

## Capacity Release Agreement

This Agreement ("Agreement") is made as of this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, by and among **The Niagara Mohawk Power Corporation d/b/a National Grid**, a New York corporation having its principal office at 300 Erie Boulevard West, Syracuse, New York 13202 ("**Company**"),

\_\_\_\_\_, a [type of entity and State of organization] \_\_\_\_\_, having its principal place of business at [street address; note that PO Box is not sufficient] \_\_\_\_\_, ("**ESCO**") and

\_\_\_\_\_, a [type of entity and State of organization] \_\_\_\_\_, having its principal place of business at [street address; note that PO Box is not sufficient] \_\_\_\_\_ ("**ESCO's Agent**"), *if an agent is so designated.*

(Company, ESCO and ESCO's Agent are hereinafter sometimes referred to collectively as the "Parties" or individually as a "Party").

**WHEREAS**, ESCO has been authorized by the New York State Public Service Commission ("**PSC**") to act as an energy services company in the State of New York and approved by the Company to participate in the Company's retail access program (the "**Program**");

**WHEREAS**, ESCO may retain a third party to assist ESCO in ESCO's participation in the Program; to the extent that ESCO has retained a third party with regard to transportation capacity on interstate pipelines, such third party is designated herein as **ESCO's Agent**;

**NOW THEREFORE**, in consideration of the mutual representation, covenants and agreements set forth herein, and intending to be legally bound hereby, the Parties agree as follows:

1. **ESCO Representations.** ESCO represents that
  - a. it is in compliance with all applicable state and federal laws, the PSC's Uniform Business Practices ("**UBP**"), and all applicable PSC rules, regulations, and PSC orders relating to ESCO qualification or obligations (collectively, "**Applicable Law**"), and all Tariff provisions for the Company (including Company's SC 11 Load Aggregation Service Agreement), each as may be amended from time to time ("**Company Requirements**") relating to the sale of natural gas by energy services companies in Company's service territory;
  - b. it is obligated to supply gas to one or more retail customers on Company's distribution system in quantities determined by the Company from time to time ("**Contract**");

Quantity”), pursuant to a state-regulated retail access program (“State Program”), as defined in Part 284 of the Federal Energy Regulatory Commission’s (“FERC”) Regulations; and

c. it and or ESCO’s Agent satisfy the credit requirements prescribed by the FERC Gas Tariffs of the pipelines on which capacity may be released.

2. **Designation and Effect of Designation of ESCO’s Agent.** ESCO hereby designates ESCO’s Agent as its agent for the purposes of providing services to ESCO under the Program, including services for transportation capacity on interstate pipelines. The details of ESCO’s eligibility to participate in such State Program shall not be deemed to be altered in any way by its designation of ESCO’s Agent as its agent under this Agreement or the transactions contemplated hereunder.

3. **Revocation of Designation.** ESCO may revoke its designation of ESCO’s Agent as its agent for purposes of providing services to ESCO under the Program, including services for transportation capacity on interstate pipelines. ESCO shall provide Company with written notice of such revocation and shall promptly designate a replacement agent for services related to transportation capacity on interstate pipelines or otherwise provide for meeting its obligations under the Program.

4. **Non-exclusive Designation.** ESCO and ESCO’s Agent acknowledge and agree that ESCO’s designation of ESCO’s Agent is not exclusive and that ESCO may designate one or more agents, or elect to retain capacity for its own use, provided that ESCO provides prior written notice to Company. If ESCO is designating an additional or alternate agent, each such additional or alternate agent and ESCO must execute a “Capacity Release Agreement.”

5. **ESCO’s Agent Representations.** ESCO’s Agent represents that it

- a. is acting as ESCO’s agent for purposes of providing services to ESCO under the Program, including services for transportation capacity on interstate pipelines;
- b. has a contractual obligation to supply gas to ESCO in an amount equivalent to the Contract Quantity and to act as an agent or as an asset manager for ESCO, including providing services for transportation capacity on interstate pipelines;
- c. is obligated to use up to the full amount of the Capacity Release, as defined herein, to supply the Contract Quantity to ESCO and, as a result, ESCO’s Agent qualifies for the exemptions from bidding and the prohibition against tying of releases of interstate gas pipeline capacity pursuant to FERC’s Regulations.
- d. Satisfies the in compliance with credit requirements prescribed by the FERC Gas Tariffs of the pipelines on which capacity may be released

- 6. Capacity Release Request.** ESCO requests that Company make a release to ESCO or ESCO's Agent where agent is designated by ESCO of interstate pipeline capacity sufficient to transport the full Contract Quantity (the "Capacity Release").
- 7. Title to Gas.** As between Company, ESCO and ESCO's Agent, ESCO and ESCO's Agent warrant to Company title to the gas to be transported pursuant to the Capacity Release.
- 8. Capacity Release Addendum.** ESCO requests that the Capacity Release be released to the named entity on the pipeline(s) as designated in the attached **Capacity Release Addendum** to be completed by ESCO and returned to Company with this Agreement. ESCO shall provide Company with prompt written notice of any modifications to the Capacity Release Addendum.
- 9. Pipeline Obligations.** ESCO and /or ESCO's Agent shall pay the pipelines directly for all charges associated with the Capacity Release, including without limitation demand charges, commodity charges, taxes, surcharges, fuel allowance, imbalance and overrun charges, penalties, and other applicable charges. Company reserves all its rights for reimbursement from ESCO and/or ESCO's Agent in the event of ESCO's and/or ESCO's Agent's failure to pay the pipelines' charges in connection with the Capacity Release. ESCO and ESCO's Agent acknowledge and agree to the extent that Company incurs any charges or losses as a result of ESCO's and/or ESCO's Agent's failure to pay pipeline charges in connection with the Released Capacity or to otherwise comply with applicable Law, ESCO and ESCO's Agent shall be jointly and severally liable to Company for such charges and losses.
- 10. FERC Compliance.** The Parties intend that the transactions hereunder qualify for the waiver of the FERC prohibition on tying and bidding requirements for capacity releases made as part of state-approved retail access programs contemplated by FERC Orders 712, 712-A and 712-B.
- 11. Limitation of Liability.** To the fullest extent allowed by law, in no event shall any Party be liable for any consequential, incidental, indirect, special or punitive damages incurred by another Party and connected with, arising from or related to this Agreement, including but not limited to loss of good will, cost of capital, claims of customers and lost profits or revenue, whether or not such loss or damages is based in contract, warranty, tort, negligence, strict liability, indemnity, or otherwise, even if a party has been advised of the possibility of such damages.
- 12. Indemnification.** ESCO and ESCO's Agent, to the fullest extent allowed by law, shall indemnify, defend and save harmless Company, its parent, subsidiary and affiliate companies, and its and their officers, directors, shareholders, agents, employees, contractors, representatives, successors and assigns ("Indemnified Parties") from and against any and all suits, actions, legal proceedings, claims, losses, demands, damages, costs, liabilities, fines, penalties, royalties, obligations, judgments, orders, writs, injunctions, decrees, assessments, diminutions in value of any kind and expenses of whatsoever kind or character, including

reasonable attorneys' fees and court costs, whether incurred in a third party action or in an action to enforce this provision that may at any time be imposed on, incurred by or asserted against any of the Indemnified Parties by any third party, including, without limitation, the FERC or ESCO Customers, arising from on in connection with any (a) breach of a representation or warranty or failure to perform any covenant or agreement in this Agreement by ESCO or ESCO's Agent, (b) any violation of applicable law, regulation or order by ESCO or ESCO's Agent, or (c) any act or omission by ESCO or ESCO's Agent with respect to this Agreement, first arising, occurring or existing during the term of this Agreement, whether incurred by settlement or otherwise, and whether such claims or actions are threatened or filed prior to or after the termination of the Agreement, except to the extent caused by an act of gross negligence or willful misconduct by an officer, director, agent, employee, or affiliate of Company or its respective successors or assigns. The obligations of ESCO and ESCO's Agent as set forth in this section shall survive the expiration, cancellation, or termination of this Agreement.

**13. General.**

- a. Assignment. No Party shall assign any of its rights or obligations under this Agreement without obtaining the prior written consent of the other Parties, which consent shall not be unreasonably withheld.
- b. Entire Agreement. This Agreement constitutes the entire agreement and understanding between the Parties with respect to the subject matter hereof, supersedes any and all previous agreements and understandings between the Parties with respect to the subject matter hereof, and binds and inures to the benefit of the Parties, their successors and permitted assigns.
- c. Amendment. Except as otherwise provided herein, no modification or waiver of all or any part of this Agreement will be valid unless in writing and signed by the Parties or their agents and approved by Company. A waiver will be effective only for the particular event for which it is issued and will not be deemed a waiver with respect to any subsequent performance, default or matter.
- d. Governing Law/Venue. Interpretation and performance of this Agreement will be in accordance with, and will be controlled by the laws of the State of New York except its conflict of law's provisions to the extent they would require the application of the laws of any other jurisdiction. The parties irrevocably consent that any legal action or proceeding arising under or relating to this Agreement will be brought in a court of the State of New York in New York or Kings County, or a Federal court of the United States of America located in the State of New York, New York or Kings County. The Parties irrevocably waive any objection that they may now or in the future have to the State of New York, New York or Kings County as the proper and exclusive forum for any legal action or proceeding arising under or relating to this Agreement.
- e. Severability. If one or more provisions herein are held to be invalid, illegal or unenforceable in any respect, it will be given effect to the extent permitted by applicable law,

and such invalidity, illegality or unenforceability will not affect the validity of the other provisions of this Agreement.

**IN WITNESS WHEREOF**, the ESCO and ESCO's Agent have caused this agreement to be executed by their duly authorized representatives as of the date first above written.

**ESCO LEGAL ENTITY NAME:** \_\_\_\_\_

Authorized Representative Signature: \_\_\_\_\_

Authorized Representative Name: \_\_\_\_\_

Authorized Representative Title: \_\_\_\_\_

Street Address: \_\_\_\_\_

Email Address: \_\_\_\_\_

**ESCO's AGENT LEGAL ENTITY NAME:** \_\_\_\_\_

Authorized Representative Signature: \_\_\_\_\_

Authorized Representative Name: \_\_\_\_\_

Authorized Representative Title: \_\_\_\_\_

Street Address: \_\_\_\_\_

Email Address: \_\_\_\_\_

- **For Company use below** -

Company Representative Name: \_\_\_\_\_

Company Representative Title: \_\_\_\_\_

Street Address: \_\_\_\_\_

Email Address: \_\_\_\_\_

### Capacity Release Addendum

**Instructions:**

Date: \_\_\_\_\_

- Please select the applicable pipelines operating in the Program service territory. *E.g.:* *Dominion, Iroquois, Tennessee, TransCanada & Union.*
- For each pipeline that capacity will be released on, fill in the legal entity names for both the ESCO and where designated, ESCO's Agent
- If the ESCO has no third party, and the ESCO will be accepting in its own capacity, enter the ESCO name in both columns.
- The name in the fourth column is the name National Grid will use when releasing interstate pipeline capacity.

✓	Pipeline	ESCO Legal Entity Name	Legal Entity Name (ESCO's Agent, where applicable) <b>(This is the name of the entity to which capacity is released on pipeline)</b>
	Dominion		
	Tennessee		
	Iroquois		
	TransCanada		
	Union		

**Service Territory: The Niagara Mohawk Power Corporation d/b/a National Grid**

ESCO: \_\_\_\_\_

ESCO's Agent: \_\_\_\_\_

**ANY CHANGES TO THIS ADDENDUM MUST BE SUBMITTED TO COMPANY BY ESCO IN WRITING.**

**NOTE:** Changes submitted mid-month may not be effective until the following capacity release month.