

*E. Blumore*  
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Charles E. Sullivan, Chief, BHWE, DEE  
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Niagara Transformer Consent Decree, Site # 915146

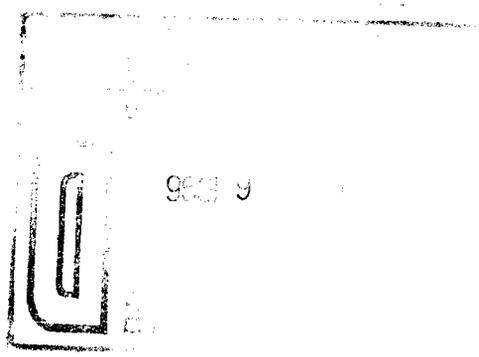
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Enclosed for your records is a final Consent Decree addressing cost recovery for the Niagara Transformer Site remediation. This Decree was entered in conjunction with the Wide Beach Site (915119) (US and NY v. Niagara Transformer, WDNY). The Decree was filed with the court on December 15, 1975, but was not entered until March 22, 1996, due to coordination with the Wide Beach settlement, which required a public comment period, and the Federal budget delays.

Terms call for annual installments, beginning in April 1998, of \$300,000.00 per year for 18 years or until all costs plus accumulated interest are covered. Provisions are made to allow Niagara Transformer to partially defer payments if economic conditions require it, but such deferral extends the number of payments. Scheduled payments total \$5.4 million, and were calculated based upon a close analysis of Niagara Transformer's ability to pay and its continued viability. Original remedial estimates in the Record of Decision ranged from \$8 to \$12 million; design developments have reduced that estimated figure to \$4.5 million.

The terms of the Niagara Transformer settlement were first negotiated as an Administrative Order on Consent. Once the financial review and evaluation established the potential limits of recovery, it became necessary to also address the Wide Beach claims to assure that the financial prognosis was realistic. The terms of a nearly completed Order on Consent were converted to a judicial consent decree and a CERCLA complaint was filed to obtain equal status and enforceability with the Wide Beach settlement, and also to establish a priority against any future claims against the company from other sources. The Department appears to be able to recover most, if not all, of its anticipated costs for the Niagara Transformer plant site under the agreements,



Charles Sullivan  
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while the Wide Beach settlement entails Department recovery of 10% of that federal superfund settlement. A comparable settlement had been reached some time ago with other parties to the Wide Beach action.

This Decree was the result of considerable time and effort by this writer and included coordination with Ben Conlon, and AAG David Munro, who was also handling Wide Beach with US DOJ's Peter Kautsky and EPA's Michael Mintzer. This Decree should be recognized in DEE's cost recovery figures for FY '96-'97, and as another example of how the flexibility in this Unit's approach to issues generally brings success.

GB:B:jb  
B121NTC.5

Enclosure

cc: (With Encl.)  
E. Belmore  
P. Buechi  
E. Armater  
L. Zeppatelli

(W/O Encl.)  
J. Cahill  
G. Caito  
M. O'Toole

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

STATE OF NEW YORK,

Plaintiff

vs.

NIAGARA TRANSFORMER CORPORATION

Defendant

Civil Action No.

FILED  
96 MAR 22 PM 11:52  
U.S. DISTRICT COURT  
W.D.N.Y. - BUFFALO

95-CV-01063 A/R

RECEIVED

DEC 15 1995

CLERK, USDC WDNY

CONSENT DECREE

WHEREAS, the State of New York ("State"), on behalf of the New York State Department of Environmental Conservation ("Department"), has filed a complaint against Niagara Transformer Corporation ("NTC"), pursuant to Section 107(a) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 42 U.S.C. § 9607(a) ("CERCLA"), and New York common law of public nuisance, seeking recovery of response costs incurred and to be incurred in responding to the release or threat of release of hazardous substances at or in connection with NTC plant site at 1747 Dale Road, Cheektowaga, Erie County, New York (the "Site") and other related relief; and

WHEREAS, NTC is a corporation organized and existing under the laws of the State of New York and is doing business in the State of New York in that it owns and operates a transformer manufacturing facility at the Site; and

WHEREAS, pursuant to an April 1, 1991 Administrative Order on Consent with the Department, Index No. B9-0334-90-05, NTC developed and implemented a Remedial Investigation and Feasibility Study (“RI/FS”) for the Site to the satisfaction of the Department, and the Department has issued a Record of Decision (“ROD”) describing the selected remedial program deemed most appropriate for the Site based upon the approved reports submitted pursuant to the aforesaid Administrative Order, and a copy of ROD is attached hereto as Appendix A; and

WHEREAS, the Site is an inactive hazardous waste disposal site, as that term is defined in New York ECL 27-1301.2, and the Department has determined that the Site presents a significant threat to public health and the environment, and the Site has been listed in the Registry of Inactive Hazardous Disposal Sites as No. 9-15-146 as a classification “2” Site pursuant to ECL 27-1305.4.b; and

WHEREAS, pursuant to ECL 27-1313.f, the Department is required to make every effort to secure appropriate relief from the owner or operator of such a site, including payment of the costs of developing and implementing the selected remedial programs; and

WHEREAS, the remedial program selected in the ROD for the Site is estimated to cost \$7-8 million, and, based upon an extensive investigation and examination of the

financial resources of NTC, the Department has determined that NTC does not have sufficient financial resources to develop and implement the remedial program selected for the Site, and, therefore, the Department has proceeded to develop and is implementing the selected remedial program for the Site using funds from the New York Hazardous Waste Remedial Fund established pursuant to Section 97-b of the New York State Finance Law; and

WHEREAS, the State and NTC agree that the Department will implement the remedial program for the Site as selected in the ROD and that NTC will reimburse the Department for its costs and expenses incurred for that purpose to the extent, on the schedule and in the manner set forth herein; and

WHEREAS, the State and the Department have determined, based upon an extensive investigation of NTC's financial condition, including NTC's status as a defendant in a CERCLA cost recovery claim brought by the United States Environmental Protection Agency and the State of New York with regard to the Wide Beach Superfund Site in Brant, New York, which claim is being settled concurrently herewith, that the scheduled payments provided for herein will maximize the recovery of the State's costs and expenses incurred for the remedial program at the Site; and

WHEREAS, the State and NTC agree that settlement of this case and the concurrent settlement of the Wide Beach case, also on an ability to pay basis, without further litigation and without the admission or adjudication of any issue of fact or law is the most appropriate means of resolving this action.

NOW, THEREFORE, it is Ordered, Adjudged and Decreed as follows:

### **JURISDICTION**

1. This Court has jurisdiction over the subject matter and the parties to this action. The parties agree to be bound by the terms of this Consent Decree and agree not to contest its validity in any subsequent proceeding to implement or enforce its terms.

### **DEFINITIONS**

2. Unless otherwise expressly provided herein, terms used in this Consent Decree which are defined in CERCLA or in regulations promulgated pursuant to CERCLA or which are defined in Article 27, Title 13 of the New York Environmental Conservation Law or in regulations promulgated pursuant thereto shall have the meaning assigned to them in such statutes or such regulations. Whenever the terms set forth below are used in this Consent Decree, the following definitions shall apply:

a. "CERCLA" means the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 42 U.S.C. § § 9601, et seq.

b. "Department" means the New York State Department of Environmental Conservation.

c. "Parties" means the State of New York on behalf of the Department and Niagara Transformer Corporation.

- d. "State" means the State of New York.
- e. "NTC" means Niagara Transformer Corporation.
- f. "Site" means the NTC plant site located at 1747 Dale Road, Cheektowaga, Erie County, New York.
- g. "ROD" means the record of decision issued by the Department for the Site.
- h. "RI/FS" means the remedial investigation and feasibility study prepared for the Site.
- i. "Remedial Program" means the remedial design and remedial construction of the remedy selected in the ROD, including any long term, post construction monitoring, sampling, analysis and maintenance, except routine landscape, fence and sign maintenance which will be performed by NTC.
- j. "ECL" means the New York Environmental Conservation Law.

**PARTIES BOUND**

3. This Consent Decree shall apply to and be binding upon the State, the Department and NTC, its successors and assigns. Each signatory to this Consent Decree represents that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to bind legally the party represented by him or her. Any change in ownership or corporate status of NTC including, but not limited to, any transfer of assets

or real or personal property shall in no way alter NTC's responsibilities under this Consent Decree.

#### **NO ADMISSION OR ACKNOWLEDGMENT**

4. Neither this Consent Decree, nor the terms hereof, nor the entry into this Consent Decree, nor the performance of the terms hereunder, by any of the parties shall constitute or be construed as an admission or acknowledgment by any of the parties of the factual or legal assertions contained in this Consent Decree and the parties retain the right to controvert in any subsequent proceedings, other than proceedings for the purpose of implementing or enforcing this Consent Decree, the validity of the facts or determinations contained in this Consent Decree. Neither this Consent Decree, nor the terms hereof, nor the entry into this Consent Decree, nor the performance of the terms hereunder, by NTC shall constitute or be construed as an admission or acknowledgment by NTC of any liability, or an admission of violation of any law by NTC or by its officers, directors, employees, agents, successors or assigns; however, the court, in enforcing this Consent Decree shall look to the terms hereof.

#### **PAYMENT**

5a. Beginning on April 1, 1998, NTC shall make annual payments in the amount of \$300,000.00 each to the Department to be compared and set off against the amounts expended by the Department in overseeing the RI/FS and in developing and

implementing the Remedial Program. Each such payment shall be by cashiers check payable to the "Department of Environmental Conservation" and shall be sent by mail to the Bureau of Program Management, Division of Hazardous Waste Remediation, Department of Environmental Conservation, 50 Wolf Road, Albany, New York 12233-7010. NTC shall continue to make such annual payments to the Department until the total sum of accumulated payments equals the total sum of expenses incurred by the Department for oversight of the RI/FS and implementation of the Remedial Program plus administrative and interest expenses or the amounts specified in subparagraph b. below have been paid, whichever occurs first.

b. Beginning April 1, 1998, NTC shall make annual payments in an amount up to \$300,000.00 for eighteen consecutive years. In the event the provisions of paragraph 6.b. hereof result in the deferral of any amount in any given year and such amount(s) plus accrued interest at the rate of 6% per annum are not fully paid by the eighteenth payment, NTC shall continue to make annual payments in the amount of \$300,000.00 until the amount of all payment deferrals plus accumulated interest has been paid in full.

6. The annual payments specified in paragraph 5 of this Consent Decree are subject to the following conditions:

a. The parties expect that the tax treatment applicable to the payments made under this Consent Decree shall be at least as favorable to NTC as the deductibility specified by the Internal Revenue Service in Revenue Ruling 94-38. In the event there is a change in the tax laws or subsequent revenue rulings resulting in an adverse change in

the tax treatment applicable to the payments to be made under this Consent Decree, NTC shall notify the Department in writing with an explanation of the change, the impact of the change on NTC's financial condition, and a proposed change in the schedule of payments to be made hereunder. Within sixty (60) days of receipt of any such notice, the Department shall respond in writing indicating its agreement to the requested change to the payment schedule or its disagreement and the basis therefore. If the parties are unable to resolve any differences through further informal discussion, NTC may apply to the Court for appropriate relief in the form of a change in the payment schedule. In granting any such relief, the aggregate amount of the payments to be made hereunder shall not exceed \$5.4 million plus interest in the event the procedures in paragraphs 5.b. and 6.b. would be applicable. Unless or until the payment schedule is changed by agreement of the parties or Order of Court, the schedule set forth in paragraph 5 of this Consent Decree shall apply.

b. The parties expect that the annual payments to be made hereunder will be payable out of NTC's current income for the year in question prior to payment of any dividends or bonuses to shareholders of NTC. In the event that NTC is unable to pay the full amount of any \$300,000.00 annual payment due to a lack of net income for that year, the unpaid portion, without penalty but with interest at the rate of 6% per annum, shall be added to the amount due the next year. For the purposes of this provision, NTC's net income shall be determined in accordance with generally accepted accounting principals by NTC's independent outside accountants prior to the deduction of the annual

payment to DEC. NTC shall not be entitled to defer payment of any portion of the \$300,000.00 payment in any year when its net income, as defined above, equals or exceeds \$400,000.00. In the event NTC's net income is less than \$400,000.00 and NTC determines it is not able to pay the entire \$300,000.00 payment, NTC, subject to the terms of paragraph 5.b. above, shall provide DEC with a copy of its annual income statement along with its partial payment for that year.

c. In any year, NTC shall have the right to prepay all or any part of a deferred payment due from the prior year, all or any part of that year's payment and/or to prepay part or all of any subsequent year's payment. In any such event, the payment(s) shall be applied against the next amount due under the schedule of payments without accelerating the schedule for any subsequent payments.

d. NTC may elect at any time to pay in full any outstanding balance calculated in accordance with paragraph 5.a. or 5.b. above. In that event, NTC will have fully discharged its payment obligations under this Decree.

7. Upon final acknowledgment by the Department that the remedy has been completed, the Department shall prepare an accounting of its expenses and the payments received from NTC through the date thereof, showing the outstanding balance and shall send a copy of such accounting statement to NTC. Thereafter, NTC shall be entitled to request and obtain from the Department an annual accounting and balance statement.

8. Upon completion of the remedial construction work and the final acceptance thereof by the Department indicating that the remedial construction work has

been satisfactorily completed, the Department shall notify NTC in writing, and thereafter, NTC shall be responsible for maintaining the site landscaping, permanent fencing and any permanent signage. At the same time, the Department may request NTC to retain a qualified contractor to conduct the post-construction monitoring, sampling, analysis and related maintenance. If NTC agrees to undertake such work, the full annual cost thereof, including administrative overhead, shall be deducted from the respective annual payments due under paragraph 5 supra.

9. No payment made pursuant to paragraph 5 of this Consent Decree shall be construed as a fine, penalty or sanction. For the purpose of this Consent Decree, the payments made by NTC shall be deemed ordinary and necessary expenses for the continued operation of NTC at its facility.

#### SITE ACCESS

10. NTC, by separate written access agreement, has granted the Department the right to use property owned by NTC adjacent to the Site for purposes related to implementation of the remedy. NTC shall continue that access agreement as long as necessary for the Department to complete implementation of the remedial program.

11. NTC shall provide the Department and its duly designated employees, agents, consultants and contractors with access to the Site and suitable operating space for the construction and implementation of the on-site elements of the Remedial Program. NTC shall assume responsibility for reasonable adjustments or modifications to its

facility use and operations which may be necessary for implementation of the Remedial Program.

### **CIVIL PENALTIES**

12. In addition to any other remedies or sanctions available to the State, if NTC fails or refuses to comply with any term or condition of this Consent Decree, it shall be subject to a civil penalty up to \$25,000.00 per day of such failure or refusal pursuant to Section 122(l) of CERCLA, 42 U.S.C. § 9622(l), or ECL 71-2705.1.

### **RESERVATION OF RIGHTS**

13. The State agrees that NTC has satisfactorily complied with all obligations undertaken in connection with the 1991 Administrator Order concerning the conduct of the RI/FS for the Site.

14. Except as expressly provided elsewhere in this Decree, nothing contained in the Decree shall be construed as barring, diminishing, adjudicating, or in any way affecting any of the State's rights, including the following:

a. The State's right to bring any action or proceeding against anyone other than NTC, or its directors, officers, employees, servants, agents affiliates, successors and assigns.

b. The State's right to enforce the provisions of this Decree against NTC and/or NTC's successors and assigns in the event NTC fails to satisfy any of the terms of this Decree.

c. The State's right to bring any criminal action against NTC, its directors, officers, employees, servants, agents, and assigns arising out of its future conduct with respect to the Site.

d. The State's right to gather information and enter and inspect property and premises in accordance with applicable law and the terms of this Decree.

Similarly, nothing contained in this Decree shall be construed as barring, diminishing, adjudicating or any way affecting NTC's rights or the rights of its officers, directors, agents, servants, employees, successors or assigns to take issue with or contest the State's entitlement to any of the foregoing.

15. Subject to paragraph 17 hereof, nothing in this Decree shall prohibit the Department Commissioner, or his duly authorized representative, or the Attorney General from executing any summary abatement or public nuisance abatement powers.

**RELEASE OF LIABILITY AND COVENANT NOT TO SUE**

16. Nothing in this Decree shall be deemed to release NTC from liability for hazardous substance conditions at the Site or the State's response costs arising therefrom except as provided in this section:

a. In consideration of, and contingent upon, NTC's compliance with the provisions of this Decree, and until the release provided for in paragraph b of this section, takes effect, the State covenants not to sue, execute judgment or take any civil, judicial or administrative action under Federal or State law (other than enforcement of this Decree) against NTC, its past, present, or future officers, directors, employees, agents, successors and assigns, arising out of or relating to the performance of the Remedial Program.

b. Upon payment of the last amount due in accordance with paragraphs 5 and 6 of this Decree, the State shall provide a release from liability to NTC, its past, present and future officers, directors, employees, agents, successors and assigns for all claims, demands, remedies or actions whatsoever under common law or any State or Federal statute arising out of or related to the past release and migration of hazardous substances or chemicals or chemical wastes as those terms are used in CERCLA, the ECL and the State's complaint in this action that have been contained, removed and/or treated through implementation of the Remedial Program as described in the Remedial Program records.

c. Nothing in this Decree shall in any way constitute or be construed as a release of claims by the State against any person not a party to this Decree.

d. Nothing in this Decree shall in any way constitute or be construed as a release of claims by NTC against any person not a party to this Decree.

### **PROTECTION FROM FURTHER CONTRIBUTION**

17. Upon entry of this Decree, and subject to its compliance with the material terms of this Decree, NTC, its past, present and future officers, directors, agents, employees, successors and assigns, shall be deemed to have resolved their liability to the State for purposes of contribution protection provided by CERCLA Section 113(f)(2). Specifically, if the obligations set forth in this Decree are met, NTC shall not be liable for any claim for contribution regarding matters addressed in the 1991 Administrative Order, the RI/FS, the ROD, the final engineering report for the Remedial Program, or this Decree. The provisions of this section shall not apply to any action which is brought by the State to enforce this Decree.

### **PUBLIC NOTICE**

18. Within thirty (30) days after the effective date of this Decree, NTC shall file a Declaration of Covenants and Restrictions with the Erie County Clerk to give all persons who may acquire any interest in its property at the Site notice of this Decree. This Declaration is and shall be deemed to be a covenant to be running with the land, binding NTC, its successors and assigns and any lessee of NTC in perpetuity or until such time that the Department determines that the covenant is no longer necessary for the protection of human health and the environment.

19. Unless prior written approval by the Department and the Department of Health is first obtained, which approval shall not be unreasonably withheld, there shall be no construction or use of NTC's property at the Site which results in the disturbance or excavation of waste materials therein, which threatens the integrity of the cap or soil cover materials or wells, or which results in unacceptable human exposure to contaminated soils or groundwater.

20. Unless prior written approval by the Department and the Department of Health is obtained, which approval shall not be unreasonably withheld, there shall be no change in the use of NTC's property at the Site in a way that would significantly interfere with the long term operation and maintenance of the Remedial Program.

21. If NTC proposes to convey the whole or any part of its property interest at the Site, NTC shall, not fewer than sixty (60) days before the date of such conveyance, notify the State in writing of the identity of the transferee and of the nature and proposed date of the conveyance, and NTC shall notify the transferee in writing, with a copy to the State, of the applicability of this Decree.

### COMMUNICATIONS

22. All written notices or communications required by this Decree shall be transmitted by United States Postal Service, by private courier service, telefax, or hand delivery as follows:

a. Communications from NTC to the State shall be sent as follows:

(i) Andrew English, P.E., New York State Department of Environmental Conservation, Division of Hazardous Waste Remediation, 50 Wolf Road, Albany, New York 12233-7010.

(ii) Director, Bureau of Environmental Exposure Investigation, New York State Department of Health, Two University Place, Albany, New York 12203

(iii) Martin Doster, P.E., New York State Department of Environmental Conservation, Division of Hazardous Waste Remediation, 270 Michigan Avenue, Buffalo, New York 14203-2999

(iv) Glen R. Bailey, New York State Department of Environmental Conservation, Division of Environmental Enforcement, 270 Michigan Avenue, Buffalo, New York 14203-2999.

(v) David A. Munro, Esq., New York State Department of Law, The Capitol, Albany, NY 12224

b. Communications from the State to NTC shall be sent as follows:

(i) One copy to Niagara Transformer Corporation, Attention Mr. Fred Darby, President, 1747 Dale Road, Buffalo, New York 14225; and

(ii) One copy to Buchanan Ingersoll Professional Corporation, One Oxford Centre, 301 Grant Street, 20th Floor, Pittsburgh, Pennsylvania 15219, Attention: Daniel M. Darragh, Esquire.

The State and NTC reserve the right to designate additional or different addressees for communications on written notice to the other.

### **INDEMNITY AND INSURANCE**

23. NTC shall indemnify and hold the Department, the State of New York, and their representatives and employees harmless from all claims, suits, actions, damages, and costs of every name and description arising out of or resulting from the performance or attempted performance of the Remedial Program by the Department and/or any other state agency, its officers, employees or agents, unless such claims, suits, actions, damages, and costs are assessed as a result of a determination or finding of negligent, unlawful, willful, or malicious acts or omissions or other culpable conduct on the part of the state, state agencies, or their officers, employees, agents, contractors or subcontractors.

24. Any contractor retained by the Department and/or any other state agency to implement any part of the Remedial Program shall be required to provide comprehensive general liability insurance applicable to its work on the Remedial Program in an amount not less than \$1 million per occurrence, \$2 million annual aggregate, and any such insurance shall name NTC as an additional insured. In addition, any such contractor shall be required to provide and maintain worker's compensation insurance as required by the laws of the State of New York.

25. In the event of a claim for indemnity under paragraph 23 hereof, NTC's obligations under said paragraph shall arise only after the limits of any applicable insurance under paragraph 24 hereof have been exhausted.

### **MISCELLANEOUS**

26. This Decree shall be lodged with the Court by the State after it has been executed by the parties. If for any reason the Court should decline to approve this Decree, in the form presented, this agreement is voidable at the sole discretion of any party hereto and the terms of the agreement may not be used as evidence in any litigation between the parties.

27. The terms of this Decree shall constitute the complete and entire agreement between NTC and the State concerning the Site. No term, condition, understanding, or agreement purporting to modify or vary any term of this Decree shall be binding unless made in writing and subscribed by the parties to be bound. No informal advice, guidance, suggestion or comment by the State regarding any proposal, schedule or any other submittal shall be construed as relieving NTC of its obligation to obtain such formal approvals as may be required by this Decree.

28. If NTC desires that any provision of this Decree be changed, NTC shall make timely written application to the State setting forth reasonable grounds for the relief sought. Copies of such written applications shall be delivered or mailed to:

a. Andrew English, P.E., New York State Department of Environmental Conservation, Division of Hazardous Waste Remediation, 50 Wolfe Road, Albany, New York 12233-7010.

b. Glen R. Bailey, New York State Department of Environmental Conservation, Division of Environmental Enforcement, 270 Michigan Avenue, Buffalo, New York 14203-2999.

c. David A. Munro, Esq., New York State Department of Law, The Capitol, Albany, NY 12224

29. The effective date of this Decree shall be the date it is entered by the Clerk of the Court.

30. The Court shall retain jurisdiction to modify or enforce the terms of this Decree and to resolve such disputes arising hereunder as may be presented to the Court.

### **TERMINATION OF DECREE**

31. The provisions of this Consent Decree shall remain in effect until completion of all payments required by this Decree. NTC shall notify the State in writing at the time it believes all such payments have been made. Within thirty (30) days of such notice, the State shall advise NTC in writing of its determination that all payments required by the Consent Decree were made or that further payments are necessary to fulfill the obligations of this Decree. Except for the provisions of paragraphs 4, 13, 14, 15, 16, 17, 18, 19, 20 and 21, which shall survive termination, the provisions of this

Decree shall terminate on the date that the State advises NTC that all of the requirements have been completed. Upon receipt of the State's acknowledgment that all required payments have been made or the failure of the State to respond within the thirty (30) day period, NTC may file a statement with the Clerk of the Court indicating that the requirements of this Decree have been fully satisfied.

Dated: Dec 13, 1995

Dennis C. Vacco  
Attorney General of the State of New  
York

By: David A. Munro  
David A. Munro  
Assistant Attorney General

Attorney for the State of New York

Buchanan Ingersoll  
Professional Corporation

By: Daniel M. Darragh  
Daniel M. Darragh

Attorney for Niagara Transformer  
Corporation

SO ORDERED:

Richard J. Brown  
United States District Judge

March 22, 1996