurring before or after termination or expiration of this Agreement).

Section 6.2 Offset. It is expressly agreed that, in addition to its right to elect to terminate this Agreement, Con Edison shall have the right, in the event that Indeck fails to meet its obligation under Sections 2.3(c) hereof to deposit Allowances into its RGGI compliance account at the time and in the amounts required by RGGI Regulations, to offset against payments Con Edison may owe to Indeck or Indeck Energy Services pursuant to any other agreement, amounts Con Edison previously paid to Indeck hereunder, to the extent of Indeck's delinquency. In addition, in the event that Indeck fails at any time to make any payments owing to Con Edison hereunder, including pursuant to (i) Section 2.2(e), (ii) the fourth sentence of Section 5.4, or (iii) Section 6.1, then Con Edison shall have the right to offset such amounts against payments Con Edison may owe to Indeck or Indeck Energy Services pursuant to any other agreement.

ARTICLE VII  
MISCELLANEOUS

Section 7.1 Notices. Any notice, request, demand, waiver, consent, approval or other communication which is required or permitted hereunder shall be in writing, and shall be deemed given (a) on the date delivered personally, by private courier (provided signature for delivery is obtained), or sent by facsimile or email transmission (if confirmation of receipt is obtained) or (b) on the fifth Business Day after the date mailed, by certified or registered mail, return receipt requested, postage prepaid. Each party to whom such communication is sent has the obligation to accept delivery of such communication. Such communications, to be valid, must be addressed as follows:

If to Indeck, to:

Indeck Corinth, L.P.  
600 N Buffalo Grove Road  
Buffalo Grove, IL 60089  
Att: Vice President, Asset Management  
Fax: (847) 520-9883  
Email: [mferguson@indeckenergy.com](mailto:mferguson@indeckenergy.com)

If to Con Edison, to:

Consolidated Edison Company of New York, Inc.  
4 Irving Place  
Suite 1810S  
Att: Vice President, Regulatory Services  
Fax: 212-677-5850  
Email: [lublingc@coned.com](mailto:lublingc@coned.com)

And to:

Consolidated Edison Company of New York, Inc.  
111 Broadway, Suite 1601  
New York, New York 10006  
Att: Director, Energy Management  
Fax: 212-385-3512  
Email: [kimballi@coned.com](mailto:kimballi@coned.com)

or to such other address or to the attention of such Person or Persons as the recipient party has specified by prior written notice to the sending party. If more than one method for sending notice as set forth above is used, the earliest notice date established as set forth above shall control.

Section 7.2 Amendment. This Agreement may not be amended, or its provisions supplemented or otherwise modified, except by an instrument in writing, signed by the parties hereto. Any amendment hereto that does not affect the rights or obligations of any Consent Decree Party other than the parties hereto shall not require Court approval.

Section 7.3 Waivers. Any waiver of any provision of this Agreement shall be effective only if it is in writing and is signed by the party against whom the waiver is sought to be effective. No failure or delay by any party in exercising any right or privilege hereunder shall operate as a waiver thereof, nor shall any single or partial exercise thereof preclude any other or further exercise thereof or the exercise of any other right, power or privilege.

Section 7.4 Further Assurances. From time to time, as and when requested by either party hereto, the other party shall use its commercially reasonable efforts to take, or cause to be taken, all such further actions as such other party may reasonably deem necessary or desirable to consummate this Agreement and the Consent Decree and the transactions contemplated hereby and thereby.

Section 7.5 Assignment. This Agreement, and the obligations owing to Indeck hereunder, are specific to Indeck. Neither this Agreement nor any of the rights, interests or obligations hereunder may be assigned by Indeck, by operation of law or otherwise, without the prior written consent of Con Edison. Con Edison may assign this Agreement, in whole or in part, to one or more of its affiliates or to any Person acquiring all of its stock or substantially all of its assets or in connection with a consolidation or merger transaction. Subject to the foregoing, all of the terms and provisions of this Agreement shall inure to the benefit of, and be binding upon, the parties hereto and their respective permitted successors and assigns.

Section 7.6 Governing Law. This Agreement (including any Exhibits and Schedules hereto) shall be governed by and construed in accordance with the laws of the State of New York without giving effect to any choice of Law or conflict of Laws rules or provisions (whether of the State of New York or of any other jurisdiction) that would cause the application of the Laws of any jurisdiction other than the State of New York.

Section 7.7 Consent to Jurisdiction. Each party hereto irrevocably submits to the exclusive jurisdiction of the Albany County Supreme Court of the State of New York for any actions, suits or proceedings arising out of or relating to this Agreement, and agrees to commence any such action, suit or proceeding only in such court. Each party further agrees that service of any process, summons, notice or document by U.S. registered mail to such party's respective address set forth herein shall be effective service of process for any such action, suit or proceeding. Each party irrevocably and unconditionally waives any objection to the laying of venue of any action, suit or proceeding arising out of this Agreement in such court, and hereby irrevocably and unconditionally waives its right and agrees not to plead or claim that any such action, suit or proceeding brought therein has been brought in an inconvenient forum. Each party hereby irrevocably waives all right to trial by jury in any action arising out of or relating to this Agreement, the transactions

contemplated hereby or the acts or omissions of such party in the negotiation, administration, performance and enforcement of this Agreement.

Section 7.8 Entire Agreement. This Agreement (including Schedule I hereto) and the Consent Decree, and the other documents and instruments specifically referred to herein and therein and delivered pursuant hereto and thereto, set forth the entire understanding of the parties with respect to the transactions contemplated hereby, and this Agreement and the Consent Decree shall be deemed to be in pari materia for the interpretation of the provisions hereof and thereof. Schedule I referred to herein is intended to be and hereby is specifically made a part of this Agreement. Any and all previous agreements and understandings between or among the parties regarding the subject matter hereof, whether written or oral, are superseded by this Agreement.

Section 7.9 Captions. All captions contained in this Agreement are for convenience of reference only, do not form a part of this Agreement and shall not affect the meaning or interpretation of this Agreement.

Section 7.10 Expenses. Each Party will pay its own expenses in connection with the negotiation and execution of this Agreement and the Consent Decree.

Section 7.11 Counterparts. This Agreement may be executed simultaneously in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. Delivery of an executed counterpart of a signature page of this Agreement by facsimile transmission or email transmission of a .pdf file shall be as effective as delivery of a manually executed counterpart of this Agreement.

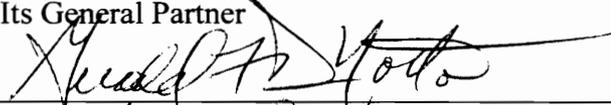
Section 7.12 Third-Party Beneficiaries. Nothing in this Agreement will be construed as giving any Person other than the parties and their permitted successors and assigns, any right, remedy or claim under or in respect of this Agreement; provided that in the case of Section 6.1 hereof, the other Con Edison Indemnitees and their respective heirs, executors, administrators, legal representatives, successors and assigns, are intended third party beneficiaries of such Section and shall have the right to enforce such Section.

[Signature page follows]

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed by their duly authorized representatives on the day and year first above written.

INDECK CORINTH, L.P.  
a Delaware limited partnership

By: INDECK ENERGY SERVICES OF CORINTH, INC.  
Its General Partner

By:   
Name: GERALD F. DENITTO  
Title: President

INDECK ENERGY SERVICES OF CORINTH, INC.  
a Delaware corporation

By:   
Name: GERALD F. DENITTO  
Title: President

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.  
a New York corporation

By: \_\_\_\_\_  
Name: Joseph P. Oates  
Title: Vice President, Energy Management

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed by their duly authorized representatives on the day and year first above written.

INDECK CORINTH, L.P.  
a Delaware limited partnership

By: INDECK ENERGY SERVICES OF CORINTH, INC.  
Its General Partner

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

INDECK ENERGY SERVICES OF CORINTH, INC.  
a Delaware corporation

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

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.  
a New York corporation

By:  \_\_\_\_\_  
Name: Joseph P. Oates  
Title: Vice President, Energy Management

**SCHEDULE I  
TO APPENDIX 1**

Year 0	Production (MWh)	% of Annual Emissions	Set-Aside Award Credit	Annual Set-Aside Award
1 January-08	84,657	11.0%	18,488	180,810
2 February-08	84,901	11.0%	18,541	
3 March-08	76,824	10.0%	16,777	
4 April-08	98,226	12.8%	21,451	
5 May-08	50,253	6.5%	10,975	
6 June-08	82,919	10.8%	18,108	
7 July-08	95,817	12.4%	20,925	
8 August-08	62,048	8.1%	13,551	
9 September-08	54,379	7.1%	11,876	
10 October-08	42,236	5.5%	9,224	
11 November-08	2,582	0.3%	564	
12 December-08	35,135	4.6%	7,673	
2008 Total	769,977	100.0%	168,153	

Year 1

Month	Actual/Estimated Con Edison Production (MWh)	Actual/Estimated CO2 Emissions (tons)	Actual/Estimated emissions subject to Carbon Intensity Cap (tons)	Set Aside Award Credit	Actual/Estimated emissions subject to Carbon Intensity Cap (tons)
January-09	55,510	26,648	18,488	18,488	
February-09	22,176	9,434	18,541	18,541	
March-09	6,677	2,857	16,777	16,777	
April-09	0	0	21,451	21,451	
May-09	4,343	1,867	10,975	10,975	
June-09	26,746	11,322	18,108	18,108	
July-09	72,770	31,162	20,925	20,925	
August-09	62,048	27,301	13,551	13,551	
September-09	54,379	23,927	11,876	11,876	
October-09	42,236	18,584	9,224	9,224	
November-09	2,582	1,136	564	564	
December-09	35,135	15,459	7,673	7,673	
2009 Total	394,602	169,697	170,387	168,153	

Notes:

Year 0 Con Edison Production is used to determine monthly distribution of set-aside award credit for subsequent year

Carbon Intensity Cap for Gas production is 0.4455 tons per MWh [see CO2 Intensity Caps tab]

Carbon Intensity Cap for Alternate Fuel is 0.65 tons per MWh [see CO2 Intensity Caps tab]

Year 1 MWh/CO2 example reflects actual generation for Jan-July, but uses

Year 0 MWh for August-December for illustrative purposes

Assumed a 5% difference between actual and estimated CO2 Allowance

Requirement for the final month in each quarter for illustrative purposes; the Carbon

Intensity Cap to be applied to both the Estimated and Actual Emissions.

Month	Carryover Amount	Auction Purchase Volume	Auction Clearing Price	Payment Amount	Actual Emissions subject to Carbon Intensity Cap	Quarterly True-up Amount	Auction Purchase Credit	Carryover Amount
January-09	0	-16,223	\$3.51	\$0	39,463	-1,879	16,223	14,344
February-09	14,344	-51,689	\$3.23	\$0	13,848	-659	51,689	51,030
March-09	51,030	-14,081	\$3.00	\$0	87,465	-4,165	14,081	9,916
2009 Total	9,916	8,937	\$3.00	\$26,811	34,585	1,729	0	1,729
					175,361			

**Quarterly Carbon Intensity Caps (lbs/MWh)**

**Gas** 891  
**Alt. Fuel** 1300

	Gas ConEd Production (MWh)	Alt. Fuel ConEd Production (MWh)	Gas CO2 Emitted (tons)	Alt. Fuel CO2 Emitted (tons)	Gas CO2 Emitted Rate (lbs/MWh)	Alt. Fuel CO2 Emitted (tons)	Quarterly Emission Cap (tons)	Total CO2 Emitted (tons)	Total CO2 Cap (tons)
Q1	84,363	0	38,939	0	923	0	37,584	38,939	37,584
Q2	31,089	0	13,189	0	848	0	13,850	13,189	13,189
Q3	191,266	0	83,300	0	871	0	85,209	83,300	83,300
Q4	82,532	0	36,314	0	880	0	36,768	36,314	36,314
<b>Total</b>	<b>389,250</b>	<b>0</b>	<b>171,742</b>	<b>0</b>					

**Annual Totals**

CO2 tons 171,742  
 MWh 389,250  
 Annual Rate (lbs/MWh) [REDACTED]

**Annual Carbon Intensity Cap (lbs/MWh) = 1,021**

# **APPENDIX 2**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

INDECK CORINTH, L.P.,

Petitioner/Plaintiff,

- against -

DAVID A. PATERSON, as Governor, NEW  
YORK STATE DEPARTMENT OF  
ENVIRONMENTAL CONSERVATION, NEW  
YORK STATE ENERGY RESEARCH AND  
DEVELOPMENT AUTHORITY, NEW YORK  
STATE PUBLIC SERVICE COMMISSION, NEW  
YORK STATE DEPARTMENT OF PUBLIC  
SERVICE, and CONSOLIDATED EDISON  
COMPANY OF NEW YORK, INC.,

Respondents/Defendants.

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BROOKLYN NAVY YARD COGENERATION  
PARTNERS, L.P. and SELKIRK COGEN  
PARTNERS, L.P.,

Intervenors in Support of  
Petitioner/Plaintiff.

INDEX NO. 5280-09

Hon. Thomas J. McNamara

**APPENDIX 2 TO  
CONSENT DECREE**

**AGREEMENT BETWEEN CON EDISON AND BNYCP**

This Agreement, dated as of December 17, 2009, is by and between Consolidated Edison Company of New York, Inc., a New York corporation ("Con Edison") and Brooklyn Navy Yard Cogeneration Partners, L.P., a Delaware limited partnership ("BNYCP"), and shall be effective as of the Effective Date set forth herein.

WITNESSETH:

WHEREAS, Con Edison and BNYCP are parties to that certain Energy Sales Agreement, dated as of October 31, 1996, as approved by the Public Service Commission of the State of New York (the "PSC") (together with all appendices, attachments and supplements thereto and as the same may hereafter be amended in accordance with the terms thereof, the "PPA"), in which Con Edison purchases capacity and energy produced

by a gas-fired cogeneration power plant owned and operated by BNYCP in Brooklyn, New York (the "BNYCP Plant"); and

WHEREAS, by a joint petition and complaint, dated January 29, 2009, against David A. Paterson, as Governor (the "Governor"), New York State Department of Environmental Conservation (the "DEC"), New York State Energy Research and Development Authority ("NYSERDA") and the PSC, Indeck Corinth, L.P., a Delaware limited partnership ("Indeck") commenced a special proceeding and action in which it alleged that the entry by New York into, and the implementation by DEC, NYSERDA and the PSC of, the Regional Greenhouse Gas Initiative ("RGGI") is unlawful and imposes a discriminatory cost upon Indeck (the "Proceeding"); and

WHEREAS, Con Edison has been served with an amended complaint, under which it would be an additional named defendant in the Proceeding; and BNYCP and Selkirk Cogen Partners, L.P. ("Selkirk") are proposing to intervene in the Proceeding as additional petitioners and plaintiffs in support of Indeck; and

WHEREAS, DEC, NYSERDA, the New York State Attorney General (acting for DEC, NYSERDA and the Governor) (the "AG"), the PSC, the New York State Department of Public Service ("DPS"), as staff to the PSC, Con Edison, Indeck, BNYCP and Selkirk have determined to settle the Proceeding on terms described in that certain Consent Decree (the "Consent Decree"), to be entered into contemporaneously herewith, by and among such parties (collectively, the "Consent Decree Parties"); and

WHEREAS, pursuant to the terms of the Consent Decree, Con Edison has agreed, subject to execution of the Consent Decree, to subject itself to the jurisdiction of the Albany County Supreme Court of the State of New York (the "Court") and to waive service upon it of an amended complaint; and

WHEREAS, BNYCP and Con Edison have agreed, pursuant to the terms of the Consent Decree, to enter into this Agreement on the terms and subject to the conditions set forth herein and in the Consent Decree.

NOW, THEREFORE, in consideration of the foregoing, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto, intending to be legally bound, do hereby agree as follows.

## ARTICLE I DEFINITIONS

Section 1.1. Definitions. As used in this Agreement, the following terms shall have the following meanings:

“Allowance” means the limited authorization by DEC under the CO<sub>2</sub> Budget Trading Program to emit up to one ton of CO<sub>2</sub>, as described and subject to the limitations set forth in such program.

“Applicable Portion” means, for any calendar year, the percentage equal to (i) Con Edison Production, divided by (ii) total energy production at the BNYCP Plant, in each case during the immediately preceding calendar year.

“Assumed Set-Aside Award” means, for the relevant year or other applicable measurement period under the RGGI Regulations, the number of Allowances DEC would have awarded to BNYCP for the BNYCP Plant, as determined by DEC, pursuant to the LTC Set-Aside Allocation Provisions as in effect on the date hereof if the events described in the proviso to Section 3.2(b) had not taken place; provided, however, that if DEC does not timely make or communicate such determination, then the “Assumed Set-Aside Award” shall mean the product of (i) the Set-Aside Award actually received in respect of that period, multiplied by (ii) a fraction, the numerator of which is 1,500,000 and the denominator of which is the total number of Allowances in the long term contract set-aside account for such period, unless the long term contract set-aside account is eliminated, in which event the “Assumed Set-Aside Award” shall mean the Set-Aside Award or the Assumed Set-Aside Award, as the case may be, applicable to the immediately preceding period.

“Auction” means the CO<sub>2</sub> allowance auctions administered by NYSERDA (or its designee) pursuant to the CO<sub>2</sub> Budget Trading Program.

“Business Day” means any day, other than a Saturday, Sunday or other day on which banks in New York, New York are authorized by Law to be closed.

“CO<sub>2</sub> Allowance Auction Program” means the New York statewide rule promulgated by NYSERDA implementing RGGI, set forth in 21 NYCRR Part 507.

“CO<sub>2</sub> Budget Trading Program” means the New York statewide rule promulgated by DEC implementing RGGI, set forth in 6 NYCRR Part 242.

“Con Edison Production” means energy production at the BNYCP Plant, to the extent (and only to the extent) that such production is purchased by Con Edison, calculated as set forth in Schedule I.

“Control Period” shall have the meaning set forth in Section 1.2(b)(40) of the CO<sub>2</sub> Budget Trading Program.

“EPA” means the United States Environmental Protection Agency.

“Governmental Authority” means any entity or body exercising executive, legislative, judicial, regulatory or administrative functions of or pertaining to United States federal, state, local or municipal government, foreign, international, multinational or other

government, including any department, commission, board, agency, bureau, subdivision, instrumentality, official or other regulatory, administrative or judicial authority thereof, and any non-governmental regulatory body to the extent that the rules and regulations or orders of such body have the force of Law.

“Law” means any statute, law (including common law), constitution, treaty, ordinance, code, order, decree, judgment, rule, regulation and any other binding requirement or determination of any Governmental Authority.

“LTC Set-Aside Allocation Provisions” means the long term contract set-aside allocation provisions of the CO<sub>2</sub> Budget Trading Program, set forth in 6 NYCRR §242-5.3(d) as in effect on the date hereof.

“Natural Gas Force Majeure Event” means any act of God, war, strike, labor unrest, terrorism, sabotage, riot or catastrophe, not proximately caused by BNYCP, or any act or omission of a third party outside the control of BNYCP that damages the natural gas delivery system, in each case as a result of which natural gas supply becomes unavailable to power generators in the State of New York generally and to BNYCP specifically.

“Person” means an individual, corporation, partnership, limited partnership, limited liability company, trust, unincorporated association, Governmental Authority or other legal entity.

“RGGI Inc.” means Regional Greenhouse Gas Initiative, Inc., a not-for-profit organization that administers the Auctions on behalf of NYSERDA, and any other entity that hereafter performs such function.

“RGGI Regulations” means the CO<sub>2</sub> Allowance Auction Program and the CO<sub>2</sub> Budget Trading Program.

“Set-Aside Award” means, for the relevant year or other applicable measurement period, the actual number of Allowances DEC awards to BNYCP for the BNYCP Plant pursuant to, and in accordance with, the LTC Set-Aside Allocation Provisions.

Section 1.2 Other Definitions. As used in this Agreement, the following terms shall have the meanings assigned to them in the Sections of this Agreement set forth below:

Actual Quarterly	Carbon Intensity Caps .....	2.2(b)
Allowance Requirement .....	Carryover Amount .....	2.2(e)
Alternative Fuel Carbon	Catch-Up Period .....	2.2(f)
Intensity Cap .....	Certified Emissions .....	2.2(b)
Applicable Quarterly Period .....	Con Edison Indemnitees .....	6.1
Auction Purchase Credit .....	Consent Decree .....	Recitals
Auction Purchase Volume .....	Consent Decree Parties .....	Recitals
Blended Carbon Intensity Cap .....	Court .....	Recitals
BNYCP Plant .....	DEC .....	Recitals

Declaratory Ruling .....	3.1(d)	NYSERDA .....	Recitals
DPS .....	Recitals	PPA .....	Recitals
Effective Date .....	3.1	Proceeding .....	Recitals
Emission Revision .....	2.2(g)	PSC .....	Recitals
Estimated Quarterly Allowance Requirement	2.2(b)	Purchase Notice .....	2.2(b)
Excess Allowance Amount .....	2.2(e)	Quarterly Carbon Intensity Cap	2.2(b)
First Auction .....	2.2(f)	RGGI .....	Recitals
Losses .....	6.1	Set-Aside Award Credit .....	2.2(a)
MWh .....	2.2(b)	Stub Period .....	2.2(b)
Natural Gas Carbon Intensity Cap .....	2.2(b)	True-up Amount .....	2.2(d)
		Year-End Carryover Amount ...	2.2(e)

Section 1.3 Construction. For purposes of this Agreement, except as otherwise expressly provided herein or the context otherwise requires, (a) the terms “hereof”, “herein”, “hereunder”, “hereby”, “herewith” and words of similar import shall, unless otherwise stated, be construed to refer to this Agreement as a whole and not to any particular provision; (b) when a reference is made in this Agreement to an Article, Section, paragraph, Exhibit or Schedule, such reference is to an Article, Section, paragraph, Exhibit or Schedule of this Agreement, unless otherwise specified; (c) the words “include”, “includes” and “including”, when used in this Agreement, shall be deemed to be modified by the words “without limitation”, unless otherwise specified; (d) a reference to any Law, means such Law as lawfully amended, modified, codified, replaced or reenacted and in effect; and (e) words using the singular or plural number also include the plural or singular number, respectively.

**ARTICLE II**  
**OBLIGATIONS OF THE PARTIES**

Section 2.1 Con Edison’s Payment Obligations. Con Edison agrees to pay BNYCP, during the term of this Agreement and on the terms and subject to the conditions set forth herein (including, without limitation, the conditions set forth in Article III), for the number of Allowances and at the prices, both as specified herein. Con Edison shall make payment to BNYCP by wire transfer of immediately available funds to an account designated in writing by BNYCP, on a quarterly basis, within five (5) Business Days following the conclusion of each Auction.

Section 2.2 Determining Payment Obligations. The parties agree that Con Edison’s payment obligation will be estimated, true-up and paid in accordance with the methodology described immediately below, and as set forth on the illustrative example attached hereto as Schedule I.

(a) Calculating the Set-Aside Award Credits. Prior to January 15 of each calendar year during the term of this Agreement (or as soon as possible after BNYCP is notified by DEC), BNYCP shall notify Con Edison of the Set-Aside Award it has been granted for that year, together with such supporting documentation as Con Edison shall

reasonably request. Con Edison shall allocate the Applicable Portion of the Set-Aside Award (or, in the event that the proviso to Section 3.2(b) applies, the Applicable Portion of the Assumed Set-Aside Award) among the 12 months in that year based upon the ratio (i.e., the applicable percentage) of Con Edison Production for each corresponding month during the prior calendar year to total Con Edison Production for the prior calendar year. The product of the Applicable Portion of the Set-Aside Award and the applicable percentage for the month shall be reflected as the "Set-Aside Award Credit" for such month. Prior to February 15 of each calendar year (or as promptly as possible following notification from BNYCP of the Set-Aside Award or from DEC of the Assumed Set-Aside Award for that year, as applicable), Con Edison shall deliver to BNYCP a schedule of the Set-Aside Award Credit allocation for each month of that year. The schedule of the Set-Aside Award Credit allocation applicable to each month of the 2009 calendar year is set forth on Schedule I.

(b) Estimating Quarterly Allowance Requirements; Calculating Auction Purchase Volume; Applying Carbon Intensity Caps. No later than five (5) Business Days prior to the date on which RGGI Inc. requires Auction participants to post funds, Con Edison, in consultation with BNYCP, shall in good faith estimate the amount of Allowances BNYCP shall be required to purchase, subject to the Carbon Intensity Caps (as defined below), to satisfy its RGGI obligations in respect of Con Edison Production for the calendar quarterly period (ending on March 31, June 30, September 30 or December 31, as applicable) during which the Auction occurs (the "Applicable Quarterly Period"), and provide written notice of the same (a "Purchase Notice") to BNYCP. Such estimate shall be computed, to the greatest extent possible, based upon actual emissions data for Con Edison Production during the Applicable Quarterly Period (as measured by continuous emissions monitoring systems at the BNYCP Plant or by any other method of measurement utilized by BNYCP and accepted by EPA and DEC), as shall be provided to Con Edison and consistent with emissions ultimately certified by BNYCP to EPA and DEC ("Certified Emissions"). No later than fifteen (15) Business Days prior to any Auction, BNYCP shall provide to Con Edison year-to-date Certified Emissions data for Con Edison Production up to the most recent day for which such data is then available. Allowance requirements for Con Edison Production in any period during the Applicable Quarterly Period during which Certified Emissions data is not available at the time the Purchase Notice is sent (the "Stub Period") shall be estimated, in good faith, by Con Edison (after consultation with BNYCP); provided, however, that Con Edison's estimate of Stub Period emissions and therefore its determination of BNYCP's total Allowance requirements for Con Edison Production for the Applicable Quarterly Period, as set forth in the Purchase Notice (the "Estimated Quarterly Allowance Requirement"), shall be final and binding on the parties for purposes of establishing the Auction Purchase Volume (as defined below). Notwithstanding the foregoing, the Estimated Quarterly Allowance Requirement shall in no event exceed, and shall (i) in all events of natural gas dispatch, be limited to the number of Allowances that would be required to be purchased for Con Edison Production if such natural gas generated production had associated with it carbon dioxide emissions at a rate of 900 lbs per megawatt hour ("MWh") during the Applicable Quarterly Period (such amount being, the "Natural Gas Carbon Intensity Cap"), and (ii) in all events of alternative fuel dispatch, be limited to the number of

Allowances that would be required to be purchased for Con Edison Production if such alternative fuel generated production had associated with it carbon dioxide emissions at a rate of 1,300 lbs per MWh during the Applicable Quarterly Period (such amount being, the “Alternative Fuel Carbon Intensity Cap”; and, together with the Natural Gas Carbon Intensity Cap, the “Quarterly Carbon Intensity Caps”); provided, further, that the total Allowance requirements for all Con Edison Production during any calendar year shall not exceed the number of Allowances that would be required to be purchased if such production had associated with it carbon dioxide emissions at a rate of 1,100 lbs per MWh (the “Blended Carbon Intensity Cap”; and, together with the Quarterly Carbon Intensity Caps, the “Carbon Intensity Caps”). Notwithstanding the foregoing, if and to the extent that a Natural Gas Force Majeure Event occurs and prevents BNYCP from satisfying the Carbon Intensity Caps, then application of such Carbon Intensity Caps shall be suspended during the period in which the condition causing such Natural Gas Force Majeure Event exists; provided, however, that BNYCP shall use commercially reasonable efforts to satisfy such Carbon Intensity Caps despite such Natural Gas Force Majeure Event. The Purchase Notice shall set forth, in reasonable detail, the total amount of Allowances BNYCP shall be obligated to purchase, which shall be calculated as the sum of (i) the Estimated Quarterly Allowance Requirement (after giving effect to the Quarterly Carbon Intensity Caps), less (ii) the Set-Aside Award Credits applicable to the Applicable Quarterly Period, less (iii) the Carryover Amount from the end of the prior quarterly period, if any (as defined below) (such sum being, the “Auction Purchase Volume”).

(c) Payment; Credits. Within five (5) Business Days following the completion of each Auction during the term of this Agreement, Con Edison shall pay to BNYCP an amount equal to the product of (i) the clearing price per Allowance for current vintage Allowances in the Auction, and (ii) the Auction Purchase Volume (provided, however, that if the Auction Purchase Volume is negative, then Con Edison shall have no payment obligation for the Applicable Quarterly Period and the absolute value of such negative amount shall be reflected for such period as an “Auction Purchase Credit”).

(d) Quarterly True-ups. No later than fifteen (15) Business Days prior to each Auction, BNYCP shall report its actual Certified Emissions for the Stub Period in the previous Applicable Quarterly Period and also its actual Certified Emissions for the previous Applicable Quarterly Period to Con Edison (the “Actual Quarterly Allowance Requirement”), and Con Edison and BNYCP shall true-up and settle differences between the Estimated Quarterly Allowance Requirement and the Actual Quarterly Allowance Requirement, in each case subject to the respective Quarterly Carbon Intensity Caps, in the next succeeding Auction (the amount of such difference, after giving effect to the Quarterly Carbon Intensity Caps, being, the “True-up Amount”), such that (A) any amounts by which the Actual Quarterly Allowance Requirement (after giving effect to the respective Quarterly Carbon Intensity Caps) exceeds the Estimated Quarterly Allowance Requirement (after giving effect to the Quarterly Carbon Intensity Caps) shall be reflected as a deduct (a negative number), and (B) any amounts by which the Estimated Quarterly Allowance Requirement (after giving effect to the Quarterly Carbon

Intensity Caps) exceeds the Actual Quarterly Allowance Requirement (after giving effect to the Quarterly Carbon Intensity Caps) shall be reflected as a credit (a positive number); provided, however, that if actual emissions in respect of Con Edison Production during any calendar year (or portion thereof ending upon the termination of this Agreement) exceed the Blended Carbon Intensity Cap, then the True-up Amount applicable to the final Applicable Quarterly Period in any calendar year shall include any adjustments made necessary due to application of the Blended Carbon Intensity Cap.

(e) Carryovers; Annual True-ups. In the event that the sum of the Auction Purchase Credit and the True-Up Amount in any period is positive (whether on a single or cumulative basis), Con Edison shall carry forward such amount as a net credit (the "Carryover Amount") throughout the applicable calendar year(s) until such credit is used; provided, however, that if (i) there is a positive Carryover Amount remaining following the conclusion of the final Auction of any calendar year (the "Year-End Carryover Amount"), and (ii) Con Edison determines that there is no reasonable basis to believe that all or any portion of such Year-End Carryover Amount will be required to satisfy Allowance requirements for Con Edison Production during the remaining term of this Agreement, then Con Edison shall have the option to require that BNYCP reimburse it in an amount up to the product of (i) the lesser of (A) the Year-End Carryover Amount or (B) the sum of all positive Auction Purchase Volumes during such calendar year (such lesser amount or applicable portion thereof being, the "Excess Allowance Amount"), and (ii) the weighted average cost of purchasing such Allowances at Auction. If Con Edison elects to exercise such option, (x) it shall do so by providing written notice thereof to BNYCP, together with its calculation of the amount so owing, (y) BNYCP shall render payment of the amount reflected in the notice to Con Edison within ten (10) Business Days following its receipt of such notice, and (z) following receipt by Con Edison of such payment, the Carryover Amount applicable to the first quarter in the next succeeding year shall be reduced by the Excess Allowance Amount. If, upon the conclusion of any calendar year, there is a negative Year-End Carryover Amount, then such negative Year-End Carryover Amount shall roll forward as a net debit into the next calendar year unless the applicable calendar year-end is also the end of a Control Period, in which event Con Edison shall, at its option, either (x) transfer from its own account the number of Allowances equal to the absolute value of the negative Year-End Carryover Amount, or (y) pay to BNYCP, within ten (10) Business Days of its receipt of notice and supporting documentation from BNYCP, the amount BNYCP paid to purchase such number of Allowances in the secondary market. Not later than ten (10) Business Days following the final determination of the Year-End Carryover Amount, Con Edison shall effect the transfer specified in clause (x) above, or notify BNYCP of BNYCP's requirement to make additional Allowance purchases, as contemplated by clause (y) above.

(f) Periods Prior to the Effective Date. The parties agree that the cumulative obligation of BNYCP to purchase Allowances for Con Edison Production during the period beginning on January 1, 2009 and ending on the last date of the calendar quarter immediately prior to the Effective Date (the "Catch-Up Period"), net of all cumulative Set-Aside Award Credits applicable to such Catch-Up Period (as set forth in Schedule I for 2009 and as otherwise calculated in accordance with Section 2.2(a) for all other

periods), and Con Edison's obligation to pay for such Allowances in accordance with Section 2.2(c), shall be satisfied in full at the Auction next succeeding the Effective Date (provided that the Effective Date is at least five (5) Business Days prior to the date on which RGGI Inc. requires Auction participants to post funds; otherwise, at the Auction immediately thereafter) (such Auction being, the "First Auction"). Specifically, on the Effective Date, BNYCP shall report to Con Edison its actual Certified Emissions for Con Edison Production during the Catch-Up Period and up to the most recent day for which such data is then available. If the First Auction is more than fifteen (15) Business Days after the Effective Date, then BNYCP shall provide an updated report of such Certified Emissions as of the fifteenth (15<sup>th</sup>) Business Day preceding the First Auction. On the tenth (10th) Business Day prior to the First Auction (or, if only a shorter period exists, then on the Business Day as far in advance of the First Auction as exists), Con Edison shall deliver a Purchase Notice to BNYCP, which notice shall set forth the total Auction Purchase Volume for such Auction, calculated as set forth in Section 2.2(b); provided, however, that the Carryover Amount for purposes of the First Auction shall be calculated as (i) the sum of the Actual Quarterly Allowance Requirements applicable to each calendar quarter during the Catch-Up Period (subject to the Carbon Intensity Caps), less (ii) the sum of all applicable Set-Aside Award Credits applicable to the Catch-up Period.

(g) Reporting and Record Keeping. BNYCP shall at all times maintain accurate and complete records reflecting CO<sub>2</sub> emissions data in respect of Con Edison Production in accordance with applicable Law and shall provide a summary of the BNYCP Plant emissions data in spreadsheet form to Con Edison on a timely basis in accordance with the terms of this Agreement. In the event that BNYCP revises any report provided to a Governmental Authority with respect to generation or emissions of CO<sub>2</sub> at the BNYCP Plant (an "Emission Revision"), it shall promptly report the same to Con Edison, together with such evidence supporting the same as Con Edison shall reasonably require. Con Edison shall have the right to investigate any Emission Revision and, upon its agreement thereto, shall determine in consultation with BNYCP the manner in which any overpayments or underpayments resulting therefrom shall be reconciled. Con Edison shall maintain accurate written records (which may be in spreadsheet form) of the Estimated Quarterly Allowance Requirement, Actual Quarterly Allowance Requirement, Set-Aside Award Credits, True-up Amounts, Carryover Amounts, Auction clearing prices, payments made and any other information with respect to each Applicable Quarterly Period as shall be necessary or appropriate to comply with the terms of this Agreement, and shall provide copies of the same to BNYCP on such regular basis as the parties shall agree.

(h) Changes in the Auction Schedule. The foregoing provisions of this Section 2.2 assume that Auctions will continue to be conducted on a quarterly basis. If, at any time prior to the expiration or termination of this Agreement, there is a change in the frequency of Auctions, then (i) the Applicable Quarterly Period shall instead be deemed to be defined as the calendar period of Auction frequency, and (ii) the foregoing provisions of this Section 2.2 shall be deemed to be modified, to the extent necessary or appropriate, to ensure that Auction Purchase Volumes are calculated, purchased and reconciled with such frequency as is consistent therewith.

Section 2.3 BNYCP's Obligations. During the term of this Agreement, BNYCP covenants and agrees with Con Edison as follows:

(a) Auction Purchases. BNYCP will participate in each Auction and make purchases therein in a manner reasonably calculated, in good faith, to ensure that it will be able to satisfy the Auction Purchase Volume, as set forth in the Purchase Notice, for the relevant period. If, notwithstanding BNYCP's good faith efforts, it was unable to purchase the required amounts in the Auction, BNYCP shall be required to cover such shortfall, whether by Auction participation or by purchases in the secondary market, by the conclusion of the next succeeding Auction.

(b) Set-Aside Applications. BNYCP will at all times maintain eligibility under the LTC Set-Aside Allocation Provisions, and will timely apply for the maximum set-aside award thereunder, and complete all requirements applicable thereto. BNYCP will provide a copy of each application submitted under the LTC Set-Aside Allocation Provisions to Con Edison, and will keep Con Edison duly apprised of all communications with DEC, NYSERDA, or other Governmental Authorities concerning its participation in the program, and of all Set-Aside Awards received.

(c) Compliance with Law. BNYCP shall comply in all material respects with all applicable provisions of the RGGI Regulations. BNYCP shall keep and maintain accurate and complete records relating to its generation and emissions of CO<sub>2</sub> at the BNYCP Plant, and shall make all purchases and deposits of Allowances into its RGGI compliance account, as required by applicable Law, whether or not paid for by Con Edison hereunder.

(d) Access to Information. BNYCP shall, upon Con Edison's request, give Con Edison and its counsel, advisors, auditors and other authorized representatives reasonable access during normal business hours to such emissions and RGGI compliance data relating to the BNYCP Plant as Con Edison or such representatives may reasonably request in order to ensure BNYCP's compliance with the terms of this Agreement; provided, however, that BNYCP shall be permitted to require Con Edison and/or Con Edison's counsel, advisors, auditors or other authorized representatives to enter into a confidentiality agreement in customary form to preserve any proprietary or confidential information of BNYCP to which such Persons may have access. BNYCP acknowledges that Con Edison may request, with respect to the BNYCP Plant, periodic statements of BNYCP's RGGI compliance account holdings, confirmatory email correspondence concerning BNYCP's Auction purchases, and/or other evidence of BNYCP's compliance with the terms of this Agreement, all as certified as true and correct by a responsible officer of BNYCP or its CO<sub>2</sub> authorized account representative under the RGGI Regulations, and BNYCP agrees to comply promptly with such request.

(e) Certain Agreements Regarding Regulatory, Legislative or Judicial Changes. BNYCP acknowledges that Con Edison has agreed to assume certain financial obligations to assist BNYCP in meeting BNYCP's compliance obligations under RGGI

and the RGGI Regulations during the term of this Agreement based upon the mutual understanding that no additional liability shall be shifted to Con Edison for compliance with RGGI and/or the RGGI Regulations during Con Edison's performance hereunder. Accordingly, BNYCP covenants and agrees that it will not, at any time prior to December 31, 2016 or the earlier termination of this Agreement, directly or indirectly, take any action (whether tacitly or overtly) to lobby or influence the decision of any Governmental Authority or representative thereof, or otherwise seek to effect (or take any action that could be reasonably expected to result in) any change in applicable Law, in each case for the purpose of shifting RGGI compliance obligations to Con Edison.

### ARTICLE III CONDITIONS

Section 3.1 Conditions to Effectiveness. This Agreement and the obligations of the parties hereunder, shall take effect only upon the satisfaction, or waiver by Con Edison, of each of the following conditions (the date upon which all conditions have been satisfied or so waived being, the "Effective Date"):

(a) The Consent Decree Parties shall have entered into, and the Court shall have approved, the Consent Decree;

(b) NYSERDA shall have amended the RGGI operating plan, or otherwise approved programs, in a manner that offers benefits to Con Edison customers at least commensurate with the amounts Con Edison shall be obligated to pay to BNYCP under this Agreement (it being understood that any such RGGI operating plan amendment or programs that comply with the Consent Decree, including Appendix 4 thereto, shall in all respects be deemed to satisfy this condition);

(c) PSC, in accordance with the Consent Decree, shall have authorized Con Edison to include in its schedule for electric service and to implement a tariff amendment, permitting Con Edison to fully recover, beginning as of January 1, 2009, the costs of performing its obligations under Article II hereof;

(d) DEC, in accordance with the Consent Decree, shall have acted favorably upon the petitions seeking a declaratory ruling regarding whether the inability to pass through Allowance costs qualifies as a financial hardship under the LTC Set-Aside Allocation Provisions (the "Declaratory Ruling") and shall have awarded BNYCP Set-Aside Awards at least for 2009; and

(e) All other conditions to the effectiveness of the Consent Decree, including any and all approvals of the Board of Directors or Board of Trustees, as applicable, of the Consent Decree Parties, shall have been obtained.

Section 3.2 Acknowledgement; Continuing Conditions. BNYCP and Con Edison each acknowledges and agrees that the purpose of this Agreement is to assist BNYCP

with its compliance with RGGI and the RGGI Regulations. If the CO<sub>2</sub> Budget Trading Program is suspended or terminated for any reason (including if it becomes preempted by a federal program) and/or RGGI and the RGGI Regulations no longer impose Allowance obligations on BNYCP, then this Agreement shall, upon the occurrence of such event, automatically terminate and be of no further force or effect, subject only to the provisions of Article V; provided, however, that if RGGI and the RGGI Regulations are suspended and then become effective again and impose Allowance obligations on BNYCP during the term hereof, then the obligations of each party shall automatically resume. The parties further acknowledge and agree that performance by Con Edison of its obligations under Article II hereof is subject to the continuing satisfaction of each of the following conditions throughout the term of this Agreement, and to the continuing authority of the Court in relation to the Consent Decree:

(a) DEC shall continue to administer the CO<sub>2</sub> Budget Trading Program and the LTC Set-Aside Allocation Provisions in the ordinary course, fairly and reasonably and the Declaratory Ruling shall remain in full force and effect;

(b) The regulations governing the CO<sub>2</sub> Budget Trading Program shall not be repealed, modified or amended (i) in a manner that would reduce the 1,500,000 Allowances presently allocated to the long term contract set-aside account, or (ii) in any other manner that would materially and adversely affect Con Edison; provided, however, that in the event that (x) DEC demonstrates to the Court that a reduction in or removal of the long term contract set-aside account is required to protect public health and the environment, (y) the Court allows modification of the Consent Decree to effect such change, and (z) the change is effected through notice and comment rulemaking, all as required by paragraph 34 of the Consent Decree, then the condition set forth in this Section 3.2(b) shall be deemed satisfied and references in this Agreement to the Set-Aside Amount shall instead be read to refer to the Assumed Set-Aside Amount;

(c) BNYCP shall timely prepare, complete and submit its application for a Set-Aside Award and shall otherwise fulfill the requirements to make such application, as set forth in the regulations or other pronouncements of the DEC or its designee, and shall be granted a Set-Aside Award of a quantity determined pursuant to the LTC Set-Aside Allocation Provisions;

(d) NYSERDA shall perform, and continue to perform, its obligations under the Consent Decree (including Appendix 4 thereto), including funding in full the amounts and programs set forth therein; and

(e) PSC shall continue to allow full recovery of costs incurred by Con Edison pursuant to the terms of this Agreement.

ARTICLE IV  
REPRESENTATIONS AND WARRANTIES

Section 4.1 BNYCP Representations and Warranties. BNYCP represents and warrants to Con Edison as follows:

(a) BNYCP is duly organized, validly existing and in good standing under the laws of the State of Delaware;

(b) BNYCP has the requisite power and authority to execute and deliver this Agreement and the Consent Decree and to perform its obligations hereunder and thereunder;

(c) the execution, delivery and performance of this Agreement and the Consent Decree by it and the consummation of the transactions contemplated hereby and thereby have been duly authorized by all necessary limited partnership or other action on the part of BNYCP and no other action is necessary on its part to authorize this Agreement or the Consent Decree or the performance by it of its obligations hereunder or thereunder;

(d) this Agreement and the Consent Decree have been duly authorized, executed and delivered by it, and are enforceable against it in accordance with their terms; and

(e) the execution and the delivery of this Agreement and the Consent Decree by it, the performance by it of its obligations hereunder and thereunder, and the consummation by it of the transactions contemplated herein and therein will not (i) violate or conflict with any provisions of any of its organizational documents; (ii) violate, breach or constitute a default, an event of default or an event creating rights of acceleration, termination, cancellation, imposition of additional obligations or loss of rights under any contract, order, or permit to which it is a party or by which it or its properties are bound or affected, or (iii) require any consent from any Person that has not already been obtained.

Section 4.2 Con Edison Representations and Warranties. Con Edison represents and warrants to BNYCP as follows:

(a) Con Edison is duly organized, validly existing and in good standing under the laws of the State of New York;

(b) Con Edison has the requisite power and authority to execute and deliver this Agreement and the Consent Decree and to perform its obligations hereunder and thereunder;

(c) the execution, delivery and performance of this Agreement and the Consent Decree by it and the consummation of the transactions contemplated hereby and thereby have been duly authorized by all necessary corporate or other action on the part

of Con Edison and no other action is necessary on its part to authorize this Agreement or the Consent Decree or the performance by it of its obligations hereunder or thereunder;

(d) this Agreement and the Consent Decree will have been duly authorized, executed and delivered by it, and enforceable against it in accordance with its terms; and

(e) the execution and the delivery of this Agreement and the Consent Decree by it, the performance by it of its obligations hereunder and thereunder, and the consummation by it of the transactions contemplated herein and therein will not (i) violate or conflict with any provisions of any of its organizational documents; (ii) violate, breach or constitute a default, an event of default or an event creating rights of acceleration, termination, cancellation, imposition of additional obligations or loss of rights under any contract, order, or permit to which it is a party or by which it or its properties are bound or affected, or (iii) require any consent from any Person that has not already been obtained.

#### ARTICLE V TERM; TERMINATION

Section 5.1 Term. This Agreement shall automatically terminate upon the earlier to occur of (i) December 31, 2016, (ii) the earlier termination of the PPA, (iii) the suspension or termination of the CO<sub>2</sub> Budget Trading Program for any reason (including if it becomes preempted by a federal program), or (iv) RGGI or RGGI Regulations no longer imposing Allowance obligations on BNYCP, unless earlier terminated in accordance with Section 5.2; provided, however, that in the event that Allowance obligations under RGGI or the RGGI Regulations are suspended but are subsequently reinstated prior to the occurrence of any other termination event described in this Section 5.1 and in Section 5.2, then the effectiveness of this Agreement shall automatically resume in accordance with its terms; and provided, further, that any termination pursuant to the foregoing clause (ii), (iii) or (iv) shall be subject to compliance with the dispute resolution procedures and enforcement provisions set forth in paragraphs 22 and 24, respectively, of the Consent Decree.

Section 5.2 Termination. This Agreement may be terminated at any time prior to its expiration (subject only to compliance with the dispute resolution procedures and enforcement provisions set forth in paragraphs 22 and 24, respectively, of the Consent Decree) by:

- (a) mutual written agreement of the parties;
- (b) Con Edison, by written notice of termination delivered to BNYCP, if the Effective Date has not occurred on or prior to December 31, 2010;
- (c) Either party, by written notice of termination delivered to the other, if the Consent Decree is no longer effective for any reason (other than as a result of a breach thereof by the party seeking termination);

(d) Con Edison, if there has been a material breach of any representation, warranty, covenant or agreement on the part of BNYCP, which breach is not capable of being cured or shall not have been cured within ten (10) Business Days following receipt of written notice thereof from Con Edison (it being expressly understood that any breach of Section 2.3 hereof shall constitute a material breach);

(e) Con Edison, if any of the conditions specified in Section 3.2 shall fail to be satisfied; and

(f) Con Edison, if (i) BNYCP (A) commences a voluntary case, or consents to the entry of a decree or order in respect of an involuntary case or proceeding, under applicable bankruptcy, insolvency or other similar laws, or (B) makes an assignment for the benefit of its creditors, or admits in writing its inability to pay its debts generally as they become due, or consents to the appointment of a receiver or liquidator or trustee or assignee in bankruptcy or insolvency of it or of a significant portion of its property or (ii) a decree or order shall be entered by a court in respect of BNYCP in an involuntary case under applicable bankruptcy, insolvency or other similar laws, or appointing a receiver, liquidator, assignee, custodian, trustee or other similar official of BNYCP or of a significant portion of its properties, or ordering the winding up or liquidation of BNYCP's affairs, and such decree or order shall remain un-stayed and in effect for a period of 60 consecutive days.

Section 5.3 Effect of Termination. Upon expiration, or earlier termination of this Agreement, all rights and obligations of the parties hereunder shall immediately cease and be of no further force or effect; provided that (i) the obligations of the parties under this Article V, and under Articles VI and VII shall survive, and the parties hereto shall have any and all remedies to enforce such obligations provided at law or in equity or otherwise; and (ii) nothing herein shall relieve the parties from liability for any breach hereof, and the parties shall be entitled to any remedies at law or in equity for any such breach.

Section 5.4 Tail Period True-up; Cooperation. Following the expiration or termination of this Agreement in accordance with its terms, the parties shall cooperate with each other to reconcile Allowance payments through the date of such expiration or termination as promptly as practicable. BNYCP agrees that it will report its Actual Quarterly Allowance Requirement for the last Applicable Quarterly Period (or portion thereof that terminates upon the expiration or termination of this Agreement) to Con Edison as promptly following the expiration or termination of this Agreement as is possible. Con Edison and BNYCP shall calculate the True-up Amount with respect to such Applicable Quarterly Period (or portion thereof) as promptly after delivery of the Actual Quarterly Allowance Requirement report as possible. If, upon calculation of the final True-Up Amount, there is a positive Carryover Amount, then BNYCP shall reimburse Con Edison the Excess Allowance Amount within ten (10) Business Days of its receipt of notice thereof from Con Edison. If, upon calculation of the final True-Up Amount, there is a negative Carryover Amount, then Con Edison shall, at its option, either (i) transfer to BNYCP such Carryover Amount of Allowances, or (ii) reimburse BNYCP the monetary

value of such Carryover Amount at a price equal to the actual amount paid by BNYCP to purchase such Carryover Amount of Allowances in the secondary market. Within ten (10) Business Days following final determination of the Carryover Amount, Con Edison shall make the transfer described in clause (i), or notify BNYCP of BNYCP's requirement to make Allowance purchases as contemplated by clause (ii). In the event that Con Edison elects the option set forth in clause (ii) above, Con Edison shall reimburse BNYCP the amount BNYCP so paid, within ten (10) Business Days of Con Edison's receipt of notice from BNYCP specifying such costs and including supporting documentation.

## ARTICLE VI OTHER AGREEMENTS

Section 6.1 Indemnification. BNYCP shall indemnify and defend Con Edison and its stockholders, officers, trustees, directors, employees, agents, affiliates, successors and assigns (collectively, "Con Edison Indemnitees") against, and shall hold them harmless from, any and all liabilities, damages, compliance obligations, fines, fees, penalties, deficiencies, losses, costs and expenses (including all interest assessed, court costs, fees and expenses of attorneys, accountants and other experts and other expenses of litigation or other proceedings or of any claim, default or assessment or pursuit of rights to indemnification (collectively, "Losses") resulting from, arising out of, or incurred by any Con Edison Indemnitee in connection with or otherwise with respect to: (i) any breach of any representation or warranty of BNYCP contained in this Agreement or in the Consent Decree, (ii) any breach of any covenant or agreement of BNYCP contained in this Agreement or in the Consent Decree, or (iii) any failure by BNYCP to comply with applicable Law, (in the case of clauses (ii) or (iii), whether occurring before or after termination or expiration of this Agreement).

Section 6.2 Offset. It is expressly agreed that, in addition to its right to elect to terminate this Agreement, Con Edison shall have the right, in the event that BNYCP fails to meet its obligation under Section 2.3(c) hereof to deposit Allowances into its RGGI compliance account at the time and in the amounts required by RGGI Regulations, to offset against payments Con Edison may owe to BNYCP pursuant to any other agreement, amounts Con Edison previously paid to BNYCP hereunder, to the extent of BNYCP's delinquency. In addition, in the event that BNYCP fails at any time to make any payments owing to Con Edison hereunder, including pursuant to (i) Section 2.2(e), (ii) the fourth sentence of Section 5.4, or (iii) Section 6.1, then Con Edison shall have the right to offset such amounts against payments Con Edison may owe to BNYCP pursuant to any other agreement.

## ARTICLE VII MISCELLANEOUS

Section 7.1 Notices. Any notice, request, demand, waiver, consent, approval or other communication which is required or permitted hereunder shall be in writing, and shall be deemed given (a) on the date delivered personally, by private courier (provided signature

for delivery is obtained), or sent by facsimile or email transmission (if confirmation of receipt is obtained) or (b) on the fifth Business Day after the date mailed, by certified or registered mail, return receipt requested, postage prepaid. Each party to whom such communication is sent has the obligation to accept delivery of such communication. Such communications, to be valid, must be addressed as follows:

If to BNYCP, to:

Brooklyn Navy Yard Cogeneration Partners, L.P.  
8002 Kew Gardens Road, Suite 200  
Kew Gardens, NY 11415-3622  
Att: Executive Director  
Fax: (718) 261-2165  
Email: [ctrabold@bnycogen.com](mailto:ctrabold@bnycogen.com)

With a copy to:

Bond, Schoeneck & King, PLLC  
One Lincoln Center  
Syracuse, New York 13202-1355  
Att: Virginia C. Robbins, Esq.  
Fax: (315) 218-8100  
Email: [vrobbs@bsk.com](mailto:vrobbs@bsk.com)

If to Con Edison, to:

Consolidated Edison Company of New York, Inc.  
4 Irving Place  
Suite 1810S  
Att: Vice President, Regulatory Services  
Fax: 212-677-5850  
Email: [lublingc@coned.com](mailto:lublingc@coned.com)

And to:

Consolidated Edison Company of New York, Inc.  
111 Broadway, Suite 1601  
New York, New York 10006  
Att: Director, Electricity Supply  
Fax: 212-385-3512  
Email: [kimballi@coned.com](mailto:kimballi@coned.com)

or to such other address or to the attention of such Person or Persons as the recipient party has specified by prior written notice to the sending party. If more than one method

for sending notice as set forth above is used, the earliest notice date established as set forth above shall control.

Section 7.2 Amendment. This Agreement may not be amended, or its provisions supplemented or otherwise modified, except by an instrument in writing, signed by the parties hereto. Any amendment hereto that does not affect the rights or obligations of any Consent Decree Party other than the parties hereto shall not require Court approval.

Section 7.3 Waivers. Any waiver of any provision of this Agreement shall be effective only if it is in writing and is signed by the party against whom the waiver is sought to be effective. No failure or delay by any party in exercising any right or privilege hereunder shall operate as a waiver thereof, nor shall any single or partial exercise thereof preclude any other or further exercise thereof or the exercise of any other right, power or privilege.

Section 7.4 Further Assurances. From time to time, as and when requested by either party hereto, the other party shall use its commercially reasonable efforts to take, or cause to be taken, all such further actions as such other party may reasonably deem necessary or desirable to consummate this Agreement and the Consent Decree and the transactions contemplated hereby and thereby. Each party shall use its commercially reasonable efforts to fulfill or obtain the fulfillment of the conditions precedent to the effectiveness of this Agreement.

Section 7.5 Assignment. This Agreement, and the obligations owing to BNYCP hereunder, are specific to BNYCP. Neither this Agreement nor any of the rights, interests or obligations hereunder may be assigned by BNYCP, by operation of law or otherwise, without the prior written consent of Con Edison. Con Edison may assign this Agreement, in whole or in part, to one or more of its affiliates or to any Person acquiring all of its stock or substantially all of its assets or in connection with a consolidation or merger transaction. Subject to the foregoing, all of the terms and provisions of this Agreement shall inure to the benefit of, and be binding upon, the parties hereto and their respective permitted successors and assigns.

Section 7.6 Governing Law. This Agreement (including any Exhibits and Schedules hereto) shall be governed by and construed in accordance with the laws of the State of New York without giving effect to any choice of Law or conflict of Laws rules or provisions (whether of the State of New York or of any other jurisdiction) that would cause the application of the Laws of any jurisdiction other than the State of New York.

Section 7.7 Consent to Jurisdiction. Each party hereto irrevocably submits to the exclusive jurisdiction of the Albany County Supreme Court of the State of New York for any actions, suits or proceedings arising out of or relating to this Agreement, and agrees to commence any such action, suit or proceeding only in such court. Each party further agrees that service of any process, summons, notice or document by U.S. registered mail to such party's respective address set forth herein shall be effective service of process for any such action, suit or proceeding. Each party irrevocably and unconditionally waives any objection to the laying of venue of any action, suit or proceeding arising out of this

Agreement in such court, and hereby irrevocably and unconditionally waives its right and agrees not to plead or claim that any such action, suit or proceeding brought therein has been brought in an inconvenient forum. Each party hereby irrevocably waives all right to trial by jury in any action arising out of or relating to this Agreement, the transactions contemplated hereby or the acts or omissions of such party in the negotiation, administration, performance and enforcement of this Agreement.

Section 7.8 Entire Agreement. This Agreement (including Schedule I hereto) and the Consent Decree, and the other documents and instruments specifically referred to herein and therein and delivered pursuant hereto and thereto, set forth the entire understanding of the parties with respect to the transactions contemplated hereby, and this Agreement and the Consent Decree shall be deemed to be in pari materia for the interpretation of the provisions hereof and thereof. Schedule I referred to herein is intended to be and hereby is specifically made a part of this Agreement. Any and all previous agreements and understandings between or among the parties regarding the subject matter hereof, whether written or oral, are superseded by this Agreement.

Section 7.9 Captions. All captions contained in this Agreement are for convenience of reference only, do not form a part of this Agreement and shall not affect the meaning or interpretation of this Agreement.

Section 7.10 Expenses. Each Party will pay its own expenses in connection with the negotiation and execution of this Agreement and the Consent Decree.

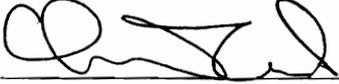
Section 7.11 Counterparts. This Agreement may be executed simultaneously in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. Delivery of an executed counterpart of a signature page of this Agreement by facsimile transmission or email transmission of a .pdf file shall be as effective as delivery of a manually executed counterpart of this Agreement.

Section 7.12 Third-Party Beneficiaries. Nothing in this Agreement will be construed as giving any Person other than the parties and their permitted successors and assigns, any right, remedy or claim under or in respect of this Agreement; provided that in the case of Section 6.1 hereof, the other Con Edison Indemnitees and their respective heirs, executors, administrators, legal representatives, successors and assigns, are intended third party beneficiaries of such Section and shall have the right to enforce such Section.

[Signature page follows]

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed by their duly authorized representatives on the day and year first above written.

BROOKLYN NAVY YARD COGENERATION PARTNERS, L.P.  
a Delaware limited partnership

By:   
Name: Christopher Trabold  
Title: Executive Director

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.  
a New York corporation

By: \_\_\_\_\_  
Name: Joseph P. Oates  
Title: Vice President, Energy Management

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed by their duly authorized representatives on the day and year first above written.

BROOKLYN NAVY YARD COGENERATION PARTNERS, L.P.  
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By: \_\_\_\_\_  
Name: Christopher Trabold  
Title: Executive Director

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.  
a New York corporation

By:  \_\_\_\_\_  
P Name: Joseph P. Oates  
Title: Vice President, Energy Management

**SCHEDULE I  
TO APPENDIX 2**

Annual Set-Aside Award  
447,658

Con Edison  
97.7%

Year 0	Con Edison Production (MWh)	% of Annual Emissions	Set-Aside Award Credit (tons)
January-08	365,930	10.9%	47,610
February-08	337,778	10.1%	43,947
March-08	348,666	10.4%	45,364
April-08	209,185	6.2%	27,216
May-08	73,474	2.2%	9,560
June-08	266,655	7.9%	34,694
July-08	283,542	8.4%	36,891
August-08	279,522	8.3%	36,368
September-08	267,492	8.0%	34,802
October-08	301,995	9.0%	39,292
November-08	285,605	8.5%	37,159
December-08	340,360	10.1%	44,283
2008 Total	3,360,203	100.0%	437,186

Notes:

Year 0 Con Edison Production is used to determine monthly distribution of set-aside award credit for subsequent year

Carbon Intensity Cap for Gas production is 0.45 tons per MWh [see CO2 Intensity Caps tab]  
Carbon Intensity Cap for Alternate Fuel is 0.65 tons per MWh [see CO2 Intensity Caps tab]

Year 1 MWh/CO2 example reflects actual generation for Jan-July, but uses Year 0 MWh for August-December for illustrative purposes

Assumed a 5% difference between actual and estimated CO2 Allowance Requirement for the final month in each quarter for illustrative purposes; the Carbon Intensity Cap to be applied to both the Estimated and Actual Emissions.

Year 0 Con Edison Production is used to determine monthly distribution of set-aside award credit for subsequent year

Year 1

Month	Actual/Estimated Con Edison Production (MWh)	Actual/Estimated CO2 Emissions (tons)	Actual/Estimated emissions subject to Carbon Intensity Cap (tons)	Set Aside Award Credit	Carryover Amount	Auction Purchase Volume	Auction Clearing Price	Payment Amount	Actual Emissions subject to Carbon Intensity Cap	Quarterly True-up Amount	Auction Purchase Credit	Carryover Amount
January-09	378,685	115,395	278,767	47,610	0	141,846	\$3.51	\$497,880	292,706	-13,938	0	-13,938
February-09	288,128	86,106	278,767	43,947	0	141,846	\$3.51	\$497,880	292,706	-13,938	0	-13,938
March-09	206,023	63,607	278,767	45,364	-13,938	235,808	\$3.23	\$761,658	308,006	-14,667	0	-14,667
April-09	339,293	101,156	278,767	27,216	-13,938	235,808	\$3.23	\$761,658	308,006	-14,667	0	-14,667
May-09	334,558	104,079	278,767	9,560	-14,667	206,886	\$2.19	\$453,081	315,294	-15,014	0	-15,014
June-09	250,337	84,634	278,767	34,694	-14,667	206,886	\$2.19	\$453,081	315,294	-15,014	0	-15,014
July-09	274,772	97,835	278,767	36,891	-15,014	182,531	\$2.05	\$374,188	274,525	13,726	0	13,726
August-09	284,360	101,513	278,767	36,368	-15,014	182,531	\$2.05	\$374,188	274,525	13,726	0	13,726
September-09	252,082	94,288	278,767	34,802	-15,014	182,531	\$2.05	\$374,188	274,525	13,726	0	13,726
October-09	265,407	89,712	278,767	39,292	-15,014	182,531	\$2.05	\$374,188	274,525	13,726	0	13,726
November-09	266,104	91,230	278,767	37,159	-15,014	182,531	\$2.05	\$374,188	274,525	13,726	0	13,726
December-09	364,057	100,954	278,767	44,283	-15,014	182,531	\$2.05	\$374,188	274,525	13,726	0	13,726
2009 Total	3,503,805	1,130,508	1,160,637	437,186	-15,014	1,160,637	\$2.05	\$374,188	1,190,530	13,726	0	13,726

**Quarterly Carbon Intensity Caps (lbs/MWh)**

Gas 900  
Alt. Fuel 1300

	Gas ConEd Production (MWh)	Alt. Fuel ConEd Production (MWh)	Gas CO2 Emitted (tons)	Alt. Fuel CO2 Emitted (tons)	Gas CO2 Rate (lbs/MWh)	Gas CO2 Emitted (tons)	Alt. Fuel CO2 Emitted (tons)	Alt. Fuel CO2 Emitted (tons)	Quarterly Emission Cap (tons)	Total CO2 Emitted (tons)	Total CO2 Cap (tons)
Q1	873,118	22,227	265,334	13,433	608	608	1,209	1,209	392,903	278,767	278,767
Q2	935,340	0	293,339	0	627	627	0	0	420,903	293,339	293,339
Q3	829,851	0	300,280	0	724	724	0	0	373,433	300,280	300,280
Q4	916,550	0	288,251	0	629	629	0	0	412,447	288,251	288,251
<b>Total</b>	<b>3,554,859</b>	<b>22,227</b>	<b>1,147,204</b>	<b>13,433</b>							

**Annual Totals**

CO2 tons 1,160,637  
MWh 3,577,086  
Annual Rate (lbs/MWh) [REDACTED]

**Annual Carbon Intensity Cap (lbs/MWh) = 1100**

# **APPENDIX 3**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

INDECK CORINTH, L.P.,

Petitioner/Plaintiff,

- against -

DAVID A. PATERSON, as Governor, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, NEW YORK STATE ENERGY RESEARCH AND DEVELOPMENT AUTHORITY, NEW YORK STATE PUBLIC SERVICE COMMISSION, NEW YORK STATE DEPARTMENT OF PUBLIC SERVICE, and CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Respondents/Defendants.

BROOKLYN NAVY YARD COGENERATION PARTNERS, L.P. and SELKIRK COGEN PARTNERS, L.P.,

Intervenors in Support of  
Petitioner/Plaintiff.

INDEX NO. 5280-09

Hon. Thomas J. McNamara

**APPENDIX 3 TO  
CONSENT DECREE**

**AGREEMENT BETWEEN CON EDISON AND SELKIRK**

This Agreement, dated as of December 17, 2009, is by and between Consolidated Edison Company of New York, Inc., a New York corporation ("Con Edison") and Selkirk Cogen Partners, L.P., a Delaware limited partnership ("Selkirk"), and shall be effective as of the Effective Date set forth herein.

WITNESSETH:

WHEREAS, Con Edison and Selkirk (who, on October 19, 1992 was assigned the rights of Selkirk Cogen Partners II, LP, the assignee of Makowski Selkirk, Inc., who was, in turn, the assignee of JMC Selkirk, Inc.), are parties to that certain Power Purchase Agreement, dated as of April 14, 1989, as amended by Rider thereto, dated September 8,

1989, First Amendment thereto, dated September 13, 1991, Second Amendment thereto, dated October 22, 1992, and Third Amendment thereto, dated September 13, 1996, and as approved by the Public Service Commission of the State of New York (the "PSC") (together with all attachments and supplements thereto and as the same may hereafter be amended in accordance with the terms thereof, the "PPA"), pursuant to which Con Edison purchases capacity and energy produced by a gas-fired cogeneration power plant owned and operated by Selkirk in Selkirk, New York (the "Selkirk Plant"); and

WHEREAS, by a joint petition and complaint, dated January 29, 2009, against David A. Paterson, as Governor (the "Governor"), New York State Department of Environmental Conservation (the "DEC"), New York State Energy Research and Development Authority ("NYSERDA") and the PSC, Indeck Corinth, L.P., a Delaware limited partnership ("Indeck") commenced a special proceeding and action in which it alleged, among other things, that the entry by New York into, and the implementation by DEC, NYSERDA and the PSC of, the Regional Greenhouse Gas Initiative ("RGGI") is unlawful and imposes a discriminatory cost upon Indeck (the "Proceeding"); and

WHEREAS, Con Edison has been served with an amended complaint, under which it would be an additional named defendant in the Proceeding, and Selkirk and Brooklyn Navy Yard Cogeneration Partners, L.P. ("BNYCP") are proposing to intervene in the Proceeding as additional petitioners and plaintiffs in support of Indeck, contemporaneously with the filing of the Consent Decree with the Court; and

WHEREAS, DEC, NYSERDA, the New York State Attorney General (acting for DEC, NYSERDA and the Governor) (the "AG"), the PSC, the New York State Department of Public Service ("DPS"), as staff to the PSC, Con Edison, Indeck, Selkirk and BNYCP have determined to settle the Proceeding on terms described in that certain Consent Decree (the "Consent Decree"), to be entered into contemporaneously herewith, by and among such parties (collectively, the "Consent Decree Parties"); and

WHEREAS, pursuant to the terms of the Consent Decree, Con Edison has agreed, subject to execution of the Consent Decree, to subject itself to the jurisdiction of the Albany County Supreme Court of the State of New York (the "Court") and to waive service upon it of an amended complaint; and

WHEREAS, Selkirk and Con Edison have agreed, pursuant to the terms of the Consent Decree, to enter into this Agreement on the terms and subject to the conditions set forth herein and in the Consent Decree.

NOW, THEREFORE, in consideration of the foregoing, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto, intending to be legally bound, do hereby agree as follows.

ARTICLE I  
DEFINITIONS

Section 1.1. Definitions. As used in this Agreement, the following terms shall have the following meanings:

“Allowance” means the limited authorization by DEC under the CO<sub>2</sub> Budget Trading Program to emit up to one ton of CO<sub>2</sub>, as described and subject to the limitations set forth in such program.

“Assumed Set-Aside Award” means, for the relevant year or other applicable measurement period under the RGGI Regulations, the number of Allowances DEC would have awarded to Selkirk for the Selkirk Plant, as determined by DEC, pursuant to the LTC Set-Aside Allocation Provisions as in effect on the date hereof if the events described in the proviso to Section 3.2(b) had not taken place; provided, however, that if DEC does not timely make or communicate such determination, then the “Assumed Set-Aside Award” shall mean the product of (i) the Set-Aside Award actually received in respect of that period, multiplied by (ii) a fraction, the numerator of which is 1,500,000 and the denominator of which is the total number of Allowances in the long term contract set-aside account for such period, unless the long term contract set-aside account is eliminated, in which event the “Assumed Set-Aside Award” shall mean the Set-Aside Award or the Assumed Set-Aside Award, as the case may be, applicable to the immediately preceding period.

“Auction” means the CO<sub>2</sub> allowance auctions administered by NYSERDA (or its designee) pursuant to the CO<sub>2</sub> Budget Trading Program.

“Business Day” means any day, other than a Saturday, Sunday or other day on which banks in New York, New York are authorized by Law to be closed.

“CO<sub>2</sub> Allowance Auction Program” means the New York statewide rule promulgated by NYSERDA implementing RGGI, set forth in 21 NYCRR Part 507.

“CO<sub>2</sub> Budget Trading Program” means the New York statewide rule promulgated by DEC implementing RGGI, set forth in 6 NYCRR Part 242.

“Con Edison Production” means electricity production at the Selkirk Plant, to the extent (and only to the extent) that such production is purchased by Con Edison pursuant to the PPA; provided that such production shall be deemed to be all energy produced by compliance units HRSG201, HRSG301, CT 201 and CT 301 and steam turbine II (collectively, “Phase 2”) at the Selkirk Plant, as shown in the schematic thereof included in Selkirk’s 2008 Qualifying Facility Monitoring Report for the Selkirk Plant, by fuel burned at Phase 2, other than electricity sold to third parties.

“Control Period” shall have the meaning set forth in Section 1.2(b)(40) of the CO<sub>2</sub> Budget Trading Program.

“EPA” means the United States Environmental Protection Agency.

“Governmental Authority” means any entity or body exercising executive, legislative, judicial, regulatory or administrative functions of or pertaining to United States federal, state, local or municipal government, foreign, international, multinational or other government, including any department, commission, board, agency, bureau, subdivision, instrumentality, official or other regulatory, administrative or judicial authority thereof, and any non-governmental regulatory body to the extent that the rules and regulations or orders of such body have the force of Law.

“Law” means any statute, law (including common law), constitution, treaty, ordinance, code, order, decree, judgment, rule, regulation and any other binding requirement or determination of any Governmental Authority.

“LTC Set-Aside Allocation Provisions” means the long-term contract set aside allocation provisions of the CO<sub>2</sub> Budget Trading Program, set forth in 6 NYCRR §242-5.3(d) as in effect on the date hereof.

“Natural Gas Force Majeure Event” means any act of God, war, strike, labor unrest, terrorism, sabotage, riot or catastrophe, not proximately caused by Selkirk, or any act or omission of a third party outside the control of Selkirk that damages the natural gas delivery system, in each case as a result of which natural gas supply becomes unavailable to power generators in the State of New York generally and to Selkirk specifically.

“Person” means an individual, corporation, partnership, limited partnership, limited liability company, trust, unincorporated association, Governmental Authority or other legal entity.

“RGGI Inc.” means Regional Greenhouse Gas Initiative, Inc., a not-for-profit organization that administers the Auctions on behalf of NYSERDA, and any other entity that hereafter performs such function.

“RGGI Regulations” means the CO<sub>2</sub> Allowance Auction Program and the CO<sub>2</sub> Budget Trading Program.

“Set-Aside Award” means, for the relevant year or other applicable measurement period, the actual number of Allowances DEC awards to Selkirk for the Selkirk Plant pursuant to, and in accordance with, the LTC Set-Aside Allocation Provisions.

Section 1.2 Other Definitions. As used in this Agreement, the following terms shall have the meanings assigned to them in the Sections of this Agreement set forth below:

Actual Quarterly		Estimated Quarterly	
Allowance Requirement .....	2.2(d)	Allowance Requirement.....	2.2(b)
Applicable Quarterly Period ..	2.2(b)	Excess Allowance Amount ...	2.2(e)
Auction Purchase Credit .....	2.2(c)	Excluded Period .....	2.2(f)
Auction Purchase Volume ....	2.2(b)	First Auction .....	2.2(f)
Carbon Intensity Cap .....	2.2(b)	Losses .....	6.1
Carryover Amount .....	2.2(e)	NYSERDA .....	Recitals
Catch-Up Period .....	2.2(f)	PPA .....	Recitals
Certified Emissions .....	2.2(b)	Proceeding .....	Recitals
Con Edison Indemnities .....	6.1	PSC .....	Recitals
Consent Decree .....	Recitals	Purchase Notice .....	2.2(b)
Consent Decree Parties .....	Recitals	RGGI .....	Recitals
Court .....	Recitals	Selkirk Plant .....	Recitals
DEC .....	Recitals	Set-Aside Award Credit .....	2.2(a)
Declaratory Ruling .....	3.1(d)	Stub Period .....	2.2(b)
DPS .....	Recitals	True-up Amount .....	2.2(d)
Effective Date .....	3.1	Year-End Carryover Amount	2.2(e)
Emission Revision .....	2.2(g)		

Section 1.3 Construction. For purposes of this Agreement, except as otherwise expressly provided herein or the context otherwise requires, (a) the terms “hereof”, “herein”, “hereunder”, “hereby”, “herewith” and words of similar import shall, unless otherwise stated, be construed to refer to this Agreement as a whole and not to any particular provision; (b) when a reference is made in this Agreement to an Article, Section, paragraph, Exhibit or Schedule, such reference is to an Article, Section, paragraph, Exhibit or Schedule of this Agreement, unless otherwise specified; (c) the words “include”, “includes” and “including”, when used in this Agreement, shall be deemed to be modified by the words “without limitation”, unless otherwise specified; (d) a reference to any Law, means such Law as amended, modified, codified, replaced or reenacted; and (e) words using the singular or plural number also include the plural or singular number, respectively.

ARTICLE II  
OBLIGATIONS OF THE PARTIES

Section 2.1 Con Edison’s Payment Obligations. Con Edison agrees to pay Selkirk, during the term of this Agreement (excluding the Excluded Period) and on the terms and subject to the conditions set forth herein (including, without limitation, the conditions set forth in Article III), for the number of Allowances and at the prices, both as specified herein. Con Edison shall make payment to Selkirk by wire transfer of immediately available funds to an account designated in writing by Selkirk, on a quarterly basis, within five (5) Business Days following the conclusion of each Auction.

Section 2.2 Determining Payment Obligations. The parties agree that Con Edison’s payment obligation will be estimated, true-up and paid in accordance with the

methodology described immediately below, and as set forth on the illustrative example attached hereto as Schedule I.

(a) Calculating the Set-Aside Award Credits. Prior to January 15 of each calendar year during the term of this Agreement (or as soon as possible after Selkirk is notified by DEC), Selkirk shall notify Con Edison of the Set-Aside Award it has been granted for that year, together with such supporting documentation as Con Edison shall reasonably request. Con Edison shall allocate the Set-Aside Award (or, in the event that the proviso to Section 3.2(b) applies, the Assumed Set-Aside Award) among the 12 months in that year based upon the ratio (i.e., the applicable percentage) of Con Edison Production for each corresponding month during the prior calendar year to total Con Edison Production for the prior calendar year; provided, however, that for the 2014 calendar year, the Set-Aside Award (or the Assumed Set-Aside Award, as applicable) shall be fully allocated, on an equal monthly basis, to the portion of such year during which this Agreement shall remain in effect. The product of the Set-Aside Award (or the Assumed Set-Aside Award) and the applicable percentage for the month shall be reflected as the "Set-Aside Award Credit" for such month. Prior to February 15 of each calendar year (or as promptly as possible following notification from Selkirk of the Set-Aside Award for that year or from DEC of the Assumed Set-Aside Award for that year, as applicable), Con Edison shall deliver to Selkirk a schedule of the Set-Aside Award Credit allocation for each month of that year. The schedule of the Set-Aside Award Credit allocation applicable to each month of the 2010 calendar year is set forth on Schedule I.

(b) Estimating Quarterly Allowance Requirements; Calculating Auction Purchase Volume; Applying Carbon Intensity Cap. No later than five (5) Business Days prior to the date on which RGGI Inc. requires Auction participants to post funds, Con Edison shall estimate the amount of Allowances Selkirk shall be required to purchase, subject to the Carbon Intensity Cap (as defined below), to satisfy its RGGI obligations in respect of Con Edison Production for the calendar quarterly period (ending on March 31, June 30, September 30 or December 31, as applicable) during which the Auction occurs (the "Applicable Quarterly Period"), and provide written notice of the same (a "Purchase Notice") to Selkirk. Such estimate shall be computed, to the greatest extent possible, based upon actual emissions data in respect of Con Edison Production during the Applicable Quarterly Period, as reported by continuous emissions monitoring systems at the Selkirk Plant or by any other method of measurement utilized by Selkirk and accepted by EPA and DEC, and consistent with emissions that will be certified by Selkirk to EPA and DEC and provided to Con Edison ("Certified Emissions"). No later than fifteen (15) Business Days prior to any Auction, Selkirk shall provide to Con Edison year-to-date Certified Emissions data for Con Edison Production up to the most recent day for which such data is then available. Allowance requirements for Con Edison Production in any period during the Applicable Quarterly Period during which Certified Emissions data is not available at the time the Purchase Notice is sent (the "Stub Period") shall be estimated, in good faith, by Con Edison (after consultation with Selkirk); provided, however, that Con Edison's estimate of Stub Period emissions and therefore its determination of Selkirk's total Allowance requirements for Con Edison Production for

the Applicable Quarterly Period, as set forth in the Purchase Notice (the “Estimated Quarterly Allowance Requirement”), shall be final and binding on the parties, subject to the further provisions of this Section 2.2. Notwithstanding the foregoing, the Estimated Quarterly Allowance Requirement shall in no event exceed (and shall in all events be limited to) the number of Allowances that would be required to be purchased for Con Edison Production if such production had associated with it carbon dioxide emissions at a rate of 998 lbs per megawatt hour during the Applicable Quarterly Period (such amount being, the “Carbon Intensity Cap”); provided, however, that if and to the extent that a Natural Gas Force Majeure Event occurs and prevents Selkirk from satisfying the Carbon Intensity Cap, then application of such Carbon Intensity Cap shall be suspended during the period in which the condition causing such Natural Gas Force Majeure Event exists, provided, further, that Selkirk shall use commercially reasonable efforts to satisfy such Carbon Intensity Cap despite such Natural Gas Force Majeure Event. The Purchase Notice shall set forth, in reasonable detail, the total amount of Allowances Selkirk shall be obligated to purchase, which shall be calculated as the sum of (i) the Estimated Quarterly Allowance Requirement (after giving effect to the Carbon Intensity Cap), less (ii) the Set-Aside Award Credits applicable to the Applicable Quarterly Period, less (iii) the Carryover Amount from the end of the prior quarterly period, if any (as defined below) (such sum being, the “Auction Purchase Volume”).

(c) Payment; Credits. Within five (5) Business Days following the completion of each Auction during the term of this Agreement, Con Edison shall pay to Selkirk an amount equal to the product of (i) the clearing price per Allowance for current vintage Allowances in the Auction, and (ii) the Auction Purchase Volume (provided, however, that if the Auction Purchase Volume is negative, then Con Edison shall have no payment obligation for the Applicable Quarterly Period and the absolute value of such negative amount shall be reflected for such period as an “Auction Purchase Credit”).

(d) Quarterly True-ups. No later than fifteen (15) Business Days prior to each Auction, Selkirk shall report its actual Certified Emissions for Con Edison Production for the Stub Period in the previous Applicable Quarterly Period and also for the previous Applicable Quarterly Period to Con Edison (the “Actual Quarterly Allowance Requirement”), and Con Edison and Selkirk shall true-up and settle differences between the Estimated Quarterly Allowance Requirement and the Actual Quarterly Allowance Requirement, in each case subject to the Carbon Intensity Cap, in the next succeeding Auction (the amount of such difference, after giving effect to the Carbon Intensity Cap, being, the “True-up Amount”), such that (A) any amounts by which the Actual Quarterly Allowance Requirement (after giving effect to the Carbon Intensity Cap) exceeds the Estimated Quarterly Allowance Requirement (after giving effect to the Carbon Intensity Cap) shall be reflected as a deduct (a negative number), and (B) any amounts by which the Estimated Quarterly Allowance Requirement (after giving effect to the Carbon Intensity Cap) exceeds the Actual Quarterly Allowance Requirement (after giving effect to the Carbon Intensity Cap) shall be reflected as a credit (a positive number).

(e) Carryovers; Annual True-ups. In the event that the sum of the Auction Purchase Credit and the True-Up Amount in any period is positive (whether on a single

or cumulative basis), Con Edison shall carry forward such amount as a net credit (the "Carryover Amount") throughout the applicable calendar year(s) until such credit is used; provided, however, that if (i) there is a positive Carryover Amount remaining following the conclusion of the final Auction of any calendar year (the "Year-End Carryover Amount"), and (ii) Con Edison determines that there is no reasonable basis to believe that all or any portion of such Year-End Carryover Amount will be required to satisfy Allowance requirements for Con Edison Production during the remaining term of this Agreement, then Con Edison shall have the option to require that Selkirk reimburse it in an amount up to the product of (i) the lesser of (A) the Year-End Carryover Amount or (B) the sum of all positive Auction Purchase Volumes during such calendar year (such lesser amount being, the "Excess Allowance Amount"), and (ii) the weighted average cost of purchasing such Allowances at Auction. If Con Edison elects to exercise such option, (x) it shall do so by providing written notice thereof to Selkirk, together with its calculation of the amount so owing, (y) Selkirk shall render payment of the amount reflected in the notice from Con Edison within five (5) Business Days following its receipt of such notice, and (z) following receipt by Con Edison of such payment, the Carryover Amount applicable to the first quarter in the next succeeding year shall be reduced by the Excess Allowance Amount. If, upon the conclusion of any calendar year, there is a negative Year-End Carryover Amount, then such negative Year-End Carryover Amount shall roll forward as a net debit into the next calendar year unless the applicable calendar year-end is also the end of a Control Period, in which event Con Edison shall, at its option, either (x) transfer from its own account the number of Allowances equal to the absolute value of the negative Year-End Carryover Amount, or (y) pay to Selkirk, within ten (10) Business Days of its receipt of notice and supporting documentation from Selkirk, the amount Selkirk paid to purchase such number of Allowances in the secondary market. Not later than ten (10) Business Days following the final determination of the Year-End Carryover Amount, Con Edison shall effect the transfer specified in clause (x) above, or notify Selkirk of Selkirk's requirement to make additional Allowance purchases, as contemplated by clause (y) above.

(f) Periods Prior to the Effective Date. The parties agree that the cumulative obligation of Selkirk to purchase Allowances in respect of CO<sub>2</sub> emissions associated with all production (including Con Edison Production) at the Selkirk Plant during the period beginning on January 1, 2009 and ending on December 31, 2009 (the "Excluded Period") rests solely with Selkirk and that Con Edison shall have no obligation to pay for such Allowances. The cumulative obligation of Selkirk to purchase Allowances in respect of CO<sub>2</sub> emissions associated with Con Edison Production during the period beginning on January 1, 2010 and ending on the last date of the calendar quarter immediately prior to the Effective Date (the "Catch-Up Period"), net of all cumulative Set-Aside Award Credits applicable to such Catch-Up Period (as calculated in accordance with Section 2.2(a)), and Con Edison's obligation to pay for such Allowances in accordance with Section 2.2(c), shall be satisfied in full at the Auction next succeeding the Effective Date (provided that the Effective Date is at least five (5) Business Days prior to the date on which RGGI Inc. requires Auction participants to post funds; otherwise, at the Auction immediately thereafter) (such Auction being, the "First Auction"). Specifically, on the Effective Date, Selkirk shall report to Con Edison its actual Certified Emissions

associated with Con Edison Production during the Catch-Up Period and up to the most recent day for which such data is then available. If the First Auction is more than fifteen (15) Business Days after the Effective Date, then Selkirk shall provide an updated report of such Certified Emissions as of the fifteenth (15<sup>th</sup>) Business Day preceding the First Auction. On the tenth (10<sup>th</sup>) Business Day prior to the First Auction (or, if only a shorter period exists, then on the Business Day as far in advance of the First Auction as exists), Con Edison shall deliver a Purchase Notice to Selkirk, which notice shall set forth the total Auction Purchase Volume for such Auction, calculated as set forth in Section 2.2(b); provided, however, that the Carryover Amount for purposes of the First Auction shall be calculated as (i) the sum of the Actual Quarterly Allowance Requirements applicable to each calendar quarter during the Catch-Up Period (subject to the Carbon Intensity Cap), less (ii) the sum of all applicable Set-Aside Award Credits applicable to the Catch-up Period.

(g) Reporting and Record Keeping. Selkirk shall at all times maintain accurate and complete records reflecting CO<sub>2</sub> emissions data in respect of Con Edison Production in accordance with applicable Law and shall provide a summary of the Selkirk emissions data in spreadsheet form to Con Edison on a timely basis in accordance with the terms of this Agreement. In the event that Selkirk revises any report provided to a Governmental Authority with respect to generation of emissions of CO<sub>2</sub> at the Selkirk Plant (an "Emission Revision"), it shall promptly report the same to Con Edison, together with such evidence supporting the same as Con Edison shall reasonably require. Con Edison shall have the right to investigate any Emission Revision and, upon its agreement thereto, shall determine in its sole discretion the manner in which any overpayments or underpayments resulting therefrom shall be reconciled. Con Edison shall maintain accurate written records (which may be in spreadsheet form) of the Estimated Quarterly Allowance Requirement, Actual Quarterly Allowance Requirement, Set-Aside Award Credits, True-up Amounts, Carryover Amounts, Auction clearing prices, payments made and any other information with respect to each Applicable Quarterly Period as shall be necessary or appropriate to comply with the terms of this Agreement, and shall provide copies of the same to Selkirk on such regular basis as the parties shall agree.

(h) Changes in the Auction Schedule. The foregoing provisions of this Section 2.2 assume that Auctions will continue to be conducted on a quarterly basis. If, at any time prior to the expiration or termination of this Agreement, there is a change in the frequency of Auctions, then (i) the Applicable Quarterly Period shall instead be deemed to be defined as the calendar period of Auction frequency, and (ii) the foregoing provisions of this Section 2.2 shall be deemed to be modified, to the extent necessary or appropriate, to ensure that Auction Purchase Volumes are calculated, purchased and reconciled with such frequency as is consistent therewith.

Section 2.3 Selkirk's Obligations. During the term of this Agreement, Selkirk covenants and agrees with Con Edison as follows:

(a) Auction Purchases. Selkirk will participate in each Auction after the Effective Date and make purchases therein in a manner reasonably calculated, in good faith, to ensure that it will be able to satisfy the Auction Purchase Volume, as set forth in the Purchase Notice, for the relevant period; provided, however, that Selkirk shall be entitled to apply to and deduct from such Auction Purchase Volume Allowances it purchased prior to the Effective Date, to the extent such Allowances exceed the amount required to satisfy RGGI obligations at the Selkirk Plant in respect of the Excluded Period. If, notwithstanding Selkirk's good faith efforts, it was unable to purchase the required amounts in the Auction, Selkirk shall be required to cover such shortfall, whether by Auction participation or by purchases in the secondary market, by the conclusion of the next succeeding Auction.

(b) Set-Aside Applications. Selkirk will at all times maintain eligibility under the LTC Set-Aside Allocation Provisions, and will timely apply for the maximum set-aside award thereunder, and complete all requirements applicable thereto. Selkirk will provide a copy of each application submitted under the LTC Set-Aside Allocation Provisions to Con Edison, and will keep Con Edison duly apprised of all communications with DEC, NYSERDA, or other Governmental Authorities concerning its participation in the program, and of all Set-Aside Awards received.

(c) Compliance with Law. Selkirk shall comply in all material respects with all applicable provisions of the RGGI Regulations. Selkirk shall keep and maintain accurate and complete records relating to its generation and emissions of CO<sub>2</sub> at the Selkirk Plant, and shall make all purchases and deposits of Allowances into its RGGI compliance account, as required by applicable Law, whether or not paid for by Con Edison hereunder.

(d) Access to Information. Selkirk shall, upon Con Edison's request, give Con Edison and its counsel, advisors, auditors and other authorized representatives reasonable access during normal business hours to such emissions and RGGI compliance data relating to the Selkirk Plant as Con Edison or such representatives may reasonably request in order to ensure Selkirk's compliance with the terms of this Agreement; provided, however, that Selkirk shall be permitted to require Con Edison to enter into a confidentiality agreement in customary form to protect the confidentiality of Selkirk's proprietary or confidential information. Selkirk acknowledges that Con Edison may request evidence of Selkirk's compliance with the terms of this Agreement, certified as true and correct by a responsible officer of Selkirk, and Selkirk agrees to comply promptly with such request.

(e) Certain Agreements Regarding Regulatory, Legislative or Judicial Changes. Selkirk acknowledges that (i) pursuant to the Consent Decree, Con Edison has agreed to assume certain financial obligations to assist Selkirk in meeting Selkirk's compliance obligations under RGGI and the RGGI Regulations during the term of this Agreement (excluding the Excluded Period), and (ii) Con Edison has undertaken those obligations on the understanding that Con Edison would not be subject to any additional liability for RGGI compliance at the Selkirk Plant. Accordingly, Selkirk covenants and

agrees that it will not, at any time, take any affirmative action to lobby or influence the decision of any Governmental Authority or representative thereof, or otherwise affirmatively seek to effect (or take any action that could be reasonably expected to result in) any change in applicable Law, in each case for the purpose of shifting RGGI compliance obligations to Con Edison. Selkirk further agrees that, in the event that the obligation to purchase, pay for and/or have Allowances is shifted to Con Edison (notwithstanding Selkirk's compliance with the foregoing covenant), then the parties shall negotiate in good faith to reach a prompt and fair resolution that gives effect, as nearly as possible, to the economic intent of the parties and is consistent with the principles set forth herein and in the Consent Decree.

### ARTICLE III CONDITIONS

Section 3.1 Conditions to Effectiveness. This Agreement, and the obligations of the parties hereunder, shall take effect only upon the satisfaction, or waiver by Con Edison, of each of the following conditions (the date upon which all conditions have been satisfied or so waived being, the "Effective Date"):

(a) The Consent Decree Parties shall have entered into, and the Court shall have entered, the Consent Decree;

(b) NYSERDA shall have amended the RGGI operating plan, or otherwise approved programs, in a manner that offers benefits to Con Edison customers at least commensurate with the amounts Con Edison shall be obligated to pay to Selkirk under this Agreement (it being understood that any such RGGI operating plan amendment or programs that comply with the Consent Decree, including Appendix 4 thereto, shall in all respects be deemed to satisfy this condition);

(c) PSC, in accordance with the Consent Decree, shall have authorized Con Edison to include in its schedule for electric service and to implement a tariff amendment, permitting Con Edison to fully recover the costs of performing its obligations under Article II hereof;

(d) DEC, in accordance with the Consent Decree, shall have acted favorably upon the petitions seeking a declaratory ruling regarding whether the inability to pass through Allowance costs qualifies as a financial hardship under the LTC Set-Aside Allocation Provisions (the "Declaratory Ruling"); and

(e) All other conditions to the effectiveness of the Consent Decree, including any and all approvals of the Board of Directors or Board of Trustees, as applicable, of the Consent Decree Parties, shall have been obtained.

Section 3.2 Acknowledgement; Continuing Conditions. Selkirk acknowledges and agrees that the purpose of this Agreement is to assist Selkirk with its compliance with

RGGI and the RGGI Regulations. If the CO<sub>2</sub> Budget Trading Program is suspended or terminated for any reason (including if it becomes preempted by a federal program) and/or RGGI and the RGGI Regulations no longer impose Allowance obligations on Selkirk, then this Agreement shall, upon the occurrence of such event, automatically terminate and be of no further force or effect, subject only to the provisions of Article V; provided, however, that if RGGI and the RGGI Regulations are suspended and then become effective again and impose Allowance obligations on Selkirk during the term hereof, then the obligations of each party shall automatically resume. The parties further acknowledge and agree that performance by Con Edison of its obligations under Article II hereof is subject to the continuing satisfaction of each of the following conditions throughout the term of this Agreement, and to the continuing authority of the Court in relation to the Consent Decree:

(a) DEC shall continue to administer the CO<sub>2</sub> Budget Trading Program and the LTC Set-Aside Allocation Provisions in the ordinary course, fairly and reasonably and the Declaratory Ruling shall remain in full force and effect;

(b) The regulations governing the CO<sub>2</sub> Budget Trading Program shall not be repealed, modified or amended (i) in a manner that would reduce the 1,500,000 Allowances presently allocated to the long term contract set-aside account, or (ii) in any other manner that would materially and adversely affect Con Edison in its reasonable judgment; provided, however, that in the event that (x) DEC demonstrates to the Court that a reduction in or removal of the long term contract set-aside account is required to protect public health and the environment, (y) the Court allows modification of the Consent Decree to effect such change, and (z) the change is effected through notice and comment rulemaking, all as required by paragraph 34 of the Consent Decree, then the condition set forth in this Section 3.2(b) shall be deemed satisfied and references in this Agreement to the Set-Aside Amount shall instead be read to refer to the Assumed Set-Aside Amount.

(c) Selkirk shall timely prepare, complete and submit its application for a Set-Aside Award and shall otherwise fulfill the requirements to make such application, as set forth in the regulations or other pronouncements of the DEC or its designee, and shall be granted a Set-Aside Award of a quantity determined pursuant to the LTC Set-Aside Allocation Provisions;

(d) NYSERDA shall perform, and continue to perform, its obligations under the Consent Decree (including Appendix 4 thereto), including funding in full the amounts and programs set forth therein; and

(e) PSC shall continue to allow full recovery of costs incurred by Con Edison pursuant to the terms of this Agreement.

ARTICLE IV  
REPRESENTATIONS AND WARRANTIES

Section 4.1 Selkirk Representations and Warranties. Selkirk represents and warrants to Con Edison as follows:

(a) Selkirk is duly organized, validly existing and in good standing under the laws of the State of Delaware;

(b) Selkirk has the requisite power and authority to execute and deliver this Agreement and the Consent Decree and to perform its obligations hereunder and thereunder;

(c) the execution, delivery and performance of this Agreement and the Consent Decree by it and the consummation of the transactions contemplated hereby and thereby have been duly authorized by all necessary limited partnership or other action on the part of Selkirk and no other action is necessary on its part to authorize this Agreement or the Consent Decree or the performance by it of its obligations hereunder or thereunder;

(d) this Agreement and the Consent Decree have been duly authorized, executed and delivered by it, and are enforceable against it in accordance with their terms; and

(e) the execution and the delivery of this Agreement and the Consent Decree by it, the performance by it of its obligations hereunder and thereunder, and the consummation by it of the transactions contemplated herein and therein will not (i) violate or conflict with any provisions of any of its organizational documents; (ii) violate, breach or constitute a default, an event of default or an event creating rights of acceleration, termination, cancellation, imposition of additional obligations or loss of rights under any contract, order, or permit to which it is a party or by which it or its properties are bound or affected, or (iii) require any consent from any Person that has not already been obtained.

Section 4.2 Con Edison Representations and Warranties. Con Edison represents and warrants to Selkirk as follows:

(a) Con Edison is duly organized, validly existing and in good standing under the laws of the State of New York;

(b) Con Edison has the requisite power and authority to execute and deliver this Agreement and the Consent Decree and to perform its obligations hereunder and thereunder;

(c) the execution, delivery and performance of this Agreement and the Consent Decree by it and the consummation of the transactions contemplated hereby and thereby have been duly authorized by all necessary corporate or other action on the part of Con Edison and no other action is necessary on its part to authorize this Agreement or the Consent Decree or the performance by it of its obligations hereunder or thereunder;

(d) this Agreement and the Consent Decree will have been duly authorized, executed and delivered by it, and enforceable against it in accordance with its terms; and

(e) the execution and the delivery of this Agreement and the Consent Decree by it, the performance by it of its obligations hereunder and thereunder, and the consummation by it of the transactions contemplated herein and therein will not (i) violate or conflict with any provisions of any of its organizational documents; (ii) violate, breach or constitute a default, an event of default or an event creating rights of acceleration, termination, cancellation, imposition of additional obligations or loss of rights under any contract, order, or permit to which it is a party or by which it or its properties are bound or affected, or (iii) require any consent from any Person that has not already been obtained.

#### ARTICLE V TERM; TERMINATION

Section 5.1 Term. This Agreement shall automatically terminate upon the earlier to occur of (i) August 30, 2014, (ii) the earlier termination of the PPA, (iii) the suspension or termination of the CO<sub>2</sub> Budget Trading Program for any reason (including if it becomes preempted by a federal program), or (iv) RGGI or RGGI Regulations no longer imposing Allowance obligations on Selkirk, unless earlier terminated in accordance with Section 5.2; provided, however, that in the event that Allowance obligations under RGGI or the RGGI Regulations are suspended but are subsequently reinstated prior to the occurrence of any other termination event described in this Section 5.1 and in Section 5.2, then the effectiveness of this Agreement shall automatically resume in accordance with its terms; and provided, further, that any termination pursuant to the foregoing clause (ii), (iii) or (iv) shall be subject to compliance with the dispute resolution procedures and enforcement provisions set forth in paragraphs 22 and 24, respectively, of the Consent Decree.

Section 5.2 Termination. This Agreement may be terminated at any time prior to its expiration (subject only to compliance with the dispute resolution procedures and enforcement provisions set forth in paragraphs 22 and 24, respectively, of the Consent Decree) by:

- (a) mutual written agreement of the parties;
- (b) Con Edison, by written notice of termination delivered to Selkirk, if the Effective Date has not occurred on or prior to December 31, 2010;
- (c) Either party, by written notice of termination delivered to the other, if the Consent Decree is no longer effective for any reason (other than as a result of a breach thereof by the party seeking termination);
- (d) Con Edison, if there has been a material breach of any representation, warranty, covenant or agreement on the part of Selkirk, which breach is not capable of being cured or shall not have been cured within ten (10) Business Days following receipt

of written notice thereof from Con Edison (it being expressly understood that any breach of Section 2.3 hereof shall constitute a material breach);

(e) Con Edison, if any of the conditions specified in Section 3.2 shall fail to be satisfied; and

(f) Con Edison, if (i) Selkirk (A) commences a voluntary case, or consents to the entry of a decree or order in respect of an involuntary case or proceeding, under applicable bankruptcy, insolvency or other similar laws, or (B) makes an assignment for the benefit of its creditors, or admits in writing its inability to pay its debts generally as they become due, or consents to the appointment of a receiver or liquidator or trustee or assignee in bankruptcy or insolvency of it or of a significant portion of its property or (ii) a decree or order shall be entered by a court in respect of Selkirk in an involuntary case under applicable bankruptcy, insolvency or other similar laws, or appointing a receiver, liquidator, assignee, custodian, trustee or other similar official of Selkirk or of a significant portion of its properties, or ordering the winding up or liquidation of Selkirk's affairs, and such decree or order shall remain un-stayed and in effect for a period of 60 consecutive days.

Section 5.3 Effect of Termination. Upon expiration, or earlier termination of this Agreement, all rights and obligations of the parties hereunder shall immediately cease and be of no further force or effect; provided, that (i) the obligations of the parties under this Article V, and under Articles VI and VII shall survive, and the parties hereto shall have any and all remedies to enforce such obligations provided at law or in equity or otherwise; and (ii) nothing herein shall relieve the parties from liability for any breach hereof, and the parties shall be entitled to any remedies at law or in equity for any such breach.

Section 5.4 Tail Period True-up; Cooperation. Following the expiration or termination of this Agreement in accordance with its terms, the parties shall cooperate with each other to reconcile Allowance payments through the date of such expiration or termination as promptly as practicable. Selkirk agrees that it will report its Actual Quarterly Allowance Requirement for the last Applicable Quarterly Period (or portion thereof that terminates upon the expiration or termination of this Agreement) to Con Edison as promptly following the expiration or termination of this Agreement as is possible. Con Edison and Selkirk shall calculate the True-up Amount with respect to such Applicable Quarterly Period (or portion thereof) as promptly after delivery of the Actual Quarterly Allowance Requirement report as possible. If, upon calculation of the final True-Up Amount, there is a positive Carryover Amount, then Selkirk shall reimburse Con Edison the Excess Allowance Amount within five (5) Business Days of its receipt of notice thereof from Con Edison. If, upon calculation of the final True-Up Amount, there is a negative Carryover Amount, then Con Edison shall, at its option, either (i) transfer to Selkirk such Carryover Amount of Allowances, or (ii) reimburse Selkirk the monetary value of such Carryover Amount at a price equal to the actual amount paid by Selkirk to purchase such Carryover Amount of Allowances in the secondary market. Within ten (10) Business Days following final determination of the Carryover Amount, Con Edison

shall make the transfer described in clause (i), or notify Selkirk of Selkirk's requirement to make Allowance purchases as contemplated by clause (ii). In the event that Con Edison elects the option set forth in clause (ii) above, Con Edison shall reimburse Selkirk the amount Selkirk so paid, within ten (10) Business Days of Con Edison's receipt of notice from Selkirk specifying such costs and including supporting documentation.

## ARTICLE VI OTHER AGREEMENTS

Section 6.1 Indemnification. Selkirk shall indemnify and defend Con Edison and its stockholders, officers, trustees, directors, employees, agents, affiliates, successors and assigns (collectively, "Con Edison Indemnitees") against, and shall hold them harmless from, any and all liabilities, damages, compliance obligations, fines, fees, penalties, deficiencies, losses, costs and expenses (including all interest assessed, court costs, fees and expenses of attorneys, accountants and other experts and other expenses of litigation or other proceedings or of any claim, default or assessment or pursuit of rights to indemnification (collectively, "Losses") resulting from, arising out of, or incurred by any Con Edison Indemnitee in connection with or otherwise with respect to: (i) any breach of any representation or warranty of Selkirk contained in this Agreement or in the Consent Decree, (ii) any breach of any covenant or agreement of Selkirk contained in this Agreement or in the Consent Decree, or (iii) any failure by Selkirk to comply with applicable Law, (in the case of clauses (ii) or (iii), whether occurring before or after termination or expiration of this Agreement).

Section 6.2 Offset. It is expressly agreed that, in addition to its right to elect to terminate this Agreement, Con Edison shall have the right, in the event that Selkirk fails to meet its obligation under Sections 2.3(c) hereof to deposit Allowances into its RGGI compliance account at the time and in the amounts required by RGGI Regulations, to offset against payments Con Edison may owe to Selkirk pursuant to any other agreement, amounts Con Edison previously paid to Selkirk hereunder, to the extent of Selkirk's delinquency. In addition, in the event that Selkirk fails at any time to make any payments owing to Con Edison hereunder, including pursuant to (i) Section 2.2(e), (ii) the fourth sentence of Section 5.4, or (iii) Section 6.1, then Con Edison shall have the right to offset such amounts against payments Con Edison may owe to Selkirk pursuant to any other agreement.

## ARTICLE VII MISCELLANEOUS

Section 7.1 Notices. Any notice, request, demand, waiver, consent, approval or other communication which is required or permitted hereunder shall be in writing, and shall be deemed given (a) on the date delivered personally, by private courier (provided signature for delivery is obtained), or sent by facsimile or email transmission (if confirmation of receipt is obtained) or (b) on the fifth Business Day after the date mailed, by certified or registered mail, return receipt requested, postage prepaid. Each party to whom such

communication is sent has the obligation to accept delivery of such communication. Such communications, to be valid, must be addressed as follows:

If to Selkirk, to:

Cogentrix Energy, LLC  
9405 Arrowpoint Boulevard  
Charlotte, North Carolina 28273  
Att: General Counsel  
Fax: (604) 672-2816  
Email: DougMiller@cogentrix.com

With a copy to:

Foley Hoag LLP  
Seaport West  
155 Seaport Boulevard  
Boston, Massachusetts 02210-2600  
Att: Mary Beth Gentleman, Esq.  
Fax: (617) 832-7000  
Email: MGentleman@foleyhoag.com

If to Con Edison, to:

Consolidated Edison Company of New York, Inc.  
4 Irving Place  
Suite 1810S  
Att: Vice President, Regulatory Services  
Fax: 212-677-5850  
Email: lublingc@coned.com

And to:

Consolidated Edison Company of New York, Inc.  
111 Broadway, Suite 1601  
New York, New York 10006  
Att: Director, Energy Management  
Fax: 212-385-3512  
Email: [kimballi@coned.com](mailto:kimballi@coned.com)

or to such other address or to the attention of such Person or Persons as the recipient party has specified by prior written notice to the sending party. If more than one method for sending notice as set forth above is used, the earliest notice date established as set forth above shall control.

Section 7.2 Amendment. This Agreement may not be amended, or its provisions supplemented or otherwise modified, except by an instrument in writing, signed by the parties hereto. Any amendment hereto that does not affect the rights or obligations of any Consent Decree Party other than the parties hereto shall not require Court approval.

Section 7.3 Waivers. Any waiver of any provision of this Agreement shall be effective only if it is in writing and is signed by the party against whom the waiver is sought to be effective. No failure or delay by any party in exercising any right or privilege hereunder shall operate as a waiver thereof, nor shall any single or partial exercise thereof preclude any other or further exercise thereof or the exercise of any other right, power or privilege.

Section 7.4 Further Assurances. From time to time, as and when requested by either party hereto, the other party shall use its commercially reasonable efforts to take, or cause to be taken, all such further actions as such other party may reasonably deem necessary or desirable to consummate this Agreement and the Consent Decree and the transactions contemplated hereby and thereby. Each party shall use its commercially reasonable efforts to fulfill or obtain the fulfillment of the conditions precedent to the effectiveness and continuing effectiveness of this Agreement.

Section 7.5 Assignment. This Agreement, and the obligations owing to Selkirk hereunder, are specific to Selkirk. Neither this Agreement nor any of the rights, interests or obligations hereunder may be assigned by Selkirk, by operation of law or otherwise, without the prior written consent of Con Edison (not to be unreasonably withheld); provided, however, that Selkirk shall have the ability to assign this Agreement to an affiliate so long as (i) Selkirk continues to remain a party hereto for purposes of Article VI hereof, or (ii) such assignee is the successor to or assignee of Selkirk, becoming the counterparty to the PPA in accordance with the terms of the PPA. Con Edison may assign this Agreement, in whole or in part, to one or more of its affiliates or to any Person acquiring all of its stock or substantially all of its assets or in connection with a consolidation or merger transaction. Subject to the foregoing, all of the terms and provisions of this Agreement shall inure to the benefit of, and be binding upon, the parties hereto and their respective permitted successors and assigns.

Section 7.6 Governing Law. This Agreement (including Schedule I hereto) shall be governed by and construed in accordance with the laws of the State of New York without giving effect to any choice of Law or conflict of Laws rules or provisions (whether of the State of New York or of any other jurisdiction) that would cause the application of the Laws of any jurisdiction other than the State of New York.

Section 7.7 Consent to Jurisdiction. Each party hereto irrevocably submits to the exclusive jurisdiction of the Albany County Supreme Court of the State of New York for any actions, suits or proceedings arising out of or relating to this Agreement, and agrees to commence any such action, suit or proceeding only in such court. Each party further agrees that service of any process, summons, notice or document by U.S. registered mail to such party's respective address set forth herein shall be effective service of process for any such action, suit or proceeding. Each party irrevocably and unconditionally waives

any objection to the laying of venue of any action, suit or proceeding arising out of this Agreement in such court, and hereby irrevocably and unconditionally waives its right and agrees not to plead or claim that any such action, suit or proceeding brought therein has been brought in an inconvenient forum. Each party hereby irrevocably waives all right to trial by jury in any action arising out of or relating to this Agreement, the transactions contemplated hereby or the acts or omissions of such party in the negotiation, administration, performance and enforcement of this Agreement.

Section 7.8 Entire Agreement. This Agreement (including Schedule I hereto) and the Consent Decree, and the other documents and instruments specifically referred to herein and therein and delivered pursuant hereto and thereto, set forth the entire understanding of the parties with respect to the transactions contemplated hereby, and this Agreement and the Consent Decree shall be deemed to be in pari materia for the interpretation of the provisions hereof and thereof. Schedule I referred to herein is intended to be and hereby is specifically made a part of this Agreement. Any and all previous agreements and understandings between or among the parties regarding the subject matter hereof, whether written or oral, are superseded by this Agreement.

Section 7.9 Captions. All captions contained in this Agreement are for convenience of reference only, do not form a part of this Agreement and shall not affect the meaning or interpretation of this Agreement.

Section 7.10 Expenses. Each Party will pay its own expenses in connection with the negotiation and execution of this Agreement and the Consent Decree.

Section 7.11 Counterparts. This Agreement may be executed simultaneously in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. Delivery of an executed counterpart of a signature page of this Agreement by facsimile transmission or email transmission of a .pdf file shall be as effective as delivery of a manually executed counterpart of this Agreement.

Section 7.12 Third-Party Beneficiaries. Nothing in this Agreement will be construed as giving any Person other than the parties and their permitted successors and assigns, any right, remedy or claim under or in respect of this Agreement; provided that in the case of Section 6.1 hereof, the other Con Edison Indemnitees and their respective heirs, executors, administrators, legal representatives, successors and assigns, are intended third party beneficiaries of such Section and shall have the right to enforce such Section.

[Signature page follows]

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed by their duly authorized representatives on the day and year first above written.

SELKIRK COGEN PARTNERS, L.P.  
a Delaware limited partnership

By: JMC SELKIRK, LLC  
Its Managing General Partner

By:  \_\_\_\_\_ LA  
Name: **Thomas J. Bonner**  
Title: **President**

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.  
a New York corporation

By: \_\_\_\_\_  
Name: Joseph P. Oates  
Title: Vice President, Energy Management

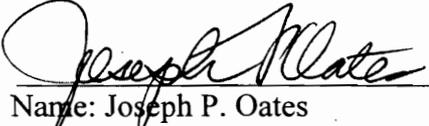
IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed by their duly authorized representatives on the day and year first above written.

SELKIRK COGEN PARTNERS, L.P.  
a Delaware limited partnership

By: JMC SELKIRK, LLC  
Its Managing General Partner

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

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.  
a New York corporation

By:  \_\_\_\_\_  
Name: Joseph P. Oates  
Title: Vice President, Energy Management

**SCHEDULE I  
TO APPENDIX 3**

Year 0	Allocation	Annual Set-Aside Award
	100.0%	332,924
1	Con Edison Production (MWh)	Set-Aside Award Credit (tons)
2	60,173	13,384
3	112,508	25,025
4	187,604	41,729
5	154,613	34,391
6	129,755	28,861
7	125,657	27,950
8	172,169	38,296
9	170,618	37,951
10	83,888	18,659
11	76,763	17,074
12	100,713	22,402
	122,295	27,202
2009 Total	1,496,756	332,924

Year 1

Month	Actual/Estimated Con Edison Production (MWh)	Actual/Estimated CO2 Emissions (tons)	Actual/Estimated emissions subject to Carbon Intensity Cap (tons)	Set Aside Award Credit
January-10	62,179	31,805	180,151	13,384
February-10	105,007	53,914		25,025
March-10	193,857	99,371		41,729
April-10	154,613	73,391		34,391
May-10	134,080	63,732		28,861
June-10	125,657	59,364		27,950
July-10	177,905	84,733		38,296
August-10	176,305	83,909		37,951
September-10	83,888	39,909		18,659
October-10	78,322	37,635		17,074
November-10	100,713	48,116		22,402
December-10	128,372	60,187		27,202
2010 Total	1,519,901	735,962	731,132	332,924

Notes:

Year 0 Con Edison Production is used to determine monthly distribution of set-aside award credit for subsequent year

Carbon Intensity Cap is 0.499 tons per MWh [see CO2 Intensity Cap tab]

Year 0 MWh/CO2 example reflects actual generation for Jan-Sep, but uses

2008 MWh for October-December for illustrative purposes

Year 1 approximates Year 0 MWh for illustrative purposes

Assumed a 10% difference between actual and estimated CO2 Allowance

Requirement for the final month in each quarter for illustrative purposes; the Carbon

Intensity Cap to be applied to both the Estimated and Actual Emissions.

Month	Carryover Amount	Auction Purchase Volume	Auction Clearing Price	Payment Amount	Actual Emissions subject to Carbon Intensity Cap	Quarterly True-up Amount	Auction Purchase Credit	Carryover Amount
January-10	0	100,022	\$3.51	\$351,079	198,177	-18,016	0	-18,016
February-10	-18,016	123,301	\$3.23	\$398,262	216,136	-19,649	0	-19,649
March-10	-19,649	133,289	\$3.00	\$399,868	229,401	-20,855	0	-20,855
April-10	-20,855	100,115	\$3.00	\$300,344	132,671	13,267	0	13,267
2010 Total					776,384			

Quarterly Carbon Intensity Cap (lbs/MWh) 998

	Gas ConEd Production (MWh)	Total CO2 Emissions (tons)	CO2 Emission Rate (lbs/MWh)	Quarterly Emission Cap (tons)	Total CO2 Cap (tons)
Q1	361,044	184,991	1,025	180,161	180,161
Q2	414,350	196,487	948	206,761	196,487
Q3	438,101	208,546	952	218,613	208,546
Q4	306,406	145,938	953	152,897	145,938
Total	1,519,901	735,962			

# **APPENDIX 4**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

INDECK CORINTH, L.P.,

Petitioner/Plaintiff,

- against -

DAVID A. PATERSON, as Governor, NEW  
YORK STATE DEPARTMENT OF  
ENVIRONMENTAL CONSERVATION, NEW  
YORK STATE ENERGY RESEARCH AND  
DEVELOPMENT AUTHORITY, NEW YORK  
STATE PUBLIC SERVICE COMMISSION, NEW  
YORK STATE DEPARTMENT OF PUBLIC  
SERVICE, and CONSOLIDATED EDISON  
COMPANY OF NEW YORK, INC.,

Respondents/Defendants.

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BROOKLYN NAVY YARD COGENERATION  
PARTNERS, L.P. and SELKIRK COGEN  
PARTNERS, L.P.,

Intervenors in Support of  
Petitioner/Plaintiff.

INDEX NO. 5280-09

Hon. Thomas J. McNamara

**APPENDIX 4 TO  
CONSENT DECREE**

**PROCEDURES IMPLEMENTING  
ARTICLE III OF THE CONSENT DECREE**

The purpose of this Appendix is to set forth procedures for determining and providing for the payment by NYSERDA of commensurate benefits to Con Edison customers pursuant to Article III of the Consent Decree, and to set forth the obligations of NYSERDA and Con Edison in connection therewith.

ARTICLE I:  
OBLIGATIONS OF NYSERDA/ CON EDISON

Section 1.1 NYSERDA's<sup>1</sup> Obligations. NYSERDA agrees to pay to Con Edison, for the purpose of funding (a) the following programs for which the PSC has approved the expenditure of ratepayer funds in its July 27, 2009 Order in Case 09-E-0310: (i) the Secure Interoperable Smart Grid Demonstration Program (referred to as "Command and Control" in such Order), (ii) the 4 kV Grid Modernization Program (each of which programs have been selected for negotiations leading to funding by the U.S. Department of Energy pursuant to the American Recovery and Reinvestment Act), and/or (b) any other program that has been proposed by Con Edison and approved by NYSERDA and PSC in accordance with the provisions of Section 1.4(b) (collectively, "Programs") during the term of the Consent Decree and on the terms and subject to the conditions set forth herein, an amount equal to the Commensurate Benefit Amount. For purposes of this Appendix 4, the "Commensurate Benefit Amount" means the total amount of costs incurred by Con Edison in performing its obligations under Paragraph 5 of the Consent Decree, which shall, for any period, include all sums paid or payable in respect of such period by Con Edison pursuant to the agreements set forth as Appendices 1, 2 and 3 to the Consent Decree (collectively, the "RGGI Generator Agreements"). NYSERDA shall make payment to Con Edison by wire transfer of immediately available funds to an account designated in writing by Con Edison on an annual basis, in accordance with the provisions set forth below.

Section 1.2 Determining the Commensurate Benefit Amount. The parties agree that, during the term of the Consent Decree, the Commensurate Benefit Amount will be estimated, paid and trued-up in accordance with the methodology described in this Section 1.2.

(a) Determining Commensurate Benefit Amount. Within forty-five (45) days following the commencement of each three-year period of compliance under the RGGI Rules (each, a "Control Period") during the term of the Consent Decree (other than the Control Period which began on January 1, 2009 (the "Initial Control Period"), which shall be governed by the last sentence of this Section 1.2(a)), Con Edison and NYSERDA shall jointly estimate the Commensurate Benefit Amount applicable to such Control Period (or, in the event that the Consent Decree terminates prior to the completion of any Control Period, then such portion of such Control Period as shall conclude upon such termination) (such amount being, the "Commensurate Benefit Estimate"). The Commensurate Benefit Estimate shall be calculated by such parties, in good faith, as: (a) the sum of the total number of tons of CO<sub>2</sub> actually emitted by each Facility in respect of energy purchased by Con Edison ("Con Edison Production") (or applicable portion thereof as set forth in the RGGI Generator Agreements) during the three most recently

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<sup>1</sup> Capitalized terms used and not defined in this Appendix 4 have the meanings assigned thereto in the Consent Decree to which this Appendix is attached.

completed calendar years (as such information has been provided to Con Edison by Indeck, BNYCP and Selkirk, respectively), less (b) the sum of the applicable percentages of the LTC set-aside awards (or of the assumed LTC set-aside awards), reflecting Con Edison Production, that is projected to be received by or applicable to each Facility pursuant to the LTC set-aside allocation provisions of the RGGI Rules in accordance with the terms of the RGGI Generator Agreements during the applicable Control Period (as such projections have been communicated to Con Edison and NYSERDA by DEC or as otherwise determined pursuant to the terms of the RGGI Generator Agreements), multiplied by (c) the average clearing price per Allowance (as such term is used in the RGGI Rules) for current vintage Allowances in the three most recently completed Auctions (as such term is used in the RGGI Rules). Notwithstanding the foregoing, the parties agree that the Commensurate Benefit Estimate applicable to the Initial Control Period shall be seven million six hundred fifty-eight thousand dollars (\$7.658 million) (the “Initial Commensurate Benefit Estimate”).

(b) Payments. On or prior to April 1 of each calendar year during the term of the Consent Decree, NYSERDA shall pay to Con Edison one-third of the Commensurate Benefit Estimate applicable to the then-current Control Period, unless there is a Revised Commensurate Benefit Estimate pursuant to Section 1.2(c), in which event NYSERDA shall pay the adjusted amount as specified in such Section 1.2(c). Notwithstanding the foregoing, (i) the parties acknowledge that the Initial Control Period commenced prior to the date hereof and, as a consequence the initial payment of one-third of the Initial Commensurate Benefit Amount shall in all events be made within (30) days following the effective date of this Appendix 4; provided, that if such effective date does not occur prior to March 1, 2010, then such initial payment shall be made in an amount equal to two-thirds of the Initial Commensurate Benefit Estimate; and (ii) the Commensurate Benefit Estimate applicable to the final year during the term shall be paid in full on April 1 of such final year.

(c) Annual Reports; Optional Mid-Control Period True-ups. No later than sixty (60) days following the completion of each calendar year, Con Edison shall report to NYSERDA the actual Commensurate Benefit Amount applicable to such year, together with such supporting documentation, if any, as NYSERDA may reasonably require (the “Annual Report”). Con Edison shall maintain and include in such Annual Report a then-current “running” written record of (i) the Commensurate Benefit Estimate applicable to each Control Period (or portion thereof) hereunder, together with (ii) the date and amount of each annual payment made by NYSERDA with respect thereto, and (iii) the actual Commensurate Benefit Amount applicable to each year during such Control Period. If the Annual Report shows that the portion of the Commensurate Benefit Estimate paid by NYSERDA as at the end of any calendar year pursuant to this Appendix exceeds by more than twenty percent (20%) the actual Commensurate Benefit Amount applicable to such portion of the Control Period then ended, then NYSERDA shall have the option, upon consultation with Con Edison, to revise downward the Commensurate Benefit Estimate applicable to such Control Period by, and to withhold from its next succeeding payment, an amount up to the difference between the amount so paid and such actual Commensurate Benefit Amount (such amount being, a “Payment Overage”); provided

that such action, as reasonably determined by both parties, (i) is necessary or prudent to ensure that amounts paid by NYSERDA during the applicable Control Period will not grossly exceed the actual Commensurate Benefit Amount for such period, and (ii) will not have an adverse effect on the implementation of the applicable Program(s), as contemplated by the then-current Annual Budget. If the Annual Report shows that the portion of the Commensurate Benefit Estimate paid by NYSERDA as at the end of any calendar year pursuant to this Appendix is less than the sum of the actual Commensurate Benefit Amount applicable to such portion of the Control Period then ended by more than twenty percent (20%), then NYSERDA shall, upon the request of Con Edison, revise upward the Commensurate Benefit Estimate applicable to such Control Period by, and add to the amount of its next succeeding payment, an amount up to the difference between the amount so paid and such actual Commensurate Benefit Amount (such amount being, a “Payment Shortfall”; and any Commensurate Benefit Estimate that is revised as herein provided as a result of any Payment Overage or Payment Shortfall being, a “Revised Commensurate Benefit Estimate”).

(d) Control Period True-Ups. If (A) (i) notwithstanding any adjustments made pursuant to Section 1.2(c) during a Control Period, or (ii) the parties did not elect, or have the opportunity, to make any such adjustments, and (B) the Annual Report delivered following the completion of any Control Period reflects that the actual Commensurate Benefit Amount for a Control Period was greater than or less than the amount paid by NYSERDA, then the parties shall true-up and settle such differences in the next succeeding Control Period (or applicable portion thereof ending upon the termination of the Consent Decree), such that (A) the amount of any Payment Overage shall be deducted from the Commensurate Benefit Estimate otherwise applicable to the next succeeding Control Period (or applicable portion thereof), as calculated in accordance with Section 1.2(a), and (B) the amount of any Payment Shortfall shall be added to the Commensurate Benefit Estimate otherwise applicable to the next succeeding Control Period (or applicable portion thereof), calculated in accordance with Section 1.2(a).

(e) Tail Period True-up. Following the expiration or termination of the Consent Decree in accordance with its terms, the parties shall reconcile total payments made by NYSERDA through the date of such expiration or termination with the actual Commensurate Benefit Amount as of such date, as finally determined. No later than sixty (60) days following the expiration or termination of the Consent Decree, Con Edison shall deliver the final Annual Report to NYSERDA. If such Annual Report reflects a net Payment Overage, then Con Edison shall refund to NYSERDA the amount of such Payment Overage, and if it reflects a net Payment Shortage, then NYSERDA shall pay to Con Edison the amount of such Payment Shortage. Payments required pursuant to this Section 1.2(e) shall be made within thirty (30) days following submission of the Annual Report, and shall be made by wire transfer of immediately available funds to an account designated in writing by the receiving party.

Section 1.3 Con Edison's Obligations.

(a) Use of Proceeds. Con Edison agrees that it will use all funds NYSERDA pays to it pursuant to Sections 1.1 and 1.2 of this Appendix ("NYSERDA Payments") for the sole purpose of funding Programs. NYSERDA will assign a project manager to collaborate with Con Edison with respect to the Program(s).

(b) Budgets. Within ninety (90) days following the date this Appendix becomes effective, and within sixty (60) days following the commencement of each calendar year during the term of the Consent Decree thereafter, Con Edison shall provide to NYSERDA a budget, reflecting projected commitments and expenditures to be made by Con Edison during the then-current year in furtherance of Programs (each, an "Annual Budget"). Each Annual Budget shall provide for estimated commitments and/or expenditures by Con Edison during such year of at least eighty percent (80%) of NYSERDA's then current payment obligation, as calculated pursuant to Section 1.2, and may be revised at any time as the Program or Programs to which it relates require. Each Annual Budget shall, in any event, include a reconciliation of the prior year's Annual Budget. Con Edison agrees to use commercially reasonable efforts to commit the full amount of NYSERDA Payments (or such smaller portion thereof as is reflected in the Annual Budget) during the then-current calendar year, but shall be permitted to deploy such funds at a later time or to deploy greater funds, in each case as Con Edison determines to be reasonable or prudent based upon the management requirements of the Program or Programs in which it is then investing. NYSERDA shall have the right to consult with Con Edison concerning any Annual Budget, but acknowledges that Con Edison shall have sole authority to conduct all Program(s) and therefore to establish and manage all Annual Budgets in its reasonable discretion. Notwithstanding the foregoing, Con Edison agrees that on or prior to the second anniversary of the expiration or termination of the Consent Decree, all NYSERDA Payments shall have been fully committed to Programs.

(c) Record Keeping. Con Edison shall keep and maintain accurate and complete records relating to all Annual Reports, Annual Budgets and any and all revisions thereto and shall provide documentation in support of the same (including records received or maintained by it pursuant to the RGGI Generator Agreements) to the extent reasonably requested by NYSERDA.

(d) Annual Reports/Program Evaluation. Con Edison shall submit to NYSERDA Annual Reports pursuant to Section 1.2(c) and, except as otherwise agreed by the parties, provide Progress Reports and Evaluations (each, as hereafter defined) pursuant to Section 1.5.

Section 1.4 Programs.

(a) Programs; Substitutions. NYSERDA acknowledges and agrees that the Secure Interoperable Smart Grid Demonstration Program and the 4 kV Grid Modernization Program meet the requirements set forth in 21 NYCRR Part 507.4(d) for

investment of Auction proceeds, including, but not limited to, the requirement that such funds be used to “promote and implement programs for energy efficiency, renewable or non-carbon emitting technologies and innovative carbon emissions abatement technologies with significant carbon reduction potential” (the “RGGI Investment Parameters”). Each such Program has been approved by NYSERDA for investment by Con Edison using NYSERDA Funds, and no further action by or on behalf of NYSERDA is required in connection with such approval. Con Edison may, at any time and for any reason, choose to implement one or more of such Programs, in addition to, or in substitution of, any other Program contemplated by the then-current Annual Budget; provided that Con Edison shall notify NYSERDA in advance of its determination to make such addition or substitution, and shall provide NYSERDA with a revised Annual Budget, if appropriate, to account for such change.

(b) Future Programs. Con Edison may seek, at any time, to develop programs (beyond the Secure Interoperable Smart Grid Demonstration Program and the 4 kV Grid Modernization Program), for which PSC has already approved or may approve in the future the use of ratepayer funds, in consultation with NYSERDA and DPS. NYSERDA shall work diligently and in good faith, to enable it to jointly develop such programs with Con Edison in a manner that would permit fulfillment of the purposes of the Consent Decree and this Appendix 4; provided that such programs satisfy the RGGI Investment Parameters. NYSERDA shall present any proposal under joint consideration by the parties to DPS, as well as to the RGGI Advisory Group, if required, and shall discuss and resolve any comments received from such parties to the mutual satisfaction of NYSERDA and Con Edison. If necessary, NYSERDA shall recommend and promptly submit all mutually approved proposals (together with required amendments to the RGGI Operating Plan, if any) to NYSERDA’s Board of Directors for approval. In the event that NYSERDA’s Board of Directors does not approve any such proposal, or approves a proposal in modified form, NYSERDA shall notify Con Edison of the same and afford Con Edison the opportunity to approve such modified proposal or offer a counter-proposal. If such counter-proposal is acceptable to NYSERDA, NYSERDA shall recommend and re-submit such counter-proposal to NYSERDA’s Board of Directors for consideration and approval.

#### Section 1.5 Program Progress Reports; Program Evaluation.

(a) Progress Reports. Within sixty (60) days following the end of each calendar year and within forty-five (45) days following the end of each calendar quarter, in each case during the term of the Consent Decree, Con Edison shall provide to NYSERDA reports on the progress of each Program that received NYSERDA Payments during such year or quarter (each, a “Progress Report”). The Progress Reports shall include such information as the parties shall mutually agree upon and shall, in any event, include information for the applicable period as well as cumulative information through such period-end.

(b) Con Edison agrees to evaluate Programs implemented by it pursuant to this Appendix pursuant to protocols developed by it, in consultation with and agreed to

by NYSERDA (provided, however, that such protocols are not inconsistent with the evaluation approaches set forth in the RGGI Operating Plan). Such evaluation shall include measurement, verification and attribution analysis, and may (upon agreement by Con Edison and NYSERDA) include market characterization and assessment analysis (the "Evaluation"). To the extent feasible, Con Edison shall develop and submit for acceptance the protocols it intends to govern its Evaluation of a Program within six (6) months following the Program's initial implementation, and shall be permitted to devote up to five percent (5%) of each Program's budget to pay the costs of conducting such Evaluation. Con Edison shall commence the process and impact components of the Evaluation for each Program funded hereunder within nine (9) months and twelve (12) months, respectively, of the Program's commencement and shall deliver an interim and final Evaluation report to NYSERDA within ninety (90) days following the second and third anniversary, respectively, of the Program's commencement. NYSERDA agrees that it shall not report publicly the results of any Evaluation without first conferring with Con Edison and obtaining Con Edison's approval as to the form and substance of such disclosure.

Section 1.6 Smart Grid Consortium. NYSERDA and Con Edison shall share non-confidential and non-customer specific information relating to the Programs with the New York State Smart Grid Consortium (of which both NYSERDA and Con Edison are founding members), to the extent appropriate to facilitate possible interactions with other smart grid projects in New York State.

Section 1.7 Public Announcements. No party will issue or cause the publication of any press release or other public announcement with respect to the transactions contemplated pursuant to this Appendix or any Program administered hereunder without the prior written consent of the other party hereto; provided, however, that nothing herein will prohibit any party from issuing or causing publication of any such press release or public announcement to the extent that such disclosure is upon advice of counsel required by any law, rule, regulation, order, legal process or stock exchange rule, in which case the party making such determination will, if practicable under the circumstances, use reasonable efforts to allow the other parties reasonable time to comment on such release or announcement in advance of its issuance.

## ARTICLE II

Section 2.1 Notices. Any notice, request, demand, waiver, consent, approval or other communication which is required or permitted pursuant to this Appendix 4 shall be in writing, and shall be deemed given (a) on the date delivered personally, by private courier (provided signature for delivery is obtained), or sent by facsimile or email transmission (if confirmation of receipt is obtained) or (b) on the fifth business day after the date mailed, by certified or registered mail, return receipt requested, postage prepaid. Each party to whom such communication is sent has the obligation to accept delivery of such communication. Such communications, to be valid, must be addressed as follows:

If to NYSERDA, to:

NYSERDA  
17 Columbia Circle  
Albany, NY 12203  
Att: Mark Torpey  
Fax: 518-862-1091  
Email: [mrt@nyserda.org](mailto:mrt@nyserda.org)

If to Con Edison, to:

Consolidated Edison Company of New York, Inc.  
4 Irving Place  
New York, New York 10003  
Att: Director, Energy Efficiency  
Fax: 212-780-3636  
Email: [crafr@coned.com](mailto:crafr@coned.com)

And to:

Consolidated Edison Company of New York, Inc.  
4 Irving Place  
New York, New York 10003  
Attn: Vice President, Regulatory Services  
Fax: 212-677-5850  
Email: [lublingc@coned.com](mailto:lublingc@coned.com)

or to such other address or to the attention of such person or persons as the recipient party has specified by prior written notice to the sending party. If more than one method for sending notice as set forth above is used, the earliest notice date established as set forth above shall control.

Section 2.2 Amendment. This Appendix 4 may be amended, or its provisions supplemented or otherwise modified, without approval of the Court, if effected via a written instrument signed by Con Edison and NYSERDA; provided that no such amendment or modification to this Appendix 4 may bind or otherwise affect the rights and obligations of any other Party to the Consent Decree.

Section 2.3 Waivers. Any waiver of any provision of this Appendix 4 shall be effective only if it is in writing and is signed by the party against whom the waiver is sought to be effective. No failure or delay by Con Edison or NYSERDA in exercising any right or privilege hereunder shall operate as a waiver thereof, nor shall any single or partial exercise thereof preclude any other or further exercise thereof or the exercise of any other right, power or privilege.