

HOST COMMUNITIES

STANDING COMMITTEE MEETING

Monday, March 20, 2008 – 12:00 p.m.

Niagara County Department of Economic Development

6311 Inducon Corporate Drive

Sanborn, New York 14132

Representatives Present:

Carmen C. Granto, Superintendent, NFSD Chairman, HCSC	Niagara Falls City School District
Paul Dyster, Mayor	City of Niagara Falls
Donald Rappold, Interim Superintendent	Lewiston-Porter School Dist
Rob Daly, Special Advisor, Relicensing	New York Power Authority
William L. Ross, Chairman, NC Legislature	Niagara County
Scott Hapeman, Esq., Counsel	Niagara Wheatfield School District
Fred M. Newlin, Supervisor	Town of Lewiston
Steven Richards, Supervisor	Town of Niagara

Guests:

Thomas O'Donnell, Esq.	City of Niagara Falls
Warren Kahn, Esq.	Lewiston Porter School District
Tom Burgasser, Esq.	Niagara County
Angelo Massaro, Esq.	Niagara Falls School District
Dan Miner	Niagara Gazette
Robert Fluskey, Esq.	Town of Lewiston
Michael Risman, Esq.	Town of Niagara
Aaron Besecker	Buffalo News
Rose Mary Warren	Taxpayer
Barbara Montante	HSBC

Staff Present:

John Baird, Treasurer
Mary Melloni, Recording Secretary
Stan Widger, Esq., NPC Counsel, Nixon Peabody (*Via Teleconference*)
Samuel M. Ferraro, Executive Director/Commissioner - Niagara County Center for
Economic Development

1.0 Call to Order

Chairman Granto called the Host Communities Standing Committee meeting to order at 12:10 p.m.

2.0 Roll Call

Ms. Melloni called the roll; a quorum was established.

3.0 Pledge of Allegiance

Chairman Granto led the pledge of Allegiance.

4.0 Approval of Meeting Minutes

4.1 February 22, 2008

4.2 March 3, 2008

It was noted that in the February 22 minutes, Mr. Rappold was listed as a member of the Funding Committee in error; Mr. Miller should be listed in his place. Change noted.

Mr. Daly made a motion, seconded by Mr. Rappold, to approve the minutes on with the understanding that further changes can be made at the next meeting if necessary. Motion passed.

5.0 Standing Committee Protocol

Chairman Granto distributed a copy of the Protocol that contained line numbering in order to make it easier to review. He suggested that with the exception of the consistency clause, the remainder of the document be examined first.

Chairman Granto asked if there were any comments/changes/additions to:

- Lines 1 – 33 (Background). There were none.
- Lines 34 – 44 (Host Communities – Vehicle for Participation and Inter-Community Relations). There were none.
- Lines 45 – 51 (Standing Committee Membership). There were none.
- Lines 52 – 63 (Meetings). There were none.
- Lines 64 – 73 (Committee Procedures - General).

Mr. Burgasser stated that “further selection and funding” is not included as being different from the general procedures (p. 8, line 154). It needs to be included in this section. Mr. Burgasser stated that it will never be totally acceptable to the County, but might be conceded to. *He suggested adding “further selection and funding” as (c) on line 70 after item (b). This was agreed to.*

Lines 74 – 162 (Consistency Determination) will be discussed after the remainder of the document is reviewed.

- Lines 163 – 172 (Chairperson, Vice Chairperson and Secretary). There were none.

5.0 Standing Committee Protocol

- Lines 173 – 196 (Sponsorship and Funding of Proposed Projects). Mr. Daly stated that on line 180, sentence beginning “Such entities...” his understanding of this is that NYPA has no issue with the original intent of the sentence; however, in the past few meetings there were discussions regarding i.e., what if the Town of Lewiston wanted to sponsor a project in the City of Buffalo or Niagara Falls – this line implies they could never do that. Mr. Newlin stated that it would be difficult for an entity to spend their money outside of their own district. Mr. Massaro stated that his understanding of that section is if an entity makes a determination whether to sponsor a project geographically, if they refuse it is over. If they say yes to the geographic location, they then have to decide if they want to sponsor it financially; if they say no financially then the party could seek sponsorship elsewhere and that would have to be with Niagara County. Mr. Widger stated that the expressed limitation here is for entities other than host communities; however, two host communities could get together on a certain project and there may be a crossover of geographical boundaries. Mr. Widger stated that in referring to third parties he agrees with Mr. Massaro’s understanding of the section. *After more discussion, it was decided to remove “(or host communities)” from lines 181 and 184.*

Mr. Burgasser suggested that on line 190, after “...the other six (6) Host Communities...” add the portion of the sentence from line 193 after “...boundaries,” that starts “provided that the project...” This was agreed to.

- Lines 197 – 211 (Format for Proposed Project Submissions). No changes.
- Lines 212 – 265 (Steps and Schedule for Review Process). No changes.
- Lines 266 – 268 (Criteria for Project Approval). No changes.
- Lines 269 – 303 (Implementation of Projects [Disbursement of Funds and Monitoring]).

Mr. Daly asked if any response was received from the Office of State Comptroller regarding the question of allowing NYPA to co-sign checks from each of the entities. Mr. Widger stated that the Comptroller’s office referred him to their Counsel whom he has yet to hear from. He will follow up on this. Chairman Grant stated that adjustments will be made when a ruling is received.

Mr. Burgasser stated that the fund accounts will be whatever is decided upon, however it was thought they would be more along the lines of money market accounts to get the best interest available. Ms. Montante of HSBC Bank stated that the money market accounts are the best bet at this time. *It was agreed to delete the work “checking” on line 280.*

It was agreed to add on line 303, after the word project, add “and such signatures shall not be unreasonably withheld.”

5.0 Standing Committee Protocol

- Lines 304 – 326 (Release of Funds).

On line 307, the word “the” will be changed to “each.”

Mr. Hapeman stated that line 309 indicates what qualifying project costs shall include...numbers 1 through 4. Right after that it states that limitations of 7.3 apply. Mr. Hapeman asked if the paragraph could be reworded.

It was agreed to revise line 309 to read “Qualifying project costs shall include any use of funds contained in Section 7.3 of the HC Settlement Agreement, including but not limited to the following.” Line 317, the first sentence beginning “The limitations on...” will be deleted.

Mr. Daly stated that they can eliminate putting a required audit in here but would like a phrase “no check will be issued in support of a project in successive years until an annual report from the project sponsor is provided to the Standing Committee.” He stated that the annual report would be what is in Section 7.5 of the Settlement Agreement (a list of all expenditures associated with the approved project and a detailed list of those planned expenditures). Mr. Rappold asked that if for bonding would that be one report for the next 15 years. Mr. Daly stated that it would just require changing a date. Mr. Rappold stated that once a bond project is done, it will still be receiving a check each year. Mr. Massaro stated that in bonding, after the first year, the report would read that a dollar amount was received for the first year and that dollar amount was paid out for the bond.

At the end of line 308, it was agreed to add “No check will be issued in support of a project in a successive year until an annual report from the project sponsor is provided to the Standing Committee providing the following information required by the Settlement Agreement in Section 7.5.”

Line 318, the sentence beginning “Funds not used..” shall be revised to read “Funds not used in one year by a Host Community shall remain in that Host Community’s Fund Account and be available for future projects of that Host Community.”

- Lines 327 – 333 (Reporting). No change.
- Lines 334 – 336 (Reimbursement). No change.
- Lines 337 – 340 (Amendment of Protocol).

Mr. Fluskey stated that they do not have a good definition of “working in a cooperative manner.” Mr. Hapeman stated that his interpretation of this is that it results in a unanimous vote and the hope that a unanimous vote itself is enough. Mr. Massaro stated that when it was previously discussed, no one seemed to have an objection to it. Mr. Fluskey stated he was not present and Mr. Hapeman explained that he was out voted. A discussion ensued. Mr. Massaro stated that it is not even necessary to say “try to reach consensus.”

5.0 Standing Committee Protocol

- Lines 337 – 340 (Amendment of Protocol).

Six of eight is what is needed to amend the Protocol. Mr. Daly stated that unless the two items are excluded that they excluded earlier (selection of funding and consistency), amending the consistency determination does not work right now. Mr. Daly stated he did not agree, because other things would be able to be excluded as well. Mr. Massaro stated there are three items under the exclusion; (a) Consistency Determination, (b) amendment of the protocols, and (c) further selection and funding. Mr. Massaro stated that what he believes is most important to NYPA is the consistency; therefore, if consistency is excluded from the Amendment to the Protocol, that would protect whatever the Host Communities decide as to what that the consistency provision is. Everything else should be done by super majority as a normal function of governments and corporations. Mr. Massaro suggested excluding (a) consistency from the amendments and making it a super majority of six; this would protect everyone.

It was suggested to change the statement (line 338) to *“In the event one or more members propose to amend this Protocol, except determining the consistency of proposed projects with the criteria described in ‘Background,’ and the further selection and funding, it shall be by a vote of six members.”*

Mr. Daly asked to include banking arrangements; Mr. Massaro stated that is under Protocol and that could be changed by a majority vote. Mr. Daly stated he feels some of the arrangements should not be changed. He stated that if the Host Communities wanted to take NYPA completely out of the picture, not allow them to sign anything or approve anything and they are not on the finance committee then there will be a problem with NYPA. There are areas of the banking arrangements that should not be changed. Mr. Massaro asked if all three of those items, including banking, consistency and selection of funding were included, and the rest is majority, he would agree to that and that would protect NYPA.

Mr. Newlin stated that the financial responsibilities stipulated in the Host Community Agreement with respect to NYPA is their paying into an account set up by the Host Communities. Mr. Burgasser stated that this is a big compromise by the Niagara Power Coalition. There is nothing in the HC Agreement that says NYPA should have any signatory power whatsoever on the funding account. Any funding account is to be approved 100% by the Niagara Power Coalition bylaws, which does not include NYPA. However, the Host Communities have agreed that we will allow NYPA to sign on those accounts for concession purposes.

5.0 Standing Committee Protocol

- Lines 337 – 340 (Amendment of Protocol).

Mr. Ross stated that in 2005 all the members did everything possible to move the process along because they wanted to make NYPA's deadline for FERC. A lot of compromises were made to make sure the Host Communities were in line with NYPA, but the same thing is not being done by NYPA. He stated that the continued change of Protocol is most caused by NYPA. As Supervisor Newlin stated there is nothing in the Agreement that ever stipulated that there be a Protocol. Therefore, Mr. Ross stated as he looks at this situation he sees hundreds of thousands of dollars that could go toward projects and the residents of his community. Mr. Newlin agreed with Mr. Ross.

Mr. Granto asked that this conversation be delayed until they discuss the Consistency Determination. The final revision is as follows:

"In the event one or more members propose to amend this Protocol, except determining the consistency of proposed projects with the criteria described in 'Background,' banking arrangements and procedures, and the further selection and funding, it shall be by a vote of six members."

Mr. Widger stated that "further selection and funding" does not need to be subject to any super majority vote for purposes of the amendment. The only reason that is in the exceptions is because of the two meeting provision; however, if the two meetings do not have consensus on further selection and funding it is a majority vote. Mr. Widger asked if everyone would agree that because that is a lower level item that happens to have the two meeting provision in it, why would it need to be subject to a super majority vote for amending that provision. This is the suggested wording:

"In the event one or more members propose to amend this Protocol, except determining the consistency of proposed projects with the criteria described in 'Background,' and banking arrangements and procedures, it shall be by a vote of six members."

Mr. Massaro stated that when they discuss consistency, banking will be included in that. Chairman Granto asked if there were any objections; none were expressed. The above revision will be made.

Meeting recessed at 1:40 p.m.

Meeting resumed at 1:55 p.m.

5.0 Standing Committee Protocol

Consistency Determination

Chairman Grant stated that regarding the Consistency Determination, he recalls that in the December meeting Mr. Newlin made a motion that the wording in the Agreement received by Mr. Widger be accepted and a consensus was reached. At subsequent meetings Mr. Fluskey was not present and has since stated he would have advised his client (Mr. Newlin) to have done things differently. Therefore, a subcommittee was formed (Mr. Daly, Mr. Fluskey, and Mr. Widger) to work on alternate language to include a sunset clause, because there was a concern that without this it would take the Standing Committee to Consistency Determination and the group would have to live with it forever. This caused many of the members to rethink the issue because many members did not realize that this could be the impact.

Mr. Burgasser stated that this discussion is going to be referring to lines 136 to 153 in the current protocol. A separate document has been handed out – entitled “Alternative Language for Effective Period for ‘Consistency Determination’.”

The issue under consideration, as suggested by Mr. Widger, is that in the event, after 5 years there is no agreement on the issue of “consensus,” then the group will start over again.

Mr. Daly stated that NYPA’s feeling on this is that the Consistency Determination is something they already agreed to. It was agreed in December to put this into the protocols. They are willing to look at other language as long as it addresses the critical interests they have outlined.

Mr. Widger stated that what they tried to do is to crystallize what Mr. Risman had concerns with; in terms of having a hard and fast cut off if an agreement cannot be reached versus the way it is in the body of the agreement where it would go to Court. Mr. Risman stated he agrees with Mr. Widger that the Court will hear it, but there is that possibility that they won’t. He stated that if the sunset clause is put in and the protocol is working for five years, there would not be a problem renewing it.

Mr. Widger stated that if a Court did not rule on it, you could go to Court separately on the issue that the agreement needs to be reformed because a major provision of it is not functioning. If you lose on this issue you would follow the Host Community Agreement.

Mr. Richards asked that the members keep in mind that right now the interest rates are very low and the Town of Niagara and Town of Lewiston both have projects ready to go and it would mean substantial savings to be able to start the process.

5.0 Standing Committee Protocol

Consistency Determination

Mr. Daly stated that after speaking with Mr. Widger and Mr. Fluskey on Friday, he understands the concerns about the possibility that this could be an item that takes five members. He stated he feels there are other ways of going about this other than a hard sunset, and that may be only adjusting the five members. He stated that he feels NYPA is open to that.

Mr. Massaro asked if NYPA will accept the sunset clause; and if they will, then the members need to decide if they want to spend the time and money to negotiate a new agreement if it becomes necessary. Mr. Daly stated that Mr. Fluskey's concern is that this could be here forever if you cannot get five committee members to address it. Mr. Daly stated that the attorneys have indicated that the Judge will make a decision. Mr. Daly stated he is willing to look at the 5 year sunset clause.

Mr. Fluskey stated that under the original protocols five people were needed just to negotiate. He went on to state that if you were in the minority and wanted to go to court, it seems the answer would be no. He stated that this should be a concern. He stated that the members can sue under the Host Community Agreement now without five people and the protocols are not needed in order to receive funds.

The discussion continued.

It was agreed to revise line 92 to read *"Nothing in this subparagraph (a) shall limit or preclude any Host Community members' rights."*

Mr. Grant asked what the probability of getting a decision by the court is, as he was under the impression it would be difficult to get a decision. Mr. Widger stated he does not view it as an advisory opinion but there could be some uncertainty about that. Mr. Massaro agreed with Mr. Widger – that the Courts will make that determination and if not it could be brought on a case by case basis. However, Mr. Massaro stated, the issue here is whether they want everything to go away in five years. Mr. Grant stated that the objection to what is in the body of the document now is that it would go on forever and a Court decision would never be made. Mr. Burgasser asked if the alternative language is agreeable to NYPA. Mr. Daly stated no because it puts them back at the table in five years. Mr. Kahn stated that right now they are dealing with a majority vote; whatever they adopt is by a majority vote. He would like to see a sunset provision in the document. Mr. Burgasser stated he thought they had a workable protocol that had a concerted effort to get consensus and if not it went to a super majority vote and it gave the Chairperson and NYPA what might be considered half a veto—one or both has to be part of the super majority.

5.0 Standing Committee Protocol

Consistency Determination

After some discussion, Mr. Fluskey requested the following line be added to the protocol after the last word on line 92: *“Nothing in this subparagraph (a) shall limit or preclude any Host Community member’s right to seek to enforce its rights under the Host Community Agreement.”*

Mr. Granto stated that the protocol submitted by Mr. Widger on March 20, 2008, with the changes that have been made at this meeting, with Counsel’s review, is agreed upon.

Mr. Burgasser asked that somewhere in lines 136 – 153 there should be something that states *“any determination by any Court has to be a determination without consideration of this section having any weight be given to it or any consideration is given to it by the Court.”* Mr. Burgasser stated he does not want to be tied into the fact that the Committee has already defined *“concerted effort to reach a consensus.”* He stated the Committee should make sure that the neither the Court nor the parties cannot use this in their papers in any consideration given by the Court. Mr. Fluskey stated he agrees with the concept. Mr. Widger will prepare the language to reflect this concern.

Mr. Newlin stated that he is leaning toward a shorter provision of two years to revisit the protocol; he feels five years is too long. The reason for that is that with what has occurred over the past few months—one member of the Committee who has given the rest his concerns and the committee has spent the last six months addressing the concerns of one member—spending a lot of time and money. Mr. Newlin explained that this is a textbook example why governing by consensus all the time does not work. The reason he is in favor of the sunset provision is that if they have to go through this every time one or two members have a legitimate concern, nothing will ever be accomplished.

Chairman Granto stated that if someone has a concern, they will have to convince four other members of that concern before it can be discussed.

Mr. Rappold stated that for 50 years there was nothing coming to any of the entities in Niagara County and he does not want to make the same mistakes for another 50 years. This is the point where history is going to look at what is done at this meeting today for the next 50 years. Mr. Rappold stated that in 2005 he was under the impression that everyone was very satisfied. Mr. Rappold stated that the farther the Committee gets away from the compromise made in 2005, the more likely Lewiston Porter will not support it.

5.0 Standing Committee Protocol

Consistency Determination

Mr. Burgasser stated that the agreement gives up a lot of what was negotiated for and agreed to in the 2005 Agreement. Once that agreement was put into effect, the agreement says that whatever went before it does not matter anymore and the entities are to live with the agreement they have. Mr. Burgasser states he fears they are giving up the right to try to reach consensus and if consensus is not reached it is left to vote by the normal standards in the communities and to him that means a majority vote. Prior protocols indicated that they would even go so far as a super majority. (Referring to the protocols that were going to be presented in October) One item that Mr. Burgasser stated he has not addressed yet because it is not in this protocol as it may have been taken out, is that the Committee has general protocols that are presently in existence by NYPA that state if there are other protocols that are inconsistent with this, their protocols rule. Mr. Burgasser stated that his understanding is that NYPA's feeling on this is that they have consensus and their general protocols are in full force and effect. They feel that the County and its representatives stood aside for the better good and let those protocols go into effect. Mr. Burgasser stated that if NYPA stands on that ruling, then there is another issue that should be addressed in the protocols – the fact that the HC protocols should trump any other protocols, theirs should not trump ours. Mr. Burgasser said that he is not sure what is going to happen with the general protocols that NYPA has as a trump card over the HC's protocols; that there is nothing addressing this in the agreement and he does not feel he can help the County go forward with it. Mr. Burgasser stated it is up to the Legislators to make that decision.

Chairperson Grant asked Mr. Widger if he agreed that the protocols of the other three Standing Committees would trump any protocols that this group has. Mr. Widger stated that he does not agree with that. He stated that NYPA has represented to him that their view at the time the HC protocols were being drafted was that with the modifications that were made they were consistent with the others so there was no issue of one trumping the other. Mr. Daly indicated he agrees with that.

Chairperson Grant asked if the other three standing committees could, in the future, attach to the HC protocols. Mr. Widger stated no, that the HC was very clear as to their standing on the general protocols and there is no mistake for anyone who looked at it or was in attendance at the meetings. It would only be if HC agreed to those protocols.

5.0 Standing Committee Protocol

Consistency Determination

Mr. Massaro asked if language could be inserted that if there is an inconsistency that the HC protocols control. Mr. Widger stated that he would certainly feel better having that in and he will look into that language.

Mr. Daly stated that he does not feel there is anything in the general protocols that is inconsistent with what has been drawn up here. He stated that regarding future protocols that may be developed amongst the other three, NYPA feels those protocols need to be changed by consensus and this committee would have to sign off on that. It was stated that NPC did not sign off on the first set. Mr. Daly stated that the way it was taken at the meeting, it was asked if the other three committees could move forward using those protocols and it was asked if the NPC would have an objection to that; and that is essentially how it was moved. He stated that Erie County and Buffalo have agreed to a similar document, but have not adopted it yet; State Parks has adopted committee-level protocols. He stated that their changes had no effect on the general protocols and if they change their committee-level protocols those changes would not affect this.

Mr. Ross stated that Mr. Burgasser is looking for a written opinion from Mr. Widger on this issue. Mr. Massaro asked if Mr. Daly would object to putting in language to address this—that if there is an inconsistency this protocol controls. Mr. Daly stated that for some reason that language was taken out and he does not remember why it was removed. Therefore, Chairman Grant requested a written opinion from Mr. Widger.

Mr. Widger stated to Mr. Daly that he is concerned with the characterization of what he said at the general meeting dealing with those protocols, as he chose his words very carefully and at no point did he ever indicate that the Niagara Power Coalition members of the Standing Committee agreed with those protocols. It was said that the other three standing committees could do whatever they wanted and implement those protocols for themselves, but we were not doing it. It did get mischaracterized in the press, but that is what he said and Mr. Miller was present at that meeting. Mr. Widger stated he will not stand by and have what he said very carefully be mischaracterized like that. Mr. Kahn stated he can verify Mr. Widger's remarks. Mr. Widger stated this causes him enough concern to think that one way or the other it needs to be clear that the general protocols are not going to trump what the HC does and that is something that he hadn't been concerned about until it was repeated today. Mr. Widger will draft language to add to this agreement.

Mr. Daly stated he is not suggesting that NPC accepted the general protocols; he understands that they did not. But what was said is that the other three committees could go ahead and implement those and move on. Mr. Widger reiterated that was for themselves, not for the Host Communities—that is the key. Mr. Newlin stated that he recalls them being asked "would you mind standing aside so the other three can go forward." Mr. Widger agreed that was what was said.

5.0 Standing Committee Protocol

Consistency Determination

Chairman Granto asked that Mr. Widger draft language that makes it very clear that the HC's are not bound by the protocols of any other subcommittee. Mr. Widger stated he will do that.

Mr. Burgasser asked if Mr. Daly considered the "standing aside" to be consensus. Mr. Daly stated yes, he considered that to be consensus in the vote on the protocols—the ability for the others to move on and work. Chairman Granto stated he heard Mr. Daly say that if there were a change in those protocols that the HC Standing Committee would have to agree to it also.

Mr. Kahn asked for a recess to confer with this client before voting on the protocols; other members agreed. Chairman Granto granted a 10 minute recess.

The HCSC meeting recessed at 3:00 p.m. The NPC meeting was held during this recess.

HCSC Meeting resumed at 3:30 p.m.

Mr. Newlin indicated that the sunset provision is not settled at this point, however, Mr. Daly is to come up with alternative language regarding those concerns.

Mr. Newlin made a motion that the HC Standing Committee authorize each member of the HC Standing Committee to take the protocols that Mr. Widger submitted today back to their respective Boards, along with the amendments/changes that were agreed to at this meeting. Mr. Hapeman seconded the motion.

Mr. Widger stated he will provide a protocol with today's revisions by tomorrow morning.

Mr. Daly stated that with regards to the changes that Mr. Widger is going to submit, it may make more sense rather than addressing it, to just not adopt the general protocol. Mr. Daly stated that with regard to which protocol rules/governs, if the general protocols are not adopted it will never be an issue. Their minutes indicate that the group "stepped aside."

5.0 Standing Committee Protocol

Mr. Hapeman agreed that it is a moot point; however, if there is something that says the Host Communities have not adopted those protocols and that they will have no affect on the HC protocols or our body, then there is no harm in that and it should not be objectionable.

A roll call vote was taken.

Town of Lewiston	Yes
Lewiston Porter	Yes
City of Niagara Falls	Yes
Town of Niagara	Yes
Niagara-Wheatfield	Yes
Niagara County	Yes
New York Power Authority	Yes
Niagara Falls Schools	Yes

Motion Passed.

6.0 Other Matters – None.

7.0 Next HCSC Meeting:

Date: Tuesday, April 1, 2008

Time: 12 Noon

The NPC meeting will follow.

8.0 Adjournment

Mr. Newlin made a motion, seconded by Mr. O'Donnell. Motion passed. Meeting was adjourned at 3:38 p.m.

Respectfully submitted,

Mary P. Melloni
Recording Secretary