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.	**CONSENT DECREE** INDEX NO. 5280-09 Hon. Thomas J. McNamara
BROOKLYN NAVY YARD COGENERATION PARTNERS, L.P. and SELKIRK COGEN PARTNERS, L.P., Intervenors in Support of Petitioner/Plaintiff.	

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_2 Budget Trading

Program, 6 NYCRR Part 242 ("CO_2 Budget Trading Program rule"), and the CO_2 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_2 Budget Trading Program establishes a cap-and-trade air pollution reduction program that is intended to reduce the overall emissions of carbon dioxide ("CO_2") 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_2 Budget Trading Program;

WHEREAS, DEC's policy and intent in circumstances where a CO_2 budget source has more than one "owner" under the terms of the CO_2 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_2 Budget Trading Program rule to impose compliance obligations on a purchaser of power from a CO_2 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_2 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_2 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_2 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_2 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_2 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_2 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_2 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_2 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_2 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_2 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_2 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_2 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, NYSERDA 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 NYSERDA and promptly review the programs developed as a result of those discussions.

15. Within a reasonable time of (i) NYSERDA'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_2 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_2 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 15th 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_2 Budget Trading Program rule; or (2) the termination of compliance obligations under the CO_2 Budget Trading Program, including, but not limited to, through implementation of federal CO_2 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 ___, 2009

FOR PETITIONER/PLAINTIFF INDECK CORINTH, L.P.

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

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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
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December ___, 2009

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

By: _____
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New York, NY
December __, 2009

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

By: _____
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Consolidated Edison Company of New
York, Inc.
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(212) 460-2985

SO ORDERED:

Saratoga Springs, New York
_____, 2010

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