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**ASSET PURCHASE AND SALE AGREEMENT**

dated as of [DATE]

by and between

PACIFICORP, as Buyer

and

\_\_\_\_\_,

as Seller

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THIS WORKING DRAFT DOES NOT CONSTITUTE A BINDING OFFER, SHALL NOT FORM THE BASIS FOR AN AGREEMENT BY ESTOPPEL OR OTHERWISE, AND IS CONDITIONED UPON SELECTION OF THE BIDDER, EXECUTION, AND EACH PARTY'S RECEIPT OF ALL REQUIRED MANAGEMENT AND BOARD APPROVALS IN THEIR SOLE DISCRETION (INCLUDING FINAL CREDIT AND LEGAL APPROVALS). ANY ACTIONS TAKEN BY A PARTY IN RELIANCE ON THE TERMS SET FORTH IN THIS WORKING DRAFT OR ON STATEMENTS MADE DURING NEGOTIATIONS RELATING TO THIS WORKING DRAFT SHALL BE AT THAT PARTY'S OWN RISK. UNTIL THE TOLLING AGREEMENT IS NEGOTIATED, APPROVED BY ALL APPROPRIATE PARTIES AND EXECUTED BY EACH PARTY'S AUTHORIZED SIGNATORY, NO PARTY SHALL HAVE ANY LEGAL OBLIGATIONS, EXPRESSED OR IMPLIED, OR ARISING IN ANY OTHER MANNER UNDER THIS WORKING DRAFT OR IN THE COURSE OF NEGOTIATIONS. ANY ASSERTION TO THE CONTRARY IN ANY PROCEEDING OR ACTION REGARDING THIS WORKING DRAFT SHALL RENDER THIS WORKING DRAFT NULL AND VOID IN ITS ENTIRETY. DURING DISCUSSIONS AND NEGOTIATIONS ANY PARTY MAY CHANGE ITS POSITION ON ANY MATTER, WHETHER OR NOT SET FORTH IN OR BASED UPON THIS WORKING DRAFT, ANY OTHER DOCUMENT OR ANY COURSE OF DEALING, AT ANY TIME OR FOR ANY REASON.

### ASSET PURCHASE AND SALE AGREEMENT

THIS ASSET PURCHASE AND SALE AGREEMENT (this "Agreement") is made and entered into as of \_\_\_\_\_ (the "Effective Date"), by and between PacifiCorp, an Oregon corporation ("Buyer"), and [SELLER FULL NAME], a Delaware limited liability company ("Seller"), each referred to individually as "Party" and collectively, as "Parties."

WITNESSETH:

WHEREAS, Seller responded to a Request for Proposals – PacifiCorp RFP-2012 (the "RFP") which was issued by Buyer on [RFP DATE]. Buyer's objective in issuing the RFP was to fulfill a portion of its resource requirements as contemplated in Buyer's integrated resource plan published in January, 2005;

WHEREAS, Buyer's selection of Seller's bid was based upon a competitive bid and was, in part, based upon Seller's representations and warranties and Seller's guaranteed performance of the Plant. Such matters were a material inducement for the selection of Seller, and Seller's failure to perform in accordance with the terms and conditions hereof shall cause material damage to Buyer;

WHEREAS, following negotiations with Seller Buyer desires to purchase from Seller, and Seller desires to sell to Buyer, the Project (defined below), upon the terms and conditions hereinafter set forth.

NOW, THEREFORE, in consideration of the mutual representations and warranties and covenants made herein, Buyer and Seller, each intending to be legally bound, hereby agree as follows:

## ARTICLE 1

### DEFINITIONS AND INTERPRETATION

#### Section 1.1 Defined Terms

Unless the context requires otherwise, capitalized terms used in this Agreement shall have the meanings assigned to them in the Glossary of Defined Terms attached hereto as Appendix F.

#### Section 1.2 Interpretation

Unless the context requires otherwise, in this Agreement: (a) words singular or plural in number shall be deemed to include the other and pronouns having a masculine or feminine gender shall be deemed to include the other; (b) any reference in this Agreement to any person shall include its permitted successors and assigns and, in the case of any governmental instrumentality, any person succeeding to its functions and capacities; (c) any reference in this Agreement to any Article, sub-Article, Section, sub-Section, Appendix, Exhibit, Schedule or Attachment to any of these shall mean and refer to the Article, sub-Article, Section, sub-Section, Appendix, Exhibit, Schedule or Attachment contained in or the Article, sub-Article, Section, sub-Section, Appendix, Exhibit, Schedule or Attachment attached to this Agreement, as the same may be amended or modified from time to time; and (d) the words “include” and “including” shall mean to include, without limitation.

## ARTICLE 2

### SALE OF ASSETS

#### Section 2.1 Sale and Transfer of Project by Seller

(a) Subject to the terms and conditions of this Agreement, and in reliance upon the representations, warranties and agreements herein, Seller shall sell, convey, transfer, deliver and assign to Buyer, and Buyer shall purchase, receive and accept, the Project and its component parts, free and clear of all Liens and other Liabilities not otherwise permitted hereunder. Title to various of the constituent components of the Project will be transferred over time as provided in this Agreement, with overall title to the Project and certain of its components to be transferred at Closing as further defined or described in this Agreement and in the Appendices and Exhibits attached hereto.

(b) At Closing, Seller shall deliver or cause to be delivered to Buyer such documents, deeds, bills of sale, assignments and other instruments of transfer or assignment, together with such releases of Liens, as Buyer shall deem necessary or Buyer may reasonably request to effect the conveyances contemplated by this Agreement at Closing, each in form and substance reasonably satisfactory to Buyer. Such documents, deeds, bills of sale, assignments and other instruments shall include:

(c) For owned Real Property and interests in owned Real Property,

- (i) special warranty deeds in recordable form, properly executed and acknowledged, conforming to and conveying Real Property interests held by or on behalf of Seller;
  - (ii) a Title Policy covering the Real Property interests held by or on behalf of Seller;
  - (iii) a bring-down endorsement issued by the Title Company, procured by Seller and at Seller's expense, in the face amount of the Title Policy and otherwise in such form and with such exceptions as are satisfactory to Buyer, in its sole and absolute discretion;
  - (iv) an endorsement from the Title Company to insure that the foundations of the Plant have been constructed within the boundaries of the Site and in accordance with all applicable easements, covenants and restrictions;
  - (v) a complete and accurate as-built survey of the Project, in form and substance reasonably acceptable to Buyer, in accordance with minimum ALTA/ACSM standards then in effect and sufficient in form and substance to permit issuance of the endorsement described in Section 2.1(c)(iii) hereof, prepared and certified as correct by a licensed land surveyor or registered engineer reasonably satisfactory to Buyer. Such survey shall show the location of the Site and all improvements thereon, including the Plant, and the location of all easements and rights-of-way, whether above or underground, and shall show no encroachments of the Plant or other improvements onto such easements or rights-of-way (except as expressly permitted under the documents governing such easements and rights-of-way) or onto property outside the boundaries of the Site as shown on the survey; and
  - (vi) an affidavit of the Secretary or Assistant Secretary of Seller including Seller's name, address, and taxpayer identification number, certifying that Seller is not a "foreign person" within the meaning of the Foreign Investment Real Property Tax Act of 1980.
- (d) Assignment with assumption and novation of each Project Document, each Contractor Guaranty, and all warranties associated with the Work, with consent of the parties thereto, as may be required or reasonably requested by Buyer;
- (e) Assignment and assumptions for the Plant, Equipment or machinery, labor and other warranties, accompanied by all consents as may be required or reasonably requested by Buyer;
- (f) Deeds, bills of sale and other instruments of transfer or assignment of any other assets of Seller to be transferred hereunder, in a form acceptable to Buyer in its sole discretion;
- (g) Assignment and/or executed requests for Governmental Authority transfer, as appropriate, of all Governmental Approvals identified by Buyer, accompanied by all consents as required or as may be reasonably requested by Buyer;
- (h) Assignment of the right to use all Intellectual Property required in connection with the Project;

(i) At the Closing, the final waiver and release(s) of Lien in the form set forth in Appendix L or posting of a bond or other security satisfactory to Buyer that all Liens will be released ; and

(j) At the Closing, the following certificates of Seller:

(i) a certificate of the Secretary or an Assistant Secretary of Seller certifying: (A) a true copy of the [Certificate of Formation] of Seller and all amendments thereto as in effect at Closing, (B) a true copy of the [Operating Agreement] of Seller as in effect at Closing, (C) copies of resolutions duly adopted by Seller’s board of directors (or similar body), authorizing the sale of the Project to Buyer and the execution, delivery and performance of this Agreement and the transactions contemplated hereby and attesting that such resolutions are in full force and effect without amendment or modification at Closing, and (D) the incumbency of the officers of Seller who execute this Agreement or any document or instrument to be delivered pursuant hereto;

(ii) a certificate signed by an Authorized Officer of Seller to the effect that the conditions specified in Section 2.6(a) and Section 2.6(b) have been satisfied; and

(iii) a certificate signed by an Authorized Officer of Seller certifying as to the true and complete nature of attached originals (or copies where originals do not exist) of the Transaction Documents.

## **Section 2.2 Purchase Price**

(a) The aggregate consideration payable by Buyer to Seller for the Project, comprising the sum of Progress Payments (if any) made pursuant to article 3 (“Terms for Progress Payments”), plus the residual amount payable at Closing (but counting as Progress Payments and amounts payable at closing any amounts retained by Buyer as retainage pursuant to Section 3.3 (“Notice of Request for Progress Payment”)) is the “Purchase Price.”

(b) Basis of Purchase Price

(i) Seller Duty to Inform Itself. Seller shall be deemed to have satisfied itself, through its own due diligence efforts and not based on any representation of Buyer or employees or agents thereof (except as set forth in this Section), as to the nature and location of the Work, the general, local, physical and other conditions of the Work, and all other matters which could in any way affect the Work or the cost thereof under this Agreement. Without limiting the foregoing, Seller shall be deemed to have inspected the Site and to have satisfied itself as to the state and condition (including but not limited to ground, geological, climatic and hydrological condition) of all circumstances affecting the Site (including but not limited to any and all safety regulations of Buyer or otherwise applicable to the Work and the project) and to have examined any documentation and information supplied or made available to Seller by Buyer or available for inspection in the public domain, the conditions and/or the Specification (with such drawings, exhibits, plans and information as may be annexed thereto or referred to therein) and to have satisfied itself as to the feasibility of executing the Work at the Site. Seller shall be responsible for its own interpretation of such documentation and information. The failure of Seller to adequately investigate and acquaint itself with any applicable conditions and

other matters shall not relieve Seller from the responsibility for properly estimating the difficulties and costs of successfully performing the Work and completing this Agreement, and shall not be grounds for adjusting either the Purchase Price or the schedule agreed in this Agreement.

(ii) Underground Obstructions. Without prejudicing or limiting the provisions of the preceding paragraph (b)(i) or of Section 10.1 (“Project Schedule”), Seller shall be responsible for ascertaining the location of and avoiding damage to all underground installations including without limitation cable, gas, water pipes, telephone lines, and other underground installations, whether the location of the excavation, digging, or trenching required for performance of the Work is fixed by Buyer or by Seller. Seller shall be responsible for all delays, costs, loss and/or expense arising, whether directly or indirectly, from any ground conditions or artificial obstructions or hazards (excluding hazardous materials encountered by Seller during the execution of the Work) including any Work underground or involving excavation that Seller should have been made reasonably aware of based on information available and Seller shall not be entitled to any additional Cost, any extension to the Time for Completion or any increase in the Purchase Price as a result thereof.

(iii) Surveying. Seller is responsible for performing, and shall include in its pricing, all construction layout surveying required for execution of the Work. Seller shall be held responsible for preserving all established project control monuments unless their removal is requested by Seller and authorized in writing by Buyer. Any costs incurred by Buyer to reestablish control monuments destroyed by Seller shall be borne by Seller.

(iv) Responsibility for Information. Seller shall be responsible for any misunderstanding or incorrect information in connection with the Site (excluding information provided by Buyer or its representative prior to the date of commencement of the Work unless such information could reasonably be verified by Seller).

(v) Existing Foundations, Structures and Work. Seller shall be solely responsible for the consequences of incorporating into the Work any existing foundations, structures, Work, equipment or materials including, without limitation, any existing piling, floor slabs and culverts. To the extent that the same are incorporated into the Work, such pre—existing items shall be subject to the applicable conditions as if they were supplied by Seller hereunder. Without prejudice to the foregoing, Seller shall notify Buyer’s Representative of its intention to incorporate any existing foundations, structures, Work, equipment or materials into the Work other than those specifically identified in the Agreement as soon as is practicable and seek the prior written consent of Buyer’s Representative to the use or utilization thereof, which consent may be withheld in the sole discretion of Buyer’s Representative.

### **Section 2.3 Closing**

(a) Closing Date, Place and Time. The closing (the “Closing”) of the sale and purchase of the Project shall take place at \_\_\_\_\_, local time, on the first Business Day after Notice of Final Acceptance has been issued pursuant to Section 20.8 (“Notice of Final Acceptance of Work”), at Buyer’s offices in Salt Lake City, Utah, or at such other time and date as the Parties shall designate in writing (such time and date, the “Closing Date”).

(b) Purchase Price Calculation. At least thirty (30) days prior to the Closing Date, Seller shall submit to Buyer a detailed calculation setting forth the Purchase Price, as the same may have been adjusted pursuant to Change Orders, if any, together with supporting documents used by Seller in calculating the Purchase Price, including an allocation of the Purchase Price not yet paid and such other documents reasonably requested by Buyer to support the calculation. At least fifteen (15) days prior to Closing Buyer shall notify Seller of any disputed amounts included in Seller's calculation of the Purchase Price. Within five (5) days prior to Closing Seller shall (a) notify Buyer of any disputes Seller may have regarding Buyer's challenges to amounts, and (b) provide a revised calculation with supporting documents showing agreed changes to the initial calculation statement. Any disputes remaining after such exchange shall be submitted for dispute resolution as set forth in article 32 ("Claims, Claim Notice and Dispute Resolution").

(c) Payment of Purchase Price. At the Closing, Buyer shall pay the Purchase Price, calculated in accordance with Section 2.3(b) ("Purchase Price Calculation"), less two times the amount (if any) then in dispute, in immediately available funds, via wire transfer to an account designated by Seller on or prior to the Closing Date.

#### **Section 2.4 Assumption of Liabilities**

Except as otherwise expressly provided herein, Buyer is not assuming, and will not assume, any present or future debt, liability or obligation of Seller, whether known or unknown, fixed or contingent. Seller agrees to indemnify and hold Buyer harmless against all present and future debts, claims, liabilities and obligations of Seller, its Contractor and Subcontractors.

#### **Section 2.5 Further Assurances**

From time to time after the Closing Date, Seller shall, at the request of Buyer but without further consideration, promptly execute and deliver to Buyer such other agreements, certificates and further instruments of sale, assignment, transfer and conveyance and take such other and further actions as Buyer may reasonably request in order to vest in Buyer or its assigns and put Buyer or its assigns in possession of the Project and to carry out and implement the transactions contemplated herein, including any financing arrangements of Buyer.

#### **Section 2.6 Conditions to Buyer's Obligation to Close**

The obligations of Buyer to effect the transactions contemplated in this Agreement are subject to the satisfaction or waiver by Buyer on or prior to the Closing Date of each of the following conditions:

(a) Accuracy of Representations and Warranties. The representations and warranties of Seller made in this Agreement shall be true and correct in all material respects, as of the date hereof and as of the Closing Date.

(b) Performance. Seller shall have performed or complied in all material respects with all obligations and covenants required by this Agreement to be performed or complied by them on or prior to the Closing Date (including, without limitation, the deliveries required by Section 2.1 ("Sale and Transfer of Project by Seller")).



(c) Authorizations. The parties shall have or shall have caused to be delivered, made or obtained all notices to, declarations, designations, registrations, filings or submissions with, and authorizations, approvals, orders, consents or waivers from Governmental Authorities and other parties listed on Schedule 2.6, and the same shall not have been withdrawn, suspended or modified.

(d) Absence of Orders. No preliminary or permanent injunction or other order of any Governmental Authority to prevent the consummation of the transactions contemplated in this Agreement shall be in effect or pending and no statute, rule or regulation shall have been enacted by any Governmental Authority that makes consummation of such transactions illegal.

(e) Material Adverse Change. No Material Adverse Change shall have occurred.

## **Section 2.7 Conditions to Seller's Obligations to Close**

The obligation of Seller to effect the transactions contemplated in this Agreement is subject to the satisfaction or waiver by Seller on or prior to the Closing Date of each of the following conditions:

(a) Accuracy of Representations and Warranties. The representations and warranties of Buyer made in this Agreement shall be true and correct in all material respects as of the date hereof and as of the Closing Date.

(b) Performance. Buyer shall each have performed or complied in all material respects with all obligations and covenants required by this Agreement to be performed or complied with by it on or prior to the Closing Date.

(c) Absence of Orders. No preliminary or permanent injunction or other order of any Governmental Authority to prevent the consummation of the transactions contemplated in this Agreement shall be in effect or pending and no statute, rule or regulation shall have been enacted by any Governmental Authority that makes consummation of such transactions illegal.

## **ARTICLE 3**

### **TERMS FOR PROGRESS PAYMENTS**

#### **Section 3.1 Terms**

(a) Procedures. A Progress Payment (if any) shall, subject to Buyer's review as set forth herein, be paid by Buyer in accordance with Appendix I and this article 3 within 30 days after submission of a Notice of Request for Progress Payment that meets the requirements of this Article and satisfaction of the conditions precedent set forth in Section 3.2 ("Conditions Precedent"). Buyer shall pay any Progress Payments (i) to Seller or (ii) either (A) to any Contractor performing or furnishing the Work or (B) jointly to Seller and such other Contractor. In addition to the foregoing, Buyer may require that to the extent Progress Payments to any direct payee (other than Seller) are made via check, that such check contain Lien release provisions and be endorsed personally by payee or payees. To the extent that a Progress Payment Date is other

than a Business Day, no interest shall accrue on such Progress Payment until the next Business Day.

(b) Payment in Dollars. All payments to Seller hereunder shall be paid in Dollars via wire transfer to a bank account of Seller as specified by Seller. All payments to Buyer hereunder shall be paid in Dollars via wire transfer to the bank account as specified by Buyer.

### **Section 3.2 Conditions Precedent**

The obligation of Buyer to pay Progress Payments (including payment of the Purchase Price at the Closing), is subject to the satisfaction on each Progress Payment Date of each the following conditions precedent:

(a) Payments on Business Days. The Progress Payment Date shall be a Business Day. If any Progress Payment becomes payable on a day that is not a Business Day, the Progress Payment shall be paid on the next succeeding Business Day. Seller shall bear the cost of any and all banking charges imposed by Seller's bank with respect to any Progress Payment.

(b) Milestones. Seller shall have achieved the Milestones associated with the Work for which the payment is requested prior to Seller submitting its commercial invoice with respect thereto, and shall have completed all Milestones to have been achieved prior to the date of such Progress Payment.

(c) Representations and Warranties. (i) The representations and warranties made by Seller in each Transaction Document to which it is a party shall be true and correct in all material respects on such Progress Payment Date both before and after giving effect to the making of such Progress Payment, and (ii) the representations and warranties made by each Project Party other than Seller in the Transaction Documents shall be true and correct in all material respects on such Progress Payment Date both before and after giving effect to the making of such Progress Payment. In each case such representations and warranties shall be deemed renewed and re-stated as of the date of such Progress Payment.

(d) No Default. (i) No circumstance, event or condition shall exist which either immediately or with the passage of time or the giving of notice, or both, would permit Seller to withhold payment under any Primary Construction Contract; (ii) no breach, violation or default shall have occurred and be continuing under (A) this Agreement (B) any Contractor Guaranty; (C) any Consent or (D) the Security Documents and (iii) to the extent not already set forth in this Section 3.2(d), no circumstance, event or condition shall exist which either immediately or with the passage of time or the giving of notice, or both, would permit Seller's counterparty to terminate any Transaction Document.

(e) No Proceeding or Litigation. No action, suit, proceeding or investigation by or before any Governmental Authority or any arbitrator shall be pending or to Seller's knowledge threatened against or affecting a Project Party or the Project which would result in a Material Adverse Change, unless such action, suit, proceeding or investigation has been initiated or threatened by Buyer.

(f) Material Adverse Change. Since the date hereof, no Material Adverse Change shall have occurred, except and to the extent that such Material Adverse Change is a result of an act or omission of Buyer.

(g) Notice of Request for Progress Payment. Buyer shall have received a Notice of Request for Progress Payment in compliance with Section 3.3 (“Notice of Request for Progress Payment”), together with all supporting documents.

(h) Governmental Approvals. Except with respect to the Deferred Governmental Approvals, all Necessary Governmental Approvals required to be obtained by such time shall have been obtained and shall be in full force and effect.

(i) Notice to Proceed. Buyer shall have issued the Notice to Proceed.

(j) Right to Withhold Payment. Buyer shall have determined that it is not necessary to withhold payment to protect Buyer from loss relating to any of the following causes:

(i) Work not in accordance with the requirements of the Project Documents;

(ii) Claims filed against Buyer, the Plant, or the Site from Seller’s actions or inactions in connection with the performance of the Work (and not otherwise covered by insurance), unless Seller is disputing such Claims in good faith and if reasonably requested by Buyer, has bonded the Claim with a bonding company or other surety reasonably acceptable to Buyer, and if any Lien is imposed with respect to such Claims, Seller has discharged such Lien; or

(iii) failure of Seller to make payments in respect of material or labor or other obligations incurred as a result of activities covered by this Agreement, unless Seller has, in good faith, disputed such payments and, if any Lien is filed with respect thereto, Seller has posted a bond against such Lien with a bonding company or other surety reasonably acceptable to Buyer.

### **Section 3.3 Notice of Request for Progress Payment**

(a) Notice Required. Prior to being entitled to any Progress Payment Seller shall submit a Notice of Request for Progress Payment in the form attached hereto as Exhibit A and in substance satisfactory to Buyer, that meets all of the requirements of this Section 3.3.

(b) Documents to be attached to Notice for Progress Payment. Each Notice of Request for Progress Payment shall be accompanied by the following documents:

(i) an invoice of Seller substantiating the amounts payable by Buyer in connection with such Progress Payment and the Work covered thereunder. Seller’s invoice shall provide separate invoices or line-items for the following items:

(A) Taxable Items. Tax paid by contractor on Materials and Parts shall be listed as a separate line item and identified as ‘Tax on Parts to be reimbursed.’

(B) Non Taxable Items Listed Separately. The following items shall be listed separately and not taxed on the invoice: (1) Labor to Recondition Materials and Parts (non-taxable) and (2) Freight (non-taxable).

(C) Non Taxable Items able to be Invoiced Together. The following items may be invoiced together but shall be listed separately on the same invoice and shall not be taxed on the invoice: (1) Scheduled and Unscheduled Work including inspection and on-site Turbine Services work (non-taxable) and (2) 'Scheduled and Unscheduled Work' and 'Management Services, Consulting, Administrative, Engineering or Professional Services' (non-taxable);

(ii) a report (the "Progress Report") in a form consistent with the progress report included in Appendix D that indicates the percentage completion achieved compared to the planned percentage completion for each activity relating to the Work and where any activity is behind the Schedule giving comments and likely consequences and stating the corrective action being taken. The Progress Report also shall present any other information reasonably requested by Buyer relating to progress of the Work;

(iii) an officer's certificate signed by an Authorized Officer of Seller certifying that each of the conditions in Sections 3.2(b), 3.2(c), 3.2(d), 3.2(e), 3.2(f), 3.2(h), and 3.2(i) has been and will be satisfied as of the date of such Progress Payment Date and such other items as may be required by this Agreement or as Buyer may reasonably request; and

(iv) A bill of sale transferring title to the Work relating to the Request for Progress Payment.

(c) Address. All Notices of Request for Progress Payment shall be addressed as follows:

PacifiCorp  
Attn: \_\_\_\_\_  
201 South Main Street, Suite 2200  
Salt Lake City, UT 84111

With a copy provided to: \_\_\_\_\_  
Attn: \_\_\_\_\_

(d) Review of Notice.

(i) Buyer shall, within fifteen (15) days after receipt of any Notice of Request for Progress Payment, determine whether (A) the Work evidenced by the Notice of Request for Progress Payment has been completed in conformance with the requirements of this Agreement; (B) the Notice of Request for Progress Payment and any required backup information have been properly submitted and (C) the Notice of Request for Progress Payment amount reflects the payment due under Appendix I and shall inform Seller as to whether it disputes any portion of the Notice of Request for Progress Payment. Buyer may also inform

Seller as to whether Buyer disputes any portion of the Notice of Request for Progress Payment due to the failure of Seller (or the Contractor or any Subcontractor) to complete the Work covered by such Notice of Request for Progress Payment, and Buyer may withhold such portion of due under Seller's invoice in the amount reasonably necessary to complete such portion of the Work in accordance with Seller's Notice of Request for Progress Payment and this Agreement.

(ii) Upon receipt of a notice from Buyer that the Notice of Request for Progress Payment is deficient, Seller shall promptly take any and all reasonable steps available to remedy any condition identified by Buyer leading to such claim of deficiency. Subject to a mutually agreed upon resolution of such claim of deficiency or a final determination of a court, payment of the disputed portion of Seller's invoice shall be made by Buyer within ten (10) Business Days following the date of such agreement or determination. In the event that Buyer is entitled to withhold payment to Seller because a condition precedent set forth in this article 3 has not been satisfied, Buyer may elect to pay the amounts due to Contractor under the Primary Contracts directly to such Contractor and such payments shall be credited against the Purchase Price. Provided Buyer has paid such amounts to a Contractor, no action properly taken by Buyer in compliance with this Article 3 shall affect the Guaranteed Substantial Completion Date for the Plant.

(iii) Subject to (A) such determination by Buyer and (B) the satisfaction of the conditions set forth in Section 3.2 ("Conditions Precedent"), and except for disputed portions of any Notice for Progress Payment, Buyer shall pay Seller on the applicable Progress Payment Date the stated amount, less any disputed portion of such Request of Request for Notice for Progress Payment and any withholding permitted under this Agreement. Late payments not excused under the provisions of this Section 3.3(d)(iii) shall accrue interest at the Late Payment Rate at that time from the date due until paid. Excused late payments shall not accrue interest until the event giving rise to the dispute has been remedied; provided, however, that if it is later determined that an excuse or withholding was improper, interest shall accrue at the Late Payment Rate on the amount which should have been paid from the date such funds should have been paid until actual payment is received by Seller. In the alternative, in the event of a disputed amount, Buyer may pay to Seller the entire amount stated in the Notice of Request for Progress Payment, and if it is subsequently determined that Buyer was entitled to withhold all or part of the amount shown on the Notice of Request for Progress Payment, Seller shall pay to Buyer upon demand interest at the Late Payment Rate on the amount that Buyer was entitled to withhold from the date of payment by Buyer until the earlier of the date of repayment to Buyer and the date on which Buyer was no longer entitled to withhold such amount. The determinations made by Buyer pursuant to this Section 3.3(d) and Section 3.2(j) are solely for the purpose of determining whether to pay a Progress Payment, and such determinations shall not prevent Buyer from subsequently asserting that Seller, a Contractor, or any Subcontractor failed to perform its obligations under a Transaction Document, nor shall such determinations be used as evidence that Seller, the Contractor, or any Subcontractor performed such obligations.

(e) A NOTICE OF REQUEST FOR PROGRESS PAYMENT THAT DOES NOT MEET THE REQUIREMENTS OF THIS SECTION MAY RESULT IN A PAYMENT DELAY.

## ARTICLE 4

### REPRESENTATIONS AND WARRANTIES OF SELLER

As used in this Article 4, “to Seller’s knowledge” refers to matters within the actual knowledge of Seller. Seller represents and warrants to Buyer on the Effective Date (except as otherwise stated), and on each date the following representations and warranties are made or are deemed made, as follows:

#### Section 4.1 Organization, Standing and Power

Seller is a [ENTITY TYPE AND DESCRIPTION], duly formed, validly existing and in good standing under the laws of the State of \_\_\_\_\_ and has the full [corporate/limited liability company] power and authority and possess all material governmental franchises, licenses, permits, authorizations and approvals necessary to enable them to own, lease or otherwise hold its properties and assets (including the Project) and to carry on its business in the places and in the manner currently conducted. Seller is duly qualified to do business in each jurisdiction where the nature of its business or the ownership or leasing of its properties makes such qualification necessary, including without limitation the State of Utah.

#### Section 4.2 Capital Structure

(a) [ASSUMES LLC STRUCTURE; CORRESPONDING REPRESENTATIONS WILL BE EXPECTED TO REFLECT CORPORATE STRUCTURE IF APPLICABLE] All of the membership interests of Seller (the “Membership Interests”) are issued and outstanding, and no Membership Interests are held by Seller in its treasury. The names of each member of Seller and the amount of Membership Interests Controlled by each such Person are set forth on Schedule 4.2(a).

(b) Except as set forth on Schedule 4.2(b), no Membership Interests or other voting securities of Seller are issued, reserved for issuance or outstanding. There are not any bonds, debentures, notes or other securities or Indebtedness of Seller having the right to vote (or convertible into, or exchangeable for, securities having the right to vote) on any matters on which Membership of Seller may vote.

#### Section 4.3 Authority; Execution and Delivery: Enforceability

(a) Seller has all requisite power and authority to execute each of the Transaction Documents to which it is a party and to consummate the transactions contemplated hereby and thereby. The execution and delivery by Seller of each Transaction Document to which it is a party and the consummation by Seller of the transactions contemplated hereby and thereby has been duly authorized by all necessary [limited liability company/corporate] action on the part of Seller. Seller has duly executed and delivered each Transaction Document to which it is a party, and each Transaction Document to which it is a party constitutes its legal, valid and binding obligation, enforceable against it in accordance with its terms except as such enforceability may be limited by applicable bankruptcy, insolvency, reorganization, moratorium or similar laws from time to time in effect that affect creditors’ rights generally and by legal and equitable limitations on the availability of specific remedies.

(b) The Managing Member(s) of Seller, acting by written consent in lieu of meeting and executed as of \_\_\_\_\_ unanimously adopted resolutions approving this Agreement, the other Transaction Documents and in accordance with Seller's organizational documents and the [APPLICABLE STATE ORGANIZATIONAL LAWS].

(c) Other than approvals or votes that are required pursuant to [STATE ORGANIZATIONAL LAW] that are required to effect and consummate the Initial Closing and the Closing in accordance with Seller's Organizational Documents and the [STATE ORGANIZATIONAL LAW], no other vote of the Membership with respect to any of the Membership Interests is required under applicable Law or otherwise in connection with Seller's execution and delivery of this Agreement, the other Transaction Documents or the consummation of the transactions contemplated hereby and thereby.

#### **Section 4.4 Validity of Agreement; No Conflict**

The execution, delivery and performance by Seller of this Agreement and each other Transaction Document to which Seller is a party, the consummation of the transactions contemplated hereby and thereby, and the compliance with the provisions hereof or thereof, by Seller shall not, with or without the passage of time or the giving of notice or both:

- (a) conflict with, constitute or result in a breach, default or violation of any provision of, or give rise to any right of termination, cancellation or acceleration under, or loss of any right and/or benefit under, any contract, lease, license, Governmental Approval, instrument or other agreement to which Seller is a party or by which it, the Project or its assets is bound;
- (b) conflict with or violate Seller's Organizational Documents;
- (c) result in the creation or imposition of any Lien of any nature on the Project, other than Permitted Liens; or
- (d) violate any Applicable Law applicable to Seller.

#### **Section 4.5 Governmental Approvals and Consents**

(a) Appendix E sets forth all Governmental Approvals. Such Governmental Approvals that are the responsibility of Buyer to obtain prior to Substantial Completion are separately identified on Appendix E (the "Buyer Governmental Approvals"). All Necessary Governmental Approvals have been obtained, are in full force and effect, and are final and all appeal periods with respect thereto have expired or terminated. Each Deferred Governmental Approval shall be obtained in a final and non-appealable form in the ordinary course prior to the time it is required to be obtained hereunder or under the other Transaction Documents. There is no action, suit, investigation or proceeding pending, or, to Seller's knowledge, threatened, that could result in the modification, rescission, termination, or suspension of any Necessary Governmental Approval obtained prior to the date this representation is made or deemed made. Subject to Section 8.2 ("Planning Permissions, Consents"), except for the Governmental Approvals listed in Appendix E, Seller is not required, and under existing Applicable Law will not in the future be required, to obtain any Governmental Approval in connection with the execution and delivery by Seller of this Agreement or the performance of Seller's obligations hereunder.

(b) Except as set forth on Schedule 4.5(b), no consent or approval of any Person is required to be obtained or made by or with respect to Seller transferring the Project to Buyer or in connection with the execution, delivery and performance of this Agreement, the Transaction Documents or the consummation of the transactions contemplated hereby other than those that may be required solely as result of the specific regulatory status of Buyer.

#### **Section 4.6 No Proceedings**

Except as set forth on Schedule 4.6, (a) there are no actions, suits, investigations or proceedings by or before any Governmental Authority or arbitrator pending against Seller or against the Project, or, to Seller's knowledge, threatened against or affecting Seller or the Project, which would result in a Material Adverse Change and (b) there are no actions, suits, investigations or proceedings by or before any Governmental Authority or arbitrator pending or, to Seller's knowledge, threatened, against or affecting any Contractor or Guarantor which would result in a Material Adverse Change.

#### **Section 4.7 Compliance**

(a) The Project is being owned, developed, constructed, and permitted in compliance with all Applicable Law in existence as of the Effective Date and in compliance with the requirements of all Governmental Approvals and Prudent Industry Practice. As constructed, based on Applicable Law currently in effect, the Project shall conform to and comply with all zoning, environmental, land use and other Applicable Law and the requirements of all Governmental Approvals.

(b) Seller and the operation of its businesses are, and at all times have been, in compliance in with all Applicable Laws, including those relating to occupational health and safety.

#### **Section 4.8 Taxes**

(a) For purposes of this Agreement, (i) "Tax" or "Taxes" shall mean all federal, state, local and foreign taxes and similar assessments, including all interest, penalties and additions imposed with respect to such amounts; (ii) "Pre-Closing Tax Period" shall mean all taxable periods ending on or before the Closing Date and the portion ending on the Closing Date of any taxable period that includes the Closing Date and (iii) "Returns" shall mean returns, reports or forms, including information returns, in respect of Taxes.

(b) Seller has filed or caused to be filed in a timely manner (within any applicable extension periods), all Returns required by applicable Tax laws to be filed by Seller prior to or as of the date hereof, and each such Return is true, complete and correct in all material respects.

(c) Seller has timely paid or caused to be paid all Taxes due and payable, whether or not shown as due and payable, on any Return. The accruals for Taxes not yet due and payable are adequate to cover such Taxes.

(d) All Taxes that Seller is required by Applicable Law to withhold or collect have been duly withheld or collected, and have been timely paid over to the appropriate Governmental Authority to the extent due and payable.



(e) No deficiencies for any Taxes have been proposed, asserted or assessed against Seller, and no requests for waivers of the time to assess any Taxes are pending. No Tax Liens have been filed and no claims are being asserted with respect to any Taxes.

(f) There are no outstanding agreements or waivers extending the statutory period of limitations applicable to any Returns required to be filed by or on behalf of Seller and Seller has not requested any extension of time within which to file any Return, which Return has not yet been filed within the applicable extension period.

(g) Seller does not hold a permit to engage in sales of tangible personal property issued by the State of Utah, and Seller has not within the past twelve (12) months made, and has no current intention of making in the next twelve (12) months, any retail sales of tangible personal property within the State of Utah.

#### **Section 4.9 Environmental Matters**

(a) Seller has provided Buyer or its representatives with all environmental reports, assessments and audits, including reports, assessments and audits relating to wetlands, air and emissions or discharges, and studies relating to threatened or endangered species, prepared by or on behalf of Seller in connection with the Project or otherwise in Seller's possession or control with respect to the Site or the Project.

(b) (i) Seller has maintained a due diligence program designed to identify all Necessary Governmental Approvals; (ii) except for Buyer Governmental Approvals, Seller holds and is in compliance with, all Necessary Governmental Approvals; (iii) Buyer appears properly as the permittee, co-permittee or authorized party with respect to all Necessary Government Approvals other than as set forth on Appendix E, (iv) the Project has been constructed and can be operated, and the Work has been performed, in compliance with all Environmental Laws, (v) Seller has not received any notice of a pending or threatened Claim, or inquiry by any Governmental Authority or other Person relating to any actual or alleged violations of Environmental Laws or any actual or potential obligation on the part of Seller to investigate or take any other action relative to any Regulated Material (as defined herein) or threatened Release of any Regulated Material and is and has been in compliance with all Environmental Laws; (vi) Seller has not entered into or agreed to any decree or order with any Governmental Authority and Seller is not subject to any Judgment relating to compliance with any Environmental Law or to the investigation or cleanup of Regulated Materials; (vii) neither Seller nor any other Person has generated, transported, treated, stored, disposed of, arranged to be disposed of, Released or threatened to Release any Regulated Materials at, on, from or under the Site in violation of, or so as would reasonably be expected to result in liability under, any Environmental Laws; (viii) Seller has not assumed any liabilities or obligations arising under any Environmental Law in connection with currently or formerly owned, leased or operated properties or facilities or in connection with any former divisions, subsidiaries or companies owned directly or indirectly by Seller; (ix) Seller has not utilized any underground storage tanks ("USTs"), Equipment using PCBs or asbestos in the conduct of its operations, on or under any property currently owned or operated by Seller.

(c) No Environmental Law imposes any obligation upon Seller or Buyer arising out of or as a condition to any transaction contemplated by this Agreement or any other Transaction

Document (other than those first arising after Closing governing actions by Buyer as owner and operator of the Project), including (i) any requirement to modify or to transfer any Governmental Approval or license, (ii) any requirement to file any notice or other submission with any Governmental Authority, (iii) the placement of any notice, acknowledgment or covenant in any land records, or (iii) the modification of or provision of notice under any agreement, consent order or consent decree. No Lien has been placed upon any of Seller's currently-owned properties related to the Project under any Environmental Law

#### **Section 4.10 Title to Properties**

Other than with respect to the Permitted Liens, Seller has good and valid title to all of the tangible and intangible personal property to be transferred to Buyer hereunder, free and clear of all Liens and Claims.

#### **Section 4.11 Real Estate**

(a) Seller has heretofore delivered to Buyer true, correct and complete copies of all agreements, contracts or other instruments providing for the sale, lease, transfer or other disposition of the Site (including any options).

(b) Seller represents and warrants to Buyer that:

(i) except as set forth on Schedule 4.11, there is no pending appropriation or condemnation Claim of which Seller has been notified, and, there is no contemplated or threatened appropriation or condemnation Claim affecting the Site or any part thereof or any sale or other disposition of the Site or any part thereof in lieu of condemnation;

(ii) to Seller's knowledge, except for assessments occurring on a regular basis in accordance with Applicable Law or as a result of the sale of the Project contemplated by this Agreement, there is no pending or contemplated reassessment of any parcel included in the Site that is reasonably expected to increase the real estate tax assessment for such properties; and

(iii) There is no violation of any applicable zoning law, regulation or other Applicable Law, relating to or affecting the Site.

(iv) The Project can be constructed on the Site in the Site's current legal, physical, geophysical and subsurface condition.

#### **Section 4.12 Transaction Documents; Representations and Warranties in Transaction Documents**

(a) Set forth on Schedule 4.12(a) is a list of all contracts, agreements, letters of intent, understandings, and instruments to which Seller is a party or by which it or its property is bound (including all amendments, supplements, waivers, letter agreements, interpretations and other documents amending, supplementing or otherwise modifying or clarifying such agreements and instruments) that may affect the Project or any transaction contemplated hereunder, (i) the

termination or cancellation of which would result in a Material Adverse Change, or (ii) have a value of twenty-five thousand Dollars (\$25,000) or more;

(b) (i) All representations and warranties made by Seller in each Transaction Document are true and correct in all material respects as of the date made or deemed made, and (ii) to Seller's knowledge, all representations, warranties and other factual statements made by each Project Party other than Seller in the Transaction Documents are true and correct in all material respects as of the date made or deemed made.

(c) All Transaction Documents are in full force and effect.

(d) Except as set forth on Schedule 4.12(d), no event has occurred that constitutes or, with the giving of notice or passage of time, or both, would constitute, a material Seller Default under any Transaction Document or, to the knowledge of Seller, any third party under any such Transaction Document. To Seller's knowledge, no claim, action, proceeding or investigation, is pending or threatened, that challenges the enforceability of any of the Transaction Documents.

#### **Section 4.13 Sufficiency of Assets**

The assets constituting the Project to be sold, transferred, conveyed, assigned and delivered to Buyer pursuant to this Agreement or any other Transaction Document, include all of the assets used, held by or necessary or convenient for the ownership of the Project and to provide an operational Project at the Site in accordance with Prudent Industry Practice and no other Person other than Seller and Buyer owns or has any rights in or to the Project.

#### **Section 4.14 Water Rights**

(a) The Project Water Rights will provide sufficient water to operate the Project.

(b) Seller has good and marketable title to the Water Rights.

(c) All of the water available for diversion under the Water Rights has been beneficially used and is not subject to forfeiture or abandonment.

(d) As and when drilled, constructed or installed, the wells, pumps, pipelines, conveyance and discharge systems and other associated equipment necessary to deliver water and discharge water are in good working order and are sufficient for the purposes of operating the Project.

(e) To the extent not already drilled, upon the drilling thereof, the wells used to produce water for the operation of the Project have been drilled and outfitted at the points of diversion approved to deliver the Project Water Rights.

(f) The water to be produced from wells (if any) required for the Project is consistent with the Specifications.

(g) Copies establishing control of a sufficient quantity of Water Rights to operate the Project at a one hundred percent (100%) capacity factor, including summer peaking operations,

are attached as Appendix M. These Water Rights shall be acquired no less than six months prior to Substantial Completion.

#### **Section 4.15 Emission Reduction Credits**

(a) The Emission Reduction Credits to be transferred to Buyer hereunder are valid and properly registered in the State Emissions Registry established by UDAQ pursuant to R-307-403-8 of the Utah Administrative Code. Upon transfer of the Emission Reduction Credits hereunder, the Emission Reduction Credits will be usable under the Utah Air Quality Rules as emission offsets for the Project, and a sufficient quantity of Emission Reduction Credits will sufficient to satisfy fully any emission offset requirements necessary to obtain the Emissions Approvals.

(b) Documents establishing control of a sufficient quantity of ERCs to operate the Project at a one hundred percent (100%) capacity factor, including summer peaking operations, are attached as Appendix M. These Credits shall be acquired no less than six months prior to Substantial Completion.

#### **Section 4.16 Discharge Permit**

The Project is capable of being operated in compliance with UPDES requirements applicable to all discharges from the Plant, including stormwater and process water.

#### **Section 4.17 Security Interests and Liens**

The Security Documents create, as security for the Secured Obligations, valid and enforceable perfected first priority Liens on all of the Collateral, in favor of Buyer, subject to no Liens other than the Permitted Liens. All Necessary Governmental Approvals relating to such Liens in favor of Buyer have been duly effected or taken.

#### **Section 4.18 No Defaults**

(i) Seller is not in breach of, or in default under, any Transaction Document, or any other agreement or instrument to which it is a party or by which it or its properties or assets may be bound and (ii) no Project Party is in breach of, or in default under, any other agreement or instrument to which it is a party or by which it or its properties or assets may be bound except where such breach or default would not, singly or in the aggregate, result in a Material Adverse Change.

#### **Section 4.19 Expertise**

(a) Seller has no reason to believe that (i) the Project will not achieve Substantial Completion by May 1, 2012, 2013 or 2014 or (ii) that the cost to complete the Project will exceed the Purchase Price.

(b) The construction and operation of the Project in accordance with the Transaction Documents and in compliance with Governmental Approvals, Applicable Law and pursuant to this Agreement is technically feasible.

(c) Seller represents it has substantial experience and expertise in the development and management of turnkey construction of combined cycle power plants such as the Plant and the capability to carry out the Work and acknowledge that Buyer is relying on such experience, expertise and capability in executing this Agreement.

Seller has not relied on any information supplied by Buyer regarding the environmental condition or Regulated Materials at, on, or under the Site in order to make any representation or warranty in this Agreement accurate or not misleading

## **ARTICLE 5**

### **REPRESENTATIONS AND WARRANTIES OF BUYER**

As used in this Article 5, “to Buyer’s knowledge” refers to matters within the actual knowledge of Buyer. Buyer represents and warrants to Seller on the Effective Date (except as otherwise stated) and on each date the following representations and warranties are made or are deemed made as follows:

#### **Section 5.1 Corporate Organization; Etc.**

Buyer is a corporation duly organized and validly existing under the laws of the State of Oregon. Buyer has full corporate power and authority to carry on its business as it is now being conducted and to own the properties and assets it now owns.

#### **Section 5.2 Validity of Contract; No Conflict**

(a) This Agreement has been duly authorized, executed and delivered by Buyer and is a legal, binding and valid obligation of Buyer enforceable against Buyer in accordance with its terms, except as such enforceability may be limited by applicable bankruptcy, insolvency, reorganization, moratorium or similar laws from time to time in effect that affect creditors’ rights generally and by legal and equitable limitations on the availability of specific remedies.

(b) The execution, delivery and performance by Buyer of this Agreement, the consummation of the transactions contemplated hereby, and the compliance with the provisions hereof by Buyer shall not, with or without the passage of time or the giving of notice or both:

(i) as to execution, delivery and performance, require any consent or approval of Buyer’s board of directors or any of Buyer’s shareholders which has not been obtained and each such consent and approval that has been obtained is in full force and effect,

(ii) conflict with, constitute a breach or violation of any provision of, or give rise to any right of termination, cancellation or acceleration under, or loss of any right and/or benefit under, any material contract or agreement to which Buyer is a party or to which it or its assets are subject or to any Governmental Approval held by or on behalf of Buyer, the loss of which would reasonably be expected to result in a Material Adverse Change on Buyer’s performance under this Agreement;

(iii) conflict with or violate the certificate of incorporation or bylaws of Buyer;

- (iv) violate any Applicable Law applicable to Buyer.

### **Section 5.3 Consents, Approvals and Authorizations**

Appendix E sets forth all Buyer Governmental Approvals. Except for Buyer Governmental Approvals listed in Appendix E, to Buyer's knowledge, Buyer is not required, and under existing Applicable Law, will not in the future be required, to obtain any Governmental Approval in connection with the execution and delivery by Buyer of this Agreement or the performance of its obligations hereunder, the failure to obtain which would materially impair Buyer's performance of its obligations hereunder.

### **Section 5.4 Resources**

Buyer has the financial resources, assets, operating capital, credit and other resources and means necessary to fulfill its obligations under this Agreement on a timely basis.

### **Section 5.5 No Proceedings**

Except as otherwise disclosed by Buyer to Seller prior to the Effective Date, there are no actions, suits, investigations or proceedings by or before any Governmental Authority or arbitrator pending or, to its knowledge, threatened against or affecting Buyer which, to Buyer's knowledge, would result in a Material Adverse Change.

## **ARTICLE 6**

### **CREDIT REQUIREMENTS**

#### **Section 6.1 Credit Requirements**

(a) Seller is to utilize the Credit Matrix in the attached Exhibit C to determine the amount of any credit assurances to be provided. The amount of credit assurances will be based upon the Credit Rating of Seller or the entity providing credit assurances on behalf of Seller, and the size of the Project.

(b) The Credit Rating will be the lower of: (x) the most recently published senior, unsecured long term debt rating (or corporate rating if a debt rating is not available) from Standard & Poor's (S&P), or (y) the most recently published senior, unsecured long term debt rating (or corporate rating if a debt rating is not available) from Moody's Investor Services. If Option (x) or (y) is not available, the Credit Rating will be determined by Buyer's Credit Dept. through an internal process review and utilizing a proprietary credit scoring model developed in conjunction with S&P.

(c) If requested by Buyer, Seller shall, within thirty (30) days, provide Buyer with copies of its most recent annual and quarterly financial statements prepared in accordance with GAAP.

## **Section 6.2 Security**

(a) Security for the credit assurances required in the Credit Matrix shall include, but not be limited to, a guaranty in a form acceptable to Buyer, a Letter of Credit or Cash Escrow.

(b) If this Contract is terminated as a result of Seller's default, Seller shall pay Buyer (i) the positive difference, if any, obtained by subtracting the Contract Price from Buyer's cost to replace or otherwise have performed, as determined and calculated by Buyer in its discretion, any Work that Seller was otherwise obligated to provide during the remaining term of this Contract plus (ii) compensation for additional managerial and administrative services and (iii) such other costs and damages as Buyer may suffer as a result of Seller's breach ("Net Replacement Cost"). Amounts owed by Seller pursuant to this paragraph shall be due within five (5) Business Days after any invoice from Buyer for the same.

If required by Buyer, Seller shall, within five (5) Business Days after the Effective Date, submit to Buyer a Letter of Credit in the amount set forth in the Credit Matrix. The terms of the Letter of Credit shall meet the requirements of the attached Exhibit F as well as the requirements of this Contract and be issued by a bank satisfactory to Buyer. The Letter of Credit shall provide for payment to Buyer of the Letter of Credit face value if Seller defaults under the terms of this Contract. Buyer shall have the right to call the entire amount of the Letter of Credit if Seller has not renewed the Letter of Credit by thirty (30) days prior to its expiration date. Seller's expenses of complying with this Letter of Credit requirement shall be paid by Seller.

## **ARTICLE 7**

### **GENERAL OBLIGATIONS OF SELLER**

#### **Section 7.1 Seller's General Obligations**

(a) Seller's general obligation hereunder is to provide Buyer with the Project for the Purchase Price, completed in accordance with the terms of this Agreement.

(b) The finished Work shall be complete in all respects. The intent of this Agreement, the Appendices, Exhibits and the Scope of Work is for Seller to provide to Buyer an engineered solution of first class workmanship in each and every respect. All hardware shall be manufactured, fabricated, assembled, finished and documented with workmanship of the highest quality throughout, and all of its components shall be new and suitable for the purposes specified. In addition, the solution shall be engineered, implemented, tested and documented in accordance with the Prudent Industry Practice and shall be suitable for the purpose specified.

(c) The Work shall be manufactured and executed in the manner set forth in the Specification or, where not so set forth, to the reasonable satisfaction of Buyer and Buyer's Representative and all Work on the Site shall be carried out in accordance with Prudent Industry Practice and such reasonable directions as Buyer or Buyer's Representative may give.

(d) Seller shall, in accordance with the terms and conditions of this Agreement, employ the Contractor and the Subcontractors who in turn shall provide all labor, services, management, supervision, Materials, tools, facilities, utilities, Governmental Approvals, licenses

and other aspects of the Work necessary for the design, engineering, construction, startup, testing, commissioning and completion of the Plant including those items specifically required in Appendix B.

(e) Seller shall: (i) cause the Contractor and Subcontractors to carry out and complete the Work in accordance with the requirements, duties and obligations imposed on the Contractor and Subcontractors pursuant to Prudent Industry Practice and all applicable Site conditions; (ii) ensure that the Contractor and each and every Subcontractor designs and performs the Work such as to achieve the objective of a Project which complies with the Applicable Law and the other requirements of this Agreement and their respective contracts; (iii) have the resources, experience, qualifications and capabilities as are required to fully perform its obligations under this Agreement; (iv) keep Buyer informed as to the status of deliveries, and if any such materials or Equipment are not being properly manufactured or fabricated in accordance with the requirements of contracts and the requirements pursuant to which they were purchased, or do not otherwise conform with such requirements, promptly making Buyer aware thereof and taking necessary corrective action; (v) acquire the Site, the Water Rights, all Governmental Approvals necessary for the development, construction and operation of the Plant, and the Emission Reduction Credits in accordance with the Milestones; (vi) cause each of the conditions precedent to the issuance of the Notice to Proceed set forth in Section 17.1 (“Notice To Proceed”) to occur; and (vii) maintain at least one office in the State of Utah.

## **Section 7.2 Physical Obstructions And Conditions (PacifiCorp Sites Only)**

If, during the performance of the Work on the Site, Seller encounters unusual or unforeseen (a) threatened or endangered plant and animal species which are regulated or require special handling under Environmental Laws, (b) underground conditions or (c) items of archeological or historical significance, Seller shall notify Buyer as soon as practicable and shall perform its obligations hereunder, including those obligations affected by such discoveries, in compliance with Applicable Law.

## **Section 7.3 The Contractor and Subcontractors**

(a) In connection with its performance of this Agreement, Seller shall either (i) cause the Contractor and each Subcontractor to purchase Equipment from the Approved/Preferred Suppliers set forth in Appendix Q, or (ii) elect to use vendors others than those set forth in Appendix Q, in which event, Seller shall provide a price adjustment to the Purchase Price. Such adjustment shall be set forth in Appendix R, and shall be accepted by Buyer in its sole discretion.

(b) Seller shall be fully liable to the Buyer hereunder for all acts and omissions of the Contractor and each Subcontractor to the same extent as though any such act or omission had been performed or omitted to be performed by Seller directly. In no case shall Seller’s engagement of the Contractor or any Subcontractor relieve Seller of any of its obligations or Liabilities hereunder and, notwithstanding the use of the Contractor or any Subcontractors hereunder, Seller shall remain fully and primarily liable to the Buyer for the full and complete performance of Seller’s obligations hereunder.



(c) Buyer shall have no contractual obligation to, and shall not be deemed to be in privity with any Subcontractor; provided, however, that in the event Seller's obligations hereunder terminate for any reason, Seller shall, at Buyer's request, take such actions and execute such documents as may be necessary or desirable to assign any or all of the contracts set forth on Schedule 4.12 selected by Buyer to Buyer at Seller's sole cost and expense. Seller shall include in all contracts with all Subcontractors and all other vendors, a consent by such Subcontractor(s) and other vendor(s) in advance to such future assignment(s).

#### **Section 7.4 Compliance With Applicable Law**

(a) Seller shall comply with all Applicable Law, and shall cause the Contractor and each Subcontractor to comply with all Applicable Laws applicable to its respective scope of work on the Project, the noncompliance with which could adversely affect the Work, the Plant, the Site or Seller's obligations under this Agreement. Seller shall be responsible for ascertaining the nature and extent of any Applicable Law, which may affect Seller, the Work, the Plant or the Site as a result of the performance by Seller of its obligations under this Agreement or, prior to Substantial Completion, the operation of the Plant. Seller shall ensure that the Work complies with Applicable Law, Prudent Industry Practice and Governmental Approvals, except to the extent any non-compliance therewith is by Buyer resulting from Buyer's gross negligence, willful misconduct or operation of the Work not in compliance with [*insert applicable Equipment manufacturer*] product manual, a copy of which is included in Appendix D.

(b) Subject to the preceding paragraph, Seller shall be responsible for fines and penalties which may arise (including those that Buyer pays or becomes liable to pay) as a direct result of Seller's non-compliance with Applicable Law, or as a result of Buyer's inability to operate the Project in compliance with Applicable Law due to the inaccuracy of Seller's representations and warranties or the breach by Seller of any of its covenants, other than any fines and penalties arising from any act or omission of Buyer, or the agents, employees, contractors (other than the Contractor and each and every Subcontractor), and representatives of Buyer.

#### **Section 7.5 Governmental Approvals**

(a) Seller shall obtain all Governmental Approvals designated as Seller's responsibility in Appendix E and all other Governmental Approvals that are not specifically designated as Buyer Governmental Approvals in Appendix E and shall cause the Contractor and the Subcontractors to reasonably support the efforts of Buyer in obtaining all Buyer Governmental Approvals, including providing such engineering and environmental data and statistical information as may be reasonably requested by Buyer. Buyer shall be properly included as the permittee, co-permittee or authorized party with respect to all Governmental Approvals.

#### **Section 7.6 Opportunities for Other Contractors; Labor Relations**

(a) Seller shall, in accordance with Buyer's reasonable instructions, afford to other contractors identified by Buyer all reasonable opportunities for carrying out their work at the Site, provided that the same shall not materially obstruct or disturb the progress of the Work. Seller shall also afford access to Buyer's employees, including employees who will operate and maintain the Plant, to perform their work at the Site.

(b) Seller shall be responsible for coordinating Buyer's contractors and employees as it relates to mobilization and laydown space requirements, interconnection with Site construction power and temporary storage facilities, water, emergency evacuation requirements, trash/waste disposal, Site access, temporary office space, safety and security and other Site regulations and requirements. Each of Buyer's contractors shall be responsible for any costs with respect to that contractor's work, including mobilization and laydown space requirements, interconnection with Site construction power and temporary storage facilities, water, emergency evacuation requirements, trash/waste disposal, Site access, safety and security and other Site regulations and requirements.

(c) Seller agrees that claims resulting from the concurrent Buyer contractor activities shall be brought to Buyer's attention within ten (10) Business Days of their occurrence. Buyer and Seller agree to informally resolve claims as they occur and otherwise in accordance with article 32 ("Claims, Claim Notice and Dispute Resolution").

### **Section 7.7 Labor and Employment**

(a) Seller shall, and shall cause the Contractor to, ensure that all construction contracts and subcontracts of any tier for the Project be awarded (i) in compliance with Utah State and Federal and all other Applicable Law and (ii) on a Merit Shop basis. Seller shall, and shall award construction contracts and subcontracts of any tier for the Work (x) in compliance with the requirements of U.S. Federal and Utah state laws and regulations and (y) on a Merit Shop basis or (z) through a project labor agreement. Each Contractor shall, subject always to the requirements of law or regulation or applicable collective bargaining agreement, and to the fullest extent commercially reasonable, perform the Work using Utah labor.. Any contract or subcontract shall be awarded on the basis of the best value to the Project including an evaluation of the Subcontractors' ability to work in harmony with others working on the Project including the Contractor, the existing labor force, Governmental Authorities, and without regard to whether or not the successful bidder is signatory or non-signatory to agreements with labor organizations. Seller shall, and shall cause the Contractor and each Subcontractor to, refrain from any discrimination against any employee on the basis of such employee's membership in any labor organization, or his or her lack of such membership. All employees working on the Project shall be permitted to exercise their right to engage in protected concerted activity, as defined in Section 7 of the National Labor Relations Act, as amended, or to refrain from doing so, without any discrimination or other adverse consequence. Seller shall, and shall cause the Contractor and each Subcontractor to, comply with Applicable Law regarding labor relations and employment matters. Any administrative or civil proceedings filed against a Project Party or any Subcontractor shall be promptly reported to Buyer. Nothing in this provision shall affect any obligation of a Project Party or Subcontractor under a lawful collective bargaining agreement applicable to some or all of such Person's operations on the Project.

(b) Seller shall be aware of, and familiar with, all collective bargaining agreements, which do or may pertain to or affect the work under this Agreement or other work at the Site. Seller shall plan and conduct its operations so that its employees and subcontractors of any tier will work harmoniously with Buyer employees and other workers employed on the same or related projects to assure that there will be no delays, work stoppages, excessive labor costs, or

other labor difficulties. Seller shall ensure that Contractor and each and every Subcontractor comply with all Applicable Law pertaining to such labor.

(c) Scarcity and Quality of Labor. Seller shall have no claim for an extension of the Time for Completion or a claim for loss, damage or additional Costs of any kind in respect of any alleged or proved unsuitability, scarcity, inefficiency of the labor it may engage or wish to engage.

(d) Equal Employment Opportunity and Other Non-Discrimination Clauses.

(i) Seller shall, at all times, comply with all Applicable Law applicable to employees, including without limitation those governing wages, hours, desegregation, employment discrimination, employment of minors, health and safety. Seller shall comply with equal opportunity laws and regulations to the extent that they are applicable.

(ii) Seller shall indemnify, defend and hold harmless Buyer, its Board of Directors, officers, employees and agents from all losses, costs and damages by reason of any violation thereof and from any liability, including without limitation fines, penalties and other costs arising out of Vendor's failure to so comply.

(iii) Seller shall execute and deliver to Buyer a completed Certificate of Compliance using Buyer's form of Certificate before starting to perform Work under this Agreement.

(e) Workers Compensation. Seller shall comply with all applicable Applicable Law regarding workers' compensation and shall, prior to commencing Work, furnish proof thereof satisfactory to Buyer.

### **Section 7.8 Authority for Access for Inspection**

Inspection of the Work at the Site and attendance at meetings (whether conducted in-person, telephonically or through similar medium) relating to the Project which are attended by Seller and Contractor or Subcontractor and related to status, progress, quality, scope, schedule and safety coordination shall at all times be afforded by Seller to Buyer, Buyer's Representative and such other Persons as shall be designated by Buyer or Buyer's Representative. Buyer, in its inspection, shall give due consideration to the needs of Seller to carry out Seller's obligations and strive not to hinder or unduly impede Seller while carrying out such inspection. Buyer, in its inspection, may observe the progress and quality of the Work to determine, in general, if the Work is proceeding in accordance with the Transaction Documents. Inspections under this Section 7.8 are solely for the benefit of Buyer and any inspection or failure to inspect and any objection or failure to object by Buyer shall not (i) relieve Seller, the Contractor, or any Subcontractor of its respective obligations under any Transaction Document or (ii) be used as evidence that Buyer agreed that Seller, Contractor, or any Subcontractor had fulfilled any obligations under any Transaction Document or that Buyer had waived any of its rights under any Transaction Document.

### **Section 7.9 Seller's Use of Buyer's Drawings**

Seller may use Buyer's Drawings only for fulfilling its obligations under this Agreement. Buyer's Drawings, specifications and other information submitted by Buyer to Seller shall remain the property of Buyer. Such materials shall not, without the written consent of Buyer, which consent may be

withheld in Buyer's sole discretion, be used, copied or communicated to a third party, other than the Contractor, by Seller unless necessary to fulfill the purposes of this Agreement, and then pursuant to a full reservation of rights in Buyer. Buyer makes no representations or warranties as to the accuracy, completeness or suitability of Buyer's Drawings and Seller shall not rely on such Buyer's Drawings.

### **Section 7.10 Contractor Drawings and Manuals**

(a) Seller shall at all times keep a copy of the most recent version of the Contractor Drawings and Manuals at Seller's office on the Site to be made available for Buyer's review. In addition, Seller shall provide and make available to Buyer electronic versions of the Contractor Drawings and Manuals accessible by Buyer through a file transfer protocol site to be maintained by Seller.

(b) Seller shall cause to be set forth in the Contractor Drawings and Manuals provided to Buyer such information as is required to operate and maintain the Work, including to the extent applicable, recommended operating and maintenance procedures, system descriptions, product catalogs, drawings, design sheets, specifications, logic diagrams, maintenance and instruction sections, spare parts lists, any vendor-supplied training documents, and current heat balances. The Contractor Drawings and Manuals shall be (i) prepared in accordance with the Specification and when completed, shall be in sufficient detail to accurately represent the Project as constructed. The Contractor Drawings and Manual shall be maintained and be available, with up-to-date drawings, specifications and design sheets, for the training as set forth in Section 7.11 ("Training").

(c) Seller shall prepare initial system descriptions, design basis documents, and operational guidelines for the Project and deliver such to Buyer for its review at least one (1) year prior to the Guaranteed Substantial Completion Date.

(d) At least sixty (60) days prior to the Guaranteed Substantial Completion Date, Seller shall provide Buyer with initial drafts of the final Contractor Drawings and Manuals for review (the "Draft Manuals"). The Draft Manuals shall contain such information described in Section 7.10(b), other than the drawings which, in accordance with this Section 7.10, are being maintained so as to be up-to-date. Two (2) complete sets of the Draft Manuals shall be provided to Buyer at least sixty (60) days prior to Substantial Completion and shall be a condition of Substantial Completion.

(e) Seller shall provide to Buyer both hard and electronic final copies of the Contractor Drawings and Manuals. Seller shall provide to Buyer five (5) final hard copies of the Contractor Drawings and Manuals within sixty (60) days after achievement of Substantial Completion. Buyer shall not be required to deliver the Notice of Final Acceptance until all such Contractor Drawings and Manuals have been so delivered.

(f) Any modifications to the Contractor Drawings and Manuals made necessary as a consequence of any Final Punch List items or modifications to the Work shall be issued as addenda to the Contractor Drawings and Manuals within sixty (60) days following completion thereof.

## **Section 7.11 Training**

(a) Training of Buyer's personnel (or other employees or agents of Buyer) shall be given by Seller or the Contractor prior to the Closing Date as required by the Specification, in accordance with the timetable to be agreed upon with Buyer prior to the Closing Date and shall include training (including on-site and classroom) in connection with the operation and maintenance of the Project. Such training shall be provided directly to Buyer's personnel as specified by Buyer in Section 10 to Appendix B and shall be conducted by a trainer experienced in the operation and maintenance of the Project.

(b) As more fully described in Section 10 of Appendix B, starting at least sixty (60) days prior to the first operation of one of the combustion turbines at the Site of the Project and continuing until Final Acceptance, Seller shall oversee the development of and provide qualified and experienced support for Buyer's execution of a practical and participatory training program at the Site for an adequate number of employees designated by Buyer, which personnel shall be experienced in electric generating facility operation appropriate to their respective job descriptions.

## **Section 7.12 Safety**

(a) Seller shall be solely responsible for being aware of and initiating, maintaining and supervising compliance with all safety laws, regulations, precautions, and programs in connection with the performance of this Agreement, including without limitation the provisions of Section 9.2 ("Site Security"), Section 9.7 ("Fencing, Protection, Lighting"), and Section 9.11 ("Material Safety Data") of this Agreement. Prior to the start and throughout the performance of the Work, Seller shall assure that each of its employees, together with all employees of its Contractor and each Subcontractor, are fully informed concerning all safety, health, and security regulations pertaining to the Work. Seller shall conduct all operations under this Agreement in such a manner as to avoid the risk of bodily harm to persons or risk of damage to any property.

(b) In the event Seller fails to promptly correct any violation of safety or health regulations, Buyer may suspend all or any part of the Work. Seller shall not be entitled to any extension of time or reimbursement for costs caused by any such suspension order. Failure of Buyer to order discontinuance of any or all of Seller's operations shall not relieve Seller of its responsibility for the safety of personnel and property. Seller shall maintain an accurate record of and shall promptly report to Buyer all cases of property damage in excess of \$100 and of death, occupational diseases, or injury to employees or any other third parties and incident to performance of Work under this Agreement. Seller shall promptly notify Buyer and provide a copy of any safety citation issued by any governmental entity. Seller shall perform all Work under this Agreement in strict accordance with its Buyer-approved Health and Safety Plan.

(c) Seller must, and must cause its Subcontractors and its and their respective agents and employees to, comply with (i) Seller's safety programs, to be set forth in exhibits hereto, (ii) Buyer's safety program set forth in Exhibit M hereto, and (iii) any and all material Subcontractor's safety programs as set forth in exhibits hereto, as the same may be supplemented from time to time. If the standards or requirements provided in the foregoing are inconsistent, Seller must

perform, or cause to be performed, the foregoing obligations in accordance with the requirements of the most stringent program, rule, standard, criteria or guideline.

(d) Without limiting Buyer's rights herein, Buyer has the right, but no obligation, to supervise or cause Seller's compliance with this Section, and will have no liability for failing to cause Buyer to comply with this Section. Buyer will have no liability for failing to advise Seller of activities or omissions, including any condition, damages, circumstances, infraction, fact, act, omission or disclosure discovered or not discovered by Buyer with respect to the Facility, Site or any Subcontractor.

### **Section 7.13 Intellectual Property Rights and Computer Program Licenses**

(a) Seller represents and warrants that it has and upon the Closing will have, (i) all rights necessary with respect to the Work (and each part thereof) and the ownership or operation of the Project after it is constructed and to perform Seller's obligations under this Agreement and (ii) that the Work (and each part thereof) does not violate or infringe any patent or copyright. Seller shall not take any action that would violate or infringe any patent or copyright.

(b) Seller shall, at its sole expense, settle or defend and pay any costs (including attorney's fees) and damages awarded in connection with, and shall defend, indemnify and hold harmless each of Buyer and Buyer's Representative, and any of its respective officers, directors, employees, contractors, agents or representatives, from and against, any and all Claims, suits or proceedings based on a Claim that the Work (or any part thereof) or the ownership or operation of the Project, infringes or violates any patent or copyright. Buyer shall give Seller notice of any such Claim promptly after Buyer has actual knowledge thereof, provided that the omission of Buyer to give such notice shall not relieve Seller of their obligations hereunder except to the extent that such omission results in a failure of actual notice to Seller and Seller are damaged as a result of such failure. The provisions of article 26 ("Indemnification") and article 32 ("Claims, Claim Notice and Dispute Resolution") shall also apply to any Claim under this Section 7.13(b).

(c) In case the Work (or any part thereof) or the ownership or operation of the Project is held to infringe or violate any patent or copyright and the use of the Work (or part thereof) or the operation of the Project is restricted or prohibited as a result thereof, Seller shall, at its sole cost and expense, at Seller's option, either procure for Buyer the right to continue using the Work (or part thereof), replace the same with non-infringing comparable substitute Work, or modify the Work (or part thereof) so that it becomes non-infringing (provided that such modification does not adversely affect the Work (or any part thereof)).

(d) Seller shall obtain and transfer to Buyer perpetual, fully-paid licenses to use all computer programs necessary or useful for the operation of the Plant, together with all warranties related thereto. Nothing contained in the Computer Program License shall restrict any of Buyer's rights under this Agreement.

### **Section 7.14 Seller's Representatives**

(a) Seller shall employ one or more competent representatives, whose name or names and details of qualifications and previous experience shall have been provided to Buyer and

Buyer's Representative by Seller, to manage the project and who shall have Seller's authority in respect of all matters arising out of or in connection with the Agreement and the Work.

(b) Assigned Project Roster.

(i) Seller shall designate a Project Manager, a Project Engineer, a Lead Mechanical and Lead Electrical, a Construction/Site Manager, a Safety Manager and a Startup or Commissioning Manager for the Project, and shall provide to Buyer a list setting forth each such position prior to beginning the Work. All employees assigned by Seller to perform any of Seller's obligations shall be fully qualified to perform the tasks assigned them.

(ii) Such representatives, or if more than one shall be employed, then one of each such representatives, shall be present on the Site during working hours and at all times the Work is in progress during the times relevant to the representative's duties are applicable to the Work, and any orders or instructions which Buyer or Buyer's Representative may give to the said representative of Seller shall be deemed to have been given to Seller.

(iii) Buyer or Buyer's Representative shall each have the right, in its sole discretion, to approve or disapprove Seller's selections for Project Manager, Project Engineer, Lead Mechanical and Lead Electrical, Construction/Site Manager, Safety Manager, Startup or Commissioning Manager and any Subcontractors or independent contractors or consultants utilized by Seller.

(iv) In the event Seller intends to remove or change its Project Manager, Project Engineer, Lead Mechanical and Lead Electrical, Construction/Site Manager, Safety Manager, or Startup or Commissioning Manager assigned to the project or reassign any such personnel to another project, Seller shall give Buyer fifteen (15) days advance written notice of Seller's intentions. Buyer shall give due diligence and consideration to any request by Seller to replace such persons and shall respond within fifteen (15) days to any such requests. Seller shall not replace its Project Manager, Project Engineer, Lead Mechanical and Lead Electrical, Construction/Site Manager, Safety Manager, or Startup or Commissioning Manager assigned to the project without the prior written consent of Buyer.

(v) Buyer shall have the right to approve Seller's senior staff on Site, and may request the removal of any of Contractor's personnel

(vi) Seller shall not remove any of the individuals identified in Section 7.14(b)(i) from the Work or the Site without the prior written consent of Buyer, and then only if a suitable replacement for such representative has been approved by Buyer prior to the removal of such representative.

(c) Objection to Seller or Contractor Representatives or Employees. Buyer shall be entitled by notice to Seller to object to any representative or person employed directly or indirectly by Seller, Contractor or any Subcontractor in the execution of or otherwise about the Work who, in the opinion of Buyer, misconducts itself, is incompetent or negligent, and Seller, Contractor or any Subcontractor, as the case may be, shall remove and exclude such person from the Work.

### **Section 7.15 Seller's Personnel/Drugs, Alcohol and Firearms**

With regard to the performance of the Work, Seller shall, and shall ensure that Contractor shall, only employ persons qualified to perform the Work. Seller shall, at all times, enforce strict discipline and good order among its employees and the employees of the Contractor and any Subcontractor. Seller shall not permit or allow the introduction or use of any firearms, illegal drugs or intoxicants upon the Work under this Agreement, or upon any of the grounds occupied, controlled, or used by Seller in the performance of the Work. Seller shall immediately remove from the Work, whenever requested by Buyer, any person considered by Buyer to be incompetent, insubordinate, careless, disorderly, in violation of the above restriction on firearms, illegal drugs or intoxicating liquor, in violation of any applicable safety standard, or under the influence of illegal drugs or intoxicants, and such person shall not again be employed in the performance of the Work herein without the consent of Buyer.

### **Section 7.16 Use of Premises and Trespassing**

Seller shall confine the storage of materials and construction equipment to locations acceptable to Buyer and in accordance with Applicable Law. Seller shall, at all times, prohibit its staff, workers and all other persons employed directly or indirectly by Seller on the Site from poaching or trespassing and any such person found so doing shall be removed forthwith from the Work and shall not be re-employed without the prior Written consent of Buyer.

### **Section 7.17 Electricity, Water and Pipeline Natural Gas**

(a) During the construction of the Plant, Seller shall provide for its own use, on-Site distribution for all utilities, including, the following: drainage, water, sewage and electrical power. Seller shall pay for electrical power, fuel and raw water used by Seller during the construction of the Plant. Seller shall make provisions in its temporary construction power load center for loads and feeds of Buyer, provided that Seller have been supplied with adequate information relative to such additional uses prior to initial mobilization at the Site; provided, however, distribution of such additional power feeds, and the cost of usage of such electrical power, shall be borne by Buyer or contractors engaged by Buyer.

(b) Seller shall provide all required supplies of demineralized water, pipeline natural gas and other commodities required for the purposes of commissioning and startup activities and the Performance Tests in accordance with manufacturer's and/or contractors' published specifications for the Plant and Equipment. Notwithstanding the foregoing, Buyer shall reimburse Seller for the cost of providing pipeline natural gas in an amount not to exceed the equivalent to two hundred seventy-five (275) hours of full-load CT operation, without duct burners in operation, based on the design documents for the Project, for purposes of commissioning and startup activities and the Performance Tests. Seller shall provide to Buyer in writing not less than 180 days prior to first firing of the Gas Turbines, the design consumption rate to be used in calculating Buyer's reimbursement obligations under this paragraph. Seller shall be responsible for all pipeline imbalance and other charges that may be assessed by any party in connection with the supply of natural gas and/or electric service to the Plant in connection with commissioning and startup activities and Performance Testing. Seller shall be responsible for the initial filling of all chemicals, lubricants, and any other consumables necessary for the startup activities and Performance Tests.



### **Section 7.18 Temporary Facilities**

Seller shall make provisions, at its cost, for all temporary facilities necessary for the construction of the Project and the installation of the Equipment, including arrangements for the supply of telephone, office equipment, sanitary toilet facilities, compressed air and other services for the Work and shall provide and maintain all pipes, cables and services required for its operation. Seller shall provide and maintain on the Site office accommodations for itself and an office for Buyer and Buyer's Representative. Seller shall also install and maintain, at its own cost and expense, a system of lighting to provide a reasonable degree of illumination over the area of its Work during performance of the Work. Seller shall remove any of such temporary installations pursuant to Section 20.7 ("Removal of Equipment").

### **Section 7.19 Decisions and Instruction of Buyer's Representative**

(a) Seller shall proceed with the decisions and instructions given by Buyer's Representative in accordance with this Agreement. Such decisions or instructions may be given orally, but shall be effective only when confirmed in writing unless and only to the extent that such instructions are necessary to remedy an emergency situation, or to ensure Site safety, that would make the provision of written instructions impractical or insufficiently timely.

(b) If Seller disputes or questions any decision or instruction by Buyer's Representative, Seller shall give notice to Buyer within five (5) days after receipt thereof, giving reasons therefor. Buyer shall within a further period of five (5) days by notice to Seller with reasons, confirm, reverse or vary such decision or instruction. If Seller disagrees with Buyer's response, or if Buyer fails to reply to Seller's notice within the stipulated days, the matter shall be resolved in accordance with article 32 ("Claims, Claim Notice and Dispute Resolution"). Notwithstanding the foregoing, to the extent that an instruction by Buyer's Representative is necessary to remedy an emergency situation and Seller disputes the action requested in such instruction, then Seller shall nonetheless comply with Buyer's instruction and the dispute shall be resolved as provided in article 32 ("Claims, Claim Notice and Dispute Resolution").

### **Section 7.20 Cooperation Between the Parties**

The Parties are expected to be called upon to make decisions regarding matters not reasonably anticipated in order to meet their respective obligations under this Agreement. In making such decisions, the Parties shall cooperate with the intent to improve the performance of the Work and reduce the likely operating and maintenance impacts. The vehicle for reaching agreement and causing a change to occur in the Work and/or the schedule for performance and/or the Guaranteed Substantial Completion Date and/or additional substantiated costs as a result of errors and omissions in information supplied by Buyer shall be by Change Order in accordance with article 13 ("Change Orders"). Additionally, if errors or omissions in information provided by Seller affect Buyer's or its other contractors' work during construction of the Plant, Buyer shall be entitled to make a Claim against Seller for Buyer's costs as the result of errors or omissions. [Notwithstanding the foregoing, the Parties at all times shall abide by and be subject to the terms of the Construction Coordination Agreement]. [Final sentence applicable only to PacifiCorp Sites]

## **Section 7.21 Spare Parts Inventory**

(a) Seller shall provide and include in the Purchase Price all spares and consumables necessary for the complete performance of the Work through Final Acceptance and through the Closing. Such spares and consumables shall be located at Site and immediately available to ensure all works, testing and reliability testing continues unimpeded by such unavailability of onsite spares and consumables.

(b) Seller shall prepare a proposed list of spare parts for the Work to be available one hundred eighty (180) days prior to the Guaranteed Substantial Completion Date. Seller shall submit the proposed inventory of spare parts to Buyer in a timely fashion so as to permit thirty (30) days for Buyer to review the list and for Buyer, in Buyer's sole discretion, to procure such spare parts or, at Buyer's option pursuant to a Change Order, to direct Seller to procure such spare parts and have such spare parts delivered to the Site or cause such spare parts to be procured and delivered to the Site, to the extent practical, prior to the Guaranteed Substantial Completion Date. The proposed inventory of spare parts shall describe each component in detail, identify the manufacturer and supplier thereof and set forth the cost and lead time of such item. Upon the request of Buyer, Seller shall meet with Buyer and its designees to discuss the proposed inventory of spare parts. If available, Buyer shall allow Seller to use any spare parts owned by Buyer, but in no event shall Buyer be liable or shall Seller be entitled to a Change Order in the event that the absence of any particular spare part or parts impacts completion of the Work.

(c) In the event Seller uses Buyer's spare parts, such spare parts shall be expeditiously replaced by Seller at its sole cost and expense.

(d) Buyer does not warrant the condition, quality, suitability, absence of defects, fitness for any purpose or aspect of any Buyer-supplied spare part and if a Seller uses any Buyer-supplied spare part, it does so at its own risk.

## **Section 7.22 Maintenance of Buyer Lien**

Seller shall take or cause to be taken all actions reasonably required by or deemed desirable by Buyer, in its sole discretion, to maintain and preserve the Lien of the Security Documents and the priority thereof. Seller shall from time to time execute or cause to be executed, or authorize Buyer to prepare and file, any and all further Security Documents and register and record such documents and instruments in such offices reasonably requested by Buyer for such purposes. Seller shall take all action reasonably required by Buyer to cause each Additional Project Document to be or become subject to the Lien of the Security Documents (whether by amendment to the Security Documents or otherwise) and shall deliver or cause to be delivered to Buyer such legal opinions, certificates or other documents, including consent agreements that are substantially similar to the Consents, with respect to such Additional Project Documents as Buyer may reasonably request.

## **Section 7.23 Further Assurances**

At any point during the course of performance of this Agreement, upon request of Buyer, Seller shall take all such further actions and execute all such further documents and instruments as Buyer may at any time reasonably determine to be necessary to further carry out and consummate the transactions contemplated by the Transaction Documents or to perfect or protect the Lien of Buyer on the Collateral

under the Security Documents or to ensure performance of Seller's obligations and responsibilities as contained herein.

#### **Section 7.24 Indebtedness**

Until the Closing shall have occurred, Seller shall not create, incur, assume, suffer to exist or otherwise become or remain directly or indirectly liable with respect to any Indebtedness other than Indebtedness incurred in the ordinary course of business that does not result in a Material Adverse Change.

#### **Section 7.25 Other Liens**

(a) Until the Closing shall have occurred, Seller shall not create, incur, assume or suffer to exist, directly or indirectly, any Lien on any of its property now owned or hereafter acquired in connection with the Project, other than the following:

(i) Liens granted to Buyer pursuant to the Security Documents;

(ii) Easements or other encumbrances on Real Property affecting the Project required to be granted (x) pursuant to Applicable Law or (y) by order of a Governmental Authority; provided, however, that such easements or other encumbrances on Real Property could not reasonably be expected to have a Material Adverse Change;

(iii) Liens set forth on Schedule 7.25(c);

(iv) Mechanics Liens relating to the Work supplied and performed by the Contractor or by any Subcontractor that have not yet been paid in the ordinary course of business; and

(v) Liens filed with respect amounts payable to the Contractor or any Subcontractor that are being disputed in good faith, provided that Seller have posted a bond against such Liens with a bonding company or other surety reasonably acceptable to Buyer.

(b) Seller shall, and shall cause Contractor, all Subcontractors, and all Suppliers to deliver Lien Releases in the form attached as Exhibit J, Exhibit K, and Exhibit L, respectively, for all Liens that arise with respect to the Project.

#### **Section 7.26 Restriction on Fundamental Changes**

(a) Until the Closing shall have occurred, Seller shall not, without Buyer's prior written consent, enter into any merger or consolidation, or liquidate, wind-up or dissolve (or suffer any liquidation or dissolution), discontinue its business.

(b) Until the Closing shall have occurred, and except in the ordinary course of business (such as the replacement of substitution of items from customary wear and tear), Seller shall not convey, sell, lease, assign, transfer or otherwise dispose of any of Seller's assets, except in connection with the Closing, if such sale, lease, assignment, transfer or other disposition would, singly or in the aggregate, result in a Material Adverse Change.

## **Section 7.27 Contingent Obligations**

Until the Closing shall have occurred, Seller shall not create or become or be liable with respect to any Contingent Obligation if, the occurrence of the contingency associated with such Contingent Obligation would result in a Material Adverse Change, other than (a) indemnities of Seller in favor of Buyer pursuant to this Agreement, (b) under the Primary Construction Contracts, (c) indemnities arising in the ordinary course of business under contracts with Subcontractors or (d) any Contingent Obligation to a Governmental Authority arising in connection with Seller's seeking to obtain a Governmental Approval, but only to the extent consented to by Buyer, such consent not to be unreasonably withheld.

## **Section 7.28 Amendment of Project Documents; Additional Project Documents**

Until the Closing shall have occurred, Seller shall not:

(a) without the prior written consent of Buyer (i) assign or permit any Person to assign any of its rights or obligations to or under any Project Document, (ii) terminate any Project Document, or (iii) make any amendment or other modification to any Project Document that would (A) result in a breach of this Agreement or the inaccuracy of any representation or warranty in this Agreement, (B) increase the Purchase Price, (C) extend the Guaranteed Substantial Completion Date, or (D) have a Material Adverse Change;

(b) to the extent not covered by Section 7.28(a), amend, modify, grant any consent or approval with respect to any obligation under, waive timely performance or observance by any Person (other than Buyer) of any obligation under, exercise any options or remedies or issue any change order, notice or make any elections under any Project Document without providing notice thereof and copies of all material documentation related thereto, to Buyer;

(c) compromise or settle any claim against any Project Party if to do so would have a Material Adverse Change; or

(d) enter into any Additional Project Document that would have a Material Adverse Change. Seller shall deliver copies of all Additional Project Documents to Buyer within three (3) Business Days of the execution thereof.

## **Section 7.29 Environmental Matters**

Until the Closing shall have occurred, Seller shall not permit (a) any underground storage tanks (other than for water or sewage) to be located on any property owned or leased by Seller, (b) any asbestos to be contained in or form part of any building, building component, structure or office space owned or leased by Seller and (c) any polychlorinated biphenyls to be used or stored at any property owned or leased by Seller.

## **Section 7.30 Records and Accounts**

Seller shall maintain all records and accounts in accordance with GAAP consistently applied and in Dollars in order to support any and all invoices, claims and disputes under this Agreement. Seller shall permit Buyer, upon reasonable prior notice and during business hours, to audit Seller's records and

accounts to verify invoice amounts and to confirm any increases or decreases to the Purchase Price and any Change Orders.

### **Section 7.31 Condemnation, Eminent Domain, Casualty Events**

(a) In the event that any Governmental Authority or any Person, acting under any Governmental Authority, other than Buyer, takes any action to condemn, seize or appropriate all or any substantial part of the Project (each a “Condemnation Proceeding”), Seller shall promptly notify Buyer of the Condemnation Proceeding and promptly update Buyer on significant events in connection with the Condemnation Proceeding, including with respect to settlement offers, and provide other information reasonably requested by Buyer as often as may be reasonably requested by Buyer. Any monetary offer to settle a Condemnation Proceeding or compensate Seller with respect thereto shall at all times be subject to Buyer’s sole and absolute discretion to accept or reject such offer, and in the event that Buyer directs Seller to accept such offer, and provided that no Seller Default, shall have occurred and be continuing, the proceeds thereof shall be applied first as a credit against any cancellation payment that may apply pursuant to Appendix I, and the remainder of such proceeds shall be paid to Buyer.

(b) In the event that any casualty event (other than a Force Majeure) shall occur which causes a suspension of all or a substantial portion of the Work for a period greater than (i) forty-five (45) days after the receipt of insurance proceeds in an amount required to successfully restore or repair the Project without having to increase the Purchase Price or (ii) ninety (90) days after the occurrence of such casualty event, then, provided that no Seller Default shall have occurred and be continuing, the proceeds of any insurance policies in respect of such casualty event shall be applied first as a credit against any cancellation payment that may apply pursuant to Appendix I and the remainder of such proceeds shall be paid to Buyer.

### **Section 7.32 Seller’s Organizational Documents**

Within thirty (30) days following the Effective Date, Seller shall deliver to Buyer or its representatives true and complete copies of their [APPLICABLE ORGANIZATIONAL DOCUMENTS] (the “Seller’s Organizational Documents”), as amended through (and including) such date.

### **Section 7.33 Construction Coordination Agreement [PacifiCorp Sites Only]**

Seller shall conduct all development, construction, commissioning and testing activities in accordance with the provisions of the Construction Coordination Agreement and in a manner that shall not interfere with the operation of Unit 1.

### **Section 7.34 Import Permits, Licenses and Duties**

Seller shall obtain all import permits or licenses required for any part of the Plant, Equipment or Work within the time stated in the Project Schedule or, if not so stated, in reasonable time having regard to the time for delivery of the Plant, the Equipment and the Time for Completion. Seller shall pay all customs and import duties arising upon the importation of Plant into the applicable port of entry. All such payments shall be deemed to be included in the Purchase Price.

### **Section 7.35 Compliance with Planning Permissions, Consents**

Seller shall comply fully in respect of design and work at Site and all other obligations under the Agreement, with the terms, conditions and requirements of all consents, licenses and planning permissions obtained by Buyer or Seller in accordance with Section 8.2 (“Planning Permissions, Consents”).

### **Section 7.36 Permits**

Seller shall, and cause the Contractor and any Subcontractor to, at its sole cost and expense, secure and maintain all applicable construction and construction related permits which are required by Applicable Law (each a “Permit”) in order to undertake and perform the Work.

### **Section 7.37 Lay Out**

(a) Seller shall be, and shall ensure that the Contractor and any Subcontractor is, responsible for the true and accurate laying out of the Work by reference to original points, lines and levels of reference given by Buyer’s Representative and provide all necessary instruments, appliances and labor therefor.

(b) If, at any time during the execution of the Work, any error appears in the positions, levels, dimensions or alignment of the Work, Seller shall rectify the error.

(c) Seller shall bear the Cost of rectifying any error caused or permitted, directly or indirectly, by Seller.

(d) Seller shall identify and protect bench marks, sight rails, pegs and other monuments or reference points used in laying out the Work.

## **ARTICLE 8**

### **GENERAL OBLIGATIONS OF BUYER**

#### **Section 8.1 Buyer’s General Obligations**

(a) Buyer’s general obligation hereunder is to purchase the Project, upon performance of Seller’s obligations as provided in this Agreement.

(b) Additionally, Buyer shall:

(i) keep Seller informed as to the status of any governmental or regulatory or other activities undertaken by Buyer that relates to the Plant and that is likely to materially adversely affect Seller’s ability to perform the Work;

(ii) comply with all Applicable Law, the noncompliance with which are likely to materially adversely affect the Work, the Plant, the Site or Seller’s or Buyer’s obligations under this Agreement; and

(iii) maintain its records and accounts in accordance with GAAP consistently applied in order to support any and all invoices, claims and disputes under this Agreement.

## **Section 8.2 Planning Permissions, Consents (PacifiCorp Sites Only)**

(a) Buyer shall, before the time specified in the schedule for delivery of any Equipment or Plant to the Site, obtain the Planning Consents set forth in Exhibit G. In the event Seller considers that a consent not contained in Exhibit G must be obtained for the execution of the Work and/or operation of the Site and which, as a result of the application of Applicable Law, can only be obtained by Buyer, Seller shall immediately inform Buyer. If Buyer determines, in its sole discretion, that any additional consent is required, Buyer shall use commercially reasonable efforts to obtain such consent.

(b) Except as expressly provided or set out in this Section 8.2 or otherwise agreed in writing, Buyer shall have no obligation to obtain any further planning or similar consents which are or may be necessary for the performance of the Work. The obtaining of any and/or all other necessary consents, permits, planning permission from local or other authorities or adjacent landowners shall be the responsibility of Seller who shall ensure that the same are promptly obtained considering the schedule and the time for delivery of the Equipment, the Plant and the Time for Completion.

(c) Each Party agrees to provide reasonable assistance to the other where such assistance is necessary for any consent, license or permission to be obtained. Seller shall ascertain, comply with, and ensure that the Work complies with, all Applicable Law, and all consents, licenses and permissions relating thereto.

## **Section 8.3 Operations and Maintenance Staff**

Buyer shall provide to Seller reasonable and necessary support during the commissioning and startup of the Plant as set out in this paragraph. Seller shall supply a schedule of requested support not less than sixty (60) days prior to commencing startup and commissioning activities. Buyer shall provide operations and maintenance staff personnel to participate in the commissioning activities and Performance Tests during normal working hours or other times as may reasonably be requested by Seller with advance notice as follows: Buyer shall provide operation and maintenance personnel as may be reasonably required by Seller to carry out the Performance Tests for purposes of commissioning, Performance Tests, training and system turnover, not to exceed 10 FTE (full-time equivalent) personnel for a period not to exceed 180 consecutive days. Buyer's operation and maintenance personnel shall work under the direction of Seller to perform their work in connection with the startup and commissioning activities. Subject to the following sentence, Buyer's personnel shall have acceptable minimum skill levels to operate the equipment. This participation shall be considered on the job training for Buyer's personnel.

## **Section 8.4 Certificate of Convenience and Necessity**

. Seller agrees to take commercially reasonable and prudent steps to represent themselves in the PSCU's regulatory proceedings in support of the CCN, including causing the Contractor and each Subcontractor to provide cooperation and assistance to Buyer in connection therewith. Such regulatory participation by Seller shall be at Seller's sole cost and expense.

## **Section 8.5 Buyer's Representative**

(a) Buyer's Power to Delegate. Buyer may at any time and from time to time delegate to its representative (the "Buyer's Representative") any of its duties and obligations (other than its payment obligations) under the Agreement. Except as explicitly provided herein, any written decision, instruction or order given by Buyer's Representative to Seller in accordance with such delegation shall have the same effect as though it had been given by Buyer.

(b) Duties of Buyer's Representative. Buyer's Representative shall carry out such duties in issuing certificates, decisions, instructions and orders as are specified in the Agreement but except as expressly provided in the conditions neither the performance of or the failure to perform such duties whether properly or at all by Buyer's Representative, nor the fact that a representative has been appointed by Buyer shall in any way relieve Seller of any responsibility or liability for any of its obligations under the Agreement. No approval of, or consent to or failure to approve or disapprove of any matter by Buyer or Buyer's Representative shall relieve Seller of any liability or any of its obligations under the Agreement.

## **Section 8.6 Standard of Conduct**

Unless explicitly stated otherwise in this Agreement, whenever the Parties or their representatives are required to exercise discretion by: (a) giving a decision or consent, (b) expressing satisfaction or approval, (c) determining value, or (d) otherwise taking action which may affect their respective rights and obligations hereunder, the exercise of such discretion shall be made in a reasonable manner and in good faith consistent with this Agreement so as to reasonably minimize any disruption to the other Party, and having regard to all the circumstances reasonably applicable thereto. Notwithstanding the foregoing, safety must not be compromised.

# **ARTICLE 9**

## **WORKING ARRANGEMENTS**

### **Section 9.1 Site Regulations**

Seller, while performing Work at the Site, shall make itself aware of and adhere to Buyer's Site regulations, if any, including without limitation environmental protection, loss control, dust control, safety, and security, as well as any plant Site special conditions.

### **Section 9.2 Site Security**

(a) Site security shall be under the direct control of Buyer and shall be in accordance with Buyer's established procedures, which include the requirements stated in this Section. Seller and its personnel and its Subcontractor's personnel of any tier shall strictly adhere to all Site security provisions. Buyer will furnish within fenced-in areas of the Site a guard force to control access to and from the Site.

(b) All personnel working at the Site and all repeat visitors may be provided and where provided, shall be required to keep in their possession at all times, while on the premises, an



identification tag (“ID Tag”) provided by Buyer. Visitor’s ID Tags will be available, but persons with such ID Tags may be required to be escorted by a designated representative of Buyer.

(c) Seller shall be assigned a personnel gate through which its employees must enter and depart. ID Tags issued to Seller’s employees may, at Buyer’s option, be utilized as “brass”, and Seller shall be responsible for the control of ID Tags issued to its employees, subcontractors, suppliers and visitors.

(d) Notwithstanding Buyer’s provision of guard service, Seller shall be fully responsible for all Equipment, as well as Buyer-furnished material and Equipment in the care, custody and control of Seller.

(e) Buyer shall designate parking areas for all persons outside the fenced-in area of the Site. Certain individuals, authorized specifically by Buyer, may drive vehicles onto the Site and may enter and leave through the main gate at times designated by Buyer. Access to the Site between the hours of 3:30 P.M. local time and 7:00 A.M. of the normal work week and all hours on weekends shall be subject to the consent of Buyer. Seller shall follow the procedure designated by Buyer in obtaining consent for access to the Site at other than normal working hours.

(f) Seller shall maintain and submit to Buyer an up-to-date inventory of Equipment and tools brought onto the Site.

(g) A representative of Buyer shall have the unqualified right to demand identification of and/or search all persons and all vehicles entering or leaving the Site. Materials leaving the Site must have an appropriate material pass issued by Buyer. Seller shall make, and cause its Subcontractors to make, advanced arrangements for tool inventory when leaving the Site upon completion of the Project. The inventory shall be coordinated with Buyer and can be conducted on weekdays between 9:00 A.M. to 2:00 P.M.

(h) Buyer shall inform Seller of all restricted areas of the Site. Before entering any such restricted area, Seller shall obtain prior consent from Buyer Representative. Any individual found in restricted areas without Buyer consent shall be subject to removal from the Site.

### **Section 9.3 Preservation of Public and Private Access**

Seller shall not damage, close, or obstruct any highway, road, or other public or private easement, except to the extent allowed by Permits. If such facilities are closed, obstructed, damaged, or made unsafe by Seller, Seller shall, at its sole cost and expense, make such repair as necessary and shall also provide such temporary guards, lights, and other signals as necessary or required for safety or as reasonably requested by Buyer.

### **Section 9.4 Night, Weekend or Holiday Work**

In the event Seller determines it necessary to undertake the Work at night, on weekends, or on holidays, and such Work is on the Site, Seller shall provide Buyer’s Representative forty-eight (48) hours notice, unless the Work is necessary for the protection of life or property or for the safety of the Work, in which case Seller shall immediately advise Buyer’s Representative. Such Work shall be performed in accordance with all Applicable Law, Permits, consents and licenses, and without

inconvenience to third parties. Seller explicitly agrees and acknowledges that full consideration and payment for the satisfactory completion of the Work includes all necessary labor hours inclusive of Work during night, weekends and holidays and explicitly agrees and acknowledges that Seller shall not file Change Orders because of the need to attract labor to perform Work at night, weekends or on holidays.

### **Section 9.5 Avoidance of Noise and Disturbance**

All Work at the Site (including night, weekend or Holiday Work subject to the requirements of Section 9.4 (“Night, Weekend or Holiday Work”)) shall be carried out in such a way as to minimize noise and disturbance and Seller shall indemnify and keep indemnified Buyer against any costs, losses or expenses, including without limitation, liability for damages arising out of or in connection with noise or other disturbance, falling outside of the limits specified in the Applicable Law and created by Seller in performing the Work.

### **Section 9.6 Opening Up of Work**

(a) No major material part of the Work shall be covered up or put out of view without the prior written consent of Buyer’s Representative. Seller shall timely inform Buyer’s Representative and shall afford full opportunity for Buyer’s Representative to inspect any part of such Work which is about to be covered up or put out of view and to examine foundations before any part of the Work is placed thereon.

(b) Seller shall uncover any part of such Work or make openings in or through the same as Buyer’s Representative may from time to time direct and shall reinstate and Repair such part. The cost of such uncovering, repair or reinstatement shall be borne by Seller unless (i) the requirements of Section 13.2(c), if applicable, have been fulfilled with respect to such part, (ii) such part is found to have been executed in accordance with the Agreement, and (iii) it was not reasonable to have requested the opening up given the existence of Defects of a similar nature in other parts of the Work, in which event the cost of such uncovering, repair, or reinstatement shall be borne by Buyer.

(c) Notwithstanding any other provision of this Section, if Defects are uncovered, Buyer shall be entitled to either accept the defective Work or to accept them only partially remedied and, provided that Seller has had a reasonable opportunity to remedy the Defects (except where such work has been deliberately concealed by Seller) the Purchase Price shall be reduced by an amount mutually agreed by Buyer and Seller, and in the absence of such agreement, an amount as is determined pursuant to the provisions of article 32 (“Claims, Claim Notice and Dispute Resolution”).

### **Section 9.7 Fencing, Protection, Lighting**

Seller shall provide adequate safety barriers, signs, lanterns, and other warning devices and service to properly protect any person having access to or near the Site. Seller shall be solely responsible for any act of trespass or any damage to adjacent property resulting from or in connection with its operations under this Agreement.

## **Section 9.8 Site Services**

Seller shall be responsible for obtaining any and all electricity, water, fuel, air and other services as Seller may require for the purposes of the Work, and Seller shall be responsible for the cost thereof .

## **Section 9.9 Cleanup**

Seller shall keep the Work area, including storage areas used by it, free from accumulation of waste materials or garbage arising out of the Work, and shall, during the course of (no less frequently than weekly) and prior to completion of the Work, remove and properly dispose of any such waste materials or garbage from and about the Work area as well as remove all tools, equipment and materials not property of Buyer. Upon completion of the Work, Seller shall leave the Work area in a condition reasonably satisfactory to Buyer. In the event of Seller's failure within a reasonable time to comply with any of the foregoing, Buyer may, after written notice to Contractor of such failure, perform the cleanup and removal at the sole cost and expense of Seller. Buyer will perform site inspections for cleanliness and safety weekly. Buyer will have the right, but not the obligation, to implement such matters as it determines in its discretion to implement proper site safety and cleanliness, including cleaning the site and disposing of waste, and invoice Seller for the full cost thereof, including any requisite licensing, with such payment due within ten days of invoice.

## **Section 9.10 Contamination**

Seller shall, at all times, be responsible for keeping the Site free from any Contamination brought to or generated at the Site by Seller, the Contractor or any Subcontractor. Prior to the Closing, Seller shall manage any Contamination, whether brought on to the Site or pre-existing, according to Applicable Law and within the requirements of Buyer's policies and programs for management and disposal of Contamination. Seller shall not be responsible for the remediation or disposal of any pre-existing Contamination. Prior to the disposal or disposition of any Contamination, Seller shall obtain the written approval of Buyer for such disposal or disposition.

## **Section 9.11 Material Safety Data**

Seller shall be familiar with and abide by all provisions of the OSHA Hazard Communication Standard. Seller shall pay special attention to the following provisions from the "Seller Employees" section of the PacifiCorp Hazard Communication Program:

- (a) Seller shall require that suppliers furnish appropriate Material Safety Data Sheets (collectively, "MSDS") and appropriate labels of all purchased chemicals.
- (b) For materials that a Contractor plans to bring onto the Site, MSDS for those materials must first be presented to Buyer for review by Buyer's Plant Safety Coordinator. Contractors coming onto the Site will provide to Buyer an MSDS for the materials to be used. Materials will be contained so as to meet any State or Federal Regulations.
- (c) Seller and its employees shall review the MSDS of the appropriate hazardous chemicals, and follow the requirements of the OSHA Hazard Communication Standard.

(d) Seller is responsible for all applicable training and adherence to the program by its employees, Subcontractors, and Subcontractor's employees, subcontractors and agents.

(e) Any employee of Seller working in an area where hazardous chemicals are or may be present shall be notified in writing by Seller of the chemicals present and provided with appropriate MSDS. It will be the responsibility of Buyer to inform Seller of the hazardous chemicals at the Site to which its employees may be exposed.

### **Section 9.12 Historical Artifacts (PacifiCorp Sites Only)**

In the event that any relics, items or structures with archaeological, geographical or historical value or any Articles (including but not limited to fossils, coins, Articles of value or antiquity and any Native American relics) are discovered by Seller or any of its subcontractors of any tier or any of their representatives or employees, Seller shall leave said items undisturbed and shall immediately notify Buyer and await its direction before proceeding with any work in the vicinity. All such historical artifacts shall be deemed to be the absolute property of Buyer and under no circumstances shall Seller take possession of any item discovered.

## **ARTICLE 10**

### **PROJECT SCHEDULE**

#### **Section 10.1 Project Schedule**

Attached hereto as Exhibit C is a preliminary general project timetable setting forth the major tasks that must be completed by Seller (each a "Milestone") and completion dates for such tasks ("Milestone Completion Dates") as provided by Seller in accordance with the Specification. One such Milestone is the final approval by both parties of a more detailed project timetable (the "Project Schedule") setting forth in more detail Milestones and Milestone Completion Dates, including all design, development and other Milestones to be achieved. In the event that the Notice to Proceed is delayed, within thirty (30) days from the date of the Notice to Proceed, Seller shall submit to Buyer's Representative an updated version of the Project Schedule for the approval of Buyer's Representative.

#### **Section 10.2 Form of Project Schedule**

The Project Schedule shall be in a form acceptable to Buyer. Such Project Schedule shall specify any tasks, obligations, or responsibilities (each a "Buyer Obligation") which Buyer must perform or fulfill in order for Seller to achieve the Milestone Completion Dates for each Milestone, and the date by which Buyer is to fulfill each and every Buyer Obligation.

#### **Section 10.3 Rejection of the Project Schedule**

(a) Buyer's Representative shall have the right to reasonably reject, vary, amend, substitute or otherwise change the Project Schedule prior to approval thereof. Any such variation, amendment, substitution, or other change (other than a rejection) shall be considered a Buyer-Initiated Change under Section 13.1 ("Changes").

(b) If, under Section 10.3(a), Buyer's Representative rejects any Project Schedule submitted by Seller, Seller shall, within seven (7) days of such rejection, submit four (4) copies of the final form of a revised Project Schedule for approval by Buyer's Representative and of the Project Schedule.

#### **Section 10.4 Alterations to Project Schedule**

Seller shall not, without the prior written consent of Buyer's Representative, make any material alteration to the Project Schedule.

#### **Section 10.5 Revision of Project Schedule**

If Buyer or Buyer's Representative determines, each in its sole discretion, that progress of the Work does not or is unlikely to match the Project Schedule, or otherwise to enable the Work to be completed by the Time for Completion, Buyer's Representative may order Seller to revise the Project Schedule. Seller shall thereafter revise the Project Schedule to show the modifications necessary to ensure completion of the Work within the Time for Completion. Seller shall notify Buyer's Representative as soon as possible of any circumstances of which Seller is or becomes aware which might result in progress not matching the Project Schedule.

#### **Section 10.6 Seller's Responsibility to Comply with Milestone Completion Dates**

Seller shall undertake sole and complete responsibility to complete and to commit sufficient manpower and resources to insure the completion of each Milestone by the appropriate Milestone Completion Date.

#### **Section 10.7 Rate of Progress**

(a) Buyer's Representative shall notify Seller if Buyer's Representative decides that the rate of progress of the Work is, in its opinion, too slow to meet the Time for Completion due to a circumstance for which Seller is or is not entitled to an extension of the Time for Completion under the provisions of this Agreement.

(b) Following receipt of such a notice Seller shall at its own cost take such steps as may be necessary and as Buyer's Representative may approve to remedy or mitigate the likely delay, including revision of the Project Schedule. Seller shall not be entitled to any additional payment or additional Cost or any increase in the Purchase Price for taking such steps.

#### **Section 10.8 Progress Reports**

(a) Seller shall submit to Buyer's Representative on the third (3<sup>rd</sup>) working day of each month or such other date as is agreed upon between Seller and Buyer, a progress report ("Progress Report") in compliance with the requirements set forth in the Specification. Seller shall submit two (2) copies of each Progress Report to Buyer's Representative.

(b) The written progress reports submitted by Seller shall specify in detail:

(i) any problem or circumstance (each a “Project Problem”) encountered by Seller or Contractor during the preceding month (including without limitation the failure of Buyer to perform any Buyer Obligations under the Agreement or the inadequacy of any such performance by Buyer) which might (A) prevent Seller from completing any Milestone by its Milestone Completion Date or (B) cause Seller to incur additional expenses in completing any Milestones;

(ii) the estimated length of any delay and the estimated amount of any additional expenses, if any, which may be chargeable to Buyer hereunder, as a result of any Project Problem identified pursuant to the Agreement, and

(iii) to the best of Seller’s knowledge, after due inquiry and analysis, the cause of any Project Problem specified pursuant to the Agreement and the specific steps taken or proposed to be taken by Seller to correct such problem.

(c) In the event that Seller fails to specify in writing any Project Problem (an “Unidentified Project Problem”) with respect to a given monthly period in the appropriate report and in such manner and at such time as specified pursuant to the Agreement as a Project Problem, Seller shall not be entitled to rely on any such Unidentified Project Problem as a purported justification for either (i) claiming that it is entitled to receive any additional amounts pursuant to the Agreement (including without limitation, damages arising out of any alleged failure by Buyer to perform any of Buyer Obligations) or (ii) failing to complete any Milestone by the specified Milestone Completion Date.

(d) The submission by Seller of any Progress Report shall not alter, amend or modify Seller’s or Buyer’s rights or obligations pursuant to this Agreement, including the Purchase Price. In the event and to the extent any Milestone is not completed by the specified Milestone Completion Date as a direct and unavoidable result of Buyer’s failure (other than as a result of Seller’s failure to perform any of its obligations on a timely basis) to fulfill any Buyer Obligation by its respective completion date, then the Milestone Completion Date for such Milestone shall be extended by one (1) day for each day in which completion of any such Buyer Obligation is delayed beyond its respective completion date and all extra costs actually incurred by Seller by reason of such delay shall be paid by Buyer, unless the delay in completing any Buyer obligation results from Seller’s failure to perform any of its obligations on a timely basis.

## **Section 10.9 Progress Meetings**

Progress meetings will be held as deemed necessary by Buyer, but normally shall not be less than once a week. Such meetings shall be at Buyer Site unless Buyer requests to change the location of such meetings. Progress meetings will be utilized to review the Work schedule and discuss any delays, unusual conditions or critical items, which have affected or could affect the progress of the Work.

## ARTICLE 11

### DELIVERY, SHIPPING, AND HANDLING OF PLANT AND EQUIPMENT

#### Section 11.1 Delivery Responsibility.

Seller shall be responsible for the safe delivery of all Plant and Seller's Equipment to the Site. Seller shall abide by the requirements of Appendix B for delivery of major items of Equipment, Plant or Seller's Equipment to the Site. Seller shall be responsible for the reception and unloading on Site of all Equipment, Plant and Seller's Equipment delivered for the purposes of the Agreement.

#### Section 11.2 Packing

(a) Seller is responsible for assuring that the Equipment is suitably packaged to ensure against damage under normal handling and transportation methods. All Equipment or components thereof shall be identified with Buyer's equipment number or tag number, if required by the technical specifications. All shipping shall be in accordance with Appendix B.

(b) The Equipment and all related parts shall be shipped FOB the Site, Freight Prepaid and Allowed, with Seller retaining risk, liability and responsibility, financial or otherwise, until Substantial Completion, and then only in accordance with this Agreement.

(c) Prior to the shipment of any Equipment, Seller shall become knowledgeable of transportation conditions, such as clearances and restrictions, height and width, bridge load limits and other limitations affecting such shipment. Notwithstanding any other provision of this Agreement, any limitations or the lack of transportation facilities shall not become the basis for Claims or damages, or for an extension of time for completion of Work under this Agreement.

#### Section 11.3 Transportation

Seller shall observe all Applicable Law in relation to and obtain all necessary consents and permissions for the transport of Plant, Equipment and Seller's Equipment over highways, bridges or culverts and shall indemnify Buyer against all claims for the repair of any such highways, bridges or culverts arising out of the execution of the Work and in respect of all proceedings, damages, costs, charges and expenses arising out of or in connection with such transportation.

#### Section 11.4 Extraordinary Traffic

Seller shall use best efforts to prevent damage to any of the highways, bridges or culverts on the routes to the Site by any traffic of Seller or any of his subcontractors. Seller shall be responsible for the cost of protecting or strengthening any highway, bridge or culvert as necessary to facilitate the moving of the Equipment, Plant or Seller's Equipment and shall be liable for any damage or injury to highways, bridges or culverts arising out of the execution of the Work, and shall indemnify Buyer in respect of any claim, proceedings, damages, cost, charges and expenses in relation thereto which may be incurred as a result of Seller's default under this Section.

### **Section 11.5 Allocation**

In the event of a partial failure of Seller's sources of supply, Seller will first meet all of Buyer's requirements hereunder prior to any allocation among other customers

## **ARTICLE 12**

### **SELLER'S EQUIPMENT**

#### **Section 12.1 Seller's Equipment**

Seller shall, within thirty (30) days after the Effective Date, provide to Buyer an indicative list of Seller's Equipment that Seller intends to use on the Site, which shall be updated from time to time during the carrying out of the Work and which shall be available for inspection by Buyer's Representative.

#### **Section 12.2 Seller's Equipment on Site**

All Seller Equipment shall, when brought on to the Site, be deemed to be exclusively intended for the execution of the Work. Seller shall not thereafter remove the same or any part thereof from the Site without the consent of Buyer, which shall not be unreasonably withheld in the case of Seller's Equipment not currently required for the execution of the Work on Site.

#### **Section 12.3 Loss or Damage to Seller's Equipment**

Seller shall be liable for loss or damage to any of Seller's Equipment which may occur otherwise than through the default of Buyer or those for whom Buyer is responsible.

#### **Section 12.4 Maintenance of Seller's Equipment**

Seller shall be responsible for maintaining Seller's Equipment on Site in safe working order.

## **ARTICLE 13**

### **CHANGE ORDERS**

#### **Section 13.1 Changes**

- (a) From time to time circumstances may arise which justify a Change.
- (b) No Change shall be effective unless authorized by Buyer by issuance of a Change Order pursuant to the provisions of this article 13.
- (c) Buyer shall, when reviewing each potential Change and determining the nature and extent of any Change Order which is to be granted in accordance with the subsequent paragraphs of this Article, consider in detail the following information:



(i) The nature, scope and extent of the Change, including but not limited to any additions or deletions from the Scope of Work;

(ii) The effect, if any, of the Change on the Project Schedule or on the Guaranteed Substantial Completion Date(s), as applicable;

(iii) The effect, if any, of the Change on the amount the Purchase Price; provided, however, that in no event shall the amount of the Purchase Price be subject to change for any Change that does not constitute a material change in the Scope of Work requested by Buyer; and

(iv) Such other information as may reasonably be necessary for the implementation of the Change Order, including but not limited to the effect on any other provisions hereof which may be impacted by the Change.

Buyer shall, in the case of an Buyer-Initiated Change or, if it elects to do so, in the case of Seller Initiated Changes, and in all events in the case of Required Changes, thereafter issue such Change Order having regard to all such circumstances as is just and equitable and in a form substantially similar to the Change Order Form attached hereto as Exhibit D-1 which shall address, to the extent required, all of the issues set out in this Section 13.1(c).

(d) In the case of any request for a Change Order which is permitted to be made in accordance with this Agreement, it shall take the form of a Change Order Request (each a "Change Order Request") which shall be delivered to Buyer in writing as soon as possible and in any event within ten (10) days after Seller becomes aware of the circumstances which it believes (or through the exercise of Best Recognized Practice should believe) necessitates a Change. In no case shall Seller be entitled to recover costs as a Change Order in connection with conditions that give rise to such Change Order arising prior the date on which Seller requests the Change Order, except to the extent that such costs are incurred reasonably and properly in order to achieve the Substantial Completion Date. Any Change Order Request shall be in a form substantially similar to the Form of Change Order Request attached hereto as Exhibit D-2 and comprising the following information: (a) the factors necessitating or the basis for the Change; (b) the impact, if any, which the proposed Change is likely to have on the Purchase Price; (c) the impact, if any, which the proposed Change is likely to have on the Project Schedule (including the Guaranteed Substantial Completion Date); (d) other impacted provisions hereof; and (e) such other information which Buyer may reasonably request in connection with such proposed Change.

(e) The issuance of a Change Order shall not result in invalidation of this Agreement.

(f) Except with respect to a Buyer Initiated Change, as to which the disregarded amount shall be \$25,000, no circumstances will constitute grounds for a Required Change Order or a Seller Initiated Change Order unless and to the extent that (i) the costs of such Change Order, in either case, is in excess of \$5,000, or (ii) the effect of such Change Order request impairs the achievement of an Buyer Critical Schedule Milestone or a Seller Critical Schedule Milestone, as applicable, by more than 3 days (except in circumstances where Seller has no means of recovering such schedule impairment in which case Seller shall be entitled to a Change Order if Seller would otherwise have been so entitled). Neither party shall game or otherwise manipulate the foregoing

process, by aggregating or disaggregating cost and/or circumstances as the case may be (or otherwise), for the purpose of recovering or avoiding additional cost or time in accordance with the foregoing.

(g) Change Orders (in each case in excess of the applicable disregarded amount) shall address the change, if any, in the amount of the Purchase Price in one of the following manners:

(i) Buyer and Seller shall agree upon the amount by which the Change will impact the Purchase Price; or

(ii) Buyer and Seller shall agree as to the nature and extent of the Change, but in lieu of changing the Purchase Price, Seller shall perform the activities associated with the Change on a cost-reimbursement basis, in which event no change shall be made in the amount of the Purchase Price.

### **Section 13.2 Procedure for Changes**

(a) Changes Initiated by Seller. Seller may, at any time and from time to time, make proposals to Buyer for improvements, efficiencies, cost savings and other similar Changes to the Work (each a “Seller-Initiated Change”), but no such proposal shall be carried out by Seller except as instructed in writing by Buyer in the form of a Change Order, which Buyer may in its discretion elect to issue as it sees fit. Such proposals of Seller shall be submitted in the form of a written Change Order Request in the manner substantially as set out in 13.1(d), and shall also contain and be supplemented with such information or additional information as Buyer may reasonably require in order to effect a reasoned decision as to the implementation, or rejection, (as the case may be) of the Change Order Request.

(b) Changes Initiated by Buyer. If Buyer desires to make a Change (each a “Buyer-Initiated Change”) not comprising rectification or recovery Work due to Seller’s negligence or breach of this Agreement, Buyer will submit a written Change Order Notice to Seller, substantially in the form of Exhibit D-3, comprising the nature and extent of the proposed change to the Scope of Work together with, to the extent available and/or applicable, Buyer’s opinion as to those matters required to be taken into account in accordance with Section 13.1 (“Changes”). Seller will promptly review the Change Order Notice and notify Buyer in writing within a reasonable amount of time of the options for implementing the proposed Change (including, if possible, any option that does not involve an extension of time) and the estimated effect(s), if any, that each such option would have on the Purchase Price and Project Schedule, and any other affected provision herein, as applicable. Such response shall also contain all those matters required to be set out in a Change. Order Request. Based upon such information, Buyer may, in its sole discretion, issue a Change Order making a Change.

(c) Required Change Orders. Seller shall be entitled to the issuance of Change Orders pursuant to this article 13 in connection with any circumstances which constitute a Change and which are attributable to the matters identified in subparagraphs (a) through (g) below (each a “Required Change”):

(i) Due to Change in Law Applicable Law/Permit. If and to the extent that a change in any Requirement of Law or Permit after the Effective Date results in an increase in

the cost of the Work or extends the Project Schedule, and in each case only to the extent that such increase or extension is greater than the threshold amounts identified in Section 13.1(f) above.

(ii) Change Order Due to Suspension of Work by Buyer. In the event that Buyer suspends the Work (i) in the circumstances with respect to which Seller is entitled to a Change Order as set out in Section 13.1 (“Changes”), or (ii) in the circumstances set out in article 16 (“Suspension of Works, Delivery or Erection”).

(iii) Change Order Due to Non-Performance by Buyer. If Buyer fails to perform or is late in performing in any material way any material obligation of Buyer under this Agreement and the cost to Seller is in excess of \$25,000 or a delay of more than 3 days. Neither party shall game or otherwise manipulate the foregoing process, by aggregating or disaggregating cost and/or circumstances as the case may be (or otherwise), for the purpose of recovering or avoiding additional cost or time in accordance with the foregoing.

Seller shall in all cases use or have used commercially reasonable efforts to mitigate potential delays to the Project Schedule and/or potential increases to the Purchase Price (the cost of such mitigation efforts to be addressed in any applicable Change Order).

(d) Except in the circumstances as set out in this Section 13.2 and with respect to which an application is properly made in accordance with this article 13, Seller shall not be entitled to seek either a Change, Change Order or extension of the Guaranteed Substantial Completion Date, nor to receive additional remuneration or reimbursement with respect to the Work.

### **Section 13.3 Continued Performance Pending Resolution of Disputes**

Notwithstanding and pending the resolution of any dispute with respect to a Change or Change Order, Seller must proceed with the Work and the performance of any Change ordered by Buyer or any Required Change, unless Buyer directs Seller not to so proceed, provided that Seller is being paid on a current basis for all undisputed Work and for all disputed Work which has been ordered to be paid through a Claim proceeding dispute resolution relating thereto in accordance with this Agreement.

### **Section 13.4 Preservation of Schedule and Purchase Price**

Where any proposed Change or Change Order Request may give rise to an extension of any of the Project Schedule or an increase in the Purchase Price, then Buyer reserves, in its sole discretion and to the extent possible, the right to require Seller to vary, amend or effect such other Change to the Work in such a manner as will mitigate or avoid the requirement for such extension of time or increase in price.

## ARTICLE 14

### WORKMANSHIP AND MATERIALS

#### Section 14.1 Manner of Execution

The Work to be supplied, including all materials, manufactured components and labor and services to be performed, shall be designed and executed in the manner set out in this Agreement. Except where the manner of design, manufacture and execution is otherwise specifically set out in this Agreement, the Work shall be designed and executed in a proper and workmanlike manner, all in accordance with accepted industry standards, applicable safety standards and Prudent Industry Practice.

#### Section 14.2 Condition of Materials

The materials, Equipment (including any rented Equipment), fixtures, software, any related items of personal property and other tangible personal property of Seller, any Subcontractor or the Contractor constituting the Project shall be OEM Certified, and shall be suitable for their current use in the generation of energy and the transportation of natural gas in accordance with the Specifications. All Equipment shall be procured solely for use in connection with the Project. Seller shall not allow any Equipment to be placed into storage for more than one year prior to shipping to the Site, nor utilize any Equipment in the Project that has been so stored.

#### Section 14.3 Inspection

(a) In addition to the inspection rights of Buyer under Section 7.8 (“Authority for Access for Inspection”), within sixty (60) days after the Effective Date, Seller shall submit to Buyer a schedule (the “Witness Point Schedule”), including but not limited to those events identified in Appendix T of tests and inspections (the “Witness Point Events”) reasonably acceptable to Buyer which shall include locations where the Equipment shall be manufactured or tested and the location at which such tests and inspections can be viewed by Buyer. Seller shall provide no less than three (3) Business Days’ advance confirmation of the actual date of each Witness Point Event identified on the Witness Point Schedule. Buyer shall be entitled to attend and witness all Witness Point Events. To the extent that any Witness Point Events have been completed prior to the date on which the Witness Point Schedule is submitted to Buyer, at Buyer’s sole discretion, Seller shall (i) allow Buyer to observe the materials and workmanship of the Project and to review documentation which may be available in lieu of viewing or witnessing the Witness Point Event, or (ii) re-open the affected portion of the Project for inspection by Buyer and repair or correct (if necessary) and restore the affected portion of the Project at no additional cost to Buyer. All inspections shall take place on the Site, on a Contractor’s or a Subcontractor’s premises or such other reasonable site as the Parties may agree, as appropriate, during normal working hours. No such inspection or examination or witnessing of tests shall release Seller from any obligation or liability under this Agreement. Inspections under this Section 14.3 are solely for the benefit of Buyer and any inspection or failure to inspect and any objection or failure to object by Buyer shall not (i) relieve Seller or any Contractor of any of their obligations under any Transaction Document or (ii) be used as evidence that Buyer agreed that either or both of Seller or any Contractor or Subcontractor had fulfilled any obligations under any Transaction Document or that Buyer had waived any of its rights under any Transaction Document.

(b) If, as a result of an inspection or examination referred to in paragraph (a) above, Buyer decides that any portion of the Work is nonconforming or otherwise not in accordance with this Agreement, Buyer shall promptly notify Seller thereof. Such notice shall state Buyer's objections and its reasons therefor in reasonable detail. Seller shall make good the nonconformity or ensure that any such portion of the Work complies with this Agreement at no additional cost to Buyer.

(c) For purposes hereof, "nonconforming" means defective or not in conformity with the Specification.

## **ARTICLE 15**

### **DRAWINGS**

#### **Section 15.1 Drawings**

(a) Following receipt and approval of the Project Schedule, Seller shall prepare a contract documentation and drawing list identifying those key data, calculations (as required for regulatory purposes and consents), drawings, technical specifications and concepts required for review for conformance with the Agreement.

(b) Seller shall, within the time detailed in the Project Schedule or elsewhere in this Agreement, submit to Buyer's Representative in hard copy and electronic form (the specific form and unitary data file format of which shall be agreed to by Buyer) such key data, calculations, drawings, technical specifications and concepts.

(c) Seller shall timely submit to Buyer's Representative drawings of temporary and permanent buildings and structures and any other information required under the terms and conditions of consents, licenses and planning permissions obtained by Seller or Buyer.

(d) Buyer's Representative may, in its sole discretion, disapprove any drawing; provided, however, it shall notify Seller of any such disapproval within twenty (20) days of receipt, except for documents and information (including calculations) which are required by Buyer's Representative for consultation with Buyer's third party contractors for the purposes of the interconnections at terminal points, where the period shall be thirty (30) days. Seller shall supply additional copies of documents or information (including calculations) in the form and numbers stated in the Agreement. Without waiver of or prejudice to any rights of Buyer, Seller shall bear all risk in relation to its performance of work arising from or in relation to all documents or information (including calculations).

#### **Section 15.2 Consequences of Documents not in accordance with Agreement**

Any documents or information (including calculations) which Buyer's Representative identifies as not being in accordance with the Agreement shall be modified and resubmitted without delay.

### **Section 15.3 Drawings Submitted**

Seller shall not deviate from drawings accepted by Buyer or issued by Seller as approved for construction, except with the prior written consent of Buyer.

### **Section 15.4 Inspection of Drawings**

Seller shall maintain and provide to Buyer's Representative from time to time or upon request a complete list of drawings identifying which is approved for construction. Buyer shall have the right at all reasonable times to inspect all drawings of any part of the Work.

### **Section 15.5 Operating and Maintenance Instructions**

(a) Not less than six (6) months prior to the scheduled Guaranteed Substantial Completion Date, Seller shall deliver to Buyer's Representative one (1) set of preliminary operating and maintenance manuals sufficiently complete that the Plant and Equipment may be safely commissioned and Buyer's personnel properly trained pursuant to Section 7.11 ("Training"). Seller shall, at its sole cost and expense, continuously update such manuals so that, as of the Closing Date, such operating and maintenance manuals are substantively in their final form with any amendments made as necessary.

(b) Within three (3) months of the scheduled Closing Date, Seller shall supply to Buyer three (3) copies of final operation and maintenance manuals and drawings of the Work as-built plus five (5) CD-ROMs incorporating any changes made during testing and/or Commissioning of the Work.

(c) All operating and maintenance manuals and drawings of the Work as-built shall be in such detail as will enable Buyer to operate, maintain, dismantle, reassemble, adjust and repair all parts of the Work. Where the employment of Seller is terminated for default or in the case of Seller's Material Adverse Change prior to the Transfer of Possession and Control of Project to Buyer Date, Seller shall provide to Buyer such information including copy drawings and Draft Manuals as is reasonable and as is necessary for Buyer to complete, use and maintain the Work.

(d) The provision by Seller of the final operation and maintenance manuals and drawings of the Work as-built in accordance with the provisions of this Section shall be identified as a Milestone in Appendix C and the provisions of article 10 ("Project Schedule") shall apply.

### **Section 15.6 Buyer's Use of Drawings**

(a) Drawings and information created by Seller for purposes of designing, developing, constructing, commissioning and operating the Project constitute "work made for hire," and Seller hereby transfers and assigns all rights in and to such drawings and information to Buyer.

(b) Drawings and information supplied by Seller that are not created by Seller specifically for or in connection with the Project, but that are necessary or useful for the operation and maintenance of the Project, the Work or any portion of them, may be used by Buyer for the purposes of completing, maintaining, operating, improving, adapting, renewing, enlarging,

dismantling, re-assembly, adjusting and repairing the Work, and for any other legal purpose, pursuant to the license granted in paragraph 15.6(c).

(c) Seller grants to Buyer an irrevocable perpetual royalty free license to use all drawings and information for the foregoing purposes and Seller shall provide Buyer with copies of such drawings and information.

### **Section 15.7 Manufacturing Drawings**

In the event of a Defect resulting in outage of the Plant in excess of two (2) days during the applicable Warranty Period, Seller shall immediately give Buyer full, unimpeded, and unqualified access to all information, documents, processes and operations, processes or operations so as to enable Buyer to satisfy itself that the Plant and Equipment shall in all respects be properly and timely repaired and/or replaced and so as to be in full compliance with the requirements of the Agreement.

### **Section 15.8 Errors in Drawings Supplied by Seller**

(a) Seller shall be responsible for the accuracy, completeness and suitability of all drawings, samples, patterns, models, calculations or information submitted by Seller, Contractor any Subcontractor in connection with the Work. Notwithstanding Buyer's or Buyer's Representative's inspection or approval of drawings, samples, patterns, models, calculations or information submitted by Seller, Seller shall not be relieved of any responsibility or liability imposed on it by any provisions of the Agreement and shall be responsible for any errors, omissions or discrepancies therein.

(b) Seller shall bear any and all costs Seller or Buyer may incur as a result of delay in providing such drawings, samples, patterns, models, calculations or information or as a result of errors, omissions or discrepancies therein or for the correction thereof.

(c) Seller shall, at its sole cost and expense, carry out or cause to be carried out any alterations or remedial work necessitated by such errors, omissions or discrepancies for which it is responsible and modify the drawings, samples, patterns, models, calculations or information accordingly.

## **ARTICLE 16**

### **SUSPENSION OF WORKS, DELIVERY OR ERECTION**

#### **Section 16.1 Order to Suspend**

(a) Buyer may, at its sole option, upon not less than seven (7) days' prior written notice to Seller, suspend at any time (a) the performance of all or any portions of the Work, (b) delivery of a component of the Work, or (c) erection of any portion of the Work that has been delivered to the Site. Such notice shall specify the length of time that Buyer anticipates the Work shall be suspended.

(b) If the cumulative days of Work suspension totals One Hundred and Eighty (180) days, or if the Work is suspended four (4) or more separate times for a period of more than 45

days in any single instance or 180 days in aggregate, Seller may terminate this Agreement by thirty (30) days' written notice to Buyer unless the suspension is lifted within such 30-day period, and such termination shall be treated as a Buyer voluntary termination pursuant to Section 30.1(b) ("Voluntary Termination").

(c) Unless otherwise instructed by Buyer, Seller shall during any suspension affecting the progress of the Work on Site, maintain its staff, labor and equipment on or near the Site ready to proceed with the Work upon receipt of the further instructions of Buyer.

(d) If Buyer desires to extend the period of suspension for a longer time than that specified in the original notice given by Buyer, Buyer shall so notify Seller in writing and the same procedures described in article 10 ("Project Schedule") shall be followed to determine whether to actually extend the suspension and the amount of the costs and charges which shall be incurred as a result of any such extension.

## **Section 16.2 Protection of Work**

(a) Seller shall, during such suspension, store, preserve, protect and otherwise secure each of the Work, Equipment and the Plant.

(b) If Buyer is unwilling or unable to receive any of the Equipment as a result of a suspension by Buyer under Section 16.1 ("Order to Suspend"), Seller shall, upon notice to Buyer and giving Buyer reasonable opportunity to designate a mutually acceptable destination, place such Equipment in storage. If any Equipment is placed into storage pursuant to this provision, delivery thereof shall not be deemed to occur until such Equipment is delivered to the Site or Buyer has notified Seller that it is prepared to accept delivery at some other location.

## **Section 16.3 Resumption of Work**

(a) Following any suspension by Buyer under this article 16, after receipt of notice to resume progress of the Work, Seller shall examine the Work affected by the suspension. Seller shall, within twenty-one (21) calendar days after receipt of notice to resume the suspended Work, submit to Buyer a written report detailing any deterioration, nonconformities and losses to the Project or any portion thereof and a Change Order Proposal related to such damages, losses and deterioration. Seller shall, pursuant to a Change Order, correct, repair or replace any deterioration to, nonconformity in or loss of the Work that occurred during the suspension; provided, however, that no Change Order shall be required or issued for any deterioration, nonconformity or loss resulting from Seller's negligence or wrongdoing during the period of suspension; and shall promptly resume performance on the suspended Work to the extent required in the notice.

(b) Any claims on the part of Seller for extensions of time in connection with a suspension shall be made in accordance with the appropriate provisions of this Agreement. Notwithstanding any other provision of this Agreement, no compensation or extension of time shall be granted to the extent that suspension results from Seller's non-compliance with the terms of the Agreement.



## Section 16.4 Change Order in Event of Suspension

(a) Seller may, at any time prior to thirty (30) days after receipt of notice to resume progress of the Work under Section 16.3 (“Resumption of Work”), notify Buyer of its request for a Change Order as a result of suspension by Buyer under Section 16.1 (“Order to Suspend”).

(b) Seller shall, within seven (7) Business Days following receipt of any notice from Buyer indicating Buyer’s intention to suspend the performance of all or any portion of the Work pursuant to Section 16.1 (“Order to Suspend”), deliver to Buyer an itemized account of the estimated charges and costs which Seller believes will be incurred by Buyer pursuant to as a result of such suspension. Seller shall make a good faith estimate of such charges and cost that will be accurate within a range of plus or minus five percent (5%). Following receipt of such estimate, Buyer shall have the right by written notice to Seller at any time prior to the effective date of suspension specified in Buyer’s suspension notice to either (i) revoke its decision to suspend performance, in which event Seller will not suspend performance of such Work, (ii) instruct Seller to suspend performance in accordance with the terms of Buyer’s suspension notice and to confirm that the charges and costs quoted by Seller are acceptable, or (iii) instruct Seller to suspend performance in accordance with the terms of Buyer’s suspension notice, with Buyer reserving the right to contest the charges and costs quoted by Seller.

(c) In the event of such suspension, Seller shall, unless the notice requires otherwise:

(i) Discontinue the Work on the date and to the extent specified in the notice;

(ii) Place no further orders or subcontracts for Equipment, Plant or services with respect to the suspended Work, other than to the extent required in the notice;

(iii) Promptly make every reasonable effort to obtain suspension, upon terms reasonably satisfactory to Buyer, of all orders, subcontracts and rental agreements to the extent they relate to performance of the Work suspended; and

(iv) Unless otherwise specifically stated in the notice, continue to protect and maintain the Work theretofore completed, including the Work suspended hereunder.

(d) As full compensation for any such suspension, Seller shall be reimbursed for the following costs, reasonably incurred, without duplication of any item, to the extent that such costs directly result from such suspension of Work, up to a maximum of one hundred and five percent (105%) of the estimate submitted by Seller pursuant to the Agreement hereof:

(i) If determined necessary by Buyer, a standby charge to Seller during the period of suspension of the Work, which standby charge shall be sufficient to compensate Seller for the reasonable costs of keeping, to the extent required in the notice, its personnel and equipment committed to the Work in a standby status;

(ii) Expenses reasonably and necessarily incurred by Seller in connection with storage of Equipment pursuant to Section 16.2 (“Protection of Work”), including preparation

for and placement into storage, handling, transportation, storage, inspection, preservation, taxes and insurance and any necessary rehabilitation prior to installation; and

(iii) Reasonable costs associated with demobilization of Seller's personnel and equipment to the extent such costs are not recovered by Seller in using such personnel and equipment on other projects during the standby period; and an equitable amount to reimburse Seller for the actual cost to Seller, if any, of maintaining and protecting that portion of the Work upon which activities have been suspended;

Buyer shall have the right, upon reasonable advance written notice to Seller, to inspect and audit Seller's books and records in order to verify the accuracy of and/or to determine the amount of any cost-based reimbursement associated with any suspension of the Work.

(e) Seller shall not be entitled to be paid any additional amounts under this article 16 if and to the extent suspension is necessary by reason of default on the part of Seller or persons for whom Seller is responsible or for the proper execution or the safety of the Work, Equipment or Plant.

## ARTICLE 17

### PROJECT COMMENCEMENT AND COMPLETION

#### Section 17.1 Notice To Proceed

(a) Upon satisfaction or waiver by Buyer of each of the conditions in Section 17.1(b), Buyer shall issue to Seller the Notice to Proceed. Following issuance of the Notice to Proceed Seller shall proceed with developing the Project and performing the Work. Buyer shall provide at least three (3) Business Days' prior notice of its intention to issue the Notice to Proceed. At Buyer's option, Buyer may issue one or more limited notices to proceed prior to issuing the Notice to Proceed, pursuant to which Seller shall perform or cause to be performed certain development activities specified in any such limited notice to proceed.

(b) The obligation of Buyer to issue the Notice to Proceed to Seller is subject to the satisfaction or waiver by Buyer of all of the following conditions precedent:

(i) Governmental Approvals. Buyer's receipt of and satisfaction with the terms of all Governmental Approvals.

(ii) Network Resource Integration. PacifiCorp Transmission shall have demonstrated to Buyer that the Project can be integrated with PacifiCorp Transmission's System as a network resource on or prior to May 1, 2012, 2013, or 2014.

(iii) Accounting Treatment. Buyer shall be satisfied that the accounting treatment relating to PacifiCorp's obligations under any Transaction Document or in connection with the Project will not result in the addition of liabilities to the balance sheet of PacifiCorp.

(iv) Appendices, Exhibits and Schedules. Each Appendix, Exhibit and Schedule to this Agreement shall be in final form and substance satisfactory to Buyer and Buyer's Representative, each in its sole discretion.

(v) Transaction Documents. Buyer shall have received the Transaction Documents, the Security Documents (including any Guaranty), and the Consents, (together with all amendments, supplements, schedules, and exhibits thereto), each of which shall (A) have been duly authorized, executed and delivered by each party thereto, (B) be in the form of the applicable form attached hereto (if such a form is attached) and otherwise in form and substance satisfactory to Buyer, and (C) be in full force and effect.

(vi) Officers' Certificates. Buyer shall have received the certificate of an Authorized Officer of Seller certifying that (A) each of the conditions precedent to the issuance of the Notice to Proceed has been satisfied (other than to the extent that the satisfaction of a condition is dependent on the judgment of Buyer) (B) that each of the conditions in Sections 3.2(b), 3.2(c), 3.2(d), 3.2(e), 3.2(f), 3.2(h) and 3.2(i) has been and will be satisfied as of the date of the issuance of the Notice to Proceed; and (C) each of the representations of Seller set forth in article 4 ("Representations and Warranties of Seller") is true and correct. The form of such aforementioned certificate is attached hereto as Exhibit E.

(vii) Security Documents; Filings. The Security Documents and all financing statements or other instruments with respect thereto, as may be necessary, shall have been duly filed or recorded in such manner and in such places as are required by Applicable Law to establish and perfect first priority Liens, in favor of Buyer, as granted pursuant to the Security Documents. Buyer shall have received either copies of all such documents (including copies of all acknowledgment copies of filed financing statements and all other recordings made pursuant hereto) or other evidence satisfactory to Buyer of the filing of all such financing statements and other recordings. All taxes (including, but not limited to, mortgage recording taxes and recording fees), fees, and other charges payable in connection therewith shall have been paid in full by Seller.

(viii) Record Searches. A search, made no more than thirty (30) days prior to the date of issuance of the Notice to Proceed, of the Uniform Commercial Code filing offices or other registers in each jurisdiction in which Seller is organized, has an office, or in which assets of Seller are located, as certified by an Authorized Officer of Seller, shall have revealed no filings, recordings or equivalent standard with respect to any of the Collateral (except such filings and recordings with respect to the Permitted Liens) in favor of any Person other than Buyer. A list of all of such filings and recordings or equivalent standard is set forth on Schedule 17.1(b)(xi). Buyer shall have received a copy of the search reports received as a result of such search.

(ix) Water Rights. Seller shall have provided a detailed attorneys' opinion addressed to Buyer evaluating and opining on the title of each of the Water Rights, together with all conveyance documents other supporting documentation related to the Water Rights, and Buyer shall be satisfied with the quality and marketability of title with respect thereto.

(x) Emission Reduction Credits. Buyer shall be satisfied with the form, substance and quantity of ERCs to provide for the lifetime operation of the Project.

(xi) Equipment. Buyer shall be satisfied with the Equipment and all anticipated storage plans with respect thereto.

(xii) Additional Matters. Buyer shall have received such other certificates, documents and instruments relating to the transactions contemplated hereby as may have been reasonably requested by Buyer, and all corporate or other organizational actions and other matters and all other documents (including all documents referred to herein and not appearing as exhibits hereto) and all legal matters in connection with such transactions shall be satisfactory in form and substance to Buyer.

### **Section 17.2 Time for Completion**

Seller shall complete the Work and the Performance Tests in accordance with the Project Schedule and the terms of this Agreement. Without limiting the foregoing, Seller shall cause the Substantial Completion Date to occur no later than the Guaranteed Substantial Completion Date.

### **Section 17.3 Buyer's Request for Earlier Completion**

Buyer may request completion of the Project earlier than the Guaranteed Substantial Completion Date and Seller shall make all commercially reasonable efforts to comply with such request.

### **Section 17.4 Delay in Completion**

If Seller fails to meet the Substantial Completion Criteria by the Substantial Completion LD Commencement Date, Buyer shall be entitled to liquidated damages under article 24 ("Liquidated Damages").

## **ARTICLE 18**

### **PERFORMANCE TESTING**

#### **Section 18.1 Performance Tests**

Seller shall conduct or cause to be conducted the Performance Tests as soon as practicable in accordance with the Specifications, procedures and protocols of Appendix H and the other tests, procedures and protocols to be developed by the Parties. At least nine (9) months prior to the Guaranteed Substantial Completion Date, Seller shall deliver to Buyer a supplement to Appendix H further outlining the tests and procedures to be followed in conducting the Performance Tests criteria. Such supplement shall include, at a minimum, provisions addressing (a) testing procedures for each item of Equipment, (b) functional performance tests for starting up the Plant under different specified operating conditions and (c) any other activities that, in accordance with Prudent Industry Practices, should be included. Thereafter, the Parties shall promptly agree on modifications to such supplement so that Appendix H, as supplemented, is satisfactory to Buyer. Seller shall provide Buyer with notice when the Plant is ready for Performance Testing.

## **Section 18.2 Emissions Guarantee**

Seller shall conduct the Performance Tests in accordance with Appendix H and, as a condition of Substantial Completion, shall demonstrate that emissions from the Project meet the Guaranteed Emissions. If the Guaranteed Emissions are not met, either in whole or in part, Seller shall, at its sole cost and expense, to diligently make such changes, modifications and/or additions to the Plant or any part thereof as may be necessary to achieve the Guaranteed Emissions. Seller shall notify Buyer upon completion of the necessary changes, modifications or additions, and Seller shall repeat the Performance Tests as necessary until the Guaranteed Emissions have been met. Nothing contained in this Section 18.2 shall relieve Seller of Seller's obligation to pay liquidated damages under this Agreement.

## **Section 18.3 Cost and Direction**

(a) The Performance Tests shall be conducted by and under the direction of Seller. Buyer will cooperate with Seller's reasonable requests in connection with the Performance Tests, but shall not be required to provide any materials, electricity, fuel, water or stores.

(b) Seller shall provide all materials, electricity, fuel, water and stores, and all personnel necessary to supervise startup and the conducting of the Performance Tests and shall provide all necessary technical assistance and advice in connection with the Performance Tests. Except as approved by Buyer in writing, Seller shall not use personnel in excess of the normal contingent of Plant operations staff to operate the Plant during the performance tests. During training and conducting the Performance Tests Buyer's operating personnel shall be working under the technical direction and instruction of Seller and Seller shall be responsible for the accuracy of its instructions/directions provided to Buyer's operating personnel.

## **Section 18.4 Buyer's Right to Validate**

Buyer and Buyer's Representative, in connection with the performance of this Agreement by Seller, shall have the right and opportunity to be present and observe the Performance Tests and shall have the right and opportunity in advance or during the Performance Tests to inspect and validate all meters, meter readings and other pertinent data necessary to verify the results of the Performance Tests. Buyer shall provide reasonable notice to Seller of any such observation and inspection, including the specific information desired and method of obtaining such information. Seller and Buyer shall coordinate such observation, inspection and validation so as not to interfere with the Performance Tests yet provide for a verifiable result. Buyer shall have the same rights with respect to any other Performance Tests conducted by Seller as set forth above.

## **Section 18.5 Additional Tests; Test Energy**

(a) After the Substantial Completion Date with respect to the Work, Seller may, unless Buyer reasonably objects, make any additional tests which Seller considers desirable at their own risk and cost; provided, however,

(i) if such tests require any change in Buyer's dispatch schedule for the Project, then Seller shall reimburse Buyer for all costs and Claims associated with such change in dispatch;

(ii) if such tests damage the Project in any way, then Seller shall bear all costs of making good such damage and of all Claims resulting from such damage; and

(iii) if such test may cause the Project to no longer meet the Performance Guarantees, then Seller shall, at its sole cost, re-conduct the Performance Tests and compensate Buyer for all costs and Claims associated with reconducting the Performance Tests.

(b) Buyer shall have the exclusive right to all electric energy generated by the Plant during any Performance Tests.

### **Section 18.6 Timing**

Seller shall give Buyer at least ninety (90) days' prior notice of the date on which the first Performance Tests will begin and at least five (5) days' prior notice of a change in the Performance Test schedule. Buyer may request that Seller conduct the Performance Tests at another time more convenient to Buyer, which request shall set forth the reasons therefor.

### **Section 18.7 Test Reports**

(a) Seller shall deliver to Buyer a preliminary test report, including the test data sheets and calculated results for each Performance Test or retest (the "Preliminary Performance Test Report"), promptly after completion of each Performance Test, together with a notice to Buyer certifying completion of the Performance Tests in accordance with this Agreement and results of such Performance Tests. Promptly after receipt of such Preliminary Performance Test Report, Buyer and Seller shall consult concerning the results of such tests, and within three (3) days thereafter, Buyer shall (i) state it concurs with the results of the Performance Tests or (ii) state it disputes the results of the Performance Tests and stating in detail the reasons therefor.

Within fifteen (15) Business Days following completion of the Performance Tests, Seller shall provide to Buyer a final test report, including test data sheets and calculated results of each Performance Test or retest (the "Final Performance Test Report") and a final notice to Buyer certifying completion of the Performance Tests. Within fifteen (15) days of receipt of such documentation from Seller, Buyer shall either (i) accept the Performance Test results or (ii) state it disputes the results of the Performance Tests and the reasons therefor. If Buyer disputes the accuracy of the Performance Tests results in the Final Performance Test Report, then Seller shall re-perform the applicable Performance Tests (or part thereof) in accordance with the procedures set forth in Appendix H. If the results of the re-test confirm the accuracy of the initial test, then Buyer shall pay the increased costs directly resulting from the re-test. If the results of the re-test do not confirm the accuracy of the initial test, then Seller shall pay for the costs of the re-test and any subsequent tests necessary to confirm compliance with all Performance Guarantees.

### **Section 18.8 Failure on Tests or Inspection**

If after inspection, examination or witnessing the testing of any of the Work, Buyer decides, in its sole discretion, that such Work or any part thereof is defective or not in accordance with the Agreement, it may reject the said Work or part thereof by giving to Seller, within ten (10) days, notice of such rejection, stating therein the grounds upon which the said decision is based. Following any such rejection, Seller shall replace or repair the Equipment, the Plant or part thereof rejected and re-submit

the same for test or inspection in accordance with this Clause. All expenses reasonably incurred by Buyer in attending or in consequence of such re-testing or inspection and Buyer's or Buyer's Representative's attendance and that of entities providing finance in connection with the Project and their representatives' attendance shall be deducted from the Purchase Price.

### **Section 18.9 Duty to Advise of Defects, Errors and Omissions in Plant and Equipment**

Seller shall advise promptly Buyer forthwith upon it becoming aware of any design, engineering, manufacturing or other Defect, error or omission that might effect the Work and its operability, operational life and maintenance and warrants and represents that, prior to the acceptance of any certificate by Buyer or Buyer's Representative and except in relation to such matters that have been notified to or by Buyer in Writing, there are no such Defects, errors and/or omissions to the best of its knowledge and belief.

## **ARTICLE 19**

### **DEFECTS BEFORE TRANSFER OF POSSESSION AND CONTROL OF WORK**

#### **Section 19.1 Identification of Defects**

(a) If, in respect of any part of the Work not already transferred and under control by Buyer, and in all cases prior to Closing, Buyer's Representative, at any time: (i) determines, in its sole discretion, that any Work done or Equipment or Plant supplied or materials used by Seller, Contractor or any Subcontractor is or are defective or otherwise not in accordance with the Agreement (each a "Defect"), or that any part thereof is defective or does not fulfill the requirements of the Agreement and (ii) as soon as reasonably practicable notifies Seller of the said decision, specifying particulars of the Defects alleged and of where the same are alleged to exist or to have occurred, then Seller shall with all speed, at its sole cost and expense, remedy the Defects so specified.

(b) If Seller fails to remedy such Defect, Buyer may take, at the sole cost and expense of Seller, such steps as may in all the circumstances be reasonably necessary or convenient to remedy such Defects. The cost of remedying such Defect may be deducted from any payment due under the Agreement and be recoverable as a debt.

#### **Section 19.2 Replacement of Defects**

All Equipment or Plant provided or Work done by Buyer to replace defective Equipment or Plant shall comply with the Agreement and shall be obtained at reasonable prices and where reasonably practicable under competitive conditions. Seller shall be entitled at its own expense to remove and retain all defective Equipment or Plant that Buyer may have replaced. Nothing contained in this Section shall affect any Claim by Buyer under article 32 ("Claims, Claim Notice and Dispute Resolution").

## **ARTICLE 20**

### **NOTICE OF SUBSTANTIAL COMPLETION, NOTICE OF FINAL ACCEPTANCE**

## **AND TRANSFER OF CARE, CUSTODY AND CONTROL**

### **Section 20.1 Notice of Substantial Completion of Work**

(a) When the Work meets the Substantial Completion Criteria set forth in Appendix H, Seller shall so notify Buyer and provide Buyer a certificate of an Authorized Officer of Seller certifying that the Substantial Completion Criteria have been met and the date thereof (such notice and affidavit, the “Request for Substantial Completion”).

(b) Within five (5) days after receipt of the Request for Substantial Completion, Buyer shall by notice (“Notice of Substantial Completion”) either: (i) reject such Request for Substantial Completion and refuse to issue the Notice of Substantial Completion and state what Substantial Completion Criteria Seller failed to achieve; or (ii) accept the Request for Substantial Completion as given or with punch list items, and issue the Notice of Substantial Completion with Substantial Completion deemed to occur on the date set forth in said Request for Substantial Completion.

(c) If Buyer rejects the Request for Substantial Completion, Seller shall promptly provide to Buyer a plan and schedule for remedying the deficiencies specified in Buyer’s rejection, shall carry out such plan at its own cost and expense, and, upon completion thereof, shall issue a new Request for Substantial Completion.

(d) The foregoing procedure shall apply again and successively thereafter until Substantial Completion Criteria have been achieved. Disputes as to whether Seller has achieved Substantial Completion shall be resolved pursuant to article 32 (“Claims, Claim Notice and Dispute Resolution”).

### **Section 20.2 Care, Custody and Control; Punch List Items**

(a) Seller shall be responsible for care and custody, and control of the Work and shall make good at Seller’s own cost, or at Buyer’s cost if Seller does not remedy the same, any loss or damage that may occur to the Work or any part thereof from any cause whatsoever until the Substantial Completion Date. Seller shall also be responsible for loss or damage thereto caused by the Contractor or any Subcontractor in the course of any work carried out under or the Project Documents or in connection with the Project until Final Acceptance. Seller hereby waives any and all claims or causes of action it might have now or in the future against Buyer, whether by way of affirmative action, offset, cross claim or otherwise, resulting from any negligence of Buyer for any loss or damage that may occur to the Work or any part thereof caused by Buyer in the course of any work to the extent carried out by Buyer at Seller’s direction or with Seller’s consent in connection with the Project. Seller shall be liable for any loss or damage to any Materials.

(b) Care, custody and control of the Work shall be transferred to Buyer as of the Substantial Completion Date. Buyer shall begin to compile a preliminary punch list as the Work progresses (with Seller and Buyer in good faith mutually determining the Dollar value of such list). Buyer shall submit to Seller the completed preliminary punch list at least ten (10) Business Days prior to the anticipated Substantial Completion Date. Within five (5) Business Days following the Substantial Completion Date, Buyer shall issue to Seller a final punch list (the “Final Punch List”). After receipt thereof, Seller and Buyer shall mutually agree on the punch list



items, the value related thereto and on a schedule for completion of such items. Buyer shall withhold from its Progress Payment at the Closing an amount equal to 1.5 times the agreed upon value of the Final Punch List, but shall make periodic pro-rata payments as Seller demonstrate completion of the items on the Final Punch List to Buyer. All of the items on the Final Punch List shall be completed expeditiously after the Substantial Completion Date. Buyer shall provide to Seller for such purpose reasonable access to the Work.

### **Section 20.3 Dispatch Coordination**

During the startup, testing and commissioning of the Plant, Seller shall coordinate with Buyer's Representative and Buyer's operating personnel the orderly startup and shut-down of the Plant. Ninety (90) days prior to the initial startup of the Plant, Seller shall provide to Buyer a schedule of dispatch for the Plant during the commissioning period, including expected net plant output, duration of the commissioning activity and expected fuel usage. Within thirty (30) days of the initial startup of the Plant, Seller shall provide to Buyer an update to this schedule and thereafter on a weekly basis until Substantial Completion is achieved. Seller shall also provide 72 hours' advance notice to Buyer of the planned Pant dispatch profile including net plant output, duration of the commissioning period and expected fuel usage.

### **Section 20.4 Use Before Acceptance Date**

Buyer shall not operate or assume control of all or a portion of the Work prior to the Substantial Completion Date; provided, however, that in no event shall Buyer be limited in its operation of any joint facilities or facilities adjacent to the Work or the Project except as may expressly be provided in the Construction Coordination Agreement.

### **Section 20.5 Title and Risk of Loss**

(a) Risk of loss with respect to the Project and the Work shall remain with Seller until the Closing Date, whereupon the same shall pass to Buyer.

(b) The Equipment and Plant to be supplied pursuant to the Agreement shall become the property of Buyer at whichever is the earlier of the following times:

- (i) the Closing Date;
- (ii) when Seller becomes entitled to have the contract value of the Equipment and Plant in question included in an Interim Certificate of Payment, or
- (iii) when the Equipment and Plant is appropriated for the purpose of the Project.

Seller shall indemnify and keep indemnified Buyer against any claims, losses or damage arising from any defect in title or encumbrances or charge upon any of the Equipment and Plant supplied pursuant to the Agreement.

## **Section 20.6 Marking of Equipment and Plant**

(a) Where, prior to delivery, the property in Equipment and Plant passes to Buyer, Seller shall, so far as is practicable, set the Equipment and Plant aside and mark it as Buyer's property in a manner reasonably required by Buyer.

(b) Until the Equipment and Plant has been so set aside and marked, Buyer shall be entitled to withhold any interim Progress Payment to which Seller might otherwise be entitled.

(c) Seller shall permit Buyer at any time upon reasonable notice to inspect any Equipment or Plant which has become the property of Buyer and shall grant Buyer or procure the grant of access to Seller's premises for such purposes or any other premises where such Equipment and Plant may be located. Such inspection shall not constitute acceptance of the Equipment and Plant.

(d) All such Equipment and Plant shall be in the care and possession of Seller solely for the purposes of the Agreement and shall not be within the ownership or disposition of Seller.

(e) No Progress Payment or interim Certificate of Payment issued by Buyer shall prejudice its right to reject Equipment or Plant which is not in accordance with the Agreement. Upon any such rejection the property in the rejected Equipment or Plant shall immediately revert to Seller.

(f) Seller shall transfer title to the Work to Buyer at the earliest to occur of (i) when the Equipment and/or Materials are brought on the Site; (ii) the specific Equipment and/or Materials are included in a request for a Progress Payment; and (iii) when the Equipment and/or Materials are appropriated for use in the Project. Seller shall cause the Contractor to transfer the Work supplied and performed by the Contractor to Buyer (x) prior to the Closing, free and clear of all Liens other than (A) mechanics liens relating to the Work supplied and performed by the Contractor's Subcontractors that have not yet been paid and (B) amounts payable to Contractor's Subcontractors that are being disputed in good faith provided that the Contractor has posted a bond against such Liens with a bonding company or other surety reasonably acceptable to Buyer, and (y) upon the Closing, free and clear of all Liens. Seller shall indemnify and keep indemnified the Buyer against any claims, losses or damage arising from any defect in title or encumbrances or charge upon any of the Equipment and Plant supplied pursuant to this Agreement.

(g) With respect to any Lien or Claim relating to the Project other than Permitted Liens (i) arising through the Contractor or any Subcontractor, Seller agrees to cause the Contractor or Subcontractor to promptly remove or cause, or cause to be removed, any such Lien or Claim and (ii) Seller agrees promptly remove or cause, or caused to be removed, any such other Liens or Claims not covered by the immediately preceding clause (a).

(h) Ownership of the Non-Buyer Materials used in connection with the Work shall remain with Seller, the Contractor or the Subcontractors. Notwithstanding the transfer of title of the Work pursuant to Section 20.5 ("Title and Risk of Loss") the responsibility for care, custody and control thereof, together with the risk of loss or damage thereto shall remain with Seller until the Substantial Completion Date.

## **Section 20.7 Removal of Equipment**

Prior to Final Acceptance, Seller shall remove from the Site all equipment, materials, temporary structures constructed by or on behalf of Seller or other items of any nature required for execution or completion of the Work, but excluding equipment, materials, appliances or other items intended to form or forming part of the Work. Prior to disposition of such items, Seller shall make a written offer to sell items to Buyer which Seller or any Contractor desires to sell. Seller shall leave the Site in good order and in neat and presentable condition. Any surplus items will become property of Buyer if not removed by Seller or its Contractor within thirty (30) days after Final Acceptance (or such later date contemplated in any completion and demobilization procedure mutually agreed by Buyer and the Project Parties). All costs to dispose of any such items not removed by Seller within the thirty (30) days following Final Acceptance (or such later date contemplated in any completion and demobilization procedure mutually agreed by Buyer and the Project Parties) and which Buyer does not wish to keep shall be for the account of Seller. Prior to removing any equipment from the Site Seller shall provide to Buyer a detailed list of Seller Equipment to be removed. No equipment shall be Seller Equipment unless it is included in the then-current list approved pursuant to Section 12.1 (“Seller’s Equipment”).

## **Section 20.8 Notice of Final Acceptance of Work**

Upon completion of all the criteria for Final Acceptance set forth in Appendix H, Seller shall give notice to Buyer by request for Final Acceptance, together with an affidavit that all requirements for Final Acceptance set forth in Appendix H have been met. Thereafter, the same procedures as specified in Section 13.1 (“Changes”) shall apply until Buyer issues notice to Seller accepting Seller’s request for Final Acceptance (“Notice of Final Acceptance”). Disputes as to whether Seller has achieved Final Acceptance shall be resolved pursuant to article 32 (“Claims, Claim Notice and Dispute Resolution”).

# **ARTICLE 21**

## **CODES AND STANDARDS**

### **Section 21.1 Comparable Quality**

Appendix B sets forth all major systems/sub-systems/Equipment/components which will be supplied in performance of the Work. Notwithstanding the foregoing, the Parties recognize that Appendix B is not all inclusive and does not specify all Equipment/components required for Plant completion. Therefore, the Parties agree that for Equipment/components not specifically set forth in Appendix B, the quality standards of such unspecified Equipment/components shall be consistent with the requirements of article 14 (“Workmanship and Materials”).

## ARTICLE 22

### ENVIRONMENTAL MATTERS

#### Section 22.1 General

Seller shall prepare and submit to Buyer appropriate materials management and emergency response procedures covering any Regulated Materials Seller expects to be used in the completion and testing of the Work, which procedures shall be satisfactory to Buyer. Seller shall comply, and shall cause Contractor and all Subcontractors to comply, at all times with such materials management and emergency response procedures, all Environmental Laws and all Governmental Approvals applicable to the Work and the Site. No Regulated Materials and shall be improperly released, disposed of or buried on the Site.

#### Section 22.2 Release On-Site

Seller shall immediately notify Buyer and applicable Governmental Authorities of any Release by Seller or any Subcontractor of Regulated Materials at the Site which is reportable to Governmental Authorities under applicable Environmental Laws and take such emergency measures as are prudent and necessary to protect the environment consistent with the materials management and emergency response procedures referred to above and Applicable Law. Seller shall take all appropriate steps consistent with the materials management and emergency response procedures referred to above and Applicable Law for immediate containment of any such Release and Remediation of the affected area.

#### Section 22.3 Release Off-Site

In the event of a Release by Seller, the Contractor or any Subcontractor of a Regulated Material off the Site but related to the Work which is reportable to Governmental Authorities under applicable Environmental Laws, Seller shall be responsible for notifying all applicable federal, state and local regulatory agencies in accordance with Applicable Law or for causing such notification to occur by the party responsible for such action. To the extent required, Seller shall take all appropriate steps consistent with the materials management and emergency response procedures referred to above and Applicable Law for immediate containment of any such Release and Remediation of the affected area.

#### Section 22.4 Liability

To the extent any Release referred to in Section 22.2 (“Release On-Site”) and Section 22.3 (“Release Off-Site”) above is caused by an act or omission of Seller, the Contractor, or any Subcontractor, Seller shall be responsible for all Liabilities with respect to such Release and the indemnification provisions set forth in Section 26.1 (“Indemnification for Third Party Claims”) shall apply.

#### Section 22.5 Pre-existing Regulated Materials

(a) Seller shall develop a contingency plan to address contaminated soils or groundwater that Seller may encounter during construction of the Project. The purpose of the contingency plan is to avoid any delays in construction of the Project by planning in advance how to respond to unexpected pre-existing environmental conditions that could impact the Schedule or

the Guaranteed Substantial Completion Date. The contingency plan shall, at a minimum, provide for:

(i) a contaminated soils staging area so that construction of the Project can continue without delays. Such contaminated soils (that must be removed for construction purposes) can be placed in the staging area while testing and subsequent disposal decisions are made;

(ii) the handling of any contaminated groundwater that might be extracted, including the prospective procurement of a UPDES permit in the event the contingency plan calls for such extracted water being discharged into an area that is subject to Clean Water Act jurisdiction; and

(iii) the final disposal of all Regulated Materials and contaminated materials encountered on the Site.

(b) Seller shall be responsible for implementing any recommendations relating to pre-existing Regulated Materials contained in any environmental surveys or reports.

#### **Section 22.6 Notice**

Seller shall immediately notify Buyer of the occurrence of any event that would or could reasonably be expected to result in any violation or noncompliance or potential violation or noncompliance of any Environmental Law relating to the Work, the Plant, or the Site, or otherwise constitutes a Material Adverse Change under this Agreement.

### **ARTICLE 23**

#### **WARRANTIES OF WORK**

##### **Section 23.1 Warranties**

(a) Seller warrants that, for the duration of the Warranty Period, the Work shall be (i) free from Defects in design, engineering, workmanship materials and operations, (ii) in accordance with the Agreement, and (iii) in compliance with Applicable Law. Seller further warrants that all Equipment and Plant shall be new and of standard quality, free of Defects and deficiencies in design, material, workmanship and title (the “Warranty”).

(b) The Warranty shall not extend to Defects or deficiencies to the extent resulting from (i) operation by Buyer’s personnel in a manner inconsistent with or contrary to instructions contained in the Operation and Maintenance Manuals, (ii) repairs or alterations by Buyer’s personnel in a manner inconsistent with or contrary to instructions provided by Seller or as contained in the Operation and Maintenance Manuals provided by Seller, or (iii) normal wear and tear.

##### **Section 23.2 Warranty Period**

Subject to the provisions in this article 23, the Warranty shall remain in full force and effect regarding all phases of the Work for a period beginning on the Closing Date and ending eighteen (18) months

thereafter (such period, the “Warranty Period”). In no event shall any Warranty terminate less than eighteen (18) months following the Closing Date.

### **Section 23.3 Repair of Defects**

If Buyer or Seller discovers that the Work, or any portion thereof, fails to meet the Warranty, the it shall notify the other Party of such failure promptly upon discovery, along with the reasonable basis therefor. Upon receipt of such notice, or upon Seller’s own discovery thereof, Seller shall promptly (i) cure such failure in accordance with the Warranty and (ii) perform such tests as Buyer may reasonably require to demonstrate the cure of such failure. Seller shall coordinate repairing, replacing or re-performing any of the Work with Buyer so as to minimize any adverse effects on the operation of the Project.

### **Section 23.4 Warranty Period Extension**

(a) Extension for Corrected Work. Any Work re-performed and any part of the Site that is reworked, repaired or replaced in satisfaction of Seller’s obligations in connection with the Warranty will be re-warranted by Seller pursuant to the same Warranty set forth in this article 23 , and Seller will have the same obligations in relation thereto as set forth in this article 23 for a period equal to eighteen (18) months from the date such re-performance, rework, repair or replacement is completed.

(b) Extension for Total Shutdown. If, during the Warranty Period, the Site is shut down (other than for the purpose of scheduled or routine maintenance) and such shutdown is caused by a defect or failure covered by the Warranty, then the Warranty Period will be extended by a period equal to the duration of the shutdown required to repair such defect or failure.

### **Section 23.5 Contractor and Subcontractor Warranties**

Seller will procure from the Contractor and each Subcontractor warranties with respect to services, Plant and Equipment provided by such entity for a period of no less than eighteen (18) months after the Closing Date and for a further eighteen (18) months after any warranty repair with respect to the subject of the repair. Seller shall obtain and maintain all such warranties in full force and effect.

### **Section 23.6 Delay in Remedying Defects**

If any such Defect or damage is not remedied by Seller within a reasonable time or requires prompt remediation as a result of an emergency situation existing at the Site, Buyer may proceed to do the Work at Seller’s risk and expense provided that it does so in a reasonable manner and notifies Seller of Buyer’s intention so to do. All Costs incurred by Buyer shall be deducted from the Purchase Price or be paid by Seller to Buyer.

### **Section 23.7 Removal of Defective Work**

Seller may, with the consent of Buyer, remove from the Site any part of the Work which is defective or damaged, if the nature of the Defect or damage is such that repairs cannot be expeditiously carried out on the Site.

### **Section 23.8 Further Tests**

If repairs or replacements are of such a character as may affect the operation of the Work or any part thereof, Buyer may, within one (1) month after such repair or replacement, give to Seller notice requiring further testing to be conducted, in which case such tests shall be carried out at Seller's cost and as provided in article 18 ("Performance Testing").

### **Section 23.9 Seller to Diagnose**

Seller shall, if required by Buyer's Representative in writing and under the direction of Buyer's Representative, diagnose the cause of any Defect. Unless such Defect or its cause shall be one which Seller would otherwise be responsible for repairing, the costs incurred by Seller in diagnosing such defect shall, subject to this article 23, be borne by Buyer and added to the Purchase Price.

### **Section 23.10 Latent Defects**

(a) Latent Defects Liability Period. Seller's liability for latent defects shall remain in full force and effect during all phases of the Work for a period beginning on the Closing Date and ending five (5) years thereafter (the "Latent Defects Liability Period").

(b) If any Latent Defect (as defined in Section 23.10(d)) shall appear in any part of the Work during the Latent Defects Liability Period, such Latent Defect shall be Repaired by Seller at Seller's option, with all possible speed and at Seller's sole cost expense, provided that the Latent Defect existed and would not have been disclosed by a reasonable examination conducted in accordance with Prudent Industry Practice prior to the expiration of the Defects Liability Period.

(c) Seller agrees that any examination of the Work undertaken by Buyer at a relevant time shall, in respect of that part of the Work examined, constitute a reasonable examination conducted in accordance with Prudent Industry Practice within the meaning of this Article.

(d) During Latent Defects Liability Period, in the event Seller's OEM issues any notice, including Technical Information Letters, service bulletins or similar notices recommending replacement or repair of one or more parts of the Equipment and such repair or replacement is necessary for continued safe operation of the Equipment or is issued to address a defect in material, or workmanship (each a "Latent Defect"), Seller shall repair or replace the affected parts in accordance with and subject to all the terms of the Warranty provided that Purchaser shall make the affected Work reasonably available for performance of the repairs or modifications and Seller shall cooperate with Purchaser in scheduling such modifications or repairs in order to avoid disruption to Purchaser's operations.

### **Section 23.11 Significant Defects**

(a) Seller warrants and guarantees to Buyer that there will be no Significant Defects.

(b) Consequences of Significant Defects. In the event that a Significant Defect occurs, Seller shall make good the Significant Defect.

## ARTICLE 24

### LIQUIDATED DAMAGES

#### Section 24.1 General

The Parties agree that it is difficult or impossible to determine with precision the amount of damages that would be incurred by Buyer as a result of Seller's failure to timely complete the Project or to meet the Guaranteed Substantial Completion Date or Performance Guarantees. Accordingly, the Parties expressly agree that if Seller fails to timely complete the Project or to meet the Guaranteed Substantial Completion Date or the Performance Guarantees, any sums which would be payable under this article 24 because of such failures are liquidated damages and not a penalty, and are fair and reasonable and any such sums represent a reasonable estimate of fair compensation for the losses that may reasonably be anticipated from such failures. Notwithstanding anything to the contrary herein: (a) provisions of this Agreement providing for liquidated damages **only relate to damages arising out of Seller's performance under the Agreement, and do not limit damages payable to Buyer related to or arising from the termination of this Agreement, by Buyer or otherwise, and (b) in no event are liquidated damages Buyer's exclusive remedy for any breach or failure to perform by Seller.**

#### Section 24.2 Critical Milestone Guarantee Liquidated Damages

(a) The Project Schedule designates certain times as critical milestones (each a "Critical Milestone") by which Seller represents that each such Critical Milestone will occur by its respective Target Date. While timely completion of each step in the Project Schedule is important to the success of the project, the occurrence of each Critical Milestone by its respective Target Date is of critical importance to completion of the Project in a timely manner consistent with Buyer's vital business interests.

(b) The Parties agree that it will be very difficult to determine the cost to Buyer for late delivery of Critical Milestones; therefore, the Parties agree upon the amounts set forth below, as liquidated damages for such late delivery and not a penalty, as consideration for delay in delivery and the resulting loss of beneficial use of the Work associated with each Critical Milestone. Such amounts being Critical Milestones Liquidated Damages ("Critical Milestone LDs").

(c) For each day of delay after the relevant Target Date in achieving any Critical Milestone, the amounts otherwise payable to Seller pursuant to this Agreement shall be reduced by \$[ ] per day for each day of delay beyond the relevant Target Date in achieving any Critical Milestone ("Reduction Amount").

(d) The Reduction Amount (i) shall arise independently with respect to each such delay and (ii) shall arise independently with respect to Late Substantial Completion LDs as defined in Section 24.3 ("Liquidated Damages for Delay in Substantial Completion"). At Buyer's option and in its sole discretion, Buyer may either require Seller to pay to Buyer the Reduction Amount or may deduct the Reduction Amount from any monies subsequently payable to Seller.

(e) Nothing in this Article, including without limitation Buyer's full payment of amounts owed hereunder, diminishes or impairs Buyer's other rights and remedies against Seller.



### **Section 24.3 Liquidated Damages for Delay in Substantial Completion**

If Seller fails to achieve Substantial Completion prior to the Substantial Completion LD Commencement Date, then commencing on the Substantial Completion LD Commencement Date, Seller shall pay Buyer liquidated damages, for each day until Seller achieves Substantial Completion, in an amount equal to (a) fifty thousand Dollars (\$50,000.00) per day if the Project is Dispatchable and (b) one hundred thousand Dollars (\$100,000.00) per day if the Project is not Dispatchable (collectively, "Late Substantial Completion LDs").

### **Section 24.4 Liquidated Damages for Net Capacity and Net Heat Rate**

Seller shall pay liquidated damages in accordance with the terms and conditions set forth in Section 14 of Appendix H as a result of the failure of the Work to achieve the Guaranteed Net Capacity, the Guaranteed Incremental Net Capacity or the Guaranteed Net Heat Rate and the Guaranteed Incremental Net Heat Rate in accordance with the Performance Guarantees. Seller shall be granted the Cure Period to allow remedial actions to be taken to achieve the Guaranteed Net Capacity and the Guaranteed Incremental Net Capacity or the Guaranteed Net Heat Rate and the Guaranteed Incremental Net Capacity, prior to Seller's being liable for payment of the liquidated damages as provided in Section 14 of Appendix H.

### **Section 24.5 Liquidated Damages for Startup and Commissioning**

If in connection with startup, commissioning and Performance Testing Seller exceeds ninety (90) Equivalent Starts and/or three hundred (300) Fired Hours per Combustion Turbine, then Seller shall pay to Buyer, in addition to any other Liquidated Damages, and amount equal to (a) Twelve Thousand Dollars (\$12,000) per Equivalent Start in excess of ninety (90) Equivalent Starts for either Combustion Turbine; plus (b) Three Hundred Dollars (\$300) per Fired Hour in excess of three hundred (300) Fired Hours for either Combustion Turbine.

### **Section 24.6 Calculations and Payments of Liquidated Damages**

(a) Unless otherwise set forth in this article 24, all calculations with respect to amounts payable as liquidated damages under this article 24 shall be made by Seller and provided to Buyer within (i) in the case of Section 24.2 ("Critical Milestone Guarantee Liquidated Damages") and Section 24.3 ("Liquidated Damages for Delay in Substantial Completion"), ten (10) Business Days after the final day of each month during which amounts become payable thereunder; and (ii) in the case of Section 24.4 ("Liquidated Damages for Net Capacity") and Section 24.5 ("Liquidated Damages for Startup and Commissioning"), ten (10) Business Days after Buyer's receipt of the Final Performance Test Report, but no later than ten (10) Business Days after the end of any applicable cure period. Buyer shall have the right to audit such calculations. Seller shall itemize such calculations and such calculations shall include supporting documentation as Buyer shall reasonably request and shall be in sufficient detail to permit Buyer to verify each calculation. Buyer shall notify Seller as soon as reasonably possible of any portion of the calculations with which Buyer disagrees.

(b) Liquidated damages shall bear interest at the Late Payment Rate, compounded daily from the date such amount was due, but not to exceed the maximum rate of interest permitted by Applicable Law.

## ARTICLE 25

### LIMITATIONS OF LIABILITY

#### Section 25.1 Duty to Mitigate

In all cases, but subject to any right or remedy which the Party may have under or by virtue of this Agreement, the Party establishing or alleging a breach of Agreement or a right to recover pursuant to any Article under this Agreement or a right to be indemnified in accordance with this Agreement shall be under a duty to take all necessary measures to mitigate the loss which has occurred provided that the Party can do so without unreasonable inconvenience or cost.

#### Section 25.2 Limitation of Buyer's Liability

Subject to the obligation of Seller to pay or allow Liquidated Damages to Buyer under this Agreement, neither Seller nor Buyer shall be liable to the other by way of indemnity or by reason of any breach of this Agreement or of statutory duty or by reason of tort (including negligence but excluding any damages payable to a third party caused by a trespass or nuisance for which Seller is responsible pursuant to this Agreement) for any loss of profit or income, loss of use, loss of production, loss of contracts or for any indirect or consequential, multiple, punitive or exemplary damages that may be suffered by the other.

#### Section 25.3 Enforceability of Liquidated Damages

(a) Enforceability of Liquidated Damages. If the provisions for the payment of Liquidated Damages in this Agreement are held to be unenforceable, Seller agrees to pay to Buyer all actual damages suffered by Buyer due to the circumstances giving rise to the liability to pay Liquidated Damages (had they been enforceable) including loss of profit or income, loss of use, loss of production, loss of contracts and indirect and consequential damages but subject to the maximum amounts which would have been payable if the Liquidated Damages provisions had been enforceable.

(b) If, however, the provisions for the payment of Liquidated Damages in this Agreement are held to be unenforceable as a result of a claim, objection, defense, dispute or proceedings raised or brought by Seller as part of or during the hearing of which Seller argues that the said provisions are unenforceable on the grounds that such liquidated damages should be construed at law as and/or amount to a penalty as opposed to an argument or suggestion that Seller is not liable to pay Liquidated Damages pursuant to this Agreement, Seller expressly agrees to pay to Buyer all costs, losses and damages whatsoever (including loss of profit, loss of use and loss of production, loss of contracts and indirect and consequential damages) incurred or payable by Buyer arising from or in connection with the circumstances giving rise to the claim for the payment of Liquidated Damages which has been made by Buyer, WHICH PAYMENTS SHALL NOT BE SUBJECT TO ANY CAPS ON LIABILITY.

## **Section 25.4 Limitations on Liquidated Damages**

(a) The aggregate amount of liquidated damages payable by Seller as Reduction Amounts under Section 24.2 (“Critical Milestone Guarantee Liquidated Damages”) shall not exceed, in the aggregate, an amount equal to 25% of the Purchase Price.

(b) The amount of liquidated damages payable by Seller for delays in achieving Substantial Completion under Section 24.3 (“Liquidated Damages for Delay in Substantial Completion”) shall not exceed, in the aggregate, an amount equal to 30% of the Purchase Price.

(c) The amount of liquidated damages payable by Seller attributable to failure to meet the Guaranteed Net Capacity pursuant to Section 24.4 (“Liquidated Damages for Net Capacity”) shall not exceed, in the aggregate, an amount equal to 15% of the Purchase Price.

(d) The amount of liquidated damages payable by Seller attributable to failure to meet the Guaranteed Net Heat Rate pursuant to Section 24.4 (“Liquidated Damages for Net Capacity”) shall not exceed, in the aggregate, an amount equal to 20% of the Purchase Price.

(e) The amount of liquidated damages payable by Seller attributable to failure to meet the startup and commissioning requirements pursuant to Section 24.5 (“Liquidated Damages for Startup and Commissioning”) shall not exceed, in the aggregate, an amount equal to 15% of the Purchase Price.

(f) The amount of liquidated damages under paragraphs (a) through (e) is cumulative, but shall not exceed, in the aggregate, an amount equal to 75% of the Purchase Price.

(g) Without prejudice to or limitation of Seller’s liabilities and obligations set forth under paragraphs (a) through (e), all of which shall be in excess of and not subject to the limitation contained in this paragraph (g), the aggregate liability of Seller to Buyer shall not exceed one hundred percent (100%) of the amount of Purchase Price. In calculating the unexpended amounts of Seller’s limitations of liability under this Section, no account shall be taken of any insurance proceeds payable to Seller (whether payable directly to Seller or payable to Seller through Buyer) under insurance coverage obtained by Buyer operate to reduce such unexpended limits of liability unless and to the extent that such proceeds are not paid due to circumstances beyond the control of Seller within a reasonable time following final determination in accordance with the relevant policy of insurance that they are payable. The limitations of liability set out in this Article shall not apply in relation to any failure by Seller to fulfill its obligations due to its gross negligence or willful misconduct under this Agreement.

## **ARTICLE 26**

### **INDEMNIFICATION**

#### **Section 26.1 Indemnification for Third Party Claims**

(a) Seller shall defend, indemnify and hold harmless Buyer, its shareholders and Affiliates, and their respective directors, officers, employees and agents, from and against all third party Claims and Liabilities for injury, including death, and property damage caused by, arising

out of, or in connection with the performance by any Project Party of the Transaction Documents to the extent any of such Claims or Liabilities were caused by the negligence, gross negligence or willful misconduct of Seller, the Contractor, any Subcontractor, and its respective employees or agents.

(b) Buyer shall defend, indemnify and hold harmless Seller and its managers, officers, employees and agents, from and against all third party Claims and Liabilities for injury, including death, and property damage caused by, arising out of, or in connection with the performance of the Transaction Documents to the extent any of such Claims or Liabilities were caused by the negligence, gross negligence or willful misconduct of Buyer, its employees or agents.

(c) Either Party seeking indemnification under this Agreement (the “Indemnified Party”) shall give notice to the Party required to provide indemnification hereunder (the “Indemnifying Party”) promptly after the Indemnified Party has actual knowledge of any Claim as to which indemnity may be sought hereunder, and the Indemnified Party shall permit the Indemnifying Party (at the expense of the Indemnifying Party) to assume the defense of any Claim or litigation resulting therefrom; provided that:

(i) counsel for the Indemnifying Party who shall conduct the defense of such Claim or litigation shall be reasonably satisfactory to the Indemnified Party;

(ii) the Indemnified Party may participate in such defense at its own expense, except the Indemnifying Party shall reimburse the Indemnified Party for its participation in such defense to the extent that the Indemnifying Party requests the Indemnified Party to participate in its own defense; and

(iii) the omission by the Indemnified Party to give notice as provided herein shall not relieve the Indemnifying Party of its indemnification obligations hereunder except to the extent that such omission results in a failure of actual notice to the Indemnifying Party and Indemnifying Party is damaged as a result of such failure to give notice.

Notwithstanding the foregoing, the Indemnifying Party may not settle any Claim related to the indemnity being provided hereunder without the consent of the Indemnified Party, such consent not to be unreasonably withheld.

(d) With regard to any Claim or Liability which is the result of the joint or concurrent fault or negligence of Seller and Buyer, the Parties agree to jointly defend any Claim with respect thereto that is based on such joint or concurrent fault or negligence of Buyer and Seller. Any Claim of contribution or indemnification between Buyer and Seller relating to such Claims shall be resolved on the basis of the percentage of fault or negligence and the Parties agree to reserve the determination of such percentage until after resolution of such Claim. Such pro rata share shall be based upon a final judicial determination of the Parties’ comparative fault or negligence or, in the absence of such determination, by mutual agreement.

(e) Nothing in this Section 26.1 is intended to allow any Indemnified Party to be indemnified from and against any third party Claims and Liabilities caused by, arising out of, or in connection with the performance of this Agreement to the extent any of such Claims or Liabilities

were caused by, arose out of, or were in any way incidental to or in connection with its own negligence or intentional misconduct.

## **Section 26.2 Title Indemnity and Liens**

(a) Seller shall promptly pay when due all obligations for labor and material in connection with the Work. Seller shall discharge at once, or bond with a bonding company or surety acceptable to Buyer or otherwise secure against all Liens and attachments which are filed in connection with the Work.

(b) Seller shall keep the Work free and clear of and shall promptly release or cause the release of all Liens, recorded notices, Claims for nonpayment and lis pendens filed of record by the Contractor or any Subcontractor.

(c) Seller shall (i) indemnify, defend, and hold harmless Buyer from all laborers', material men's and mechanics' Liens, or Claims made or filed upon the Work, or the property on which the Work is located on account of any labor performed or labor, services, equipment, and materials furnished by Seller's Subcontractors of any tier and all laborers, materialmen, mechanics, and other persons in connection with the work, and (ii) keep the work and said property free and clear of all liens or claims arising from the performance of any Work covered by this Agreement by Seller, its Subcontractors of any tier, and all laborers, materialmen, mechanics and other such persons.

(d) If any Lien arising out of this Agreement is filed before or after Work is completed, Seller, within ten (10) calendar days after receiving from Buyer written notice of such lien, shall obtain release or provide financial assurance satisfactory to Buyer to protect Buyer from or otherwise satisfy such lien. If Seller fails to do so, Buyer may take such steps and make such expenditures as in its discretion it deems advisable to obtain release of or otherwise satisfy any such lien or liens, and Seller shall upon demand reimburse Buyer for all costs incurred and expenditures made by Buyer in obtaining such release or satisfaction.

(e) Seller's obligation to indemnify, defend and hold harmless Buyer from liens shall not in any way be rendered unenforceable, or altered, amended, eliminated or otherwise conditioned by any laws and regulations related to processing such liens. Buyer shall have no obligation to deliver a copy of any notice of claim or right to a lien to Seller or any other person or entity.

(f) If Seller shall default in discharging any Liens, Claims or encumbrances filed or asserted against the Work, Buyer shall promptly provide notice to Seller, and Seller shall then satisfy or defend any such Liens, Claims or encumbrances. If Seller either does not promptly satisfy such Liens, Claims or encumbrances or does not give Buyer reasons satisfactory to Buyer for not paying such Liens, Claims or encumbrances, within fifteen (15) days of Seller's receipt of such notice, Buyer shall have the right, at its option, after providing notice to Seller, to pay or settle such Liens, Claims or encumbrances by agreement, and Seller shall, within fifteen (15) days of request by Buyer, reimburse Buyer for all costs incurred by Buyer to discharge such Liens, Claims or encumbrances, including administrative costs, attorneys' fees and other expenses or Buyer shall have the right to deduct the amount of such costs from the amount payable to Seller.

Seller shall have the right to contest any such Lien, Claim or encumbrance, provided that Seller first provide to Buyer financial assurances in amount, form and substance satisfactory to Buyer and otherwise complies with Applicable Law with respect to removal of Liens.

(g) Seller shall at its own expense defend any suit or proceeding based on any Claim for which Seller is responsible under this Section. Buyer shall give Seller such assistance as Seller may reasonably require in the defense of such suit, and Buyer shall have the right to be represented herein by counsel of its own choosing at its own expense. If Seller fails to defend diligently any such suit or proceeding, Buyer may, in its reasonable discretion, either defend the suit or proceeding or settle the Claim which is the basis thereof without the consent of Seller and without relieving Seller of the obligation to indemnify as provided herein. In such a case Seller's obligation to defend shall include reimbursement of Buyer's reasonable legal fees and related costs incurred in defending or settling the suit.

### **Section 26.3 Indemnity Period**

Seller's obligation to indemnify Buyer consistent with the provisions of this article 26 shall continue after the closing in accordance with the following (collectively, the "Indemnity Period"):

(a) With respect to Claims and Liabilities brought by third parties, Seller's obligation to indemnify Buyer shall continue for a period of two years following the Closing Date.

(b) With respect to Claims and Liabilities relating to the title of the Site, Project, or the Work, Seller's obligation to indemnify Buyer shall continue indefinitely.

(c) With respect to all other Claims and Liabilities, Seller's obligation to indemnify Buyer shall continue for a period of eighteen months following the Closing Date.

## **ARTICLE 27**

### **INSURANCE**

#### **Section 27.1 Contractor's and Subcontractors' Insurance Coverage**

Seller shall maintain and shall require and cause the Contractor and all Subcontractors, while performing work on the Site, to provide, pay for and continuously maintain in full force and effect with insurers having an A.M. Best Insurance Reports rating of A-:VII or better the following insurance coverages:

(a) Employers' Liability insurance with a minimum limit of \$1,000,000.

(b) Commercial General Liability insurance, to include contractual liability, with a minimum single limit of \$1,000,000 with \$3,000,000 annual aggregate to protect against and from all loss by reason of injury to persons or damage to property based upon and arising out of the work performed under this Agreement.

(c) Umbrella or Excess Liability insurance with minimum limits of \$10,000,000 per occurrence and \$10,000,000 annual aggregate to cover claims in excess of the underlying limits for Employer's Liability, General Liability, and Automobile Liability.

(d) Business Automobile Liability insurance with a minimum single limit of \$1,000,000 for bodily injury and property damage with respect to Seller's vehicles whether owned, hired or non-owned, assigned to or used by Seller in the performance of the work.

(e) Professional Liability insurance (Errors and Omissions) with a minimum single limit of \$1,000,000 to cover claims arising out of Consultant's professional services hereunder. This policy shall be maintained until one year after Buyer's acceptance of Consultant's work..

(f) Transit and Installation insurance with a minimum single limit of \$500,000 to cover damage to property and other claims arising out of the loading, unloading, transportation, lifting, lowering, or other handling of such property.

(g) For Commercial General Liability insurance, the policy shall include:

(i) Provisions or endorsements naming Buyer, its Board of Directors, officers and employees as additional insured;

(ii) Cross liability coverage so that the insurance applies separately to each insured against whom claim is made or suit is brought, even in instances where one insured claims against or sues another insured.

(h) All policies, except professional liability and transit and installation, shall include provisions that such insurance is primary insurance with respect to the interests of Buyer and that any other insurance maintained by Buyer is excess and not contributory insurance with the insurance required hereunder, and provisions that such policies shall not be canceled or their limits of liability reduced without:

(i) Ten (10) days' prior written notice to Buyer if canceled for nonpayment of premium

(ii) Thirty (30) days' prior written notice to Buyer if canceled for any other reason.

(iii) A certificate in a form satisfactory to Buyer certifying to the issuance of such insurance shall be furnished to Buyer and included at Exhibit H.

(i) Commercial general liability coverage written on a "claims-made" basis, if any, shall be specifically identified on the certificate.

(j) If requested by Buyer, a copy of each insurance policy, certified as a true copy by an authorized representative of the issuing insurance company, shall be furnished to Buyer.

(k) Insurance coverage provided on a "claims-made" basis shall be maintained by Seller for a minimum period of five (5) years after the completion of any award and for such other length of time necessary to cover liabilities arising out of the work.

(l) Insurance coverage provided on a “claims-made” basis shall be maintained by Seller for a minimum period of five (5) years after the completion of this Agreement and for such other length of time necessary to cover liabilities arising out of the Work.

(m) Seller shall ensure that the Contractor and each and every Subcontractor maintains in full force and effect the insurance coverage and limits required under this Section 27.1 (“Contractor’s Insurance”) at all times on and after the commencement of the Work and continuing until the Closing Date, unless otherwise indicated herein. The coverage under Contractor’s Insurance shall be primary to the extent of the Contractor’s obligations to indemnify Seller and Buyer without regard to other insurance available to Buyer. Within thirty (30) days prior to the commencement of the Work at the Site, Seller shall provide Buyer applicable insurance certificates of such coverage completed by duly authorized representatives of the insurer certifying that (a) the coverages required hereunder are in effect, and (b) the coverages will not be canceled, nonrenewed or materially changed by endorsement or through issuance of other policies of insurance without thirty (30) days’ prior notice to Seller and Buyer. The acceptance by Buyer of Seller’s delivery of any certificate of insurance evidencing the insurance coverages and limits required hereunder shall not be deemed to constitute approval or agreement that (i) the insured party has satisfied the insurance requirements set forth herein or (ii) the insurance policies described in such certificates of insurance comply with such requirements.

(n) If Seller fails to require the Contractor and the Subcontractors to maintain the insurance required hereunder, Buyer shall have the right, but not the obligation, to purchase such insurance at Seller’s expense.

(o) The Contractor’s insurance carrier and the Subcontractors or Subcontractors’ insurance carriers shall use commercially reasonable efforts to provide Seller and Seller will provide Buyer written notice of cancellation, termination or material alteration.

(p) Anything in this Agreement to the contrary notwithstanding, the occurrence of any of the following shall in no way relieve Seller from any of its obligations under this Agreement; (a) failure by the Contractor or any Subcontractor to procure the insurance required by this Agreement; (b) failure by the Contractor or any Subcontractor to comply fully with any of the insurance provisions of this Agreement; (c) failure by the Contractor or any Subcontractor to secure such endorsements on the policies as may be necessary to carry out the terms and provisions of this Agreement; (d) the insolvency, bankruptcy or failure of any insurance company providing insurance to the Contractor or any Subcontractor; or (e) failure of any insurance company to pay any claim accruing under its policy.

(q) In the event that liability for any loss or damage is denied by the underwriter or underwriters in whole or in part due to the breach of said insurance by the Contractor or any Subcontractors, or for any other reason attributable to the Contractor or any Subcontractor, or if the Contractor or any Subcontractor fails to maintain any of the insurance herein required, then Seller shall defend, indemnify and hold Buyer harmless against all losses which would otherwise have been covered by said insurance.



## Section 27.2 Buyer's Insurance

(a) Owner shall procure at its own expense and maintain in full force and effect during the life of this Contract, with responsible insurance companies authorized to do business in the State of Utah, the types and limits of insurance as set forth below. Such companies shall have an A.M. Best Insurance Reports rating of A-:VII or better. Buyer, at its own cost, may purchase any additional insurance it believes necessary to protect its interests.

(b) **Builder's All-Risk Insurance.** Effective the earlier of 1) the point of groundbreaking at the Site or 2) the date of the first shipment of any Material, Equipment, supplies or other elements of the Work, Buyer shall obtain and thereafter at all times during performance of the Work, maintain Builder's All-Risk Insurance. Coverage shall remain in effect until replaced by permanent property insurance which will be placed by Buyer upon Final Completion. Such Builder's All-Risk Insurance shall insure as an insured, Seller, Contractor, their respective affiliates and Subcontractors of any tier, Buyer and its affiliates, and shall cover all property in the course of construction, including the Work, Materials and Equipment, miscellaneous equipment and furnishings (other than equipment covered under Seller's or Contractor's equipment floater), from physical loss or damage caused by perils covered by a Builder's All-Risk form or equivalent coverage. Such insurance shall include mechanical and electrical breakdown coverage during start-up and testing, and other operations of the Project prior to Final Completion. The limit of liability shall be the full replacement cost of the Work including primary cost of equipment plus freight. The required deductible for all such insurance shall not exceed Two Hundred Fifty Thousand Dollars (\$250,000), except as noted below, and except during the Performance Testing, when the applicable deductibles shall be \$500,000 per occurrence, or in the case of turbine/generator units \$1,000,000 per occurrence. The Builder's All-Risk coverage shall not contain an exclusion for resultant damage caused by faulty workmanship, design or materials. Buyer and Seller agree, and Seller shall require Contractor and all Subcontractors to agree, to waive all rights of recovery against each other for damages caused by fire and/or other perils to the extent covered by the "All Risk" policy.

(c) The following additional coverages shall be provided:

(i) Flood coverage with a sublimit of \$25,000,000 per occurrence and in the aggregate, with a deductible of 5% of the values at risk at the time of loss, subject to a deductible of \$1,000,000;

(ii) Expediting expense with a sublimit of \$10,000,000 except \$5,000,000 for air-freight per loss;

(iii) Earthquake coverage with a sublimit of \$25,000,000 per occurrence and in the aggregate, with a deductible of 5% of the values at risk at the time of loss, subject to a deductible of \$1,000,000;

(iv) Coverage for Equipment and Material at laydown areas or temporary storage off of the actual construction site (including freight expense) with a sub-limit of \$25,000,000 per location. Should the values at risk at any location exceed this sublimit, Seller shall secure such additional coverage as may be required to insure the full values then at risk at its own cost;

(v) Removal of debris with a sublimit of 10% of Project value, subject to \$25,000,000 maximum per loss; and

(vi) Transit coverage with a \$15,000,000 limit for turbines and generators only and a \$5,000,000 limit for all other property including ocean and air transit if any Equipment is to be moved by vessel or aircraft, with sublimits sufficient to insure the full replacement value. Coverage shall protect the interest of Seller and of Buyer, and their directors, officers, employees and agents.

(d) Endorsements. Buyer's insurance policies shall be endorsed to provide that Seller, Contractor and its Subcontractors, and their respective officers, directors and employees shall be named as additional insured with a waiver of insurer's right of subrogation. In addition, Seller, Contractor and its Subcontractors shall be extended the benefit of any operating property insurance, including being named additional insured and a waiver of insurer's right of subrogation through Final Completion.

### **Section 27.3 Waiver of Rights**

In regards to any property insurance maintained by any Party, each such Party shall waive all rights of recovery and subrogation against the other Party.

### **Section 27.4 Seller's Cooperation with Buyer**

(a) Seller agrees to cooperate with and assist Buyer, as reasonably requested by Buyer, in Buyer's procurement of any insurance required by this Agreement or otherwise to be procured in connection with the Project.

(b) Seller agrees to provide such assistance and documentation as Buyer may request in connection with Claims Buyer may make under its insurance policies purchased in connection with the Project for damage or events that occur after the Effective Date and prior to the expiration of the applicable warranty period.

## **ARTICLE 28**

### **FORCE MAJEURE**

#### **Section 28.1 Effect of Force Majeure**

Neither Party shall be considered to be in default or in breach of its obligations under this Agreement to the extent that performance of such obligations is prevented by any event of Force Majeure arising after the date of this Agreement. In no event may Seller claim a Force Majeure for economic reasons or for changes in Seller's costs or the costs of its Subcontractors, including, but not limited to, commodity price changes, changes in labor markets, increased cost of labor or transportation, or due to changes in scope due to changes in engineering design or applied engineering not requested by Buyer.

## **Section 28.2 Notice of Occurrence**

If either Party considers that any event of Force Majeure has occurred which may affect performance of its obligations under this Agreement, it shall promptly notify the other Party thereof stating the full particulars and anticipated duration of the event and the performance obligations that will be affected by the event.

## **Section 28.3 Performance to Continue**

Upon the occurrence of any event of Force Majeure, Seller shall use commercially reasonable efforts to continue to perform its obligations under this Agreement. Seller shall notify Buyer of the steps Seller proposes to take, including any reasonable alternative means for performance, which is not prevented by Force Majeure. Seller shall not take any such alternative steps unless directed so to do by Buyer pursuant to a Change Order. In any such case, Seller shall use reasonable efforts to mitigate all such costs and impacts on the schedule for performance and on the Guaranteed Substantial Completion Date.

## **Section 28.4 Termination in Consequence of Force Majeure**

If circumstances of Force Majeure have occurred that have materially affected the Work and have continued for a period of forty-five (45) days in the aggregate, and there is a corresponding delay in the schedule for performance and the Guaranteed Substantial Completion Date of forty-five (45) days in the aggregate caused by the Force Majeure, then, notwithstanding that Seller may by reason thereof have been granted an extension of the schedule for performance and the Guaranteed Substantial Completion Date, by Change Order, Buyer shall be entitled to provide notice of its intent to terminate this Agreement upon thirty (30) days notice to Seller. If at the expiration of such thirty (30)-day period such Force Majeure shall still continue, Buyer may elect to terminate this Agreement.

## **Section 28.5 Risk of Loss**

Prior to termination of this Agreement, nothing in this article 28 shall change the allocation to Seller of the risk of loss or damage prior to the Closing Date, and any Change Order or payment to Seller resulting from a Force Majeure shall take into account such allocation of the risk of loss or damage.

# **ARTICLE 29**

## **DEFAULT**

### **Section 29.1 Seller's Default**

Seller shall be in default ("Seller Default") hereunder if:

(a) A Project Party (i) fails to meet a Critical Milestone, (ii) makes a false or unsubstantiated claim of Force Majeure, (iii) fails to meet the Project and Site Safety Performance Metrics set forth in the Appendix G or (iv) fails in any material respect to comply with its other obligations under the Transaction Documents; provided, however, that if all material adverse consequences of a breach of such other obligation can be cured or remedied by Seller within a period of thirty (30) days after such breach, such breach shall not become a Seller Default until thirty (30) days after such breach;

(b) A Project Party assigns the Transaction Documents to which it is a party other than as permitted both hereunder and thereunder;

(c) A Project Party shall commence a voluntary case under the Bankruptcy Code; file a petition seeking to take advantage of any other laws, domestic or foreign, relating to bankruptcy, insolvency, reorganization, winding up or composition or adjustment of debts; consent to or fail to contest in a timely and appropriate manner any petition filed against it in an insolvency case under such bankruptcy laws or other laws; apply for, or consent to or fail to contest in a timely and appropriate manner, the appointment of, or the taking of possession by, a receiver, custodian, trustee, liquidator or the like of itself or of a substantial part of its assets; admit in writing its inability to pay, or generally not be paying, its debts (other than those that are the subject of bona fide disputes) as they become due; make a general assignment for the benefit of creditors; take any action for the purpose of effecting any of the foregoing; or a case or other proceeding shall be commenced by a third party against a Project Party seeking (i) relief under the Bankruptcy Code or under any other laws, domestic or foreign, relating to bankruptcy, insolvency, reorganization, winding up or composition or adjustment of debts or (ii) the appointment of a trustee, receiver, custodian, liquidator or the like of such Project Party of all or any substantial part of its assets, and such case or proceeding shall continue undismissed or unstayed for a period of sixty (60) days;

(d) any representation or warranty made by Seller for which an express remedy is not provided shall prove to have been false in any material respect as of the date made;

(e) any Judgment shall be entered against any Project Party (i) decreeing such Person's involuntary dissolution or split up or (ii) any (x) such Judgment shall award non monetary relief which results in a Material Adverse Change or (y) such Judgment shall award monetary damages in an amount of (I) \$\_\_\_\_\_ with respect to Seller or (II) with respect to Project Parties other than Seller, such Judgment shall award monetary damages in an amount that would cause a Material Adverse Change;

(f) as a result of an act or omission of any Project Party, any of the Security Documents shall for any reason cease to be in full force and effect, or shall cease to give Buyer the Liens, rights, powers and privileges purported to be created thereby in any material respect. At any time, as a result of an act or omission of any Project Party, Buyer shall fail to have a first priority perfected security interest in all the Collateral;

(g) a Material Adverse Change shall have occurred and be continuing, unless such Material Adverse Change is a result of an act or omission of Buyer; or

(h) Seller fails to pay liquidated damages to Buyer or to the Substantial Completion LD Delay Account when due, except to the extent such payments are being disputed in good faith.

## **Section 29.2 Buyer's Default**

Buyer shall be in default ("Buyer's Default") hereunder if:

(a) Buyer fails to pay Seller any undisputed amount due Seller under article 2 ("Sale of Assets") or article 3 ("Terms for Progress Payments"), and fails to cure such default within ten (10) Business Days after receiving notice of default from Seller;

(b) Buyer has failed in any material respect to comply with its other material obligations under this Agreement; provided, however, that if all material adverse consequences of a breach of an obligation can be cured or remedied by Buyer within a period of thirty (30) Business Days after such breach, such breach shall not become a Buyer's Default until thirty (30) Business Days after such breach;

(c) Buyer shall commence a voluntary case under the Bankruptcy Code; file a petition seeking to take advantage of any other laws, domestic or foreign, relating to bankruptcy, insolvency, reorganization, winding up or composition or adjustment of debts; consent to or fail to contest in a timely and appropriate manner any petition filed against it in an insolvency case under such bankruptcy laws or other laws; apply for, or consent to or fail to contest in a timely and appropriate manner, the appointment of, or the taking of possession by, a receiver, custodian, trustee, liquidator or the like of itself or of a substantial part of its assets; admit in writing its inability to pay, or generally not be paying, its debts (other than those that are the subject of bona fide disputes) as they become due; make a general assignment for the benefit of creditors; take any action for the purpose of effecting any of the foregoing; or a case or other proceeding shall be commenced by a third party against Buyer seeking (i) relief under the Federal bankruptcy laws (as now or hereafter in effect) or under any other laws, domestic or foreign, relating to bankruptcy, insolvency, reorganization, winding up or composition or adjustment of debts or (ii) the appointment of a trustee, receiver, custodian, liquidator or the like of Buyer of all or any substantial part of its assets, and such case or proceeding shall continue undismissed or unstayed for a period of sixty (60) days;

(d) any representation or warranty made by Buyer in this Agreement for which an express remedy is not provided shall have been false in any material respect as of the date made;

(e) any suspension of the Work requested by Buyer continues for more than thirty (30) days, and Buyer and Seller are unable to agree on a Change Order, unless such dispute is being resolved under article 32 ("Claims, Claim Notice and Dispute Resolution").

### **Section 29.3 Removal of Seller's Equipment**

Upon termination due to Buyer's default, Seller shall be entitled to remove during normal working hours all the Seller Equipment which are on the Site. Prior to removing any Seller Equipment from the Site Seller shall provide to Buyer a detailed list of Seller Equipment to be removed. No equipment shall be Seller Equipment unless it is included in the then-current list approved pursuant to Section 12.1 ("Seller's Equipment").

### **Section 29.4 Remedies on Default**

(a) Step-In Rights. During the occurrence and continuance of any Seller Default or occurrence of any event described in Section 30.1(b) ("Termination by Buyer"), and in addition to any other rights Buyer may have hereunder or at law or in equity, Buyer shall have the right, but not the obligation, take all actions necessary to perform any and all work and labor it deems necessary to complete, operate or maintain the Project in accordance with the terms of this Agreement, including causing Seller to vacate the Project and surrender possession of the Project and all proprietary information, Equipment, spare parts and other supplies located at the Project to

Buyer. If Buyer at any time exercises its rights under this Section 29.4(a), Buyer shall be relieved of its obligations of payment during such time as it is exercising its right under this Section, and shall be entitled to recover all costs incurred by Buyer, plus 20% for general and administrative costs in connection with work performed during that time. Notwithstanding the foregoing, nothing set forth in this Section shall excuse Seller of its obligations to remedy its default and perform its obligations hereunder.

(b) Cure Rights. During the occurrence and continuance of any Seller Default or occurrence of any event described in Section 30.1(b) (“Termination by Buyer”) and upon receipt of any notice that Seller is in default of any of its obligations under any of the Project Documents, and in addition to any other rights Buyer may have hereunder or at law or in equity, Buyer shall have the right, but not the obligation, to cure any default of Seller under any Transaction Document. If Buyer at any time exercises its right under this Section 29.4(b), Buyer shall be relieved of its obligations of payment during such time as it is exercising its right under this Section. Notwithstanding the foregoing, nothing set forth in this Section shall excuse Seller of its obligations to remedy its default and perform its obligations hereunder.

(c) Buyer Rights Following Termination due to a Seller Default. Upon termination of this Agreement pursuant to Section 30.1(b) (“Termination by Buyer”), Buyer may, but shall not be obligated to:

(i) remove Seller from the Site with risk of loss of the Work transferring to Buyer. In addition, Buyer may, but shall not be obligated to, require Seller, at no additional cost to Buyer, to take all steps necessary or requested by Buyer to assign Seller’s rights and obligations under the Transaction Documents and Governmental Approvals identified by Buyer to Buyer and to transfer to Buyer all other property, whether tangible or intangible, in which Seller has rights which is necessary or desirable for the development, construction ownership or operation of the Project at Seller’s actual cost;

(ii) in addition to the foregoing, upon the occurrence and during the continuance of any Seller Default, Buyer may exercise all of its rights as a secured party, under the Security Documents or under applicable Law or otherwise (and all remedial provisions in the Security Documents are hereby incorporated by reference); and

(iii) pursue any and all remedies available at law or in equity.

(d) Nothing in this Section 29.4 limits Buyer's remedies under Article 30.

## **ARTICLE 30**

### **TERMINATION**

#### **Section 30.1 Termination by Buyer**

(a) Default Termination Rights. Upon the occurrence or continuation of a Seller Default, Buyer may elect to terminate this Agreement as follows:

(i) with respect to a Seller Default described in subsection 29.1(c), immediately terminate this Agreement and remove Seller from the Site with risk of loss of the Work transferring to Buyer as provided in Section 29.4(c) hereof; and

(ii) with respect to a Seller Default described in any subsection other than subsection (c) of Section 29.1 (“Seller’s Default”), after having given notice to Seller of such Seller Default and Seller’s having failed to cure such Seller Default within the cure period specified in such subsection, or, if no cure period is specified, then fourteen (14) days after such notice, terminate this Agreement.

(b) Voluntary Termination. Following the achievement by Seller of the Notice to Proceed Milestone, Buyer may elect to terminate this Agreement at any time without cause upon not less than thirty (30) days’ notice to Seller.

### **Section 30.2 Termination by Seller**

(a) Default Termination Rights. Upon the occurrence or continuance of a Buyer Default, Seller may elect to terminate this Agreement as provided in this Section 30.2.

(i) with respect to a Buyer’s Default described in Section 29.2(c), immediately terminate this Agreement; and

(ii) with respect to a Buyer’s Default described in any subsection other than Section 29.2(c), after having given notice to Buyer of such default and Buyer having failed to cure such Buyer’s Default within the cure period specified in such subsection, or, if no cure period is specified, then fourteen (14) Business Days after such notice, terminate this Agreement.

(iii) Notwithstanding anything to the contrary in this Agreement, Buyer's right to collect damages from Seller will not be limited or foreclosed by any termination by Buyer under this Section or otherwise.

(b) Suspension Termination Rights. Seller may elect to terminate this Agreement due to Suspension of the Work as provided in Section 16.1(b) (“Order to Suspend”).

### **Section 30.3 Procedures Following Termination by Seller or due to Force Majeure**

(a) Upon any termination of this Agreement pursuant to Section 28.4 (“Termination in Consequence of Force Majeure”), Section 30.1(b) (“Voluntary Termination”) or Section 30.2(a) (“Default Termination Rights”), the following provisions shall apply: (i) Buyer shall pay to Seller the amount, if any, by which the applicable termination amount set forth in Appendix I corresponding to the effective date of the termination (partial month to be appropriately pro-rated) exceeds the cumulative payments made by Buyer prior to such date; (ii) at Buyer’s option, title (to the extent not already transferred) and risk of loss to some or all of the Site and the Materials shall transfer to Buyer; and (iii) Buyer shall be responsible for, as applicable, any transportation, storage and insurance of and for the Materials for which Buyer has elected to take title.

(b) In addition to the foregoing, upon any such termination of this Agreement pursuant to Section 28.4 (“Termination in Consequence of Force Majeure”), Section 30.1(b) (“Voluntary

Termination”) or Section 30.2(a) (“Default Termination Rights”) the following provisions shall apply: Buyer may, but shall not be obligated to, at no additional cost to Buyer (i) require that Seller take all steps necessary or requested by Buyer to assign its rights and obligations under the Transaction Documents and Governmental Approvals identified by Buyer to Buyer and to transfer to Buyer all other property, whether tangible or intangible, in which Seller has rights which is necessary or desirable for the development, construction ownership or operation of the Project and (ii) exercise all of Seller’s rights including the right to request performance under and to enforce any and all rights to, the Collateral, as provided in the Security Documents (and all remedial provisions in the Security Documents are hereby incorporated by reference); and (iv) enter onto the Site and to remove all Materials for which it has elected to take title.

#### **Section 30.4 Exclusivity**

THE RIGHTS AND REMEDIES OF SELLER SET FORTH HEREIN FOR DEFAULT AND TERMINATION ARE EXCLUSIVE AND NO OTHER REMEDIES OF ANY KIND WHATSOEVER SHALL APPLY IN THE EVENT OF SUCH DEFAULT AND TERMINATION.

### **ARTICLE 31**

#### **TAXES**

##### **Section 31.1 Buyer’s Obligation**

In addition to the Purchase Price, Buyer shall be obligated to pay the amount of any property, privilege, license, sales, use, excise, gross receipts, value added, privilege or similar taxes or assessments applicable to the sale of the Work or to the use of the Work. Seller shall use all reasonable efforts to minimize the amount of such taxes and assessments payable by Buyer. All real or personal property taxes related to the Project shall be paid by Buyer and shall not be apportioned at the Closing.

##### **Section 31.2 Seller’s Obligation**

Seller have included in the Purchase Price the amount of any customs duties, and related customs broker fees and charges or similar charges, for delivery of any components to the United States from countries outside of the United States and transportation to the Site. Seller shall be liable for all payroll and other employee related taxes and costs, for all property taxes related to the Site prior to Closing and for all taxes based on its income. Contractor shall cooperate with Buyer’s reasonable requests with respect to any challenge that Buyer elects to make with respect to any taxes imposed in connection with the Project.

### **ARTICLE 32**

#### **CLAIMS, CLAIM NOTICE AND DISPUTE RESOLUTION**

##### **Section 32.1 Claims**

- (a) Submission of Claims



(i) In the event Seller has a claim or request for a time extension, additional compensation, any other adjustment of the Agreement terms and conditions, or any dispute arising out of the Work (each a “Claim”), Seller shall notify Buyer in writing within five (5) Business Days following the occurrence of the event giving rise to the Claim. Seller’s failure to give notice as required will constitute a waiver of all of Seller’s rights with respect to the Claim.

(ii) As soon as practicable after Claim notification, Seller shall submit the Claim to Buyer with all supporting information and documentation. Seller shall also respond promptly to all Buyer inquiries about the Claim and its basis.

(iii) Any Claim which is not disposed of by mutual agreement between the Parties shall be decided by Buyer, which shall provide a written decision to Seller. Such decision shall be final unless Seller, within thirty (30) days after such receipt of Buyer’s decision, provides to Buyer a written protest, stating clearly and in detail the basis thereof, and such protest shall be resolved in accordance with Section 32.2 (“Dispute Resolution”). It is agreed that Seller’s failure to protest Buyer’s decision shall constitute a waiver by Seller of its Claim.

(iv) Seller shall continue its performance of this Agreement notwithstanding the submission of any Claim.

(b) Notification Prior to Incurring Costs. In any circumstances which might give rise to a claim pursuant to this Article, Seller shall, before incurring any cost or expense, first give Buyer every opportunity to determine whether the cost or expense should be incurred or whether any act or forbearance shall or might mitigate the cost of any such claim.

(c) Buyer’s Liability to Pay Claims. Buyer shall not be liable to make payment in respect of any claim for an additional payment unless Seller has complied with each and all of the requirements of this article 32, whether as to the time within which claims must be made and/or information provided or otherwise, it being acknowledged and agreed that the absence of complete compliance herewith will involve significant prejudice to Buyer.

## **Section 32.2 Dispute Resolution**

All disputes in connection with this Agreement between Buyer and Seller or between Buyer and any Transaction Party shall be settled, if possible, by negotiation of Buyer Representative and Seller Representative. If the matter is not resolved by such negotiations, either party may, by giving written notice to the other party, cause the matter to be referred to a meeting of a Buyer Senior Procurement Representative and Seller’s Management Representative. Such meeting shall be held within fifteen (15) days following the giving of the written notice. If the matter is not resolved by such negotiations, either party may, by giving written notice to the other party, cause the matter to be referred to a meeting of appropriate higher management representatives of the parties. Such meeting shall be held within thirty (30) days following the giving of the written notice. If the matter is not resolved within thirty (30) days after the date of the notice referring the matter to the appropriate high management or such later date as may be mutually agreed upon, the parties may then, subject to the terms of this Agreement, commence legal action in court of competent jurisdiction in order to resolve the dispute.

## ARTICLE 33

### ASSIGNMENT

#### Section 33.1 Assignment of Seller's Interests

Seller shall not assign any of its rights and obligations hereunder, except with Buyer's prior written consent.

## ARTICLE 34

### CONFIDENTIALITY

#### Section 34.1 Confidentiality

(a) It is understood that certain information may be exchanged among Buyer and Seller that the disclosing Party considers proprietary and confidential. Each Party agrees that it shall (and shall cause its Affiliates and its and their officers, directors, consultants, employees, legal counsel, agents and representatives (together with the Affiliates, the "Confidentiality Affiliates") to): (i) hold confidential and not disclose other than to its Confidentiality Affiliates having a reasonable need to know in connection with the permitted purposes hereunder, without the prior consent of the other Party, all confidential or proprietary written information which is marked confidential or proprietary or oral information or data which is reduced to writing within five (5) days of such disclosure and marked as confidential or proprietary (including sources of equity and/or other financing, development strategy, competitor information, cost and pricing data, warranties, technical information, research, developmental, engineering, manufacturing, marketing, sales, financial, operating, performance, business and process information or data, know how and computer programming and other software techniques) provided or developed by the other Party or its Confidentiality Affiliates in connection herewith or the Work ("Confidential Information"); and (ii) use such Confidential Information only for the purposes of performing its obligations hereunder or where reasonably necessary to enjoy the benefits of this Agreement. In no event shall any Confidential Information be disclosed to any competitor of Seller or Buyer.

(b) The obligations contained in the preceding paragraph shall not apply, or shall cease to apply, to Confidential Information if or when, and to the extent that, such Confidential Information (i) was known to the receiving Party or its Confidentiality Affiliates prior to receipt from the disclosing Party or its Confidentiality Affiliates; (ii) was, or becomes through no breach of the receiving Party's obligations hereunder, known to the public; (iii) becomes known to the receiving Party or its Confidentiality Affiliates from other sources under circumstances not involving any breach of any confidentiality obligation between such source and the disclosing Party's or discloser's Confidentiality Affiliates or a third party; (iv) is independently developed by the receiving Party or its Confidentiality Affiliates; or (v) is required to be disclosed by law, governmental regulation or applicable legal process. Seller acknowledges that Buyer is subject to regulation as a public utility, and as such may be required to disclose all or substantially all information provided by Seller pursuant to this Agreement by order of state and federal regulators, and that such disclosure shall in no event be deemed a violation of this Section 34.1. As to

Confidential Information that is not a trade secret under Applicable Law, the foregoing obligations shall expire three (3) years after the Closing Date.

(c) When required by the appropriate Governmental Authority, a Party may disclose the Confidential Information of the other Party to such Governmental Authority provided, however, that prior to making any such disclosure, such Party shall: (i) provide the owning Party with timely advance notice of the Confidential Information requested by such Governmental Authority and the intent of such Party to so disclose; (ii) minimize the amount of Confidential Information to be provided consonant with the interest of the owning Party, Seller, the Contractor, and each and every Subcontractor and the requirements of the Governmental Authority involved; and (iii) make every reasonable effort (which shall include participation by the owning Party, Seller, Contractor or any Subcontractor, as applicable in discussions with the Governmental Authority involved) to secure confidential treatment and minimization of the Confidential Information to be provided. In the event that efforts to secure confidential treatment are unsuccessful, the owning Party shall have the prior right to revise such information to minimize the disclosure of such Confidential Information in a manner consonant with its interest and the requirements of the Governmental Authority involved.

(d) Buyer's disclosure of Seller Drawings and Manuals to third parties in accordance with its obligations hereunder shall not be a breach of this article 34.

## **ARTICLE 35**

### **MISCELLANEOUS PROVISIONS**

#### **Section 35.1 Notices, Consents and Approvals**

Contact information for notices, requests, demands and other communications required or permitted hereunder is as follows:

(a) if to Seller, to:

with copies to:

or to such other person or address as Seller shall furnish to Buyer;

(b) if to Buyer, to:

PacifiCorp  
825 NE Multnomah, Suite 600  
Portland, Oregon 97232-2315

Attn: \_\_\_\_\_

Tel: \_\_\_\_\_

Fax: \_\_\_\_\_

with copies, in connection with default notices, to:

or to such other person(s) or address(es) as Buyer furnishes to Seller from time to time.

(c) All notices, including, acceptances, consents, approvals, agreements, deliveries of information, designations, requests, demands and other communications required or permitted hereunder shall be in writing, properly addressed as provided in paragraph (a) above, and given by (i) hand delivery, (ii) a national overnight courier service, (iii) confirmed facsimile transmission, followed by a hard copy, or (iv) certified or registered mail, return receipt requested, and postage prepaid. Any such notice or other communication shall be deemed to have been duly given as of the date delivered if by hand delivery, national overnight courier service or confirmed facsimile transmission (provided a hard copy promptly follows by other means provided herein), or five (5) calendar days after mailing if by certified or registered mail.

### **Section 35.2 Entire Agreement**

This Agreement, together with the appendices and exhibits delivered in connection with it, contains the entire agreement and understanding of the Parties with respect to the subject matter hereof and supersedes all prior agreements and understandings, whether written or oral, of the Parties relating to the subject matter hereof. Any oral or written representation, warranty, course of dealing or trade usage not contained or referenced herein shall not be binding on either Party.

### **Section 35.3 Amendment; Waiver**

No amendment or other modification of any provision of this Agreement shall be valid or binding unless it is signed by each of the Parties. No waiver of any provision of this Agreement shall be valid or binding unless it is signed by the Party waiving compliance with such provision. No delay on the part of either Party in exercising any right, power or privilege hereunder shall operate as a waiver thereof, nor shall any waiver or any partial exercise of any such right, power or privilege preclude any further exercise thereof or the exercise of any other such right, power or privilege. No waiver of any breach, term or condition of this Agreement by any Party shall constitute a subsequent waiver of the same or any other breach, term or condition.

### **Section 35.4 Successors and Assigns**

Each and all of the covenants, terms, provisions and agreements herein contained shall be binding upon and inure to the benefit of the Parties hereto and, to the extent permitted by this Agreement, their respective successors and assigns.

### **Section 35.5 Third Party Beneficiaries**

The provisions of this Agreement shall only be for the benefit of, and enforceable by, the Parties hereto and shall not inure to the benefit of or be enforceable by any third party.

### **Section 35.6 Severability**

In the event any one or more of the provisions contained in this Agreement should be held invalid, illegal or unenforceable in any respect, the validity, legality and enforceability of the remaining provisions contained herein shall not in any way be affected or impaired thereby.

### **Section 35.7 Further Assurances**

Each Party shall, at the request of the other, execute and deliver or cause to be executed and delivered such documents and instruments not otherwise specified herein, and take or cause to be taken all such other reasonable actions, as may be necessary or desirable to more fully and effectively carry out the intent and purposes of this Agreement, including, but not limited to requests for further assurances pertaining to executory performance obligations hereunder.

### **Section 35.8 Publicity**

Except as required by law, Seller agrees that Seller will not issue or release for external publication any press release, Article, advertising or other publicity matter in any form (including print, electronic, or interview) relating to the Project, or to this Agreement without first consulting with and obtaining the prior consent of Buyer, which consent shall not be unreasonably withheld or delayed.

### **Section 35.9 Independent Contractor**

Seller is an independent contractor with respect to the Work, and each part thereof, and in respect of all work to be performed hereunder. Neither Seller, the Contractor, nor any Subcontractor, the employees of any of such entities, employed in connection with the Work shall be deemed to be agents, representatives, joint ventures, employees or servants of Buyer by reason of their performance hereunder or in any manner dealt with herein. Neither Party shall perform any act or make any representation to any Person to the effect that Seller, or any of its agents, representatives, the Contractor or Subcontractors, is the agent of Buyer.

### **Section 35.10 Survival**

The provisions of Articles 4 (“Representations and Warranties of Seller”), 12 (“Seller’s Equipment”), 23 (“Warranties”), 24 (“Liquidated Damages”), 25 (“Limitations of Liability”), 26 (“Indemnification”), 27 (“Insurance”), 32 (“Claims, Claim Notice and Dispute Resolution”), and 34 (“Confidentiality”), and Sections 6.2 (“Security”), 7.10 (“Contractor Drawings and Manuals”), 7.13 (“Intellectual Property Rights and Computer Program Licenses”), Section 7.22 (“Maintenance of Buyer’s Lien”), Section 7.25 (“Other Liens”), 7.29 (“Environmental Matters”), 7.30 (“Records and Accounts”), 7.33 (“Construction Coordination Agreement”), 9.1 (“Site Regulations”), 9.2 (“Site Security”), 9.9 (“Cleanup”), 15.6 (“Buyer’s Use of Drawings”), 15.7 (“Manufacturing Drawings”), 22.4 (“Liability”), 29.3 (“Removal of Seller’s Equipment”), and 35.11 (“Governing Law; Waiver of Jury Trial”) of this Agreement shall survive the expiration or earlier termination of this Agreement

indefinitely, provided that the foregoing enumeration shall not be interpreted to bar survival of any other provision hereof which would otherwise be deemed to survive by operation of law.

#### **Section 35.11 Governing Law; Waiver of Jury Trial**

(a) THIS AGREEMENT SHALL BE GOVERNED BY, CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF UTAH (WITHOUT GIVING EFFECT TO THE PRINCIPLES THEREOF RELATING TO CONFLICTS OF LAW).

(b) EACH PARTY HEREBY IRREVOCABLY WAIVES ALL RIGHT OF TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT OR ANY OTHER TRANSACTION DOCUMENT OR ANY MATTER ARISING HEREUNDER OR THEREUNDER. EACH PARTY HEREBY WAIVES ANY RIGHT TO CONSOLIDATE ANY ACTION, PROCEEDING OR COUNTERCLAIM ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT OR ANY OTHER TRANSACTION DOCUMENT OR ANY MATTER ARISING HEREUNDER OR THEREUNDER IN WHICH A JURY TRIAL HAS NOT OR CANNOT BE WAIVED.

#### **Section 35.12 Counterparts**

This Agreement may be executed by the Parties in two or more separate counterparts (including by facsimile transmission), each of which shall be deemed an original, and all of said counterparts taken together shall be deemed to constitute one and the same instrument.

#### **Section 35.13 Captions**

The captions for Articles and Sections contained in this Agreement are for convenience and reference only and in no way define, describe, extend or limit the scope or intent of this Agreement or the intent of any provision contained herein.

#### **Section 35.14 Consent Agreements**

Seller agrees to cooperate with Buyer's efforts to obtain on a timely basis such direct agreements, consents, opinions and related documents from Project Parties or any of Seller's counterparties to any Additional Project Document as may be reasonably requested by Buyer, its financing parties, or any entity that is Controlled by or is under common Control with Buyer.

[THE NEXT PAGE IS THE SIGNATURE PAGE]

IN WITNESS WHEREOF, the authorized representatives of the Parties have executed this Agreement as of the first date set forth above:

**PACIFICORP,**  
as Buyer

By: \_\_\_\_\_

Print Name: \_\_\_\_\_

Title: \_\_\_\_\_

**Attest:**

By: \_\_\_\_\_

Print Name: \_\_\_\_\_

Title: \_\_\_\_\_

[\_\_\_\_\_, LLC],  
as Seller

By: \_\_\_\_\_

Print Name: \_\_\_\_\_

Title: \_\_\_\_\_

**Attest:**

By: \_\_\_\_\_

Print Name: \_\_\_\_\_

Title: \_\_\_\_\_