

## ARTICLE 5. INTERCONNECTION FACILITIES ENGINEERING, PROCUREMENT, AND CONSTRUCTION

**5.1 Options.** Unless otherwise mutually agreed to by Developer and Transmission Owner, Developer shall select the In-Service Date, Initial Synchronization Date, and Commercial Operation Date; and either Standard Option or Alternate Option set forth below for completion of the Transmission Owner's Attachment Facilities and System Upgrade Facilities as set forth in Appendix A hereto, and such dates and selected option shall be set forth in Appendix B hereto. However, in no event shall any such date be earlier than fifteen (15) months after satisfaction of all of the activities and related conditions precedent provided for in subparagraphs 5.4 and 5.5.

**5.1.1 Standard Option.** The Transmission Owner shall design, procure, and construct the Transmission Owner's Attachment Facilities and System Upgrade Facilities, using ~~r~~Reasonable ~~e~~Efforts to complete the Transmission Owner's Attachment Facilities and System Upgrade Facilities by the dates set forth in Appendix B hereto. The Transmission Owner shall not be required to undertake any action which is inconsistent with its standard safety practices, its material and equipment specifications, its design criteria and construction procedures, its labor agreements, and Applicable Laws and Regulations. In the event the Transmission Owner reasonably expects that it will not be able to complete the Transmission Owner's Attachment Facilities and System Upgrade Facilities by the specified dates, the Transmission Owner shall promptly provide written notice to the Developer and NYISO, and shall undertake ~~r~~Reasonable ~~r~~Efforts to meet the earliest dates thereafter.

**5.1.2 Alternate Option.** If the dates designated by Developer are acceptable to Transmission Owner, the Transmission Owner shall so notify Developer and NYISO within thirty (30) Calendar Days, and shall assume responsibility for the design, procurement and construction of the Transmission Owner's Attachment Facilities by the designated dates.

If Transmission Owner subsequently fails to complete Transmission Owner's Attachment Facilities by the In-Service Date, to the extent necessary to provide back feed power; or fails to complete System Upgrade Facilities by the Initial Synchronization Date to the extent necessary to allow for Trial Operation at full power output, unless other arrangements are made by the Developer and Transmission Owner for such Trial Operation; or fails to complete the system Upgrade Facilities by the Commercial Operation Date, as such dates are reflected in Appendix B hereto; Transmission Owner shall

pay Developer liquidated damages in accordance with Article 5.3, Liquidated Damages, provided, however, the dates designated by Developer shall be extended day for day for each day that NYISO refuses to grant clearances to install equipment.

~~**5.1.3 Option to Build.** If the dates designated by Developer are not acceptable to Transmission Owner, the Transmission Owner shall so notify the Developer and NYISO within thirty (30) Calendar Days, and unless the Developer and Transmission Owner agree otherwise, Developer shall have the option to assume responsibility for the design, procurement and construction of Transmission Owner's Attachment Facilities and Stand Alone System Upgrade Facilities. Both Transmission Owner and Developer must agree as to what constitutes Stand Alone System Upgrade Facilities and identify such Stand Alone System Upgrade Facilities in Appendix A hereto. Except for Stand Alone System Upgrade Facilities, Developer shall have no right to construct System Upgrade Facilities under this option.~~

~~**5.1.4 Negotiated Option.** If the Developer elects not to exercise its option under Article 5.1.3, Option to Build, Developer shall so notify Transmission Owner and NYISO within thirty (30) Calendar Days, and the Developer and Transmission Owner shall in good faith attempt to negotiate terms and conditions (including revision of the specified dates and liquidated damages, the provision of incentives or the procurement and construction of a portion of the Transmission Owner's Attachment Facilities and Stand Alone System Upgrade Facilities by Developer) pursuant to which Transmission Owner is responsible for the design, procurement and construction of the Transmission Owner's Attachment Facilities and System Upgrade Facilities. If the two Parties are unable to reach agreement on such terms and conditions, Transmission Owner shall assume responsibility for the design, procurement and construction of the Transmission Owner's Attachment Facilities and System Upgrades Facilities pursuant to 5.1.1, Standard Option.~~

~~**5.2 General Conditions Applicable to Option to Build.** If Developer assumes responsibility for the design, procurement and construction of the Transmission Owner's Attachment Facilities and Stand Alone System Upgrade Facilities,~~

~~(1) Developer shall engineer, procure equipment, and construct the Transmission Owner's Attachment Facilities and Stand Alone System Upgrade Facilities (or portions thereof) using Good Utility Practice and using standards and specifications provided in advance by the Transmission Owner;~~

~~(2) — Developer's engineering, procurement and construction of the Transmission Owner's Attachment Facilities and Stand Alone System Upgrade Facilities shall comply with all requirements of law to which Transmission Owner would be subject in the engineering, procurement or construction of the Transmission Owner's Attachment Facilities and Stand Alone System Upgrade Facilities;~~

~~(3) — Transmission Owner shall review and approve the engineering design, equipment acceptance tests, and the construction of the Transmission Owner's Attachment Facilities and Stand Alone System Upgrade Facilities;~~

~~(4) — prior to commencement of construction, Developer shall provide to Transmission Owner and NYISO a schedule for construction of the Transmission Owner's Attachment Facilities and Stand Alone System Upgrade Facilities, and shall promptly respond to requests for information from Transmission Owner or NYISO;~~

~~(5) — at any time during construction, Transmission Owner shall have the right to gain unrestricted access to the Transmission Owner's Attachment Facilities and Stand Alone System Upgrade Facilities and to conduct inspections of the same;~~

~~(6) — at any time during construction, should any phase of the engineering, equipment procurement, or construction of the Transmission Owner's Attachment Facilities and Stand Alone System Upgrade Facilities not meet the standards and specifications provided by Transmission Owner, the Developer shall be obligated to remedy deficiencies in that portion of the Transmission Owner's Attachment Facilities and Stand Alone System Upgrade Facilities;~~

~~(7) — Developer shall indemnify Transmission Owner and NYISO for claims arising from the Developer's construction of Transmission Owner's Attachment Facilities and Stand Alone System Upgrade Facilities under the terms and procedures applicable to Article 18.1 Indemnity;~~

~~(8) — Developer shall transfer control of Transmission Owner's Attachment Facilities and Stand Alone System Upgrade Facilities to the Transmission Owner; and~~

~~(9) — Transmission Owner shall approve and accept for operation and maintenance the Transmission Owner's Attachment Facilities and Stand Alone System Upgrade Facilities to the extent engineered, procured, and constructed in accordance with this Article 5.2.~~

## 5.2.3 Liquidated Damages.

5.2.1 Unless otherwise agreed to by the Transmission Owner and Generator, this provision shall not apply to the Standard Option set forth in subparagraph 5.1.1 above. ¶ The actual damages to the Developer, in the event the Transmission Owner's Attachment Facilities or System Upgrade Facilities are not completed by the dates designated by the Developer and accepted by the Transmission Owner pursuant to subparagraphs 5.1.2 ~~or 5.1.4~~, above, may include Developer's fixed operation and maintenance costs and lost opportunity costs. Such actual damages are uncertain and impossible to determine at this time. Because of such uncertainty, any liquidated damages paid by the Transmission Owner to the Developer in the event that Transmission Owner does not complete any portion of the Transmission Owner's Attachment Facilities or System Upgrade Facilities by the applicable dates, shall be an amount equal to 1/2 of 1 percent per day of the actual cost of the Transmission Owner's Attachment Facilities and System Upgrade Facilities that are delayed, and in the aggregate, for which Transmission Owner has assumed responsibility to design, procure and construct.

However, in no event shall the total liquidated damages exceed 20 percent of the actual cost of the Transmission Owner Attachment Facilities and System Upgrade Facilities for which the Transmission Owner has assumed responsibility to design, procure, and construct. The foregoing payments will be made by the Transmission Owner to the Developer as just compensation for the damages caused to the Developer, which actual damages are uncertain and impossible to determine at this time, and as reasonable liquidated damages, but not as a penalty or a method to secure performance of this Agreement.

## 5.2.2

~~Further,~~ Notwithstanding anything herein to the contrary, Transmission Owner shall not pay liquidated damages to Developer if: (1) Developer is not ready to commence use of the Transmission Owner's Attachment Facilities or System Upgrade Facilities to take the delivery of power for the Developer's Large Facility's Trial Operation or to export power from the Developer's Large Facility on the specified dates, unless the Developer would have been able to commence use of the Transmission Owner's Attachment Facilities or System Upgrade Facilities to take the delivery of power for Developer's Large Facility's Trial Operation or to export power from the Developer's Large Facility, but for Transmission Owner's delay, or has otherwise failed to demonstrate any material damage or injury resulting solely from the delay in the completion of the facilities; (2) the Transmission Owner's failure to meet the specified dates is the result of the action or inaction of the Developer or any other Developer who has entered into an Interconnection Agreement with the Transmission Owner

~~or and~~ NYISO, or the action or inaction of any other party or any other ~~cause~~ beyond Transmission Owner's reasonable control or reasonable ability to cure; ~~(3) the Developer has assumed responsibility for the design, procurement and construction of the Transmission Owner's Attachment Facilities and Stand Alone System Upgrade Facilities; or~~ (4) the Transmission Owner and Developer have otherwise agreed; or (5) the Transmission Owner is unable to recover any such liquidated damages from its customers.

5.2.3 Any liquidated damages paid by the Transmission Owner shall represent the sole and exclusive remedy for any failure to complete construction of any such facilities.

5.2.4 In no event shall NYIS ~~OO~~ have any liability whatever to Developer or Transmission Owner for liquidated damages, or any other damages of whatever kind, associated with the engineering, procurement or construction of Attachment Facilities or System Upgrade Facilities; unless the failure to meet the construction schedule is attributable to the action or inaction of the NYISO.

**5.45.3 Power System Stabilizers.** The Developer shall procure, install, maintain and operate Power System Stabilizers in accordance with the requirements identified in the Interconnection Studies conducted for Developer's Large Facility. NYISO and Transmission Owner reserve the right to reasonably establish minimum acceptable settings for any installed Power System Stabilizers, subject to the design and operating limitations of the Large Facility. If the Large Facility's Power System Stabilizers are removed from service or not capable of automatic operation, the Developer shall immediately notify the Transmission Owner and NYISO.

**5.45 Equipment Procurement.** ~~If responsibility for construction of the Transmission Owner's Attachment Facilities or System Upgrade Facilities is to be borne by the Transmission Owner, then t~~The Transmission Owner shall commence design of the Transmission Owner's Attachment Facilities or System Upgrade Facilities and procure necessary equipment as soon as practicable after all of the following conditions are satisfied, unless the Developer and Transmission Owner otherwise agree in writing:

**5.54.1** NYISO and Transmission Owner have completed the Interconnection Facilities Study pursuant to the Interconnection Facilities Study Agreement;

**5.45.2** The NYISO has completed the required cost allocation analyses, and Developer has accepted his share of the costs for necessary

System Upgrade Facilities in accordance with the provisions of Attachment S of the NYISO OATT;

- 5.45.3** The Transmission Owner has received written authorization to proceed with design and procurement from the Developer by the date specified in Appendix B hereto; and
- 5.45.4** The Developer has provided security to the Transmission Owner in accordance with Article 11.5 by the dates specified in Appendix B hereto.
- 5.65 Construction Commencement.** The Transmission Owner shall commence construction of the Transmission Owner's Attachment Facilities and System Upgrade Facilities for which it is responsible as soon as practicable after the following additional conditions are satisfied:

  - 5.56.1** Approval of the appropriate Governmental Authority has been obtained for any facilities requiring regulatory approval;
  - 5.65.2** Necessary real property rights and rights-of-way have been obtained, to the extent required for the construction of a discrete aspect of the Transmission Owner's Attachment Facilities and System Upgrade Facilities;
  - 5.56.3** The Transmission Owner has received written authorization to proceed with construction from the Developer by the date specified in Appendix B hereto; and
  - 5.56.4** The Developer has provided security to the Transmission Owner in accordance with Article 11.5 by the dates specified in Appendix B hereto.
- 5.76 Work Progress.** The Developer and Transmission Owner will keep each other, and NYISO, advised periodically as to the progress of their respective design, procurement and construction efforts. Any Party may, at any time, request a progress report from the Developer or Transmission Owner. If, at any time, the Developer determines that the completion of the Transmission Owner's Attachment Facilities will not be required until after the specified In-Service Date, the Developer will provide written notice to the Transmission Owner and NYISO of such later date upon which the completion of the Transmission Owner's Attachment Facilities will be required.
- 5.78 Information Exchange.** As soon as reasonably practicable after the Effective Date, the Developer and Transmission Owner shall exchange information, and provide NYISO the same information, regarding the

design and compatibility of their respective Attachment Facilities and compatibility of the Attachment Facilities with the New York State Transmission System, and shall work diligently and in good faith to make any necessary design changes.

**5.89 Limited Operation.** If any of the Transmission Owner's Attachment Facilities or System Upgrade Facilities are not reasonably expected to be completed prior to the Commercial Operation Date of the Developer's Large Facility, NYISO shall, upon the request and at the expense of Developer, ~~with the cooperation in conjunction with~~ of the Transmission Owner, perform operating studies on a timely basis to determine the extent to which the Developer's Large Facility and the Developer's Attachment Facilities may operate prior to the completion of the Transmission Provider's Attachment Facilities or System Upgrade Facilities consistent with Applicable Laws and Regulations, Applicable Reliability Standards, Good Utility Practice, ~~and Subject to the other provisions of this Agreement,~~ Transmission Owner and NYISO shall use reasonable efforts to permit Developer to operate the Developer's Large Facility and the Developer's Attachment Facilities in accordance with the results of such studies.

**5.940 Developer's Attachment Facilities ("DAF").** Developer shall, at its expense, design, procure, construct, own and install the DAF, as set forth in Appendix A hereto.

**5.940.1 Large Facility Specifications.** Developer shall submit initial specifications for the DAF, including System Protection Facilities, to Transmission Owner and NYISO at least one hundred eighty (180) Calendar Days prior to the Initial Synchronization Date; and final specifications for review and comment at least ninety (90) Calendar Days prior to the Initial Synchronization Date. Transmission Owner and NYISO shall review such specifications to ensure that the DAF are compatible with the technical specifications, operational control, and safety requirements of the Transmission Owner and NYISO and comment on such specifications within thirty (30) Calendar Days of Developer's submission. All specifications provided hereunder shall be deemed to be Confidential Information.

**5.940.2 No Warranty.** The review of Developer's final specifications by Transmission Owner and NYISO shall not be construed as confirming, endorsing, or providing a warranty as to the design, fitness, safety, durability or reliability of the Large Facility, or the DAF. Developer shall make such changes to the DAF as may reasonably be required by Transmission Owner or NYISO, in accordance with Good Utility Practice, to ensure that the DAF are

compatible with the telemetry, communications, and safety requirements of the Transmission Owner and NYISO.

**5.910.3 DAF Construction.** The DAF shall be designed and constructed in accordance with Good Utility Practice. Within one hundred twenty (120) Calendar Days after the Commercial Operation Date, unless the Developer and Transmission Owner agree on another mutually acceptable deadline, the Developer shall deliver to the Transmission Owner and NYISO “as-built” drawings, information and documents for the DAF, such as: a one-line diagram, a site plan showing the Large Facility and the DAF, plan and elevation drawings showing the layout of the DAF, a relay functional diagram, relaying AC and DC schematic wiring diagrams and relay settings for all facilities associated with the Developer’s step-up transformers, the facilities connecting the Large Facility to the step-up transformers and the DAF, and the impedances (determined by factory tests) for the associated step-up transformers and the Large Facilities. The Developer shall provide to, and coordinate with, Transmission Owner and NYISO with respect to proposed specifications for the excitation system, automatic voltage regulator, Large Facility control and protection settings, transformer tap settings, and communications.

**5.104 Transmission Owner’s Attachment Facilities Construction.** The ~~Transmission Provider’s~~ Transmission Owner’s Attachment Facilities shall be designed and constructed in accordance with Good Utility Practice. Upon request, within one hundred twenty (120) Calendar Days after the Commercial Operation Date, unless the Transmission Owner and Developer agree on another mutually acceptable deadline, the Transmission Owner shall deliver to the Developer the following “as-built” drawings, information and documents for the Transmission Owner’s Attachment Facilities [include appropriate drawings and relay diagrams]. The Transmission Owner shall transfer operational control of the Transmission Owner’s Attachment Facilities and ~~Stand Alone~~ System Upgrade Facilities to the NYISO upon completion of such facilities.

**5.112 Access Rights.** Upon reasonable notice and supervision by the Granting Party, and subject to any required or necessary regulatory approvals, either the Transmission Owner or Developer (“Granting Party”) shall furnish ~~at no cost~~ to the other Party, subject to an agreement on reasonable compensation, of those two Parties (“Access Party”) any rights of use, licenses, rights of way and easements with respect to lands owned or controlled by the Granting Party ~~and its agents~~ that are necessary to enable the Access Party solely to obtain ingress and egress at the point of interconnection to construct, operate, maintain, repair, test (or witness testing), inspect, replace or remove facilities and equipment to: (i)



interconnect the Large Facility with the New York State Transmission System; (ii) operate and maintain the Large Facility, the Attachment Facilities and the New York State Transmission System; and (iii) disconnect or remove the Access Party's facilities and equipment upon termination of this Agreement. In exercising such licenses, rights of way and easements, the Access Party shall not unreasonably disrupt or interfere with normal operation of the Granting Party's business and shall adhere to the safety rules and procedures established in advance, as may be changed from time to time, by the Granting Party and provided to the Access Party. Notwithstanding the foregoing, nothing herein should be construed as requiring the Granting Party to provide the Access Party with access rights for the purpose of siting facilities. In addition, the Access Party shall indemnify the Granting Party against all claims of injury or damage from third parties resulting from the exercise of the access rights provided for herein.

**5.123 Lands of Other Property Owners.** If any part of the Transmission Owner's Attachment Facilities and/or System Upgrade Facilities is to be installed on property owned by persons other than Developer or Transmission Owner, the Transmission Owner shall at Developer's expense use reasonable efforts, ~~similar in nature and extent to those that it typically undertakes on its own behalf, including use of its eminent domain authority,~~ and to the extent consistent with state law, to procure from such persons any rights of use, licenses, rights of way and easements that are necessary to construct, operate, maintain, test, inspect, replace or remove the Transmission Owner's Attachment Facilities and/or System Upgrade Facilities upon such property. ~~Upon receipt of a reasonable siting request, Transmission Owner shall provide siting assistance to the Developer comparable to that provided to the Transmission Owner's own, or an Affiliate's generation, if any. This~~ subparagraph shall not apply in situations where Developer has the ability to exercise eminent domain rights.

**5.134 Permits.** Appendix [\_\_\_\_] of this Agreement shall specify the allocation of the responsibilities of the NYISO or Transmission Owner and the Developer to obtain all permits, licenses and authorizations that are necessary to accomplish the interconnection in compliance with Applicable Laws and Regulations. The NYISO, Transmission Owner and the Developer shall cooperate with each other in good faith in obtaining any such permits, licenses and authorizations. With respect to this paragraph, Transmission Owner shall provide permitting assistance to the Developer comparable to that provided to the Transmission Owner's own, or an Affiliate's generation, if any.

**5.145 Early Construction of Base Case Facilities.** Developer may request Transmission Owner to construct, and Transmission Owner shall

construct, using ~~r~~Reasonable ~~=e~~Efforts to accommodate Developer's In-Service Date, all or any portion of any System Upgrade Facilities required for Developer to be interconnected to the New York State Transmission System which are included in the Base Case of the Facilities Study for the Developer, and which also are required to be constructed for another Developer, but where such construction is not scheduled to be completed in time to achieve Developer's In-Service Date. Generator shall reimburse Transmission Owner for all costs incurred to the extent such costs are not recovered from other Developers included in the Base Case.

**5.156 Suspension.** Developer reserves the right, upon written notice to Transmission Owner and NYISO, to suspend or cancel its proposed interconnection. ~~at any time all work by Transmission Owner associated with the construction and installation of Transmission Owner's Attachment Facilities and/or System Upgrade Facilities required under this Agreement with the condition that the Transmission Owner shall be left in a safe and reliable condition in accordance with Good Utility Practice and the safety and reliability criteria of Transmission Owner and NYISO. In such event, Developer shall be responsible for all reasonable and necessary costs which Transmission Owner or NYISO (i) has incurred pursuant to this Agreement prior to the suspension and (ii) incurs in suspending such work, including any costs incurred to perform such work as may be necessary to ensure the safety of persons and property and the integrity of the New York State Transmission System during such suspension and, if applicable, any costs incurred in connection with the 88-129. This is not intended to be an exclusive list of the relevant conditions that must be met to conform to IRS requirements for nontaxable treatment. At Transmission Owner's request, Developer shall provide Transmission Owner with a report from an independent engineer confirming its representation in clause (iii), above. Transmission Owner represents and covenants that the cost of the Transmission Owner's Attachment Facilities paid for by Developer will have no net effect on the base upon which rates are determined. To the extent Developer suspends or cancels it proposed interconnection, it shall nevertheless remain liable for its share of any Transmission Owner Attachment Facilities and/or System Upgrade Facilities contemplated by the Interconnection Facilities Study. Any suspension for a period of three years or more will require Developer to recommence the interconnection process and the performance of a new Interconnection Facilities Study. [THIS CHANGE IS REQUIRED BY THE ISO'S METHOD OF DEALING WITH INTERCONNECTIONS FOR MULTIPLE GENERATORS IN A CLASS YEAR ON AN INTEGRATED BASIS--OTHERWISE ALL OTHER GENERATORS WOULD BE HARMED AS WELL AS LOAD THAT IS DEPENDING ON THE CLASS YEAR]~~

**5.167 Taxes.**

**5.167.1 Developer Payments Not Taxable.** The Developer and Transmission Owner intend that all payments or property transfers made by Developer to Transmission Owner for the installation of the Transmission Owner's Attachment Facilities and the System Upgrade Facilities shall be nontaxable, either as contributions to capital, or as an advance, in accordance with the Internal Revenue Code and any applicable state income tax laws and shall not be taxable as contributions in aid of construction or otherwise under the Internal Revenue Code and any applicable state income tax laws.

**5.167.2 Representations And Covenants.** In accordance with IRS Notice 2001-82 and IRS Notice 88-129, Developer represents and covenants that (i) ownership of the electricity generated at the Large Facility will pass to another party prior to the transmission of the electricity on the New York State Transmission System, (ii) for income tax purposes, the amount of any payments and the cost of any property transferred to the Transmission Owner for the Transmission Owner's Attachment Facilities will be capitalized by Developer as an intangible asset and recovered using the straight-line method over a useful life of twenty (20) years, and (iii) any portion of the Transmission Owner's Attachment Facilities that is a "dual-use intertie," within the meaning of IRS Notice 88-129, is reasonably expected to carry only a de minimis amount of electricity in the direction of the Large Facility. For this purpose, "de minimis amount" means no more than 5 percent of the total power flows in both directions, calculated in accordance with the "5 percent test" set forth in IRS Notice 88-129. This is not intended to be an exclusive list of the relevant conditions that must be met to conform to IRS requirements for nontaxable treatment.

At Transmission Owner's request, Developer shall provide Transmission Owner with a report from an independent engineer confirming its representation in clause (iii), above. Transmission Owner represents and covenants that the cost of the Transmission Owner's Attachment Facilities paid for by Developer will have no net effect on the base upon which rates are determined.

**5.167.3 Indemnification for Taxes Imposed Upon Transmission Owner.** Notwithstanding Article 5.167.1, Developer shall protect, indemnify and hold harmless Transmission Owner from income taxes imposed against Transmission Owner as the result of payments or property transfers made by Developer to Transmission Owner under this Agreement, as well as any interest and penalties,

other than interest and penalties attributable to any delay caused by Transmission Owner.

Provided that Developer provides Transmission Owner with security in an amount and form reasonably acceptable to Transmission Owner, the n Transmission Owner shall not include a gross-up for income taxes in the amounts it charges Developer under this Agreement unless (i) Transmission Owner has determined, in good faith, that the payments or property transfers made by Developer to Transmission Owner should be reported as income subject to taxation or (ii) any Governmental Authority directs Transmission Owner to report payments or property as income subject to taxation; provided, however, that Transmission Owner may require Developer to provide security, in a form reasonably acceptable to Transmission Owner (such as a parental guarantee or a letter of credit), in an amount equal to Developer's estimated tax liability under this Article 5.17. Developer shall reimburse Transmission Owner for such taxes on a fully grossed-up basis, in accordance with Article 5.17.4, within thirty (30) Calendar Days of receiving written notification from Transmission Owner of the amount due, including detail about how the amount was calculated.

~~In the event that the Transmission Owner includes a gross-up upon its own determination that the payments or property transfers should be reported as income subject to taxation, the Developer may require the Transmission Owner to provide security, in a form reasonably acceptable to the Developer (such as a parental guarantee or a letter of credit) in an amount equal to the Developer's estimated tax liability under this Article 5.17.~~

This indemnification obligation shall terminate at the earlier of (1) the expiration of the 10-year testing period, as contemplated by IRS Notice 88-129, and the applicable statute of limitation, as it may be extended by the Transmission Owner upon request of the IRS, to keep these years open for audit or adjustment, ~~or (2) the occurrence of a subsequent taxable event and the payment of any related indemnification obligations as contemplated by this Article 5.17.~~

**5.167.4 Tax Gross-Up Amount.** Developer's liability for taxes under this Article 5.17 shall be calculated on a fully grossed-up basis.

Except as may otherwise be agreed to by the parties, this means that Developer will pay Transmission Owner, in addition to the amount paid for the Attachment Facilities and System Upgrade Facilities, an amount equal to (1) the current taxes imposed on Transmission Owner (“Current Taxes”) on the excess of (a) the gross income realized by Transmission Owner as a result of payments or property transfers made by Developer to Transmission Owner under this Agreement (without regard to any payments under this Article 5.17) (the “Gross Income Amount”) over (b) the present value of future tax deductions for depreciation that will be available as a result of such payments or property transfers (the “Present Value Depreciation Amount”), plus (2) an additional amount sufficient to permit the Transmission Owner to receive and retain, after the payment of all Current Taxes, an amount equal to the net amount described in clause (1).

For this purpose, (i) Current Taxes shall be computed based on Transmission Owner’s composite federal and state tax rates at the time the payments or property transfers are received and Transmission Owner will be treated as being subject to tax at the highest marginal rates in effect at that time (the “Current Tax Rate”), and (ii) the Present Value Depreciation Amount shall be computed by discounting Transmission Owner’s anticipated tax depreciation deductions as a result of such payments or property transfers by Transmission Owner’s current weighted average cost of capital. Thus, the formula for calculating Developer’s liability to Transmission Owner pursuant to this Article 5.17.4 can be expressed as follows:  $(\text{Current Tax Rate} \times (\text{Gross Income Amount} - \text{Present Value of Tax Depreciation})) / (1 - \text{Current Tax Rate})$ . Developer’s estimated tax liability in the event taxes are imposed shall be stated in Appendix A, Attachment Facilities, System Upgrade Facilities and Distribution Upgrades.

**5.167.5 Private Letter Ruling or Change or Clarification of Law.**

At Developer’s request and expense, and subject to Developer providing Transmission Owner with an appropriate legal opinion from a qualified tax attorney, Transmission Owner shall file with the IRS a request for a private letter ruling as to whether any property transferred or sums paid, or to be paid, by Developer to Transmission Owner under this Agreement are subject to federal income taxation. Developer will prepare the initial draft of the request for a private letter ruling, and will certify under penalties of perjury that all facts represented in such request are true and accurate to the best of Developer’s knowledge. Transmission

Owner and Developer shall cooperate in good faith with respect to the submission of such request.

Transmission Owner shall keep Developer fully informed of the status of such request for a private letter ruling and shall execute either a privacy act waiver or a limited power of attorney, in a form acceptable to the IRS, that authorizes Developer to participate in all discussions with the IRS regarding such request for a private letter ruling.

Transmission Owner shall allow Developer to attend all meetings with IRS officials about the request and shall permit Developer to prepare the initial drafts of any follow-up letters in connection with the request. If the private letter ruling concludes that such transfers or sums are not subject to federal income taxation, or a clarification of or change in law results in Transmission Owner determining in good faith that such transfers or sums are not subject to federal income taxation, Parties' obligations regarding a gross-up or **security** under this Article 5.17 shall be reduced accordingly.

Notwithstanding such a private letter ruling, the Interconnecting Transmission Owner may continue require security to safeguard against changed circumstances that may invalidate the private letter ruling.

**5.167.6 Subsequent Taxable Events.** If, within 10 years from the date on which the relevant Transmission Owner Attachment Facilities are placed in service, (i) Developer Breaches the covenant contained in Article 5.17.2(i), (ii) a "disqualification event" occurs within the meaning of IRS Notice 88-129, or (iii) this Agreement terminates and Transmission Owner retains ownership of the Attachment Facilities and System Upgrade Facilities, the Developer shall pay a tax gross-up for the taxes imposed on Transmission Owner, calculated using the methodology described in Article 5.17.4 and in accordance with IRS Notice 90-0.

**5.167.7 Contests.** In the event any Governmental Authority determines that Transmission Owner's receipt of payments or property constitutes income that is subject to taxation, Transmission Owner shall notify Developer, in writing, within thirty (30) Calendar Days of receiving notification of such determination by a Governmental Authority. Upon the timely written request by Developer and at Developer's sole expense, Transmission Owner shall appeal, protest, seek abatement of, or otherwise oppose such determination. Upon Developer's written request and sole expense,

Transmission Owner shall file a claim for refund with respect to any taxes paid under this Article 5.17, whether or not it has received such a determination. Transmission Owner reserves the right to make all decisions with regard to the prosecution of such appeal, protest, abatement or other contest, including the selection of counsel and compromise or settlement of the claim, but Transmission Owner shall keep Developer informed, shall consider in good faith suggestions from Developer about the conduct of the contest, and shall reasonably permit Developer or an Developer representative to attend contest proceedings.

Developer shall pay to Transmission Owner on a periodic basis, as invoiced by Transmission Owner, Transmission Owner's documented reasonable costs of prosecuting such appeal, protest, abatement or other contest. Transmission Owner will not be required to appeal or seek further review beyond one level of judicial review. At any time during the contest, Transmission Owner may agree to a settlement either with Developer's consent or after obtaining written advice from nationally-recognized tax counsel, selected by Transmission Owner, but reasonably acceptable to Developer, that the proposed settlement represents a reasonable settlement given the hazards of litigation. Developer's obligation shall be based on the amount of the settlement agreed to by Developer, or if a higher amount, so much of the settlement that is supported by the written advice from nationally-recognized tax counsel selected under the terms of the preceding sentence. Any settlement without Developer's consent or such written advice will relieve Developer from any obligation to indemnify Transmission Owner for the tax at issue in the contest.

**5.167.8 Refund.** In the event that (a) a private letter ruling is issued to Transmission Owner which holds that any amount paid or the value of any property transferred by Developer to Transmission Owner under the terms of this Agreement is not subject to federal income taxation, (b) any legislative change or administrative announcement, notice, ruling or other determination makes it reasonably clear to Transmission Owner in good faith that any amount paid or the value of any property transferred by Developer to Transmission Owner under the terms of this Agreement is not taxable to Transmission Owner, (c) any abatement, appeal, protest, or other contest results in a determination that any payments or transfers made by Developer to Transmission Owner are not subject to federal income tax, or (d) if Transmission Owner receives a refund from any taxing authority for any overpayment of tax

attributable to any payment or property transfer made by Developer to Transmission Owner pursuant to this Agreement, Transmission Owner shall promptly refund to Developer the following:

(i) any payment made by Developer under this Article 5.17 for taxes that is attributable to the amount determined to be nontaxable, together with interest thereon,

(ii) on any amounts paid by Developer to Transmission Owner for such taxes which Transmission Owner did not submit to the taxing authority, calculated in accordance with the methodology set forth in FERC's regulations at 18 C.F.R. §35.19a(a)(2)(ii) from the date payment was made by Developer to the date Transmission Owner refunds such payment to Developer, and

(iii) with respect to any such taxes paid by Transmission Owner, any refund or credit Transmission Owner receives or to which it may be entitled from any Governmental Authority, interest (or that portion thereof attributable to the payment described in clause (i), above) owed to the Transmission Owner for such overpayment of taxes (including any reduction in interest otherwise payable by Transmission Owner to any Governmental Authority resulting from an offset or credit); provided, however, that Transmission Owner will remit such amount promptly to Developer only after and to the extent that Transmission Owner has received a tax refund, credit or offset from any Governmental Authority for any applicable overpayment of income tax related to the Transmission Owner's Attachment Facilities.

The intent of this provision is to leave both the Developer and Transmission Owner, to the extent practicable, in the event that no taxes are due with respect to any payment for Attachment Facilities and System Upgrade Facilities hereunder, in the same position they would have been in had no such tax payments been made.

**5.167.9 Taxes Other Than Income Taxes.** Upon the timely request by Developer, and at Developer's sole expense, Transmission Owner shall appeal, protest, seek abatement of, or otherwise contest any tax (other than federal or state income tax) asserted or assessed against Transmission Owner for which Developer may be required to reimburse Transmission Owner under the terms of this Agreement. Developer and Transmission Owner shall cooperate in good faith with respect to any such contest. Unless the payment of



such taxes is a prerequisite to an appeal or abatement or cannot be deferred, no amount shall be payable by Developer to Transmission Owner for such taxes until they are assessed by a final, non-appealable order by any court or agency of competent jurisdiction. In the event that a tax payment is withheld and ultimately due and payable after appeal, Developer will be responsible for all taxes, interest and penalties, other than penalties attributable to any delay caused by Transmission Owner.

**5.178 Tax Status.** Each Party shall cooperate with the other Parties to maintain the other Parties' tax status. Nothing in this Agreement is intended to adversely affect the tax status of any Party, including the status of NYISO, or the status of any Transmission ~~Owner~~Owner, or the tax exempt status of any existing or new bonds or other debt securities- with respect to the issuance of bonds including, but not limited to, Local Furnishing Bonds.

**5.189 Modification.**

**5.189.1 General.** Either the Developer or Transmission Owner may undertake modifications to its facilities covered by this Agreement. If either the Developer or Transmission Owner plans to undertake a modification that reasonably may be expected to affect the other Party's facilities, that Party shall provide to the other Party, and to NYISO, sufficient information regarding such modification so that the other Party and NYISO may evaluate the potential impact of such modification prior to commencement of the work. Such information shall be deemed to be confidential information hereunder and shall include information concerning the timing of such modifications and whether such modifications are expected to interrupt the flow of electricity from the Large Facility. The Party desiring to perform such work shall provide the relevant drawings, plans, and specifications to the other Party and NYISO at least ninety (90) Calendar Days in advance of the commencement of the work or such shorter period upon which the Parties may agree, which agreement shall not unreasonably be withheld, conditioned or delayed.

In the case of Large Facility modifications that do not require Developer to submit a New Interconnection Request, Transmission Owner shall provide, within thirty (30) Calendar Days (or such other time as the Parties may agree), an estimate of any additional modifications to the New York State Transmission System, Transmission Owner's Attachment Facilities or System Upgrade Facilities

necessitated by such Developer modification and a good faith estimate of the costs thereof.

**5.189.2 Standards.** Any additions, modifications, or replacements made to a Party's facilities shall be designed, constructed and operated in accordance with this Agreement, NYISO requirements and Good Utility Practice.

**5.189.3 Modification Costs.** Developer shall not be assigned the costs of any additions, modifications, or replacements that Transmission Owner makes to the Transmission Owner's Attachment Facilities or the New York State Transmission System to facilitate the interconnection of a third party to the Transmission Owner's Attachment Facilities or the New York State Transmission System, or to provide Transmission Service under the NYISO OATT, except in accordance with the cost allocation procedures in the NYISO OATT. Developer shall be responsible for the costs of any additions, modifications, or replacements to the Developer Attachment Facilities that may be necessary to maintain or upgrade such Developer Attachment Facilities consistent with Applicable Laws and Regulations, Applicable Reliability Standards or Good Utility Practice.