

Host Community Agreement

between the

Town of Benton

and

Empire State Wind Energy, LLC

October 2007

THIS AGREEMENT, made this 15th day of October, 2007, by and between **Empire State Wind Energy, LLC**, a limited liability company duly organized and existing under the laws of the State of New York and having its offices at 131 Main Street, Suite 101, Oneida, New York 13421 (hereinafter referred to as "**ESWE**") on behalf of itself or an assignee to be named later; and the **TOWN OF BENTON**, a municipal corporation duly organized and existing under the laws of the State of New York and having its offices at 1000 Route 14A, Penn Yan, New York 14527 (hereinafter referred to as the "**Town**").

WHEREAS, ESWE is a duly formed limited liability company under the laws of the State of New York; and,

WHEREAS, ESWE proposes to construct and operate a wind energy facility in the Town of Benton, consisting of a number of turbines not to exceed 25 turbines and associated equipment and improvements as more specifically described on the detail plan annexed hereto at Appendix A, and,

WHEREAS, ESWE is primarily concerned with developing community wind projects which simultaneously provide consumers across the State of New York concerned with mitigating the environmental impacts of their energy use with an option for clean, renewable energy and provide communities hosting wind energy facilities with a significant and substantial share of the revenue generated from the sale of wind-derived electricity; and,

WHEREAS, the Town supports the development of clean, renewable wind-derived energy in accordance with local, state, and federal laws and regulations which could reduce dependence on fossil fuels of all kinds and on foreign oil in particular, but is concerned with preserving the local environment for the benefit of all residents of the Town and with generating revenue which may reduce the tax burden on Town residents; and

WHEREAS, ESWE has applied for or will be applying for authorization from the Town and other governmental authorities, as applicable, to construct and operate a wind energy facility in the Town; and

WHEREAS, the Town Board and/or Town Planning Board and/or Town Zoning Board of Appeals, as involved agencies under the State Environmental Quality Review Act, Article 8, Environmental Conservation Law, (SEQRA), will be authorized to issue the appropriate findings for the facility after consideration of the environmental impacts of the project ; and

WHEREAS, the parties hereto believe that their mutual best interests will be served by the execution of this Agreement which specifies their respective rights, interests and obligations relative to the construction and operation of a wind energy facility, subject to the findings required to be made pursuant to local law and SEQRA;

NOW, THEREFORE, in consideration of the mutual promises hereinafter set forth, the parties hereto agree as follows:

I. PURPOSE.

The purpose of this Agreement is to define the rights, interests and obligations of the parties regarding the construction and operation of the proposed wind energy facility and appurtenant facilities, located in the Town in the event that the Facility (as hereinafter deferred) is deemed feasible by ESWE and approved by all governmental entities with jurisdiction over the project.

II. DEFINITIONS.

The terms set forth in this Agreement shall have the meanings ascribed to them herein, for all purposes of this Agreement, unless the context clearly indicates some other meaning. Words in singular shall include the plural and words in the plural shall include the singular where the context so requires.

- A. “Agreement” means this Host Community Benefit Agreement and any and all amendments, appendices or schedules attached hereto.
- B. “Assignee” means any person, affiliate, subsidiary, partnership, corporation, limited liability company to which or to whom ESWE assigns this Agreement.
- C. “Effective Date”, for purposes of determining the commencement of the Host Community Payments described hereinafter at item VI, Effective Date means the first date on which the Facility produces energy for commercial resale, for all other purposes Effective Date means the date this Agreement is executed by the Town and ESWE.
- D. “Facility” means the “wind energy facility” as more specifically described in Appendix “A” attached hereto.

- E. “Net Revenue” means Gross revenue from the sale of energy generated by the Facility minus the following: (i) maintenance fees; (ii) management fees; (iii) Debt Service Payments; (iv) Payment for leasehold interests; easements or other real property rights; (v) Taxes or Tax Equivalent Payments; (vi) miscellaneous costs imposed by the town or any other state, local or federal governmental entity or agency, (vii) operational costs for obligations arising hereunder or otherwise, (viii) costs for any surety bonds, escrows or other forms of security required by the Town for purposes of securing the cost of decommissioning the Facility.
- F. “New York State Department of Environmental Conservation” (“DEC”) is the Department or Agency of the government of the State of New York created by Chapter 140 of the Laws of 1970, and having the jurisdiction, powers, and duties described in the Environmental Conservation Law of the State of New York, or any successor thereto.
- G. “Related Agencies” shall mean the Town’s Planning Board, Zoning Board of Appeals, or any Agency of the Town with review and oversight jurisdiction over the Facility.
- H. “Site” is the real property, including any necessary easements or rights of way, identified in the ESWE application and supporting documents for authorization to construct and operate a wind energy facility, situate in the Town of Benton, Yates County, New York; and being more particularly described in Appendix “A” attached hereto.
- I. “State Environmental Quality Review Act” (“SEQRA”), shall mean Article 8 of the Environmental Conservation Law of the State of New York and the implementing regulations set forth in 6 N.Y.C.R.R. Part 617.
- J. “Tax Payments” or Tax Equivalent Payment mean any taxes of any nature payable or payments in lieu of taxes (“PILOT”) payable to the Town, County of Yates, Penn Yan Central School District or Marcus Whitman Central School District, or any applicable Fire District, or the State of New York or the United States of America.

- K. “Town” means the municipal corporation known as the Town of Benton in Yates County, State of New York, and, depending upon the context, the geographical area thereof .
- L. “Town Board” means the Town Board of the Town of Benton.
- M. “Local Laws of the Town of Benton” means the laws, codes and ordinances duly enacted by the Town of Benton.

III. RESTRICTION ON SITE OWNERSHIP AND TRANSFER.

- A. This Agreement is applicable to ESWE any Assignee thereof or, its successors or any parties to which ESWE transfers any or all of its ownership interests or contracts or subcontracts concerning management and/or operations in, and responsibilities for, the Facility.
- B. To the extent permissible by law, ESWE specifically reserves the right to assign any of its rights hereunder or under any permit or license covering the Facility to any Assignee. Notice of any such assignment shall be provided to the Town not less than 90 days prior to the date of such assignment. However, no such Notice shall be required if such assignment is to a wholly owned subsidiary of ESWE.

IV. COMPLIANCE WITH LAW.

- A. ESWE agrees that the Facility shall be constructed and operated, in compliance with all applicable laws, rules, and regulations, and in compliance with all permits and other authorizations issued by the Town, State or Federal agencies with respect to the Site. In the event that there is conflict in any of the applicable controlling laws, rules, regulations, permits or authorizations, ESWE agrees to comply with the most stringent among them.
- B. This Agreement shall not relieve either ESWE or the Town from any of their respective obligations under State Local Laws or SEQRA.
- C. This Agreement in and of itself shall not provide any basis for approval of the Facility by the Town or any of its Related Agencies. The parties hereto acknowledge and agree that such approval can only be granted upon a full review of any related application in accordance with all substantive and procedural legal standards generally applicable to similar applications.

V. FACILITY INSPECTIONS.

In order to permit the Town to monitor construction and operation of the Facility and compliance with this agreement, ESWE will allow the elected Town officials, the Town Engineer, his or her designee or other employees of the Town as designated by the Supervisor to have access to the Facility at reasonable times and at reasonable intervals during the course of site preparation, construction and operation of the Facility. The Town may make recommendations to ESWE based upon such inspections regarding any actions it may deem appropriate. Town officials, the Town Engineer, his or her designee, other employees designated by the Town and any consultant engaged thereby will be permitted access to the Facility and related structures and surrounding property, at reasonable times. Such periodic inspections of the Facility and Site will take place by the Town through the above referenced individuals, to observe the facility and maintenance of the Site to help ensure compliance with all applicable conditions and requirements imposed by the Town pursuant to this agreement, permit or State local law. ESWE will cooperate with the above referenced individuals in the performance of the responsibilities hereunder and will receive their comments and suggestions in good faith for such action as may be appropriate under the circumstances and will cure any and all violations found on the facility site or with the facilities themselves within a reasonable timeframe given by the Town. Town inspections will not interfere with operation, equipment or methods employed at the Site.

VI. HOST COMMUNITY PAYMENTS.

- A. An annual host community fee, payable in annual installments consisting of the greater of 1) a guaranteed minimum payment in the amount set forth hereinafter at Appendix B, or 2) seventy-five per cent (75%) of the net revenues received by ESWE for the sale of electricity generated by the Facility will be paid by ESWE to the Town.
- B. ESWE operates on a Fiscal year cash accounting basis. Annual payments will be due thirty (30) days after the end of each fiscal year and will be based on the revenue received during that Fiscal year.

- C. Verification of net revenue will be performed by an independent certified public accountant selected by the Town and ESWE. Such verification will consist of an audit of revenues and expenses for the Facility for the relevant Fiscal year. The audit will be paid for by ESWE. The accountant will use a protocol approved by the Town and ESWE. Neither the Town's or ESWE's approvals of the accountant or the protocol will be unreasonably withheld.
- D. The Town has the option of hiring its own independent auditor or CPA to verify the net revenue or the audit performed pursuant to paragraph C. above. ESWE shall cooperate with such independent auditor or CPA and provide all documents and information needed to perform such independent audit. Only the audit described in this paragraph D. shall be paid for by the Town.
- E. If the two audits are unable to be reconciled, then the two parties will agree on a new CPA to produce a verification of the net revenue and both parties agree to be bound by this third audit. The cost of this third audit shall be split evenly between the Town and ESWE.

VII. LIABILITY COVERAGE.

ESWE will maintain a form of financial assurance for claims arising out of injury to persons or property, relative to either sudden and accidental occurrences or non-sudden and accidental occurrences, resulting from operation of the Facility.

VIII. ENFORCEMENT OF RESTRICTIONS.

- A. In the event ESWE breaches or threatens to breach the obligations and restrictions contained within this Agreement, in addition to an action for money damages, the Town may apply to the Courts for equitable relief directing ESWE to comply and/or enjoining or restraining ESWE from any breach hereof.

IX. INDEMNIFICATION.

- A. Except to the extent caused by the gross negligence, illegal or willful misconduct of the Town or its officers, agents, employees or subcontractors, ESWE agrees that it will indemnify and hold harmless the Town and its officers and employees from and

against all liability, actions, damages, claims, demands, judgments, losses, cost, expenses and fees, including reasonable attorney's fees (collectively, "losses"), including losses for injury or death to persons or for loss or damage to property, and will defend the Town and its officers and employees in any court action, administrative proceeding or appeal in connection with such losses, whether or not finally adjudicated and including any settlement thereof, provided such losses result from or arise out of any act, omission, negligence or other fault of ESWE or its officers or employees; and further provided such losses arise out of or occur in connection with this agreement or the construction and operation of the Facility.

Without limiting the foregoing, ESWE agrees to indemnify, hold harmless and defend the Town and its officers and employees in connection with any litigation commenced against the Town or its officers or employees by reason of entering into this agreement, including but not limited to any litigation commenced against the Town or any improvement district therein, by any entity relating to the payments to be made by ESWE to the Town hereunder.

- B. ESWE will have the right to control the defense of any such actions or claims and will have the right to settle such actions or claims on such terms as it may deem reasonable so long as such defense and/or settlement are approved by the Town and releases or indemnifies the Town.

X. OBLIGATIONS OF THE TOWN.

- A. The Town agrees and covenants that it will not institute or maintain an action pursuant to Article 78 of the Civil Practice Law and Rules against any governmental authority relating to the issuance of any authorization or permit to construct and operate the Facility, as defined herein, in the Town of Benton.
- B. The Town and ESWE agree that the Town Board cannot legally bind any future Town Board regarding issuance of the required Town approvals for construction and operation of the facility.

- C. In the event that the Town, in the future, modifies the terms and conditions of any authorization issued to ESWE or its regulations governing operation of the Facility in a manner which substantially interferes with the operation of the Facility, which is inconsistent with any State regulation of the facility and which requires ESWE to materially change its operations to its significant detriment, ESWE may opt, at its discretion, to terminate the agreement. ESWE reserves its rights, if any, to initiate a judicial challenge to the Town's permit or regulations in question, which challenge shall not serve as a waiver of its right to terminate the agreement. In the event that ESWE opts to terminate this agreement, and either the Town or ESWE seeks a judgment in a court of competent jurisdiction to declare the rights of the parties under the agreement, any host community benefit payments otherwise due under this agreement shall be deposited with the court or an escrow agent mutually agreeable to both parties pending the outcome of the litigation. In the event that ESWE terminates the agreement, the Town reserves whatever rights it may have to enjoin the Facility from further operation and to compel its closure.

XI. DURATION OF AGREEMENT.

- A. The terms of this Agreement will continue throughout the design, construction and operation of the Facility at the site described herein. ESWE's obligations to defend and indemnify the Town as set forth above and to maintain liability insurance will continue in full force and effect during the period of closure and decommissioning of the Facility only if ESWE or its Assignee is operating the Facility at the time of any such closure or decommissioning.
- B. Host Community Payments pursuant to paragraph VI hereof shall be made for a period of ten (10) years commencing with the Effective Date for Host Community Payments as defined above.
- C. Except as provided otherwise hereinafter at Paragraph XII. C. this Agreement shall expire at the end of the tenth year following the Effective Date for Host Community Payments unless terminated earlier by the mutual consent of the Town and ESWE.

XII. PURCHASE OPTION

- A. Upon the expiration of ten (10) years, or upon an earlier termination of this Agreement, the Town shall have the option to purchase the Facility at such mutually agreeable purchase price and other terms as may be negotiated between the Town and ESWE.
- B. Upon the sale of the Facility to the Town, ESWE agrees, if so requested by the Town to continue to operate the Facility as agent for the Town in exchange for the Town's Payment to ESWE or its Assignees of Management fees and maintenance and operation fees the amount of which are to be determined by mutual agreement at the time of sale.
- C. In the event that the Town elects not to purchase the Facility and ESWE (including its successors and/or assignees) elects to continue to operate the Facility the Town shall have the option to have this Host Community Agreement continue for a period not to exceed five (5) years thereafter on the same terms and conditions set forth herein.

XIII. CONTINGENCIES

This Agreement is contingent upon the following:

- A. ESWE determining, solely within its own discretion, that the Facility is technically and financially feasible. ESWE reserves the right to withdraw from the project at any time prior to the construction of the Facility. In such case this Agreement shall become null and void.
- B. The entry into a Payment In Lieu of Taxes ("PILOT") Agreement between the Town, the County of Yates, and the Penn Yan Central School District or the Marcus Whitman Central School District.
- C. ESWE receiving all required permits, licenses or other required authorizations governmental or otherwise to construct and operate the Facility.

XIV. SEVERABILITY

If any clause, provision, subsection, section or article of this Agreement shall be ruled invalid by any court of competent jurisdiction, then the parties will:

- A. Promptly meet and negotiate a substitute for such clause, provision, section or article, which will to the greatest extent legally permissible affect the original intent of the parties therein.
- B. If necessary or desirable to accomplish item A above, apply to the court having declared such invalidity for a judicial construction of the invalidated portion of this Agreement; and
- C. Negotiate such changes in, substitutions for, or additions to the remaining provisions of this Agreement as may be necessary in addition to and in conjunction with items A and B above to affect the original intent of the parties in the provision declared invalid.
- D. The invalidity of such clause, provision, subsection, section or Article will not affect any of the remaining provisions hereof, and this Agreement will be construed and enforced as if such invalid portion did not exist.

XV. APPENDICES

- A. The scope of the project shall be fully described at Appendix A at such time as ESWE completes any feasibility analysis undertaken in connection with the Project. The specific amount of fees to be paid to ESWE as management fees, maintenance fees or any other fees payable pursuant to this agreement shall be fully set forth at Appendix B. The parties acknowledge that neither Appendix A nor Appendix B (together called the “Appendices”) can be completed until such time as ESWE has completed all studies to determine the feasibility of the Project. Once ESWE has determined that the Project is feasible the parties shall use best efforts to finalize the terms and conditions to be contained in the Appendices. Upon the completion of the Appendices and the execution thereof by the Town and ESWE the Appendices shall become fully part of this agreement. This agreement shall not become operative until such time as the Appendices have been executed by the Town and ESWE.
- B. The Town is in no way obligated to approve and sign the Appendices as a result of the Town signing this Agreement when the Appendices were not attached. If the Town decides to not sign the Appendices, for any reason or reasons and in its sole judgment, this Agreement, as presigned by the Town and ESWE prior to the inclusion of the Appendices, shall be immediately null and void and no further action shall be required by the Town or by ESWE.
- C. ESWE agrees to reimburse the reasonable expenses necessarily incurred by the Town for legal, engineering or other professional consulting services rendered on behalf of the Town in the review and application process in connection with the Facility.

XVI. NOTICES

Notices hereunder will be given in writing and delivered to the parties by first class mail, postage prepaid, at the addresses set forth hereafter:

- (i) Notices to the Town:
 - Town of Benton
 - Attention: Town Supervisor
 - 1000 Route 14A
 - Penn Yan, New York 14527

- (ii) Notices to ESWE:
 - Empire State Wind Energy, LLC
 - 131 Main Street, Suite 101
 - Oneida, New York 13421

XVII. MISCELLANEOUS.

- A. Waiver.

The failure of any party to insist on the strict performance of any term or provision hereof will not be deemed a waiver of the right to insist on strict performance of any other term or provision, nor will it be deemed a waiver of any subsequent breach.
- B. Applicable Law.

This Agreement will be governed by the laws of the State of New York.
- C. Entire Agreement.

Unless supplemented or otherwise amended in writing by the Town Board and ESWE in accordance with the laws of the State of New York, this Agreement constitutes the parties' entire agreement with respect to the subject set forth herein, and no other agreements, written or unwritten, implied or express, will be deemed effective.
- D. Authority.
 - 1. The Town represents and warrants that the supervisor has executed this Agreement pursuant to a resolution adopted by the Town Board of the Town of Benton, at a meeting thereof held on October 10th, 2007 and that Robert Clark, Supervisor, whose signature appears thereafter, is both duly authorized and empowered to execute this instrument and enter into such an agreement on behalf of the Town. This instrument will be executed in triplicate and at least one copy thereof will be permanently filed, after execution thereof, in the office of the Town Clerk, Town of Benton, New York.

2. ESWE represents and warrants that its President and Chief Executive Officer has executed this Agreement and that, Keith Pitman, whose signature appears hereafter, is both duly authorized and empowered to execute this instrument and enter into such an agreement on behalf of ESWE. This instrument has been executed in triplicate and at least one copy hereof will be permanently filed in the office ESWE.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals on the date and year above written.

EMPIRE STATE WIND ENERGY, LLC

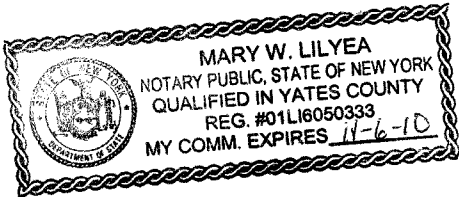
By: 
Name: Keith Pitman
Title: President and Chief Executive Officer

TOWN OF BENTON

By: 
Robert Clark, Supervisor

STATE OF NEW YORK)
COUNTY OF YATES) SS:

On the 15th day of October, 2007, before me personally came **KEITH PITMAN**, to me known who, being by me duly sworn did depose and say that he resides in the City of Sherrill, that he is the President of **EMPIRE STATE WIND ENERGY, LLC**; the corporation described in and which executed the above instrument.

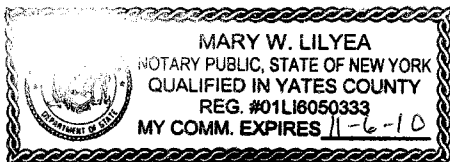


Mary W. Lilyea

Notary Public

STATE OF NEW YORK)
COUNTY OF YATES) SS:

On the 15th day of October, 2007, before me personally came **ROBERT CLARK**, to me personally known, who, being by me duly sworn did depose and say that he resides in the Town of Benton, that he is Supervisor of the **TOWN OF BENTON**, the municipal corporation described in and which executed the within instrument; and that he signed his name thereto by order of the Town Board of the Town of Benton.



Mary W. Lilyea

Notary Public