R-12-058

# RESOLUTION

## APPROVING TWO AGREEMENTS REGARDING THE JACKSON MILLS DAM

## *CITY OF NASHUA*

*In the Year Two Thousand and Twelve*

***RESOLVED*** *by the Board of Aldermen of the City of Nashua* that the Mayor is authorized to enter into two agreements regarding the Jackson Mills Dam, in substantially the same form as the attached, with Nashua Hydro Associates and Cotton Mill Square, LLC, to construct a crest gate on the Jackson Mills Dam.

# LEGISLATIVE YEAR 2012

**RESOLUTION:** R-12-058

**PURPOSE:** Approving two agreements regarding the Jackson Mills Dam

**SPONSOR(S):** Mayor Donnalee Lozeau
Alderman-at-Large Brian S. McCarthy
Alderman Michael Tabacsko
Alderman Diane Sheehan

**COMMITTEE ASSIGNMENT:**

**FISCAL NOTE:** Indeterminate.

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## ANALYSIS

This resolution approves two agreements regarding the Jackson Mills Dam relative to constructing and operating a crest gate on the dam. The first agreement is between the city and Nashua Hydro Associates, who operates a hydroelectric power generating facility at the Jackson Mills Dam, under an existing lease with the city. This first agreement establishes the conditions by which Nashua Hydro will permit the construction and operation of the crest gate. The second agreement is between the city and Cotton Mill Square, LLC, who will be the city's assignee of the rights and obligations of the city's agreement with Nashua Hydro Associates relative to the construction of the crest gate.

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**Approved as to account number and/or structure, and amount:**

**Financial Services Division**

**By:** _____

**Approved as to form:**

**Office of Corporation Counsel**

**By:** _____

**Date:** July 10, 2012

# AGREEMENT REGARDING JACKSON MILLS DAM

On this _____ day of July, 2012, the City of Nashua ("the City"), a New Hampshire municipal corporation, having a principal place of business at 229 Main Street, Nashua, New Hampshire 03060, and Nashua Hydro Associates, a New Hampshire limited partnership, having its principal place of business at Two Commercial Street, Boscawen, New Hampshire 03303 with a mailing address c/o Essex Hydro Associates, LLC, 55 Union Street, 4th Floor, Boston, Massachusetts 02108, ("NHA") (collectively, the "parties"), enter into this Agreement regarding Jackson Mills Dam (the "Agreement"):

**W I T N E S S E T H:**

**WHEREAS**, the City is the owner of certain property and rights concerning a certain dam located in the Nashua River in Nashua, New Hampshire identified as the Jackson Mills Dam (the "Dam");

**WHEREAS**, NHA has developed and operates a facility for the production of hydroelectric power at the Dam, pursuant to a certain Lease dated July 18, 1984, as amended, by Amendment to Lease dated November 21, 1984 (collectively the "Lease") and pursuant to a certain multiparty Agreement dated September 1, 1983, as amended by Amendment to Lease dated November ___, 1984, and Second Amendment to Lease dated November 21, 1984;

**WHEREAS**, pursuant to the Lease, NHA has obtained an order granting exemption from licensing of a small hydroelectric project issued by the United States of America Federal Energy Regulatory Commission, Project #7590-000 (the "FERC Exemption") located at the Dam;

**WHEREAS**, pursuant to the Lease, NHA controls all use and the operation of the Dam, including improvements thereto, during the term of the Lease;

**WHEREAS**, the City is desirous of modifying the infrastructure of the Dam at the City's expense for the purpose of flood water control along the Nashua River (said modification being hereinafter referred to as the "Modifications"), the Modifications to include, at least, removal of a portion of the existing dam structure and restoration thereof, and the construction of a crest gate (the "Crest Gate") in place to be operated by the dam operator for purposes of allowing the lowering of the impoundment level during flood stages of the Nashua River;

**WHEREAS**, the Modifications may require a modification or amendment to the existing FERC Exemption and other state and federal approvals (collectively referred to hereinafter as the "Approvals");

**WHEREAS**, construction of the Modifications may result in loss of use of the Dam for hydroelectric generation for periods of time and loss of generation subsequent to installation of the modifications;

**WHEREAS**, the Modifications may require NHA to change its operations, increase its potential liabilities and incur certain costs and expenses and create a risk of damage to the existing Dam structure;

**WHEREAS,** NHA is willing to cooperate with the City in pursuing the Approvals, including any amendment to the FERC Exemption, under the condition that the City agrees: (a) to prepare and complete all applications for the Approvals subject to review by NHA; (b) to reimburse NHA for any costs and expenses it may incur in the negotiation and review of the Agreement and the review and submission of the applications for the Approvals, by way of a credit against rent due under the Lease; (c) to execute a complete indemnification by the City for the benefit of NHA, and (d) to reimburse NHA for any costs, including lost revenues, incurred during construction of the modifications and costs, including lost revenues, incurred post construction, until the termination of the Lease;

**WHEREAS,** in order to allow the City to proceed to modify the Dam in accordance with the Approvals, the City is willing to be responsible; (a) for the production of all applications for the Approvals, at its sole cost and expense; (b) for the construction of the Modifications to the Dam at its sole cost and expense; (c) for the reimbursement of the costs and expenses incurred by NHA in the negotiation and review of the terms of this Agreement; (d) for the reimbursement of the costs and expenses incurred by NHA in the review and submission of all applications for the Approvals, and NHA's work during the construction period,(e) for the reimbursement of costs incurred by NHA to operate and maintain the Modifications post construction and; (f) for indemnifying and holding harmless NHA for the Modification.

**NOW, THEREFORE,** the parties hereto, for the mutual promises and covenants contained herein, all of which are deemed good and valuable consideration, do hereby agree and say as follows:

1. The City, its assignee and its independent contractors shall undertake drafting of the applications for the Approvals. The City shall submit all proposed applications, including the details of the proposed Modifications, to NHA for its review prior to NHA's submittal of the applications for Approvals to the various governmental agencies.

2. NHA will cooperate with the City in the application process, including prompt review, comment and submission of completed applications for the Approvals to allow the Modifications as necessary and as described in paragraphs 2-4 below.

3. Following receipt of any proposed applications from the City or its contractors, NHA shall have a period of seven (7) days to review the proposed applications. NHA reserves the right to reject any application for the Modifications which; (a) threaten the structural integrity of the Jackson Mills Dam; (b) compromise the safety of the operation of the hydroelectric generating facilities located at the Dam; (c) are contrary to the terms set forth in the Agreement; or (d) dictates any action or condition which might reasonably be expected to result in a violation of the terms of NHA's FERC Order of Exemption.

4. Any NHA rejection must be delivered to the City in writing within the seven (7) day review period. If no reasons for rejections have been tendered, prior to the expiration of the seven day review period, the applications shall be deemed accepted and NHA shall sign and submit the applications without delay. In the event of a rejection of an application, NHA shall notify the City of the basis for such rejection and shall agree to a meeting with the City, within five (5) days of such notification, to attempt to correct any matter giving rise to a NHA rejection. After which meeting, NHA may only refuse to execute any such rejected application for one or more of the valid reasons set forth in the preceding paragraph of the Agreement, with

such reason based strictly upon the opinion of a competent engineer or NHA's counsel, whichever the appropriate case may be.

5. The City shall reimburse NHA up to $60,000 by means of crediting the rental obligations of NHA, to the City, under the Lease, for the time expended by NHA personnel and costs and expenses incurred in the negotiations to date and the review of the Agreement, $15,832.00 of which has been credited as of the date of this Agreement. NHA personnel time shall be billed at specific rates as set forth on **Schedule A** attached hereto.

6. The City shall also reimburse NHA for all costs incurred by NHA resulting from NHA's efforts to effect the Modifications and arising from the construction and operation of the Modifications. Such NHA costs shall include, but not be limited to (a) time expended by NHA personnel (to be billed at specific rates as set forth on **Schedule A** attached hereto), (b) costs and expenses incurred for consultants, engaged by NHA, including, but not limited to attorneys and engineers, and (c) revenue lost by NHA as a result of interrupted or degraded hydroelectric generation, as defined in greater detail herein. Without limiting the generality of the forgoing, the broad areas of effort, for which the City agrees to reimburse NHA, are (a) all work related to obtaining the Approvals, (b) any and all review of construction plans and specifications for the construction of the Modifications, (c) the general review and periodic monitoring (to be not more frequent than once per week) of the construction of the Modifications, (d) the training of NHA's personnel in the use and operation of the Crest Gate once the Crest Gate is in place, and (e) the costs and expenses related to modifying NHA's equipment, structures, and software to accommodate the operation of the Modifications. Except for the expenses noted in the following Section 8, the City shall reimburse NHA for costs by crediting the rental obligations of NHA, to the City, under the Lease.

7. The City shall compensate NHA in the form of cash for the following: (a) costs and expenses incurred for consultants, engaged by NHA, including, but not limited to attorneys and engineers, and (b) revenue lost by NHA as a result of interrupted or degraded hydroelectric generation, related to the design, permitting, or construction of the Modifications or occurring after the commencement of the construction , up through the time when the Modifications are completed and the Crest Gate has become operational ("Lost Revenue"). The calculation of Lost Revenue will be made by NHA and presented to the City, using a formula set forth on **Schedule B** attached; (c) costs and expenses related to modifying NHA's equipment, structures, and software to accommodate the operation of the Modifications, which shall include the time and expenses of NHA's technical staff.

8. NHA shall submit periodic invoices for the Reimbursements to the City, no less often than monthly, supplying sufficient records and data to support the invoices in order to allow the City to confirm such costs and expenses to have been reasonably incurred. The amount of the invoice will be credited against NHA's lease payment to the City for the year in which the invoice is billed unless the invoice presented requires cash payment, as outlined in Section 8 of this document, in which case the City shall pay such invoice within 30 days of receipt. In the event the credit accrued by NHA in a year exceeds NHA's rental amount due to the City for that year, the amount in excess shall be credited against NHA's rental amount due to the City for the following year. For cash invoices not paid within 30 days, the City shall pay NHA the monies owed plus interest accrued from the date the invoice was due. Interest shall be

accrued at the average Prime rate over the period. The Prime rate shall be taken from the Wall Street Journal or some other suitable source.

9. Following construction of the Modifications by the City, NHA shall lower the Crest Gate any time the river level at the dam exceeds 116 feet [this number needs to be provided by the City's engineer]. Notwithstanding the terms of the Lease, the Modifications including the Crest Gate, shall belong to the City and remain in place following termination of the Lease. During the remainder of the Lease, the City shall be responsible for insuring the Modifications, including the Crest Gate.

10. The City shall compensate NHA in the form of credits against rent due from NHA to the City under the Lease for (a) the costs and expenses incurred by NHA in the actual operation of the Crest Gate or maintenance which exceed the costs and expenses of operation of the Jackson Mills Dam in its current condition, and (b) the loss of revenue from hydroelectric power generation caused by the loss of hydraulic head when the Crest Gate is lowered. Such costs, expenses and loss of revenue shall be invoiced in sufficient detail by NHA to the City in order to allow the City a reasonable review of the same and shall follow the conditions in Section 9. In the event the City shall dispute the amount of costs, expenses and Lost Revenue or the time involved in the operation of the Crest Gate which exceed the cost of the operation of the Dam in its current state, the parties will attempt to mediate the dispute within fifteen (15) days, failing which the dispute shall be resolved as otherwise set forth herein below.

11. The City and its independent contractor shall at all times provide statutory workers' compensation insurance coverage for all employees working on the investigation leading up to the preparation of the application and the construction of the Modifications. The City and its independent contractor shall provide a certificate of insurance to NHA reflecting such coverage and providing that such coverage may not be cancelled with less than thirty (30) days written notice to NHA.

12. The City and its independent contractor shall at all times during the term of the Agreement maintain general liability insurance in the minimum amount of $5,000,000 per occurrence, $5,000,000 aggregate, insuring against liabilities and damages arising out of the construction of the Modifications, and following the completion of the Modifications, arising out of the operation of the Crest Gate; and shall name NHA as an additional insured under the insurance policy, and shall provide a certificate of insurance to NHA reflecting such coverage and providing that such coverage may not be cancelled with less than thirty (30) days written notice to NHA. Notwithstanding the following sections, in no case shall any party's insurance have recourse against NHA's insurance.

13. The City shall hold NHA harmless from and against any claims, losses, damages or liabilities suffered by the City or its independent contractors or subcontractors arising out of the rights granted to the City by NHA hereunder, including, but not limited to, the construction of the Modifications and the operation by NHA of the Crest Gate, except in the event such claims, losses, damages or liabilities are the result of the gross negligence, willful misconduct or fraud of NHA or breach by NHA of the terms and conditions of the Agreement.

14. The City and its independent contractor shall indemnify NHA for, from and against any claims, losses, damages or other liabilities (including legal costs) arising out of the rights granted to the City by NHA under the Agreement, excepting those claims, damages, or

liabilities resulting from the gross negligence, willful misconduct or fraud of NHA or the breach by NHA of the terms and conditions of the Agreement.

15. NHA shall be released by the City from any obligations to maintain or repair the Jackson Mills Dam, the Crest Gate or any of the Modifications, whether under the Lease or otherwise, at any time during the term of the Lease or in the future, excepting in the event such repair or maintenance is not the result of the installation of the Modifications or the gross negligence, willful misconduct or fraud of NHA or is as a result of the breach of the terms of the Agreement by NHA.

16. The City shall hold NHA harmless from any claims arising from the failure of the Modifications to modify the flood plain. The City agrees that NHA is not responsible for the Crest Gate Modification's ability to modify the flood plain and the City shall hold NHA harmless should the Modifications not result in the anticipated changes to the flood plain. Furthermore, the City shall hold NHA harmless from any claims that may result from flooding that occurs following the installation of the Modifications and is a result of the Modifications, except in the event of the gross negligent operation of the Modifications by NHA.

17. To the extent that it has the legal authority to do so, NHA shall allow the City and its independent contractor and subcontractors full and unfettered access to Jackson Mills Dam, including a right of easement over the access ways and/or any appurtenant rights attributable to the operation of the Jackson Mills Dam during the construction of the Modifications and shall agree to remove from operation the hydroelectric generating facility at the Jackson Mills Dam during the construction of the Modifications as may be reasonably necessary to allow the construction of the Modifications, the cost of which removal and reinstallation of equipment, materials or machinery, and labor shall be borne one hundred percent (100%) by the City. In addition, NHA reserves the right to perform the mechanical and computer work necessary to integrate the Modifications into NHA's existing command and control system.

18. The Agreement shall be deemed a contract enforceable under the laws of the State of New Hampshire and shall be binding upon the heirs, successors and assigns of the within parties.

19. All agreements of the parties are expressed herein and any prior agreements of the parties shall be deemed to have been merged into the terms and conditions set forth in the Agreement, and the terms and conditions hereof shall supercede any prior agreements of the parties with regard to the subject matter addressed herein.

20. In the event any term or provision hereof or the application thereof to any person or party shall be deemed invalid or unenforceable, the remainder of the Agreement shall not be affected thereby and shall remain in full force and effect.

21. Each of the parties hereto acknowledges that it has had adequate and appropriate opportunity to review the Agreement with legal counsel of its choosing.

22. In the event of a dispute between the parties as to any of the terms and conditions contained in the Agreement or the performance of the obligations of any party under the terms and conditions of the Agreement, such dispute shall be resolved by binding arbitration which shall be performed in accordance with the general rules and conditions as set forth by the

American Arbitration Association, but which shall be an arbitration before a private arbitrator, to be identified by the mutual agreement of the parties. The arbitration process shall be by notification of a dispute and demand for arbitration to be submitted in writing by the party seeking arbitration, to be made within thirty (30) days of the date by which the party seeking arbitration has knowledge of a disputed matter, said notification to be delivered by certified mail, return receipt requested or an overnight mail carrier, whereupon the two (2) parties shall communicate over the following thirty (30) days to identify a mutually agreeable arbitrator to hear the case, at the convenience of the arbitrator selected, but no later than sixty (60) days after the selection of the arbitrator. In the event the parties shall fail to agree upon a mutually agreeable arbitrator, the parties shall each select a Rule 170 Neutral from the list of New Hampshire Superior Court Rule 170 Neutrals for Hillsborough County, and the two (2) Neutrals selected shall select an arbitrator, who shall be the designated mutually agreed upon arbitrator of the parties in this matter. The selection and designation process shall occur within sixty (60) days of the date of the notice of demand for arbitration and arbitration shall occur within thirty (30) days of the designation of the arbitrator, at the convenience of the designated arbitrator.

23. In the event of a dispute between NHA and the City, if the arbitrator rules in either party's favor, the losing party shall reimburse the prevailing party for all legal expense and any monies owed to the prevailing party. In the event the City withholds money during any dispute and the monies withheld are more than thirty (30) days overdue, and NHA prevails in the dispute, the City shall pay NHA the monies owed plus interest accrued from the date the invoice was presented to the City. Interest shall be accrued at the average Prime rate over the period. The Prime rate shall be taken from the Wall Street Journal or some other suitable source.

**IN WITNESS WHEREOF**, we have hereunto set our hands effective on the day and year first above-written.

CITY OF NASHUA

_____ By:_____
Witness Donnalee Lozeau, Mayor, Duly Authorized

NASHUA HYDRO ASSOCIATES, a New Hampshire Limited Partnership

_____ By:_____
Witness Richard Norman, President, Essex Hydro Associates
Its Duly Authorized General Partner

Schedule A

**EPSI 2012 External Billing Rates**

| Role | Rate |
|---|---|
| Partner | $290 |
| Manager | $120 |
| Admin | $100 |
| Supervisor | $75 |
| Operator | $50 |

Schedule B

*Lost Revenue Calculations*

Lost revenue is equal to the revenue NHA would have been able to earn through electrical generation and the sale of Massachusetts Class II Renewable Energy Certificates ("REC") if the construction of the Modifications had not occurred. Lost revenue shall be calculated monthly.

*Lost electrical generation revenue calculations*

For periods when NHA is unable to generate because of the construction of the Modifications, NHA shall multiply the number of hours of lost generation by the 10 year average hourly generation for the month in which the lost generation occurred. The product of this calculation, displayed in kilowatt hours ("kWh"), will be the total lost generation for the month.

The total lost generation for the month shall then be multiplied by the electricity price per kWh to determine the lost electrical revenue.

- The 10 year average hourly generation is determined by taking the 10 year average output for the month in which generation was impacted by the construction of the Modifications and dividing it by the number of hours in that month. The 10 year average output shall be calculated using NHA's historical output data for the period July 1, 2003 through June 30, 2013. For purposes of this calculation, the quotient shall be carried to two decimal places.

- The electricity price per kWh shall be determined by the rate order between NHA and Public Service Company of New Hampshire dated October 29, 1984. Per the contract, for 2013 and 2014, NHA is to be paid $.1236/kWh and $.1250/kWh, respectively.

*Lost REC revenue calculations*

One REC is equal to 1,000 kWhs. Lost REC revenue shall be calculated by taking the total lost generation for the month and dividing it by 1,000. The quotient shall equal the number of RECs lost for the month. For purposes of this calculation, the quotient shall be carried to one decimal

place. This quotient will be multiplied by the Avoided Cost Price ("ACP") for the REC to determine the lost REC revenue.

- The Dam is presently certified as a Massachusetts Class II renewable energy project. The ACP shall equal the price set by the Massachusetts Department of Energy Revenue for Massachusetts Class II certified project for the year in which the construction of the Modifications occurs.

*Example – provided for illustrative purposes only*

If the 10 year average monthly output at the Dam in the month of August is 168,935 kWhs and there are 744 hours in August, the 10 year average hourly generation for August is 227.1 kWhs.

If NHA was unable to generate for 300 hours in August, 300 hours multiplied by 227.1 kWhs equals the total lost generation for August, 68,130 kWhs.

The electricity price per kWh in August 2013 is $.1236 per kWh. Multiplying this rate times the total lost generation for the month results in a lost electrical revenue of $8,420.87.

The total lost generation of 68,130 kWhs divided by 1,000 kWhs results in 68.1 RECs. If the ACP is $25/REC then the lost REC revenue for August is $1,702.50.

Combined, NHA's lost revenue in this example is $8,420.87 plus $1,702.50, or $10,123.37.

**AGREEMENT BETWEEN CITY AND COTTON MILL**
**SQUARE, LLC REGARDING JACKSON MILLS DAM**

On this _____ day of June, 2012, **NOW COME**, the City of Nashua ("the City"), a New Hampshire municipal corporation, having a principal place of business at 229 Main Street, Nashua, New Hampshire 03060 and Cotton Mill Square, LLC ("CMS"), a New Hampshire limited liability company, having a mailing address of 20 Cotton Road, Suite 200, Nashua, New Hampshire 03063, and say as follows:

**WHEREAS**, the City has entered into an agreement with Nashua Hydro Associates, a New Hampshire limited partnership, ("NHA") entitled "Agreement Regarding Jackson Mills Dam" (the "NHA Agreement") to allow for the application for certain approvals ("Approvals") and the construction of certain modifications ("Modifications") to the Jackson Mills Dam located in Nashua, New Hampshire;

**WHEREAS**, pursuant to said NHA Agreement, the City has been given certain rights regarding application for and construction of certain Modifications to the Jackson Mills Dam (the "Rights");

**WHEREAS**, pursuant to said NHA Agreement, the City has undertaken certain obligations to or for the benefit of NHA (the "Obligations");

**WHEREAS**, the City anticipates assigning the Rights to a third party independent contractor in order to pursue the Approvals and to construct the Modifications pursuant to the Approvals;

**WHEREAS**, CMS has received approval from the City of Nashua Planning Board for the construction of multi-family housing within the existing Cotton Mill Building located on Front Street in Nashua, New Hampshire; and

**WHEREAS**, as a beneficiary of a reduced 100 year flood zone resulting from the construction of the Modifications, CMS desires to participate in the application for Approvals and construction of the Modifications and agrees to assume the Obligations during the period of the application for Approvals and the construction of the Modifications in consideration for the assignment of the Rights by the City together with limited financial participation of the City.

**NOW, THEREFORE**, the parties hereto, for the mutual promises and covenants contained herein, all of which are deemed good and valuable consideration, do hereby agree and say as follows:

1. The City shall assign the Rights under the NHA Agreement to CMS, its successors or assigns.

2. CMS, its successor or assigns shall assume all of the Obligations during the period of application for Approvals and the construction of the Modifications at its sole cost and expense, except as may be paid by the City in its sole discretion, and for itself, its contractors, agents and employees, shall hold harmless the City for any claim, damages, losses or liabilities, arising out of the exercise of the Rights or undertakings of the Obligations by CMS or its assigns

and its contractors, agents and employees, and shall indemnify the City from and against any claims, damages, losses or liabilities made by any third parties arising out of the exercise of the Rights or the performance of the Obligations by CMS, its successors or assigns, and its contractors, agents and employees, excepting as to those matters caused by the negligence or willful or fraudulent acts of the City, its contractors, agents or employees.

3. CMS, in the performance of the Obligations, shall pay to the City, any and all amounts of the reimbursements required under the NHA Agreement ("Reimbursements") or pay the cost of any credits to be provided to NHA by the City against NHA's rental obligations to the City under its Lease with the City, all as provided in the NHA Agreement; provided, however, by assuming the Obligations, CMS is not obligated to construct the Modifications as may be permitted by the Approvals, but once the construction of the Modifications has begun, it must be completed to the satisfaction of and acceptance by the City, and CMS shall post a completion bond to the benefit of the City and NHA in the amount of the cost of construction of the Modifications, satisfactory to the City to ensure completion of the Modifications once begun.

4. CMS, in accepting the Obligations, agrees to be bound by the terms and conditions of the NHA Agreement.

5. This Agreement may be terminated by either party in the event CMS elects not to pursue applications for the Approvals or to perform construction of the Modifications pursuant to the Approvals, or if the Modifications have not been completed within three (3) years of the date hereof.

6. Notices, requests, demands and other communications shall be in writing and shall be deemed to have been duly given when delivered in hand to such party or mailed by certified or registered mail, postage prepaid, return receipt requested at the addresses set forth hereinabove or at such other address as delivered by one party to the other.

7. CMS shall carry and maintain in effect during the performance of services:

- General Liability insurance in the amount of $1,000,000 per occurrence; $3,000,000 aggregate;
- $1,000,000 Combined Single Limit Automobile Liability; and
- Workers' Compensation Coverage in compliance with the State of New Hampshire statutes, $100,000/$500,000/$100,000.

CMS shall maintain in effect at all times during performance all specified insurance coverage with insurers. None of the requirements as to types and limits to be maintained by CMS are intended to and shall not in any manner limit or qualify the liabilities and obligations assumed by CMS. The City of Nashua shall not maintain any insurance on behalf of CMS. Subcontractors are subject to the same insurance requirements as CMS and it shall be the CMS' responsibility to ensure compliance of this requirement.

The parties agree that CMS shall have the status of and shall perform all work as an independent contractor, maintaining control over all its consultants, sub consultants, contractors, or subcontractors.

CMS will provide the City of Nashua with certificates of insurance for coverage and endorsements affecting coverage. The City of Nashua requires thirty days written notice of cancellation or material change in coverage. General Liability, Employers' Liability and Auto Liability polices must name the **City of Nashua as an additional insured** and **reflect on the certificate of insurance.**

- All deductibles and self-insured retentions shall be fully disclosed in the certificate(s) of insurance.
- If aggregate limits of less than $3,000,000 are imposed on bodily injury and property damage, CMS must maintain umbrella liability insurance of at least $2,000,000. All aggregates must be fully disclosed on the required certificate of insurance.
- The specified insurance requirements do not relieve CMS of its responsibilities or limit the amount of its liability to the City or other persons, and CMS is encouraged to purchase such additional insurance, as it deems necessary.
- The insurance provided herein is primary, and no insurance held or owned by the City of Nashua shall be called upon to contribute to a loss.
- CMS is responsible for and required to remedy all damage or loss to any property, including property of the City, caused in whole or part by CMS or anyone employed, directed, or supervised by CMS.

Regardless of any coverage provided by any insurance, CMS agrees to indemnify and shall defend and hold harmless the City, its agents, officials, employees and authorized representatives and their employees from and against any and all suits, causes of action, legal or administrative proceedings, arbitrations, claims, demands, damages, liabilities, interest, attorney's fees, costs and expenses of any kind or nature in any manner caused, occasioned, or contributed to in whole or in part by reason of any negligent act, omission, or fault or willful misconduct, whether active or passive, of CMS or of anyone acting under its direction or control or on its behalf in connection with or incidental to the performance of this contract. CMS indemnity, defense and hold harmless obligations, or portions thereof, shall not apply to liability caused by the sole negligence or willful misconduct of the party indemnified or held harmless.

8. This Agreement and the performance thereof shall be interpreted and governed as a contract under the laws of the State of New Hampshire.

9. Any dispute with respect to the terms and provisions contained in this Agreement or the performance thereof shall be settled by arbitration in accordance with the rules and regulations of the American Arbitration Association then in effect, the award rendered by the arbitrator's decision shall be final and binding and judgment upon such award may be entered in any court having jurisdiction thereof.

10. This Agreement may be executed in any number of counterparts, each of which when so executed shall be an original, but all of the counterparts together shall constitute one in the same instrument.

11. If any term or provision of this Agreement or the application thereof to any person or circumstance shall, to any extent, be deemed invalid or unenforceable, the remainder of this Agreement, or the application of such term or provision to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby, and each term

and provision of this Agreement shall be valid and be enforced to the fullest extent permitted by law.

**IN WITNESS WHEREOF**, we have hereunto set our hands on the day and year first above-written.

CITY OF NASHUA

_____ By:_____

Witness Donnalee Lozeau, Mayor, Duly Authorized

COTTON MILL SQUARE, LLC

_____ By:_____

Witness John P. Stabile, II, Manager, Duly Authorized

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**AMENDED**
**R-12-058**

# RESOLUTION

## APPROVING TWO AGREEMENTS REGARDING THE JACKSON MILLS DAM

## *CITY OF NASHUA*

*In the Year Two Thousand and Twelve*

***RESOLVED*** *by the Board of Aldermen of the City of Nashua* that the Mayor is authorized to enter into two agreements regarding the Jackson Mills Dam, in substantially the same form as the attached, with Nashua Hydro Associates and Cotton Mill Square, LLC, to construct a crest gate on the Jackson Mills Dam.

# AGREEMENT REGARDING JACKSON MILLS DAM

On this _____ day of July, 2012, the City of Nashua ("the City"), a New Hampshire municipal corporation, having a principal place of business at 229 Main Street, Nashua, New Hampshire 03060, and Nashua Hydro Associates, a New Hampshire limited partnership, having its principal place of business at Two Commercial Street, Boscawen, New Hampshire 03303 with a mailing address c/o Essex Hydro Associates, LLC, 55 Union Street, 4th Floor, Boston, Massachusetts 02108, ("NHA") (collectively, the "parties"), enter into this Agreement regarding Jackson Mills Dam (the "Agreement"):

**W I T N E S S E T H:**

**WHEREAS**, the City is the owner of certain property and rights concerning a certain dam located in the Nashua River in Nashua, New Hampshire identified as the Jackson Mills Dam (the "Dam");

**WHEREAS**, NHA has developed and operates a facility for the production of hydroelectric power at the Dam, pursuant to a certain Lease dated July 18, 1984, as amended, by Amendment to Lease dated November 21, 1984 (collectively the "Lease") and pursuant to a certain multiparty Agreement dated September 1, 1983, as amended by Amendment to Lease dated November ___, 1984, and Second Amendment to Lease dated November 21, 1984;

**WHEREAS**, pursuant to the Lease, NHA has obtained an order granting exemption from licensing of a small hydroelectric project issued by the United States of America Federal Energy Regulatory Commission, Project #7590-000 (the "FERC Exemption") located at the Dam;

**WHEREAS**, pursuant to the Lease, NHA controls all use and the operation of the Dam, including improvements thereto, during the term of the Lease;

**WHEREAS**, the City is desirous of modifying the infrastructure of the Dam at the City's expense for the purpose of flood water control along the Nashua River (said modification being hereinafter referred to as the "Modifications"), the Modifications to include, at least, removal of a portion of the existing dam structure and restoration thereof, and the construction of a crest gate (the "Crest Gate") in place to be operated by the dam operator for purposes of allowing the lowering of the impoundment level during flood stages of the Nashua River;

**WHEREAS**, the Modifications may require a modification or amendment to the existing FERC Exemption and other state and federal approvals (collectively referred to hereinafter as the "Approvals");

**WHEREAS**, construction of the Modifications may result in loss of use of the Dam for hydroelectric generation for periods of time and loss of generation subsequent to installation of the modifications;

**WHEREAS**, the Modifications may require NHA to change its operations, increase its potential liabilities and incur certain costs and expenses and create a risk of damage to the existing Dam structure;

**WHEREAS**, NHA is willing to cooperate with the City in pursuing the Approvals, including any amendment to the FERC Exemption, under the condition that the City agrees: (a) to prepare and complete all applications for the Approvals subject to review by NHA; (b) to reimburse NHA for any costs and expenses it may incur in the negotiation and review of the Agreement and the review and submission of the applications for the Approvals, by way of a credit against rent due under the Lease; (c) to execute a complete indemnification by the City for the benefit of NHA, and (d) to reimburse NHA for any costs, including lost revenues, incurred during construction of the modifications and costs, including lost revenues, incurred post construction, until the termination of the Lease;

**WHEREAS**, in order to allow the City to proceed to modify the Dam in accordance with the Approvals, the City is willing to be responsible; (a) for the production of all applications for the Approvals, at its sole cost and expense; (b) for the construction of the Modifications to the Dam at its sole cost and expense; (c) for the reimbursement of the costs and expenses incurred by NHA in the negotiation and review of the terms of this Agreement; (d) for the reimbursement of the costs and expenses incurred by NHA in the review and submission of all applications for the Approvals, and NHA's work during the construction period,(e) for the reimbursement of costs incurred by NHA to operate and maintain the Modifications post construction and; (f) for indemnifying and holding harmless NHA for the Modification.

**NOW, THEREFORE**, the parties hereto, for the mutual promises and covenants contained herein, all of which are deemed good and valuable consideration, do hereby agree and say as follows:

1. This agreement shall become effective following the City's inspection of the Dam and written communication to NHA certifying that the City accepts the Dam "as is" in its current condition.

2. The City, its assignee and its independent contractors shall undertake drafting of the applications for the Approvals. The City shall submit all proposed applications, including the details of the proposed Modifications, to NHA for its review prior to NHA's submittal of the applications for Approvals to the various governmental agencies.

3. NHA will cooperate with the City in the application process, including prompt review, comment and submission of completed applications for the Approvals to allow the Modifications as necessary and as described in paragraphs 2-4 below.

4. Following receipt of any proposed applications from the City or its contractors, NHA shall have a period of seven (7) days to review the proposed applications. NHA reserves the right to reject any application for the Modifications which; (a) threaten the structural integrity

of the Jackson Mills Dam; (b) compromise the safety of the operation of the hydroelectric generating facilities located at the Dam; (c) are contrary to the terms set forth in the Agreement; or (d) dictates any action or condition which might reasonably be expected to result in a violation of the terms of NHA's FERC Order of Exemption.

5. Any NHA rejection must be delivered to the City in writing within the seven (7) day review period. If no reasons for rejections have been tendered, prior to the expiration of the seven day review period, the applications shall be deemed accepted and NHA shall sign and submit the applications without delay. In the event of a rejection of an application, NHA shall notify the City of the basis for such rejection and shall agree to a meeting with the City, within five (5) days of such notification, to attempt to correct any matter giving rise to a NHA rejection. After which meeting, NHA may only refuse to execute any such rejected application for one or more of the valid reasons set forth in the preceding paragraph of the Agreement, with such reason based strictly upon the opinion of a competent engineer or NHA's counsel, whichever the appropriate case may be.

6. The City shall reimburse NHA up to $60,000 by means of crediting the rental obligations of NHA, to the City, under the Lease, for the time expended by NHA personnel and costs and expenses incurred in the negotiations to date and the review of the Agreement, $15,832.00 of which has been credited as of the date of this Agreement. NHA personnel time shall be billed at specific rates as set forth on **Schedule A** attached hereto.

7. The City shall also reimburse NHA for all costs incurred by NHA resulting from NHA's efforts to effect the Modifications and arising from the construction and operation of the Modifications. Such NHA costs shall include, but not be limited to (a) time expended by NHA personnel (to be billed at specific rates as set forth on **Schedule A** attached hereto), (b) costs and expenses incurred for consultants, engaged by NHA, including, but not limited to attorneys and engineers, and (c) revenue lost by NHA as a result of interrupted or degraded hydroelectric generation, as defined in greater detail herein. Without limiting the generality of the forgoing, the broad areas of effort, for which the City agrees to reimburse NHA, are (a) all work related to obtaining the Approvals, (b) any and all review of construction plans and specifications for the construction of the Modifications, (c) the general review and periodic monitoring (to be not more frequent than once per week) of the construction of the Modifications, (d) the training of NHA's personnel in the use and operation of the Crest Gate once the Crest Gate is in place, and (e) the costs and expenses related to modifying NHA's equipment, structures, and software to accommodate the operation of the Modifications. Except for the expenses noted in the following Section 8, the City shall reimburse NHA for costs by crediting the rental obligations of NHA, to the City, under the Lease.

8. The City shall compensate NHA in the form of cash for the following: (a) costs and expenses incurred for consultants, engaged by NHA, including, but not limited to attorneys and engineers, and (b) revenue lost by NHA as a result of interrupted or degraded hydroelectric generation, related to the design, permitting, or construction of the Modifications or occurring after the commencement of the construction , up through the time when the Modifications are

completed and the Crest Gate has become operational ("Lost Revenue"). The calculation of Lost Revenue will be made by NHA and presented to the City, using a formula set forth on **Schedule B** attached; (c) costs and expenses related to modifying NHA's equipment, structures, and software to accommodate the operation of the Modifications, which shall include the time and expenses of NHA's technical staff.

9. NHA shall submit periodic invoices for the Reimbursements to the City, no less often than monthly, supplying sufficient records and data to support the invoices in order to allow the City to confirm such costs and expenses to have been reasonably incurred. The amount of the invoice will be credited against NHA's lease payment to the City for the year in which the invoice is billed unless the invoice presented requires cash payment, as outlined in Section 8 of this document, in which case the City shall pay such invoice within 30 days of receipt. In the event the credit accrued by NHA in a year exceeds NHA's rental amount due to the City for that year, the amount in excess shall be credited against NHA's rental amount due to the City for the following year. For cash invoices not paid within 30 days, the City shall pay NHA the monies owed plus interest accrued from the date the invoice was due. Interest shall be accrued at the average Prime rate over the period. The Prime rate shall be taken from the Wall Street Journal or some other suitable source.

10. Following construction of the Modifications by the City, NHA shall lower the Crest Gate any time the river level at the dam exceeds 116 feet [this number needs to be provided by the City's engineer]. Notwithstanding the terms of the Lease, the Modifications including the Crest Gate, shall belong to the City and remain in place following termination of the Lease. During the remainder of the Lease, the City shall be responsible for insuring the Modifications, including the Crest Gate.

11. The City shall compensate NHA in the form of credits against rent due from NHA to the City under the Lease for (a) the costs and expenses incurred by NHA in the actual operation of the Crest Gate or maintenance which exceed the costs and expenses of operation of the Jackson Mills Dam in its current condition, and (b) the loss of revenue from hydroelectric power generation caused by the loss of hydraulic head when the Crest Gate is lowered. The calculation for lost revenue caused by the loss of hydraulic head shall be developed by the City's engineer and approved by NHA prior to the completion of Modifications. Such costs, expenses and loss of revenue shall be invoiced in sufficient detail by NHA to the City in order to allow the City a reasonable review of the same and shall follow the conditions in Section 9. In the event the City shall dispute the amount of costs, expenses and Lost Revenue or the time involved in the operation of the Crest Gate which exceed the cost of the operation of the Dam in its current state, the parties will attempt to mediate the dispute within fifteen (15) days, failing which the dispute shall be resolved as otherwise set forth herein below.

12. The City and its independent contractor shall at all times provide statutory workers' compensation insurance coverage for all employees working on the investigation leading up to the preparation of the application and the construction of the Modifications. The

City and its independent contractor shall provide a certificate of insurance to NHA reflecting such coverage and providing that such coverage may not be cancelled with less than thirty (30) days written notice to NHA.

13. The City and its independent contractor shall at all times during the term of the Agreement maintain general liability insurance in the minimum amount of $5,000,000 per occurrence, $5,000,000 aggregate, insuring against liabilities and damages arising out of the construction of the Modifications, and following the completion of the Modifications, arising out of the operation of the Crest Gate; and shall name NHA as an additional insured under the insurance policy, and shall provide a certificate of insurance to NHA reflecting such coverage and providing that such coverage may not be cancelled with less than thirty (30) days written notice to NHA. Notwithstanding the following sections, in no case shall any party's insurance have recourse against NHA's insurance.

14. The City shall hold NHA harmless from and against any claims, losses, damages or liabilities suffered by the City or its independent contractors or subcontractors arising out of the rights granted to the City by NHA hereunder, including, but not limited to, the construction of the Modifications and the operation by NHA of the Crest Gate, except in the event such claims, losses, damages or liabilities are the result of the gross negligence, willful misconduct or fraud of NHA or breach by NHA of the terms and conditions of the Agreement.

15. The City and its independent contractor shall indemnify NHA for, from and against any claims, losses, damages or other liabilities (including legal costs) arising out of the rights granted to the City by NHA under the Agreement, excepting those claims, damages, or liabilities resulting from the gross negligence, willful misconduct or fraud of NHA or the breach by NHA of the terms and conditions of the Agreement.

16. NHA shall be released by the City from any obligations to maintain or repair the Jackson Mills Dam, the Crest Gate or any of the Modifications, whether under the Lease or otherwise, at any time during the term of the Lease or in the future, excepting in the event such repair or maintenance is not the result of the installation of the Modifications or the gross negligence, willful misconduct or fraud of NHA or is as a result of the breach of the terms of the Agreement by NHA.

17. The City shall hold NHA harmless from any claims arising from the failure of the Modifications to modify the flood plain. The City agrees that NHA is not responsible for the Crest Gate Modification's ability to modify the flood plain and the City shall hold NHA harmless should the Modifications not result in the anticipated changes to the flood plain. Furthermore, the City shall hold NHA harmless from any claims that may result from flooding that occurs following the installation of the Modifications and is a result of the Modifications, except in the event of the gross negligent operation of the Modifications by NHA.

18. To the extent that it has the legal authority to do so, NHA shall allow the City and its independent contractor and subcontractors full and unfettered access to Jackson Mills Dam,

including a right of easement over the access ways and/or any appurtenant rights attributable to the operation of the Jackson Mills Dam during the construction of the Modifications and shall agree to remove from operation the hydroelectric generating facility at the Jackson Mills Dam during the construction of the Modifications as may be reasonably necessary to allow the construction of the Modifications, the cost of which removal and reinstallation of equipment, materials or machinery, and labor shall be borne one hundred percent (100%) by the City. In addition, NHA reserves the right to perform the mechanical and computer work necessary to integrate the Modifications into NHA's existing command and control system.

18. The Agreement shall be deemed a contract enforceable under the laws of the State of New Hampshire and shall be binding upon the heirs, successors and assigns of the within parties.

19. All agreements of the parties are expressed herein and any prior agreements of the parties shall be deemed to have been merged into the terms and conditions set forth in the Agreement, and the terms and conditions hereof shall supercede any prior agreements of the parties with regard to the subject matter addressed herein.

20. In the event any term or provision hereof or the application thereof to any person or party shall be deemed invalid or unenforceable, the remainder of the Agreement shall not be affected thereby and shall remain in full force and effect.

21. Each of the parties hereto acknowledges that it has had adequate and appropriate opportunity to review the Agreement with legal counsel of its choosing.

22. In the event of a dispute between the parties as to any of the terms and conditions contained in the Agreement or the performance of the obligations of any party under the terms and conditions of the Agreement, such dispute shall be resolved by binding arbitration which shall be performed in accordance with the general rules and conditions as set forth by the American Arbitration Association, but which shall be an arbitration before a private arbitrator, to be identified by the mutual agreement of the parties. The arbitration process shall be by notification of a dispute and demand for arbitration to be submitted in writing by the party seeking arbitration, to be made within thirty (30) days of the date by which the party seeking arbitration has knowledge of a disputed matter, said notification to be delivered by certified mail, return receipt requested or an overnight mail carrier, whereupon the two (2) parties shall communicate over the following thirty (30) days to identify a mutually agreeable arbitrator to hear the case, at the convenience of the arbitrator selected, but no later than sixty (60) days after the selection of the arbitrator. In the event the parties shall fail to agree upon a mutually agreeable arbitrator, the parties shall each select a Rule 170 Neutral from the list of New Hampshire Superior Court Rule 170 Neutrals for Hillsborough County, and the two (2) Neutrals selected shall select an arbitrator, who shall be the designated mutually agreed upon arbitrator of the parties in this matter. The selection and designation process shall occur within sixty (60) days of the date of the notice of demand for arbitration and arbitration shall occur within thirty (30) days of the designation of the arbitrator, at the convenience of the designated arbitrator.

23. In the event of a dispute between NHA and the City, if the arbitrator rules in either party's favor, the losing party shall reimburse the prevailing party for all legal expense and any monies owed to the prevailing party. In the event the City withholds money during any dispute and the monies withheld are more than thirty (30) days overdue, and NHA prevails in the dispute, the City shall pay NHA the monies owed plus interest accrued from the date the invoice was presented to the City. Interest shall be accrued at the average Prime rate over the period. The Prime rate shall be taken from the Wall Street Journal or some other suitable source.

**IN WITNESS WHEREOF**, we have hereunto set our hands effective on the day and year first above-written.

CITY OF NASHUA

_____ By:_____
Witness Donnalee Lozeau, Mayor, Duly Authorized

NASHUA HYDRO ASSOCIATES, a New Hampshire Limited Partnership

_____ By:_____
Witness Richard Norman, President, Essex Hydro Associates
Its Duly Authorized General Partner

Schedule A

**EPSI 2012 External Billing Rates**

| Role | Rate |
|---|---|
| Partner | $290 |
| Manager | $120 |
| Admin | $100 |
| Supervisor | $75 |
| Operator | $50 |

Schedule B

*Lost Revenue Calculations*

Lost revenue is equal to the revenue NHA would have been able to earn through electrical generation and the sale of Massachusetts Class II Renewable Energy Certificates ("REC") if the construction of the Modifications had not occurred. Lost revenue shall be calculated monthly.

*Lost electrical generation revenue calculations*

For periods when NHA is unable to generate because of the construction of the Modifications, NHA shall multiply the number of hours of lost generation by the 10 year average hourly generation for the month in which the lost generation occurred. The product of this calculation, displayed in kilowatt hours ("kWh"), will be the total lost generation for the month.

The total lost generation for the month shall then be multiplied by the electricity price per kWh to determine the lost electrical revenue.

- The 10 year average hourly generation is determined by taking the 10 year average output for the month in which generation was impacted by the construction of the Modifications and dividing it by the number of hours in that month. The 10 year average output shall be calculated using NHA's historical output data for the period July 1, 2003 through June 30, 2013. For purposes of this calculation, the quotient shall be carried to two decimal places.

- The electricity price per kWh shall be determined by the rate order between NHA and Public Service Company of New Hampshire dated October 29, 1984. Per the contract, for 2013 and 2014, NHA is to be paid $.1236/kWh and $.1250/kWh, respectively.

*Lost REC revenue calculations*

One REC is equal to 1,000 kWhs. Lost REC revenue shall be calculated by taking the total lost generation for the month and dividing it by 1,000. The quotient shall equal the number of RECs lost for the month. For purposes of this calculation, the quotient shall be carried to one decimal place. This quotient will be multiplied by the Avoided Cost Price ("ACP") for the REC to determine the lost REC revenue.

- The Dam is presently certified as a Massachusetts Class II renewable energy project. The ACP shall equal the price set by the Massachusetts Department of Energy Revenue for Massachusetts Class II certified project for the year in which the construction of the Modifications occurs.

*Example – provided for illustrative purposes only*

If the 10 year average monthly output at the Dam in the month of August is 168,935 kWhs and there are 744 hours in August, the 10 year average hourly generation for August is 227.1 kWhs.

If NHA was unable to generate for 300 hours in August, 300 hours multiplied by 227.1 kWhs equals the total lost generation for August, 68,130 kWhs.

The electricity price per kWh in August 2013 is $.1236 per kWh. Multiplying this rate times the total lost generation for the month results in a lost electrical revenue of $8,420.87.

The total lost generation of 68,130 kWhs divided by 1,000 kWhs results in 68.1 RECs. If the ACP is $25/REC then the lost REC revenue for August is $1,702.50.

Combined, NHA's lost revenue in this example is $8,420.87 plus $1,702.50, or $10,123.37.

**AGREEMENT BETWEEN CITY AND COTTON MILL**
**SQUARE, LLC REGARDING JACKSON MILLS DAM**

On this _____ day of June, 2012, **NOW COME**, the City of Nashua ("the City"), a New Hampshire municipal corporation, having a principal place of business at 229 Main Street, Nashua, New Hampshire 03060 and Cotton Mill Square, LLC ("CMS"), a New Hampshire limited liability company, having a mailing address of 20 Cotton Road, Suite 200, Nashua, New Hampshire 03063, and say as follows:

**WHEREAS**, the City has entered into an agreement with Nashua Hydro Associates, a New Hampshire limited partnership, ("NHA") entitled "Agreement Regarding Jackson Mills Dam" (the "NHA Agreement") to allow for the application for certain approvals ("Approvals") and the construction of certain modifications ("Modifications") to the Jackson Mills Dam located in Nashua, New Hampshire;

**WHEREAS**, pursuant to said NHA Agreement, the City has been given certain rights regarding application for and construction of certain Modifications to the Jackson Mills Dam (the "Rights");

**WHEREAS**, pursuant to said NHA Agreement, the City has undertaken certain obligations to or for the benefit of NHA (the "Obligations");

**WHEREAS**, the City anticipates assigning the Rights to a third party independent contractor in order to pursue the Approvals and to construct the Modifications pursuant to the Approvals;

**WHEREAS**, CMS has received approval from the City of Nashua Planning Board for the construction of multi-family housing within the existing Cotton Mill Building located on Front Street in Nashua, New Hampshire; and

**WHEREAS**, as a beneficiary of a reduced 100 year flood zone resulting from the construction of the Modifications, CMS desires to participate in the application for Approvals and construction of the Modifications and agrees to assume the Obligations during the period of the application for Approvals and the construction of the Modifications in consideration for the assignment of the Rights by the City together with limited financial participation of the City.

**NOW, THEREFORE**, the parties hereto, for the mutual promises and covenants contained herein, all of which are deemed good and valuable consideration, do hereby agree and say as follows:

1. The City shall assign the Rights under the NHA Agreement to CMS, its successors or assigns.

2. CMS, its successor or assigns shall assume all of the Obligations during the period of application for Approvals and the construction of the Modifications at its sole cost and expense, except as may be paid by the City in its sole discretion, and for itself, its contractors, agents and employees, shall hold harmless the City for any claim, damages, losses or liabilities, arising out of the exercise of the Rights or undertakings of the Obligations by CMS or its assigns

and its contractors, agents and employees, and shall indemnify the City from and against any claims, damages, losses or liabilities made by any third parties arising out of the exercise of the Rights or the performance of the Obligations by CMS, its successors or assigns, and its contractors, agents and employees, excepting as to those matters caused by the negligence or willful or fraudulent acts of the City, its contractors, agents or employees.

3. CMS, in the performance of the Obligations, shall pay to the City, any and all amounts of the reimbursements required under the NHA Agreement ("Reimbursements") or pay the cost of any credits to be provided to NHA by the City against NHA's rental obligations to the City under its Lease with the City, all as provided in the NHA Agreement; provided, however, by assuming the Obligations, CMS is not obligated to construct the Modifications as may be permitted by the Approvals, but once the construction of the Modifications has begun, it must be completed to the satisfaction of and acceptance by the City, and CMS shall post a completion bond to the benefit of the City and NHA in the amount of the cost of construction of the Modifications, satisfactory to the City to ensure completion of the Modifications once begun.

4. CMS, in accepting the Obligations, agrees to be bound by the terms and conditions of the NHA Agreement.

5. This Agreement may be terminated by either party in the event CMS elects not to pursue applications for the Approvals or to perform construction of the Modifications pursuant to the Approvals, or if the Modifications have not been completed within three (3) years of the date hereof.

6. Notices, requests, demands and other communications shall be in writing and shall be deemed to have been duly given when delivered in hand to such party or mailed by certified or registered mail, postage prepaid, return receipt requested at the addresses set forth hereinabove or at such other address as delivered by one party to the other.

7. CMS shall carry and maintain in effect during the performance of services:

- General Liability insurance in the amount of $1,000,000 per occurrence; $3,000,000 aggregate;
- $1,000,000 Combined Single Limit Automobile Liability; and
- Workers' Compensation Coverage in compliance with the State of New Hampshire statutes, $100,000/$500,000/$100,000.

CMS shall maintain in effect at all times during performance all specified insurance coverage with insurers. None of the requirements as to types and limits to be maintained by CMS are intended to and shall not in any manner limit or qualify the liabilities and obligations assumed by CMS. The City of Nashua shall not maintain any insurance on behalf of CMS. Subcontractors are subject to the same insurance requirements as CMS and it shall be the CMS' responsibility to ensure compliance of this requirement.

The parties agree that CMS shall have the status of and shall perform all work as an independent contractor, maintaining control over all its consultants, sub consultants, contractors, or subcontractors.

CMS will provide the City of Nashua with certificates of insurance for coverage and endorsements affecting coverage. The City of Nashua requires thirty days written notice of cancellation or material change in coverage. General Liability, Employers' Liability and Auto Liability polices must name the **City of Nashua as an additional insured** and **reflect on the certificate of insurance.**

- All deductibles and self-insured retentions shall be fully disclosed in the certificate(s) of insurance.
- If aggregate limits of less than $3,000,000 are imposed on bodily injury and property damage, CMS must maintain umbrella liability insurance of at least $2,000,000. All aggregates must be fully disclosed on the required certificate of insurance.
- The specified insurance requirements do not relieve CMS of its responsibilities or limit the amount of its liability to the City or other persons, and CMS is encouraged to purchase such additional insurance, as it deems necessary.
- The insurance provided herein is primary, and no insurance held or owned by the City of Nashua shall be called upon to contribute to a loss.
- CMS is responsible for and required to remedy all damage or loss to any property, including property of the City, caused in whole or part by CMS or anyone employed, directed, or supervised by CMS.

Regardless of any coverage provided by any insurance, CMS agrees to indemnify and shall defend and hold harmless the City, its agents, officials, employees and authorized representatives and their employees from and against any and all suits, causes of action, legal or administrative proceedings, arbitrations, claims, demands, damages, liabilities, interest, attorney's fees, costs and expenses of any kind or nature in any manner caused, occasioned, or contributed to in whole or in part by reason of any negligent act, omission, or fault or willful misconduct, whether active or passive, of CMS or of anyone acting under its direction or control or on its behalf in connection with or incidental to the performance of this contract. CMS indemnity, defense and hold harmless obligations, or portions thereof, shall not apply to liability caused by the sole negligence or willful misconduct of the party indemnified or held harmless.

8. This Agreement and the performance thereof shall be interpreted and governed as a contract under the laws of the State of New Hampshire.

9. Any dispute with respect to the terms and provisions contained in this Agreement or the performance thereof shall be settled by arbitration in accordance with the rules and regulations of the American Arbitration Association then in effect, the award rendered by the arbitrator's decision shall be final and binding and judgment upon such award may be entered in any court having jurisdiction thereof.

10. This Agreement may be executed in any number of counterparts, each of which when so executed shall be an original, but all of the counterparts together shall constitute one in the same instrument.

11. If any term or provision of this Agreement or the application thereof to any person or circumstance shall, to any extent, be deemed invalid or unenforceable, the remainder of this Agreement, or the application of such term or provision to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby, and each term

and provision of this Agreement shall be valid and be enforced to the fullest extent permitted by law.

**IN WITNESS WHEREOF**, we have hereunto set our hands on the day and year first above-written.

CITY OF NASHUA

_____ By:_____

Witness Donnalee Lozeau, Mayor, Duly Authorized

COTTON MILL SQUARE, LLC

_____ By:_____

Witness John P. Stabile, II, Manager, Duly Authorized

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**RESOLUTION** **R-12-058**

**Approving two agreements regarding the Jackson Mills Dam**

**IN THE BOARD OF ALDERMEN**

1ST READING JULY 10, 2012

Referred to:

FINANCE COMMITTEE

2nd Reading AUGUST 6, 2012

3rd Reading

4th Reading

Other Action

Passed AUGUST 6, 2012

Indefinitely Postponed

Defeated

Attest: City Clerk

President

Approved Mayor's Signature

August 7-2012 Date

**Endorsed by**

MAYOR

McCARTHY

TABACSKO

SHEEHAN

CRAFFEY

VITALE

DOWD

MELIZZI-GOLJA

PRESSLY

Vetoed:

Veto Sustained:

Veto Overridden:

Attest: City Clerk

President