

**PROPOSED  
TERM SHEET  
for a Lease between Crown Hydro LLC and  
the Minneapolis Park and Recreation Board**

This document suggests the business terms of a potential lease between the Minneapolis Park and Recreation Board and Crown Hydro LLC. This document sets forth the regulatory requirements that would have to be met to protect the Park Board and Community before Crown Hydro can develop a 3.4 megawatt capacity run-of-the-river hydroelectric plant on Park Board property.

**HIGHLIGHTS**

The proposed term sheet includes several changes from previous Crown Hydro proposals in order to respond to concerns, question and suggestions from Park Board members and staff as well as others including:

- Flow Over St. Anthony Falls. The Park Board will have complete control over use of the first 1,000 cubic feet per second (cfs) of available water flowing over the Falls under a Federal Energy Regulatory Commission (FERC) license provision that Crown Hydro will submit to FERC.
- Certainty of Protection for the Park Board and Community. Several existing protections – of the aesthetics of the Falls, historical and cultural resources, the geological integrity of the Falls and riverfront and the quiet of Mill Ruins Park – have been “beefed up.” Several of the protections have been put into the lease and will be submitted for addition to the FERC license.
- Park Board Option to Buy. A Park Board option to buy has been added to the lease so that the Park Board can maximize the control it has over the project in order to meet its responsibility to the public. The lease also includes a right of first refusal in the event Crown Hydro wants to sell the project.
- Revenue to the Park Board. Revenue from the project to the Park Board has been increased. It will be as much as \$330,000 a year. Crown Hydro also will pay the Park Board 10% of the sale price, net of transfer tax and closing costs, if it sells the project.

## TERMS

1. Term. The term would be coterminous with the Project license issued by the Federal Energy Regulatory Commission (FERC). The FERC license is a 50-year license. The lease would automatically renew for a single term upon renewal of the FERC license.
2. Termination by Crown Hydro. Crown Hydro can terminate the lease within the first five years of the lease term.
3. Termination of FERC License. If the FERC license is surrendered, the lease is terminated.
4. Rent. Rent comprises several different components:
  - (a) *Start-up payment*. At the commencement of construction, Crown Hydro will pay to the Park Board either a one-time payment of \$1,000,000 or an annual payment of \$75,000 per year for the duration of the lease. The Park Board can elect either option.
  - (b) *Annual Rent*. \$75,000 per year for the term of the lease, adjusted by some commonly-used adjustment factor such as the Consumer Price Index.
  - (c) *Production Tax Credits*. If Crown Hydro receives and is allowed to retain federal tax credits based on the amount of power produced (currently Production Tax Credits under section 45 of the Internal Revenue Code), Crown Hydro will pay one-half of the value of those tax credits, after the credits are received, to the Park Board. Currently, PTCs are paid on qualified hydro projects for 10 years. Illustration: If Crown Hydro produces 20,000,000 kwh of electricity and the applicable PTC is 1.8 cents/kwh, the benefit to the Park Board can be expressed as  $.018 \times 20,000,000 = \$360,000/2 = \$180,000$  per year for 10 years. Total = \$1,800,000.
  - (d) *Payment upon transfer*. If Crown Hydro sells the Project to an entity other than the Park Board, Crown Hydro will pay to the Park Board 10% of the sale price, net of transfer tax and closing costs.
5. Use. Crown Hydro will use the leased property only for a hydroelectric project.
6. Obligation to Operate. Crown Hydro is not required to build or operate the project.
7. Legal Compliance. Crown Hydro is required to comply with legal, regulatory and contractual requirements with respect to the construction and operation of the project. If Crown Hydro decides that complying with legal obligations is too difficult or costly, it can choose not to construct the project.
8. Taxes. Crown Hydro will pay all taxes associated with the leased property, but will not pay any income taxes associated with the income from the lease to the Park Board.

9. Utilities. Crown Hydro will pay any charges associated with extending utilities to the property as well as any utility charges associated with operating the Project.
10. Permits. The Park Board will join in any applications for permits to construct and operate the project, if it is necessary.
11. Operation and Maintenance Plan. Crown Hydro will develop an operation and maintenance plan with the Park Board's input. Crown Hydro is required to consult with the Park Board and other resource managers, such as the DNR and National Park Service, in developing this plan under Crown Hydro's current FERC license. More detail on this protection for the Park Board and Community is provided below under the heading "Regulatory Requirements."
12. Flow over the Falls. Crown Hydro will develop a license article regarding flow over the falls that will be submitted to FERC for inclusion in Crown Hydro's FERC license. The license article will specify that Crown Hydro can use available water over 1,000 cfs for hydropower production and that the use of any remaining flow is determined by the Park Board.
13. Historical and Cultural Resources. Crown Hydro must comply with a Programmatic Agreement (PA) under section 106 of the National Historic Preservation Act (NHPA) that governs how historical and cultural resources must be protected during the construction and operation of the project. The Park Board signed the current PA in 1998. The PA requires Crown Hydro to develop the cultural resource plans for the operation and construction of the project. Crown Hydro is required to involve the Park Board in the development of both plans. The Programmatic Agreement will be incorporated into the lease.
14. Vibration and Noise. If the of the project results in vibration beyond predetermined design tolerance of the turbines, the turbines will automatically shut down until the problem is resolved. The Project will comply with state and local noise ordinances.
15. Compliance with FERC Orders. Crown Hydro, as FERC licensee, will comply with FERC's orders. Park Board approval is not required.
16. Liens. Aside from encumbrances specifically allowed under the lease, such as a mortgage of Crown Hydro's leasehold interest, Crown Hydro will not do anything to encumber the property or create any lien against the property, and will indemnify the Park Board against liens placed against Crown Hydro's interest in the property.
17. Insurance. Crown Hydro will acquire general public liability insurance in an amount acceptable to the Park Board.
18. Mutual Indemnity. Crown Hydro and the Park Board will provide the usual mutual indemnities, including indemnification against liability for injuries caused by the other party.
19. Casualty. Crown Hydro is not required to rebuild if casualty occurs. If Crown Hydro elects not to rebuild, the Park Board can terminate the lease, and Crown Hydro will surrender the FERC license.

20. Assignment. Crown Hydro can assign the lease only to a new holder of the FERC license. The license transfer, and by implication the lease assignment, are subject to FERC approval.
21. Leasehold Mortgage. Crown Hydro can mortgage its leasehold estate and its interests in the lease. Crown Hydro will notify the Park Board of any mortgagee. The Park Board will provide duplicate notice of certain events to any mortgagee as well as Crown Hydro.
22. Option. Any time after two years after the project is operating, the Park Board can, at its election, acquire the project. Acquisition would be subject to negotiation of a purchase price and FERC approval of the FERC License transfer. Xcel Energy would also need to consent under the power purchase agreement.
23. Right of First Refusal. If Crown Hydro intends to sell the project to someone other than the Park Board, the Park Board has a right of first refusal on the project. Any exercise of this right is subject to FERC and Xcel approval. If the Park Board exercises the right of first refusal but FERC or Xcel does not approve the transfer, Crown Hydro is can sell the project to someone else.
24. Environmental Issues. Crown Hydro will be responsible for complying with all environmental laws and will also be responsible for securing any Minnesota Pollution Control Agency approvals associated with the construction of the project. Crown Hydro will indemnify the Park Board for any liability arising from the use or release of any hazardous materials resulting from Crown Hydro's actions.
25. Compliance with Regulatory Requirements. The Park Board will not be responsible for costs and expenses associated with compliance with the requirements of the Minnesota Environmental Policy Act (MEPA), the National Environmental Policy Act (NEPA), Section 106 of the NHPA or the Federal Power Act (FPA). Crown Hydro will indemnify the Park Board for any costs or expenses assessed against the Park Board for compliance with these acts in the approval or development phases.
26. Crown Hydro's Default and the Park Board's Remedies. Crown Hydro will be in default if it fails to pay rent or has not performed some other obligation under the lease, including failure to comply with the PA. The Park Board can institute an action to recover damages or for injunctive or other equitable relief. The Park Board cannot terminate the lease or recover the premises. The FERC License requires Crown Hydro as the licensee to have site control. The Park Board has the right and ability to raise any issues of noncompliance with FERC. Many of the issues that the Park Board will likely be concerned about are intended to be addressed through the inclusion of additional FERC license provisions and compliance with other regulatory requirements, such as section 106 of the NHPA.
27. The Park Board's Default and Crown Hydro's Remedies. If the Park Board defaults on its obligations under the lease, Crown Hydro can cure on behalf of the Park Board and demand payment for the costs incurred in effecting that cure. If it is an emergency situation, Crown Hydro can immediately correct the problem and seek reimbursement, but the Park Board's failure to correct such a situation immediately will not be considered a default by the Park Board.

## REGULATORY REQUIREMENTS

### 1. Environmental Review.

(a) State Requirements. It is Crown Hydro's understanding that the Park Board has been advised by the Environmental Quality Board that it must complete a mandatory environmental assessment worksheet (EAW) before it may enter into a lease because Crown Hydro intends to connect with the historic tunnels in connection with its power production. Crown Hydro will bear the costs of, and through consultants, do the majority of the work on, the EAW.

Minn. R. 4410.1400, "Preparation of an EAW," provides that the project proposer is responsible for providing the completed "data portion" of the EAW to the responsible government unit (RGU). If the RGU believes the submittal is incomplete, it will require the proposer to complete the missing data. While "data portion" is not defined in the rules, generally the project proposer provides a draft of the EAW form with the data pertaining to environmental effects filled in. The RGU's role is to ensure that the EAW is complete and processed in a timely fashion. Obviously, the RGU must also make the determination as to whether an environmental impact statement is required for the project.

The environmental review process might lead to some additional requirements that should be addressed in the lease. This proposal is provided for discussion purposes, and Crown Hydro is open to considering modifications based on the EAW or other public processes.

(b) Federal Requirements. Crown Hydro currently holds a license from FERC. That license was issued in 1999, and FERC will likely require amendments to the license to address changes along the riverfront that have occurred in the time since the license was granted. This will likely require an updated review under section 106 of the NHPA and a supplemental environmental assessment EA under NEPA. Because FERC will not supplement the EA if and until Crown Hydro has leased the property from the Park Board, the Park Board's EAW would need to be completed before FERC's EA. While much of the same data can be used for both documents, NEPA's requirements vary slightly from MEPA's requirements, so the documents will be slightly different. The end result is that two separate agencies – the Park Board and FERC – will have reviewed the environmental effects of the project before approval.

The EA will be used to determine whether there will be significant environmental effects associated with the project so as to require an EIS. The analysis in the EA will also be used in developing articles to be included in the FERC license. The proposed lease provides for the development of license articles and plans in cooperation with Crown Hydro and the Park Board. In addition, the Park Board can comment during the EA process.

2. Section 106. Section 106 of the NHPA requires federal agencies to consider the effects of their actions on historic properties and requires consultation with the Advisory Council on Historic Places if the actions will effect properties that are either on the National Register of Historic Places or that meet the criteria for listing on the Register. The end result of the process is usually a section 106 memorandum or programmatic agreement. There is an existing PA applicable to the Project, which was signed in 1998. The PA is designed to protect both known and unknown historic resources, and provides an open and consultative process for addressing historic resources. Under Crown Hydro's proposal, several requirements of the PA will be incorporated into the lease between Crown Hydro and the Park Board, including the preparation of the construction cultural resources management plan and the operations cultural resource management plan. The existing PA will also be an exhibit to the lease and will be incorporated by reference. If subsequent federal review results in a new memorandum or programmatic agreement, that document will be substituted.
3. FERC Licensing. The FERC license was issued in 1999, and it is likely that FERC will need to update the license before giving final construction approval to the Project. The proposed lease provides that Crown Hydro will submit a license provision dealing with flows over St. Anthony Falls to FERC for inclusion in the license.

(a) The Existing License. Numerous existing provisions of the FERC license already protect the Park Board's interests or will be made more protective of the Park Board's interests:

- 204: Requiring that land must be kept clear and unnecessary material be properly disposed. Must be done in accordance with appropriate federal, state and local statutes and regulations.
- 309: Requiring Crown Hydro to participate in the "System-Wide Low Flow Management Plan, Mississippi Rivers above St. Paul, Minnesota." Crown Hydro signed a revised version of that plan in 2005.
- 401: Crown Hydro is required to file a plan with FERC to address erosion, sedimentation and soils issues, including potential soil contamination issues.
- 403: Crown Hydro is required to implement the section 106 programmatic agreement, including but not limited to the cultural resources management plans for construction and operation.
- 404: Existing license provision regarding flow over St. Anthony Falls. This will be revised pursuant to the lease to reflect Crown Hydro and the Park Board's current understanding.
- 406: Crown Hydro is required to file an operation and maintenance plan. The license requires that the plan be prepared after construction with the Park Board, among others. This provision is also incorporated in the lease.

(b) Restrictions on Lease Transfer. A number of lease provisions, such as the Park Board's exercise of its option or right of first refusal, would require FERC approval if exercised. This is because the FPA provides that FERC must approve all holders of hydropower licenses, including all transferees of such licenses. Under the FPA, a hydropower project on a navigable waterway, such as the Mississippi River can only be operated subject to a FERC license so as to ensure that the nation's resources are operated for the benefit of the public.

(c) Site Control. All FERC hydropower licenses require that the licensee have control of all property needed to construct, maintain and operate the licensed project. FERC requires this of all licensees, because FERC can regulate hydropower projects only through its licensees. FERC has no authority over any other entity. Therefore, it is necessary that Crown Hydro have the ability to comply with the FERC license and all FERC orders regardless of the provisions of the lease. That said, it is highly unlikely that FERC would issue an order requiring Crown Hydro to take any action that would harm Park Board resources, given FERC's charge to ensure that public resources are used in a manner that benefits the public.

(d) Dispute Resolution Procedures. FERC has both a formal and informal dispute resolution procedure, as well as a Dispute Resolution Service that can be used to assist parties in resolving disputes that are within FERC's jurisdiction. Crown Hydro has suggested including certain provisions in its FERC license so that any issue of compliance, for example, with respect to flows over the falls or historic preservation, would be within FERC's jurisdiction and therefore subject to FERC's dispute resolution procedures. FERC has both a formal complaint procedure, described at 18 C.F.R. §385.206, which allows any person to file a complaint against any other person for violation of any statute, rule, order or other law administered by FERC, or for any other alleged wrong over which FERC may have jurisdiction. FERC also has an enforcement hotline, which can lead to a quicker resolution of disputes.