

**2018 Rocky Mountain Power Renewable Energy RFP  
Pro Forma**

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**BUILD TRANSFER AGREEMENT<sup>1</sup>**

by and between

[\_\_\_\_\_]

as Seller,

and

[PACIFICORP] d/b/a PACIFICORP d/b/a ROCKY MOUNTAIN POWER,

as Purchaser

[\_\_\_\_\_] , 2018

[NAME OF PROJECT]

[County], Utah

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<sup>1</sup> Further conforming changes will be required for a geothermal Project.

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## EXHIBITS

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Exhibit C – Forms of Assignment and Assumption Agreements

[Exhibit D – Form of Bargain and Sale Deed]<sup>3</sup>

Exhibit E – Form of EPC Agreement

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Schedule 5.10 – Construction Insurance Requirements<sup>7</sup>

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<sup>2</sup> NTD: To be deleted if replaced with alternative form of security acceptable to Purchaser in its sole discretion.

<sup>3</sup> NTD: To be deleted if the Project Site is not owned in fee by Seller, with applicable conforming changes to be made throughout this Agreement.

<sup>4</sup> NTD: For wind Projects only.

<sup>5</sup> NTD: Project Contracts shall include the Construction Agreements.

<sup>6</sup> NTD: To be provided by Purchaser.

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SELLER’S DISCLOSURE SCHEDULE

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<sup>7</sup> NTD: To be provided by Purchaser.

## **BUILD TRANSFER AGREEMENT**

**THIS BUILD TRANSFER AGREEMENT** (the “Agreement”) is made and entered into effective as of [\_\_\_\_], 2018 (the “Execution Date”), by and between [SELLER NAME], a [state] [entity type] (“Seller”), and **PACIFICORP d/b/a ROCKY MOUNTAIN POWER**, an Oregon corporation (“Purchaser”). Seller and Purchaser are also each referred to herein as a “Party” and collectively as the “Parties.”

### **RECITALS**

A. Purchaser is a public utility engaged in the generation, transmission, distribution and sale of electric energy, capacity and ancillary services in the state of Utah.

B. Seller holds or will as of the Closing hold all assets, properties, rights and interests of every kind, nature, character and description (whether real, personal, or mixed, whether tangible or intangible, and whether at or deliverable to the Project Site (as defined below)) which relate to or are used or held for use in connection with a [ground-mounted solar photovoltaic]<sup>8</sup> [wind-powered]<sup>9</sup> electric generating facility to be located in [County], Utah and known as [Common Name], which is nominally rated at approximately [\_\_\_\_] MW (dc) (the “Project”).<sup>10</sup>

C. Seller desires to sell and assign to Purchaser, and Purchaser desires to purchase and assume from Seller, all assets, properties, rights and interests of every kind, nature, character and description (whether real, personal, or mixed, whether tangible or intangible, and whether at or deliverable to the Project Site (as defined below)) of Seller which relate to or are used or held for use in connection with, and certain specified liabilities related to, the Project, all on the terms and subject the conditions set forth in this Agreement.

D. As an inducement to Purchaser entering into this Agreement, Seller has agreed to provide the Seller’s Parent Guaranty (as defined below), guaranteeing the obligations, including the indemnity obligations, of Seller under this Agreement.

**NOW, THEREFORE**, in consideration of the premises and the mutual representations, warranties, covenants and agreements set forth in this Agreement, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows.

### **AGREEMENT**

#### **ARTICLE I DEFINITIONS; USAGE**

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<sup>8</sup> NTD: For solar Projects only.

<sup>9</sup> NTD: For wind Projects only

<sup>10</sup> NTD: This Agreement has been prepared to accommodate solar and wind, Projects. Conforming changes will be required to accommodate geothermal Projects.



1.1 Definitions. Unless the context shall otherwise require, capitalized terms used in this Agreement shall have the meanings assigned to them in this Section 1.1.

“Acquisition Proposal” means any offer, proposal, inquiry or indication of interest from any third party relating to any transaction involving any acquisition or purchase by any Person (other than Purchaser or an Affiliate of Purchaser) of the Project, the Project Site or the Project Assets, or any interest therein.

“Action” means any suit, claim, proceeding, arbitration, audit or investigation by or before any Governmental Authority or arbitral tribunal.

“Affiliate” of any Person means any other Person directly or indirectly Controlling, directly or indirectly Controlled by or under direct or indirect common Control with such Person; provided, however, with respect to Purchaser, the term “Affiliate” does not include Berkshire Hathaway Inc. or any of its affiliates (other than PacifiCorp d/b/a Rocky Mountain Power and any direct or indirect subsidiaries of PacifiCorp d/b/a Rocky Mountain Power), and no provision of this Agreement shall apply to, be binding on, create any liability of or otherwise restrict the activities of Berkshire Hathaway Inc. or any of its affiliates (other than PacifiCorp d/b/a Rocky Mountain Power and any direct or indirect subsidiaries of PacifiCorp d/b/a Rocky Mountain Power).

“Agreement” has the meaning set forth in the Preamble of this Agreement.

“Ancillary Agreements” means those other documents, instruments, certificates or agreements as may be executed and delivered by one or both Parties in connection with this Agreement and the transactions contemplated hereby, including the Bill of Sale, the Assignment and Assumption Agreements, the Bargain and Sale Deed, the Construction Agreements, the Construction Completion Agreement, and the O&M Agreement.

“Approved Construction Costs” means any Construction Costs that: (a) consistent with Good Operating Practices and applicable Law, must be incurred prior to (and cannot be delayed, consistent with Good Operating Practices and applicable Law, until after) the UPSC Approval Deadline in order to achieve Commercial Operation by the Commercial Operation Deadline; (b) Seller requests prior written approval from Purchaser to incur such Construction Costs prior to the UPSC Approval Deadline, such request to provide specific details as to the Construction Costs and the reasons Seller believes such Construction Costs must be incurred prior to the applicable UPSC Approval Deadline; and (c) Purchaser approves in writing Seller incurring such Construction Costs, such approval to be in Purchaser’s sole discretion.

“Assignment and Assumption Agreements” has the meaning set forth in Section 2.5.1(b).

“Assumed Liabilities” has the meaning set forth in Section 2.1.4(b).

“Bargain and Sale Deed” means the grant, bargain, sale deed in substantially the form of

Exhibit D to this Agreement.<sup>11</sup>

“Begin Construction Guidance” means Section 48 of the Code (including Section 48(a)(2), (5), and (6)), Section 45 of the Code (including Section 45(b)(5) and (d)), and Internal Revenue Service Notices 2013-29, 2013-60, 2014-46, 2015-25, 2016-31 and 2017-04, and any amendment, clarification, addition or supplement thereto, or replacement thereof.<sup>12</sup>

“Bill of Sale” has the meaning set forth in Section 2.5.1(a).

“Books and Records” means any and all data, books, records, files, documents, instruments, papers, correspondence that can be reasonably and practically provided, journals, deeds, licenses, Permits, Resource Data, computer files and programs, studies and reports (including environmental and construction studies and reports), annual operating plans, monthly operating reports, operating logs, operations and maintenance records, purchase orders, safety and maintenance manuals, incident reports, standard OSHA logs, engineering design plans, blue prints and as-built plans, records, drawings, specifications, test reports, quality documentation and reports, hazardous waste disposal records, training records, procedures and similar items, in each case, (a) in all formats in which they are reasonably and practically available, including electronic, where applicable, and (b) in the possession or control of Seller or its Affiliates and to the extent the same relates to Seller, the Project Site or the Project, including the Project Assets, but excluding any Excluded Assets.

“Business Day” means any day except Saturday, Sunday or a weekday that banks in Salt Lake City, Utah or New York, New York are authorized or obligated to close.

“Claim Threshold” has the meaning set forth in Section 8.4.1.

“Closing” has the meaning set forth in Section 2.4.

“Closing Date” has the meaning set forth in Section 2.4.

“Closing Deadline” means [\_\_\_\_\_].<sup>13</sup>

“Closing Payment” means the Payment payable to Seller at the Closing, subject to the terms and conditions of Schedule 2.2.1.

“Code” means the Internal Revenue Code of 1986, as amended.

“Commercial Operation Date” means the date on which the Project has achieved [Substantial Completion]<sup>14</sup> [Project Mechanical Completion]<sup>15</sup> (as such term is defined in the EPC Agreement) pursuant to and in accordance with the EPC Agreement.

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<sup>11</sup> NTD: To be deleted if the Project Site is not owned in fee by Seller, with applicable conforming changes to be made throughout this Agreement.

<sup>12</sup> NTD: To be updated to reflect changes pursuant to tax reform/extenders.

<sup>13</sup> NTD: To be provided by Purchaser consistent with the RFP requirements.

<sup>14</sup> NTD: For solar Projects only.

<sup>15</sup> NTD: For wind Projects only.

“Commercial Operation Deadline” means the [Guaranteed Substantial Completion Date]<sup>16</sup> [Guaranteed Mechanical Completion Date]<sup>17</sup> (as such term is defined in the EPC Agreement).

“Commercial Operation Payment” means the Payment to be made in connection with the occurrence of the Commercial Operation Date, subject to the terms and requirements of Section 2.2.1 and Schedule 2.2.1.

“Confidentiality Agreement” means the [Nondisclosure Agreement] dated as of [\_\_\_\_], 2018, by and between Purchaser and Seller.

“Construction Agreements” means the EPC Agreement, [the Turbine Supply Agreement, the Service and Maintenance Agreement]<sup>18</sup> and the O&M Agreement.

“Construction Completion Agreement” means the Construction Completion Management Agreement by and between Seller and Purchaser, which shall be substantially and in all material respects in the form of Exhibit F.

“Construction Contractors” means every Person (other than Seller or Purchaser) who is party to a Construction Agreement, including the EPC Contractor [and the Turbine Supplier].<sup>19</sup>

“Construction Costs” means the aggregate of any and all costs and expenses incurred or accrued by Seller, any of its Affiliates or any other Person to site, design, develop, engineer, procure, supply, construct, interconnect, permit, startup, commission or test the Project or any parts or components thereof or materials used therein, in each case, in order for the Project to achieve Final Completion, including all amounts owing under the Project Contracts; provided, however, that “Construction Costs” shall not include any such amounts owing under the Construction Agreements that are the result of any Change Order (as it (or any similar term) is defined in the Construction Agreements) that is issued by Purchaser after the Closing Date without the express written consent of Seller and such Change Order (as it (or any similar term) is defined in the Construction Agreements) results in an increased payment obligation due to the Construction Contractor (other than such Change Orders (as it (or any similar term) is defined in the Construction Agreements) that are necessary to maintain the Project schedule or ensure compliance with the requirements of this Agreement).

“Contract” means any agreement, lease, license (other than a Permit), note, bond, evidence of Indebtedness, mortgage, indenture, security agreement, purchase order, binding bid or other instrument or contract, whether written or oral.

“Control” of any Person means the possession, directly or indirectly, of the power either to (a) vote fifty percent (50%) or more of the securities or interests having ordinary voting power for the election of directors (or other comparable controlling body) of such Person or (b) direct or cause the direction of management or policies of such Person, whether through the ownership of

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<sup>16</sup> NTD: For solar Projects only.

<sup>17</sup> NTD: For wind Projects only.

<sup>18</sup> NTD: For wind Projects only.

<sup>19</sup> NTD: For wind Projects only.

voting securities or interests, by contract or otherwise, excluding in each case, any secured lender of such Person.

“Credit Support Obligations” means any and all obligations relating to deposits, guaranties, letters of credit, bonds, indemnities, other credit assurances of a comparable nature (including cash posted as credit support) made or issued by or on behalf of Seller or any Affiliate of Seller for the benefit of the Project.

“Default Rate” means the lesser of: (a) the prime rate under “Money Rates” as reported in the Wall Street Journal on the first Business Day of the month during which interest is payable plus two percent (2%); and (b) the maximum rate of interest permitted to be charged by applicable Law.

“

“Disclosure Schedule Update” has the meaning set forth in Section 5.11.2.

“Easements” means easements, rights-of-way, licenses, occupancy or encroachment permits, or similar entitlements which are used, or to be used, for or in the development, construction, ownership, operation, use or maintenance of the Project.

“Environmental Condition” means the Release to the environment of Hazardous Materials, including any migration of Hazardous Materials through air, soil or water.

“Environmental Attributes” means any and all attributes of the Project (including all renewable energy credits and similar credits associated with such attributes) that are created or otherwise arise from the Project’s generation of electricity using solar generation technologies, including any avoided, reduced, displaced or off set emissions of pollutants to the air, soil or water such as sulfur dioxides (SO<sub>2</sub>), nitrogen oxides (NO<sub>x</sub>), carbon monoxide (CO), mercury (Hg), carbon dioxide (CO<sub>2</sub>), any other greenhouse gas (GHG) that contributes to the actual or potential threat of altering the Earth’s climate, and any other pollutant that is now or may in the future be regulated under federal, state or local pollution control Laws, regulations or ordinances, including those implemented under the federal Clean Air Act, 42 U.S.C. § 7401 et seq. and any equivalent state Laws, or any voluntary rules, guidelines or programs. Forms of Environmental Attributes include any and all environmental air quality credits, green credits, carbon credits, emissions reduction credits, certificates, tags, offsets, allowances, or similar products or rights, howsoever entitled, (a) resulting from the avoidance of the emission of any gas, chemical, or other substance, including mercury, nitrogen oxide, sulfur dioxide, carbon dioxide, carbon monoxide, particulate matter or similar pollutants or contaminants of air, water, or soil gas, chemical, or other substance, and (b) attributable to the generation, purchase, sale or use of [solar]<sup>20</sup> [wind]<sup>21</sup> energy generated by use of [solar]<sup>22</sup> [wind]<sup>23</sup> generation technologies by the Project, or otherwise attributable to the Project. Environmental Attributes include those

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<sup>20</sup> NTD: For solar Projects only.

<sup>21</sup> NTD: For wind Projects only.

<sup>22</sup> NTD: For solar Projects only.

<sup>23</sup> NTD: For wind Projects only.

currently existing or after-arising under local, state, regional, federal, or international legislation or regulation or voluntary program, including any such legislation, regulation or program administered by the United Nations Framework Convention on Climate Change, the United States Environmental Protection Agency, or any other Governmental Authority.

“Environmental Law” means any applicable Law that is in effect as of the Closing Date and relates to pollution, occupational safety, protection of occupational health or the protection of the environment, including, without limitation, (a) the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 et seq., (b) the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 et seq., (c) the Federal Water Pollution Control Act, 33 U.S.C. § 1251 et seq., (d) the Clean Air Act, 42 U.S.C. § 7401 et seq. (“CAA”), (e) the Hazardous Materials Transportation Authorization Act of 1994, 49 U.S.C. § 5101 et seq., (f) the Occupational Safety and Health Act, 29 U.S.C. § 651 et seq., (g) the Toxic Substances Control Act, 15 U.S.C. §§ 2601 through 2629, (h) the Oil Pollution Act, 33 U.S.C. § 2701 et seq., (i) the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11001 et seq., (j) the Safe Drinking Water Act, 42 U.S.C. §§ 300f through 300j, (k) the Federal Insecticide, Fungicide, & Rodenticide Act, 7 U.S.C. § 136 et seq., (l) the Endangered Species Act, 16 U.S.C. § 1531 et seq., (m) the Clean Water Act, 33 U.S.C. § 1251 et seq., (n) National Environmental Policy Act, 42 U.S.C. § 55 et seq., (o) the Migratory Bird Treaty Act, 16 U.S.C. § 703 et seq., (p) the Bald and Golden Eagle Protection Act, (q) Archeological Resources Protection Act, 16 U.S.C. § 470aa et seq. and (r) state equivalents to items (a) through (q).

“Environmental Permit” means any Permit pertaining to any Environmental Law.

“EPC Agreement” means [that certain Engineering, Procurement and Construction Agreement]<sup>24</sup> [Balance of Plant Engineering, Procurement and Construction Agreement]<sup>25</sup> by and between Seller and the EPC Contractor, which shall be substantially and in all material respects in the form of Exhibit E.

“EPC Contractor” means the counterparty (other than Seller) to the EPC Agreement.

“ERISA” means the Employee Retirement Income Security Act of 1974, as amended.

“ERISA Affiliate” means any entity that, together with a Person, would be deemed a single employer within the meaning of Code Section 414(b), (c), or (m) or ERISA Section 4001(b).

“Excluded Assets” means the items listed on Schedule 1.1(a).

“Excluded Liabilities” has the meaning set forth in Section 2.1.4(a).

“Execution Date” has the meaning set forth in the Preamble of this Agreement.

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<sup>24</sup> NTD: For solar Projects only.

<sup>25</sup> NTD: For wind Projects only.

[“Facility” means “facility” within the meaning of Code Section 45(d)(1) and Internal Revenue Service Revenue Ruling 94-31.]<sup>26</sup>

“Federal Power Act” means the Federal Power Act of 1935, as amended.

“FERC” means the Federal Energy Regulatory Commission or any successor.

“FERC Approval” means a final order issued by FERC under Section 203 of the Federal Power Act approving the transactions contemplated hereby that: (a) does not contain any conditions imposed on, or modifications required of, Purchaser that Purchaser determines adversely affects its decision to acquire the Project, including the Project Assets; and (b) does not contain any conditions imposed on, or modifications required of, Seller that Seller determines adversely affects its decision to sell the Project, including the Project Assets.<sup>27</sup>

“Final Completion” has the meaning set forth in the EPC Agreement.

“Final Completion Date” has the meaning set forth in the EPC Agreement.

“Fundamental Purchaser Representations” means the representations and warranties set forth in Section 4.1 (Existence), Section 4.2 (Authority), Section 4.3 (Binding Agreement) and Section 4.7 (Brokers).

“Fundamental Seller Representations” means the representations and warranties set forth in Section 3.1 (Existence), Section 3.2 (Authority), Section 3.3 (Limited Purpose Entity), Section 3.4 (Binding Agreement), Section 3.9 (Title to Project Assets), Section 3.10.1 (Real Property) and Section 3.20 (Brokers).

“GAAP” means generally accepted accounting principles in the United States of America applied on a consistent basis.

“Good Operating Practices” means, with respect to the Project, the practices, methods and acts generally engaged in or approved by a significant portion of the electric power industry in the United States for similarly situated facilities in the United States during a particular period, or any of such practices, methods and acts, which, in the exercise of reasonable judgment in light of the facts known at the time a decision is made, would be expected to accomplish the desired result in a manner consistent with applicable Law, reliability, safety, environmental protection, economy and expedition, the Project Contracts and the other Contracts affecting the construction, ownership, use, operation and maintenance of the Project. Without limiting the foregoing, Good Operating Practices are not intended to be limited to the optimum practices, methods or acts, to the exclusion of all others, but rather to include a spectrum of possible practices, methods or acts generally acceptable in the region during the relevant period in light of the circumstances.

“Governmental Authority” means any federal or state entity, authority, agency, court, tribunal, department, board, commission or other body or political subdivision thereof, including any municipality, township and county, and any entity exercising executive, legislative, judicial,

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<sup>26</sup> NTD: For wind Projects only.

<sup>27</sup> NTD: All references to FERC Approval in this Agreement shall apply, only if applicable.

regulatory or administrative functions of or pertaining to government, including any corporation or other entity owned or controlled by any of the foregoing.

“Hazardous Materials” means: (a) any substance, emission or material defined as or listed in any Environmental Law as a “regulated substance,” “hazardous substance,” “toxic substance,” “pesticide,” “hazardous waste,” “hazardous material,” “waste,” “pollutant,” “contaminant” or words of similar import in any Environmental Law; or (b) any products or substances containing petroleum, friable asbestos, polychlorinated biphenyls or radioactive materials.

“HSR Act” means the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended.<sup>28</sup>

“Indebtedness” means any of the following: (a) any indebtedness for borrowed money, whether secured or unsecured; (b) any obligations evidenced by bonds, debentures, notes or other similar instruments; (c) any obligations to pay the deferred purchase price of property or services, except trade accounts payable, accrued compensation or similar obligations arising in the ordinary course of business, consistent with past practice; (d) any obligations as lessee under capitalized leases; (e) any obligations, contingent or otherwise, under acceptances, letters of credit or similar facilities; (f) any obligations created or arising under conditional sale or title retention agreements; (g) any net obligations payable under any rate, currency, commodity or other swap, option or derivative agreement; (h) any obligations secured by (or for which the holder of such obligation has an existing right, contingent or otherwise, to be secured by) any Lien on property (other than Permitted Liens); and (i) any guaranty of any of the foregoing.

“Indemnified Party” has the meaning set forth in Section 8.3.1.

“Indemnifying Party” has the meaning set forth in Section 8.3.1.

“Independent Accounting Firm” means such nationally recognized, independent accounting firm as is mutually appointed by Purchaser and Seller for purposes of this Agreement.

“Insurance Policies” has the meaning set forth in Section 5.10.2.

“Intellectual Property” means: (a) patents and industrial designs (including any continuations, divisionals, continuations-in-part, renewals, reissues and applications for any of the foregoing); (b) copyrights (including any registrations and applications for any of the foregoing); (c) trademarks, service marks, trade names, logos, slogans, trade dress and applications for registration of the foregoing; and (d) trade secrets and confidential information, including confidential know-how, processes, formulae, algorithms, models or methodologies.

“ITC” means the energy credit pursuant to Section 48 of the Code.

“Law” means any applicable statute, law, treaty, rule, code, common law, ordinance, regulation, certificate or order of any Governmental Authority, or any judgment, decision,

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<sup>28</sup> NTD: All references to HSR Act in this Agreement shall apply, only if applicable.

decree, injunction, writ, order or like action of any court, arbitrator or other Governmental Authority, including each Environmental Law.

“Liability” means any Indebtedness and other obligations of a Person (whether absolute, accrued, contingent, fixed or otherwise, or whether due or to become due).

“Lien” means any mortgage, pledge, deed of trust, hypothecation, assignment, deposit arrangement, charge, security interest, encumbrance, lien (statutory or other) or preference, priority or other security agreement of any kind or nature whatsoever, any conditional sale or other title retention agreement, any financing lease having substantially the same effect as any of the foregoing or the filing of any financing statement or similar instrument under the Uniform Commercial Code as in effect in any relevant jurisdiction or comparable Law of any jurisdiction, domestic or foreign.

“Loss” means any judgment, amount paid in settlement, damage, fine, penalty, deficiency, replacement power cost, Liability, loss or expense (including interest, court costs, reasonable fees and expenses of attorneys, accountants and other experts or other reasonable expenses of litigation or other proceedings or of any claim, default or assessment).

“O&M Agreement” means the Operation and Maintenance Agreement by and between Seller and Operator, which shall be substantially and in all material respects in the form of Exhibit G.

“Objectionable Title and Survey Matters” has the meaning set forth in Section 5.7.4.

“Objectionable Title and Survey Matters Required to be Cured” means any matters shown on the Title Insurance Commitment or the Survey (other than Permitted Liens) that: (a) relate to a fee mortgage that is superior to any Project Real Property Agreements that could be cured by the provision of a nondisturbance and attornment agreement acceptable to Purchaser in its reasonable discretion, or the payment of funds to have such mortgage released; (b) relate to overdue tax payments, mechanics liens, judgment liens, or other, similar liens on the fee property that could be released with the payment of funds; (c) as to each individual non-monetary Lien, could be cured with the payment of monetary consideration not to exceed twenty-five thousand dollars (\$25,000); (d) could be cured with endorsements to the Title Insurance Policy that are acceptable to Purchaser in its reasonable discretion and required to address Objectionable Title and Survey Matters; (e) if not cured could materially detract from the value or materially interfere with the operation of the Project, as determined by Purchaser in its reasonable discretion; or (f) [\_\_\_\_\_].<sup>29</sup>

“Operator” means the counterparty (other than Seller) to the O&M Agreement.

“Outside Date” has the meaning set forth in Section 7.1.5.

“Overlap Period” means any taxable period beginning on or before and ending after the

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<sup>29</sup> NTD: Purchaser to provide additional Objectionable Title and Survey Matters Required to be Cured based on facts and circumstances of the Project Site and Project Real Property Documents.



Closing Date.

“Overlap Period Taxes” means any Taxes (other than Seller Income Taxes) imposed on or with respect to the Project Assets or Seller for an Overlap Period.

“Party” and “Parties” have the meanings set forth in the Preamble of this Agreement.

“Payment” and “Payments” have the meanings set forth in Section 2.2.1.

“Permits” means registrations, permits, licenses, authorizations, consents, approvals, grants, franchises, variances, certificates of authority, letter rulings, or similar rights and privileges granted by or obtained from any Governmental Authority, as well as applications for any of the foregoing.

“Permitted Encumbrances” has the meaning set forth in Section 5.7.4.

“Permitted Liens” means: (a) those Liens set forth in Schedule 1.1(b); (b) zoning, entitlement, conservation restriction and other land use and environmental regulations by any Governmental Authority; (c) Liens for Taxes and other governmental charges and assessments which are not yet due and payable or which are being contested in good faith by appropriate proceedings and for which adequate reserves have been made; (d) mechanics’, carriers’, workers’, repairers’ and other similar Liens arising or incurred in the ordinary course of business which are not yet due and payable; (e) Liens expressly granted under, or created by, existing or pursuant to, the terms and conditions of the Project Contracts; (f) Liens created pursuant to, or as a result of the existence of, this Agreement or any Ancillary Agreement; (g) any Liens approved or consented to in writing by Purchaser; and (h) Liens relating to any Excluded Asset or Excluded Liability.

“Person” means any individual, corporation, partnership, joint venture, association, joint stock company, trust, limited liability company, unincorporated organization, Governmental Authority or any other form of entity.

“Placed In Service” means “placed in service” for purposes of Sections 45, 48, or 168 of the Code.

“Post-Closing Tax Period” means any taxable period ending after the Closing Date, or with respect to any Overlap Period, the portion of such Overlap Period that begins the day after the Closing Date.

“Pre-Closing Books and Records” has the meaning set forth in Section 2.6.2(a).

“Pre-Closing Tax Period” means any taxable period ending on or before the Closing Date, or with respect to any Overlap Period, the portion of such Overlap Period ending on the Closing Date.

“Pre-Closing Taxes” has the meaning set forth in Section 9.3.

“Preliminary Title Report” has the meaning set forth in Section 5.7.1.

“Project” has the meaning set forth in the Recitals to this Agreement.

“Project Assets” means all assets, properties, rights and interests of every kind, nature, character and description (whether real, personal or mixed, whether tangible or intangible, and whether at or deliverable to the Project Site), and any goodwill related thereto, owned or leased by, or licensed to, Seller as of the Closing Date, in each case, which relate to or are used or held for use in connection with the development, construction, operation, maintenance, repair, ownership or use of the Project (other than the Excluded Assets), including,:

- (a) the Books and Records;
- (b) the Project Site;
- (c) the Project Contracts;
- (d) the Project Real Property Agreements;
- (e) the Project Fixtures and Equipment;
- (f) the Project Improvements;
- (g) the Project Intellectual Property;
- (h) the Project Permits (other than the Purchaser Permits);
- (i) the Reports; and
- (j) the Resource Data.

“Project Contracts” means all Contracts to which Seller or any of its Affiliates is a party with respect to the Project or the Project Assets (other than the Project Real Property Agreements), including the Construction Agreements and the Construction Completion Agreement, all of which are listed on Schedule 1.1(c).

“Project Fixtures and Equipment” means all fixtures, equipment, construction in progress and other tangible personal property related to, used or held for use by Seller or any of its Affiliates for or in connection with the development, construction, operation, maintenance, repair, ownership or use of the Project, in each case, whether located at or deliverable to the Project Site, other than the Excluded Assets, all of which are listed on Schedule 1.1(d).

“Project Improvements” means all buildings, structures, fixtures, improvements and the point of interconnection with the Transmission Provider located at or on the Project Site that will comprise the Project and Project Assets, all of which are listed on Schedule 1.1(e).

“Project Intellectual Property” means all Intellectual Property and licenses to use such Intellectual Property owned or held by Seller or any of its Affiliates and used or held for use with

respect to the Project or the Project Assets, all of which are listed on Schedule 1.1(f).

“Project Permits” means all Permits required by applicable Law and Good Operating Practices for the development, design, engineering, supply, construction, installation, testing, commissioning, operation, maintenance, repair, ownership and use of the Project at the Project Site (except for immaterial Permits or ministerial Permits of a type that are routinely granted on application), all of which are listed on Part A of Schedule 1.1(g).

“Project Real Property Agreements” means all Contracts, instruments, deeds for fee, leasehold or subleasehold, Easements and any other interest in real property, including any Contracts for real property rights granted by the State of Utah or any other Governmental Authority (including any option to acquire the same), and all amendments, assignments, and modifications thereto and all schedules and exhibits attached thereto, which comprise the Project Site, to which Seller is a party or by which Seller or any of the Project Assets are bound, and that grant, convey, assign or otherwise affect real property interests relating to the Project Site, all of which are listed on Schedule 1.1(h).

“Project Site” means the real property located in [County], Utah, including the Easements, upon which the Project, its interconnection and transmission facilities and its access rights will be located, as further described on Schedule 1.1(i).

“PTC” means the renewable energy production tax credit pursuant to Section 45 of the Code.

“Purchase Price” means the aggregate amount of all Payments paid to Seller pursuant to this Agreement, subject to adjustment, if any, as provided for in this Agreement.

“Purchase Price Allocation Schedule” has the meaning set forth in Section 2.3.

“Purchaser” has the meaning set forth in the Preamble of this Agreement.

“Purchaser Indemnified Party” has the meaning set forth in Section 8.1.

“Purchaser Material Adverse Effect” means a material adverse effect on the ability of Purchaser to perform its obligations under this Agreement or any Ancillary Agreement to which it is a party or to complete the transactions contemplated hereby or thereby.

“Purchaser Permits” means the Project Permits required by applicable Law and Good Operating Practices to be obtained by Purchaser in connection with the development, design, engineering, supply, construction, installation, testing, commissioning, operation, maintenance, repair, ownership and use of the Project at the Project Site (except for immaterial Permits or ministerial Permits of a type that are routinely granted on application), all of which are listed on Part D of Schedule 1.1(g).

“Purchaser’s Consents” has the meaning set forth in Section 4.4.2.

“Purchaser’s Disclosure Schedule” means the Schedules prepared by Purchaser and

delivered to Seller in conjunction with the execution of this Agreement.

“Purchaser’s Knowledge” means the actual knowledge, after due inquiry, of the Persons listed on Schedule 1.1(j).

“Related Person” means with respect to each Party, its Affiliates, and the employees, officers and directors of such Party and its Affiliates.

“Release” means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, seeping, or disposing to the environment (including the abandonment or discarding of barrels, containers, and receptacles containing Hazardous Materials).

“Remediation” means actions required under Environmental Laws or by a Governmental Authority, or a claim by a third party against a Purchaser Indemnified Party, in each case to address an Environmental Condition, including any monitoring, investigation, assessment, characterization, treatment, cleanup, containment, removal, mitigation, response or restoration work.

“Renewable Energy Incentives” means: (a) federal, state or local tax credits or other tax benefits (such as accelerated depreciation, the ITC, or the PTC) associated with the construction or ownership of, or the sale or production of electricity from, the Project, including any investment tax credits, production tax credits or governmental payments made in lieu of such credits; (b) any federal, state or local grants, rebates, subsidized financing or any other subsidy relating to the property of the Project or the output thereof; and (c) any other form of incentive that is not an Environmental Attribute that is available with respect to the Project.

“Reports” means all final material third party reports, studies, analyses and tests (and all amendments and supplements thereto) prepared for, or commissioned by, and delivered to, Seller or any of its Affiliates that relate to the Project, including the Project Assets, or the Project Site, including Phase I environmental assessments, environmental impact studies, geotechnical studies, transportation studies, cultural resources studies, transmission or interconnection studies, including interconnection system impact studies, wildlife studies, studies or analysis of or reports on the environmental condition of the Project Site or compliance by the Project or the Project Site with Environmental Laws, Federal Aviation Administration analyses, state department of transportation analyses, zoning studies, visual impact studies, and wetlands studies, in each case, together with all necessary reliance letters and in form and substance reasonably acceptable to Purchaser, all of which are described in Schedule 1.1(k).

“Reports Cut-Off Date” has the meaning set forth in Section 7.1.6.

“Representatives” means, as to any Person, its officers, directors, employees, agents, partners, members, stockholders, counsel, accountants, investment bankers, engineers, consultants and other representatives or advisors.

“Resource Data” means, all [solar irradiance]<sup>30</sup> [wind]<sup>31</sup> and meteorological data with respect to the Project or related to the Project Site from the meteorological station located at the Project Site and generated prior to the Execution Date, all of which data is listed in or attached to Schedule 1.1(l).

“Retained Information” has the meaning set forth in Section 2.6.2(b).

“Schedule” or “Schedules” means one or more of the disclosure schedules attached hereto.

“Seller” has the meaning set forth in the Preamble to this Agreement.

“Seller Income Taxes” means any franchise or similar Taxes imposed on, or Taxes imposed on, or measured by reference to, the net income or net worth of, Seller or any Affiliate of Seller.

“Seller Indemnified Party” has the meaning set forth in Section 8.2.

“Seller Material Adverse Effect” means any change or changes that is, or in the aggregate are, materially adverse to: (a) the business, assets, operations, property or condition of Seller or Seller’s Parent Guarantor; (b) the business, assets, operations, construction, ownership, use or condition of the Project or the Project Assets; (c) the validity or enforceability of this Agreement or the Ancillary Agreements or the transactions contemplated hereby or thereby; or (d) the ability of Seller to perform its obligations under this Agreement or the Ancillary Agreements to which Seller is a party or to complete the transactions contemplated hereby or thereby; provided, however, that the term “Seller Material Adverse Effect” shall not include: (i) changes or developments in the international, national or regional electric industry in general, including effects on such industry resulting from any new regulatory and political conditions or developments; (ii) changes or developments in general national or regional economic or financial conditions; (iii) changes or developments in financial and securities markets in the United States; or (iv) changes or developments in Law; provided, further, that the foregoing shall not apply with respect to clauses (i) through (iv) if the impact of such event, individually or in the aggregate, is materially disproportionately adverse to the Project, the Project Assets, Seller or Seller’s Parent Guarantor as compared with other projects or participants in the relevant businesses or geographic area.

“Seller’s Consents” has the meaning set forth in Section 3.5.2.

“Seller’s Disclosure Schedule” means the Schedules prepared by Seller and delivered to Purchaser in conjunction with the execution of this Agreement.

“Seller’s Knowledge” means the actual knowledge, after due inquiry, of the Persons listed on Schedule 1.1(m).

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<sup>30</sup> NTD: For solar Projects only.

<sup>31</sup> NTD: For wind Projects only.

“Seller’s Parent Guarantor” means [\_\_\_\_\_].<sup>32</sup>

“Seller’s Parent Guaranty” means the Guaranty substantially and in all material respects in the form of Exhibit A, pursuant to which Seller’s Parent Guarantor guarantees the payment and performance of Seller’s obligations under this Agreement, including the indemnification obligations as set forth in ARTICLE VIII and ARTICLE IX, in the maximum amount of [\_\_\_\_\_] (\$[\_\_\_\_\_]), representing one hundred percent (100%) of the Purchase Price.

“Seller’s Title/Survey Objection Response” has the meaning set forth in Section 5.7.4.

[“Service and Maintenance Agreement” means the Service and Maintenance Agreement by and between Seller and Turbine Supplier, which shall be substantially and in all material respects in the form of Exhibit I.]<sup>33</sup>

“Substantial Completion” has the meaning set forth in the EPC Agreement.

“Survey” has the meaning set forth in Section 5.7.2.

“Surveyor” has the meaning set forth in Section 5.7.2.

“Tax” or “Taxes” means any and all taxes, including any interest, penalties or other additions to tax that may become payable in respect thereof, imposed by any foreign, federal, state or local government or any agency or political subdivision of any such government, which taxes shall include all income taxes, profits taxes, taxes on gains, alternative minimum taxes, estimated taxes, payroll and employee withholding taxes, unemployment insurance taxes, social security taxes, welfare taxes, disability taxes, severance taxes, license charges, taxes on stock, sales and use taxes, ad valorem taxes, value added taxes, excise taxes, franchise taxes, gross receipts taxes, business license taxes, occupation taxes, real or personal property taxes, stamp taxes, environmental taxes, transfer taxes, workers’ compensation taxes and other taxes, fees, duties, levies, customs, tariffs, imposts, assessments, obligations and charges of the same or of a similar nature to any of the foregoing.

“Tax Returns” means any return, report, rendition, information return, claim for refund or other document (including any related or supporting information) supplied to or required to be supplied to any Taxing Authority with respect to Taxes, including any attachments, amendments and supplements thereto.

“Taxing Authority” means, with respect to any Tax, the Governmental Authority or political subdivision thereof that imposes such Tax and the agency (if any) charged with the collection of such Tax for such entity or subdivision.

“Title and Survey Objection Notice” has the meaning set forth in Section 5.7.

“Title Company” means [\_\_\_\_\_].

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<sup>32</sup> NTD: Seller’s Parent Guarantor to be provided by Seller and acceptable to Purchaser.

<sup>33</sup> NTD: For wind Projects only

“Title Insurance Commitment” has the meaning set forth in Section 5.7.3.

“Title Insurance Policy” has the meaning set forth in Section 5.7.3.

“Transfer Taxes” has the meaning set forth in Section 9.2.

“Transmission Provider” means [PacifiCorp d/b/a Rocky Mountain Power], acting in its capacity of providing generator interconnection and transmission services under the terms of its Open Access Transmission Tariff on file with the FERC, as it may be amended from time to time, or its successors or assigns.

[“Turbine Supplier” means the counterparty (other than Seller) to the Turbine Supply Agreement, which shall be a turbine supply manufacturer listed on Schedule 1.1(n) or otherwise a first-tier turbine supply manufacturer acceptable to Purchaser in its sole discretion.

“Turbine Supply Agreement” means that certain Turbine Supply Agreement by and between Seller and Turbine Supplier, which shall be substantially and in all material respects in the form of Exhibit H.]<sup>34</sup>

“UAC” means the Utah Administrative Code, as amended through the date hereof.

“UPSC” means the Utah Public Services Commission or any successor.

“UPSC Approval” means [\_\_\_\_\_].

“UPSC Approval Deadline” means [\_\_\_\_\_].

“UTC” means the Utah Code, as amended through the date hereof.

1.2 Rules as to Usage. Except as otherwise expressly provided herein, the following rules shall apply to the usage of terms in this Agreement:

(a) The terms defined above have the meanings set forth above for all purposes, and such meanings are equally applicable to both the singular and plural forms of the terms defined. If a term is defined as one part of speech (such as a noun), it shall have a corresponding meaning when used as another part of speech (such as a verb).

(b) “Include,” “includes” and “including” shall be deemed to be followed by “without limitation” whether or not they are in fact followed by such words or words of like import.

(c) “Writing,” “written” and comparable terms refer to printing, typing, and other means of reproducing in a visible form.

(d) Any Law defined or referred to herein means such Law as from time to time amended, modified or supplemented, including by succession of comparable successor Law

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<sup>34</sup> NTD: For wind and integrated wind/storage Projects only.

and any rules and regulations promulgated thereunder.

(e) References to a Person are also to its permitted successors and assigns.

(f) “Hereof,” “herein,” “hereunder” and comparable terms refer, unless otherwise expressly indicated, to the entire agreement or instrument in which such terms are used and not to any particular article, section or other subdivision thereof or exhibit or schedule or other attachment thereto. References in an instrument to “Article,” “Section” or another subdivision or to an exhibit, schedule or other attachment are, unless the context otherwise requires, to an article, section, subsection or subdivision of or an exhibit or schedule or other attachment to such agreement or instrument.

(g) Pronouns, whenever used in any agreement or instrument that is governed by this Agreement and of whatever gender, shall include all Persons. References to any gender include, unless the context otherwise requires, references to all genders.

(h) The word “or” will be deemed to be disjunctive but not necessarily exclusive (i.e., unless the context dictates otherwise, “or” will be interpreted to mean “and/or” rather than “either/or”). “Shall” and “will” have equal force and effect.

(i) Whenever the consent or approval of any Party is required pursuant to this Agreement, unless expressly stated that such consent or approval is to be given in the sole discretion of such Party, such consent or approval shall not be unreasonably withheld, conditioned or delayed.

(j) Whenever this Agreement refers to a number of days, such number shall refer to calendar days unless Business Days are specified. Whenever any action must be taken hereunder on or by a day that is not a Business Day, then such action may be validly taken on or by the next day that is a Business Day.

(k) All accounting terms used herein and not expressly defined herein shall have the meanings given to them under GAAP.

1.3 Schedules and Exhibits. This Agreement consists of the Articles contained herein and the Schedules and Exhibits attached hereto, all of which comprise part of one and the same agreement with equal force and effect.

## **ARTICLE II PURCHASE AND SALE; PURCHASE PRICE; CLOSING**

2.1 Purchase and Sale; Project Contracts; Excluded Assets; Excluded Liabilities; Assumed Liabilities.

2.1.1 Purchase and Sale. On the terms and subject to the conditions set forth in this Agreement, at the Closing, Seller shall sell, transfer, convey, assign and deliver to Purchaser, free and clear of all Liens (other than Permitted Liens and Permitted Encumbrances), and Purchaser will purchase and pay for, all of Seller’s right, title and interest in and to the Project



Assets, but not the Excluded Assets.

2.1.2 Assignment and Assumption of Project Contracts. On the terms and subject to the conditions set forth in this Agreement, effective as of the Closing, Seller shall assign to Purchaser, and Purchaser shall accept and assume from Seller: (a) all of Seller's rights under the Project Contracts; and (b) all of Seller's obligations arising under the Project Contracts, solely to the extent such obligations arise after the Closing and do not constitute Liabilities (i) arising out of any failure to perform, improper performance, warranty or other breach, default or violation by Seller or any of its Affiliates prior to the Closing or (ii) arising or accruing on, prior to or after the Closing relating to Construction Costs. For the avoidance of doubt, with respect to indemnity obligations under the Project Contracts, Purchaser shall assume Liabilities only for events that occur after the Closing.

2.1.3 Excluded Assets. Seller shall have no obligation to, and does not, transfer any interest or rights in the Excluded Assets, and Purchaser shall have no Liability with respect thereto. The Parties acknowledge and agree that Seller shall have the right on or prior to the Closing Date to retain or to transfer and assign to one or more of its Affiliates its interests in the Excluded Assets.

2.1.4 Excluded Liabilities; Assumed Liabilities.

(a) Excluded Liabilities. Except for the Assumed Liabilities, Purchaser shall not assume and shall not be responsible to pay, perform, satisfy or discharge any Liabilities of Seller or any of its Affiliates of any kind or nature whatsoever, whether direct or indirect, known or unknown, absolute or contingent, relating to the construction, ownership, operation or maintenance of the Project, the Project Assets or the Project Site prior to the Closing (collectively, the "Excluded Liabilities"). On and after the Closing, Seller shall, and shall cause each of its Affiliates to, retain, pay, perform, satisfy and discharge all Excluded Liabilities for which it or they are respectively obligated, including the following:

(i) all Liabilities arising from any violation of applicable Environmental Law (A) by Seller or any of its Affiliates or (B) any other Person acting on behalf of Seller or any of its Affiliates, in each case, in connection with the construction, ownership, operation or maintenance of the Project or the Project Site prior to the Closing;

(ii) all Liabilities arising from any Environmental Condition on, under, or near the Project Site to the extent existing prior to the Closing, including Liabilities related to Remediation, natural resource damages, bodily injury or property damage;

(iii) all Liabilities arising from the off-site transportation, disposal, recycling or storage, or arrangement for same, of Hazardous Materials, from the Project or the Project Site prior to the Closing, including Liabilities related to Remediation, natural resource damages, bodily injury or property damage;

(iv) all Liabilities that have arisen or may arise with respect to: (A) any employee benefit plan, employment agreement or other arrangement of Seller, any Affiliate of Seller or any of their respective ERISA Affiliates providing any type of

compensation to any former or current employee of Seller, any Affiliate of Seller or any of their respective ERISA Affiliates, including any obligation or Liability for providing continuation coverage under and complying with Section 4980B of the Code, Sections 601 through 608 of ERISA, and any applicable state Law of similar intent with respect to any individual who either prior to, on or after the Closing Date was covered under any group health plan contributed to or maintained by Seller, any Affiliate of Seller, or any of their respective ERISA Affiliates, or who will otherwise be an “M&A Qualified Beneficiary” (as such phrase is defined in Treasury Regulation Section 54.4980B-9, Q&A-4) in connection with the transactions contemplated by this Agreement; and (B) any current or former employee, independent contractor or consultant of Seller, any Affiliate of Seller or any of their respective ERISA Affiliates;

(v) all Liabilities of Seller and any of its Affiliates under the Project Contracts relating to the period prior to Closing and not expressly assumed by Purchaser pursuant to Section 2.1.2, and all Liabilities under Contracts relating to the Project, the Project Assets or the Project Site which are not Project Contracts;

(vi) all Liabilities of Seller and any of its Affiliates under the Project Permits (other than Purchaser Permits) relating to the period prior to Closing and not expressly assumed by Purchaser pursuant to Section 2.1.2, and all Liabilities under Permits relating to the Project, the Project Assets or the Project Site which are not Project Permits;

(vii) all Liabilities arising or accruing on, prior to or after the Closing relating to Construction Costs;

(viii) all Liabilities to any Person for personal injury, property damage or tort arising out of the siting, design, development, interconnection, construction, start-up, testing, commissioning, ownership, use, operation or maintenance of the Project or the Project Assets on or prior to the Closing, whether or not such claim was made or asserted on or prior to the Closing;

(ix) all Liabilities with respect to litigation and threatened litigation in connection with the Project or the Project Assets (other than in connection with this Agreement) arising or accruing on or prior to the Closing, regardless of when filed;

(x) all Pre-Closing Taxes and Seller Income Taxes with respect to the transfer of the Project Assets pursuant to this Agreement; and

(xi) all Liabilities in any way relating to any Excluded Assets.

(b) Assumed Liabilities. From and after the Closing, Purchaser shall assume, and Purchaser hereby agrees to pay, satisfy and discharge when due, the following Liabilities of Seller (the “Assumed Liabilities”), and no other Liabilities:

(i) all Liabilities under the Project Contracts expressly assumed by Purchaser, pursuant to, and subject to the conditions set forth in, Section 2.1.2; and

(ii) other than Liabilities arising or accruing on, prior to or after

the Closing relating to Construction Costs, all Liabilities arising from the ownership, operation, maintenance or use of the Project or the Project Assets by Purchaser following the Closing.

## 2.2 Purchase Price.

2.2.1 Amount. In consideration of the purchase by Purchaser and sale by Seller of the Project Assets and the other matters set forth herein (including all of Seller's obligations in connection with consummation of the transactions contemplated hereby and Purchaser's assumption of the Assumed Liabilities), Purchaser shall pay to Seller the amounts (each, a "Payment" and, collectively, the "Payments") at the times and subject to the conditions and requirements set forth in Schedule 2.2.1. In no event shall Purchaser be obligated to pay Seller any Payment unless and until the applicable conditions and requirements in Schedule 2.2.1 are satisfied.<sup>35</sup>

2.2.2 Method of Payment of Purchase Price. Payment of the Purchase Price shall be made in United States Dollars, by wire transfer of immediately available federal funds to an account located in the United States as Seller may specify by notice. Without limiting the foregoing, Purchaser shall be entitled to deduct and withhold from any cash amounts payable pursuant to this Agreement such amounts as Purchaser may be required to deduct and withhold with respect to the making of such payment under United States federal, state or local or foreign Tax laws. To the extent that such amounts are so withheld and paid over to the appropriate Taxing Authority by Purchaser, such withheld amounts shall be treated for all purposes of this Agreement as having been paid to the Person in respect of which such deduction and withholding was made.

2.2.3 Documentation. Seller agrees to provide Purchaser with a receipt, confirmation or other appropriate documentation reasonably requested by Purchaser from time to time in order to evidence Payments made pursuant to this Agreement.

2.3 Allocation of Purchase Price. Not later than forty-five (45) days after the Closing, Purchaser shall provide Seller with an allocation of the Purchase Price, plus any liabilities deemed assumed for U.S. federal income Tax purposes, among the Project Assets as of the Closing Date using the allocation method provided by Section 1060 of the Code and the Treasury regulations thereunder (the "Purchase Price Allocation Schedule"). Within thirty (30) days after its receipt of Purchaser's proposed Purchase Price Allocation Schedule, Seller shall propose to Purchaser any changes thereto, or otherwise shall be deemed to have agreed with Purchaser's proposed Purchase Price Allocation Schedule. If Seller proposes changes to Purchaser's proposed Purchase Price Allocation Schedule within the thirty (30) day period described above, the Parties shall cooperate in good faith to mutually agree upon a revised Purchase Price Allocation Schedule as soon as practicable and in any event within fifteen (15) days of receipt of Seller's proposed changes. If, after such fifteen (15) day period, the Parties are unable to agree on a revised Purchase Price Allocation Schedule, the Parties shall refer such dispute to an Independent Accounting Firm, which Independent Accounting Firm shall make a

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<sup>35</sup> NTD: In addition to Seller's Parent Guaranty (or other security acceptable to Purchaser in its sole discretion), Purchaser may require a security agreement and mortgage with respect to all Project Assets as well as a pledge of ownership interest in Seller as security for the Payments.

final and binding determination as to all matters in dispute with respect to the Purchase Price Allocation Schedule (and only such matters) on a timely basis and shall promptly notify the Parties in writing of its resolution. The Independent Accounting Firm shall not have the power to modify or amend any term or provision of this Agreement. Purchaser, on the one hand, and Seller, on the other hand, shall bear and pay one-half of the fees and other costs for services rendered by the Independent Accounting Firm pursuant to this Section 2.3. The Parties agree that they will not take nor will they permit any Affiliate to take, for Tax purposes, any position inconsistent with such Purchase Price Allocation Schedule unless otherwise required pursuant to applicable Law. If any adjustment is required to be made to the Purchase Price Allocation Schedule as a result of the payment of any additional Purchase Price or otherwise, this Section 2.3 shall govern the rights and obligations of the Parties with respect to such revised Purchase Price Allocation Schedule. Each Party shall notify the other Party, within twenty (20) days after notice or commencement of an examination, audit or other proceeding regarding the allocation determined under this Section 2.3.

2.4 The Closing. The closing of the transactions contemplated herein (the “Closing”) will take place at the offices of Rocky Mountain Power, 1407 West N. Temple, Suite 310, Salt Lake City, Utah, at, at 10:00 a.m. Mountain time on the date as soon as practicable (but in no event longer than three (3) Business Days, subject to an additional ten (10) day extension at the election of Purchaser in the event of a Disclosure Schedule Update pursuant to Section 5.11.2 which occurs less than ten (10) days prior to the Closing Date, and further subject to the provisions of Sections 5.11.2, 7.1.3 and 7.2), after the conditions to the Closing set forth in Section 6.1 and Section 6.2 have been satisfied or waived, or at such other place, time or date as Purchaser and Seller mutually agree (the “Closing Date”), and shall be effective as of 12:01 a.m. Pacific time on the Closing Date.

## 2.5 Closing Deliveries.

2.5.1 Purchaser’s Closing Deliveries. At the Closing, Purchaser will pay to Seller the Closing Payment in accordance with Section 2.2 and Schedule 2.2.1, and execute and deliver or pay (as applicable) to Seller the following items:

(a) a counterpart signature page to the Bill of Sale in substantially the form attached hereto as Exhibit B (the “Bill of Sale”), executed by an authorized representative of Purchaser;

(b) counterpart signature pages to the Assignment and Assumption Agreements in substantially the forms attached hereto as Exhibit B (collectively, the “Assignment and Assumption Agreements”), executed by an authorized representative of Purchaser;

(c) a counterpart signature page to the Construction Completion Management Agreement, executed by an authorized representative of Purchaser;

(d) a certificate, dated as of the Closing Date, executed by an authorized officer of Purchaser, certifying that attached thereto is: (i) a true, accurate and complete copy of a Certificate of Good Standing with respect to Purchaser, issued by the

Secretary of State of the State of Utah as of a recent date; (ii) a true, accurate and complete copy of the resolutions of the board of directors of Purchaser, authorizing the execution, delivery and performance by Purchaser of this Agreement and all of the other agreements and instruments, including the Ancillary Agreements to which it is a party, in each case, to be executed and delivered by Purchaser in connection with this Agreement; and (iii) the name, title and signature of each of the authorized representatives of Purchaser authorized to execute and deliver this Agreement and the other agreements and instruments contemplated by this Agreement, including the Ancillary Agreements to which it is a party;

(e) a certificate, dated as of the Closing Date, executed by an authorized officer of Purchaser, certifying as to the matters set forth in Section 6.2.1 and Section 6.2.2; and

(f) such other documents and instruments as may be reasonably requested by Seller to complete the transactions contemplated by this Agreement.

2.5.2 Seller's Closing Deliveries. At the Closing, Seller will execute and deliver, or will cause to be executed and delivered (as applicable), to Purchaser the following items:

(a) a counterpart signature page to the Bill of Sale, executed by an authorized representative of Seller;

(b) counterpart signature pages to the Assignment and Assumption Agreements, executed by an authorized representative of Seller;

(c) a counterpart signature page to the Construction Completion Agreement, executed by an authorized representative of Seller;

(d) fully-executed copies of the Construction Agreements, executed by authorized representatives of Seller and the applicable counterparties thereto;

(e) [the Bargain and Sale Deed, executed by an authorized representative of Seller]<sup>36</sup>;

(f) an Owner's Affidavit and related documentation, with respect to the Project Site, executed by an authorized representative of Seller, in form and substance satisfactory to the Title Company;

(g) a certification of non-foreign status, in the form and manner which complies with the requirements of Section 1445(b)(2) of the Code and Treasury Regulation Section 1.1445-2(b)(2) and in form and substance reasonably satisfactory to Purchaser;

(h) a certificate, dated as of the Closing Date, executed by an

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<sup>36</sup> NTD: To be deleted if not applicable.

authorized officer of Seller, certifying that attached thereto is: (i) a true, correct and complete copy of a Certificate of Good Standing with respect to Seller, issued by the Secretary of State of the State of [ ] as of a recent date; (ii) a true, correct and complete copy of the resolutions of Seller, authorizing the execution, delivery and performance by Seller of this Agreement and all of the other agreements and instruments, including the Ancillary Agreements to which it is a party, in each case, to be executed and delivered by Seller in connection with this Agreement; and (iii) the name, title and signature of each of the authorized representatives of Seller authorized to execute and deliver this Agreement and the other agreements and instruments contemplated by this Agreement;

(i) a certificate, dated as of the Closing Date, executed by an authorized officer of Seller, certifying as to the matters set forth in Section 6.1.1 and Section 6.1.2;

(j) a Phase I Environmental Site Assessment (“ESA”) for the Project Site, current and valid on the Closing Date under ASTM Standard Practice E1527-13 for ESAs, addressed to Purchaser as the user, or accompanied by a reliance letter in form and substance reasonably satisfactory to Purchaser and incorporating user provided information from Purchaser, in form and substance reasonably satisfactory to Purchaser;

(k) a current and valid (1) geotechnical study with respect to each Project Site, (2) [ ] and (3) [ ], in each case, in form and substance reasonably acceptable to Purchaser<sup>37</sup>; and

(l) such other documents and instruments as may be reasonably requested by Purchaser to complete the transactions contemplated by this Agreement.

## 2.6 Further Assurances; Post-Closing Cooperation.

2.6.1 Further Assurances. Subject to the terms and conditions of this Agreement, at any time or from time to time after the Closing, at any Party’s request and without further consideration, the other Party shall execute and deliver to such Party such other instruments of sale, transfer, conveyance, assignment and confirmation, provide such materials and information and take such other actions as such Party may reasonably deem necessary or desirable in order more effectively: (a) to transfer, convey and assign to Purchaser, and to confirm Purchaser’s title to, the Project Assets; (b) to effectuate the assumption by Purchaser of the Project Contracts, Project Permits (other than Purchaser Permits), Project Intellectual Property, and the assumption by Purchaser of the Assumed Liabilities; and (c) otherwise to complete the transactions contemplated by this Agreement.

### 2.6.2 Pre-Closing Books and Records.

(a) Following Closing, each Party and its Affiliates will afford each other Party and their respective Representatives, during normal business hours, reasonable access to the Books and Records with respect to periods prior to Closing (the “Pre-Closing Books and

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<sup>37</sup> NTD: Any additional studies and reports to be determined.

Records”) and the right to make copies and extracts therefrom, to the extent that such access may be reasonably required by the requesting Party in connection with: (i) the preparation of Tax Returns; (ii) compliance with the requirements of any Governmental Authority; (iii) any Excluded Liabilities or Assumed Liabilities; or (iv) any rights and obligations arising under ARTICLE VIII, ARTICLE IX or ARTICLE XI. Each Party shall maintain Pre-Closing Books and Records reasonably expected to be required in connection with the matters described in items (i) through (iv) of the preceding sentence in accordance with the ordinary course document retention policies of such Party; provided, however, that nothing in this Agreement shall be deemed to obligate a Party to maintain the Pre-Closing Books and Records for longer than seven (7) years after Closing, and, (x) in the case of Purchaser, to provide access to Pre-Closing Books and Records other than those of Purchaser, and (y) in the case of Seller, to provide access to Pre-Closing Books and Records other than those of Seller; and provided, further, that, in the case of any dispute between the Parties, access to Books and Records shall instead be governed by the applicable Laws of discovery.

(b) Purchaser acknowledges and consents to the retention by Seller of information made available to Purchaser relating to the Project Assets (the “Retained Information”). From and after the Closing Date for a period of two (2) years, Seller shall, and shall cause its Representatives to, treat the Retained Information as strictly confidential (except to extent: (a) the Retained Information is or was generally available to the public; (b) the Retained Information is or was available to Seller or its Representatives on a non-confidential basis from other sources not actually known by Seller to be under a duty of confidentiality to Purchaser; or (c) compelled to disclose by judicial or administrative process or by other requirements of applicable Law, any stock exchange or any other self-regulatory organization or as reasonably required by Seller in connection with the matters described in clauses (i) through (iv) of Section 2.6.2(a)).

**2.6.3 Delivery of Books and Records.** No later than the Closing Date (or in the case of Books and Records not immediately required for the ownership, use, operation and maintenance of the Project that cannot be reasonably and practicably delivered at the Closing, as soon as reasonably practicable thereafter, but no later than forty-five (45) days after the Closing Date), Seller shall deliver any Books and Records (to the extent providing such to Purchaser does not violate any applicable Law) that are not located at the Project Site to Purchaser at Purchaser’s offices in Salt Lake City, Utah, the Project Site or another location as designated by Purchaser in or near Salt Lake City, Utah.

### **ARTICLE III REPRESENTATIONS AND WARRANTIES OF SELLER**

Seller hereby represents and warrants to Purchaser that, except as set forth in Seller’s Disclosure Schedule, all of the statements contained in this ARTICLE III are true and correct as of the Execution Date, except to the extent such representations and warranties are specifically made as of a particular date (in which case such representations and warranties will be true and correct as of such date). Each exception and other response to this Agreement set forth in Seller’s Disclosure Schedule is identified by reference to, or has been grouped under a heading referring to, a specific individual section of this Agreement, and, except as otherwise specifically

stated with respect to such exception, relates only to such section and to other sections to the extent that the application of such exception or other response to such other sections is reasonably apparent on its face without further investigation.

3.1 Existence. Seller is duly formed, validly existing and in good standing, as applicable, under the Laws of the jurisdiction of its formation. Seller has the requisite entity power and authority to own, operate and lease its properties and assets and to carry on its business as now being conducted. Seller is duly qualified or licensed to do business and is in good standing in all jurisdictions in which the character of the properties owned or held under lease by it or the nature of the business transacted by it makes qualification necessary, except where the failure to be so qualified, licensed or in good standing would not reasonably be expected to have a Seller Material Adverse Effect.

3.2 Authority. Seller has full entity power and authority to execute and deliver this Agreement and the Ancillary Agreements to which it is (or will be) a party in connection with the transactions contemplated hereby, to perform its obligations hereunder and thereunder and to complete the transactions contemplated hereby and thereby. The execution and delivery by Seller of this Agreement and the Ancillary Agreements to which it is (or will be) a party in connection with the transactions contemplated hereby, and the performance by Seller of its obligations hereunder and thereunder, have been duly and validly authorized by all necessary entity action.

3.3 Limited Purpose Entity. Since its formation, Seller has engaged solely in the business of developing, constructing, owning and operating the Project, including the Project Assets.

3.4 Binding Agreement. This Agreement and the Ancillary Agreements to which Seller is (or will be) a party have been (or will be when delivered) duly executed and delivered by Seller and, assuming due and valid authorization, execution and delivery thereof by Purchaser and each other party thereto, this Agreement and the Ancillary Agreements to which it is (or will be) a party are (or will be when delivered) valid and binding obligations of Seller enforceable against Seller in accordance with their terms (subject to applicable bankruptcy, insolvency, reorganization, moratorium or other similar Laws relating to or affecting the enforcement of creditors' rights generally and to general principles of equity).

3.5 No Conflicts. The execution and delivery by Seller of this Agreement and the Ancillary Agreements to which it is (or will be) a party does not, and the performance by Seller of its obligations under this Agreement and the Ancillary Agreements to which it is (or will be) a party and the completion of the transactions contemplated hereby and thereby, shall not:

3.5.1 conflict with or result in a violation or breach of any of the terms, conditions or provisions of Seller's organizational documents;

3.5.2 assuming all of the consents and approvals set forth in Section 3.5 of Seller's Disclosure Schedule (the "Seller's Consents") have been obtained or given, result in a default (or give rise to any right of termination, cancellation or acceleration) under any of the terms, conditions or provisions of any Project Contract or Contract (with or without notice or



lapse of time or both) with respect to the Project Assets to which Seller or any of its Affiliates is a party or by which Seller, any of its Affiliates or any of the Project Assets may be bound, except for such defaults (or rights of termination, cancellation or acceleration) as to which requisite waivers or consents have been obtained in writing (true, correct and complete copies of which have been furnished to Purchaser);

3.5.3 assuming all of the Seller's Consents have been obtained or given, conflict with or result in a violation or breach of any term or provision of any Law applicable to Seller, the Project, the Project Site or the Project Assets; or

3.5.4 assuming all of the Seller's Consents have been obtained or given, result in the imposition or creation of any Lien (other than a Permitted Lien or a Permitted Encumbrance) upon any of the Project Assets, other than in favor of Purchaser.

3.6 Governmental Approvals and Filings. Except as set forth in Section 3.6 of Seller's Disclosure Schedule, no consent or approval of, filing with or notice to, any Governmental Authority by Seller is required in connection with the execution, delivery and performance by Seller of this Agreement or any of the Ancillary Agreements to which it is (or will be) a party or the completion of the transactions contemplated hereby or thereby.

3.7 Legal Proceedings. There are no suits or proceedings (a) outstanding or pending to which Seller is a party or (b) to Seller's Knowledge, threatened against Seller or any of its assets and properties, in each case, which would be reasonably expected to (i) result in the issuance of an order restraining, enjoining or otherwise prohibiting or making illegal the completion of the transactions contemplated by this Agreement or any of the Ancillary Agreements, or (ii) individually or in the aggregate, have a Seller Material Adverse Effect.

3.8 Compliance with Laws. Seller is not in violation of or in default under any Law applicable to it (excluding any Environmental Laws, which are addressed in Section 3.18, and Tax Laws, which are addressed in Section 9.1), the Project, the Project Site or the Project Assets, in each case, in any material respect. Seller has not received written notification alleging that it is in violation of any Law (excluding any Environmental Laws, which are addressed in Section 3.18, and Tax Laws, which are addressed in Section 9.1), applicable to the Project, the Project Site or the Project Assets, in each case, in any material respect.

3.9 Title to Project Assets. As of the Execution Date, Seller has good and marketable title to the Project Assets constituting personal property (as opposed to real property), free and clear of all Liens, except for Permitted Liens. At the Closing, Purchaser will acquire good and marketable title to such Project Assets constituting personal property, free and clear of all Liens, except for Permitted Liens.

### 3.10 Real Property.

3.10.1 As of the Execution Date, Seller holds good, marketable and fee simple title to, or good and valid leasehold or Easement interests in, the Project Site pursuant to the Project Real Property Agreements, free and clear of all Liens other than Permitted Liens. At the Closing, Purchaser will acquire good, marketable and fee simple title to, or good and valid

leasehold or Easement interests in, the Project Site pursuant to the Project Real Property Agreements, free and clear of all Liens other than Permitted Liens, and subject to Permitted Encumbrances. As of the Closing Date, the Project Real Property Agreements shall constitute all of the real property rights necessary for the development, construction, ownership, operation, use or maintenance of the Project at the Project Site.

3.10.2 With respect to Seller and, to Seller's Knowledge, each other party thereto, each Project Real Property Agreement (a) was duly executed and delivered by a person with the power and authority to do so, and (b) is legal, valid, binding and in full force and effect, except as the enforceability thereof may be limited by applicable bankruptcy, insolvency, reorganization, moratorium or similar Laws affecting the enforcement of creditors' rights generally and equitable principles.

3.10.3 (a) Seller is not in breach or default in any material respect under any Project Real Property Agreement and, to Seller's Knowledge, no other party to a Project Real Property Agreement is in breach or default in any material respect thereunder; (b) no event has occurred which, with notice or lapse of time, or both, would constitute a breach or default by Seller or, to Seller's Knowledge, any other party to a Project Real Property Agreement, or, to Seller's Knowledge, would permit termination, modification or acceleration, thereof; and (c) Seller has not and, to Seller's Knowledge, no other party to a Project Real Property Agreement has, repudiated any provision thereof.

3.10.4 Neither the Project Site nor any of Seller's interests in any Project Real Property Agreement is subject to any Lien, assignment, lease, sublease, transfer, conveyance, option, mortgage, deed of trust or other encumbrance, other than Permitted Liens and, at the Closing, Permitted Encumbrances.

3.10.5 There are no commitments or agreements between Seller or any Affiliate of Seller, on the one hand, and any Governmental Authority, public or private utility or any other Person, on the other hand, affecting the Project, the Project Site, the Project Real Property Agreements, the Project Fixtures and Equipment, the Project Improvements, the Project Permits, or any portion thereof or interest therein.

3.10.6 There are no Actions pending or, to Seller's Knowledge, threatened, against or affecting the Project, the Project Site, the Project Real Property Agreements, the Project Fixtures and Equipment or the Project Improvements, or any portion thereof or interest therein, in the nature of, or in lieu of, condemnation, land use, zoning or eminent domain proceedings, or otherwise.

3.10.7 All utility services necessary for the construction, operation, maintenance and use of the Project for its intended purpose are available at the Project Site or will be so available as and when required upon commercially reasonable terms.

3.10.8 Schedule 1.1(h) contains a true, correct and complete list of all Project Real Property Agreements with respect to the Project. Seller has delivered to Purchaser true, correct and complete copies of (a) all Project Real Property Agreements and (b) title insurance commitments, policies, opinions, abstracts and surveys with respect to the Project Site, in each

case, that are in the possession or control of Seller or any of its Affiliates.

### 3.11 Sufficiency of Project Assets.

3.11.1 The Project Assets constitute all of the material Contracts, Permits, rights, assets and properties necessary to develop, site, permit, design, engineer, supply, construct, install, interconnect, test, commission, own, use, operate and maintain the Project on the Project Site in accordance with applicable Law, the Project Permits and Good Operating Practices, and other than the Project Assets, there are no other Contracts, Permits, rights, assets or properties that are held by Seller, any of its Affiliates or any other Person, relating to, associated with or concerning the Project or the Project Site, that are necessary for the development, siting, permitting, design, engineering, supply, construction, installation, interconnection, testing, commissioning, ownership, use, operation, or maintenance of the Project on the Project Site in accordance with applicable Law, the Project Permits and Good Operating Practices.

3.11.2 No Person other than Seller owns or has any interest in, or option or other right (contingent or otherwise), including a right of first refusal or a right of first offer, or has any Lien (other than Permitted Liens) on any of the Project Assets. There are no adverse claims of ownership to any of the Project Assets and neither Seller nor any of its Affiliates has received any notice that any Person has asserted a claim of ownership or right of possession or use in or to any of the Project Assets.

3.11.3 (a) Schedule 1.1(d) contains a true, correct and complete list and description of all Project Fixtures and Equipment and (b) Schedule 1.1(e) contains a true, correct and complete list and description of all Project Improvements.

3.11.4 All Project Fixtures and Equipment, Project Improvements and other Project Assets constituting personal property (a) are in good working order and condition, ordinary wear and tear excepted, (b) are adequate for the uses to which they are being put and (c) have been maintained in accordance with Good Operating Practices. All Project Fixtures and Equipment and Project Improvements are, and immediately before the Closing shall be, located at the Project Site.

3.12 No Seller Material Adverse Effect. No Seller Material Adverse Effect exists. To Seller's Knowledge, no event(s) have occurred or circumstance(s) exist that, individually or in the aggregate, would reasonably be expected to result in a Seller Material Adverse Effect.

### 3.13 Contracts.

3.13.1 Except for the Project Contracts and any Contracts with respect to which none of the Project Assets will be bound or have Liability after the Closing, there are no Contracts by which any of the Project Assets may be bound after the Closing, including Contracts of the following types:

(a) Contracts for the purchase, exchange or sale of electric power or ancillary services;

(b) Contracts for the interconnection, transmission or distribution of electric power;

(c) other than Contracts of the nature addressed by Section 3.13.1(a) and Section 3.13.1(b), Contracts for the current or future provision of goods or services requiring payments in excess of \$25,000 for each individual Contract;

(d) outstanding agreements of guaranty, surety or indemnification, direct or indirect, for the benefit of the Project Assets;

(e) Contracts relating to the current or future provision of goods or services;

(f) Contracts relating to the employment at or for the Project of any employee, independent contractor or consultant, including employment or consulting Contracts, Contracts providing severance benefits and any collective bargaining agreement;

(g) outstanding futures, swap, collar, put, call, floor, cap, option or other Contracts that are intended to benefit from or reduce or eliminate the risk of fluctuations in the price of commodities, including electric power or securities;

(h) partnership, joint venture or limited liability company agreements;

(i) Contracts relating to Indebtedness; and

(j) Contracts relating to the use of Intellectual Property for the Project which are not Excluded Assets.

3.13.2 The Project Contracts, together with the Ancillary Agreements, are all of the material Contracts that are necessary as of the Closing Date for the development, permitting, design, engineering, supply, construction, installation, testing, commissioning, use, operation and maintenance of the Project in accordance with applicable Laws, the Project Permits and Good Operating Practices.

3.13.3 Seller has provided Purchaser with true, correct and complete copies of all Project Contracts, including all amendments, supplements, schedules and exhibits thereto. No written waiver or, to Seller's Knowledge, oral waiver of any term or condition of any Project Contract is currently in effect. Seller has not assigned any of its interests in any of the Project Contracts, and none of Seller's interests in any of the Project Contracts is subject to any Liens (other than Permitted Liens).

3.13.4 Neither Seller, nor to Seller's Knowledge, any counterparty, is in default in any material respect in the performance or observance of any term or provision of, and no event has occurred which, with the giving of notice or the lapse of time or both, would result in such a default under, any Project Contract. Each Project Contract constitutes a legal, valid and binding agreement of Seller and, to Seller's Knowledge, of each other party thereto, enforceable in accordance with its terms (subject to applicable bankruptcy, insolvency or other similar Laws

relating to or affecting the enforcement of creditors' rights generally and to general principles of equity).

3.13.5 Neither Seller nor any of its Affiliates has sold or transferred, agreed or committed to sell or transfer, or granted any options or rights to purchase electric power, Environmental Attributes or Renewable Energy Incentives in connection with or related to the Project.

3.13.6 Schedule 1.1(c) contains a true, correct and complete list and description of all Project Contracts.

### 3.14 Permits.

#### 3.14.1 Lists of Permits.

(a) Part A of Schedule 1.1(g) sets forth a true, correct and complete list of all Project Permits;

(b) Part B of Schedule 1.1(g) sets forth a true, correct and complete list of all Project Permits obtained by or on behalf of Seller;

(c) Part C of Schedule 1.1(g) sets forth a true, correct and complete list of the Project Permits for which Seller or any of its Affiliates has applied (other than those referenced in clause (b) above); and

(d) Part D of Schedule 1.1(g) sets forth a true, correct and complete list of all Purchaser Permits.

3.14.2 With respect to each Project Permit (other than the Purchaser Permits) that has been obtained as of the Execution Date or the Closing Date, as applicable:

(a) each such Permit is legal, valid, binding and in full force and effect;

(b) the completion of the transactions contemplated by this Agreement and the Ancillary Agreements will not affect the legality, validity, binding nature or force and effect of each such Permit being transferred to Purchaser pursuant to the applicable Assignment and Assumption Agreement, except with respect to the identity of the parties thereto as a result of such Assignment and Assumption Agreement;

(c) Seller is in compliance with the terms and conditions of each such Permit, and, to Seller's Knowledge, no event has occurred which with the giving of notice or lapse of time, or both, would constitute non-compliance with such terms and conditions;

(d) each such Permit is properly in the name of the Project or Seller, as applicable;

(e) no Action is pending or, to Seller's Knowledge, threatened in

writing, in each case, which challenges the legality, validity or enforceability of, or threatens to revoke, suspend or modify, any such Permit;

(f) no notice of noncompliance or default has been received by Seller or any of its Affiliates in respect of any such Permit, and no information has been received by Seller or any of its Affiliates that would reasonably be expected to prevent Seller from maintaining any such Permit or from transferring to Purchaser on the Closing Date any such Permit; and

(g) no condition or requirement exists in any such Permit which does or would reasonably be expected to adversely affect the ownership, use, operation and maintenance of the Project by or on behalf of Purchaser after the Closing.

3.14.3 As of the Closing Date, Seller holds all Project Permits (other than the Purchaser Permits). All Project Permits (other than the Purchaser Permits) have been obtained by Seller on or prior to the date required under applicable Law, and in any event on or prior to the Closing Date.

3.15 Insurance. Section 3.15 of Seller's Disclosure Schedule sets forth a true, complete and correct list and description of all insurance policies in force on the Execution Date with respect to the Project Assets, together with a statement of the aggregate amount of claims paid out within the past three (3) years and claims pending under each such insurance policy, in each case, relating to the Project, the Project Site or the Project Assets. As of the Execution Date, all such insurance policies are in full force and effect, all premiums due thereon have been paid and Seller is in compliance in all material respects with the terms and provisions of such insurance policies. Furthermore, solely as they relate to the Project, the Project Site and the Project Assets, as of the Execution Date: (a) there is no claim pending under any of such insurance policies as to which coverage has been questioned, denied or disputed by the underwriters of such insurance policies; and (b) Seller has received no written notice that the Project, the Project Site, or any Project Fixtures and Equipment or Project Improvements, or the operation thereof, will not be insurable or will be subject to exclusions arising from actual or potential defects in the Project Site or the Project Assets.

3.16 Resource Data. Schedule 1.1(I) sets forth a true, complete and correct list or copy of all Resource Data. With respect to each item of Resource Data:

3.16.1 Seller has made available to Purchaser true, correct and complete copies of all reports, studies, analyses, tests, monitoring results and assessments with respect to Resource Data measured or recorded at or with respect to the Project or related to the Project Site;

3.16.2 the Resource Data is accurate in all material respects;

3.16.3 Seller owns and possesses all right, title and interest in and to the Resource Data, free and clear of any Liens;

3.16.4 Seller has not received any notification of disputes with respect to any Resource Data;

3.16.5 the Resource Data is not subject to any outstanding injunction, judgment, decree, or judicial or administrative order, of any Governmental Authority; and

3.16.6 no Person has assigned, transferred or conveyed any interest in the Resource Data or the information contained therein in any manner that would reasonably be expected to impair Purchaser's right to use the Resource Data after the Closing.

3.17 Environmental Attributes. Neither Seller nor any of its Affiliates, as the case may be, has sold or transferred, or agreed to sell or transfer, or taken any actions or granted any options or rights to purchase energy, capacity or Environmental Attributes related to the electric power to be generated by the Project.

3.18 Environmental Matters.

3.18.1 (a) Part A of Schedule 1.1(g) contains a true, correct and complete list of all Environmental Permits that are Project Permits, (b) Part B of Schedule 1.1(g) contains a true, correct and complete list of all such Environmental Permits that have been obtained by or on behalf of Seller with respect to the Project or the Project Site as of the Execution Date, (c) Part C of Schedule 1.1(g) contains a true, correct and complete list of all such Environmental Permits for which Seller or any of its Affiliates has applied as of the Execution Date (other than those referenced in clause (b) above), and Part D of Schedule 1.1(g) contains a true, correct and complete list of all Environmental Permits that are Purchaser Permits.

3.18.2 With respect to each Environmental Permit that is a Project Permit (other than a Purchaser Permit) that has been obtained as of the Execution Date or the Closing Date, as applicable:

(a) each such Environmental Permit is legal, valid, binding and in full force and effect;

(b) the completion of the transactions contemplated by this Agreement and the Ancillary Agreements will not affect the legality, validity, binding nature or force and effect of each such Environmental Permit being transferred to Purchaser pursuant to the applicable Assignment and Assumption Agreement, except with respect to the identity of the parties thereto as a result of such Assignment and Assumption Agreement;

(c) Seller is in compliance with the terms and conditions of each such Environmental Permit, and, to Seller's Knowledge, no event has occurred which with the giving of notice or lapse of time, or both, would constitute non-compliance with such terms and conditions;

(d) each such Environmental Permit is properly in the name of the Project or Seller, as applicable;

(e) no Action is pending or, to Seller's Knowledge, threatened in writing, in each case, which challenges the legality, validity or enforceability of, or threatens to revoke, suspend or modify, any such Environmental Permit;

(f) no notice of noncompliance or default has been received by Seller or any of its Affiliates in respect of any such Environmental Permit, and no information has been received by Seller or any of its Affiliates that would reasonably be expected to prevent Seller from maintaining any such Environmental Permit or from transferring to Purchaser on the Closing Date any such Environmental Permit; and

(g) no condition or requirement exists in any such Environmental Permit which does or would reasonably be expected to adversely affect the ownership, use, operation and maintenance of the Project by or on behalf of Purchaser after the Closing.

3.18.3 Seller has made available to Purchaser true, correct and complete copies of (a) all Environmental Permits and applications therefor that are Project Permits (or applications therefor), (b) all material documents, reports and correspondence provided by Seller or any of its Affiliates to any Governmental Authority with respect to such Environmental Permits and applications, (c) all material documents, reports and correspondence received by Seller or any of its Affiliates from any Governmental Authority with respect to such Environmental Permits and applications, and (d) all environmental site assessment studies and reports and other environmental assessments, studies, audits and reports, including reports, assessments, studies, audits and reports relating to wetlands, air and emissions or discharges, or threatened or endangered species, that are in the possession or control of Seller or any of its Affiliates and which relate to environmental matters in connection with development, construction, ownership, use, operation or maintenance of the Project or the Project Site or which concern any condition of the environment with respect to the Project Site

3.18.4 To Seller's Knowledge, there exist no conditions, facts or circumstances that would reasonably be expected to (a) prevent, hinder, delay or restrict the ability of (i) Purchaser to obtain any Purchaser Permit that is an Environmental Permit, or (ii) Seller to transfer, or Purchaser to maintain after the Closing, any Project Permits that are Environmental Permits, in each case, as and when needed for the development, siting, permitting, design, engineering, supply, construction, installation, interconnection, testing, commissioning, ownership, use, operation or maintenance of the Project on the Project Site, (b) result in the imposition of Liabilities under, or noncompliance with, any Environmental Laws at the Project Site or by Seller, or (c) materially impact the ability of Seller or Purchaser, as applicable, to develop, site, permit, design, engineer, supply, construct, install, interconnect, test, commission, own, use, operate or maintain the Project.

3.18.5 Seller (a) has not entered into or agreed to any judicial or administrative consent decree or order, and (b) is not subject to any judgment, decree, or judicial or administrative order, relating to compliance with any Environmental Law or to investigation or cleanup of Hazardous Materials or Environmental Conditions, in each case, relating to the Project or the Project Site. There are no Actions pending or, to Seller's Knowledge, threatened under any Environmental Law relating to the Project or the Project Site.

3.18.6 Seller is and has been for the past three (3) years in compliance in all material respects with all Environmental Laws and Environmental Permits with respect to the Project and the Project Site.



3.18.7 There has been no Release of Hazardous Materials on, beneath or from the Project Site, except for Releases of Hazardous Materials that would not reasonably be expected to result in a claim by a Governmental Authority or other Person not affiliated with Purchaser or a requirement to conduct a Remediation.

3.18.8 Except as set forth in Section 3.18.8 of Seller's Disclosure Schedule, no species listed as threatened or endangered under any Environmental Law, or any applicable state or local counterpart, or a candidate for such status, or otherwise identified under Environmental Laws as having special status have been observed by Seller or any of its Affiliates or Representatives at the Project Site, (b) no bald or golden eagles or migratory birds or their nests have been observed on the Project Site, (c) no human remains or historical, archeological or paleontological resources (which for purposes of this representation shall mean "archeological resources" as defined under Environmental Laws) have been identified on the Project Site and (d) no wetlands or water bodies are located on the Project Site.

3.19 Employee and Employee Benefits Matters.<sup>38</sup>

3.19.1 Seller does not employ and has never employed any employees.

3.19.2 None of Seller or any of its Affiliates has any Liabilities with respect to any employees of Seller or any of its Affiliates or any other individuals (including independent contractors, contract workers, leased employees or temporary employees) that have performed work at or in connection with the Project or in connection with the business of Seller. None of Seller or any of its Affiliates has made any commitments or representations to any Person regarding: (a) potential employment by Purchaser or any of its Affiliates at the Project after the Closing Date; or (b) any terms and conditions of any such potential employment by Purchaser or any of its Affiliates following the Closing Date.

3.19.3 Seller does not sponsor, maintain, contribute to or have any obligation to contribute to, and since the date of its creation has never sponsored, maintained, contributed to or had any obligation to contribute to, any Employee Benefit Plan.

3.19.4 From and after the Closing Date, none of Purchaser or any of its Affiliates will incur, and no condition or set of circumstances would reasonably be expected to exist under which Purchaser or any of its Affiliates could incur, directly or indirectly, any Tax, penalty, fine, Liability, Loss or expense under ERISA, the Code or any other applicable Law, or pursuant to any indemnification or similar agreement, under the terms of or otherwise in respect of any employee compensation or benefit plan, program, agreement or arrangement, providing retirement, incentive compensation, health, disability, severance, life, change in control or equity compensation or benefits (including any employee benefit plan within the meaning of ERISA Section 3(3)), established or maintained by Seller or any of its Affiliates or ERISA Affiliates.

3.20 Brokers. All negotiations relative to this Agreement and the Ancillary Agreements and the transactions contemplated hereby and thereby have been carried out by

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<sup>38</sup> NTD – To be revised and conformed to reflect specific employee and employee benefits matters applicable to Seller.

Seller directly with Purchaser without the intervention of any Person on behalf of Seller in such manner as to give rise to any valid claim by any Person against Purchaser for a finder's fee, brokerage commission or similar payment.

3.21 Intellectual Property. Schedule 1.1(f) contains a true, correct and complete list and description of all Project Intellectual Property. As of the Closing Date, Seller shall own or have the right to use all the Project Intellectual Property used in the operations of the Project, free and clear of all Liens other than Permitted Liens and restrictions applicable in the Project Contracts. No Person has asserted against Seller or any of its Affiliates a claim in writing that any Project Intellectual Property infringes or misappropriates the Intellectual Property of such or any other Person, and to Seller's Knowledge, no Person is infringing or misappropriating any Project Intellectual Property.

3.22 Due Diligence. Seller has made available for Purchaser's review all material information in the possession or control of Seller or any Affiliate of Seller relating to the Project, including the Project Assets, or the Project Site in connection with Purchaser's due diligence examination conducted with respect to the transactions contemplated by this Agreement. To Seller's Knowledge, none of the information provided by Seller to Purchaser contains any untrue statement of a material fact, or omits to state a material fact necessary to make the statements contained therein, in light of the circumstances in which they are made, not misleading.

3.23 Reports. Seller has delivered to Purchaser a true and complete copy of each Report. The Reports neither individually nor in the aggregate indicate any event, result, occurrence, development, fact, change or effect of whatever nature or kind that has or would reasonably be expected to have a Seller Material Adverse Effect. To Seller's Knowledge, there has been no material change in any findings or conclusions of any Report delivered by Seller to Purchaser other than for which Seller has redelivered such Report to Purchaser in final form as revised to address such change pursuant to Section 5.15.2.

3.24 Disclosure. No representation or warranty by Seller in this Agreement or any Ancillary Agreement to which Seller is or will be a party in connection with the transactions contemplated hereby, and no statement contained in Seller's Disclosure Schedule or any certificate or other document furnished or to be furnished to Purchaser pursuant to this Agreement contains any untrue statement of a material fact, or omits to state a material fact necessary to make the statements contained therein, in light of the circumstances in which they are made, not misleading.

3.25 Anti-Corruption. None of Seller or any Affiliate of Seller, or any Person acting on behalf of Seller or any Affiliate of Seller, has, directly or indirectly, made contributions, gifts, or payments relating to any political activity or solicitation of business which was prohibited by Law or, on behalf of Seller, made any direct or indirect unlawful payment to any official or employee of any Governmental Authority, or established or maintained any unlawful or unreported funds. None of Seller or any Affiliate of Seller, or any Person acting on behalf of Seller or any Affiliate of Seller, has accepted or received any unlawful contribution, payment, gift, entertainment or expenditure.

3.26 Solvency. No petition or notice has been presented, no order has been made and

no resolution has been passed for the bankruptcy, liquidation, winding-up or dissolution of Seller. No receiver, trustee, custodian or similar fiduciary has been appointed over the whole or any part of Seller's assets or the income of Seller. Seller has no plan or intention of, nor has received any written notice that any other Person has any plan or intention of, filing, making or obtaining any such petition, notice, order or resolution or of seeking the appointment of such a receiver, trustee, custodian or similar fiduciary.

3.27 Seller's Parent Guaranty. Seller's Parent Guarantor is duly formed, validly existing and in good standing, as applicable, under the Laws of the jurisdiction of its formation. Seller's Parent Guarantor has full power and authority to execute and deliver the Seller's Parent Guaranty and to perform its obligations thereunder. The execution and delivery by Seller's Parent Guarantor of the Seller's Parent Guaranty and the performance by Seller's Parent Guarantor of its obligations thereunder have been duly and validly authorized by all necessary action. Seller's Parent Guaranty is in full force and effect and constitutes valid and binding obligations of Seller's Parent Guarantor, enforceable against Seller's Parent Guarantor in accordance with its terms (subject to applicable bankruptcy, insolvency, reorganization, moratorium or other similar Laws relating to or affecting the enforcement of creditors' rights generally and to general principles of equity).

#### **ARTICLE IV REPRESENTATIONS AND WARRANTIES OF PURCHASER**

Purchaser hereby represents and warrant to Seller that, except as set forth in Purchaser's Disclosure Schedule, all of the statements contained in this ARTICLE IV are true and correct as of the Execution Date, except to the extent such representations and warranties are specifically made as of a particular date (in which case such representations and warranties will be true and correct as of such date). Each exception and other response to this Agreement set forth in Purchaser's Disclosure Schedule is identified by reference to, or has been grouped under a heading referring to, a specific individual section of this Agreement, and, except as otherwise specifically stated with respect to such exception, relates only to such section and to other sections to the extent that the application of such exception or other response to such other sections is reasonably apparent on its face without further investigation.

4.1 Existence. Purchaser is duly formed, validly existing and in good standing, as applicable, under the Laws of the jurisdiction of its formation. Purchaser has the requisite entity power and authority to own, operate and lease its properties and assets. Purchaser is duly qualified or licensed to do business and is in good standing in all jurisdictions in which the character of the properties owned or held under lease by it or the nature of the business transacted by it makes qualification necessary, except where the failure to be so qualified, licensed or in good standing would not be reasonably expected to have a Purchaser Material Adverse Effect.

4.2 Authority. Purchaser has full power and authority to execute and deliver this Agreement and the Ancillary Agreements to which it is (or will be) a party in connection with the transactions contemplated hereby, to perform its obligations hereunder and thereunder and to complete the transactions contemplated hereby and thereby. The execution and delivery by Purchaser of this Agreement and the Ancillary Agreements to which Purchaser is (or will be) a

party in connection with the transactions contemplated hereby, and the performance by Purchaser of its obligations hereunder and thereunder, have been duly and validly authorized by all necessary action.

4.3 Binding Agreement. This Agreement and the Ancillary Agreements to which Purchaser is (or will be) a party have been (or will be when delivered) duly and validly executed and delivered by Purchaser and, assuming due and valid authorization, execution and delivery thereof by Seller and each other party thereto, this Agreement and the Ancillary Agreements to which Purchaser is (or will be) a party are (or will be when delivered) valid and binding obligations of Purchaser enforceable against Purchaser in accordance with their terms (subject to applicable bankruptcy, insolvency, reorganization, moratorium or other similar Laws relating to or affecting the enforcement of creditors' rights generally and to general principles of equity).

4.4 No Conflicts. The execution and delivery by Purchaser of this Agreement and the Ancillary Agreements to which it is (or will be) a party does not, and the performance by Purchaser of its obligations under this Agreement and the Ancillary Agreements to which it is (or will be) a party and the completion of the transactions contemplated hereby and thereby shall not:

4.4.1 conflict with or result in a violation or breach of any of the terms, conditions or provisions of Purchaser's organizational documents;

4.4.2 assuming all of the consents and approvals set forth in Section 4.4 of Purchaser's Disclosure Schedule (the "Purchaser's Consents") have been obtained or given, result in a default (or give rise to any right of termination, cancellation or acceleration) under any of the terms, conditions or provisions of any Contract or other obligation (with or without notice or lapse of time, or both) to which Purchaser is a party or by which any of its assets and properties may be bound, except for such defaults (or rights of termination, cancellation or acceleration) as to which requisite waivers or consents have been obtained in writing (true, correct and complete copies of which have been furnished to Seller); or

4.4.3 assuming all of the Purchaser's Consents have been obtained or given, conflict with or result in a violation or breach of any term or provision of any Law applicable to Purchaser or any of its assets and properties.

4.5 Governmental Approvals and Filings. Except as set forth in Section 4.5 of Purchaser's Disclosure Schedule, no consent or approval of, filing with or notice to, any Governmental Authority is required in connection with the execution, delivery and performance by Purchaser of this Agreement or any of the Ancillary Agreements to which Purchaser is (or will be) a party or the completion by Purchaser of the transactions contemplated hereby or thereby.

4.6 Legal Proceedings. There are no suits or proceedings (a) outstanding or pending to which Purchaser is a party or (b) to Purchaser's Knowledge, threatened against Purchaser or any of its assets and properties, which would be reasonably expected to (i) result in the issuance of an order restraining, enjoining or otherwise prohibiting or making illegal the completion of the transactions contemplated by this Agreement or any of the Ancillary Agreements, or (ii)

individually or in the aggregate, have a Purchaser Material Adverse Effect.

4.7 Brokers. All negotiations relative to this Agreement and the Ancillary Agreements and the transactions contemplated hereby and thereby have been carried out by Purchaser directly with Seller without the intervention of any Person on behalf of Purchaser in such manner as to give rise to any valid claim by any Person against Seller for a finder's fee, brokerage commission or similar payment.

4.8 Financial Resources. Purchaser will have unrestricted cash sufficient to satisfy its obligations to pay the Purchase Price as and when required pursuant to Section 2.2.1.

4.9 Solvency. No petition or notice has been presented, no order has been made and no resolution has been passed for the bankruptcy, liquidation, winding-up or dissolution of Purchaser. No receiver, trustee, custodian or similar fiduciary has been appointed over the whole or any part of Purchaser's assets or the income of Purchaser. Purchaser has no plan or intention of, nor has received any written notice that any other Person has any plan or intention of, filing, making or obtaining any such petition, notice, order or resolution or of seeking the appointment of such a receiver, trustee, custodian or similar fiduciary.

## **ARTICLE V COVENANTS**

5.1 Efforts to Close and Fulfillment of Conditions. After the Execution Date and prior to the Closing:

5.1.1 Each Party shall use commercially reasonable efforts to take, or cause to be taken, all actions, and to do, or cause to be done, all things necessary, proper or advisable under Law to complete and make effective the transactions contemplated by this Agreement. Such actions shall include each Party using its commercially reasonable efforts to ensure satisfaction of the conditions precedent to its obligations hereunder, as soon as practicable after the Execution Date.

5.1.2 Each Party shall use commercially reasonable efforts to refrain from taking (or omitting to take) any action which would reasonably be expected to materially delay the completion of the transactions contemplated by this Agreement; provided, however, that neither (a) the filing by Seller of a petition for leave to intervene or notice of intent to comment in any proceeding(s) initiated by Purchaser in accordance with Section 5.2, or otherwise, nor (b) Purchaser's inclusion in its application for UPSC Approval requests or action plan items unrelated to the Project or the Project Assets, shall be deemed to be an action which would reasonably be expected to materially delay the completion of the transactions contemplated by this Agreement.

5.2 Consents and Approvals. After the Execution Date and prior to Closing, each Party shall provide reasonable cooperation to the other Party in obtaining consents or approvals of, making all filings with and giving all notices to Governmental Authorities or other Persons required to complete the transactions contemplated by this Agreement and the Ancillary Agreements. The Parties shall use commercially reasonable efforts to respond promptly and

accurately to any requests for additional information made by any such Governmental Authority. The Parties agree that they shall consult with each other with respect to the transfer to Purchaser of the Project Assets or the obtaining by Purchaser or Seller of the FERC Approval, the UPSC Approval and applicable Permits, consents, approvals and authorizations of all third parties and Governmental Authorities and, if applicable, the HSR Act filing; provided that, for the avoidance of doubt, the UPSC filings and attachments thereto need not be exchanged or preapproved by the non-filing Party. Seller (i) may, at its sole discretion, file a petition for leave to intervene in the UPSC proceeding(s) related to the applicable UPSC filing(s) and retain counsel to represent it in such proceeding(s) in accordance with [*Utah Administrative Code Section*], and (ii) shall not file any documents in direct opposition to Purchaser's applicable UPSC filings, or any part thereof, with respect to the inclusion of the Project in such filings; provided, however, that nothing herein shall be deemed to restrict or otherwise limit Seller's ability to file any documents in support of the transactions contemplated hereunder. Subject to Section 5.6, each Party shall cooperate in good faith with the Governmental Authorities and undertake promptly all commercially reasonable actions required to complete lawfully the transactions contemplated by this Agreement. Seller shall request from the applicable counterparties to the Project Contracts the Seller's Consents, in the forms reasonably acceptable to the Parties.

5.3 UPSC Filings. On or before [\_\_\_\_], 2018, Purchaser shall file with the UPSC, pursuant to [*Utah Code Section*], its [\_\_\_\_], which filing includes the transactions contemplated by this Agreement. Purchaser shall use commercially reasonable efforts to respond promptly and accurately to any requests for additional information made by the UPSC, and Seller shall use commercially reasonable efforts to cooperate with Purchaser in connection therewith. Purchaser shall consult with Seller on all principal filings submitted by Purchaser to the UPSC in connection with the UPSC Approval; provided, that such UPSC filings and attachments thereto need not be exchanged with, or preapproved by, Seller. For the avoidance of doubt, Seller shall not be entitled to receive any proprietary data related to current and forecasted operations of Purchaser, including production models, operating costs and other similar information in connection with the preparation of filings to be submitted to the UPSC. Each Party shall bear its own costs and expenses of the preparation of such filings.

5.4 FERC Filings and Other Filings. Each Party shall prepare, as soon as is practical following the execution of this Agreement, all necessary filings in connection with the transactions contemplated by this Agreement that may be required by FERC or under any applicable Laws. If required, Purchaser and Seller shall cooperate in the preparation of a joint application for FERC approval under Section 203 of the Federal Power Act, which shall be subject to the review and comment of the Parties, and the approval of the Parties; provided that any statements or commitments made therein regarding Purchaser mitigation, the sale or retirement of Purchaser's assets, or other transactions involving Purchaser or any of its Affiliates and not involving Seller shall be at the sole discretion of Purchaser and shall not be subject to the approval of Seller. Each Party shall use commercially reasonable efforts to submit all necessary filings with the FERC as promptly as practicable and, in any event, not later than sixty (60) days after the Execution Date. The Parties shall promptly furnish each other with copies of any notices, correspondence or other written communication from the relevant Governmental Authority, shall promptly make any appropriate or necessary subsequent or supplemental filings,

permit the other Parties or their counsel to review in advance any proposed written communications with FERC regarding filings in connection with the transactions contemplated by this Agreement, and shall cooperate in the preparation of such filings as is reasonably necessary and appropriate (provided that any exchange of information between Seller and Purchaser in connection with any filings shall be done in a manner that complies with applicable antitrust Laws).

5.5 HSR Filings. If it is determined that the HSR Act will be applicable to the transactions contemplated by this Agreement, then each Party shall use commercially reasonable efforts to submit such filings no later than [\_\_\_\_\_], or such other period as may be mutually agreed between the Parties. No Party shall request early termination of the waiting period under the HSR Act. The Parties shall promptly furnish each other with copies of any notices, correspondence or other written communication from the relevant Governmental Authority, shall promptly make any appropriate or necessary subsequent or supplemental filings and shall cooperate in the preparation of such filings as is reasonably necessary and appropriate (provided, that such filings and attachments need not be exchanged with, or preapproved by, the other Party and provided, further, that any exchange of information between Seller and Purchaser in connection with any such filings shall be done in a manner that complies with applicable antitrust Laws). If HSR Act filings are required, the filing fee under the HSR Act shall be paid by Purchaser.

5.6 Limitation. Notwithstanding the foregoing, nothing in Sections 5.1 through 5.5, inclusive, shall require, or be construed to require, Purchaser or Seller or any of their respective Affiliates to agree to: (a) sell, hold, divest, discontinue or limit, before or after the Closing Date, any assets, businesses or interests of Purchaser or Seller or any of their respective Affiliates (other than pursuant to this Agreement); (b) waive any of their respective conditions to Closing set forth in Section 6.1 and Section 6.2; or (c) any modification or waiver of the terms and conditions of this Agreement.

5.7 Title Report, Survey, Title Insurance Commitment and Title Insurance Policy Matters.

5.7.1 Within thirty (30) days after the Execution Date, Purchaser shall, at Seller's cost and expense, use commercially reasonable efforts to obtain a preliminary title report with respect to each parcel of real property comprising the Project Site or that is the subject of a Project Real Property Agreement, including the Easements (the "Preliminary Title Report").

5.7.2 Within sixty (60) days after Purchaser's receipt of the Preliminary Title Report, Purchaser shall, at Seller's cost and expense, use commercially reasonable efforts to obtain a current ALTA/ACSM survey of the Project Site prepared by a [licensed surveyor / Certified Federal Surveyor (CFedS) acceptable to Purchaser]<sup>39</sup> (the "Surveyor"), in form and substance acceptable to Purchaser (the "Survey"), which Survey shall be in the name of, and prepared at the direction of Purchaser.

5.7.3 Within thirty (30) days after Purchaser's receipt of the Survey, Purchaser

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<sup>39</sup> NTD – If any portion of the Project Site or Easements are located on federal land, a CFedS will be necessary.

shall use commercially reasonable efforts to obtain a commitment for title insurance issued by the Title Company (the “Title Insurance Commitment”), to issue on the Closing Date, at Seller’s cost and expense, a title insurance policy insuring Purchaser’s rights in each parcel of real property comprising the Project Site or that is the subject of a Project Real Property Agreement, including the Improvements and the Easements as appurtenant easements, that: (a) is in form and substance as Purchaser may reasonably approve and contains such requirements, modifications and endorsements as Purchaser may reasonably require; (b) contains such additional affirmative coverage (at Purchaser’s cost and expense) as Purchaser may reasonably request; (c) is in such amount as Purchaser may negotiate with the Title Company; (d) insures that Purchaser is the sole fee owner of each parcel of real property comprising the Project Site and the sole holder of all rights, title and interests granted under the Project Real Property Agreements, subject to Permitted Liens and Permitted Encumbrances; (e) names Purchaser as the insured; (f) is issued as of the Closing Date by the Title Company; and (g) shows as exceptions only the Permitted Liens and the Permitted Encumbrances (the “Title Insurance Policy”).

5.7.4 Purchaser may object to any matters shown on the Title Insurance Commitment or the Survey, other than Permitted Liens, by delivering written notice (the “Title and Survey Objection Notice”) to Seller no later than twenty-one (21) days after receipt by Purchaser of the later of the Title Insurance Commitment and the Survey. If Purchaser does not deliver the Title and Survey Objection Notice within the prescribed 21-day period, all matters reflected on the Title Insurance Commitment and Survey shall be “Permitted Encumbrances”, and all matters reflected on the Title Insurance Commitment and the Survey to which Purchaser does not object in the Title and Survey Objection Notice shall be Permitted Encumbrances. Seller may, but shall have no obligation to, remove or rectify prior to Closing any matters identified as objections in the Title and Survey Objection Notice (the “Objectionable Title and Survey Matters”), other than Objectionable Title and Survey Matters Required to be Cured which Seller shall be obligated to promptly remove or rectify prior to Closing. Within fourteen (14) days after receipt of Purchaser’s Title and Survey Objection Notice, Seller shall provide Purchaser notice (“Seller’s Title/Survey Objection Response”) of those Objectionable Title and Survey Matters which Seller will remove or rectify, and those which Seller elects not to remove or rectify, provided that Seller shall be obligated to remove and rectify any Objectionable Title and Survey Matters Required to be Cured prior to Closing. Upon completion of such curative work, but prior to Closing, Seller shall cause the Title Company to deliver to Seller a revised Title Commitment that includes all matters cured by Seller.

## 5.8 Conduct of Business.

5.8.1 Commencing on the Execution Date and ending on the earlier of the Closing Date and the date as of which this Agreement is validly terminated by Purchaser or Seller in accordance with this Agreement, except as otherwise consented to by Purchaser in writing, which consent shall not be unreasonably withheld, conditioned or delayed, Seller shall conduct its business in the ordinary course and consistent with Good Operating Practices (including (a) keeping in full force and effect its legal existence, (b) preserving and maintaining the Project Assets as they are currently being preserved and maintained, (c) maintaining its Books and Records, (d) performing and complying in all material respects with the Project Contracts, (e) performing and complying in all material respects with applicable



Law and (f) continuing to develop the Project in the ordinary course of business and consistent with Good Operating Practices).

5.8.2 Without limiting the foregoing, Seller shall not, and shall not cause or permit its Affiliates with respect to the Project to, without the prior written consent of Purchaser (which consent shall not be unreasonably withheld, conditioned or delayed):

(a) enter into the Construction Agreements other than in substantially and in all material respects in the forms attached to this Agreement, except for any changes to such form which (i) do not have or would not reasonably be expected to have a material adverse effect on the capacity, availability, operations (including the cost of operations), reliability, Project schedule, or safety (including safety of construction) of the Project or (ii) do not materially amend any of the performance remedies or warranties or defined terms from the Construction Agreements referenced in this Agreement or the technical specifications of the Project set forth in the Construction Agreements; provided, that Seller provides Purchaser with any proposed changes to such forms at least ten (10) Business Days prior to executing such Contract;

(b) except as contemplated in this Section 5.8.2, enter into any material Contract relating to the Project, the Project Assets or the Project Site;

(c) modify or amend in any material respect, terminate or assign any material Contract; waive, release or assign any material rights or claims under any material Contract; violate in a material manner any material term of any material Contract; or take any action or fail to take any action that would reasonably be expected to cause a material breach of any material Contract, in each case, with respect to material Contracts relating to the Project, the Project Assets or the Project Site; provided, however, that Purchaser's consent shall not be required with respect to any modification or amendment to any material Contract, including the Construction Agreements, which (i) do not have or would not reasonably be expected to have a material adverse effect on the capacity, availability, operations, reliability, schedule or safety (including safety of construction) of the Project; or (ii) do not materially amend any of the performance remedies or warranties or defined terms from the Construction Agreements referenced in this Agreement or the technical specifications of the Project set forth in the Construction Agreements; provided, further, that Seller shall consult with Purchaser at least five (5) Business Days prior to entering into, giving or making any such modifications, amendments, waivers, releases or assignments and provide Purchaser with copies of any such proposed modifications, amendments, waivers, releases or assignments at least five (5) Business Days prior to executing, delivering or approving the same;

(d) fail to take such reasonable action as is necessary to maintain, preserve, renew and keep in full force and effect the Project Permits or take or fail to take any reasonable action that would jeopardize the eligibility of the Project for the ITC, PTC, accelerated depreciation or other Renewable Energy Incentives, or materially and adversely affect the Environmental Attributes;

(e) take any action or fail to take any reasonable action which would reasonably be expected to materially adversely affect the Project or the Project Assets, including the capacity, availability, operations, reliability, schedule or safety (including safety of construction) of the Project;

(f) sell, lease, or otherwise dispose of (other than in the ordinary course of business in accordance with Good Operating Practices), or incur or permit to exist a Lien (other than a Permitted Lien) on, any of the material Project Assets;

(g) except in connection with obtaining or maintaining the Project Permits required or permitted pursuant to this Agreement, agree or consent in writing to any matter in connection with any material proceeding by or before any Governmental Authority related to the Project;

(h) amend or supplement in any material respect or terminate any Project Permit or any related application therefor;

(i) cease to maintain insurance coverage under the Insurance Policies in accordance with Section 5.10; or

(j) enter into any agreement or otherwise commit to take any actions described in the foregoing clauses.

5.8.3 Notwithstanding Section 5.8.1 or Section 5.8.2, or any other provision in this Agreement, Seller may take reasonable actions with respect to emergency situations or to comply with Project Permits or applicable Laws.

5.9 Purchaser's Inspection Right. Commencing on the Execution Date and ending on the earlier of the Closing Date and the date as of which this Agreement is validly terminated by Purchaser or Seller in accordance with this Agreement, Purchaser, its Related Persons and its Representatives shall have reasonable access, upon reasonable prior notice, to the Project, the Project Site, the Project Assets and the Books and Records, all for purposes of inspection and review; provided, however, that any investigation shall be conducted during normal business hours in such manner as not to interfere unreasonably with the operation of the Project and Purchaser shall require each Person conducting or participating in any such investigation to comply with Seller's reasonably adopted procedures relating to safety and security. In furtherance of the foregoing, Seller shall take all reasonable actions necessary to allow, permit, or obtain the right of Purchaser, its Related Persons and its Representatives to access the Project Site in order to confirm the progress of development of the Project and to perform due diligence of survey work, testing, geotechnical drilling and any other studies Purchaser deems necessary in its reasonable discretion, provided that Purchaser complies with applicable Law and Seller's reasonable safety and security procedures at the Project. At Purchaser's request, Seller shall (a) include Purchaser, its Related Persons and its Representatives in weekly meetings or teleconferences to discuss the progress of development and construction of the Project, and (b) include Purchaser, its Related Persons, and Representatives in communications with, or may authorize Purchaser to have independent communications with, the Construction Contractors. Purchaser may from time to time offer input to Seller for

consideration related to material Contracts and performance thereunder. From and after the Execution Date, Seller shall promptly advise Purchaser of any material notices, demands, claims, requests for information or other communications received relating to or in connection with the Project and shall not take any action thereto without the consent and direction of Purchaser, such consent not to be unreasonably withheld, delayed or conditioned. In addition, Seller shall provide other management reports for the Project, including progress reports received from the Construction Contractors and reports regarding owner supplied equipment, reports from Governmental Authorities and reports from counterparties to material Contracts, in each case, in the form, and at the times, historically prepared or received by Seller and its Affiliates in the ordinary course, or as soon as practicable upon receipt from such third parties, as applicable.

#### 5.10 Insurance.

5.10.1 Effective on the date that construction work is to begin at the Project Site, Seller shall, or shall cause an Affiliate or Construction Contractor to, obtain and thereafter at all times during the performance of such construction work, shall maintain, insurance in accordance with the requirements set forth in Schedule 5.10. Purchaser shall and its Affiliates shall be a named insured on such insurance policies in accordance with the requirements of Schedule 5.10.

5.10.2 After the Closing, Purchaser shall have the right to submit to Seller any claims for any damages, Losses, expenses or Liabilities of the Project that are covered by the insurance policies described in Section 3.15 or Section 5.10.1 (collectively, the “Insurance Policies”) arising out of insured incidents to the extent occurring from the date coverage thereunder first commenced until the Closing. With respect to any such claim, Seller shall submit such claim and use its commercially reasonable efforts to administer such claims on behalf of Purchaser and to seek reasonable recovery under the applicable Insurance Policies covering a Loss of the Project to the same extent as it would if such Loss were a Loss of Seller and to the extent that the terms and conditions of any such policies so allow (it being understood that (a) Seller shall have the right to administer and control such claims and (b) such claims shall be subject, in each case as the sole liability or obligation of Purchaser and Seller, to any and all applicable deductibles, retentions, self-insurance provisions or any payment or reimbursement obligations in respect thereof, and the exhaustion of existing aggregate limits), and Seller shall pay to Purchaser the amount of such recovery within fifteen (15) days after receipt thereof, net of any out-of-pocket costs and expenses (including reasonable legal fees and expenses) and increased premiums reasonably incurred by Seller in seeking or obtaining such recovery. Through the Final Completion Date, all insurance proceeds received for any and all covered losses under the Insurance Policies shall be used to restore the Project back to its original condition prior to all insurable loss events.

#### 5.11 Certain Schedule Updates; Update of Seller’s Disclosure Schedule.

5.11.1 Certain Schedule Updates. Prior to Closing, Seller shall promptly supplement or amend:

(a) Schedule 1.1(c) to include thereon any additional Project Contracts entered into by Seller after the Execution Date in accordance with this Agreement (and update Section 3.5 and Section 3.6 of Seller's Disclosure Schedule, as applicable, to reflect any additional Seller's Consents or consents, approvals, filings or notices of or to Governmental Authorities, respectively, that are required in respect of such additional Project Contracts);

(b) Schedule 1.1(d) to include thereon any additional Project Fixtures and Equipment acquired by Seller after the Execution Date in accordance with this Agreement;

(c) Schedule 1.1(e) to include thereon any additional Project Improvements constructed on the Project Site after the Execution Date in accordance with this Agreement;

(d) Schedule 1.1(f) to include thereon any additional Project Intellectual Property acquired by or licensed to Seller after the Execution Date in accordance with this Agreement;

(e) Part B of Schedule 1.1(g) to include thereon any Project Permits listed in Part C of Schedule 1.1(g) that Seller has obtained after the Execution Date in accordance with this Agreement;

(f) Schedule 1.1(h) to include thereon any additional Project Real Property Agreements entered into by Seller after the Execution Date in accordance with this Agreement;

(g) Schedule 1.1(k) to include thereon any additional Reports received by Seller after the Execution Date with respect to the Project, the Project Assets or the Project Site; and

(h) Schedule 1.1(l) to include thereon any additional Resource Data obtained after the Effective Date with respect to the Project, the Project Assets or the Project Site.

Such Schedules shall be deemed so supplemented or amended for all purposes of this Agreement as if such supplements or amendments had existed as of the Execution Date.

5.11.2 Update of Seller's Disclosure Schedule. Purchaser and Seller shall use commercially reasonable efforts to refrain from taking any action which would render any representation or warranty contained in this Agreement to be inaccurate as of the Closing. Prior to the Closing, Seller shall promptly supplement or amend Seller's Disclosure Schedule previously delivered by Seller with respect to any matter arising after the Execution Date which, if existing, occurring or known on or before the Execution Date, would have been required to be set forth or described in Seller's Disclosure Schedule (each, a "Disclosure Schedule Update"). Seller shall deliver any such Disclosure Schedule Update to Purchaser no later than five (5) Business Days after the discovery of any such matter by Seller. Any disclosure in a Disclosure Schedule Update shall be deemed to have been disclosed solely for purposes of determining whether the condition precedent set forth in Section 6.1.1 has been satisfied. If the Closing

occurs, the making of any such disclosure in any such Disclosure Schedule Update shall be deemed to have cured the breach of any representation, warranty, covenant or agreement relating to the matter set forth in the Disclosure Schedule Update for purposes of Purchaser's right to indemnification as set forth in Section 8.1.1 and Section 8.1.2.

5.12 No Solicitation of Competing Transaction. After the Execution Date and prior to the earlier of the Closing Date and the date as of which this Agreement is validly terminated by Purchaser or Seller in accordance with this Agreement, Seller shall not, and shall not authorize any of its Affiliates or their respective Representatives, directly or indirectly, through any Representatives or otherwise (except as may be required by applicable Law) to: (a) solicit, initiate, or facilitate the making, submission or announcement of any Acquisition Proposal to any Person other than Purchaser or an Affiliate of Purchaser; (b) furnish any nonpublic information regarding Seller, the Project, the Project Assets or the terms of or transactions contemplated by this Agreement, to any Person other than Purchaser or an Affiliate of Purchaser in connection with or in response to an Acquisition Proposal or an inquiry or indication of interest that could lead to an Acquisition Proposal; or (c) engage in discussions or negotiations with any Person other than Purchaser or an Affiliate of Purchaser with respect to any Acquisition Proposal or an inquiry or indication of interest that could lead to an Acquisition Proposal. In the event Seller, any of its Affiliates, or any of their respective Representatives receives any Acquisition Proposal by any Person other than Purchaser or an Affiliate of Purchaser, Seller shall: (i) immediately notify Purchaser of receipt of such Acquisition Proposal; (ii) disclose the details of the Acquisition Proposal to Purchaser and provide copies of any written materials related thereto; (iii) comply with the covenants set forth in clauses (a), (b), and (c) of this Section 5.12; and (iv) immediately inform any and all third parties making the Acquisition Proposal of the covenants and prohibitions set forth in this Section 5.12.

5.13 Tax Covenants. After the Execution Date and prior to Closing, Seller shall not make any new, or change any existing, material election with respect to Taxes, or settle any Tax liability in a manner that would reasonably be expected to have a material adverse effect on Purchaser after the Closing.

5.14 Release of Credit Support Obligations. At or promptly following the Closing, Purchaser shall use commercially reasonable efforts to replace each of the non-cash Credit Support Obligations set forth on Schedule 5.14 with parent guarantees, letters of credit, bonds, indemnities or another non-cash credit assurance of a comparable and sufficient nature that satisfies the requirements of the counterparties specified in Schedule 5.14, to the extent such substitute credit support arrangements are required; provided that, if Purchaser is not successful in obtaining a release or, with Seller's assistance, a replacement of any such Credit Support Obligations at Closing, then Seller or its Affiliates, as applicable, shall keep in place such Credit Support Obligations for ten (10) Business Days following Closing, after which time Seller and its Affiliates shall have no further obligation to keep in place such Credit Support Obligations.

5.15 Reports; Authorizations.

5.15.1 Prior to the Reports Cut-Off Date, Seller shall deliver to Purchaser a true, correct and complete copy of each Report in respect of the Project and Project Site in final form or such other form as received by Seller. Each such Report (and all Reports in the aggregate)

shall not indicate any event, result, occurrence, development, fact, change or effect of whatever nature or kind that has or would reasonably be expected to have a Seller Material Adverse Effect.

5.15.2 If after delivery to Purchaser there is a material change in any findings or conclusions of a Report delivered by Seller to Purchaser, Seller shall redeliver such Report to Purchaser in final form as revised to address such change.

5.15.3 Seller shall use commercially reasonable efforts to obtain letters or other authorizations from such Persons who prepared material Reports that are part of the Project Assets as Purchaser may reasonably request, which letters or other authorizations will allow Purchaser to rely on such Reports.

5.16 Reimbursement of Purchaser-Paid Construction Costs. From and after the Closing Date, Seller shall reimburse Purchaser for any Construction Costs incurred and paid by Purchaser.

## **ARTICLE VI CONDITIONS TO CLOSING**

6.1 Purchaser's Conditions Precedent. The obligations of Purchaser hereunder to execute or deliver the items it is required to deliver pursuant to Section 2.5.1 and to complete the Closing are subject to the fulfillment to the reasonable satisfaction of Purchaser, at or before the Closing, of each of the following conditions (all or any of which may be waived in whole or in part by Purchaser in its sole discretion):

6.1.1 Representations and Warranties. Each of the representations and warranties made by Seller in this Agreement shall be true and correct in all material respects on and as of the Closing Date with the same force and effect as though made by Seller on and as of the Closing Date (except for representations and warranties made as of a specified date, which shall be true and correct as of that date in all material respects), except for (a) those representations and warranties qualified by "Seller Material Adverse Effect", "material" and "materially", which shall be true and correct in all respects, and (b) the Fundamental Seller Representations, which shall be true and correct in all respects.

6.1.2 Performance. Seller shall have performed and complied in all material respects with the agreements, covenants and obligations required by this Agreement to be so performed or complied with by Seller at or before the Closing.

6.1.3 Law. There shall not be in effect on the Closing Date any Law restraining, enjoining or otherwise prohibiting or making illegal the completion of the transactions contemplated by this Agreement or the Ancillary Agreements.

6.1.4 UPSC Approval; FERC Approval; HSR Act. The UPSC Approval and the FERC Approval shall have been duly obtained, made or given and shall be in full force and effect, and, if applicable, the termination or expiration of the waiting period under the HSR Act necessary for the completion of the transactions contemplated by this Agreement shall have occurred.

6.1.5 Purchaser's Consents. All of the Purchaser's Consents (other than the UPSC Approval, the FERC Approval, and, if applicable, the termination or expiration of the waiting period under the HSR Act necessary for the completion of the transactions contemplated by this Agreement to occur, all of which are addressed in Section 6.1.4) shall have been duly obtained, made or given and shall be in full force and effect, as applicable.

6.1.6 Deliveries. Seller shall have executed and delivered, or caused to be executed and delivered (as applicable), to Purchaser the items set forth in Section 2.5.2.

6.1.7 Project Schedule. All Project Contracts, current project schedules (as of the Closing Date) and Project Permits associated with the Project reflect and support the achievement of the Commercial Operation Date on or prior to the Commercial Operation Deadline.

6.1.8 Status of the Project. The Project shall have achieved Availability Completion<sup>40</sup> (as such term is defined in the EPC Agreement) in accordance with the EPC Agreement, and no change, event or occurrence shall have occurred thereafter that would result in the Project not satisfying any of the requirements of Availability Completion (as such term is defined in the EPC Agreement) on the Closing Date.

6.1.9 Power from the Project. The Project shall not, in whole or in part, have been synchronized to the electric transmission system.

6.1.10 Begin Construction. Seller has provided information, documentation and certifications satisfactory to Purchaser, in Purchaser's sole discretion, confirming that, for purposes of the Begin Construction Guidance: (a) construction of the Project[, any Facility in the Project,]<sup>41</sup> and any other property that is part of the Project, including the Project Assets, began in [\_\_\_\_];<sup>42</sup> and (b) neither the Physical Work Test nor the Five Percent Safe Harbor (as such terms are defined in the Begin Construction Guidance) were satisfied in any earlier year with respect to the Project[, any Facility in the Project,]<sup>43</sup> and any other property that is part of the Project, including the Project Assets.

6.1.11 Seller's Parent Guaranty. Seller's Parent Guaranty shall be in full force and effect.

6.1.12 Title Insurance Policy. The Objectionable Title and Survey Matters Required to be Cured shall have been cured by Seller to Purchaser's reasonable satisfaction, and the Title Company shall be in a position, upon Closing, to issue the Title Insurance Policy to Purchaser as contemplated by Section 5.7.3.

6.1.13 No Seller Material Adverse Effect. No Seller Material Adverse Effect shall exist nor shall any event(s) have occurred or circumstance(s) exist that, individually or in

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<sup>40</sup> NTD: The timing, conditions and requirements of "Availability Completion" remain subject to further review and change by Purchaser's tax advisors.

<sup>41</sup> NTD: For wind Projects only.

<sup>42</sup> NTD: Seller to provide.

<sup>43</sup> NTD: For wind Projects only.

the aggregate, would reasonably be expected to result in a Seller Material Adverse Effect.

6.1.14 Project Permits. The Project Permits required to be transferred to Purchaser as of Closing, or other Permits required to be issued to Purchaser as of the Closing, in each case, under applicable Law, shall have been so transferred or issued in accordance with applicable Law, and shall be valid and binding and in full force and effect.

6.2 Seller's Conditions Precedent. The obligations of Seller hereunder to execute or deliver the items it is required to deliver pursuant to Section 2.5.2 are subject to the fulfillment, to the reasonable satisfaction of Seller at or before the Closing, of each of the following conditions (all or any of which may be waived in whole or in part by Seller in its sole discretion):

6.2.1 Representations and Warranties. Each of the representations and warranties made by Purchaser in this Agreement shall be true and correct in all material respects on and as of the Closing Date with the same force and effect as though made by Purchaser on and as of the Closing Date (except for representations and warranties made as of a specified date, which shall be true and correct as of that date in all material respects), except for (a) those representation and warranties qualified by "Purchaser Material Adverse Effect", "material" and "materially", which shall be true and correct in all respects, and (b) the Fundamental Purchaser Representations, which shall be true and correct in all respects.

6.2.2 Performance. Purchaser shall have performed and complied in all material respects with the agreements, covenants and obligations required by this Agreement to be so performed or complied with by Purchaser at or before the Closing.

6.2.3 Law. There shall not be in effect on the Closing Date any Law restraining, enjoining or otherwise prohibiting or making illegal the completion of the transactions contemplated by this Agreement or the Ancillary Agreements.

6.2.4 UPSC Approval; FERC Approval; HSR Act. The UPSC Approval and the FERC Approval shall have been duly obtained, made or given and shall be in full force and effect, and, if applicable, the termination or expiration of the waiting period under the HSR Act necessary for the completion of the transactions contemplated by this Agreement shall have occurred.

6.2.5 Seller's Consents. The Seller's Consents shall have been duly obtained, made or given and shall be in full force and effect.

6.2.6 Deliveries. Purchaser shall have executed and delivered, or caused to be executed and delivered (as applicable), to Seller the items set forth in Section 2.5.1 and shall have paid the Closing Payment.

6.3 Delayed Closing and Commercial Operation. Notwithstanding anything to the contrary in this Agreement or any Ancillary Agreement:



6.3.1 Liquidated Damages for Delayed Closing Date. If the Closing Date is not achieved by the Closing Deadline, then the Closing Payment shall be reduced in accordance with Schedule 6.3, and such reduction shall constitute liquidated damages.

6.3.2 Liquidated Damages for Delayed Commercial Operation Date. If the Commercial Operation Date is not achieved by the Commercial Operation Deadline, then the Commercial Operation Payment shall be reduced in accordance with Schedule 6.3, and such reduction shall constitute liquidated damages.

6.3.3 Liquidated Damages Not a Penalty. The Parties acknowledge and agree that actual damages, costs or expenses of any delay of the Closing Date or the Commercial Operation Date would be difficult to ascertain and that the liquidated damages remedy provided for in this Section 6.3 is a fair and equitable amount to reimburse any Purchaser Indemnified Parties for damages sustained due to such delay and is not a penalty. On and after the Closing Date, the remedies set forth in this Section 6.3 shall be the sole and exclusive remedy of the Purchaser Indemnified Parties for failure to achieve (a) the Closing Date by the Closing Deadline and (b) the Commercial Operation Date by the Commercial Operation Deadline, and the Purchaser Indemnified Parties shall not be entitled to a rescission of this Agreement or to any further indemnification rights or claims of any nature whatsoever in respect of such delay.

## **ARTICLE VII TERMINATION**

7.1 Termination Prior to Closing. This Agreement may be terminated, and the transactions contemplated hereby may be abandoned:

7.1.1 at any time before the Closing, by mutual written consent of the Parties;

7.1.2 at any time before the Closing, by Seller or Purchaser upon written notice to the other Party, in the event that any final and non-appealable Law becomes effective which restrains, enjoins or otherwise prohibits or makes illegal the completion of the transactions contemplated by this Agreement or the Ancillary Agreements;

7.1.3 at any time before the Closing, by Purchaser upon written notice to Seller, if: (a) there has been a breach by Seller of any representation, warranty, covenant or agreement contained in this Agreement or any Ancillary Agreement to which it is a party which would result in a failure of, or inability of Seller to satisfy, any condition set forth in Section 6.1, and such breach has not been cured to Purchaser's reasonable satisfaction within thirty (30) days following Seller's receipt of written notice of such breach, provided that such 30-day period shall be extended if: (i) such breach is reasonably capable of cure and curing such breach reasonably requires more than thirty (30) days; (ii) Seller commences such cure within such 30-day period and diligently prosecutes and completes such cure before the Outside Date; and (iii) Seller timely pays to Purchaser all liquidated damages in accordance with Section 6.3; or (b) a Disclosure Schedule Update is delivered to Purchaser that discloses a Seller Material Adverse Effect has occurred, which Seller Material Adverse Effect (i) was not caused by a breach by Purchaser of any provision of this Agreement or any Ancillary Agreement to which it is a party and (ii) has not been cured to Purchaser's reasonable satisfaction within thirty (30) days following Seller's

delivery to Purchaser of such Disclosure Schedule Update, provided that such 30-day period shall be extended if: (x) such Seller Material Adverse Effect is reasonably capable of cure and curing such Seller Material Adverse Effect reasonably requires more than thirty (30) days; (y) Seller commences such cure within such 30-day period and diligently prosecutes and completes such cure before the Outside Date; and (z) Seller timely pays to Purchaser all liquidated damages in accordance with Section 6.3;

7.1.4 at any time before the Closing, by Seller upon written notice to Purchaser, if: (a) there has been a breach by Purchaser of any representation, warranty, covenant or agreement contained in this Agreement or any Ancillary Agreement to which it is a party which would result in a failure of, or inability of Purchaser to satisfy, any condition set forth in Section 6.2, and such breach has not been cured to Seller's reasonable satisfaction within thirty (30) days following Purchaser's receipt of written notice of such breach, provided that such 30-day period shall be extended if: (i) such breach is reasonably capable of cure and curing such breach reasonably requires more than thirty (30) days; and (ii) Purchaser commences such cure within such 30-day period and diligently prosecutes and completes such cure before the Outside Date; or (b) a Purchaser Material Adverse Effect has occurred, which Purchaser Material Adverse Effect: (i) was not caused by a breach by Seller of any provision of this Agreement or any Ancillary Agreement to which it is a party; and (ii) cannot be cured to Seller's reasonable satisfaction within thirty (30) days following Purchaser's notification to Seller thereof, provided that such thirty 30-day period shall be extended if: (x) such Purchaser Material Adverse Effect is reasonably capable of cure and curing such Purchaser Material Adverse Effect reasonably requires more than thirty (30) days; and (y) Purchaser commences such cure within such thirty 30-day period and diligently prosecutes and completes such cure before the Outside Date;

7.1.5 at any time following [ ]<sup>44</sup> (the "Outside Date"), (a) by Purchaser upon written notice to Seller, if the Closing shall not have occurred on or before such date and such failure to complete the Closing is not caused by a breach by Purchaser of this Agreement or any Ancillary Agreement to which it is a party, and (b) by Seller upon written notice to Purchaser if the Closing shall not have occurred on or before such date and such failure to complete the Closing is not caused by a breach by Seller of this Agreement or any Ancillary Agreement to which it is a party;

7.1.6 by Purchaser, (a) if Purchaser has not received from Seller by [ ]<sup>45</sup> (the "Reports Cut-Off Date"), all of the Reports, in form and substance reasonably acceptable to Purchaser and which, in any event, individually or in the aggregate, do not disclose any event, result, occurrence, development, fact, change or effect of whatever nature or kind that has or would reasonably be expected to have a Seller Material Adverse Effect; or (b) if Seller has redelivered a Report to Purchaser pursuant to Section 5.15.2 which Purchaser, in the exercise of Purchaser's reasonable discretion, has determined has or would reasonably be expected to have a Seller Material Adverse Effect;

7.1.7 by Purchaser or Seller upon written notice to the other Party no later than thirty (30) days after the UPSC Approval Deadline, if the UPSC Approval has not been received

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<sup>44</sup> NTD: Purchaser to provide the Outside Date consistent with the RFP.

<sup>45</sup> NTD: Purchaser to provide the Reports Cut-Off Date.

by the UPSC Approval Deadline, or if the UPSC Approval has been received before the UPSC Approval Deadline but not in form and substance acceptable to Purchaser in its sole discretion.

7.2 Effect of Termination or Breach Prior to Closing. If this Agreement is validly terminated, then: (a) all further obligations of the Parties under this Agreement (other than the provisions which by their terms are intended to survive the expiration or termination of this Agreement, including the provisions of Section 3.20 (Brokers), Section 4.7 (Brokers), Section 5.9 (Purchaser's Inspection Rights), ARTICLE XI (Dispute Resolution), ARTICLE XII (Limited Remedies and Damages), Section 13.1 (Notices), Section 13.2 (Payments), Section 13.3 (Entire Agreement), Section 13.4 (Expenses), Section 13.5 (Public Announcements), Section 13.6 (Confidentiality), Section 13.9 (No Construction Against Drafting Party), Section 13.10 (No Third Party Beneficiary), Section 13.11 (Headings), Section 13.12 (Invalid Provisions), Section 11.2 (Governing Law), Section 13.13 (No Assignment; Binding Effect), and this Section 7.2 which shall continue to apply following any such termination) shall be terminated without further Liability of any Party to the other Party; and (b) other than in the case of termination by Seller pursuant to Section 7.1.4, Seller shall promptly refund to Purchaser all Payments made hereunder prior to the date of such termination, less any Approved Construction Costs. If this Agreement is validly terminated pursuant to Section 7.1.3 or Section 7.1.4 by Purchaser or Seller, as applicable, as a result of a breach by the non-terminating Party, then, subject to Section 12.2, the terminating Party shall be entitled to all rights and remedies available to it with respect to such breach, including, in the case of termination by Purchaser pursuant to Section 7.1.3, the remedies in this Section.

## **ARTICLE VIII INDEMNIFICATION**

8.1 Indemnification by Seller. Subject to the limitations set forth in Section 8.4 (Limitations of Liability), Section 8.5 (Indemnification in Case of Certain Liability), Section 9.3 (Seller's Tax Indemnification), Section 10.1 (Survival), Section 10.2 (No Other Representations) and ARTICLE XII (Limited Remedies and Damages), if the Closing occurs, Seller agrees to indemnify and hold Purchaser and its Related Persons (each, a "Purchaser Indemnified Party"), harmless from and against (and to reimburse each Purchaser Indemnified Party as the same are incurred for) any and all Losses incurred by any Purchaser Indemnified Party resulting from any of the following:

8.1.1 any breach of a representation or warranty made by Seller in this Agreement;

8.1.2 the breach by Seller of, or default in the performance by Seller of, any covenant, agreement or obligation to be performed by Seller pursuant to this Agreement or any Ancillary Agreement to which it is a party;

8.1.3 any fraud or willful misconduct by Seller in connection with this Agreement or the Ancillary Agreements or the transactions contemplated hereby or thereby;

8.1.4 the Excluded Assets or the Excluded Liabilities; provided, that any Purchaser Indemnified Party shall have the right, at such party's sole discretion, to elect to

pursue recovery for any such Losses under either Section 8.1.1 (with respect to Section 3.18 (Environmental Matters)) or this Section 8.1.4 (with respect to Section 2.1.4(a) (Excluded Liabilities)); or

8.1.5 the Construction Costs.

8.2 Indemnification by Purchaser. Subject to the limitations set forth in Section 8.4 (Limitations of Liability), Section 8.5 (Indemnification in Case of Certain Liability), Section 10.1 (Survival), Section 10.2 (No Other Representations) and ARTICLE XII (Limited Remedies and Damages), if the Closing occurs, Purchaser hereby agrees to indemnify and hold Seller and its Related Persons (each, a “Seller Indemnified Party”) harmless from and against (and to reimburse each Seller Indemnified Party as the same are incurred for) any and all Losses incurred by any Seller Indemnified Party resulting from any of the following:

8.2.1 any breach of a representation or warranty made by Purchaser in this Agreement;

8.2.2 the breach by Purchaser of, or default in the performance by Purchaser of, any covenant, agreement or obligation to be performed by Purchaser pursuant to this Agreement or any Ancillary Agreement to which it is a party;

8.2.3 any fraud or willful misconduct by Purchaser in connection with this Agreement or the Ancillary Agreements or the transactions contemplated hereby or thereby; or

8.2.4 the Assumed Liabilities.

8.3 Method of Asserting Claims.

8.3.1 Notification of Claims. If any Purchaser Indemnified Party or Seller Indemnified Party (each, an “Indemnified Party”) asserts that a Party has become obligated to the Indemnified Party pursuant to this Agreement other than pursuant to ARTICLE IX (as so obligated, an “Indemnifying Party”), or if any suit, action, investigation, claim or proceeding is begun, made or instituted as a result of which the Indemnifying Party may become obligated to the Indemnified Party hereunder, then in each instance the Indemnified Party shall notify the Indemnifying Party promptly and shall cooperate with the Indemnifying Party, at the Indemnifying Party’s expense, to the extent reasonably necessary for the resolution of such claim or in the defense of such suit, action or proceeding, including making available any information, documents and things in the possession of the Indemnified Party. Notwithstanding the foregoing notice requirement, the right to indemnification hereunder shall not be affected by any failure to give, or delay in giving, notice, unless, and only to the extent that, the rights and remedies of the Indemnifying Party shall have been prejudiced as a result of such failure or delay. Any assertion by an Indemnified Party that an Indemnifying Party is liable to the Indemnified Party for indemnification pursuant to Section 8.1 or Section 8.2 above must be delivered to the Indemnifying Party prior to the expiration date (if applicable) of the representation, warranty, covenant, agreement or obligation giving rise to such indemnification obligation, as provided in Section 10.1.

8.3.2 Defense of Claims. In fulfilling its obligations under this Section 8.3, after the Indemnifying Party has provided each Indemnified Party with a written notice of its agreement to indemnify each Indemnified Party under this Section 8.3, as between such Indemnified Party and the Indemnifying Party, the Indemnifying Party shall have the right to investigate, defend, settle or otherwise handle, with the aforesaid cooperation, any claim, suit, action or proceeding brought by a third party in such manner as the Indemnifying Party may reasonably deem appropriate; provided, that: (a) the Indemnifying Party will not consent to any settlement or entry of judgment imposing any obligations on any Indemnified Parties, other than financial obligations for which such Person will be indemnified hereunder, unless such Person has consented in writing to such settlement or judgment (not to be unreasonably withheld, conditioned or delayed); and (b) the Indemnifying Party will not consent to any settlement or entry of judgment unless, in connection therewith, the Indemnifying Party obtains a full and unconditional release of the Indemnified Party from all liability with respect to such suit, action, investigation, claim or proceeding. Notwithstanding the Indemnifying Party's election to assume the defense or investigation of such claim, action or proceeding, the Indemnified Party shall have the right to employ separate counsel (at its own cost except as provided below) and to reasonably participate in the defense or investigation of such claim, action or proceeding, which participation shall be at the expense of the Indemnifying Party, if: (a) on the advice of counsel to the Indemnified Party use of counsel of the Indemnifying Party's choice would reasonably be expected to give rise to a conflict of interest; (b) the Indemnifying Party shall authorize the Indemnified Party to employ separate counsel at the Indemnifying Party's expense; or (c) separate counsel is retained to represent the Indemnifying Party in any action which seeks relief other than monetary damages against the Indemnified Party to the extent such representation is related to such relief.

#### 8.4 Limitations of Liability.

8.4.1 Claim Threshold. Notwithstanding anything to the contrary contained in this Agreement, (a) Seller shall not have liability for its obligations under Section 8.1 until the aggregate amount of all Losses incurred by the Purchaser Indemnified Parties equals or exceeds one-half of one percent (0.5%) of the Purchase Price (the "Claim Threshold"), in which event Seller shall become liable for the aggregate Losses under Section 8.1; it being understood and agreed that the Claim Threshold shall not apply in the event of fraud, willful misconduct or to claims for indemnification relating to Excluded Assets, Excluded Liabilities, Construction Costs, the Fundamental Seller Representations, or ARTICLE IX (Tax Matters), in each case for which Seller shall become liable for all such Losses, whether or not the Claim Threshold has been reached; and (b) Purchaser shall have no liability for its obligations under Section 8.2 until the aggregate amount of all Losses incurred by the Seller Indemnified Parties equals or exceeds the Claim Threshold, in which event Purchaser shall become liable for the aggregate Losses under Section 8.2; it being understood and agreed that the foregoing Claim Threshold shall not apply in the event of fraud, willful misconduct or to claims for indemnification relating to Assumed Liabilities, the Fundamental Purchaser Representations, or ARTICLE IX (Tax Matters), in each case for which Purchaser shall become liable for all such Losses, whether or not the Claim Threshold has been reached.

8.4.2 Cap Amount. In no event shall: (a) Seller's aggregate liability arising out

of its indemnification obligations under Section 8.1 or otherwise in any respect of or relating to this Agreement, exceed the Purchase Price; it being understood and agreed that the foregoing limitation shall not apply in the event of fraud or willful misconduct committed by Seller or its Related Persons, or to claims for indemnification relating to relating to Excluded Assets, Excluded Liabilities, Construction Costs, the Fundamental Seller Representations, ARTICLE IX (Tax Matters) or to any claim under Section 12.3 (Specific Performance), provided that any such excluded indemnifiable Losses shall not be deemed to count against or otherwise reduce such limitation on Seller's aggregate liability, and provided, further, that, except with respect to Construction Costs or fraud or willful misconduct committed by Seller or its Related Persons, all claims for indemnification pursuant to such sections shall not, under any circumstances, in the aggregate, exceed the Purchase Price; and (b) Purchaser's aggregate liability arising out of its indemnification obligations under Section 8.2 exceed the Purchase Price; it being understood and agreed that the foregoing limitation shall not apply in the event of fraud or willful misconduct committed by Purchaser or its Related Persons, or to claims for indemnification relating to Assumed Liabilities, the Fundamental Purchaser Representations, ARTICLE IX (Tax Matters) or to any claim under Section 12.3 (Specific Performance), provided that any such excluded indemnifiable Losses shall not be deemed to count against or otherwise reduce such limitation on such Purchaser's aggregate liability, and provided, further, that, except with respect to fraud or willful misconduct committed by Purchaser or its Related Persons, all claims for indemnification pursuant to such sections shall not, under any circumstances, in the aggregate, exceed the Purchase Price.

8.4.3 Effect of Investigation. A Purchaser Indemnified Party's right to indemnification, payment, reimbursement or any other remedy based upon any representation, warranty, covenant, agreement or obligation contained in this Agreement shall not be limited, diminished or otherwise affected by any investigation conducted with respect to, or any knowledge acquired at any time, whether before or after the Closing and regardless of whether such knowledge came from Purchaser, Seller, their respective Representatives, or any other Person, with respect to the accuracy or inaccuracy of or compliance with any such representation, warranty, covenant, agreement or obligation.

8.5 Indemnification in Case of Certain Liability. THE INDEMNIFICATION PROVISIONS IN THIS ARTICLE VIII AND ARTICLE IX SHALL BE ENFORCEABLE REGARDLESS OF WHETHER THE LIABILITY IS BASED ON PAST, PRESENT OR FUTURE ACTS, CLAIMS OR LAWS (INCLUDING ANY PAST, PRESENT OR FUTURE ENVIRONMENTAL LAW, FRAUDULENT TRANSFER ACT, OCCUPATIONAL SAFETY AND HEALTH LAW OR PRODUCTS LIABILITY, SECURITIES OR OTHER LAW), AND REGARDLESS OF WHETHER ANY PERSON (INCLUDING THE PERSON FROM WHOM INDEMNIFICATION IS SOUGHT) ALLEGES OR PROVES SOLE, JOINT, OR CONCURRENT STRICT LIABILITY IMPOSED ON THE PERSON SEEKING INDEMNIFICATION.

8.6 Determination of Losses. For purposes of this ARTICLE VIII and ARTICLE IX, the amount of Losses arising out of any inaccuracy in or breach of any representations or warranties of Seller or Purchaser in ARTICLE III, ARTICLE IV or ARTICLE IX shall be calculated as if the terms "material" and "Material Adverse Effect" (and variations thereof)

were omitted from such representations and warranties; provided that, and for the avoidance of doubt, such qualifiers shall be taken into account initially in determining whether a breach of any representations and warranties of Seller or Purchaser has occurred.

## **ARTICLE IX TAX MATTERS**

9.1 Representations and Warranties. Seller represents and warrants to Purchaser that, with respect to the Project Assets:

9.1.1 All Tax Returns that were required to be filed with respect to the Project Assets have been timely filed, and such Tax Returns were prepared in compliance with applicable Law and were true, correct, and complete. All Taxes required to be paid with respect to the Project Assets (whether or not shown due on any Tax Returns) have been timely paid.

9.1.2 There are no audits, claims, assessments, levies, administrative or judicial proceedings pending, or to Seller's Knowledge, threatened, proposed or contemplated with respect to the Project Assets by any Taxing Authority.

9.1.3 True, correct and complete copies of all sales and use and property Tax Returns relating to the Project Assets for taxable years for the preceding five (5) years have been made available to Purchaser.

9.1.4 There is no extension or waiver of the application of any statute of limitations of any jurisdiction regarding the assessment or collection of any Tax with respect to the Project Assets.

9.1.5 Seller has withheld and paid all Taxes required to have been withheld and paid in connection with amounts paid or owing to any employee, independent contractor, creditor, member or other third party.

9.1.6 No written claim has ever been made by a Taxing Authority in a jurisdiction where a Tax Return is not filed by, or with respect to, Seller or the Project Assets, that Seller (with respect to the Project Assets) or any of the Project Assets is or may be subject to Tax in that jurisdiction.

9.1.7 The transactions contemplated in this Agreement will not have an adverse effect on the continuing validity and effectiveness of any Tax exemption, Tax holiday, Tax credit, Tax incentive or similar arrangement or benefit for which the Project Assets are currently eligible.

9.1.8 No power of attorney is currently in effect, and no Tax ruling has been requested of any Governmental Authority with respect to any Tax matter, relating to the Project Assets.

9.1.9 Seller (or if Seller is a disregarded entity, the person treated as owning Seller's assets for income Tax purposes) is not a foreign person as defined in Section 1445(f)(3) of the Code.

9.1.10 None of the Project[, any Facility in the Project,]<sup>46</sup> or any other property that is part of the Project has been Placed In Service and there has been no "original use" (within the meaning of Section 48 of the Code) of the Project or any property that is part of the Project.

9.1.11 None of the property in the Project, including the Purchased Assets, is "tax-exempt bond financed property" or "tax-exempt use property" within the meaning of Section 168 of the Code, or imported property of the kind described in Section 168(g)(6) of the Code. No election under Section 168(g)(7) of the Code has been made with respect to any part of the Project, including the Purchased Assets. The Project, including the Purchased Assets, is located in its entirety in the United States.

9.1.12 Neither Seller nor any Affiliate of Seller has taken, nor does Seller or any Affiliate of Seller intend to take, a position on any Tax Return that is inconsistent with the Project, including the Project Assets, being Placed In Service by Purchaser and the "original use" (within the meaning of Section 48 of the Code) of the Project and any property that is part of the Project, including the Project Assets, commencing with Purchaser. Neither Seller nor any Affiliate of Seller has claimed, nor does Seller or any Affiliate of Seller intend to claim, on any Tax Return any depreciation or amortization deductions, ITCs, PTCs, or any other tax credits or deductions that are available with respect to ownership or operation of the Project or any property that is part of the Project, including the Project Assets.

9.1.13 To Seller's Knowledge, the Project is capable of qualifying for the [ITC and PTC],<sup>47</sup> and no facts or circumstances exist that reasonably could be expected to hinder, impair, restrict, limit or disqualify the Project from qualifying for [the ITC and PTC].<sup>48</sup> No portion of the Project, including the Project Assets, has benefited from the proceeds of any federal or state grant or rebate program that would cause a reduction in the amount of [the ITC or PTC],<sup>49</sup> and no application with respect to any such grant or rebate has been filed or submitted.

9.1.14 [No portion of the Project is or has been financed with, and neither the Seller nor any Affiliate of Seller has benefited from: (a) a grant provided by the United States, a state, a political subdivision of a state or any other Governmental Authority; (b) proceeds of an issue of state or local government obligations, the interest on which is exempt from tax under Section 103 of the Code; or (c) any subsidized energy financing provided (directly or indirectly) under a federal, state, or local program provided in connection with the Project (in each case, within the meaning of Section 45(b)(3) of the Code).]<sup>50</sup>

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<sup>46</sup> NTD: For wind Projects only.

<sup>47</sup> NTD: Modify as applicable for solar and wind Projects.

<sup>48</sup> NTD: Modify as applicable for solar and wind Projects.

<sup>49</sup> NTD: Modify as applicable for solar and wind Projects.

<sup>50</sup> NTD: For wind Projects only.



9.1.15 No portion of the tax basis of any Project Assets acquired pursuant to this Agreement is or will be attributable to “qualified rehabilitation expenditures” within the meaning of Section 47(c)(2)(A) of the Code.

9.1.16 For purposes of the Begin Construction Guidance, construction of the Project[, any Facility in the Project,]<sup>51</sup> and any other property that is part of the Project, including the Project Assets, began in [\_\_\_\_],<sup>52</sup> and neither the Physical Work Test nor the Five Percent Safe Harbor (as such terms are defined in the Begin Construction Guidance) were satisfied in any earlier year with respect to the Project[, any Facility in the Project,]<sup>53</sup> and any other property that is part of the Project, including the Project Assets.<sup>54</sup> The Project, including the Purchased Assets, will be Placed In Service in [\_\_\_\_]<sup>55</sup> (or, if earlier, the last date on which the Continuity Safe Harbor (as such term is defined in the Begin Construction Guidance) would be satisfied), and no facts or circumstances exist that reasonably could be expected to hinder, impair, restrict, limit or disqualify the Project, including the Purchased Assets, from being Placed In Service in such timeframe. The factual certifications contained in Schedule 9.1 are accurate as to all efforts to begin construction with respect to the Project, including the Purchased Assets, pursuant to the Begin Construction Guidance.

9.2 Transfer Taxes. Seller shall be responsible for any sales, use, value added, gross receipts, excise, registration, stamp duty, transfer or other similar Taxes or governmental fees (including any interest or penalties related thereto) that may be payable with respect to the transfer of the Project Assets pursuant to this Agreement (“Transfer Taxes”). Seller shall file all Tax Returns with respect to any Transfer Taxes and shall timely pay such Transfer Taxes. The Parties shall cooperate to comply with all Tax Return requirements for any and all Transfer Taxes and shall use commercially reasonable efforts to minimize the amount of any Transfer Taxes.

9.3 Seller’s Tax Indemnification. Seller shall indemnify and hold harmless Purchaser from and against (a) any and all Seller Income Taxes, (b) any and all Taxes (other than Seller Income Taxes) imposed on or with respect to the Project Assets or Seller attributable to any Pre-Closing Tax Period (“Pre-Closing Taxes”), and (c) any Taxes arising from a breach by Seller of its representations, warranties and covenants in this ARTICLE IX. Taxes for an Overlap Period shall be allocated to the Pre-Closing Tax Period (i) ratably based on the number of days in the Straddle Period that are in the Pre-Closing Tax Period if they are imposed on a periodic basis and (ii) based on an interim closing of the books if they are based upon or related to income or receipts. For the avoidance of doubt, the limitations of liability contained in ARTICLE VIII shall not apply with respect to any indemnification claim under this Section 9.3.

9.4 Cooperation. After the Closing Date, Seller and Purchaser shall (and shall cause their respective Affiliates to): (a) assist the other Party in preparing any Tax Returns which such

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<sup>51</sup> NTD: For wind Projects only.

<sup>52</sup> NTD: Seller to provide.

<sup>53</sup> NTD: For wind Projects only.

<sup>54</sup> NTD: Modifications may be required based on future “begin construction” guidance for solar and wind projects.

<sup>55</sup> NTD: Seller to provide the calendar year that is no more than four calendar years after the calendar year during which construction of the Project began.

other Party is responsible for preparing and filing in accordance with the terms of this Agreement, (b) cooperate fully in preparing for any audits of, or disputes with any Taxing Authority regarding, any Tax Returns of Seller with respect to the Project Assets and (c) make available to each other as reasonably requested all information, records or documents relating to liability or potential liability for Pre-Closing Taxes, Overlap Period Taxes and Transfer Taxes and will preserve such information, records or documents until thirty (30) days after the expiration of the applicable statute of limitations (including extensions or waivers thereof) with respect to the particular Tax to which the information, records or documents relate.

9.5 Covenants. Neither Seller nor any Affiliate of Seller will engage in any action or fail to take any action that it knows or reasonably should know would adversely affect the eligibility of the Project for, or the receipt by Purchaser or any of its Affiliates of, [the ITC, PTC, or other applicable tax incentive],<sup>56</sup> including the ability of the Project to be Placed In Service in [ ]<sup>57</sup> (or, if earlier, the last date on which the Continuity Safe Harbor (as such term is defined in the Begin Construction Guidance) would be satisfied). Neither Seller nor any Affiliate of Seller will take a position on any Tax Return that is inconsistent with the Project being Placed In Service by Purchaser and the “original use” (within the meaning of Section 48 of the Code) of the Project and any property that is part of the Project, including the Purchased Assets, commencing with Purchaser. Neither Seller nor any Affiliate of Seller will claim on any Tax Return any depreciation or amortization deductions, ITCs, PTCs, or any other tax credits or deductions that are available with respect to ownership or operation of the Project or any property that is part of the Project, including the Purchased Assets.

9.6 Survival of Obligations. The representations, warranties and obligations of the Parties set forth in this ARTICLE IX shall remain in effect until ninety (90) days after expiration of the applicable statutes of limitation (giving effect to any extensions or waivers thereof) relating to the Tax or Tax Return in question.

9.7 Adjustments to Purchase Price. The Parties hereby agree that any and all indemnity payments made pursuant to this Agreement shall, to the maximum extent permitted by applicable Law, be treated for all Tax purposes as an adjustment to the Purchase Price.

## **ARTICLE X**

### **SURVIVAL PERIODS; NO OTHER REPRESENTATIONS**

10.1 Survival of Representations, Warranties, Covenants and Agreements. All representations and warranties contained in this Agreement shall survive, and thus a claim may be brought in respect of a breach thereof, until the day that is twenty-four (24) months after the Closing Date (the “Expiration Date”); provided, however, that: (a) the Fundamental Seller Representations and the Fundamental Purchaser Representations shall survive indefinitely after the Closing Date; (b) the representations and warranties contained in Section 3.18 (Environmental Matters) shall survive until the day that is five (5) years after the Closing Date; and (c) the representations and warranties in Section 9.1 (Taxes) and Section 3.19 (Employee

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<sup>56</sup> NTD: To be modified as relevant for the particular Project.

<sup>57</sup> NTD: Seller to provide the calendar year that is no more than four calendar years after the calendar year during which construction of the Project began.

and Employee Benefits Matters) shall survive until the day that is sixty (60) days after the expiration of the applicable statute of limitations (giving effect to any extensions or waivers thereof). The covenants and agreements contained in this Agreement shall survive, and thus a claim may be brought in respect of a breach thereof, until the day that is twenty-four (24) months following the last day of the applicable period for which such covenant or agreement is required to be performed or, if no such period is set forth herein, until the day that is twenty-four (24) months following the last day such covenant or agreement is fully performed; provided, however, that the covenants and agreements contained in: (x) Section 2.1.2 (Assignment and Assumption of Project Contracts), Section 2.1.4(a) (Excluded Liabilities), Section 2.1.4(b) (Assumed Liabilities), ARTICLE X (Survival Periods, No Other Representations), ARTICLE XI (Dispute Resolution) and ARTICLE XII (Limited Remedies and Damages), shall survive indefinitely after the Closing Date; (y) ARTICLE IX (Tax Matters) and Section 13.6 (Confidentiality) shall be governed solely by the terms therein; and (z) ARTICLE VIII shall survive the Closing in accordance with its terms.

## 10.2 No Other Representations.

10.2.1 NOTWITHSTANDING ANYTHING IN THIS AGREEMENT TO THE CONTRARY, IT IS THE EXPLICIT INTENT OF EACH PARTY HERETO, AND THE PARTIES HEREBY AGREE, THAT NONE OF THE PARTIES OR ANY OF THEIR AFFILIATES OR REPRESENTATIVES HAS MADE OR IS MAKING ANY REPRESENTATION OR WARRANTY WHATSOEVER, EXPRESS OR IMPLIED, WRITTEN OR ORAL, INCLUDING ANY IMPLIED REPRESENTATION OR WARRANTY INCLUDING AS TO THE CONDITION, MERCHANTABILITY, VALUE, QUALITY, USAGE, SUITABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE, APPARENT OR LATENT DEFECTS OF ANY TYPE, OR RISKS OR OTHER INCIDENTS OF THE BUSINESS, THE PROJECT, THE PROJECT SITE, THE PROJECT ASSETS, THE ASSUMED LIABILITIES OR ANY PART THEREOF, EXCEPT THOSE EXPRESS REPRESENTATIONS AND WARRANTIES CONTAINED IN ARTICLE III, ARTICLE IV AND ARTICLE IX, AS APPLICABLE TO A PARTY. IN PARTICULAR, AND WITHOUT IN ANY WAY LIMITING THE FOREGOING, SELLER MAKES NO REPRESENTATION OR WARRANTY TO PURCHASER WITH RESPECT TO THE PROSPECTS, ANY FINANCIAL PROJECTIONS OR FORECASTS RELATING TO THE PURCHASED ASSETS; PROVIDED, THAT THIS SENTENCE SHALL NOT LIMIT THE EXPRESS REPRESENTATIONS AND WARRANTIES OF SELLER CONTAINED IN ARTICLE III AND ARTICLE IX.

10.2.2 EXCEPT FOR THOSE EXPRESS REPRESENTATIONS AND WARRANTIES CONTAINED IN ARTICLE III AND ARTICLE IX, THE PURCHASED ASSETS ARE BEING TRANSFERRED “AS IS, WHERE IS, WITH ALL FAULTS.”

10.2.3 Notwithstanding anything to the contrary contained in this Agreement, and except in connection with the Seller’s Parent Guaranty, no Related Person of Seller will have any personal liability to Purchaser or any other Person as a result of this Agreement or the breach of any representation, warranty, covenant, agreement or obligation of Seller contained in this Agreement, and no Related Person of Purchaser will have any personal liability to Seller or any

other Person as a result of this Agreement or the breach of any representation, warranty, covenant, agreement or obligation of Purchaser contained in this Agreement.

## **ARTICLE XI DISPUTE RESOLUTION**

11.1 Dispute Resolution. Any dispute or claim arising under this Agreement which is not resolved in the ordinary course of business shall be referred to a panel consisting of a senior executive (President or a Vice President) of Purchaser and Seller, with authority to decide or resolve the matter in dispute, for review and resolution. Such senior executives shall meet and in good faith attempt to resolve the dispute within thirty (30) days. If the Parties are unable to resolve a dispute pursuant to this Section 11.1, then any Party may exercise any right or remedy available under this Agreement or applicable Law.

11.2 Governing Law. THIS AGREEMENT AND THE RIGHTS AND OBLIGATIONS OF THE PARTIES HEREUNDER AND THE TRANSACTIONS CONTEMPLATED HEREBY SHALL BE GOVERNED BY, ENFORCED AND INTERPRETED IN ACCORDANCE WITH THE LAWS OF THE STATE OF UTAH WITHOUT REGARD TO PRINCIPLES OF CONFLICTS OF LAW THAT WOULD APPLY THE LAWS OF ANOTHER JURISDICTION.

11.3 Venue. Each of the Parties hereby irrevocably and unconditionally submits to the exclusive jurisdiction of the federal and state courts located in Salt Lake City, Utah (or if no such court will accept jurisdiction, in any state or federal court of general jurisdiction in the State of Utah, or if no such court will accept jurisdiction, in any court of competent jurisdiction in the United States) with respect to any proceeding relating to this Agreement. Further, each of the Parties hereby irrevocably and unconditionally waives any objection or defense that it may have based on improper venue or forum *non conveniens* to the conduct of any such proceeding in any such courts. The Parties agree that either or both of them may file a copy of this paragraph with any court as written evidence of the knowing, voluntary and bargained agreement between the Parties irrevocably to waive any objections to venue or to convenience of forum. Each of the Parties (on behalf of itself and its Affiliates) agrees that a final judgment in any such action or proceeding will be conclusive and may be enforced in other jurisdictions by suit on the judgment or in any other manner provided by applicable Law.

11.4 Waiver of Trial by Jury. TO THE FULLEST EXTENT PERMITTED BY LAW, EACH OF THE PARTIES HERETO WAIVES ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN RESPECT OF LITIGATION DIRECTLY OR INDIRECTLY ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS AGREEMENT. EACH PARTY FURTHER WAIVES ANY RIGHT TO CONSOLIDATE ANY ACTION IN WHICH A JURY TRIAL HAS BEEN WAIVED WITH ANY OTHER ACTION IN WHICH A JURY TRIAL CANNOT BE OR HAS NOT BEEN WAIVED.

## **ARTICLE XII LIMITED REMEDIES AND DAMAGES**

12.1 Exclusive Remedies. EXCEPT FOR CLAIMS ARISING UNDER ARTICLE II

RELATED TO PURCHASE PRICE ADJUSTMENTS, AND CLAIMS FOR FRAUD OR WILLFUL MISCONDUCT WITH RESPECT TO A PARTY IN CONNECTION WITH THE TRANSACTIONS CONTEMPLATED BY THIS AGREEMENT, THE EXPRESS REMEDIES SET FORTH IN SECTION 6.3, SECTION 7.2 AND IN SECTION 12.3, AND THE INDEMNITIES SET FORTH IN ARTICLE VIII AND ARTICLE IX, ARE THE SOLE AND EXCLUSIVE REMEDIES FOR A PARTY UNDER OR RELATING TO THIS AGREEMENT, WHETHER BASED ON STATUTE, IN TORT, COMMON LAW, STRICT LIABILITY, CONTRACT OR OTHERWISE, AND ALL OTHER REMEDIES OR DAMAGES AT LAW OR IN EQUITY ARE HEREBY WAIVED BY EACH PARTY. NOTWITHSTANDING THE FOREGOING, NOTHING IN THIS ARTICLE XII SHALL LIMIT ANY PERSON'S RIGHT TO SEEK AND OBTAIN ANY EQUITABLE RELIEF TO WHICH ANY PERSON SHALL BE ENTITLED, OR TO SEEK ANY REMEDY ON ACCOUNT OF ANY PERSON'S FRAUDULENT, CRIMINAL OR WILLFUL MISCONDUCT, OR ANY PERSON'S RIGHT TO SEEK AND OBTAIN EQUITABLE OR MONETARY RELIEF PRIOR TO CLOSING.

12.2 Limitation of Liability. NOTWITHSTANDING ANY PROVISION OF THIS AGREEMENT TO THE CONTRARY, NO PARTY SHALL, UNDER ANY CIRCUMSTANCES, BE LIABLE FOR SPECIAL, INDIRECT, CONSEQUENTIAL, INCIDENTAL, PUNITIVE OR EXEMPLARY DAMAGES, LOST PROFITS OR LOSS OF REVENUE, WHETHER BY STATUTE, IN TORT, COMMON LAW, STRICT LIABILITY OR CONTRACT OR OTHERWISE. THE LIMITATIONS HEREIN IMPOSED ON REMEDIES AND THE MEASURE OF DAMAGES SHALL BE WITHOUT REGARD TO THE CAUSE OR CAUSES RELATED THERETO, INCLUDING THE NEGLIGENCE, GROSS NEGLIGENCE, STRICT LIABILITY OR OTHER FAULT OF ANY PARTY, AND WHETHER LIABILITY IS BASED ON CONTRACT, TORT, STATUTE, COMMON LAW, STRICT LIABILITY OR OTHERWISE ("NON-REIMBURSABLE DAMAGES"); PROVIDED, HOWEVER, THAT A PARTY SHALL BE LIABLE FOR, AND NON-REIMBURSABLE DAMAGES SHALL NOT INCLUDE, (A) ALL SUCH DAMAGES ARISING FROM THIRD PARTY CLAIMS FOR WHICH AN INDEMNIFIED PARTY SEEKS INDEMNIFICATION AND (B) ANY LIQUIDATED DAMAGES PROVIDED FOR IN SECTION 6.3. THIS PROVISION SHALL SURVIVE ANY TERMINATION, CANCELLATION OR SUSPENSION OF THIS AGREEMENT.

12.3 Specific Performance. EACH PARTY AGREES THAT DAMAGE REMEDIES SET FORTH IN THIS AGREEMENT MAY BE DIFFICULT OR IMPOSSIBLE TO CALCULATE OR OTHERWISE INADEQUATE TO PROTECT ITS INTERESTS AND THAT IRREPARABLE DAMAGE MAY OCCUR IN THE EVENT THAT PROVISIONS OF THIS AGREEMENT ARE NOT PERFORMED BY THE PARTIES IN ACCORDANCE WITH THE SPECIFIC TERMS OF THIS AGREEMENT. ANY PARTY MAY SEEK TO REQUIRE THE PERFORMANCE OF ANY OTHER PARTY'S OBLIGATIONS UNDER THIS AGREEMENT THROUGH AN ORDER OF SPECIFIC PERFORMANCE RENDERED BY THE FEDERAL COURT IN THE STATE OF UTAH OR THE STATE COURTS IN THE STATE OF UTAH AS PROVIDED IN SECTION 11.2.

## ARTICLE XIII

## MISCELLANEOUS

### 13.1 Notices.

13.1.1 Notice Addresses. Unless this Agreement specifically requires otherwise, any notice, demand or request provided for in this Agreement, or served, given or made in connection with it, shall be in writing and shall be deemed properly served, given or made if delivered in person or sent by fax, by registered or certified mail, postage prepaid, or by a nationally recognized overnight courier service that provides a receipt of delivery, in each case, to a Party at its address specified below:

If to Purchaser, to:

PacifiCorp d/b/a Rocky Mountain Power

[\_\_\_\_\_]

[\_\_\_\_\_]

Attention: [\_\_\_\_\_]

Email: [\_\_\_\_\_]

with a copy to:

PacifiCorp d/b/a Rocky Mountain Power

[\_\_\_\_\_]

[\_\_\_\_\_]

Attention: [\_\_\_\_\_]

Email: [\_\_\_\_\_]

If to Seller, to:

[\_\_\_\_\_]

[\_\_\_\_\_]

[\_\_\_\_\_]

Attention: [\_\_\_\_\_]

Email: [\_\_\_\_\_]

with a copy to:

[\_\_\_\_\_]

[\_\_\_\_\_]

[\_\_\_\_\_]

Attention: [\_\_\_\_\_]

Email: [\_\_\_\_\_]

13.1.2 Effective Time. Notice given by personal delivery, mail or overnight courier pursuant to this Section 13.1.2 shall be effective upon physical receipt. Notice given by fax pursuant to this Section 13.1.2 shall be effective as of (a) the date of confirmed delivery if delivered before 5:00 p.m. local time on any Business Day, or (b) the next succeeding Business Day if confirmed delivery is after 5:00 p.m. local time on any Business Day or during any non-Business Day.

13.2 Payments. Except for payments due at Closing, including the Closing Payment, if a Party is required to make any payment under this Agreement on a day other than a Business Day, the date of payment shall be extended to the next Business Day. In the event a Party does not make any payment required or approved by the Parties under this Agreement on or before the due date, interest on the unpaid amount shall be due and paid at the Default Rate from the date such payment is due until the date such payment is made in full. Any payment of such interest at the Default Rate pursuant to this Agreement shall not excuse or cure any default hereunder. All payments shall first be applied to the payment of accrued but unpaid interest.

13.3 Entire Agreement. This Agreement, the Ancillary Agreements and the Confidentiality Agreement, including, in each case, all schedules and exhibits thereto, supersede all prior discussions and agreements between the Parties with respect to the subject matter hereof and thereof, and contain the sole and entire agreement between the Parties hereto with respect to the subject matter hereof and thereof.

13.4 Expenses. Except as otherwise expressly provided in this Agreement, whether or not the transactions contemplated hereby are completed, each Party will pay its own costs and expenses incurred in connection with the negotiation, execution and performance under this Agreement and the Ancillary Agreements and the transactions contemplated hereby and thereby.

13.5 Public Announcements. Seller and Purchaser will not issue or make any press releases or similar public announcements concerning the transactions contemplated hereby without the written consent of the other Party. If a Party is unable to obtain the approval of its press release or similar public statement from the other Party and such press release or similar public statement is, in the opinion of legal counsel to such Party, required by Law in order to discharge such Party's disclosure obligations, then such Party may make or issue the legally required press release or similar public statement and promptly furnish the other Party with a copy thereof. Seller and Purchaser will also obtain the other Parties' prior written approval of any press release to be issued immediately following the execution of this Agreement or the Closing announcing either the execution of this Agreement or the completion of the transactions contemplated by this Agreement.

13.6 Confidentiality. Each of Purchaser and Seller hereby agree that it shall be bound in all respects by the Confidentiality Agreement. The Confidentiality Agreement shall continue to be in full force and effect for the term set forth therein notwithstanding the execution and delivery of this Agreement or the occurrence of the Closing, except that following the Closing the Confidentiality Agreement shall not apply to information concerning any of the Project Assets which is available to Purchaser as owner of the Project Assets after the Closing.

### 13.7 Waivers.

13.7.1 Grant of Waivers. Any term or condition of this Agreement may be waived at any time by the Party that is entitled to the benefit thereof, but no such waiver shall be effective unless set forth in a written instrument duly executed by or on behalf of the Party waiving such term or condition. No waiver by any Party of any term or condition of this Agreement, in any one or more instances, shall be deemed to be or construed as a waiver of the same or any other term or condition of this Agreement on any future occasion. All remedies, either under this Agreement or by Law or otherwise afforded, will be cumulative and not alternative.

13.7.2 Exercise of Remedies. No failure or delay of any Party, in any one or more instances, (a) in exercising any power, right or remedy (other than failure or unreasonable delay in giving notice of default) under this Agreement or (b) in insisting upon the strict performance by the other Party of such other Party's covenants, obligations or agreements under this Agreement, shall operate as a waiver, discharge or invalidation thereof, nor shall any single or partial exercise of any such right, power or remedy or insistence on strict performance, or any abandonment or discontinuance of steps to enforce such a right, power or remedy or to enforce strict performance, preclude any other or future exercise thereof or insistence thereupon or the exercise of any other right, power or remedy. Subject to Section 10.1, the covenants, obligations and agreements of a defaulting Party and the rights and remedies of the other Party upon a default shall continue and remain in full force and effect with respect to any subsequent breach, act or omission.

13.8 Amendment. This Agreement may be amended, supplemented or modified only by a written instrument duly executed by the Parties.

13.9 No Construction Against Drafting Party. The language used in this Agreement is the product of the Parties' efforts and each Party hereby irrevocably waives the benefits of any rule of contract construction that disfavors the drafter of a contract or the drafter of specific words in a contract.

13.10 No Third Party Beneficiary. The terms and provisions of this Agreement are intended solely for the benefit of each Party hereto and their respective successors or permitted assigns, and it is not the intention of the Parties to confer third-party beneficiary rights upon any other Person.

13.11 Headings. The headings used in this Agreement have been inserted for convenience of reference only and do not define or limit the provisions hereof.

13.12 Invalid Provisions. If any provision of this Agreement is held to be illegal, invalid or unenforceable under any present or future Law, and if the rights or obligations of any Party hereto under this Agreement will not be materially and adversely affected thereby, (a) such provision will be fully severable, (b) this Agreement will be construed and enforced as if such illegal, invalid or unenforceable provision had never comprised a part hereof, (c) the remaining provisions of this Agreement will remain in full force and effect and will not be affected by the illegal, invalid or unenforceable provision or by its severance herefrom and



(d) Purchaser and Seller shall negotiate an equitable adjustment in the provisions of this Agreement with a view toward effecting the purposes of this Agreement, and the validity and enforceability of the remaining provisions, or portions or applications thereof, shall not be affected thereby.

### 13.13 Assignment.

13.13.1 In General. Except as set forth in this Section 13.13, neither this Agreement nor any of the rights or obligations hereunder shall be assigned by either Party, including by operation of Law, without the prior written consent of the other Party. Any assignment of this Agreement in violation of the foregoing shall be, at the option of the non-assigning Party, void.

13.13.2 Purchaser Assignment. Purchaser may, without the consent of Seller, assign this Agreement, or assign or delegate its rights and obligations under this Agreement, in whole or in part, if such assignment or delegation is made to: (a) PacifiCorp d/b/a Rocky Mountain Power; (b) any successor to Purchaser, provided such successor is a public utility holding a certificate of public convenience and necessity granted by the UPSC pursuant to [*Utah Code Provision*], where such assignment does not occur by operation of Law; (c) a Person (other than a natural person) providing wholesale or retail electric service in Utah; or (d) a Person (other than a natural person) as otherwise required by Law and, in each case, such assignee or delegatee enters into an assignment and assumption agreement, in form and substance satisfactory to Seller, pursuant to which such assignee or delegatee assumes all of Purchaser's obligations hereunder and otherwise agrees to be bound by the terms of this Agreement. Purchaser shall provide Seller with written notice of any such assignment.

13.13.3 Seller Assignment. Seller may, without the consent of Purchaser (and without relieving itself from liability hereunder), transfer or assign this Agreement, or assign or delegate its rights and obligations under this Agreement, in whole or in part, if such assignment or delegation is made to: (a) an Affiliate of Seller, provided the Seller's Parent Guaranty remains in full force and effect in accordance with its terms and without change due to such transfer or assignment; and (b) such Affiliate enters into an assignment and assumption agreement, in form and substance satisfactory to Purchaser, pursuant to which such Affiliate assumes all of Seller's obligations hereunder and otherwise agrees to be bound by the terms of this Agreement.

13.13.4 Liability After Assignment. A Party's assignment or transfer of rights or obligations pursuant to this Section 13.13 (other than Section 13.13.3) shall relieve said Party from any liability and financial responsibility for the performance thereof arising after any such transfer or assignment, provided such transferee enters into an assignment and assumption agreement, in form and substance satisfactory to the other Party, pursuant to which such transferee assumes all of the assigning or transferring Party's obligations hereunder and otherwise agrees to be bound by the terms of this Agreement.

13.14 Counterparts. This Agreement may be executed in any number of counterparts, each of which will be deemed an original, but all of which together will constitute one and the same instrument.

13.15 Time of Essence. Time is of the essence with respect to all obligations of the Parties hereunder.

[Signature page follows.]

**IN WITNESS WHEREOF**, this Agreement has been executed by the Parties as of the Execution Date.

**SELLER:**

[\_\_\_\_\_] ,  
a [State] [entity type]

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**PURCHASER:**

**PACIFICORP d/b/a ROCKY MOUNTAIN POWER,**  
**an Oregon corporation**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

Exhibit A  
Form of Seller's Parent Guaranty  
[To be provided by Purchaser]

Exhibit A

Exhibit B  
Form of Bill of Sale  
[To be provided by Purchaser]

Exhibit B

Exhibit C

Forms of Assignment and Assumption Agreements

[To be provided by Purchaser]

Exhibit C

Exhibit D

[Form of Bargain and Sale Deed]

[To be provided by Purchaser]

Exhibit D

Exhibit E  
Form of EPC Agreement<sup>58</sup>

See attached

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<sup>58</sup> NTD: The version of the term sheet to be attached to be based on the type of the Project.

Exhibit E



Exhibit F  
Form of Construction Completion Agreement<sup>5960</sup>

See attached

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<sup>59</sup> NTD: The version of the term sheet to be attached to be based on the type of the Project.

<sup>60</sup> NTD: The form of Construction Completion Agreement shall be attached to this Agreement prior to the Execution Date and replace the term sheet attached hereto. The form of Construction Completion Agreement shall be substantially and in all material respects consistent with the term sheet attached hereto and otherwise in form and substance satisfactory to Purchaser.

Exhibit F

Exhibit G  
Form of O&M Agreement<sup>6162</sup>

See attached

---

<sup>61</sup> NTD: The version of the term sheet to be attached to be based on the type of the Project.

<sup>62</sup> NTD: The form of O&M Agreement shall be attached to this Agreement prior to the Execution Date and replace the term sheet attached hereto. The form of O&M Agreement shall be substantially and in all material respects consistent with the term sheet attached hereto and otherwise in form and substance satisfactory to Purchaser.

Exhibit G

[Exhibit H  
Form of Turbine Supply Agreement<sup>63</sup>  
See attached]<sup>64</sup>

---

<sup>63</sup> NTD: The form of Turbine Supply Agreement shall be attached to this Agreement prior to the Execution Date and replace the term sheet attached hereto. The form of Turbine Supply Agreement shall be substantially and in all material respects consistent with the term sheet attached hereto and otherwise in form and substance satisfactory to Purchaser.

<sup>64</sup> NTD: For wind Projects only.

Exhibit H

[Exhibit I  
Form of Service and Maintenance Agreement<sup>65</sup>  
See attached]<sup>66</sup>

---

<sup>65</sup> NTD: The form of Service and Maintenance Agreement shall be attached to this Agreement prior to the Execution Date and replace the term sheet attached hereto. The form of Service and Maintenance Agreement shall be substantially and in all material respects consistent with the term sheet attached hereto and otherwise in form and substance satisfactory to Purchaser.

<sup>66</sup> NTD: For wind Projects only.

**2018 Rocky Mountain Power Renewable RFP  
Pro Forma**

**THIS DRAFT DOES NOT CONSTITUTE A BINDING OFFER AND SHALL NOT FORM THE BASIS FOR AN AGREEMENT BY ESTOPPEL OR OTHERWISE. ANY ACTIONS TAKEN BY A PARTY IN RELIANCE ON THE TERMS SET FORTH IN THIS DRAFT OR ON STATEMENTS MADE DURING NEGOTIATIONS PURSUANT TO THIS DRAFT SHALL BE AT THAT PARTY'S OWN RISK. UNTIL THE PARTIES HAVE COMPLETED THEIR DUE DILIGENCE AND THIS AGREEMENT IS NEGOTIATED, APPROVED, EXECUTED AND DELIVERED, NO PARTY SHALL HAVE ANY LEGAL OBLIGATIONS, EXPRESSED OR IMPLIED, OR ARISING IN ANY OTHER MANNER UNDER THIS DRAFT OR IN THE COURSE OF ANY NEGOTIATIONS.**

**ENGINEERING, PROCUREMENT AND CONSTRUCTION AGREEMENT<sup>1</sup>  
([ ] PV Solar Project)**

**by and between**

[ ]

**Contractor's License No. [ ]<sup>2</sup>**

**and**

[ ]

Dated as of [ ]

---

<sup>1</sup> Further conforming changes will be required for a geothermal Project.

<sup>2</sup> Note to Bidders: A Utah contractor's license is required prior to execution of the EPC agreement.

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## **EXHIBITS**

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- Exhibit 2 – Site Description
- Exhibit 3 – Technical Specifications
- Exhibit 3A – Substation Specifications
- Exhibit 3B – Transmission Specifications
- Exhibit 3C – O&M Building Specification
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- Exhibit 29 – Owner's Code of Business Conduct
- Exhibit 30 – Major Facility Equipment Warranties

## ENGINEERING, PROCUREMENT AND CONSTRUCTION AGREEMENT

This ENGINEERING, PROCUREMENT AND CONSTRUCTION AGREEMENT, dated as of [ ] (this “Agreement”), is entered into by and between [ ], a [ ] doing business as (“Owner”), and [ ], a [ ] formed under the laws of the State of [ ] (“Contractor”). Owner and Contractor are each hereinafter sometimes referred to as a “Party” and collectively as the “Parties.”

### RECITALS

**WHEREAS**, Owner intends to develop a [ ] MW AC at the Delivery Point (approximately [ ] MW DC nameplate capacity) solar photovoltaic power plant (the “Facility”)<sup>3</sup> located in [ ], Utah, as more fully described in and including all of the components set forth in Exhibit 1, Exhibit 3, Exhibit 3A, Exhibit 3B, Exhibit 3C, Exhibit 3D, and Exhibit 3E (collectively, the “Technical Specifications”), on the real property more fully described in Exhibit 2 (the “Site”); and

**WHEREAS**, Contractor designs, engineers, supplies, constructs and installs photovoltaic systems such as the Facility on a turn-key basis, to make available electrical energy to a transmission interconnection facility; and

**WHEREAS**, Owner desires to engage Contractor to design, engineer, supply, construct, install, test and commission the Facility at the Site and perform all other Work under this Agreement and Contractor desires to carry out such work or services, all as further defined by and in accordance with the terms and conditions set forth in this Agreement; and

**WHEREAS**, Owner is an Affiliate of [ ], a [ ] [limited liability company] (“Project Company”), after the Full Notice to Proceed, Owner will assign all of its rights, title and interest in, and obligations under, the Agreement to the Project Company and the Project Company will accept such assignment of all such rights, title, and interest and assumes all such obligations of Owner under the Agreement in each case so that the Project Company, as of the effective date of such assignment, is the Owner under the Agreement; and

**WHEREAS**, after the Full Notice to Proceed, the Project Company as Owner may assign all of its rights, title and interest in, and obligations under, the Agreement to a prospective or actual purchaser of the Project assets and such prospective or actual purchaser will accept such assignment of all such rights, title, and interest and assumes all such obligations of Owner (except for payment obligations) under the Agreement in each case so that such prospective or actual purchaser of the Project assets, as of the effective date of such assignment, is the Owner under the Agreement.

---

<sup>3</sup> Note to Bidders: If there are multiple facilities, it is contemplated that a separate EPC Agreement will be entered into for each facility.

**NOW THEREFORE**, in consideration of the mutual promises set forth below, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

## **ARTICLE 1**

### **CONTRACT INTERPRETATION AND EFFECTIVENESS**

**1.1 Rules of Interpretation.** Unless the context requires otherwise or unless otherwise stated: (a) the singular includes the plural and vice versa, (b) terms defined in a given number, tense or form shall have the corresponding meanings when used with initial capitals in another number, tense or form, (c) words in the Exhibits which have well known technical or construction industry meanings are used in accordance with such recognized meanings, (d) the words “include”, “includes” and “including” shall be deemed to be followed by the words “without limitation” and unless otherwise specified shall not be deemed limited by the specific enumeration of items, (e) references to “Sections”, “Schedules” and “Exhibits” are to sections, schedules and exhibits to this Agreement, (f) the words “herein”, “hereof”, “hereto”, “hereinafter” “hereunder” and other terms of like import refer to this Agreement as a whole and not to any particular section or subsection of this Agreement, (g) a reference to a Person in this Agreement or any other agreement or document shall include such Person’s successors and permitted assigns, (h) references to this Agreement include a reference to all schedules and exhibits hereto, as the same may be amended, modified, supplemented or replaced from time to time, (i) references to Applicable Law or Applicable Permit are references to the Applicable Law or Applicable Permit, as applicable, as now or at any time hereafter may be in effect, together with all amendments and supplements thereto and any Applicable Law or Applicable Permit substituted for or superseding such statute or regulation, (j) without adversely impacting the rights of either Party with respect to the amendment, restatement or replacement of any agreement under which such Party shall be liable hereunder, references to agreements, certificates, documents and other legal instruments include all subsequent amendments thereto, and changes to, and restatements or replacements of, such agreements, certificates or instruments that are duly entered into and effective against the parties thereto or their successors and permitted assigns, (k) a reference to a Governmental Authority includes an entity or officer that or who succeeds to substantially the same functions as performed by such Governmental Authority as of the date hereof, (l) “shall” and “will” mean “must” and have equal force and effect and express an obligation, (m) this Agreement will be construed as if drafted jointly by the Parties and no presumption or burden of proof will arise favoring or disfavoring any Party by virtue of the authorship of any provision in this Agreement, (n) the word “or” in this Agreement is disjunctive but not necessarily exclusive, (o) references in this Agreement to time periods in terms of a certain number of Days mean calendar Days unless expressly stated herein to be Business Days, (p) headings used in this Agreement are for ease of reference only and shall not be taken into account in the interpretation or construction of the provisions of this Agreement, and (q) the words “dollar”, “dollars” or “money” and the symbol “\$” each mean United States Dollars.

**1.2 Defined Terms.** Unless otherwise stated in this Agreement, capitalized terms used in this Agreement have the following meanings:

“AAA” means the American Arbitration Association.

“Abandons” means, other than in the event of a Force Majeure Event or an Owner-Caused Delay, that Contractor abandons, ceases to perform the Work or leaves the Site for a period longer than thirty (30) consecutive Days.

“AC” means alternating current.

“Actual Delay” has the meaning set forth in Section 10.3.

“Affiliate” means, when used with reference to a specified Person, any Person directly or indirectly Controlling, Controlled by, or under common Control with such specified Person. Notwithstanding the foregoing, for purposes of this Agreement (i) Transmission Provider shall not be deemed to be an Affiliate of Owner; and (ii) Affiliates of Owner shall extend only to Berkshire Hathaway Energy Company and such subsidiaries it directly or indirectly Controls.

“Agreement” has the meaning set forth in the preamble, including all Exhibits hereto, as the same may be modified, amended or supplemented from time to time in accordance with the terms hereof.

“Applicable Codes” means codes, standards or criteria, such as the National Electric Code and those codes, standards or criteria promulgated by the American Society of Mechanical Engineers, Underwriters Laboratories and Institute of Electrical and Electronics Engineers, and other standards institutions which are generally recognized as applicable to the Work or the Facility.

“Applicable Laws” means any constitutional provision, law, statute, rule, regulation, ordinance, treaty, order, decree, judgment, decision, certificate, injunction, registration, license, permit, authorization, guideline, governmental approval, consent or requirement of any Governmental Authority, as construed from time to time by such Governmental Authority, including Environmental Laws.

“Applicable Permits” means each and every national, regional and local license, authorization, consent, ruling, exemption, variance, order, judgment, certification, filing, recording, permit or other approval with or of any Governmental Authority, including each and every environmental, construction or operating permit and any agreement, consent or approval from or with any other Person that is required by any Applicable Law or that is otherwise necessary for the performance of, in connection with, or related to, the Work or the design, construction or operation of the Facility, including those set forth on Exhibit 6A and Exhibit 6B.

“Applicable Tax Basis” means the actual tax basis (or as applicable the actual EITC eligible tax basis) of the Facility as reasonably determined by Owner consistent with the values reflected in Exhibit 23.



“Application for Payment” means an application for payment in the form attached hereto as Exhibit 10.

“Arbitration Rules” has the meaning set forth in Section 28.2(c).

“Availability Completion” has the meaning set forth in Section 15.4.<sup>4</sup>

“Availability Completion Date” has the meaning set forth in Section 15.4.

“Availability Test” means the pre functional test of the Facility as described in Exhibit 25.

“Availability Test Certificate” means the certificate in the form of Exhibit 15A to be issued by Contractor after completion of the Availability Test.

“BCP” has the meaning set forth in Section 25.1.

“Business Day” means a Day, other than a Saturday or Sunday or a public holiday, on which banks are generally open for business in the State of Utah.

“Capacity Shortfall” means the difference between the Guaranteed Capacity and the Facility Capacity.

“Capacity Test” means the test and commissioning of the Facility as described in Exhibit 14C.

“Capacity Test Certificate” means the certificate in the form of Exhibit 15B to be issued by Contractor after completion of the Capacity Test.

“Cancellation Cost Cap” means the maximum applicable payment amount as set forth in the Cancellation Cost Cap column of the Schedule of Values that is due to Contractor in any given period should Owner terminate this Contract for convenience pursuant to Section 20.7 or should Contractor terminate this Contract pursuant to Section 20.4(b).

“Cash Flow Curve” means the periodic cash flow curve set forth in the Schedule of Values that constitutes the cumulative maximum payment obligation Owner will have to Contractor under this Agreement for any given period during the performance of the Work.

“Certificate of Final Completion” means a certificate delivered by Contractor pursuant to Section 18.2 and substantially in the form attached as Exhibit 19.

“Certificate of Substantial Completion” means a certificate delivered by Contractor pursuant to Section 16.3 and substantially in the form attached as Exhibit 18.

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<sup>4</sup> Note to Bidders: The timing, conditions and requirements of Availability Completion remain subject to further review and change by Owner’s tax advisors.

“Change Order” means a written document signed by Owner and Contractor in accordance with Article 10, authorizing an addition, deletion or revision to the Work, an adjustment of the Contract Price or Construction Schedule, and/or any other obligation of Owner or Contractor under this Agreement, which document is issued after execution of this Agreement.

“Claim Notice” has the meaning set forth in Section 24.5.

“Code” means the Internal Revenue Code of 1986, as amended.

“Confidential Information” has the meaning set forth in Section 25.1.

“Construction Equipment” means all equipment, machinery, tools, consumables, temporary structures or other items as may be required for Contractor to complete the Work but which will not become a permanent part of the Facility.

“Construction Schedule” means the critical path method construction schedule based on and consistent with the provisions set forth in Exhibit 4 for the progression of the Work by Contractor (including the achievement of the Guaranteed Substantial Completion Date and the Guaranteed Final Completion Date), created in accordance with Section 3.11 and as updated from time to time pursuant to the terms of this Agreement.

“Construction Start Date” means the date on which Contractor begins construction of the Facility as defined under the Code.

“Contract Documents” means this Agreement, the exhibits and schedules hereto, and the Contractor Submittals.

“Contract Price” means the sum of [ ] (\$ ), as the same may be modified from time to time in accordance with the terms of this Agreement.

“Contractor” has the meaning set forth in the preamble.

“Contractor Acquired Permits” means those Applicable Permits to be acquired by Contractor and designated on Exhibit 6A and any other Applicable Permits, other than Owner Acquired Permits.

“Contractor Critical Path Items” means those items that are designated as “Contractor Critical Path Items” in the Construction Schedule.

“Contractor Event of Default” has the meaning set forth in Section 20.1.

“Contractor Lien” means any right of retention, mortgage, pledge, assessment, security interest, lease, advance claim, levy, claim, lien, charge or encumbrance on the Work, the Facility Equipment, the Facility, the Site or any part thereof directly or indirectly created, incurred, assumed or suffered to be created by any Contractor Party (other than in accordance with any

other Project Transaction Document), any Subcontractor, or any of their respective employees, laborers or materialmen.

“Contractor Party” or “Contractor Parties” means each of Contractor, Contractor’s Guarantor and any of their respective present and future Affiliates and their respective directors, officers, employees, shareholders, agents, representatives, successors and permitted assigns.

“Contractor Performance Security” means a corporate guaranty from Contractor’s Guarantor in the form attached hereto as Exhibit 11.<sup>5</sup>

“Contractor Submittals” means the drawings, specifications, plans, calculations, model, designs and other deliverables described in Exhibit 7.

“Contractor’s Guarantor” means [\_\_\_\_\_].

“Contractor’s Insurance” has the meaning set forth in Section 23.1, as further described in Part I of Exhibit 13.

“Contractor’s Representative” has the meaning set forth in Section 5.2.

“Control” means (including with correlative meaning the terms “Controlled”, “Controls” and “Controlled by”), as used with respect to any Person, the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of such Person, whether through the ownership of voting securities, by contract or otherwise.

“Credit Rating” of a Person means the credit rating then assigned by a Relevant Rating Agency to the long-term, senior, unsecured, non-credit-enhanced indebtedness of that Person.

“Day” means a calendar day unless it is specified that it means a Business Day.

“DC” means direct current.

“Defect Warranty” has the meaning given in Section 21.3(a).

“Defect Warranty Period” has the meaning given in Section 21.4(a).

“Defective” means, unless otherwise defined elsewhere in this Agreement as to a specific aspect of the Work, any designs, engineering, Equipment, installation or other Work which, in Owner’s reasonable judgment:

- (a) does not conform to Exhibit 1, the Technical Specifications, or the Contractor Submittals that have been reviewed by Owner;
- (b) is of improper or inferior workmanship or quality;

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<sup>5</sup> Note to Bidders: Subject to Contractor credit review, a letter of credit or other security may be required during the Term and the Warranty Period.

(c) includes a Serial Defect; or

(d) is inconsistent with Prudent Utility Practice.

“Delay Response Plan” has the meaning set forth in Section 3.22.

“Delivery Point” means [\_\_\_\_\_].

“Depreciation Benefit” means the most accelerated depreciation available under Sections 167 and 168 of the Code, assuming the utilization of the shortest available recovery period, the most accelerated depreciation method available, the half-year convention and a full first taxable year (however, in no event shall the depreciation be more accelerated than five (5) year two hundred percent (200%) declining balance depreciation (without application of Section 168(k) of the Code or any successor thereto)). The recovery periods applicable to the Facility shall be determined using the depreciation class percentage allocations derived from costs by class divided by the total costs for the Facility listed on Exhibit 23. In determining the Depreciation Benefit, a thirty-five percent (35%)<sup>6</sup> tax rate shall be applied. Further, in accordance with Section 50(c) of the Code tax basis for purposes of calculating depreciation shall be deemed to be reduced by fifty percent (50%) of the Maximum EITCs.

“Design Warranty” has the meaning given in Section 21.3(b).

“Design Warranty Period” has the meaning given in Section 21.4(b).

“Direct Costs” means the actual and substantiated costs (without mark-up) that are reasonably incurred by Contractor as a result of the event requiring the Change Order for the following items: (a) payroll wages paid for labor in the direct employ of Contractor at the Site; (b) cost of materials and permanent equipment; (c) payments made by Contractor to Subcontractors (such payments excluding any mark-ups by Contractor); (d) rental charges of machinery and equipment for the Work; (e) permit fees; (f) costs of mobilization and/or demobilization; (g) associated standard indirect field costs; and (h) associated engineering costs, if any, directly related to Work implemented under the Change Order. Direct Costs exclude any home-office, overhead or other indirect costs.

“Disclosing Party” has the meaning set forth in Section 25.1.

“Dispute” has the meaning set forth in Section 28.1.

“Dispute Initiator” has the meaning set forth in Section 28.2(a).

“Documentation” shall mean all Contractor Submittals, design documents, Monthly Progress Reports, Weekly Progress Reports engineering change notices (ECNs), requests for information (RFIs), as-built drawings, system turnover packages, isometrics, specifications (including the Technical Specifications), studies, system descriptions, lists, diagrams,

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<sup>6</sup> Note to Bidders: The rate will need to be updated in light of the Tax Cuts and Jobs Act.

procedures, instructions, reports, test results, calculations, manuals, and project schedules required by or referenced in the Technical Specifications or elsewhere in this Agreement, including all electronically originated and stored information and other data and information originated by Contractor or any Subcontractor in connection with Contractor's obligations under this Agreement.

"Dollar" and "\$" means the lawful currency of the United States of America.

"Effective Date" has the meaning set forth in Section 1.9.

"EITC" means the investment tax credit for energy property described in Section 48(a)(3)(A)(i) of the Code.

"EITC Applicable Percentage" means, for any period, the federal investment tax credit (or successor thereto) percentage for utility scale solar available under then Applicable Law.

"EITC Liquidated Damages" the meaning set forth in Section 17.6(b).

"EITC Timing Determinate" means the time value difference between when the Maximum EITCs were contemplated to be reflected in Owner's estimated tax and when the EITCs are ultimately reflected in Owner's estimated tax payments. It is determined assuming Owner will pay its estimated taxes based on the annualized income installment method of Section 6655(e)(2) of the Code (using the annualization periods set forth in Sections 6655(e)(2)(A) and (B) of the Code), and using as the interest rate the Wall Street Journal "prime rate" as of the first Business Day preceding the date of such first estimated tax installment payment.

"Emergency" means an event occurring at the Site or any adjoining property that poses actual or imminent risk of serious personal injury to any Person or material physical damage to the Facility requiring immediate preventative or remedial action, as reasonably determined by the Party assessing the subject event.

"Environmental Laws" means any federal, Indian tribe (including any agency, council or political subdivision thereof), state, or local law, regulation, ordinance, standard, guidance, or order pertaining to the protection of the environment and human health, including the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9601, et seq.; the Resource Conservation and Recovery Act, 42 U.S.C. 6901, et seq.; the Toxic Substances Control Act, 15 U.S.C. 2601, et seq.; the Clean Air Act, 42 U.S.C. 7401, et seq.; the Federal Water Pollution Control Act, 33 U.S.C. 1251 et seq.; the Occupational Safety and Health Act, 29 U.S.C. 651 et seq.; and any other law that governs: (a) the existence, removal, or remediation of Hazardous Materials on real property; (b) the emission, discharge, release, or control of Hazardous Materials into or in the environment; or (c) the use, generation, handling, transport, treatment, storage, disposal, or recovery of Hazardous Materials.

"Equipment" means, collectively, Construction Equipment and Facility Equipment.

“Event of Default” means either a Contractor Event of Default or an Owner Event of Default, as the context may require.

“Expected EITCs” means, as of any determination date, the amount of EITCs available for the Facility using the EITC Applicable Percentage multiplied by the Facility’s Applicable Tax Basis. Further, it shall be assumed that Substantial Completion is equivalent to Placed in Service for the Facility (assuming the Construction Start Date occurred on or prior to the Guaranteed Construction Start Date.)

“Facility” has the meaning set forth in the Recitals.

“Facility Capacity” means, with respect to the Facility, the Final Test Results pursuant to the Capacity Test.

“Facility Delay Liquidated Damages” means an amount equal to: (a) with respect to the first (1<sup>st</sup>) through and including the sixtieth (60<sup>th</sup>) day subsequent to the Guaranteed Substantial Completion Date, [ ] U.S. Dollars (\$[ ]) per MW of Guaranteed Capacity per Day; (b) with respect to the sixty-first (61<sup>st</sup>) through and including the one-hundred-twentieth day subsequent to the Guaranteed Substantial Completion Date, [ ] U.S. Dollars (\$[ ]) per MW of Guaranteed Capacity per Day; and (c) with respect to the one-hundred-twenty-first (121<sup>st</sup>) day subsequent to the Guaranteed Substantial Completion Date and thereafter, [ ] U.S. Dollars (\$[ ]) per MW of Guaranteed Capacity per Day.<sup>7</sup>

“Facility Equipment” means the modules, inverters, trackers and all other equipment, fixtures, materials, supplies, devices, machinery, tools, parts, components, instruments, appliances and other items that are required to complete the Facility and will become a permanent part of the Facility, as well as Spare Parts, whether provided by Contractor or any Subcontractor, and all special tools required to operate and maintain the Facility.

“Facility Tests” means, collectively, the Availability Test, the Functional Test, the Power Plant Controller Test, and the Capacity Test.

“FERC Electrical Plant Chart of Accounts” shall have the meaning set forth in Exhibit 28.

“FERC Unit of Plant Cost Allocation Book” shall have the meaning set forth in Exhibit 28.

“Final Capacity Liquidated Damages” has the meaning set forth in Section 17.2(a).

“Final Completion” means satisfaction or waiver of all of the conditions for completion of the Facility as set forth in Section 18.1.

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<sup>7</sup> Note to Bidders: Please provide liquidated damages to be included in definitive Solar EPC.

“Final Completion Date” means the actual date on which the Facility has achieved Final Completion in accordance with Section 18.2.

“Final Test Results” means (i) with respect to the Availability Test, the final test results determined pursuant to the pre functional test set forth in Exhibit 25 and certified by Contractor pursuant to Section 15.4, (ii) with respect to the Power Plant Controller Test pursuant to Exhibit 14B, and (iii) with respect to the Capacity Test, the final test determined pursuant to Exhibit 14C and certified by Contractor pursuant to Section 15.4.

“Financing Parties” means any and all lenders, security holders, note or bond holders, lessors, lien holders, investors, equity providers, holders of indentures, security agreements, mortgages, deeds of trust, pledge agreements and providers of swap agreements, interest rate hedging agreements, letters of credit and other documents evidencing, securing or otherwise relating to the construction, interim or long-term financing or refinancing of the Facility or a portfolio of projects including the Facility, and their successors and permitted assigns, and any trustees or agents acting on their behalf. The term “Financing Party” includes, for the avoidance of doubt, any Person or Persons that owns the Facility and leases the Facility to Owner or an Affiliate of Owner, as applicable, under a lease, sale-leaseback or synthetic lease structure.

“Force Majeure Event” means, when used in connection with the performance of a Party’s obligations under this Agreement, any act, condition or event occurring after the Effective Date which renders said Party unable to perform or comply with its obligations under this Agreement, but only if and to the extent (a) such event is not within the reasonable control, directly or indirectly, of the Party (or in the case of Contractor, any Affiliate thereof) seeking to have its performance obligation(s) excused thereby, (b) the Party seeking to have its performance obligation(s) excused thereby (or in the case of Contractor, any Affiliate thereof) has taken all reasonable precautions and measures in order to prevent or avoid such event or mitigate the effect thereof on its ability to perform its obligations under this Agreement and which by the exercise of due diligence such Party could not reasonably have been expected to avoid and which by the exercise of due diligence it has been unable to overcome, (c) such event is not the direct or indirect result of the negligence or the failure of, or caused by, the Party seeking to have its performance obligations excused thereby (or in the case of Contractor, any Affiliate thereof) and (d) the Party seeking to have its performance obligations excused thereby (or in the case of Contractor, any Affiliate thereof) had no actual or constructive prior knowledge of such event.

(i) Without limiting the meaning of but subject to the preceding sentence, the following events constitute Force Majeure Events to the extent that they render a Party unable to perform or comply with its obligations under this Agreement:

(A) war (whether or not war is declared), hostilities, revolution, rebellion, insurrection against any Governmental Authority, riot, terrorism, acts of a public enemy or other civil disturbance;

(B) acts of God, including storms, floods, lightning, earthquakes, hailstorms, ice storms, tornados, typhoons, hurricanes, landslides, volcanic

eruptions, fires, objects striking the earth from space (such as meteorites), or any other naturally occurring event for the location of the Site, or at such location in which Contractor performs the Work or Owner performs its obligations under this Agreement, that impacts the ability of the affected Party to perform its obligations under this Agreement;

(C) sabotage or destruction by a third party (other than any contractor retained by or on behalf of the invoking Party) of plants, facilities and equipment located in the continental United States of America necessary for the performance by the affected Party of its obligations under this Agreement; and

(D) except as set forth in subsections (ii)(C) and (ii)(D) below, industrial action, work stoppage, labor strike, boycott, or labor shortage in the continental United States of America.

(ii) Notwithstanding anything to the contrary in this definition, the term Force Majeure Event shall not be based on or include any of the following:

(A) economic hardship of either Party;

(B) Owner's inability to pay;

(C) a strike, work stoppage or labor dispute limited only to any one or more of Owner, Owner's Affiliates, Contractor or subcontractors thereof, or any other third party employed by a Party to work on the Facility including strikes of Contractor or Subcontractor personnel at the Site or at Contractor's or Subcontractor's facilities;

(D) any labor shortages involving Contractor or a Subcontractor;

(E) Contractor's compliance or inability to comply with the Project Labor Agreement, except if Contractor's inability to comply is caused solely by a Force Majeure Event of the specific type described in subsection (i)(D) above;

(F) Site Conditions, except if Contractor's inability to comply is caused solely by a Force Majeure Event of the specific type described in subsection (i)(B) above;

(G) a Party's inability to obtain sufficient labor, materials, equipment or other resources to build the Facility and perform the Work, except if such Party's inability to obtain sufficient labor, materials, equipment or other resources to build the Facility and perform the Work is caused solely by a Force Majeure Event of the specific type described in any of subsections (i)(A) through (i)(D) above;



(H) the lack of sun or other fuel source of an inherently intermittent nature, except to the extent it is of the specific type described in subsection (i)(B) above;

(I) reductions in generation from the Facility resulting from ordinary wear and tear, deferred maintenance or operator error;

(J) curtailment or reduction in deliveries at the direction of a Transmission Provider;

(K) a Party's inability to obtain permits or approvals of any type for the construction, operation or maintenance of the Facility and necessary interconnection agreements or approvals, including, without limitation, approvals by any Governmental Authority that are subject to pre-decisional analysis under the federal National Environmental Policy Act, 42 U.S.C. §§ 4321-4370d;

(L) an Equipment failure, except if such Equipment failure is caused solely by a Force Majeure Event of the specific type described in any of subsections (i)(A) through (i)(D) above;

(M) utility interruptions;

(N) transportation or shipping accidents; or

(O) unavailability of preferred shipping methods.

"Full Notice to Proceed" means a notice signed by a duly authorized representative of Owner to Contractor authorizing Contractor to commence and complete all Work under this Agreement.

"Functional Test" means the test to determine the functionality of the Facility and equipment and components incorporated therein, as described in Exhibit 25.

"Governmental Authority" means any national, federal, Indian tribe (including any agency, council or political subdivision thereof), state, regional, province, town, city, county, local or municipal government, whether domestic or foreign or other administrative, regulatory or judicial body of any of the foregoing and all agencies, authorities, departments, instrumentalities, courts and other authorities lawfully exercising or entitled to exercise any administrative, executive, judicial, legislative, police, regulatory or taxing authority or power, or other subdivisions of any of the foregoing. For clarity, each of the Western Electricity Coordinating Council and the UPSC shall be a Governmental Authority.

"Guaranteed Capacity" means, with respect to the Facility, the MW values set forth in Exhibit 14D.

“Guaranteed Construction Start Date” means [\_\_\_\_].<sup>8</sup>

“Guaranteed Date” means each of the Guaranteed Construction Start Date, Guaranteed Substantial Completion Date and the Guaranteed Final Completion Date.

“Guaranteed Final Completion Date” has the meaning set forth in Section 18.1, as may be extended only in accordance with the express terms of this Agreement.

“Guaranteed Substantial Completion Date” means the corresponding date set forth in Exhibit 4.

“Hazardous Materials” means (a) any regulated substance, hazardous constituent, hazardous materials, hazardous wastes, hazardous substances, toxic wastes, radioactive substance, contaminant, pollutant, toxic pollutant, pesticide, solid wastes, and toxic substances as those or similar terms are defined under any Environmental Laws; (b) any friable asbestos or friable asbestos-containing material; (c) polychlorinated biphenyls (“PCBs”), or PCB-containing materials or fluids; (d) any petroleum, petroleum hydrocarbons, petroleum products, crude oil and any fractions or derivatives thereof; and (e) any other hazardous, radioactive, toxic or noxious substance, material, pollutant, or contaminant that, whether by its nature or its use, is subject to regulation or giving rise to liability under any Environmental Laws.

“Indemnifying Party” means, with respect to an indemnification obligation under this Agreement, the Party providing such indemnification.

“Indemnitee” means an Owner Party or a Contractor Party, as the context may require, being indemnified pursuant to Section 24.5.

“Independent Engineer” has the meaning set forth in Section 31.9.

“Independent Expert” means an independent third-party engineer mutually agreed upon by the Parties.

“Insolvency Event” means, with respect to a Person, such Person becomes insolvent, institutes or has instituted against it a case under Title 11 of the United States Code or is unable to pay its debts as they mature or makes a general assignment for the benefit of its creditors, or a receiver is appointed for the benefit of its creditors or on account of its insolvency.

“Intellectual Property Claim” means an allegation, claim or legal action asserted by a third party against an Owner Party alleging unauthorized use, disclosure, misappropriation, infringement, or other violation of such third party’s Intellectual Property Rights arising from (a) Owner Party’s use of the Licensed Technology to the extent used in accordance with the license granted pursuant to Section 14.1 or (b) Contractor’s performance (or that of its Affiliates or Subcontractors) under this Agreement asserted against Owner that (i) concerns any Facility Equipment or other goods, materials, supplies, items or services provided by Contractor (or its

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<sup>8</sup> Note to Bidders: Please provide the proposed Guaranteed Construction Start Date and the assumed ITC value.

Affiliates or Subcontractors) under this Agreement, (ii) is based upon or arises out of the performance of the Work by Contractor (or its Affiliates or Subcontractors), including the use of any tools or other implements of construction by Contractor (or its Affiliates or Subcontractors) or (iii) is based upon or arises out of the design or construction of any item by Contractor (or its Affiliates or Subcontractors) under this Agreement or the use, or operation, of any item according to directions embodied in Contractor's (or its Affiliates' or Subcontractors') Contractor Submittals, or any revision thereof, prepared or provided by Contractor.

"Intellectual Property Rights" means all intellectual property rights throughout the world, including all rights in patents and inventions (whether or not patentable); registered and unregistered copyrights, trademarks, database rights, semiconductor mask work rights; proprietary rights, trade secrets, know-how and confidential information.

"Interconnection Agreement" means [\_\_\_\_\_].

"IRS" means the Internal Revenue Service.

"Key Personnel" has the meaning set forth in Section 5.2.

"Licensed Technology" has the meaning set forth in Section 14.1.

"Liquidated Damages" means, collectively, the Facility Delay Liquidated Damages and the Final Capacity Liquidated Damages and the EITC Liquidated Damages.

"Losses" means any and all claims, actions, suits, proceedings, losses, liabilities, penalties, damages, costs or expenses (including attorneys' fees and disbursements) of any kind.

"Major Facility Equipment Warranties" has the meaning set forth in Section 21.6(c)(i).

"Major Subcontract" means a Subcontract with a Major Subcontractor.

"Major Subcontractor" means (a) a Supplier of the distribution transformers, step-up transformers, inverters, racking and Modules for the Facility, (b) Contractor's electrical installation Subcontractors, Site preparation/grading Subcontractors and Facility substation design and construction Subcontractors and (c) any other Subcontractor or Supplier for the Facility with Subcontracts having an aggregate value in excess of Two Hundred Thousand Dollars (\$200,000) for performance of any part of the Work.

"Maximum EITCs" means the maximum amount of EITCs for which the Facility could have qualified, assuming (i) the Construction Start Date occurred on or prior to the Guaranteed Construction Start Date<sup>9</sup> (ii) that the Facility achieved Substantial Completion by its Guaranteed Substantial Completion Date (as in effect on the Effective Date and without giving effect to any

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<sup>9</sup> Note to Bidders: "Begun Construction" test could apply and should be analyzed; Placed in Service would still be required by 2023 in such event.

extensions thereof under this Agreement) and (iii) Substantial Completion is equivalent to Placed in Service (assuming construction began as set forth in subsection (i) above).

“Milestone” means any milestone for the Work listed on Exhibit 4.

“Milestone Schedule” means the schedule attached hereto as Exhibit 4.

“Minimum Capacity Level” means ninety-seven percent (97%) of the Guaranteed Capacity of the Facility, calculated in accordance with Exhibit 14D.

“Minimum Credit Rating” of a Person means that the Credit Rating of that Person is at least (a) BBB- (or its equivalent) as determined by Standard & Poor’s and (b) Baa3 (or its equivalent) as determined by Moody’s.

“Modules” means solar photovoltaic modules with an expected electrical output of [ ] watts of electric power (expressed as DC) as determined under the Standard Test Conditions.

“Monthly Progress Report” means a progress report prepared by Contractor setting forth the detail required in Exhibit 8A.

“MW” means 1,000,000 watts of electric power (expressed as AC).

“Notice of Dispute” has the meaning set forth in Section 28.1.

“Operator” means [ ].

“Owner” has the meaning set forth in the preamble.

“Owner Acquired Permits” means those Applicable Permits to be acquired by Owner, as designated on Exhibit 6B.

“Owner-Caused Delay” means (a) any Owner suspension of the Work designated as an Owned-Caused Delay pursuant to Section 19.1 or (b) a failure by Owner (which failure is not otherwise excused by a Force Majeure Event or otherwise in accordance with this Agreement) to perform any of its material obligations under this Agreement including any failure by Owner to timely approve Contractor’s Submittals delivered in connection with this Agreement on or prior to the applicable date as provided in this Agreement (unless a deemed response to such notice is provided for hereunder); provided, however, that any actions by Transmission Provider shall in no event constitute an Owner-Caused Delay.

“Owner Event of Default” has the meaning set forth in Section 20.3.

“Owner Inspection Parties” has the meaning set forth in Section 6.1.

“Owner Party” or “Owner Parties” means Owner and its present and future Affiliates and their respective directors, officers, employees, shareholders, agents, representatives, successors

and permitted assigns. Notwithstanding the foregoing, for purposes of this Agreement, Transmission Provider shall not be deemed to be an Owner Party.

“Owner Taxes” means all Utah sales and use taxes with regard to any tangible personal property purchased or leased for, used in the permanent construction of, or incorporated into the Facility.

“Owner’s Code of Business Conduct” means the Owner’s Code of Business Conduct set forth on Exhibit 29.

“Owner’s Engineer” means any engineering firm or firms or other engineer or engineers selected and designated by Owner, which may include an employee or employees of an Owner Party.

“Owner’s Insurance” has the meaning set forth in Section 23.2, as further described in Part II of Exhibit 13.

“Owner’s Representative” means the individual designated by Owner in accordance with Section 5.1.

“Party” and “Parties” have the meanings set forth in the preamble.

“Performance Criteria” means the relevant performance criteria for the Facility identified in Exhibit 14D.

“Permit Fees” means the actual costs payable to a Governmental Authority and all other reasonable third-party costs and expenses incurred in connection with the application for and issuance of an Applicable Permit.

“Person” means any individual, corporation, partnership, company, joint venture, association, trust, unincorporated organization, limited liability company or any other entity or organization, including any Governmental Authority. A Person shall include any officer, director, member, manager, employee or agent of such Person.

“Placed in Service” means “placed in service” for purposes of Sections 45, 48 and 168 of the Code.

“Progress Payment” has the meaning set forth in Section 8.3.

“Project Labor Agreement” means that certain Project Labor Agreement among Contractor and [\_\_\_\_].<sup>10</sup>

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<sup>10</sup> Note to Bidders: If the Site is on Tribal lands, any applicable Tribal labor requirements and related provisions will need to be addressed.

“Project Transaction Documents” means this Agreement, the Contractor Performance Security, and any other agreements between Contractor or any Affiliate of Contractor and Owner relating to the engineering, procurement, construction, development, acquisition, ownership, operation or maintenance of the Facility.<sup>11</sup>

“Proposed Punch List” has the meaning set forth in Section 16.4(a).

“Prudent Utility Practice” means those standards of design, engineering, construction, workmanship, care and diligence and those practices, methods and acts that would be implemented and normally practiced or followed by prudent solar engineering, construction, and installation firms in the design, engineering, procurement, installation, construction, testing and commissioning (and operation associated therewith) of rate-based, utility-scale photovoltaic facilities in the Western United States and otherwise performing services of a similar nature in the jurisdiction in which the Work will be performed and in accordance with which practices, methods and acts, in the exercise of prudent and responsible professional judgment by those experienced in the industry in light of the facts known (or that reasonably should have been known) at the time the decision was made, could reasonably have been expected to accomplish the desired result consistent with good business practices, good engineering design practices, safety, reliability, Applicable Codes, Applicable Laws, and Applicable Permits. Solely with respect to Section 21.5(a), “Prudent Utility Practice” shall mean those standards of care and diligence normally practiced by entities that operate and maintain rate-based, utility-scale photovoltaic power plants.

“Punch List” has the meaning set forth in Section 16.4(a).

“Punch List Amount” means the cost or estimated cost reasonably determined by Owner to complete any Punch List Item in connection with the approval of the Proposed Punch List or Proposed Punch List in accordance with Section 16.4, as applicable.

“Punch List Estimate” means Contractor’s cost estimate for completing the Punch List Items.

“Punch List Holdback” means an amount equal to one hundred fifty percent (150%) of the Punch List Amount for each Punch List Item.

“Punch List Items” means those non-critical finishing items with respect to the Facility (a) that consistent with Prudent Utility Practice do not affect the operability, reliability, safety, or mechanical, civil or electrical integrity of the Facility, (b) that Owner or Contractor identifies as requiring completion or containing non-material defects, and (c) the completion of which will not adversely affect the performance of the Facility, so long as the Facility is nonetheless ready for commercial operations in a safe and continuous manner and in accordance with Applicable Law and Applicable Permits.

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<sup>11</sup> Note to Bidders: Project Transaction Documents should reference any O&M Agreement, Supply Agreement, Performance Guarantee or other agreements between Owner and Contractor or an Affiliate of Contractor, as applicable.

“Real Property Rights” means all rights in or to real property necessary to perform the Work and to develop, construct, complete, operate, maintain and access the Facility and the Site, including those rights set forth in deeds, leases, option agreements, co-tenancy and shared facility agreements, Applicable Permits, easements, licenses, private rights-of-way agreements and crossing agreements that exist as of the Effective Date, including as set forth on Exhibit 2.

“Receiving Party” has the meaning set forth in Section 25.1.

“Release” means the release, threatened release, discharge, deposit, injection, dumping, spilling, leaking or placing of any Hazardous Material into the environment so that such Hazardous Material or any constituent thereof may enter the environment, or be emitted into the air or discharged into any waters, including ground waters under Applicable Law and Applicable Permits.

“Relevant Rating Agency” means Moody’s or S&P.

“Required Manuals” means the manuals (including any Spare Parts manuals), instructions and training aids, whether created by Contractor, Subcontractor or Supplier, reasonably necessary for the safe and efficient operation, maintenance, curtailment, start-up and shut down of the Facility and Facility Equipment as reasonably determined by Owner or Operator, including those identified in Exhibit 7.

“Retainage” means an amount equal to ten percent (10%) of the amount payable pursuant to each Progress Payment (other than the payment to be made in connection with Final Completion).

“SCADA System” means the supervisory control and data acquisition system installed by Contractor in the Facility, as more specifically described in the Technical Specifications under “SCADA System”.

“Schedule of Values” means the schedule of values attached hereto as Exhibit 9 which allocates the Contract Price to different separately identifiable portions of the Work and includes the Cancellation Cost Cap and Cash Flow Curve.

“Scope of Work” means the scope of the work to be performed by Contractor under this Agreement, as further described in the Exhibits.

“Serial Defect” means any failure or non-conformance has occurred with respect to five percent (5%) or more units of any particular item of Facility Equipment, and such failure or non-conformance could reasonably be expected to result from the same cause.

“Site” has the meaning set forth in the Recitals.

“Site Condition” has the meaning set forth in Section 3.25.

“Site Safety Plan” means the site safety plan attached hereto as Exhibit 20.

“Spare Parts” means the spare parts provided by Contractor to Owner in accordance with Exhibit 27.

“Standard Test Conditions” has the meaning set forth in Exhibit 14C.

“Start-up and Commissioning” means the energization and Functional Testing of the Facility, including verifying completeness and readiness for operations and testing of the Facility.

“Subcontract” means any purchase order, agreement or subcontract with a Subcontractor.

“Subcontractors” means any Person (including a Supplier) that, directly or indirectly, and of any tier (other than Contractor but including any Affiliate of Contractor) supplies any items or performs any portion of the Work in furtherance of Contractor’s obligations under this Agreement.

“Substantial Completion” has the meaning set forth in Section 16.2.

“Substantial Completion Date” has the meaning set forth in Section 16.3.

“Supplier” means any Equipment supplier with which Contractor or Subcontractor contracts in furtherance of Contractor’s obligations under this Agreement.

“Survival Period” has the meaning set forth in Section 24.7.

“Taxes” means any and all taxes, charges, duties, imposts, levies and withholdings imposed by any Governmental Authority, including sales tax, use tax, property tax, transfer tax, income tax, withholding taxes, corporation tax, franchise taxes, margin tax, capital gains tax, capital transfer tax, inheritance tax, value added tax, customs duties, capital duty, excise duties, betterment levy, stamp duty, stamp duty reserve tax, national insurance, social security or other similar contributions, and any interest, penalty, fine or other amount due in connection therewith.

“Technical Dispute” has the meaning set forth in Section 28.2(a).

“Technical Specifications” has the meaning set forth in the Recitals.

“Termination Payment” means (a) with respect to a termination by Contractor for an Owner Event of Default in accordance with Section 20.5(a) or a termination by Owner for convenience pursuant to Section 20.7, an amount equal to the Direct Costs incurred by Contractor (and not previously paid by Owner) through the effective date of the termination, which amount shall not in the aggregate exceed the Cancellation Cost Cap; and (b) with respect to a termination by Owner for a Contractor Event of Default, such amount determined in accordance with Section 20.5(b).

“Title Company” means [\_\_\_\_\_].



“Transmission Provider” means the transmission function of PacifiCorp d/b/a Rocky Mountain Power. Notwithstanding the foregoing, for purposes of this Agreement, Transmission Provider shall not be deemed to be Owner, an Owner Party or an Affiliate of Owner.

“UPSC” has the meaning set forth in Section 25.1.

“UTC” means the Utah Code.

“Warranty” means, as applicable, the Defect Warranty or the Design Warranty.

“Warranty Period” means, as applicable, the Defect Warranty Period or the Design Warranty Period.

“Weekly Progress Report” means a weekly progress report prepared by Contractor setting forth the detail required in Exhibit 8B.

“Work” means all obligations, duties, and responsibilities assigned to or undertaken by Contractor under this Agreement, as further described in Exhibit 1, with respect to the Facility, including any of the foregoing obligations performed prior to the Effective Date, which shall be deemed to be Work performed by Contractor under this Agreement, notwithstanding the fact that it was performed in whole or in part prior to the Effective Date.

**1.3 Order of Precedence.** In the event of a conflict or inconsistency between any of the Contract Documents forming part of this Agreement, the following order of precedence shall apply: (a) any duly executed amendment or Change Order to this Agreement (and between them, the most recently executed amendment or Change Order shall take precedence); (b) this Agreement (to the extent not superseded by a subsequent amendment); (c) Exhibit 1, Exhibit 16, the Technical Specifications, Exhibit 7, Exhibit 20 and Exhibit 21 to this Agreement in the order indicated; (d) the Exhibits to this Agreement not otherwise specified in subclause (c) above; and (e) any other Contract Documents not previously noted.

**1.4 Entire Agreement.** This Agreement and the exhibits attached hereto constitute the complete and entire agreement between the Parties with respect to the engineering, procurement, construction, testing and commissioning of the Facility and supersedes any previous communications, negotiations, representations or agreements, whether oral or in writing, with respect to the subject matter addressed herein. NO PRIOR COURSE OF DEALING BETWEEN THE PARTIES SHALL FORM PART OF, OR SHALL BE USED IN THE INTERPRETATION OR CONSTRUCTION OF, THIS AGREEMENT. For the avoidance of doubt, this Agreement shall not supersede the other Project Transaction Documents, which shall remain in full force and effect.

**1.5 No Agency.** The Parties are independent contractors. Nothing in this Agreement is intended, or shall be construed, to create any association, joint venture, agency relationship or partnership between the Parties or to impose any such obligation or liability upon either Party (except and solely to the extent expressly provided in this Agreement pursuant to which Owner appoints Contractor as Owner’s agent). Nothing in this Agreement shall be construed to give

either Party any right, power or authority to enter into any agreement or undertaking for, or act as an agent or representative of, or otherwise bind, the other Party. Neither Contractor nor any of its employees is or shall be deemed to be an employee of Owner.

**1.6 Invalidity.** Whenever possible, each provision or portion of any provision of this Agreement shall be interpreted in such manner as to be effective and valid under Applicable Law, but, to the extent permitted by law, if for any reason any provision which is not essential to the effectuation of the basic purpose of this Agreement is determined to be invalid, illegal or unenforceable, in whole or in part, such invalidity, illegality or unenforceability shall not affect the validity or enforceability of any other provision of this Agreement or this Agreement as a whole. Any such invalid, illegal or unenforceable portion or provision shall be deemed severed from this Agreement and the balance of this Agreement shall be construed and enforced as if this Agreement did not contain such invalid, illegal or unenforceable portion or provision. If any such provision of this Agreement is so declared invalid, illegal or unenforceable, the Parties shall promptly negotiate in good faith new provisions to eliminate such invalidity, illegality or unenforceability and to restore this Agreement as near as possible to its original intent and effect (including economic effect).

**1.7 Binding Effect.** This Agreement shall be binding upon the Parties hereto and their respective successors, heirs and assigns and shall inure to the benefit of the Parties hereto and their respective permitted successors, heirs and assigns.

**1.8 Counterparts.** This Agreement may be signed in counterparts, each of which when executed and delivered shall constitute one and the same instrument. The Parties agree that the delivery of this Agreement may be effected by means of an exchange of facsimile, .pdf or emailed signatures, which shall be deemed to be an original and shall be as effective for all purposes as delivery of a manually executed counterpart.

**1.9 Effective Date.** The effective date of this Agreement is the date when this Agreement has been signed by both Parties (the “Effective Date”), and Owner shall be deemed to have issued a full notice to proceed as of the Effective Date.

**1.10 Time is of the Essence.** To the extent that there is not a specific time period specified in this Agreement, time is of the essence with respect to a Party’s performance of its obligations under this Agreement.

## ARTICLE 2

### REPRESENTATIONS AND WARRANTIES

**2.1 Representations and Warranties of Contractor.** Contractor represents and warrants to Owner that as of the Effective Date:

(a) Organization, Standing and Qualification. Contractor is a [\_\_\_\_], duly organized, validly existing, and in good standing under the laws of the State of [\_\_\_\_], and

has full power to execute, deliver and perform its obligations hereunder to own, lease and operate its properties and to engage in the business it presently conducts and contemplates conducting under this Agreement, and is and will be duly licensed or qualified and in good standing under the laws of the State of Utah and in each other jurisdiction in which the nature of the business transacted by it makes such licensing or qualification necessary and where the failure to be licensed or qualified would have a material adverse effect on its ability to execute and deliver this Agreement or perform its obligations hereunder.

(b) Due Authorization; Enforceability. This Agreement has been duly authorized, executed and delivered by or on behalf of Contractor and is, upon execution and delivery by each of the Parties hereto, the legal, valid and binding obligation of Contractor, enforceable against Contractor in accordance with its terms, except as such enforceability may be limited by applicable bankruptcy, insolvency or similar laws affecting creditors' rights generally and by general equitable principles.

(c) No Conflict. The execution, delivery and performance by Contractor of this Agreement will not (i) violate or conflict with or cause a default under any covenant, agreement or understanding to which it is a party or by which it or any of its properties or assets is bound or affected, or its organizational documents, (ii) violate or conflict with any Applicable Law or (iii) subject the Facility or any component part thereof to any lien other than as contemplated or permitted by this Agreement.

(d) Government Approvals. Other than with respect to the Applicable Permits, neither the execution nor the delivery by Contractor of this Agreement requires the consent or approval of, or the giving of notice to or registration with, or the taking of any other action in respect of, any Governmental Authority. Contractor represents and warrants that all Contractor Acquired Permits either have been obtained by Contractor and are in full force and effect or Contractor has no knowledge of any reason that any Contractor Acquired Permit cannot be obtained in the ordinary course of business and within the timeframe necessary so as to permit Contractor to timely commence and perform the Work to completion in accordance with the terms and conditions of this Agreement.

(e) Violation of Laws; No Suits; Proceedings. Contractor is not in violation of any Applicable Laws or judgment entered by any Governmental Authority, which violations, individually or in the aggregate, would materially and adversely affect its performance of any obligations under this Agreement. There are no actions, suits, proceedings, patent or license infringements or investigations pending or, to Contractor's knowledge after due inquiry, threatened against it before any court, arbitrator or Governmental Authority that individually or in the aggregate could result in any materially adverse effect on the business, properties or assets or the condition, financial or otherwise, of Contractor or in any impairment of its ability to perform its obligations under this Agreement. Contractor has no knowledge of any violation or default with respect to any order, writ, injunction or decree of any court or any Governmental Authority that may result in any such materially adverse effect or such impairment.

(f) Business Practices. Neither Contractor nor any Subcontractor, or their respective employees, officers, representatives, or other agents of Contractor have made or will make any payment or have given or will give anything of value, in either case to any government official (including any officer or employee of any Governmental Authority) to influence his, her or its decision or to gain any other advantage for Owner or Contractor in connection with the Work to be performed hereunder. Contractor is in compliance with the requirements set forth in Section 3.29.

(g) Licenses. All Persons who will perform any portion of the Work have or will have all business and professional certifications and licenses if and as required by the terms and conditions of this Agreement, Applicable Codes, Applicable Law and Applicable Permits to perform such portion of the Work under this Agreement and Contractor has no knowledge of any reason that any such certifications and licenses cannot be obtained in the ordinary course of business and within the timeframe necessary so as to permit such Persons to timely commence and perform any portion of the Work to completion in accordance with the terms and conditions of this Agreement.

(h) Financial Condition and Adequate Resources. Contractor is financially solvent, able to pay its debts as they mature, and possessed of sufficient working capital to complete its obligations under this Agreement. Contractor has or will procure adequate resources and is qualified, in each case directly or through its Subcontractors, to perform the Work in accordance with the terms and conditions of this Agreement.

(i) Intellectual Property. Contractor owns or has the right to use, or will be able to secure from its Affiliates or Subcontractors the right to use, all Intellectual Property Rights necessary to perform the Work without infringing on the rights of others and to enable Owner to use the Intellectual Property Rights in connection with the ownership, operation, use, maintenance, modification, altering, commissioning, de-commissioning, disposal of or removal of the Facility without infringement on the rights of others. The Licensed Technology (and the use thereof to the extent used in accordance with the license granted under Section 14.1) do not and shall not infringe, or cause the infringement of, the Intellectual Property Rights of a third party.

**2.2 Representations and Warranties of Owner.** Owner represents and warrants to Contractor that as of the Effective Date:

(a) Organization, Standing and Qualification. Owner is a corporation, duly organized, validly existing, and in good standing under the laws of the State of Utah, and has the full power to execute, deliver and perform its obligations hereunder and engage in the business it presently conducts and contemplates conducting under this Agreement, and Owner is and will be duly licensed or qualified and in good standing under the laws of the State of Utah and in each other jurisdiction in which the nature of the business transacted by it makes such licensing or qualification necessary and where the failure to be licensed or qualified would have a material adverse effect on its ability to perform its obligations hereunder.

(b) Due Authorization; Enforceability. This Agreement has been duly authorized, executed and delivered by or on behalf of Owner and is, upon execution and delivery by each of the Parties hereto, the legal, valid and binding obligation of Owner, enforceable against Owner in accordance with its terms, except as such enforceability may be limited by applicable bankruptcy, insolvency or similar laws affecting creditors' rights generally and by general equitable principles.

(c) No Conflict. The execution, delivery and performance by Owner of this Agreement will not violate or conflict with or cause a default under any Applicable Law or any covenant, agreement or understanding to which it is a party or by which it or any of its properties or assets is bound or affected, or its organizational documents.

### ARTICLE 3

#### CONTRACTOR'S OBLIGATIONS

**3.1 Performance of Work.** Contractor shall diligently, duly and properly perform and complete the Work in accordance with the Scope of Work and the terms of this Agreement in order to construct the Facility according to the Construction Schedule and Milestone Schedule, place it into operation in conformance with the Contract Documents and the Technical Specifications, and achieve Final Completion of the Facility. Contractor acknowledges and agrees that it is obligated to perform the Work on a "turnkey basis" which means that Contractor is obligated to supply all of the Equipment, labor and design services and to supply and perform all of the Work, in each case as may reasonably be required, necessary, or appropriate (whether or not specifically set forth in this Agreement) to complete the Work such that the Facility satisfies the applicable terms and conditions set forth in this Agreement for the Contract Price, including, but not limited to any such work that would be required of a turnkey contractor of a rate-based, utility-operated solar photovoltaic generation project of comparable size and design in the Western United States and/or be included in the engineering, procurement and construction contract for the construction of such comparable project in accordance with the Contract Documents, all Applicable Laws, Applicable Codes and Prudent Utility Practices. Where this Agreement describes a portion of the Work in general, but not in complete detail, the Parties acknowledge and agree that the Work includes any incidental work reasonably inferred or required to complete the Work in accordance with this Agreement. Contractor shall execute the entire Work under this Agreement, including work not specifically delineated in this Section 3.1 or elsewhere in this Agreement to the extent necessary to complete the Facility in accordance with Prudent Utility Practice or to comply with Applicable Law and such Work shall be deemed included herein. Except as otherwise expressly specified herein, Contractor shall provide all facilities and services required for a complete photovoltaic solar power plant facility, including all balance-of-system facilities set forth in the Scope of Work and the Technical Specifications, for the Contract Price.

**3.2 Scope of Work.** Contractor shall perform the Scope of Work to the extent necessary (a) for the proper execution and completion of the Work under this Agreement; (b) to supervise and direct the Work in a safe manner and perform all Work in accordance with this

Agreement, Applicable Law, Applicable Permits and Prudent Utility Practice; (c) to achieve Final Completion of the Facility; and (d) to place the Facility into operation in conformance with the Contract Documents and the Exhibits and such that the Facility is in compliance with the Interconnection Agreement, Prudent Utility Practice, Applicable Codes, Applicable Laws and Applicable Permits. Subject to Owner's right to review and comment, Contractor shall have sole control over the engineering, design and construction means, methods, techniques, sequences, and procedures and for coordination of all portions of the Work under this Agreement. To that end, Contractor may, in its sole discretion, accelerate the Work and cause Milestones to be completed prior to the scheduled date therefor in the Construction Schedule; provided that Owner shall have no obligation to pay any Application for Payment in amounts in excess of the amount to which Contractor is entitled under Article 8 based upon the Schedule of Values.

**3.3 Properly Licensed; Sufficient Qualified Personnel.** Contractor shall use, and shall require each of its Subcontractors to use, only personnel who are qualified and properly trained and who possess every license, permit, registration, certificate or other approval required by Applicable Law or Applicable Permits to enable such persons to perform work forming part of the Work.

**3.4 Utilities.** As part of the Work, Contractor shall arrange and pay for construction power and water (including all water used for dust control) and the installation of construction telecommunication lines and utilities, but only to the extent necessary for Contractor to perform its Work hereunder, and pay when due all such utility usage charges. For all permanent utilities, such as backfeed power, permanent water and power (i.e., for operations and maintenance facilities), permanent telecommunication lines, grid telemetry, and infrastructure necessary (including internet access) to transmit data gathered by the SCADA System, Contractor shall arrange and pay for such permanent utilities prior to the Substantial Completion Date and Owner shall pay for such permanent utilities after the Substantial Completion Date.

**3.5 Contract Documents.** Contractor shall deliver to Owner all Contract Documents as and when required pursuant to the terms of this Agreement, including Exhibit 7.

**3.6 Record-Keeping.** All Documentation relating to the Facility shall be kept by Contractor in an organized fashion for reference by Owner during the performance by Contractor of the Work. Contractor shall also maintain at the Site at least one (1) copy of all Contractor Submittals, Change Orders and other modifications.

**3.7 Materials and Equipment.** As part of the Work, Contractor shall procure all Facility Equipment (including Modules) and shall provide or cause to be provided, at its own expense, all Construction Equipment, machinery, tools, consumables, temporary structures (including temporary facilities for Owner at the Site) or other items as may be required for Contractor to complete the Work. Contractor shall not incorporate any Facility Equipment that (a) constitutes "prototype" equipment pursuant to the risk ratings standards customarily employed by the commercial insurance industry and (b) on account of being deemed "prototype" equipment, would not be insurable under the insurance policies to be obtained by the Parties pursuant to Article 23.

**3.8 Compliance and Cooperation with EITC Requirements, Applicable Laws, Applicable Permits, Applicable Codes and Prudent Utility Practices.** Whether or not expressly set forth in any specific section or exhibit, Contractor shall comply with all Applicable Laws, Applicable Permits, Applicable Codes and Prudent Utility Practices in the course of performing the Work and cause the Facility to comply with all Applicable Laws and Applicable Permits prior to the Substantial Completion Date. Contractor shall provide to Owner such information, reports, and documents and take such other actions as may be reasonably requested by Owner to assist Owner in performing its notification and submittal responsibilities as set forth in any Applicable Permit, including as set forth in Section 3.24, and in connection with Owner's claiming of EITCs and sales and property tax abatements with respect to the Facility. The Facility shall be designed and constructed in compliance with all of the requirements for a renewable energy system as may be provided under the Utah Code, including Chapter [*Chapter Number, Section Numbers*], any regulations promulgated thereunder, and the associated implementing rules and regulations of the UPSC.

**3.9 Contractor Acquired Permits; Other Approvals.** Contractor shall obtain and maintain in full force and effect the Contractor Acquired Permits and shall file on a timely basis any documents as are required to obtain and maintain the Contractor Acquired Permits in full force and effect. Contractor shall also be responsible for obtaining and maintaining in Contractor's or Owner's name in connection with the Work, as applicable, all construction permits, transportation permits, road use agreements, crossing rights with respect to electrical distribution lines, cable TV lines, drain tiles, rural water lines, telecommunication lines, and other licenses and, with respect to rights-of-way, those necessary to build the Facility, all of which, as necessary for operation of the Facility, shall be included as Contractor Submittals as a condition of Final Completion. The Contract Price includes consideration for Contractor to obtain the Contractor Acquired Permits and such other approvals. Any Taxes, Permit Fees and other costs required for the procurement or maintenance of the Contractor Acquired Permits and such other approvals shall be at Contractor's sole expense. Additionally, Contractor shall provide reasonably requested assistance to Owner in obtaining any Owner Acquired Permit.

**3.10 Spare Parts.** Contractor shall (i) no later than three (3) months prior to the Guaranteed Substantial Completion Date, provide a list of recommended Spare Parts as required pursuant to Exhibit 27 and specifically incorporating any spare parts determined by Operator to be in keeping with Prudent Utility Practice and (ii) on or before the Substantial Completion Date, provide the Spare Parts required pursuant to Exhibit 27 and this Section 3.10 to Owner. Such Spare Parts delivered to Owner by Contractor pursuant to this Section 3.10 or Exhibit 27 shall be delivered to the location directed by Owner, at Contractor's sole cost and expense, and free and clear of any liens.

**3.11 Construction Schedule; Progress Reports; Meetings.**

(a) Within thirty (30) Days after the Effective Date, Contractor shall deliver to Owner the Construction Schedule, which shall (i) be a Gantt chart developed using Primavera, (ii) designate appropriate Contractor Critical Path Items utilizing the critical path method and (iii) be consistent with Exhibit 4 and inclusive of all Milestones set forth therein and shall

provide necessary data about the timing for Owner decisions and all Owner milestones. The Construction Schedule shall contain Milestones and include details to support all major engineering, procurement, construction, commissioning and testing activities of the Facility. The Construction Schedule shall form the basis for progress reporting through the course of the performance of the Work. The Construction Schedule shall be subject to Owner's approval, such approval not to be unreasonably withheld or delayed. The Construction Schedule and any revisions thereto shall be submitted in both written and electronic format to Owner on at least a monthly basis.

(b) Contractor shall prepare and submit to Owner (i) through the Final Completion Date, Monthly Progress Reports in the format required under Exhibit 8A (which shall include a summary of any material deviations from the prior Construction Schedule and the reasons for such deviation) on the sooner of (x) delivery of an Application for Payment and (y) ten (10) Days after the end of each calendar month and (ii) through the Substantial Completion Date, Weekly Progress Reports in the format required under Exhibit 8B delivered on a weekly basis. In addition, Owner or any Affiliate of Owner shall be entitled to attend and participate in meetings convened by Contractor on the Site and other regularly scheduled meetings with respect to the progress and performance of the Facility.

**3.12 Transportation.** Contractor shall provide transportation and shipping with respect to all Equipment hereunder and shall be responsible for all necessary Applicable Permits and documentation relating thereto. All transportation and shipping services, including quality assurance, shipping, loading, unloading, customs clearance (and payment of any customs duties in connection therewith), receiving, and any required storage and claims shall be included in the Contract Price.

**3.13 Security.** Contractor shall be responsible for the proper security and protection of the Site and all Equipment and materials furnished by Contractor and the Work performed until Substantial Completion. Contractor shall prepare and maintain accurate reports of incidents of loss, theft, or vandalism and shall furnish these reports to Owner in a timely manner.

**3.14 Safety; Quality Assurance.** Contractor shall take all precautions for the safety of all Persons present at the Site and to prevent accidents or injury to individuals or damage to property on, about, or adjacent to the Site. Contractor shall provide to all such Persons, at its own expense, safety equipment required to protect against injuries during the performance of the Work and shall provide (or cause to be provided) appropriate safety training to its employees, Subcontractors and Suppliers. Contractor and Owner hereby agree that the Site Safety Plan shall be implemented by Contractor to secure the Facility and the Site during the execution of the Work, both before and after transfer of custody and control to Owner, including any remedial or warranty Work. Contractor shall notify all Persons accessing the Site of the Site Safety Plan, which shall apply to all such Persons. During the performance of the Work, Contractor shall be responsible for the oversight of all Persons at the Site and for the performance of the Work in accordance with the Site Safety Plan and with all Applicable Laws governing occupational health and safety, Applicable Permits and Prudent Utility Practices. Contractor shall require that any employee or personnel of Contractor or any Subcontractor or Supplier shall have passed a



drug test within ten (10) Days prior to first coming on to the Site. Contractor and Owner further agree that the Quality Assurance Plan attached hereto as Exhibit 21 shall be implemented by Contractor.

**3.15 Clean-Up.** Contractor shall keep the part of the Site where the Facility is to be located and surrounding areas free from accumulation of debris, waste materials or rubbish caused by the Work throughout all phases of the Work, and as a condition of Final Completion or as soon as practicable after termination of this Agreement by Owner, all of Contractor's and Subcontractors' personnel shall have left the Site and Contractor shall remove from the part of the Site where the Facility is located and surrounding areas all debris, waste materials, rubbish, tools, Construction Equipment, machinery and surplus materials arising from or due to the Work. Should Contractor fail to comply with its obligations under this Section 3.15, Owner may undertake same and charge the cost thereof to Contractor.

### **3.16 Suppliers and Subcontractors.**

(a) Set forth in Exhibit 22 is a schedule of qualified Major Subcontractors who, notwithstanding anything to the contrary herein, Contractor shall be entitled to engage in furtherance of Contractor's obligations under this Agreement without the consent of Owner. Contractor shall notify Owner of any proposed additional Major Subcontractors or replacements thereof with whom Contractor anticipates engaging. Owner shall have the right to review and approve such engagement, such approval not to be unreasonably withheld or delayed. Contractor shall update and amend Exhibit 22 by notice to Owner from time to time as necessary to reflect approved additions or changes thereto, provided Contractor may not change the supplier of Modules without Owner's express written consent in its sole discretion.

(b) No Subcontract shall bind or purport to bind Owner, but each Major Subcontract shall (i) provide that the Subcontractor expressly agrees, upon Owner's request if this Agreement is terminated, to the assignment of such Major Subcontract to, at Owner's request, Owner, a Financing Party or any successor EPC contractor to Contractor, (ii) incorporate by reference and flow down the provisions of this Agreement to the work or services performed by such Subcontractor, irrespective of whether such provisions are expressly made to so apply, including any provisions related to standards of performance, safety, insurance, indemnification, liability, choice of law and dispute resolution (iii) provide that Owner, any Financing Party or any successor EPC contractor are a third-party beneficiary under such Major Subcontract.

(c) The use by Contractor of any Subcontractor shall not (i) constitute any approval of the Work undertaken by any such Subcontractor, (ii) relieve Contractor of its duties, responsibilities, obligations or liabilities hereunder, (iii) relieve Contractor of its responsibility for the performance of any work rendered by any such Subcontractor or (iv) create any relationship between Owner, on the one hand, and any such Subcontractor, on the other hand, or cause Owner to have any responsibility for the actions or payment of such Subcontractor. As between Owner and Contractor, Contractor shall be solely responsible for the acts, omissions or defaults of its Subcontractors and any other Persons for which Contractor or any such

Subcontractor is responsible (with the acts, omissions and defaults of its Subcontractors and any such other Person being attributable to Contractor).

(d) In no event shall any act or omission by any Subcontractor constitute a Force Majeure Event except to the extent caused by an event or circumstance that itself constituted a Force Majeure Event.

(e) Until the Final Completion Date, Contractor shall furnish Owner with (i) claims, notices of claim, and other information relating to disputes with any Subcontractor and (ii) such information with respect to any Subcontractor as Owner may reasonably request; it being understood and agreed that information that Owner may reasonably request may include technical specifications, drawings, operating and maintenance manuals, Spare Parts lists, sourcing information for Spare Parts and consumables, inspection and test reports and training materials relative to the Work. Until the expiry of the Defect Warranty Period, Contractor shall furnish Owner with reports received from the Subcontractors or other Persons relating to recall notices, defect notices or other similar product communications.

**3.17 Insurance.** Contractor and each Subcontractor shall obtain and maintain insurance required in accordance with Article 23 and Exhibit 13.

**3.18 Contractor's Key Personnel.** Contractor shall appoint Contractor's Key Personnel in accordance with Section 5.2.

**3.19 Hazardous Materials.** Contractor shall comply with the provisions of Article 12 with respect to Hazardous Materials as part of and in connection with the Work.

**3.20 Contractor Performance Security.** Contractor shall provide to Owner and maintain until expiry of the Warranty Period the Contractor Performance Security in accordance with Section 8.8.

**3.21 FERC Electrical Plant Chart of Accounts.** Within thirty (30) Days after the Final Completion Date, Contractor shall deliver to Owner a FERC Unit of Plant Cost Allocation Book, including a FERC Electrical Plant Chart of Accounts, containing the information described in Exhibit 28 and otherwise in form and substance acceptable to Owner. Owner shall have thirty (30) Days to review such FERC Unit of Plant Cost Allocation Book and provide comments to Contractor, and Contractor shall incorporate Owner's comments therein and provide the final FERC Unit of Plant Cost Allocation Book to Owner not later than seventy-five (75) Days after the Final Completion Date.

**3.22 Delay Response Plan.** If, at any time during the performance of the Work, the updated, detailed schedule reflecting actual progress to date included in a Monthly Progress Report delivered under Section 3.11(b) shows that the critical path of the Work is delayed such that (i) the Construction Start Date is reasonably expected to occur later than the Guaranteed Construction Start Date or (ii) Substantial Completion is reasonably expected to occur later than the Guaranteed Substantial Completion Date, Contractor shall, in any such instance, prepare and

submit to Owner within ten (10) Business Days a plan which specifies in reasonable detail the actions to be taken by Contractor and the associated schedule to explain and display how Contractor intends to recover from such delay (the “Delay Response Plan”). The corrective actions described in the Delay Response Plan that Contractor proposes to undertake with respect to the Work shall be (a) undertaken at Contractor’s sole cost and expense and (b) designed and intended to recover the schedule for the Facility as promptly as reasonably practicable. Contractor shall promptly and diligently perform the Work in accordance with the Delay Response Plan until the Work is progressing in compliance with the Construction Schedule and the critical path of the Work. Unless set forth in a Change Order executed by the Parties, the implementation of any Delay Response Plan shall not change the Guaranteed Dates.

### **3.23 Project Labor Agreement; Employees.**

(a) Contractor shall comply in all material respects with the terms and conditions of the Project Labor Agreement; provided, however that Contractor is solely responsible for such compliance, and the Project Labor Agreement and compliance thereunder are not obligations of Owner and do not excuse Contractor from, or entitle Contractor to any schedule or cost relief with respect to, its performance of Work and other obligations under this Agreement.

(b) Contractor shall remove from any performance of the Work, and cause any Subcontractor to remove from any performance of the Work, as soon as reasonably practicable, any Person performing the Work (including any Key Personnel) who is creating a risk of bodily harm or injury to themselves or others or whose actions create a risk of material property damage. Additionally, as soon as practicable after receiving a request by Owner Contractor shall remove such Person (including any Key Personnel) from the Site, and cause any Subcontractor to remove such Person (including any Key Personnel) from the Site.

(c) Contractor shall also remove, and cause its Subcontractors and agents to remove, any employee, agent or other Person engaged in the performance of the Work for Contractor (including any Key Personnel) or such Subcontractor, as the case may be, whose off-Site conduct violates any Applicable Laws or Applicable Permits. If a Person is harming or having a negative effect on the perception of the Facility or Owner’s relationship with the surrounding community based on two or more documented incidents, Owner may provide notice to Contractor and Contractor and Owner will meet to discuss an appropriate response. If the Parties cannot otherwise agree Contractor shall remove and cause its Subcontractors and agents to remove such Person.

**3.24 Notification.** To the extent not prohibited by Applicable Law, with respect to the Facility, Contractor shall provide Owner, promptly and in any event within five (5) Business Days (or such other time period set forth below) following (a) Contractor’s actual knowledge of its occurrence or (b) Contractor’s receipt of the relevant documentation, with written:

(i) Notification of all events requiring the submission by Contractor of a report to any Governmental Authority pursuant to the Occupational Safety and Health Act;

(ii) Notifications and copies of all citations by Governmental Authorities concerning accidents or safety violations at the Site and, within five (5) Business Days of such written notice, a follow up report containing a description of any steps Contractor is taking and proposes to take, if any, with respect to such accident or safety violations;

(iii) Notifications and copies of all written communication to or from any Governmental Authority, relating to any breach or violation or alleged breach or violation of any Applicable Law, any Applicable Permit, Applicable Codes or any provision of the Interconnection Agreement;

(iv) Updates of status of communications with insurance companies related to claims with respect to an accident, incident or occurrence at the Site or in the performance of Work;

(v) Notifications and copies of any actions, suits, proceedings, patent or license infringements, or investigations pending or threatened against it at law or in equity before any court or before any Governmental Authority (whether or not covered by insurance) that (A) if determined adversely to Contractor would have a material adverse effect on Contractor's ability to perform its obligations under this Agreement or (B) relates to the Facility; and

(vi) Notifications within (A) (x) one (1) Business Day after Contractor has actual knowledge of any accident related to the Work that has a material and adverse impact on the environment or on human health (including any accident resulting in the loss of life) and (y) within three (3) Business Days after Contractor has actual knowledge of any recordable, lost-time injury related to the Work and (B) ten (10) Business Days thereafter, a report describing such accident or injury, the impact of such accident or injury and the remedial efforts required and (as and when taken) implemented with respect thereto.

**3.25 Site Conditions.** Contractor has inspected the Site, including both surface and subsurface conditions, and has satisfied itself as to all matters regarding the geotechnical and physical condition thereof, including those matters related to the environment, availability and quality of water, heat and other weather conditions at the Site, physical conditions at the Site, topography and ground surface conditions (including as such conditions may impact surface water runoff), any underground utilities, sound attenuation conditions, subsurface geology and conditions, nature and quality of surface and subsurface materials to be encountered (collectively, "Site Conditions"), and shall be responsible at its sole expense for all necessary works in relation to, or because of, such Site Conditions both below and above ground (including (subject to Article 12 and Article 24) the existence of Hazardous Materials, archeological or religious sites,

and monuments) on the Site in connection with Contractor's performance of the Work. Contractor shall be solely responsible for performing any preliminary Work on the Site necessary for the commencement of construction to occur, including removal of all physical impediments to performing Work on the Site, above and below ground, and preparing the Site for the Work. Contractor specifically acknowledges and accepts the Site Conditions and agrees that no claims by Contractor for additional payment or extensions of time shall be permitted with respect to the Site Conditions on the ground of any misunderstanding or misapprehension of the matters referred to in this Section 3.25 or on the ground of incorrect or insufficient information in respect of the Site or the Site Conditions, and Contractor specifically waives any right to seek a Change Order relating to any of the foregoing. Contractor acknowledges and agrees that none of Owner, any of its Affiliates or any of its agents or representatives have made, nor shall they make, any express or implied warranty to Contractor as to Site Conditions. Additionally, Contractor shall install the piles necessary for the Facility as part of the Scope of Work. If additional soil samples, other geotechnical information or information about Site Conditions are needed before the piles can be installed, this additional sampling or gathering of additional information is the sole responsibility of Contractor.

**3.26 Other Reports and Quality Control Documents.** Contractor shall provide Owner with other reports and quality control documentation relating to the Work, the Facility Equipment, the Facility and the Subcontractors as Owner may reasonably request.

**3.27 Construction Methods.** Contractor shall make itself and its Subcontractors available to discuss and shall promptly respond to any reasonable questions from Owner, Owner's Engineer, any Financing Parties or the Independent Engineer regarding construction methods or procedures used during construction of the Facility.

**3.28 Cooperation; Access.** Contractor shall, and shall cause the other Contractor Parties and any Subcontractor and their respective hired personnel to, cooperate with Owner and its contractors and other hired personnel in coordinating the work of Owner's contractors and personnel who may be working at the Site with the Work being performed by any Contractor Party or Subcontractor at the Site. Contractor shall take reasonable efforts to accomplish any necessary modification, repairs or additional work with respect to the Facility after Substantial Completion with minimal interference with commercial operation of the Facility or any portion thereof and that reductions in and shut-downs of all or part of the Facility's operations will be required only when necessary, taking into consideration the length of the proposed reduction or shut-down, and any impact on Owner's native load or other contractual obligations. Contractor acknowledges that Owner may schedule such reduction or shut-down at any time including off-peak hours, nights, weekends and holiday.

**3.29 Business Ethics.** Contractor, its employees, officers, agents, representatives and Subcontractors shall at all times maintain the highest ethical standards and avoid conflicts of interest in the performance of Contractor's obligations under this Agreement and shall comply with the Owner's Code of Business Conduct as it may be revised, updated or amended from time to time. In conjunction with its performance of the Work, Contractor and its employees, officers, agents and representatives shall comply with, and cause its subcontractor and its employees,

officers, agents and representatives to comply with, all Applicable Laws, statutes, regulations and codes prohibiting bribery, corruption, kick-backs or similar unethical practices including, without limitation, the United States Foreign Corrupt Practices Act and the United Kingdom Bribery Act 2010. Without limiting the generality of the foregoing, Contractor specifically represents and warrants that neither Contractor nor any Subcontractor, employees, officers, representatives or other agents of Contractor have made or will make any payment, or have given or will give anything of value, in either case to any government official (including any officer or employee of any governmental authority) to influence his, her, or its decision or to gain any other advantage for Owner or Contractor in connection with the Work to be performed hereunder. Contractor shall maintain and cause to be maintained effective accounting procedures and internal controls necessary to record all expenditures in connection with this Agreement and to verify Contractor's compliance with this Section 3.29. Owner shall be permitted to audit such records as reasonably necessary to confirm Contractor's compliance with this Section 3.29. Contractor shall immediately provide notice to Owner of any facts, circumstances or allegations that constitute or might constitute a breach of this Section 3.29 and shall cooperate with Owner's subsequent investigation of such matters. Contractor shall indemnify and hold Owner harmless for all fines, penalties, expenses or other losses sustained by Owner as a result of Contractor's breach of this provision. The Parties specifically acknowledge that Contractor's failure to comply with the requirements of this Section 3.29 shall constitute a condition of default under this Agreement.

### **3.30 Real Property Rights.**

(a) Compliance with Real Property Rights. Contractor shall comply with the terms of the Real Property Rights.

(b) Access to Site. If the Real Property Rights do not allow for the currently contemplated route of access to the Site, then obtaining any additional Real Property Rights needed for alternative routes of access and the construction and use of such alternative routes of access to the Site shall be at Contractor's sole cost and expense. Contractor shall be responsible to ensure that the access to the Site is sufficient to permit cranes and other operating and rigging equipment that will be used in the performance of the Work, if any, freedom to maneuver on or about the Site.

(c) Relocation of Facilities. If any lack of necessary Real Property Rights or exercise by a counterparty of its rights under any agreement relating to the Real Property Rights requires relocation of any utilities, transmission lines or other facilities from their existing or currently planned location, Contractor shall bear the sole construction cost associated with relocating any such utilities, transmission lines or other facilities.

(d) Construction Real Property Rights. To the extent not already obtained, Contractor shall obtain any additional Real Property Rights and easements necessary for Contractor to perform the Work. Contractor shall notify Owner upon the occurrence, or potential occurrence, of a dispute, conflict, confrontation, or other similar problem, or potential problem, involving Real Property Rights or one or more owners or occupiers of land so situated as to

potentially result in a situation that would reasonably be expected to have a material adverse effect upon the performance of the Work. Owner shall cooperate with Contractor in resolving all such problems.

(e) Damage from Construction. Contractor shall be required to reimburse Owner for any payment Owner is required to make to any other party to the agreements setting forth the Real Property Rights arising out of or in connection with Contractor's performance of the Work.

(f) Acknowledgment. Contractor acknowledges that it has reviewed the Real Property Rights, confirmed adequacy of the Real Property Rights, and is satisfied that such Real Property Rights are sufficient for Contractor to perform the Work hereunder.

**3.31 Tax Abatement Requirements.** Contractor acknowledges that Owner expects to obtain the sales and property tax abatements applicable to the Facility under Utah law and recognizes that such abatements place specific requirements on Contractor and the construction of the Facility. In connection therewith, Contractor agrees and warrants that all Work will be carried out in all respects necessary to fully comply with the requirements of Utah Code Chapter [*Chapter and Provision Numbers*], and any regulations promulgated thereunder, and Contractor agrees to cooperate with all requests by Owner in connection therewith.

### **3.32 Training of Personnel.**

(a) Design and Review of Training Program. Contractor shall design the training program (in accordance with the provisions of Exhibit 1) to be used for the training of Owner's designated operating personnel in the requirements for the start up, shut-down, operation and maintenance of, and safety, general process understanding and emergency procedures for, the Facility and all of its sub-systems and shall submit such training program to Owner by no later than the date that is six (6) months prior to the Guaranteed Substantial Completion Date. Owner will review, comment on, and approve or disapprove such program in writing within twenty-five (25) Days after such submission by Contractor. If Owner conditions its approval on reasonable changes in the program submitted by Contractor, Contractor will effect such changes at no additional cost to Owner and resubmit the program to Owner within ten (10) Days after Contractor receives Owner's conditional approval. Owner will then have ten (10) Days after such resubmission to review, comment on the original comments, and approve or disapprove the program as resubmitted by Contractor. Such procedure shall continue with the same ten (10) Day time periods until a program is approved by Owner.

(b) Commencement of Training. Commencing on the date that is six (6) months prior to the Guaranteed Substantial Completion Date, and in accordance with Section 3.2, Contractor shall train Owner's designated operating personnel in the requirements for the startup, shut-down, operation and maintenance of, and safety, general process understanding and emergency procedures for, the Facility and all of its sub-systems pursuant to the training program approved by Owner as set forth in Section 3.32(a).

**3.33 Taxes.** Contractor represents and warrants: (i) Contractor has not and will not claim production tax credits or investment tax credits under Code sections 45 or 48 with respect to any portion of the Facility, Facility Equipment, or Work; (ii) Contractor has not and will not claim depreciation deductions under Code sections 167 or 168 with respect to any portion of the Facility, Facility Equipment, or Work; (iii) No portion of the Facility, Facility Equipment, or Work as described in Code section 168(g)(1)(D); (iv) Contractor has acquired and held the Facility, Facility Equipment, and Work for sale in the normal course of its business of constructing and selling solar powered electrical generating facilities to third parties; (v) There has been no “original use” (within the meaning of Code section 48) of the Facility, Facility Equipment, or Work, other than original use by Owner; and (vi) No portion of the Facility, Facility Equipment, or Work has been or will be Placed in Service other than by Owner.

## **ARTICLE 4**

### **OWNER’S OBLIGATIONS**

**4.1 Access.** From the Effective Date until the Substantial Completion Date, Owner shall provide Contractor with reasonable access to the Site as suitable and necessary for Contractor to complete the Work and perform its obligations in accordance with this Agreement. From the Substantial Completion Date until the Final Completion Date, Owner shall provide Contractor with reasonable access to the Site as suitable and necessary for Contractor to complete the Punch List Items. Owner shall also provide Contractor with access to the SCADA System (consistent with Section 25.2). Owner shall provide reasonable access to the Site for Contractor to complete work in connection with the Warranties. Notwithstanding the foregoing, Contractor’s access shall be subject to the terms of the Real Property Rights and any lack of access due to Contractor’s failure to comply with the Real Property Rights or otherwise with the terms of this Agreement shall not be considered a breach by Owner.

**4.2 Compliance with Laws and Permits.** Owner shall at all times fully comply with Applicable Laws and Applicable Permits. Owner shall obtain and maintain in full force and effect all Owner Acquired Permits.

**4.3 Owner Scope.** Owner shall perform any obligations clearly identified as being Owner’s responsibility pursuant to Exhibit 1. In connection with Owner’s obligations under this Agreement, Owner shall be entitled to hire any third party quality consultants to advise Owner concerning the quality control and performance of the Facility.

**4.4 Owner’s Representative.** Owner shall appoint an Owner’s Representative in accordance with Section 5.1.

**4.5 Insurance.** Owner shall obtain and maintain insurance required in accordance with Article 23.

**4.6 Cooperation.** Owner shall, and shall cause its contractors and their respective hired personnel to, cooperate with Contractor and Subcontractors in coordinating the work of



Owner's contractors and personnel who are working at or near the Site with the Work being performed by any Contractor Party or Subcontractor at or near the Site.

**4.7 Owner-Provided Information.** Owner, or its Affiliates, or their respective employees, representative and agents (or Owner's Engineer) may provide Contractor with opinions, recommendations and other statements or information and Contractor acknowledges that all such opinions, recommendations, statements and information have been or will be provided as background information and as an accommodation to Contractor. Contractor further acknowledges that neither Owner nor any of its Affiliates or their respective employees, representative or agents (nor Owner's Engineer) makes any representations or warranties with respect to the accuracy of such information (including oral statements) or opinions expressed. Contractor further agrees, represents and warrants that it is not relying on Owner or Owner's Affiliates, or any of their respective employees, representatives or agents (or Owner's Engineer) for any information, data, inferences, conclusions, or other information with respect to Site Conditions, including the surface and sub-surface conditions of the Site and the surrounding areas, or the design of the Facility, the Work, or otherwise.

**4.8 Conditions Precedent to Owner's Obligations.** Owner's obligations under this Agreement are subject to the fulfillment or waiver by Owner of each of the following conditions:

- (a) Owner has issued a Full Notice to Proceed to Contractor hereunder; and
- (b) Owner has received all required board and management approvals to authorize the issuance of such Full Notice to Proceed.

Contractor acknowledges that the decision whether or not to grant such approvals are in the sole, unreviewable discretion of Owner's board of directors and management; provided, however, that Contractor is entitled to assume that if Owner issues a Full Notice to Proceed, Owner has obtained all board and management approvals necessary to authorize such issuance.

## ARTICLE 5

### REPRESENTATIVES; KEY PERSONNEL

**5.1 Owner's Representative.** Owner designates, and Contractor agrees to accept, [ ] as Owner's Representative for all matters relating to this Agreement and Contractor's performance of the Work (except as otherwise stated in this Agreement). The acts and omissions of Owner's Representative with respect to this Agreement are deemed to be the acts and omissions of Owner and shall be fully binding upon Owner. Owner may, upon written notice to Contractor pursuant to Article 27, change the designated Owner's Representative.

**5.2 Contractor's Key Personnel and Contractor's Representative.** Contractor designates, and Owner accepts, those individuals set forth on Exhibit 5 (the "Key Personnel") for all matters relating to Contractor's performance under this Agreement. The individual designated by Contractor on Exhibit 5 as "Contractor's Representative" (the "Contractor's

Representative”) shall have full responsibility for the prosecution and scheduling of the Work and any issues relating to this Agreement. If Contractor elects to replace Key Personnel, it shall promptly deliver a notice to Owner with the name and résumé of the proposed replacement individual. Owner shall have the right to approve any such replacement of Key Personnel, provided, however, that such approval shall not be unreasonably withheld or delayed. The actions taken by Contractor’s Representative are deemed to be the acts of Contractor.

**5.3 Power to Bind.** The Parties shall vest, respectively, Owner’s Representative and Contractor’s Representative with sufficient powers to enable them to assume the obligations and exercise the rights of each Party, as applicable, under this Agreement.

**5.4 Notices.** Notwithstanding Section 5.1, Section 5.2, and Section 5.3, all amendments to this Agreement, Change Orders, notices and other communications between Contractor and Owner contemplated herein shall be delivered in writing and otherwise in accordance with Article 27.

## ARTICLE 6

### INSPECTION

**6.1 Inspection.** Owner, its Affiliates, its representatives (including Owner’s Engineer), any Financing Party, its representatives (including any Independent Engineer), and the Transmission Provider (collectively, “Owner Inspection Parties”) shall have the right to observe and inspect any item of Facility Equipment at the Site, including to witness any Facility Test, and the material, design, engineering, service, workmanship or any other portion of the Work at the Site; provided that (a) such observations and inspections shall be arranged at reasonable times and with reasonable advance notice to Contractor and (b) Owner has granted such Person access to the Site and Work for such purpose. Notwithstanding the foregoing, any personnel of such Owner Inspection Parties that have completed Contractor’s safety training and worker environmental training may observe and inspect the Work at the Site, including to witness Facility Tests, at any time subject to compliance with the Site Safety Plan. Prior to Substantial Completion, Contractor shall promptly correct or cause the correction of any part of the Work that is defective, deficient or is otherwise not in accordance with this Agreement, regardless of the stage of its completion or the time or place of discovery of such errors and regardless of whether Owner has previously reviewed or inspected or otherwise accepted such part of the Work in any way. Contractor shall bear the cost of re-performing any defective, deficient or non-conforming Work and removing any deficient Work from the Site. In the event that any part of the Work is discovered to be in a defective, deficient or non-conforming condition after Substantial Completion, correction of such defective, deficient or non-conforming condition shall be governed by Article 21.

**6.2 Off-Site Inspections.** If requested by Owner, Contractor shall obtain access and arrange for Owner Inspection Parties to inspect the off-Site facilities of Contractor and any Supplier under a Major Subcontract, including to witness tests of the Facility Equipment being supplied by them and to partake in manufacturing facility tours, such inspections to be arranged

at reasonable times and with reasonable advance notice. Contractor shall incorporate a forward-looking schedule into each Monthly Progress Report of the tests (if any) to be performed on such Facility Equipment. If any Owner Inspection Party desires to be present at any such test listed on the Monthly Progress Report, Owner shall give Contractor five (5) Business Days' notice prior to the date of such test. If the Contractor proposes to conduct any testing on Facility Equipment that is not otherwise identified in a Monthly Progress Report, the Contractor must provide the Owner Inspection Parties no less than ten (10) Business Days' notice of such proposed testing so that such Owner Inspection Parties may arrange to observe such testing.

## **ARTICLE 7**

### **CONTRACT PRICE**

**7.1 Contract Price.** As full compensation for the Work and all of Contractor's obligations hereunder, Owner shall pay to Contractor, and Contractor agrees to accept as full compensation for the Work, the Contract Price. All payments due and payable to Contractor shall not exceed the applicable amount for such period in the Cash Flow Curve set forth in the Schedule of Values. The Contract Price shall be adjusted only as expressly provided under the terms of this Agreement and is otherwise firm and fixed and, except as otherwise indicated in Article 8 below, shall be deemed to include all expenses to be incurred by Contractor related to Contractor's performance of its obligations under this Agreement. The Contract Price includes all Taxes except Owner Taxes as provided in Article 9, as well as all Permit Fees related to all Contractor Acquired Permits and assistance provided by Contractor in acquiring all Owner Acquired Permits and any other obligation of Contractor hereunder. The Contract Price shall be paid by Owner to Contractor in accordance with the terms of Article 8.

## **ARTICLE 8**

### **PAYMENT PROCESS & PERFORMANCE SECURITY**

#### **8.1 Payments.**

(a) Owner shall pay the Contract Price according to the Schedule of Values. Each Progress Payment shall be due and payable only to the extent it is supported by the completion of the corresponding Work set forth in the Schedule of Values for the payment of such Progress Payment. Subject to and in accordance with any mutually agreed upon Change Order, in no circumstance shall Owner have an obligation to pay any Application for Payment in amounts in excess of the Schedule of Values.

(b) Within thirty (30) Days after the acceptance of the Certificate of Substantial Completion, Owner shall release to Contractor the Retainage, less an amount equal to the Punch List Holdback for all Punch List Items that have not been completed at such time pursuant to the terms hereof. On the Final Completion Date, concurrent with the payment for the Final Completion, Owner shall release to Contractor any remaining Punch List Holdbacks then

held by Owner. Any interest accruing on the Retainage shall accrue for the account of Owner and not Contractor.

(c) If Contractor fails to perform any Punch List Item on the Punch List within sixty (60) Days after the Substantial Completion Date, Owner may elect by written notice to Contractor to retain the Punch List Holdback applicable to such Punch List Item and complete such Punch List Item itself. Upon Owner making such election, Contractor shall forfeit any return of such portion of the Punch List Holdback and Contractor's obligation to perform such Punch List Item shall be deemed satisfied.

**8.2 Milestone Assessment.** Contractor and Owner shall periodically, and in any event at least once each month, review the Work completed and assess the progress of on-Site Work completed and completion of the relevant Milestone. Owner's Engineer and any Independent Engineer may be present during such review and assessment of the Work.

**8.3 Application for Payment.** On or before the tenth (10<sup>th</sup>) Day of each month during the performance of the Work, Contractor shall submit to Owner an Application for Payment with respect to that portion of the Work (including Punch List Items) which Contractor has satisfactorily completed during that month and for which Contractor has not been previously paid. Each Application for Payment shall set forth, as the amount of the Contract Price Contractor is entitled to be paid for such month, with respect to the items of Work set forth in the Schedule of Values, the aggregate of the amounts obtained by multiplying (x) the value of each item of Work set forth in the Schedule of Values and (y) that portion of such item of Work, expressed as a percentage, which has been satisfactorily completed during such month, as verified and approved by Owner, less (z) Retainage (for such month, the "Progress Payment"). The Application for Payment in respect to Substantial Completion shall be delivered when required under Section 16.3. Each Application for Payment shall be reasonably detailed and shall be accompanied by supporting Documentation evidencing the achievement of the Milestone pursuant to the Schedule of Values for which the Progress Payment is being requested, shall be accompanied by lien waivers required to be delivered pursuant to Section 8.4 and shall be sent by either (i) written notice, or (ii) electronic mail and confirmed by first class mail (with the date of receipt of the original by first class mail to be the date of receipt). In addition, as a condition precedent to Owner's obligation to make payment, Contractor shall be current in its delivery of Monthly Progress Reports, Weekly Progress Reports and other Documentation required for all periods through the month for which payment is requested. In no event shall the aggregate amounts invoiced by Contractor or payable by Owner under each Application for Payment exceed the aggregate amount of the Contract Price payable cumulatively through such month according to the Cash Flow Curve. Owner shall make all payments of undisputed amounts when they become due, but in any event, no later than thirty (30) Days after receipt of the Application for Payment; provided that the payments in respect of any Application for Payment with respect to Substantial Completion shall be due within thirty (30) Days after Owner's acceptance of the Certificate of Substantial Completion. If Owner disputes a portion of an Application for Payment, Owner shall notify Contractor of such Dispute and shall pay to Contractor the undisputed portion in accordance with this Section 8.3. If such dispute is resolved within thirty (30) Days after receipt of the Application for Payment, Owner shall make payment

of such resolved amounts within thirty (30) Days after resolution of the dispute. No partial payment made under this Agreement shall be construed to be an acceptance or approval by Owner of any part of the Work or to relieve Contractor of any of its obligations under this Agreement. Contractor shall be responsible for paying or ensuring the payment of all Subcontractors in connection with the Work completed by the Subcontractors in accordance with the terms of their Subcontracts.

**8.4 Lien Releases.** Contractor shall submit with each Application for Payment a conditional partial lien release in the form set forth in Exhibit 12A for the amount requested in the current Application for Payment in respect of work performed or materials delivered on the Site during the period covered by such Application for Payment. Both Contractor and its Major Subcontractors shall provide Owner a conditional final lien release in the form set forth in Exhibit 12B as a condition precedent to payment by Owner of the final Application for Payment. In addition to the lien releases described in this Section 8.4, Contractor shall deliver to the Title Company, as and when required by the Title Company in order to issue title insurance to any Financing Party and to provide an endorsement thereto with respect to mechanic's liens pending disbursement coverage, (a) Contractor's sworn statement and (b) a mechanic's lien subordination agreement, each executed by Contractor and in form and substance acceptable to the Title Company.

**8.5 Release of Liability.** Contractor's acceptance of payment of the Application for Payment for Final Completion shall constitute a release by Contractor of Owner from all liens (whether statutory or otherwise and including mechanics' or suppliers' liens), claims and liability with respect to the payment of the Contract Price or any event or circumstance that would entitle Contractor to request a Change Order in respect of any event that occurs prior to Final Completion, except claims for which Contractor has delivered a dispute notice to Owner, claims that are based on facts or circumstances arising after Final Completion and claims arising under Article 24. No payment by Owner shall be deemed a waiver by Owner of any obligation of Contractor under this Agreement.

**8.6 Overdue Payments.** Overdue payment obligations of either Party hereunder shall bear interest from the date due until the date paid at a rate per annum equal to the lesser of (a) the rate published by the *Wall Street Journal* as the "prime rate" on the Business Day preceding the date on which such interest begins to accrue plus two percent (2%) and (b) the maximum rate allowed under Applicable Law.

**8.7 Disputed Payments.** Failure by Owner to pay any invoiced amount disputed in good faith until such dispute has been resolved in accordance with Article 28 shall not alleviate, diminish, modify or excuse the performance of Contractor or relieve Contractor's obligations to perform hereunder, subject to the provisions of such Article 28. Contractor's acceptance of any payment, and Owner's payment of any invoiced amount, shall not be deemed to constitute a waiver of amounts that are then in dispute. Contractor and Owner shall use reasonable efforts to resolve all disputed amounts expeditiously and in any case in accordance with the provisions of Article 28. No payment made hereunder shall be construed to be acceptance or approval of that part of the Work to which such payment relates or to relieve Contractor of any of its obligations

hereunder. If an Application for Payment was properly submitted in accordance with all of the provisions of this Agreement and amounts disputed by Owner with respect to such Application for Payment are later resolved in favor of Contractor, Owner shall pay interest on such disputed amounts due to Contractor, at the interest rate set forth in Section 8.6, from the date on which such payment was originally due under Section 8.3 until the date such payment is actually received by Contractor. If amounts disputed in good faith that have been paid by Owner are later resolved in favor of Owner, Contractor shall refund any such payment and pay interest on such payment at the interest rate set forth in Section 8.6, from the date on which the payment was originally made by Owner until such refunded payment is received by Owner.

**8.8 Contractor Performance Security.** On the Effective Date, Contractor shall deliver to Owner and maintain in full force and effect the Contractor Performance Security in the form set forth in Exhibit 11. If Contractor fails to deliver the Contractor Performance Security or the issuer thereof repudiates or breaches its obligation to pay or perform thereunder, Owner shall be excused from paying any Progress Payments until such time as Contractor shall have delivered replacement contractor performance security in a form acceptable to Owner in its sole discretion.

**8.9 Holdback.**

(a) Any provision hereof to the contrary notwithstanding, upon the occurrence and continuance of any of the following events, Owner, upon notice to Contractor, may, but shall have no obligation to, withhold or retain such portion (including all) of any payment due to Contractor under this Agreement as reasonably necessary to ensure the performance of the Work, to cover one hundred fifty percent (150%) of the Losses or reasonably anticipated Losses to Owner related to such event, or to otherwise protect fully Owner's rights hereunder:

(i) A Contractor Event of Default shall have occurred;

(ii) Contractor shall have failed to timely make undisputed payments to its Subcontractors for material or labor used in the Work and Owner is not in breach of its obligations to pay Contractor;

(iii) Owner in good faith shall have determined based upon the Construction Schedule that Contractor cannot with prompt and reasonable acceleration of the Work achieve Substantial Completion before the Guaranteed Substantial Completion Date; provided, however, that amounts withheld or retained on account of this Section 8.9(a)(iii) shall not exceed the amount of any Facility Delay Liquidated Damages or EITC Liquidated Damages which would be payable under Section 17.1 or Section 17.6 on account of the then-estimated delay in Substantial Completion (assuming the Construction Start Date occurred on or prior to the Guaranteed Construction Start Date); or

(iv) Any part of such payment shall be attributable to Work that contains a defect or has not been performed in accordance with the terms of this Agreement.

(b) No payment made under this Section 8.9 shall be construed to be acceptance or approval of that part of the Work to which such payment relates or to relieve Contractor of any of its obligations hereunder. Should any dispute arise with respect to Owner's exercise of its rights under this Section 8.9, such dispute shall be subject to resolution in accordance with the expedited payment dispute procedures provided in Article 28. Contractor shall not have any rights of termination or suspension under Section 20.4 as a result of Owner's exercise or attempted exercise of its rights under this Section 8.9.

**8.10 Setoff.** Notwithstanding any other provision in this Agreement, Owner shall be entitled to set off against any amount it owes to Contractor under this Agreement, any undisputed amount(s) that either (a) Contractor owes to Owner under this Agreement or (b) Contractor or any Affiliate of Contractor owes to Owner under the Project Transaction Documents.

## ARTICLE 9

### TAXES

**9.1 Taxes.** The Contract Price includes any and all Taxes imposed under Applicable Law on Contractor, the Subcontractors, the Work, the construction or sale of Facility Equipment to Owner or installation of the Facility, except for Owner Taxes. In addition to the Contract Price, Owner assumes exclusive liability for and shall pay all Owner Taxes. Contractor and Owner agree to cooperate with each other to minimize the Tax liability of both Parties to the extent legally permissible and commercially reasonable for such Party. Contractor shall provide Owner with such assistance as may be reasonably requested by Owner in demonstrating eligibility for exemptions or exclusions from such Taxes (and any other Tax exemptions) to the relevant Governmental Authority, including as provided in Section 3.31. Contractor shall, in accordance with Applicable Law, timely administer and timely pay all Taxes that are included in the Contract Price and timely furnish to the appropriate taxing authorities all required information and reports in connection with such Taxes and furnish copies of such information and reports (other than information specifically pertaining to Contractor's income and profit) to Owner as reasonably requested by Owner and within thirty (30) Days after any request from Owner. Contractor shall provide Owner with any other information regarding allocation of quantities, descriptions, and costs of property provided by Contractor and installed as part of the Facility that is necessary in connection with the preparation of Owner's tax returns or as a result of an audit by a taxing authority. The Owner or its designee shall be entitled to all tax benefits associated with the Facility, and Contractor will have no claim with respect to such benefits.

## ARTICLE 10

### CHANGES AND EXTRA WORK

**10.1 Owner Requested Change Order.** Without invalidating this Agreement, Owner may request changes in the Work or the Facility. Owner shall request such changes in the Work or the Facility by delivering a written Change Order request to Contractor. As soon as practicable after receipt of a Change Order request, but in no event later than five (5) Days after receipt of a Change Order request, Contractor shall prepare and forward to Owner in writing: (i) a quotation for the price for the extra or changed Work and change to the Schedule of Values (if applicable); (ii) an estimate of any required adjustment to the Construction Schedule; (iii) any adjustment to Performance Criteria; and (iv) an estimate of any impact of the proposed change on any Applicable Permit, warranty and any other term or condition of this Agreement. The Parties shall negotiate in good faith to determine the adjustment to the Contract Price for Change Orders contemplated by this Section 10.1. If the Parties do not agree on the adjustment to the Contract Price in respect of this Section 10.1, then the adjustment to the Contract Price may be determined in accordance with Exhibit 16 but only if the Parties so agree. If the Parties do not agree either (A) to a fixed price Change Order, or (B) that an adjustment to the Contract Price shall be determined in accordance with Exhibit 16, then Owner may nonetheless direct Contractor to proceed with the Work that is the subject of the Change Order, in which case (1) for a deductive Change Order, the Contract Price shall be reduced by the amount of any reduction in Contractor's Direct Costs and (2) in the case of an additive Change Order (or Change Order involving additive and deductive elements), Contractor shall be paid an amount equal to any net increase in its Direct Costs in performing the Change Order plus a markup of six percent (6%). Contractor shall submit Applications for Payment no more frequently than monthly with respect to Contractor's Direct Costs in accordance with the preceding sentence and Owner shall be obligated to pay such undisputed amounts within thirty (30) Days after Owner's receipt of Contractor's Application for Payment.

**10.2 Contractor Requested Change Order.** Contractor may propose a Change Order to Owner if the proposed changes improve the Facility or are otherwise advisable for the Work. Any such proposed Change Order shall not affect the obligation of Contractor to perform the Work and to deliver the Facility in accordance with this Agreement unless and until Owner executes a Change Order pursuant to Section 10.6. If the Parties do not agree on the adjustment to the Contract Price in respect of this Section 10.2, then the adjustment to the Contract Price may be determined in accordance with Exhibit 16 but only if the Parties so agree. If the Parties do not agree either (a) to a fixed price Change Order or (b) that an adjustment to the Contract Price shall be determined in accordance with Exhibit 16, then no Change Order shall be executed. If Contractor proceeds with a proposed change in the Work pursuant to this Section 10.2 without receiving the consent of Owner, Contractor shall be responsible for the removal of any such work if a Change Order request is not subsequently approved by Owner; provided, however, that in the event of any Emergency, Contractor shall act, in its good faith discretion, to prevent threatened damage, injury or loss to any Person or property.



**10.3 Mandatory Change Order.** Contractor shall be entitled to an adjustment in the Contract Price in the event of an Owner-Caused Delay and an adjustment in the Construction Schedule (including to any Guaranteed Dates) as set forth below upon the occurrence of any of the following events: (a) an Owner-Caused Delay or (b) a Force Majeure Event, in each case as and only to the extent permitted by Article 11. Contractor shall only be entitled to a Change Order if and to the extent it can demonstrate that the occurrence of a preceding event had an actual and demonstrable adverse impact (i) on Contractor's Direct Costs or (ii) when taken together with all other delays caused by the events described in (a) and (b) above of which Contractor has timely provided notice to Owner in accordance with this Agreement, on Contractor's ability to perform any Contractor Critical Path Item necessary for the achievement of any Guaranteed Date and, in such event, the Contractor Critical Path Items shall be correspondingly extended by the period of time (if any) that Contractor is actually and demonstrably delayed in the performance of such Contractor Critical Path Item as a result of the impact of such event (such period, the "Actual Delay").

**10.4 Limitation on Change Orders.** Change Orders shall be limited to (i) changes requested by Owner in accordance with Section 10.1, (ii) changes requested by Contractor and mutually agreed to by the Parties in accordance with Section 10.2 and (iii) changes in connection with mandatory Change Orders in accordance with Section 10.3. Notwithstanding anything to the contrary, other than to the extent resulting from a Force Majeure Event occurring after the Effective Date, in no event shall any Site Condition give rise to a Change Order.

**10.5 Determining Change Order.** Any adjustment of the Construction Schedule pursuant to a Change Order shall be determined in accordance with Section 10.3 as well as Article 11. Any adjustment of the Contract Price shall include all costs to Contractor associated with the performance of the extra Work or changes or a reduction of the Contract Price based on savings to Contractor associated with the changes, as applicable. Adjustments in the Contract Price shall be determined in accordance with Section 10.1, Section 10.2 and Section 10.3, as applicable, as well as Article 11.

**10.6 Change Order Must Be in Writing.** No change in the Work or extra Work shall be valid and effective unless it is in writing in the form of a Change Order signed by the representatives of both Parties that includes a description of the amount of any adjustment of the Contract Price and any adjustment to the Construction Schedule, the Schedule of Values or the Performance Criteria due to the change.

## ARTICLE 11

### FORCE MAJEURE EVENT; OWNER-CAUSED DELAY

**11.1 Certain Events.** No failure or omission to carry out or observe any of the terms, provisions or conditions of this Agreement shall give rise to any claim against a Party, or be deemed to be a breach or an Event of Default under this Agreement, if such failure or omission shall be caused by or arise out of a Force Majeure Event or an Owner-Caused Delay; provided that the Party claiming relief strictly complies with the provisions of Article 11.

Notwithstanding anything to the contrary in the foregoing, the obligation to pay money in a timely manner in accordance with the terms hereof shall not be subject to the Force Majeure Event or Owner-Caused Delay provisions hereof.

**11.2 Notice of Force Majeure Event and Owner-Caused Delay.** If a Party's ability to perform its obligations under this Agreement is affected by a Force Majeure Event or an Owner-Caused Delay (in the case of Contractor), the Party claiming relief shall provide prompt notice, but in any event not later than twenty-four (24) hours of when the Force Majeure Event or Owner-Caused Delay first prevents or delays performance under this Agreement, to Contractor's Representative or Owner's Representative, as applicable, of any delay or anticipated delay in the claiming Party's performance of this Agreement due to such Force Majeure Event or Owner-Caused Delay, including a description of the event including reasonable details (to the extent available and known to the claiming Party, at such time) regarding the underlying facts and conditions pursuant to which such Party is claiming a Force Majeure Event or Owner-Caused Delay and the anticipated length of the delay. After such notice, the claiming Party shall deliver written notice as soon as practicable, but in any event not later than five (5) Business Days after the claiming Party becomes aware of the delay or anticipated delay, describing in detail the particulars of the occurrence giving rise to the claim, including what date the claiming Party became aware of the occurrence of such event and an estimate of the event's anticipated duration and effect upon the performance of its obligations, any action being taken to avoid or minimize its effect, and a proposed recovery schedule (the "Delay Notice"). The Party claiming relief due to a Force Majeure Event or Owner-Caused Delay shall have a continuing obligation to deliver to the other Party regular updated reports and any additional documentation and analysis supporting its claim regarding a Force Majeure Event or an Owner-Caused Delay promptly after such information becomes available to such Party. IT IS A CONDITION TO CONTRACTOR'S RIGHT TO RECEIVE AN EXTENSION OF TIME, AN INCREASE TO THE CONTRACT PRICE AND OTHER ADJUSTMENTS TO THE CONSTRUCTION SCHEDULE THROUGH A CHANGE ORDER AS PROVIDED IN SECTION 10.3 THAT CONTRACTOR PROVIDE NOTICE TO OWNER WITHIN TWENTY-FOUR (24) HOURS OF THE TIME CONTRACTOR BECAME AWARE OR SHOULD HAVE BECOME AWARE OF THE FACTS OR CIRCUMSTANCES THAT PERMIT CONTRACTOR TO SEEK A CHANGE ORDER UNDER SECTION 10.3; IN THE EVENT CONTRACTOR DOES NOT PROVIDE NOTICE WITH SUFFICIENT DETAIL WITHIN TWENTY-FOUR (24) HOURS OF THE TIME CONTRACTOR BECAME AWARE OR SHOULD HAVE BECOME AWARE OF THE FACTS OR CIRCUMSTANCES THAT PERMIT CONTRACTOR TO SEEK A CHANGE ORDER UNDER SECTION 10.3, CONTRACTOR SHALL NOT BE ENTITLED TO A CHANGE ORDER UNDER ARTICLE 10 OR ANY OTHER RELIEF HEREUNDER.

**11.3 Force Majeure Event and Owner-Caused Delay Conditions.** Upon the occurrence of a Force Majeure Event or an Owner-Caused Delay, the suspension of, or impact on, performance due to such Force Majeure Event or Owner-Caused Delay shall be of no greater scope and no longer duration than is required by such event (taking into account the obligations affected thereby). In addition, the claiming Party shall exercise reasonable efforts to (a) minimize and mitigate the effects of any delay caused by, and costs arising from said Force Majeure Event or Owner-Caused Delay, (b) continue to perform its obligations hereunder not

affected by such event and (c) correct or cure the effect of such event. When the Party claiming relief due to such Force Majeure Event or Owner-Caused Delay is able to resume performance of its affected obligations, such Party shall provide prompt notice to the other Party to that effect and promptly resume performance of all of its obligations under this Agreement.

#### **11.4 Contractor's Remedies.**

(a) Force Majeure Event. As Contractor's sole remedy for the occurrence of a Force Majeure Event, and provided that Contractor has otherwise materially complied with the applicable obligations it may have under Section 11.2 and Section 11.3, Contractor shall be entitled to an extension to the Construction Schedule (including to the Guaranteed Dates, other than the Guaranteed Construction Start Date or the Guaranteed Substantial Completion Date) to the extent of the Actual Delay in accordance with Section 10.3. Force Majeure Events shall not entitle Contractor to an adjustment in the Contract Price or otherwise be compensable.

(b) Owner-Caused Delay. As Contractor's sole remedy for the occurrence of an Owner-Caused Delay, and provided that Contractor has otherwise materially complied with the applicable provisions of Section 11.2 and Section 11.3, Contractor shall be entitled to an extension to the Construction Schedule (including to the Guaranteed Dates) to the extent of the Actual Delay in accordance with Section 10.3. If Contractor's costs increase despite Contractor's reasonable efforts to mitigate any such increases pursuant to Section 11.3, the Contract Price shall be increased by the Direct Costs incurred by Contractor as a direct result of such Owner-Caused Delay.

(c) Changes Orders. Upon the occurrence of an event that entitles Contractor to relief under this Section 11.4, and subject to Contractor's compliance with the applicable provisions of this Article 11 and Article 10 in all material respects, Contractor and Owner shall prepare a Change Order in accordance with Article 10. The remedies set forth in this Section 11.4 shall be Contractor's sole remedies for any such event.

### **ARTICLE 12**

#### **HAZARDOUS MATERIALS**

**12.1 Use by Contractor.** Contractor shall minimize and manage the use of Hazardous Materials in the performance of its obligations under this Agreement and shall not permit any of the Subcontractors, directly or indirectly, to cause any Release in, on or under the Facility, the Site or the adjacent area except to the extent required for the performance of the Work, in such case, in accordance with Applicable Laws and Applicable Permits (including the performance of investigatory, monitoring, or other remedial work upon the Facility, the Site or adjacent areas to the extent reasonably necessary to comply with Applicable Laws and Applicable Permits).

**12.2 Remediation by Contractor.** Contractor shall conduct and complete all investigations, studies, sampling, testing and remediation of the Site as required by Applicable Laws and Applicable Permits in connection with any Release, disposal or the presence of

Hazardous Materials, where existing prior to the Effective Date or brought onto or generated at the Site by any Contractor Party or Subcontractor or to the extent any such Release is caused by the negligent acts or omissions of any Contractor Party or Subcontractor, except to the extent such Release is caused by any Owner Party after the Effective Date. Contractor shall promptly comply with all lawful orders and directives of all Governmental Authorities regarding Applicable Laws and Applicable Permits relating to the use, transportation, storage, handling or presence of Hazardous Materials, or any Release, by any Contractor Party, Subcontractor or any Person acting on its or their behalf or under its or their control of any such Hazardous Materials brought onto or generated at the Site by any Contractor Party or Subcontractor, except to the extent any such orders or directives are being contested in good faith by appropriate proceedings in connection with the Work.

**12.3 Hazardous Materials File.** During the performance of the Work, Contractor shall maintain and update a file of all safety data sheets for all Hazardous Materials used in connection with the Work hereunder, or used by or on behalf of any Contractor Party or Subcontractor at the Site and shall promptly deliver such file and any updates to Owner.

**12.4 Notice of Hazardous Materials.** If Contractor discovers, encounters or is notified of any Release or exposure to Hazardous Materials at the Site:

(a) Contractor shall promptly notify Owner thereof and take all reasonable efforts, consistent with Applicable Law or Applicable Permits, to mitigate the impacts associated with such Hazardous Materials including, as appropriate, containing any Release and stopping Work in and restricting access to areas affected by such Hazardous Materials;

(b) if any Contractor Party or Subcontractor has brought such Hazardous Materials onto the Site or generated such Hazardous Materials, Contractor shall, as promptly as reasonably practicable, remove such Hazardous Materials from the Site and remediate the Site to the extent required by all Applicable Laws and Applicable Permits in each case at Contractor's sole cost and expense, except where such materials were Released after the Effective Date by Owner, its Affiliates, or any third party other than any Contractor Party or Subcontractor; and

(c) if any Contractor Party or any Subcontractor has brought such Hazardous Materials onto the Site or generated such Hazardous Materials, Contractor shall not be entitled to any extension of time or additional compensation hereunder for any delay or costs incurred by Contractor as a result of the existence of such Hazardous Materials, except where such materials were Released after the Effective Date by Owner, its Affiliates, or any third party other than any Contractor Party or Subcontractor.

**12.5 Hazardous Materials Disposal System.** Contractor shall, in consultation with Owner, arrange and contract with contractors (who are appropriately licensed and insured) for the transportation from the Site and the management or disposal in accordance with Applicable Law and Applicable Permits of Hazardous Materials generated by or produced in connection with Contractor's performance of the Work. To the extent required by Applicable Law or Applicable Permits, Contractor shall (a) prepare and maintain accurate and complete

documentation of all Hazardous Materials used by Contractor or Contractor Parties at the Site in connection with the Facility, and of the disposal of any such materials, including transportation documentation and the identity of all Subcontractors providing Hazardous Materials disposal services to Contractor at the Site and (b) prepare and deliver all required notifications and reports to Governmental Authorities in connection with the presence of Hazardous Materials at the Site that were brought onto the Site or generated by any Contractor Party or Subcontractor. Contractor shall comply with Owner's reasonable requirements and procedures with respect to the disposal of such Hazardous Materials.

**12.6 Scope of Contractor Environmental Indemnification.** Contractor hereby specifically agrees to indemnify, defend and hold Owner and the Owner Parties harmless from and against any and all losses, liabilities, claims (including relating to personal injury or bodily injury or death), demands, damages, causes of action, fines, penalties, costs and expenses (including all reasonable consulting, engineering, attorneys' or other professional fees), whether or not involving damage to the Facility or the Site, that they may incur or suffer by reason of:

(a) any use of or introduction of Hazardous Materials to the Site by any Contractor Party or Subcontractor in connection with the performance of the Work, which use includes the storage, transportation, processing or disposal of such Hazardous Materials by Contractor or any of its Subcontractors, whether lawful or unlawful;

(b) any Release or disturbance of Hazardous Materials in connection with the performance of the Work by Contractor or any of its Subcontractors (except as provided in Section 12.7);

(c) any administrative, enforcement or compliance proceeding commenced by or in the name of any Governmental Authority because of an alleged, threatened or actual violation of any Environmental Law by any Contractor Party or any Subcontractor;

(d) any action reasonably necessary to abate or remediate Hazardous Materials described in paragraphs (a) or (b) above, or prevent a violation or threatened violation of any Environmental Law by any Contractor Party or Subcontractor; and

(e) any action required by Contractor to mitigate a situation created by the violation of any Applicable Law or Applicable Permit by any Contractor Party or Subcontractor.

**12.7 Scope of Owner Environmental Indemnification.** Owner hereby specifically agrees to indemnify, defend and hold Contractor and Contractor Parties harmless from and against any and all losses, liabilities, claims (including relating to personal injury or bodily injury or death), demands, damages, causes of action, fines, penalties, costs and expenses (including, all reasonable consulting, engineering, attorneys' or other professional fees), whether or not involving damage to the Facility or the Site, that they may incur or suffer by reason of:

(a) any Hazardous Materials present or used, brought upon, transported, stored, kept, discharged, or spilled by Owner or any Owner Party in, on, under or from the Site

after the Effective Date including any Release by Owner or its Affiliates, in accordance with the terms of this Agreement and all Applicable Laws;

(b) any administrative, enforcement or compliance proceeding commenced by or in the name of any Governmental Authority because of an alleged, threatened or actual violation of any Environmental Law by Owner; and

(c) any action reasonably necessary to abate or remediate Hazardous Materials described in paragraphs (a) or (b) above, or to prevent a violation or threatened violation of any Environmental Law by Owner.

## **ARTICLE 13**

### **TITLE AND RISK OF LOSS**

**13.1 Equipment – Risk of Loss Before Substantial Completion.** From the Effective Date and until the Substantial Completion Date, subject to the provisions of this Article 13, Contractor has care, custody and control of all Facility Equipment and other items that become part of the Facility and shall exercise due care with respect thereto and assumes the risk of loss and full responsibility for the cost of replacing or repairing any damage to the Facility and all materials, Equipment, supplies and maintenance equipment (including temporary materials, equipment and supplies) that are purchased for permanent installation in or for use during construction of the Facility.

**13.2 Equipment – Risk of Loss After Substantial Completion.** Owner shall take possession and control and shall assume and shall bear the risk of loss and responsibility in respect of the Facility completed and transferred to Owner upon the Substantial Completion Date or the earlier termination of this Agreement, unless the loss or damage to the Facility is (a) caused by any Contractor Party, Subcontractor or other Person over whom Contractor has control or (b) a defect covered by the Warranties provided by Contractor under this Agreement.

#### **13.3 Title.**

(a) Contractor warrants good and marketable title, free and clear of all Contractor Liens (to the extent Owner's payments to Contractor are made in accordance with this Agreement), to all Work, Facility Equipment and other items furnished by Contractor or any of the Subcontractors that become part of the Facility.

(b) Title to the Facility, and to any discrete and identifiable item or series of Facility Equipment, shall pass to Owner upon the earliest to occur of (i) receipt by Contractor of payment (less any Retainage) in full therefor, (ii) delivery of such Facility Equipment to the Site; (iii) Availability Completion, (iv) Substantial Completion and (v) with respect to any applicable Facility Equipment, incorporation of such Facility Equipment into the Facility.

## ARTICLE 14

### INTELLECTUAL PROPERTY

**14.1 Title to Plans and Specifications.** Upon Owner's payment of the Contract Price as provided in this Agreement, the documentation prepared by Contractor shall become the exclusive property of Owner; provided, however, that Contractor's intellectual property rights in any such documentation shall remain with Contractor and nothing in this Agreement shall be construed as limiting Contractor's rights to use its know-how, experience and skills of its employees (excluding Owner confidential information), whether or not acquired during performance of the Work, or to perform any construction or other services for any other person. Notwithstanding the foregoing, Contractor agrees to grant, and hereby does grant, to Owner an irrevocable, fully paid-up, royalty-free, perpetual, non-exclusive, world-wide, transferable license to use such intellectual property rights as needed for installing, owning, operating, repairing, maintaining, replacing, modifying and expanding the Facility (the "Licensed Technology").

**14.2 Intellectual Property.** Contractor shall include, as a term or condition of each contract with a Major Subcontractor employed by it in the performance of the Work, an intellectual property indemnification provision (including patents, trademarks, copyrights and trade secrets) extending from the Major Subcontractor to Owner and Contractor, with similar obligations as those set forth in Section 14.4. Contractor shall enforce and render all assistance Owner may reasonably require on a reimbursable cost basis to enforce the terms of those indemnifications by such Major Subcontractors. This obligation shall not reduce or otherwise affect Contractor's obligation to provide all Work to Owner free and clear of all intellectual property infringement or other violation claims.

#### **14.3 Procurement of Proprietary Rights.**

(a) Contractor warrants that no infringement of any patents, trademark, registered design, copyright, design right or other registerable or proprietary intellectual property right of any kind will be caused by the performance of the Work, the ownership of confidential information or the Facility and the Facility's operation in accordance with the Required Manuals.

(b) Contractor shall procure, as required, the appropriate proprietary rights, licenses, agreements and permissions for materials, methods, processes and systems incorporated into the Facility. In performing the Work, Contractor shall not incorporate into the Facility any materials, methods, processes or systems which involve the use of any confidential information or intellectual property rights that Owner or Contractor do not have the right to use in connection with the performance of the Work or the construction, ownership or operation of the Facility or which may cause any Losses to Owner or Contractor arising out of claims of infringement of any domestic intellectual proprietary rights, or applications for such rights, or use of confidential information.

#### 14.4 Intellectual Property Infringement.

(a) Contractor shall pay all royalties, license and other fees payable under or in respect of, and shall defend, indemnify and hold harmless the Owner Parties from and against any claim arising out of, resulting from, or reasonably incurred in contesting, (i) any unauthorized disclosure by Contractor or any Subcontractor or use of any trade secrets, (ii) any other intellectual property infringement (including patent, copyright or trademark infringement) caused by Contractor's performance, or that of its Subcontractors, under this Agreement, or (iii) any claim asserted against such Owner Party that (A) concerns any equipment or other items provided by Contractor or any Subcontractor under this Agreement, (B) is based upon the performance of the Work by Contractor or any Subcontractor, including the use of any tools or implements for construction by Contractor or any Subcontractor, or (C) is based upon the design or construction of any item or unit specified by Contractor under this Agreement or upon the operation of any item or unit according to directions embodied in Contractor's final process design, or any revision thereof, prepared or approved by Contractor unless to the extent that such claims relate, in whole or in part, to (a) Owner's modification of such equipment or other items made without Contractor's approval, (b) the combination of such item with other products, materials, equipment, parts or apparatus not approved by Contractor, unless such combination was done in accordance with this Agreement, any change order, the Technical Specifications, or otherwise agreed to by the Contractor, and provided that such claim could not be brought but for such combination and such claim is based on infringement by the other products, materials, equipment, parts or apparatus or (c) a failure to promptly install an update required by Contractor, provided such update does not reduce or potentially reduce the performance of the Facility as of such date or otherwise adversely affect the Facility in any way with respect to the Project Transaction Documents or otherwise.

(b) If such claim for infringement or other violation results in a suit against an Owner Party, Contractor shall, at its election and in the absence of a waiver of this indemnity by such Owner Party, have sole charge and direction of said suit on such Owner Party's behalf so long as Contractor diligently prosecutes the same. If Contractor has charge of a suit brought against an Owner Party by a third party, such Owner Party shall render such assistance at Contractor's expense as Contractor may reasonably require in the defense of such suit except that such Owner Party shall have the right to be represented therein by counsel of its own choice and at its own expense. If such Owner Party is enjoined from completion of the Facility or any part thereof, or from the use, operation or enjoyment of the Facility or any part thereof as a result of such claim or any litigation based thereon, Contractor shall promptly seek to have such injunction removed at no cost to any Owner Party. If in such claim any device is held to constitute an infringement or other violation and its use is enjoined, Contractor shall either secure for each of the Owner Parties the right to continue using such device by suspension of the injunction or by procuring for such Owner Party a license, or otherwise at Owner's option and at Contractor's expense, replace such device with a non-infringing or violating device of equivalent utility, performance and expected life, or modify it so that it becomes non-infringing or violating without impairing its utility, performance and expected life.



## ARTICLE 15

### START-UP, COMMISSIONING & TESTING<sup>12</sup>

**15.1 Start-up and Commissioning.** Contractor shall conduct the Start-up and Commissioning of the Facility in accordance with the Start-up and Commissioning requirements set forth in the Technical Specifications and Exhibit 25.

**15.2 Facility Tests.** Contractor shall conduct the Availability Test and Functional Test for the Facility in accordance with Exhibit 25, and when Contractor believes that the Facility can satisfy the Minimum Capacity Level, Contractor shall conduct the Power Plant Controller Test and the Capacity Test in accordance with Exhibit 14B or Exhibit 14C, as applicable. Contractor shall submit a test report for each Facility Test within five (5) Days after the completion thereof, which test report shall include a summary of such Facility Test and the results for such test. Owner and Contractor will negotiate in good faith to agree upon detailed testing procedures that comply with the protocols set forth in Exhibit 14B, Exhibit 14C and Exhibit 25.

**15.3 Availability and Capacity Test Notice.** Contractor shall provide Owner with at least five (5) Business Days' prior written notice of the commencement of the Availability Test and the Capacity Test, in order to permit Owner's Representative to arrange attendance at such tests. Contractor shall give Owner's Representative at least five (5) Business Days advance notice of the re-performance of the Availability Test or Capacity Test, as applicable. Owner's Representative, and any Owner Inspection Party identified to Contractor by Owner in writing prior to the date of the Availability Test or Capacity Test, shall be entitled to attend and observe the Availability Test and Capacity Test and each re-performance thereof.

**15.4 Availability and Capacity Test Acceptance.** Contractor shall, as soon as practicable following the successful completion of the Availability Test, submit to Owner's Representative an Availability Test Certificate, signed by Contractor's Representative and attaching the Final Test Results performed pursuant to such Availability Test. Subject to this Section 15.4, Owner shall, within thirty (30) Days after Owner's receipt of an Availability Test Certificate from Contractor, either (y) approve the Availability Test results by countersigning and delivering to Contractor the fully executed Availability Test Certificate (which shall be deemed effective on the date the Availability Test Certificate was delivered); or (z) give Contractor written notice stating that Owner rejects the Availability Test results and describing the non-conformity on which the rejection is based. Acceptance of the Availability Test Certificate by Owner shall not affect any rights Owner may have with respect to the Capacity Test (and Substantial Completion) or under a Warranty for any Facility Equipment or the Facility pursuant to Article 21. Once the Availability Test Certificate is accepted by Owner as provided in this Section 15.4, such acceptance shall constitute "Availability Completion" and the date of Contractor's submission of the corresponding Availability Test Certificate to Owner that was

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<sup>12</sup> Note to Bidders: To the extent the approved Construction Schedule includes phased completion of the Facility on a block-by-block basis, the provisions of this Agreement relating to testing, delays, acceptance liquidated damages and related matters will be revised to reflect block completion milestones.

accepted shall constitute the “Availability Completion Date.” With respect to the Capacity Test, Contractor shall, as soon as practicable following the completion of a Capacity Test in which the Final Test Results reveal that the Minimum Capacity Level for the Facility has been achieved, submit to Owner’s Representative a Capacity Test Certificate, signed by Contractor’s Representative and attaching the Final Test Results performed pursuant to Exhibit 14C. Subject to this Section 15.4, Owner shall, within thirty (30) Days after Owner’s receipt of a Capacity Test Certificate from Contractor, either: (a) approve the Capacity Test results by countersigning and delivering to Contractor the fully executed Capacity Test Certificate (which shall be deemed effective on the date the Capacity Test Certificate was delivered); or (b) give Contractor written notice stating that Owner rejects the Capacity Test results and describing the non-conformity on which the rejection is based. A Capacity Test Certificate signed by Owner is deemed conclusive evidence that the Facility has met the Minimum Capacity Level required under this Agreement. Acceptance of the Capacity Test Certificate by Owner shall not affect any rights Owner may have under a Warranty for any Facility Equipment or the Facility pursuant to Article 21.

**15.5 Capacity Test Rejection.** If the Final Test Results reveal that the Facility fails to meet the Minimum Capacity Level, Contractor shall repeat the Capacity Test as necessary until the Minimum Capacity Level has been met. Contractor shall take all corrective actions so that the Facility successfully completes the Capacity Test and meets the Minimum Capacity Level, without prejudice to Owner’s rights and remedies under this Agreement. If the Final Test Results reveal that the Facility has satisfied the Minimum Capacity Level but not the Guaranteed Capacity, Contractor may elect to perform additional Work (if it deems necessary) and repeat the Capacity Test. Any such additional Work shall be performed in compliance with the requirements of this Agreement. Prior to commencing any such additional Work, Contractor shall provide to Owner a detailed plan and schedule to perform such additional Work and shall not commence any such additional Work without Owner’s consent, not to be unreasonably withheld. The Capacity Test may be repeated pursuant to this Section 15.5 no more frequently than once per week; provided that in no event shall the Capacity Test continue beyond sixty (60) Days after the Guaranteed Substantial Completion Date.

**15.6 Correction of Defects.** Prior to Substantial Completion, Contractor shall promptly correct or cause the correction of any part of the Work that is Defective, deficient or is otherwise not in accordance with this Agreement, regardless of the stage of its completion or the time or place of discovery of such errors and regardless of whether Owner has previously reviewed or inspected or otherwise accepted such part of the Work in any way. Contractor shall bear the cost of re-performing any Defective, deficient or non-conforming Work. All internal and third party costs reasonably incurred by Owner in attending or in consequence of any re-testing or inspection necessitated by any Work that is Defective, deficient or is otherwise not in accordance with this Agreement shall be deducted from the Contract Price. In the event that any part of the Work is discovered to be in a Defective, deficient or non-conforming condition after Substantial Completion, correction of such Defective, deficient or non-conforming condition shall be governed by Article 21. Acceptance of any Facility Test, Facility Equipment or Work by Owner shall not affect any rights Owner may have under a Warranty pursuant to Article 21.

**15.7 Serial Defects.** Without limiting Section 15.6, if any Serial Defect arises at any time prior to Substantial Completion, Owner shall provide notice to Contractor of such Serial Defect or, if Contractor becomes aware of any such Serial Defect, Contractor shall provide written notice of the same to Owner. Contractor shall determine what changes, repairs or replacements to any affected items of Facility Equipment are necessary to correct such Serial Defect and to avoid further failures of the Facility Equipment at the Facility which may not have yet experienced such failures, and Contractor shall make such necessary changes, repairs or replacements to all the Facility Equipment installed at the Facility (whether or not such Facility Equipment is installed, has been tested or has experienced such failures) all at its own cost and expense. Contractor shall repeat such process on an iterative basis until such Serial Defect and the underlying cause thereof is corrected.

## ARTICLE 16

### SUBSTANTIAL COMPLETION

**16.1 Generally.** Subject to Article 17, Contractor shall perform the Work in accordance with the Construction Schedule, as may be amended from time to time in accordance with the terms of this Agreement, so as to achieve Substantial Completion by the Guaranteed Substantial Completion Date and Final Completion by the Guaranteed Final Completion Date.

**16.2 Substantial Completion Defined.** Subject to Section 16.3, “Substantial Completion” means (excepting the completion of Punch List Items):

- (a) if required by the terms of Section 17.1, Contractor has paid any Facility Delay Liquidated Damages;
- (b) the design, engineering, procurement and construction of the Facility has been completed in accordance with this Agreement;
- (c) the Facility as a whole is capable of continuous operation in a safe manner (with respect to damage to any portion or component of the Facility or injury to any Person) in accordance with Applicable Law, Applicable Permits, Applicable Codes, the Interconnection Agreement, manufacturers’ recommendations, Prudent Utility Practice, the Technical Specifications and the design criteria related to the Facility;
- (d) installation of a minimum of [ ] MW of inverters as determined by aggregating the nameplate of inverters;<sup>13</sup>
- (e) the Facility is fully operational and can demonstrate that it produces power at the Delivery Point and Contractor has received the Capacity Test Certificate, substantially in the form of Exhibit 15B signed by Owner;

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<sup>13</sup> Note to Bidders: The minimum number of installed MWs will be based on the expected size of DC project.

(f) the Facility is electrically interconnected to, has been synchronized with, and is capable of transmitting electric energy to, the Delivery Point, all in accordance with the Interconnection Agreement;

(g) Contractor has certified by written notice to Owner that it has administered the training required by Section 3.32;

(h) the most recent Functional Test has been completed in accordance with the requirements of Exhibit 25 and the Facility is ready to commence commercial operation;

(i) Contractor shall have received (i) the Availability Test Certificate, substantially in the form of Exhibit 15A signed by Owner and (ii) Owner has accepted the results of the completed Facility Power Plant Controller Test in accordance with the requirements set out in Exhibit 14B;

(j) the Guaranteed Capacity for the Facility has been achieved, or, if not so achieved, the Facility Capacity is greater than the Minimum Capacity Level and Contractor has paid the applicable Final Capacity Liquidated Damages;

(k) Contractor and Owner have agreed upon the list of Punch List Items;

(l) Owner has received all Contractor Submittals as required to be delivered by the Substantial Completion Date in accordance with Exhibit 7;

(m) all special tools and Spare Parts described on Exhibit 27 and required to be purchased and delivered to the Site by Contractor pursuant to Section 3.10 have been delivered to Owner at the Site free and clear of any liens;

(n) all construction and post-construction submittals required by the Contractor Acquired Permits for the Facility have been submitted to the appropriate Governmental Authorities; and

(o) Contractor has delivered the notice and certificate of Substantial Completion to Owner pursuant to Section 16.3.

**16.3 Notice and Certificate of Substantial Completion.** When Contractor considers that Substantial Completion has been achieved in accordance with Section 16.2, Contractor shall deliver to Owner a Certificate of Substantial Completion signed by Contractor, together with supporting documentation evidencing the satisfaction of the provisions in Section 16.2 and the corresponding Application for Payment. Contractor shall provide Owner with a Punch List Estimate at such time. Upon receipt of a Certificate of Substantial Completion from Contractor together with supporting documentation, Owner shall confirm whether Substantial Completion has been achieved and as soon as practicable, but in no event later than twenty (20) Days from the date of receipt of Contractor's notice, Owner shall either issue Contractor: (a) a countersignature to the Certificate of Substantial Completion, signed by Owner's Representative and stating that the Substantial Completion Date is the date on which Contractor delivered the

Certificate of Substantial Completion to Owner under this Section 16.3; or (b) a written notice stating why Owner does not consider that Substantial Completion has been achieved. The “Substantial Completion Date” shall be the date on which Contractor delivered the Certificate of Substantial Completion that is accepted by Owner; provided, however, in the event Owner rejects a Certificate of Substantial Completion and any dispute arising from such rejection is resolved in favor of Contractor, such date shall be the date of Contractor’s delivery of the Certificate of Substantial Completion or such later date as may be determined in connection with the resolution of such dispute under Article 28. If Contractor receives a notice under clause (b) above, Contractor shall take the necessary steps to achieve Substantial Completion and the procedures set forth under this Section 16.3 shall be repeated until such time as the Certificate of Substantial Completion has been accepted by Owner. Any disputes regarding the existence or correction of any alleged deficiencies shall be resolved under Article 28.

#### **16.4 Punch List.**

(a) Creation of Punch List. Prior to Substantial Completion, Owner and Contractor shall agree upon the relevant Punch List Items to be completed by Contractor. Contractor and Owner shall jointly walk-down the Facility and confer together as to the items which should be included on the punch list for the Facility. Prior to Substantial Completion, Contractor shall prepare a proposed punch list for the Facility to reflect the result of such joint walk down and deliver the same to Owner for its review and approval, which submitted list shall be explicitly designated as the “Proposed Punch List” and shall set forth all Work remaining to be completed after the Substantial Completion Date. The Proposed Punch List may only contain Punch List Items, and shall include a Punch List Estimate for the completion or repair of each such Punch List Item and Contractor’s estimated schedule for completion therefor. The Proposed Punch List that is ultimately approved by Owner for the Facility shall be referred to as the “Punch List”. Contractor shall note on such Punch List the items under dispute. Any disputes regarding the existence or resolution of Punch List Items shall be resolved under Article 28.

(b) Completion of Punch List Items. Contractor shall proceed promptly to complete and correct the Punch List Items no later than thirty (30) Days after the Substantial Completion Date. On a weekly basis after the Substantial Completion Date, Contractor shall update the Punch List to include the date(s) that items listed on such Punch List are completed by Contractor and accepted by Owner. Notwithstanding the foregoing, the items listed on such Punch List shall not be considered complete until Owner shall have inspected such Punch List Items and acknowledged, by notation on the updated Punch List, that such item of Work is complete.

(c) Access Following Substantial Completion. After Owner takes possession and control of the Facility upon Substantial Completion, Owner shall provide Contractor with reasonable access to the Facility in order to complete the Work, including the Punch List Items and, if applicable, to attempt to achieve the Performance Guarantees pursuant to Section 15.5; provided, however, following Substantial Completion, Owner shall not be obligated hereunder to take an outage and/or de-rate, or otherwise interfere with its operation of the Facility as a direct or indirect result of allowing Contractor access pursuant to this Section 16.4(c). Any such access

by Contractor shall be subject to Owner's processes and requirements relating to Site access, including safety, lock and tag out and confined space. Contractor shall complete the Work and shall perform its obligations using its reasonable efforts to minimize interference to the operations of the Facility and only as scheduled by mutual agreement of the Parties. Contractor shall, except to the extent otherwise agreed by the Parties, use all reasonable efforts to promptly complete all Punch List Items after the Substantial Completion Date. The Parties expect that Contractor will accomplish any necessary modifications, repairs and Punch List Items with minimal interference with the commercial operation of the Facility. Notwithstanding the provisions of Article 29, Contractor shall reimburse Owner for all costs, expenses or damages, including lost revenues incurred by or on behalf of Owner or any other Persons which result from Contractor's performance under Section 16.4(b) or Section 16.4(c).

## ARTICLE 17

### STAGES OF COMPLETION; DELAY AND CAPACITY LIQUIDATED DAMAGES

**17.1 Guaranteed Substantial Completion Delay Liquidated Damages.** If Contractor has not achieved Substantial Completion by the Guaranteed Substantial Completion Date for reasons not excused under the terms of this Agreement, then Contractor shall pay to Owner delay liquidated damages in an amount equal to, for each Day (or partial Day) after the Guaranteed Substantial Completion Date that the Facility has not achieved Substantial Completion, the Facility Delay Liquidated Damages.

**17.2 Final Capacity Liquidated Damages.** Contractor agrees that if based on the Final Test Results of the Facility Capacity calculation performed in accordance with Exhibit 14C, the Facility shall have failed to achieve the Guaranteed Capacity, Contractor shall pay to Owner upon Substantial Completion an amount equal to the Contract Price multiplied by a fraction, the numerator of which is the Capacity Shortfall and the denominator of which is the Guaranteed Capacity (the "Final Capacity Liquidated Damages").

**17.3 Payment.** Payment of Liquidated Damages shall be made payable within thirty (30) Days after Contractor's receipt of Owner's invoice. Liquidated Damages shall bear interest at the interest rate set forth in Section 8.6. Amounts payable by Contractor to Owner pursuant to this Article 17 may be set off by Owner against the payment due for Final Completion under the final Application for Payment. Any amounts that Contractor is obligated to pay to Owner under this Article 17 are subject to the limitations set forth in Article 29.

**17.4 Liquidated Damages Reasonable.** The Parties agree that the extent and amount of loss or damage to Owner as a result of Contractor's failure (a) to achieve the Construction Start Date by the Guaranteed Construction Start Date, (b) to achieve Substantial Completion by the Guaranteed Substantial Completion Date and (c) to achieve the Guaranteed Capacity for the Facility is impractical and difficult to determine with certainty. The Parties agree that Liquidated Damages are a genuine pre-estimate of the damages suffered by Owner by reason of Contractor's failure to achieve, or failure to cause the Facility to satisfy, obtain or achieve, the Guaranteed Construction Start Date, Guaranteed Substantial Completion Date or the Guaranteed Capacity for

the Facility and are not intended as a penalty. The amounts payable by Contractor to Owner under this Article 17 shall be Contractor's sole and exclusive liability to Owner, and Owner's sole and exclusive remedy, with respect to Contractor's failure (i) to achieve the Construction Start Date by the Guaranteed Construction Start Date, (ii) to achieve to achieve Substantial Completion by the Guaranteed Substantial Completion Date or (iii) to achieve the Guaranteed Capacity for the Facility. If Contractor fails to pay any Liquidated Damages owing under this Article 17, Owner may deduct the amount thereof from any payment due, or that may become due, to Contractor under this Agreement or, if no payment is due, Owner may invoice Contractor for such amount. Nothing in this Article 17 shall be construed as relieving Contractor of its obligation to achieve Substantial Completion or the Guaranteed Capacity for the Facility.

**17.5 Energy and Revenues of the Facility.** Any energy, environmental attributes or revenues generated by the Facility at any time, including during the performance of any testing, shall be solely for the benefit of Owner.

**17.6 EITC and Depreciation Loss.** Without limiting any other Liquidated Damages required to be paid under this Article 17, the following additional remedies shall apply:

(a) The Parties acknowledge that the Contract Price reflects, in part, the value to Owner of certain tax benefits (as specified below) and to obtain those tax benefits in accordance with the expected schedule for the construction and completion of the Facility.

(b) If Contractor fails to cause the Facility to achieve the Construction Start Date on or prior to the Guaranteed Construction Start Date or thereafter achieve Substantial Completion by the Guaranteed Substantial Completion Date for any reason other than, subject to Section 17.6(f), an Owner-Caused Delay or an Owner Event of Default, then Contractor shall pay Owner, as a Contract Price adjustment and not as a penalty, the following amounts (collectively, the "EITC Liquidated Damages")<sup>14</sup>:

(i) an amount equal to the difference, if any, between the Maximum EITCs for the Facility and the Expected EITCs for the Facility, and

(ii) an amount equal to the equivalent of interest (using the Wall Street Journal "prime rate" as of the dates specified below as an annual rate, compounded annually) on the following amounts, determined as follows: the sum of (A) interest on the amount paid pursuant to Section 17.6(b)(i) for the period from the applicable estimated tax installment payment dates on which Owner would have taken all or any part of the corresponding Maximum EITCs into account when paying its estimated taxes (assuming Owner will pay its estimated taxes based on the annualized income installment method of Section 6655(e)(2) of the Code (using the annualization periods set forth in Sections 6655(e)(2)(A) and (B) of the Code)) until such payment pursuant to Section 17.6(b)(i) is received by Owner, and using as the interest rate the Wall Street Journal "prime rate" as

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<sup>14</sup> Note to Bidders: missing the Guaranteed Construction Start Date could reduce percentage of ITC available (i.e. ITC stepdown – 30%/26%/22%) and missing Guaranteed Substantial Completion Date could lead to a 10% or 0% ITC depending on tax reform.

of the first Business Day preceding the date of such first estimated tax installment payment, plus (B) the time value of the deferred tax depreciation available to Owner with respect to the Facility based on the difference between the Depreciation Benefit that would have been available had Contractor achieved Substantial Completion on the Guaranteed Substantial Completion Date (assuming that the Facility is deemed Placed in Service upon achieving Substantial Completion) and the available depreciation deductions (determined based on the same principles and tax rates specified in the definition of Depreciation Benefit (utilizing in the last sentence thereof “Expected EITCs” rather than “Maximum EITCs”)) given the applicable actual Substantial Completion Date, assuming Owner pays estimated taxes when specified in Section 17.6(b)(ii)(A) and such time value is calculated based on the hypothetical estimated tax payments that would be made on each estimated tax installment payment date given the actual Substantial Completion Date, compared to the hypothetical payments that would have been made had Contractor achieved Substantial Completion as specified above in this Section 17.6(b)(ii)(B) and using as the interest rate the Wall Street Journal “prime rate” as of the first Business Day preceding the date of such first estimated tax installment payment that is affected by such depreciation or EITC, plus (C) the EITC Timing Determinate. For the avoidance of doubt, there is to be no “double counting” of the interest factors calculated under Sections 17.6(b)(ii)(A) and 17.6(b)(ii)(B) with respect to EITCs, and in the event the interest factor determined under Section 17.6(b)(ii)(A) includes with respect to the reduced EITCs reimbursed under Section 17.6(b)(i) a portion of the time value captured under Section 17.6(b)(ii)(B) with respect to the deferral of EITCs, then the amount due under Section 17.6(b)(ii)(B) shall be reduced by the amount of such overlap.

(c) Any EITC Liquidated Damages required by Section 17.6(b) shall be paid within thirty (30) Days of Owner providing Contractor a written request therefor setting forth the calculations thereof in reasonable detail.

(d) Within ten (10) Days of receipt of such request, Contractor may request that a nationally recognized independent accounting firm selected by Owner and reasonably acceptable to Contractor verify the calculation of the EITC Liquidated Damages. The fees and expenses of such accounting firm shall be borne by Contractor. Absent manifest error, the determination of such accounting firm shall be final and binding upon the Parties.

(e) The calculation of the EITC Liquidated Damages due pursuant to Section 17.6(b) is intended to be hypothetical. Therefore, the amount shall not be altered based on (i) Owner’s actual federal income tax posture or liability, (ii) any audit or adjustment by the Internal Revenue Service or the results of any cost segregation analysis that allocates tax basis in a manner different than that set forth in Exhibit 23, (iii) any transfer, merger, sale, reorganization, lease, financing or other transaction entered into by Owner or any Affiliate thereof, (iv) any tax election made by Owner or any Affiliate thereof, (v) any penalties or interest payable to any tax authority, and (vi) all state tax items shall be disregarded.

(f) Notwithstanding the foregoing, Contractor agrees that it shall not be entitled to claim an Owner-Caused Delay or Owner Event of Default as a defense to liability for



Contractor's failure to achieve Substantial Completion by the Guaranteed Substantial Completion Date, unless: (i) delays caused by such events exceed seventy-five (75) Days in the aggregate commencing on the Effective Date and (ii) Contractor demonstrates that such Owner-Caused Delay or Owner Event of Default had an actual and demonstrable adverse impact to the Contractor Critical Path Items set forth on the Construction Schedule and that Contractor has used reasonable efforts to minimize and mitigate the impacts of any such events.

(g) Contractor's liability for the EITC Liquidated Damages shall survive any termination of this Agreement due to a Contractor Default, in which case such liability shall be determined by reference to the date that Substantial Completion is ultimately achieved by Owner or any replacement EPC contractor, and any EITC Liquidated Damages owing from Contractor shall be included in the Termination Payment calculated pursuant to Section 20.5(b).

**17.7 Enforceability.** The Parties explicitly agree and intend that the provisions of this Article 17 shall be fully enforceable by any court exercising jurisdiction over any dispute between the Parties arising under this Agreement. Each Party hereby irrevocably waives any defenses available under law or equity relating to the enforceability of the liquidated damages provisions set forth in this Article 17 on the grounds that such liquidated damages provisions should not be enforced as constituting a penalty or forfeiture.

## ARTICLE 18

### FINAL COMPLETION

**18.1 Generally.** Contractor shall achieve Final Completion of the Facility within sixty (60) Days after the Substantial Completion Date (the "Guaranteed Final Completion Date"). Subject to Section 18.2 and Section 18.3, Final Completion of the Facility means that all of the following conditions have been met:

(a) Contractor shall have received the Substantial Completion Certificate, substantially in the form of Exhibit 18 signed by Owner;

(b) the performance of the Work for the Facility is fully-complete, including all Punch List Items or, pursuant to Section 8.1(c), Owner has withheld any remaining Punch List Holdback to complete any items on the Punch List not completed by Contractor in accordance with the terms hereof;

(c) Contractor has delivered all Contractor Submittals, including the final record as-built drawings;

(d) Contractor has paid all bills from its Subcontractors related to the Facility that are not in dispute;

(e) no Contractor Liens shall be outstanding against the Facility and Owner shall have received all required final lien waivers under Section 8.4;

(f) Contractor has complied with its clean-up obligations pursuant to Section 3.15;

(g) Contractor has paid all Liquidated Damages, if any, to the extent required in accordance with this Agreement; and

(h) Contractor shall have delivered the Certificate of Final Completion to Owner pursuant to Section 18.2.

**18.2 Certificate of Final Completion.** When Contractor considers that the Facility has achieved Final Completion in accordance with Section 18.1, it shall deliver to Owner notice thereof by delivering to Owner a Certificate of Final Completion signed by Contractor, together with supporting documentation evidencing the satisfaction of the provisions in Section 18.1. Upon receipt of the Certificate of Final Completion from Contractor together with supporting documentation, Owner shall promptly, but in no event later than twenty (20) Business Days from the date of receipt of Contractor's notice, either issue Contractor: (a) a countersignature to the Certificate of Final Completion, signed by Owner's Representative and stating that the Final Completion Date for the Facility is the date on which Contractor gave its notice to Owner under this Section 18.2; or (b) a written notice stating why Owner does not consider that Final Completion of the Facility has been achieved.

**18.3 Failure to Achieve Final Completion.** If Contractor receives a notice under Section 18.2(b) above, Contractor shall take the necessary steps to achieve Final Completion of the Facility at Contractor's cost. Upon completion of such corrective action, Contractor shall provide a new Certificate of Final Completion and supporting documentation to Owner for approval and the procedures set forth under Section 18.2 and this Section 18.3 shall be repeated until such time as the Certificate of Final Completion has been accepted by Owner. Any disputes regarding the existence or correction of any alleged deficiencies shall be resolved under Article 28.

## ARTICLE 19

### SUSPENSION OF THE WORK

**19.1 Owner-Directed Suspension.** Owner may, upon five (5) Business Days' prior written notice to Contractor, direct Contractor to suspend its performance of all or any portion of the Work; provided that no prior written notice shall be required if such suspension is due to an Emergency or is otherwise required by Applicable Law. Upon the commencement of the suspension, Contractor shall stop the performance of the suspended Work except as may be necessary to carry out the suspension and protect and preserve the Work completed prior to the suspension. Contractor shall thereafter resume any suspended Work upon receipt of a written direction from Owner to resume the Work. Except as otherwise provided in Section 19.2, any period of Owner-directed suspension that extends beyond thirty (30) Days shall constitute an Owner-Caused Delay.

**19.2 Costs and Schedule Relief for Contractor-Caused Suspension.** Notwithstanding anything to the contrary, Contractor shall bear its own costs and delays incurred due to a suspension by Owner pursuant to Section 19.1 where such suspension is necessitated due to a breach of this Agreement by Contractor, any act or omission by any Contractor Party or Subcontractor, an Emergency or as otherwise required by Applicable Law, and Contractor shall not be entitled to a change to the Construction Schedule or an extension of time to the Guaranteed Dates in any of such cases.

## **ARTICLE 20**

### **DEFAULTS AND REMEDIES**

**20.1 Contractor Events of Default.** Contractor shall be in default of its obligations pursuant to this Agreement upon the occurrence of any one or more events of default set forth below (each, a “Contractor Event of Default”):

(a) Contractor fails to pay any amount due and owing to Owner under this Agreement that is not disputed in good faith, and such failure remains outstanding for a period of twenty (20) Business Days or more after receipt of notice from Owner stating that if Contractor does not pay such amount Owner may terminate in accordance with Section 20.2;

(b) an Insolvency Event occurs with respect to Contractor or, while the Contractor Performance Security is required to be in place, Contractor’s Guarantor;

(c) Contractor fails to maintain any insurance coverages required of it in accordance with Article 23 and Contractor fails to remedy such breach within thirty (30) Days after the date on which Contractor first receives a notice from Owner with respect thereto;

(d) Contractor assigns or transfers this Agreement or any right or interest herein except in accordance with Article 26;

(e) prior to the Final Completion Date, Contractor or any Affiliate of Contractor defaults under any other Project Transaction Document, or any such document is invalid, no longer in effect or unenforceable for any reason;

(f) except as a result of an Owner Event of Default, a Force Majeure Event, an Owner-Caused Delay or such other event for which Contractor is entitled to schedule relief under Section 10.3, Contractor fails to achieve Substantial Completion within sixty (60) Days of the Guaranteed Substantial Completion Date;

(g) except as a result of an Owner Event of Default, a Force Majeure Event, an Owner-Caused Delay or such other event for which Contractor is entitled to schedule relief under Section 10.3, Contractor fails to achieve Final Completion within sixty (60) Days of the Guaranteed Final Completion Date;

(h) the total amount of Liquidated Damages or other damages owed by Contractor to Owner under this Agreement (including damages for any Losses incurred by Owner or Owner Parties pursuant to Article 24) exceed the applicable maximum liability thresholds set forth in Section 29.2;

(i) except as a result of an Owner Event of Default, a Force Majeure Event, an Owner-Caused Delay or such other event for which Contractor is entitled to schedule relief under Section 10.3, Contractor Abandons the Work and Contractor fails to remedy such breach within ten (10) Business Days after receipt of notice from Owner;

(j) Contractor violates in any material respect any of the provisions of this Agreement not otherwise addressed in this Section 20.1 (except for Sections 17.1 and 17.2, the exclusive remedy for which is provided in Article 17), which violation remains uncured for thirty (30) Days following Contractor's receipt of written notice thereof from Owner; provided, that if such violation is capable of cure but cannot reasonably be cured within such thirty (30) Day period, then Contractor's right to cure shall extend beyond for an additional period (not to exceed thirty (30) Days) so long as Contractor is diligently attempting to cure such violation;

(k) a representation or warranty made by Contractor in or pursuant to this Agreement was false or misleading in any material respect as of the date on which it was made and has not been cured within ten (10) Days after Contractor receives a notice from Owner with respect thereto; provided that such ten (10) Day limit shall be extended if: (i) such failure is reasonably capable of cure and curing such failure reasonably requires more than ten (10) Days; and (ii) Contractor commences such cure within such ten (10) Day period and diligently prosecutes and completes such cure within sixty (60) Days thereafter, in each case, after the date on which Contractor receives a notice from Owner with respect thereto;

(l) Contractor's Guarantor defaults in the performance of its obligations under the Contractor Performance Security or the Contractor Performance Security ceases to be in full force and effect as required by Section 8.8 and, in either case, Contractor has failed to deliver a comparable replacement therefor within five (5) Business Days after such failure;

(m) the Transmission Provider terminates the Interconnection Agreement due to an event of default or termination right thereunder resulting from (i) the negligence or willful misconduct of any Contractor Party or any Subcontractor in connection with this Agreement or (ii) the failure of any Contractor Party or any Subcontractor to comply with any of its obligations or a breach under this Agreement; or

(n) Contractor fails to comply with the requirements of Section 3.29.

**20.2 Owner Rights and Remedies.** If a Contractor Event of Default occurs, subject to Article 29 and without permitting double recovery, Owner shall have the following rights and remedies and may elect to pursue any or all of them, in addition to any other rights and remedies that may be available to Owner hereunder, and Contractor shall have the following obligations:

(a) Owner may terminate this Agreement by giving notice of such termination to Contractor and, upon such termination:

(i) Contractor shall withdraw from the Site, shall assign (to the extent such subcontract may be assigned) to Owner such of Contractor's subcontracts or purchase orders (including any module supply agreement) as Owner may request (in which case Contractor shall execute all assignments or other reasonable documents and take all other reasonable steps requested by Owner which may be required to vest in Owner all rights, set-offs, benefits and titles necessary to effect such assumption by Owner), and shall license, in the manner provided herein, to Owner all Intellectual Property Rights (to the extent not previously licensed in accordance with the terms hereof) of Contractor related to the Work reasonably necessary to permit Owner to complete or cause the completion of the Work, and in connection therewith Contractor authorizes Owner and its respective agents to use such information in completing the Work, shall remove such materials, equipment, tools, and instruments used by and any debris or waste materials generated by Contractor in the performance of the Work as Owner may reasonably direct, and Owner may take possession of any or all Contract Documents necessary for completion of the Work (whether or not such Contract Documents are complete); and

(ii) Contractor shall be liable to Owner for damages as provided in Section 20.5 or as otherwise provided herein;

(b) Owner may direct Contractor to turn over to Owner all Facility Equipment and other materials paid for by Owner;

(c) Owner may proceed against the Contractor Performance Security in accordance with its terms;

(d) Subject to the dispute resolution procedures set forth in Article 28, Owner may seek equitable relief solely to cause Contractor to take action, or to refrain from taking action, pursuant to this Agreement;

(e) Owner may pursue the dispute resolution procedures set forth in Article 28 to enforce the provisions of this Agreement;

(f) Subject to the dispute resolution procedures set forth in Article 28 and without permitting double recovery, Owner may seek actual damages subject to the limitations of liability set out in this Agreement;

(g) Owner may pursue remedies under Section 8.9;

(h) Owner may pursue remedies in accordance with Section 20.6; and

(i) Without limiting Contractor's right to assert any defenses with respect to such payment, Owner may make such payments, acting reasonably, that Contractor is failing to

pay in connection with the relevant Contractor Event of Default and either offset the cost of such payment against payments otherwise due to Contractor under this Agreement or Contractor shall be otherwise liable to pay and reimburse such amounts to Owner.

**20.3 Owner Events of Default.** Owner shall be in default of its obligations pursuant to this Agreement upon the occurrence of any one or more events of default set forth below (each, an “Owner Event of Default”):

(a) Owner fails to pay any amount of the Contract Price owing under this Agreement that is not disputed in good faith, and such failure remains outstanding for a period of twenty (20) Business Days after Owner has received a notice of such payment default from Contractor stating that if Owner does not pay such amount Contractor may terminate this Agreement in accordance with Section 20.4; or

(b) An Insolvency Event occurs with respect to Owner.

**20.4 Contractor Rights and Remedies.** If an Owner Event of Default occurs, subject to Article 29 and Section 20.5 and without permitting double recovery, Contractor shall have the following rights and remedies and may elect to pursue any or all of them, in addition to any other rights and remedies that may be available to Contractor hereunder:

(a) Contractor may suspend the Work by giving notice of such suspension to Owner concurrently with or at any time after Contractor gives Owner notice described in Section 20.3(a); and

(b) Contractor may terminate this Agreement upon providing notice of such termination to Owner and shall be entitled to the remedy set forth in Section 20.5(a).

**20.5 Termination Payment.**

(a) Upon any termination of this Agreement by Contractor for an Owner Event of Default, Owner shall pay the applicable Termination Payment due to Contractor on the date that is thirty (30) Days after Owner’s receipt from Contractor of an Application for Payment for such Termination Payment. Such Termination Payment shall be Contractor’s sole and exclusive remedy with respect to an Owner Event of Default that results in termination of this Agreement.

(b) In addition to the remedies provided in Section 20.2, upon termination of this Agreement for a Contractor Event of Default, subject to Article 29, Owner shall be entitled to recover from Contractor promptly upon notice to Contractor, as damages for loss of bargain and not as a penalty, (and in addition to all other amounts Owner is entitled to recover under this Agreement, including any liquidated damages or indemnification obligations owing from Contractor) an amount equal to the reasonable and direct costs of completing the Work (taking into account the requirements of the Construction Schedule and including compensation for obtaining a replacement contractor required as a consequence of such Contractor Event of Default) minus those costs that would have been payable to Contractor but for such Contractor

Event of Default (and after considering all other amounts Owner is entitled to recover under this Agreement, including any liquidated damages or indemnification obligations owing from Contractor). Upon determination of the total cost of such remaining Work, Owner shall notify Contractor in writing of the amount, if any, of the resulting Termination Payment that Contractor shall pay Owner.

**20.6 Termination Right Not Exclusive.** Except as otherwise set forth in Section 20.5(a), a Party's right to terminate this Agreement pursuant to this Article 20 is in addition to, and without derogation from, any other rights and remedies such Party may have against the other Party under this Agreement or any Applicable Law, and each Party expressly reserves all such rights and remedies it may have against the other Party, whether in contract, tort or otherwise.

**20.7 Owner Termination for Convenience.** Owner may in its sole discretion terminate the Work and this Agreement for convenience and without cause at any time by giving notice of termination to Contractor to be effective upon the receipt of such notice by Contractor. In the event of such termination, as Contractor's sole and exclusive remedy, Owner shall, on the date that is thirty (30) Days after Owner's receipt of an Application for Payment therefor, pay the applicable Termination Payment due to Contractor.

**20.8 Contractor Conduct.** Upon issuance of a notice of termination pursuant to this Article 20, Contractor shall: (a) cease operations as directed by Owner in the notice; (b) take action necessary, or that Owner may reasonably direct, for the protection and preservation of the Work; and (c) except for Work directed to be performed prior to the effective date of termination stated in such notice, or except as expressly requested by Owner or under Section 20.2(a)(i), terminate all existing subcontracts and purchase orders that are terminable without premium, penalty or termination charges and enter into no further subcontracts and purchase orders with respect to the Work or the Facility.

## ARTICLE 21

### WARRANTIES

**21.1 Sole Warranty.** Except as set forth in Section 2.1, Section 3.31, Section 4.7, Section 13.3(a) and Section 14.3(a), the Warranties provided in this Article 21 shall be Contractor's sole warranties with respect to the Work and the Facility.

**21.2 No Liens or Encumbrances.** To the extent Owner's payments to Contractor are made in accordance with this Agreement, Contractor warrants that title to all Work, materials and Facility Equipment provided by Contractor and its Subcontractors hereunder shall pass to Owner free and clear of all Contractor Liens. Contractor shall diligently pursue the removal and discharge of any lien filings relating to Contractor Liens.

### **21.3 Defect Warranty.** Contractor warrants to Owner:

(a) Defect Warranty. That the Facility, all Facility Equipment furnished by Contractor and any of the Subcontractors and other Work, including installation, shall, upon the Substantial Completion Date: (i) be free from defects in materials, construction, fabrication and workmanship; (ii) be new and unused (except for use as part of the Facility); (iii) be of good quality and in good condition and (iv) conform to the applicable requirements of the Scope of Work in effect as of the Substantial Completion Date (collectively, the “Defect Warranty”).

(b) Design Warranty. That the design services included as part of the Work shall conform to the terms and conditions of the Contract Documents, including the Technical Specifications, Prudent Utility Practices, Applicable Codes, Applicable Laws and Applicable Permits, in each case in effect as of the Substantial Completion Date (the “Design Warranty”).

### **21.4 Warranty Period.**

(a) Defect Warranty Period. With respect to the Facility, any Facility Equipment furnished by Contractor and any of the Subcontractors and all other Work including installation services, the Defect Warranty shall commence on the Substantial Completion Date and end on the second (2nd) year anniversary of the Substantial Completion Date (such period, the “Defect Warranty Period”) and Contractor shall have no liability under the Defect Warranty for any Defect Warranty claims submitted by Owner from and after the expiration of the Defect Warranty Period; provided that a claim may be made by Owner within thirty (30) Days after the end of a Defect Warranty Period for a matter which arose within such Defect Warranty Period; provided, further, however, that the Defect Warranty Period for any item or part required to be re-performed, repaired, corrected or replaced following discovery of a defect during the applicable Defect Warranty Period shall continue until the end of the later of (i) the expiration of such Defect Warranty Period and (ii) one (1) year from the date of completion of such repair, re-performance, correction or replacement.

(b) Design Warranty Period. With respect to the Facility, any Facility Equipment furnished by Contractor and any of the Subcontractors and all other Work including installation services, the Design Warranty shall commence on the Substantial Completion Date and end on the second (2nd) year anniversary of the Substantial Completion Date (such period, the “Design Warranty Period”) and Contractor shall have no liability under the Design Warranty for any Design Warranty claims submitted by Owner from and after the expiration of the Design Warranty Period; provided that a claim may be made by Owner within thirty (30) Days after the end of a Design Warranty Period for a matter which arose within such Design Warranty Period; provided, further, however, that the Design Warranty Period for any item or part required to be re-performed, repaired, corrected or replaced following discovery of a defect during the applicable Design Warranty Period shall continue until the end of the later of (i) the expiration of such Design Warranty Period and (ii) one (1) year from the date of completion of such repair, re-performance, correction or replacement.



(c) Serial Defect. If any Serial Defect arises during the Warranty Period, Contractor shall follow the procedures set forth in Section 15.7 with respect to such Serial Defect.

**21.5 Exclusions.** The Defect Warranty and the Design Warranty shall not apply to damage to or failure of any Work or Facility Equipment to the extent such damage or failure is caused by the following, provided that in no event shall the breach or fault of a Contractor Party or Subcontractor be the basis of an exclusion from the Defect Warranty or Design Warranty:

(a) a failure by Owner or its representatives, agents or contractors (other than any Contractor Party or Subcontractor) to maintain such Work or Facility Equipment in accordance with Prudent Utility Practice or in accordance with the recommendations set forth in the Required Manuals; or

(b) operation of such Work or Facility Equipment by Owner or its representatives, agents or contractors (other than any Contractor Party or Subcontractor) in excess of or outside of the operating parameters or specifications for such Work or Facility Equipment as set forth in the Required Manuals.

#### **21.6 Correction of Defects.**

(a) Notice of Warranty Claim. If, during the applicable Warranty Period or within thirty (30) Days thereafter, Owner provides notice to Contractor within a reasonable period after discovery that the applicable portion of the Facility has manifested a defect during the Defect Warranty Period or that the Work fails to satisfy the Design Warranty during the Design Warranty Period, then Contractor as promptly as practicable, but in no event later than five (5) Days following receipt of such notice, shall inspect such claimed warranty defect or nonconformance, and at Contractor's own cost and expense as promptly as practicable refinish, repair or replace, at its option, such non-conforming or defective part of the Facility or Work and resulting property damage to the Facility caused by such defective Work. Contractor shall pay the cost of removing any defective component, the costs of shipping and installation of replacement parts in respect of a defect, and the cost of re-performing, repairing, replacing or testing such item as shall be necessary to cause conformance with the Defect Warranty or Design Warranty. The timing of the work to be completed with respect to any such replacement or repair shall be subject to Owner's approval. Such replacement or repair shall be considered complete when the applicable defect has been corrected by the affected equipment or parts being restored to Technical Specifications and the other requirements of this Agreement and the Contract Documents, and compliance with Applicable Laws, Prudent Utility Practices and Applicable Permits. Notwithstanding the foregoing, if the Facility shall fail to satisfy the applicable Warranty during the applicable Warranty Period, and such failure endangers human health or property or materially and adversely affects the operation of the Facility, Contractor shall correct the failure as soon as is practicable or, if Contractor does not so correct such failure, Owner shall be permitted to correct such failure at Contractor's sole cost pursuant to Section 21.6(b). For the purposes of this Section 21.6(a), manifestation of a defect shall include failure to function and physical damage.

(b) Failure of Contractor to Perform Warranty Work. If after Substantial Completion, Contractor does not use its reasonable efforts to proceed to complete the applicable Warranty work, or cause any relevant Subcontractor to proceed to complete the Warranty work, required to satisfy any Warranty claim properly asserted under the terms of this Article 21 in accordance with the terms hereof, Owner shall, after giving Contractor notice of Owner's intent to perform the remedial Warranty work itself at least three (3) Business Days prior to Owner's commencement of any such remedial Warranty work, have the right to perform the necessary Warranty work to remedy the Warranty claim, or have third parties perform the necessary Warranty work and Contractor shall bear the costs thereof. If Contractor (or the relevant Subcontractor) implements a plan to diligently perform the Warranty work to satisfy such Warranty claim during such three (3) Business Day period, and thereafter diligently prosecutes the execution of such plan, Owner shall not perform, or cause any third party to perform, such Warranty work. If a defect or other nonconformance to the applicable Warranty arises during the applicable Warranty Period and such defect or nonconformance occurs under circumstances where there is an immediate need for repairs due to the endangerment of human health or property, Owner may perform such Warranty work for Contractor's account. If Owner performs or causes third parties to perform such Warranty work as set forth above, Owner shall provide reasonable access to Contractor to the Facility to observe Owner's and its Affiliates' or any third party's performance of the Warranty work. The performance of Warranty work, either performed by Owner or performed by third parties engaged by Owner which was performed in accordance with the applicable provisions of this Agreement related to such Warranty work that Contractor, had it performed the Warranty work itself, would have observed to comply with this Agreement, shall be deemed covered by the Warranties, and Contractor shall reimburse Owner for all reasonable costs, charges and expenses incurred by Owner in connection therewith, which shall include a ten percent (10%) mark-up. For clarity, Contractor may not rely upon the failure of any Subcontractor to honor its warranty obligations to excuse or limit Contractor's Warranties. At Owner's election, it may apply any Retainage being held under Section 8.1(c) toward any costs for which Contractor is responsible hereunder.

(c) Enforcement by Owner.

(i) Major Facility Equipment Warranties. Contractor shall obtain or has obtained warranties for the Equipment supplied by the Major Subcontractors (the "Major Facility Equipment Warranties") including those set forth in U0. Upon Owner's request, Contractor shall deliver to Owner copies of any other Major Facility Equipment Warranty.

(ii) Assignment. All Major Facility Equipment Warranties shall be assignable to Owner. If this Agreement has been terminated in accordance with Article 20 or otherwise, at the end of each Defect Warranty Period, Contractor shall assign to Owner (unless previously assigned), or otherwise hold in trust on behalf of Owner until such assignment shall occur, at the request and direction of Owner, all unexpired Major Facility Equipment Warranties, subject to the terms and conditions of any such warranties; provided that, notwithstanding such assignment, Contractor shall be entitled to enforce each such warranty to the exclusion of Owner through the earlier of

the termination of this Agreement in accordance with Article 20 and the end of the applicable Defect Warranty Period. Notwithstanding the foregoing, Contractor shall not be obligated to assign any claims of Contractor with respect to any Major Subcontractor then or thereafter existing so long as Contractor is performing its obligations under this Article 21. At Owner's request, Contractor shall deliver to Owner, at the end of each Defect Warranty Period (unless previously provided), copies of all subcontracts containing such Major Facility Equipment Warranties.

**21.7 Limitations On Warranties.** EXCEPT FOR THE EXPRESS WARRANTIES AND REPRESENTATIONS SET FORTH IN SECTION 2.1, SECTION 3.29, SECTION 3.31, SECTION 4.7, SECTION 13.3(a), SECTION 14.3(a) AND THIS ARTICLE 21, CONTRACTOR DOES NOT MAKE ANY EXPRESS WARRANTIES OR REPRESENTATIONS, OR ANY IMPLIED WARRANTIES OR REPRESENTATIONS, OF ANY KIND, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR PURPOSE. THE REMEDIES PROVIDED FOR IN THIS ARTICLE 21 WITH RESPECT TO ANY WORK WHICH FAILS TO SATISFY THE DEFECT WARRANTY DURING THE APPLICABLE DEFECT WARRANTY PERIOD OR THE DESIGN WARRANTY DURING THE APPLICABLE DESIGN WARRANTY PERIOD (AS THE CASE MAY BE) SHALL BE THE SOLE AND EXCLUSIVE REMEDIES OF OWNER AS A RESULT OF SUCH FAILURE. NOTWITHSTANDING ANY OTHER PROVISION OF THIS AGREEMENT TO THE CONTRARY, THIS SECTION 21.7 DOES NOT OPERATE TO LIMIT ANY WARRANTIES OR GUARANTEES SET FORTH IN ANY OTHER PROJECT TRANSACTION DOCUMENT.

## ARTICLE 22

### PUBLICITY

**22.1 Press Releases.** Subject to Section 25.1, as applicable, the Parties shall jointly agree upon the necessity and content of any press release in connection with the matters contemplated by this Agreement. Contractor shall coordinate with Owner with respect to, and provide Owner advance copies of the text of, any proposed announcement or publication that may include any non-public information concerning the Work prior to the dissemination thereof to the public or to any Person other than Subcontractors or advisors of Contractor, in each case, who agree to keep such information confidential. Contractor shall not disseminate any such announcement or publication without Owner's consent, which may be withheld in Owner's sole and absolute discretion.

## ARTICLE 23

### INSURANCE

**23.1 Contractor's Insurance.** Contractor shall, at its expense, procure or cause to be procured, and maintain or cause to be maintained, the policies of insurance and corresponding coverages specified in Part I of Exhibit 13 ("Contractor's Insurance"). Unless otherwise

specified in Exhibit 13, Contractor's Insurance shall commence no later than the Effective Date and shall remain in full force and effect at all times from commencement of the Work until Substantial Completion, unless required for a longer or shorter period in accordance with Exhibit 13.

**23.2 Owner's Insurance.** Owner shall, at its expense, procure or cause to be procured, and maintain or cause to be maintained, the policies of insurance and corresponding coverages specified in Part II of Exhibit 13 ("Owner's Insurance"). Owner's Insurance shall commence on the Effective Date and shall remain in full force and effect at all times until Substantial Completion, unless required for a longer or shorter period in accordance with Exhibit 13. Subject to the prior agreement of the Parties and the affected insurers, Owner's Insurance may be included, at Owner's cost and responsibility, under one or more policies of Contractor's Insurance.

**23.3 Ratings.** All policies of insurances required or otherwise contemplated under this Agreement shall be provided by insurance companies having an A.M. Best Insurance Reports rating of A- X or better, and shall otherwise be in accordance with the requirements of this Article 23 and Exhibit 13.

**23.4 Policy Requirements.** Contractor's Commercial General Liability and Worker's Compensation insurance policies shall: (a) provide for a waiver of subrogation rights against Owner and all Owner Parties and any Financing Parties, and of any right of the insurers to any set-off or counterclaim or any other deduction, whether by attachment or otherwise, in respect of that policy; and (b) list Owner and the Owner Parties as "additional named insureds" with respect to liability arising out of or in connection with the Work by or on behalf of Contractor, excluding any contributory liability of Owner or any Owner Parties.

**23.5 No Limitation and Release.** Unless otherwise expressly provided in this Agreement, the insurance policy limits set forth in Exhibit 13 shall not be construed to limit the liability of the insured Party under this Agreement. Notwithstanding the foregoing sentence, each Party releases and waives any and all rights of recovery against the other Party and all of its Affiliates, subsidiaries, employees, successors, permitted assigns, insurers and underwriters that the other Party may otherwise have or acquire in, or from, or in any way connected with, any loss covered by policies of insurance maintained or required to be maintained by that Party pursuant to this Agreement or because of deductible clauses in or inadequacy of limits of any such policies of insurance.

**23.6 Reduction or Ceasing to be Maintained.** If at any time the insurance to be provided by Owner or Contractor hereunder shall be reduced or cease to be maintained, then (without limiting any other rights of the other Party set forth in this Agreement that arises as a result of such failure) the other Party may at its option take out and maintain the insurance required hereby and, in such event, (a) Owner may withhold the cost of insurance premiums expended for such replacement insurance from any payments to Contractor, or (b) Owner shall promptly reimburse Contractor for the premium of any such replacement insurance, as applicable.

**23.7 Expiration.** With respect to any insurance carried by Contractor which may expire before the date specified in Section 23.1, Contractor shall, at least one (1) month prior to the relevant policy renewal date, submit to Owner certificates of insurance, insurer binders or other satisfactory evidence that coverage required by this Article 23 has been renewed.

## **ARTICLE 24**

### **INDEMNITY**

**24.1 Contractor Indemnity.** Contractor shall indemnify, hold harmless and defend Owner and all Owner Parties from and against the following:

(a) all Losses arising from third-party claims for property damage, personal injury or bodily injury or death to the extent caused by any negligent, willful, reckless or otherwise tortious act or omission (including strict liability) of Contractor, any Subcontractor, or anyone directly or indirectly employed by any of them, or anyone for whose acts such Person may be liable during the performance of the Work or from performing or from a failure to perform any of its obligations under this Agreement, or any curative action under any Warranty following performance of the Work;

(b) all Losses associated with a take of a protected species if any are found on the Site during the performance of the Work;

(c) Losses sustained by Owner as a result of Contractor's breach of Section 3.29;

(d) all Losses incurred by Owner as a result of a claim under the Project Labor Agreement against Owner arising from the construction of the Facility and performance of the Work;

(e) all Losses that directly arise out of or result from all claims for payment of compensation for Work performed hereunder, whether or not reduced to a lien or mechanic's lien, filed by Contractor or any Subcontractors, or other persons performing any portion of the Work, including reasonable attorneys' fees and expenses incurred by any Owner Party in discharging any Contractor Lien, except to the extent of a breach by Owner in relation to any obligation it has to make a payment under this Agreement;

(f) all Losses that directly arise out of or result from employers' liability or workers' compensation claims filed by any employees or agents of Contractor or any of the Subcontractors, regardless of negligence of Owner or any Owner Party contributing to such Losses;

(g) all Losses arising from third-party claims, including by Subcontractors, for property damage, personal injury or bodily injury or death that directly or indirectly arise out of or result from the failure of Contractor or any of the Subcontractors to comply with the terms and conditions of Applicable Laws during their performance of the Work;

(h) all fines or penalties issued by any Governmental Authority that directly arise out of or result from the failure of the Facility (or any portion thereof), as designed, constructed and completed by Contractor or any Subcontractor, to be capable of operating in compliance with all Applicable Laws or the conditions or provisions of all Applicable Permits;

(i) any and all fines, penalties or assessments issued by any Governmental Authority that Owner may incur as a result of executing any applications to any such Governmental Authority at Contractor's request;

(j) all Losses arising from claims by any Governmental Authority that directly or indirectly arise out of or result from the failure of Contractor to pay, as and when due, all Taxes [(other than Owner Taxes)], fees or charges of any kind imposed by any Governmental Authority for which Contractor is obligated to pay pursuant to the terms of this Agreement;

(k) all Losses arising from claims by any Governmental Authority claiming Taxes [(other than Owner Taxes)] based on gross receipts or on income of Contractor, any of the Subcontractors, or any of their respective agents or employees with respect to any payment for the Work made to or earned by Contractor, any of the Subcontractors, or any of their respective agents or employees under this Agreement;

(l) all fines or penalties issued by, and other similar amounts payable to, any Governmental Authority that arise out of or result from the failure of Contractor, a Subcontractor or any of their respective agents or employees to comply with any Applicable Permit;

(m) all Losses arising from claims by any counterparties to the agreements setting forth the Real Property Rights arising out of or in connection with Contractor's performance of the Work;

(n) all Losses, including claims for property damage, personal injury or bodily injury or death, whether or not involving damage to the Facility or the Site, that arise out of or result from:

(i) the use of Hazardous Materials by Contractor or any of its Subcontractors in connection with the performance of the Work, which use includes the storage, transportation, processing or disposal of such Hazardous Materials by Contractor or any of its Subcontractors, whether lawful or unlawful;

(ii) any Release in connection with the performance of the Work by Contractor or any of its Subcontractors; or

(iii) any enforcement or compliance proceeding commenced by or in the name of any Governmental Authority because of an alleged, threatened or actual violation of any Applicable Law by Contractor or any of its Subcontractors with respect to Hazardous Materials in connection with the performance of the Work.

**24.2 Owner Indemnity.** Owner shall indemnify, hold harmless and defend Contractor and all Contractor Parties from and against the following:

(a) all Losses arising from third-party claims for property damage, personal injury or bodily injury or death to the extent caused by any grossly negligent or willful act or omission during the performance by Owner or any Affiliate, or anyone directly or indirectly employed by any of them, or anyone for whose acts such Person may be liable, of their obligations or from a failure to perform any of their obligations under this Agreement;

(b) [all Losses arising from claims by any Governmental Authority that directly or indirectly arise out of or result from the failure of Owner to pay, as and when due, all Owner Taxes for which Owner is obligated to pay pursuant to the terms of this Agreement;]

(c) all Losses that directly arise out of or result from employers' liability or workers' compensation claims filed by any employees or agents of Owner, regardless of negligence of any Contractor Party or Subcontractor contributing to such Losses; and

(d) all fines or penalties issued by, and other similar amounts payable to, any Governmental Authority that arise out of or result from the failure of Owner, or any of its contractors, agents or employees, to comply with any Owner Acquired Permit.

**24.3 Patent Infringement and Other Indemnification Rights.**

(a) Contractor shall defend, indemnify, and hold harmless the Owner Parties against all Losses arising from any Intellectual Property Claim. If Owner provides notice to Contractor of the receipt of any such claim, Contractor shall, at its own expense, settle or defend any such Intellectual Property Claim and pay all damages and costs, including reasonable attorneys' fees, awarded against Owner. In addition to the indemnity set forth above, if Owner is enjoined from completing the Facility or any part thereof, or from the use, operation, or enjoyment of the Facility or any part thereof, as a result of a final, non-appealable judgment of a court of competent jurisdiction or as a result of injunctive relief provided by a court of competent jurisdiction, Contractor shall use its best efforts to have such injunction removed at no cost to Owner; and Contractor shall, at its own expense and without impairing the performance requirements set forth in this Agreement: (i) procure for Owner, or reimburse Owner for procuring, the right to continue using the infringing service, Facility Equipment or other Work; (ii) if the obligation set forth in subclause (i) is not commercially feasible, modify the infringing service, Facility Equipment or other Work with service, Facility Equipment or other Work, as applicable, with substantially the same performance, quality and expected life, so that the same becomes non-infringing; or (iii) if the obligations set forth in subclauses (i) and (ii) are not commercially feasible, replace the infringing service, Facility Equipment or other Work with non-infringing service, Facility Equipment or other Work, as applicable, of comparable functionality and quality; provided that in no case shall Contractor take any action which adversely affects Owner's continued use and enjoyment of the applicable service, Facility Equipment, or other Work without the prior written consent of Owner.

(b) Notwithstanding anything set forth in Section 24.3(a) to the contrary, Contractor shall have no indemnity obligations under Section 24.3(a) for any Intellectual Property Claim to the extent arising from or in connection with (i) any modification of the Work by Owner or any third party (other than any Contractor Party or Subcontractor) of the Work, the Facility, any Module, the Equipment or other goods, materials, supplies, items or services provided by Contractor (or any of its Affiliates or Subcontractors) that was not, in either case, authorized by any Contractor Party or Subcontractor or (ii) Owner's material variation from Contractor's recommended written procedures for using the Work (unless otherwise authorized by any Contracting Party or Subcontractor).

(c) Owner's acceptance of the supplied materials and equipment or other component of the Work shall not be construed to relieve Contractor of any obligation hereunder.

**24.4 Environmental Indemnification.** The scope of Contractor's and Owner's indemnification obligations with respect to environmental matters are addressed in Section 24.1(n), Section 12.6 and Section 12.7.

**24.5 Right to Defend.** An Indemnitee shall provide notice to the Indemnifying Party within thirty (30) Days after receiving notice of the commencement of any legal action or of any claims or threatened claims against such Indemnitee in respect of which indemnification may be sought pursuant to the foregoing provisions of this Article 24 or any other provision of this Agreement providing for an indemnity (such notice, a "Claim Notice"), and the Indemnifying Party shall thereafter promptly elect whether to assume such defense. The Indemnitee's failure to give, or tardiness in giving, such Claim Notice will reduce the liability of the Indemnifying Party only by the amount of damages attributable and prejudicial to such failure or tardiness, but shall not otherwise relieve the Indemnifying Party from any liability that it may have under this Agreement. If the Indemnifying Party assumes the defense, (i) it shall retain counsel reasonably acceptable to the Indemnitee and (ii) the Indemnitee shall have the right to employ separate counsel in any such proceeding and to participate in (but not control) the defense of such claim, and the fees and expenses of such special counsel shall be borne by the Indemnitee unless the Indemnifying Party agrees otherwise or except as set forth in the following sentence. If the Indemnifying Party does not assume the defense of the Indemnitee, does not diligently prosecute such defense, or if a conflict (including any actual or potential differing of interest between the Parties) precludes counsel for Indemnifying Party from providing the defense, then the Indemnitee shall have the absolute right to control the defense of such claim and the fees and expenses of such defense, including reasonable attorneys' fees of the Indemnitee's counsel, reasonable costs of investigation, court costs and other costs of suit, arbitration, dispute resolution or other proceeding, and any reasonable amount determined to be owed by Indemnitee pursuant to such claim, shall be borne by the Indemnifying Party, provided that the Indemnifying Party shall be entitled, at its expense, to participate in (but not control) such defense, and provided further that the Indemnifying Party shall reimburse the Indemnitee on a monthly basis for such costs and expenses. Subject to all of the foregoing provisions of this Section 24.5 as between the Parties, the Indemnifying Party shall control the settlement of all claims, in coordination with any insurer as required under the applicable insurance policies in Article 23 as to which it has assumed the defense; provided that to the extent the Indemnifying Party, in



relation to such insurer, controls settlement: (a) such settlement shall include a dismissal of the claim and an explicit release from the party bringing such claim or other proceedings of all Indemnitees; and (b) the Indemnifying Party shall not conclude any settlement without the prior approval of the Indemnatee, which approval shall not be unreasonably withheld or delayed; provided further that, except as provided in the preceding sentence concerning the Indemnifying Party's failure to assume or to diligently prosecute the defense of any claim, no Indemnatee seeking reimbursement pursuant to the foregoing indemnity shall, without the prior written consent of the Indemnifying Party, settle, compromise, consent to the entry of any judgment in or otherwise seek to terminate any action, claim, suit, investigation or proceeding for which indemnity is afforded hereunder unless such Indemnatee reasonably believes that the matter in question involves potential criminal liability against such Indemnatee. Other than as provided in this Section 24.5, the Indemnifying Party shall not settle any claim without the prior written approval of the Indemnatee, which approval shall not be unreasonably withheld, delayed or conditioned. The Indemnatee shall provide reasonable assistance to the Indemnifying Party when the Indemnifying Party so requests, at the Indemnifying Party's expense, in connection with such legal action or claim, including executing any powers-of-attorney or other documents required by the Indemnifying Party with regard to the defense or indemnity obligations.

**24.6 Comparative Fault.** Except as expressly provided to the contrary herein, it is the intent of the Parties that where fault is determined to have been joint or contributory, principles of comparative fault will be followed and each Party shall bear the proportionate cost of any Losses attributable to such Party's fault.

**24.7 Survival of Indemnity Obligations.** The indemnities set forth in this Article 24 shall survive the Final Completion Date or the earlier termination of this Agreement for a period expiring five (5) years following the Final Completion Date or said termination, whichever first occurs; provided that (i) with respect to indemnities arising out of or related to the Warranties, the indemnities shall survive for a period of five (5) years after the last Day of the applicable Warranty Period; (ii) indemnities arising out of or related to environmental matters (including as set forth in Article 12) shall survive for a period equal to the applicable statute of limitations; (iii) the indemnities arising out of Section 24.3 shall survive for a period expiring ten (10) years following the Final Completion Date or the earlier termination of this Agreement; and (iv) indemnities arising out of or related to Tax shall survive for a period equal to the later of (A) five (5) years following the Final Completion Date and (B) the applicable statute of limitations plus one hundred twenty (120) Days (such period, as applicable, the "Survival Period"). All Claim Notices must be delivered, if at all, to the applicable Party prior to the expiration of such applicable Survival Period. If any Claim Notice is made within such Survival Period, then the indemnifying period with respect to all claims identified in such Claim Notice (and the indemnity obligation of the Parties hereunder with respect to such claim) shall extend through the final, non-appealable resolution of such claims. For purposes of clarification hereunder, without limiting the other rights granted hereunder to either Party, a Party may enforce the indemnity provisions hereunder pursuant to the provisions of this Article 24 without having to declare an Owner Event of Default or a Contractor Event of Default, as applicable.

## ARTICLE 25

### CONFIDENTIALITY

**25.1 Dissemination of Confidential Information.** Neither Party (the “Receiving Party”) shall (1) use for any purpose other than (i) performing its obligations under this Agreement or (ii) within the scope of the license and rights granted pursuant to Section 14.1 or (2) divulge, disclose, produce, publish, or permit access to, without the prior written consent of the other Party (the “Disclosing Party”), any Confidential Information of the Disclosing Party. “Confidential Information” means proprietary information concerning the business operations or assets of Owner or Contractor (as the case may be), and may include this Agreement and exhibits hereto, all information or materials prepared in connection with the Work performed under this Agreement, designs, drawings, specifications, techniques, models, data, documentation, source code, object code, diagrams, flow charts, research, development, processes, procedures, know-how, manufacturing, development or marketing techniques and materials, development or marketing timetables, strategies and development plans, customer, supplier or personnel names and other information related to customers, suppliers or personnel, pricing policies and financial information, and other information of a similar nature, whether or not reduced to writing or other tangible form, and any other trade secrets. Confidential Information does not include (a) information known to the Receiving Party prior to obtaining the same from the Disclosing Party; (b) information in the public domain at the time of disclosure by the Receiving Party; (c) information obtained by the Receiving Party from a third party; (d) information approved for public release by express prior written consent of an authorized officer of the Disclosing Party or (e) information independently developed by the Receiving Party without use of the information provided by the Disclosing Party or in breach of this Article 25. Notwithstanding anything herein to the contrary, the Receiving Party has the right to disclose Confidential Information without the prior written consent of the Disclosing Party: (i) as required by any court or other Governmental Authority, or by any stock exchange on which the shares of any Party are listed, but only to the extent, that, based upon reasonable advice of counsel, Receiving Party is required to do so by the disclosure requirements of any Applicable Laws and prior to making or permitting any such disclosure, Receiving Party shall, to the extent legally permitted, provide Disclosing Party with prompt notice of any such requirement so that Disclosing Party (with Receiving Party’s assistance if requested) may seek a protective order or other appropriate remedy, (ii) as otherwise required by Applicable Law, (iii) in connection with any government or regulatory filings, including without limitation, filings with any state energy regulatory commission, (iv) to any power purchaser, transmission provider, or an Owner contractor or prospective contractor (or advisors retained on their behalf) or their successors and permitted assigns, any Financing Parties, Independent Engineer, Owner’s Engineer and its attorneys, accountants, financial advisors or other agents, in each case bound by confidentiality obligations, (v) to banks, investors and other financing sources and their advisors, in each case bound by confidentiality obligations or (vi) in connection with an actual or prospective merger or acquisition or similar transaction where the party receiving the Confidential Information is bound by the same or similar confidentiality obligations. The Parties acknowledge that the Utah Public Service Commission (“UPSC”) and the Utah [ ] have the power to examine Owner’s books, records, minutes, papers and property and may, from time to time, request or

require Owner to disclose or report to the UPSC and/or BCP (or any representatives thereof), as the case may be, any Confidential Information so requested or required without any requirement of notice to or consultation with Contractor.

**25.2 SCADA System Information.** Notwithstanding any other provision of this Article 25, Contractor shall have the right to remotely access the SCADA System installed by Contractor in the Facility in order to collect all plant data for its own uses to the end of the Warranty Period; provided, however, that such access by Contractor shall be subject to any limitations Owner may impose that pertain to ensuring electric system reliability or infrastructure security. For the avoidance of doubt, this Agreement does not give Contractor any right to have operational control of the Facility. Information shall not be distributed outside Contractor's organization without the express written consent of Owner.

### **25.3 Return of Confidential Information.**

(a) Except for Confidential Information necessary for Contractor to perform the Work and its obligations under this Agreement or as necessary for Owner in connection with the construction, operation or maintenance, use, modification, repair, disposal, removal or alteration of the Facility, and subject to and in accordance with Section 14.1, at any time upon the request of Disclosing Party, Receiving Party shall promptly deliver to Disclosing Party or destroy (as determined by Receiving Party) all documents (and all copies thereof, however stored) furnished to or prepared by Receiving Party that contain Confidential Information and all other documents in Receiving Party's possession that contain any such Confidential Information; provided that the Receiving Party may retain one copy of such Confidential Information solely for the purpose of complying with its audit and document retention policies and may retain such Confidential Information if required by Applicable Law; and provided, further, that all such retained Confidential Information shall be held subject to the terms and conditions of this Agreement.

(b) Notwithstanding the return or destruction of all or any part of the Confidential Information, the confidentiality provisions set forth in this Agreement shall nevertheless remain in full force and effect with respect to Confidential Information until the date that is two (2) years after the earlier of (i) the Final Completion Date or (ii) the termination of this Agreement.

## **ARTICLE 26**

### **ASSIGNMENT**

**26.1 Prohibition on Assignment.** Except as set forth in Section 26.2, no Party shall be entitled to assign this Agreement or any of its rights or obligations under this Agreement without the prior written consent of the other Party, which consent shall not be unreasonably withheld.

**26.2 Exceptions.** Notwithstanding the foregoing, (a) Owner, without the consent of the Contractor, shall be entitled to assign its right, title and interest in and to this Agreement to: (i) [PacifiCorp d/b/a Rocky Mountain Power], (ii) any successor to Owner provided such successor is a public utility holding a certificate of public convenience and necessity granted by the UPSC pursuant to [Utah Code], where such assignment does not occur by operation of Law, (iii) a Person (other than a natural person) providing retail electric service in Utah, (iv) a Person (other than a natural person) whose Credit Rating, as published by either Relevant Rating Agency, is equal or superior to the Minimum Credit Rating as of the time of assignment or (v) a Person (other than a natural person) as otherwise required by Law, (b) Owner shall be entitled to assign its right, title and interest in and to this Agreement to any Financing Parties by way of security for the performance of obligations to such Financing Parties without the consent of Contractor who, subject to any consent entered into by Contractor with the Financing Parties, may further assign such rights, title and interest under this Agreement upon exercise of remedies by a Financing Party following a default by Owner under the financing agreements entered into between Owner and the Financing Parties and (c) each Party shall be entitled to assign its right, obligation, title and interest in and to this Agreement to any of its Affiliates or in connection with a merger or acquisition of substantially all of the assets of such Party, subject, with respect to any such assignment by Contractor, to the Contractor Performance Security and the continued validity thereof. Contractor shall execute any consent and agreement or similar documents with respect to such an assignment described in subclause (b) as the Financing Parties may reasonably request and acknowledges that such consent and agreement or similar document may, among other things, require Contractor to give the Financing Parties notice of, and an opportunity to cure, any breach of this Agreement by Owner. Contractor shall reasonably cooperate with Owner in the negotiation and execution of any reasonable amendment or addition to this Agreement required by the Financing Parties. Contractor shall, at Owner's cost and subject to the confidentiality provisions set forth in Article 25, make available to any Financing Parties and other Persons involved in the financing or refinancing of the Facility who have a need-to-know (e.g., counsel to a lender or any such other Person, Governmental Authority, underwriters, rating agencies, independent reviewers and feasibility consultants) such information in the control of Contractor (including financial information concerning Contractor) as may reasonably be requested by Owner on behalf of the Financing Parties or the Financing Parties' engineer with respect to financing of the Facility. Contractor further agrees that, in connection with the financing or refinancing of the Facility, Contractor shall, at the request of Owner, provide an opinion of counsel as to the enforceability against Contractor of this Agreement until expiration of the last Warranty Period. Any authorized assignment of this Agreement by either Party shall relieve such Party of its obligations hereunder at such time as the authorized successor agrees in writing to be bound by such assigning Party's obligations hereunder.

**26.3 Indemnitees; Successors and Assigns.** Upon any assignment by either Party hereunder, with respect to indemnification obligations, the definition of "Owner Party" or "Contractor Party", as applicable, shall be deemed modified to include the assignor and permitted assignee under such assignment and each of their respective employees, agents, partners, Affiliates, shareholders, officers, directors, members, managers, successors and permitted assigns.

**26.4 Assignment to Owner Affiliate; Assignment With Consent.** This Agreement or any right or obligation contained herein may be assigned by Owner, without the prior consent of Contractor, to (i) PacifiCorp d/b/a Rocky Mountain Power, its Affiliates, or their Financing Parties as a collateral assignment, on the understanding that, on enforcement of such collateral assignment by PacifiCorp d/b/a Rocky Mountain Power, its Affiliates or such Financing Parties, PacifiCorp d/b/a Rocky Mountain Power, its Affiliates or such Financing Parties (or their respective designee) may assume, or cause any purchaser at any foreclosure sale or any assignee or transferee under any instrument of assignment or transfer in lieu of foreclosure to assume, all of the interests, rights and obligations of Owner hereunder, (ii) any of its Affiliates, including the Project Company, or (iii) to PacifiCorp d/b/a Rocky Mountain Power, its Affiliates or to any other actual or prospective purchaser or owner of the Project assets (and such purchaser or owner may assign its rights in this Agreement back to Owner or any of its Affiliates without the consent of Contractor); provided that such Affiliate, purchaser or owner of the Project assets assumes all of Owner's obligations hereunder in such assignment (except for payment obligations that remain with the assigning Owner); and provided, further, that, in the case of an assignment of this Agreement by Owner to PacifiCorp d/b/a Rocky Mountain Power or its Affiliates, unless otherwise Notified by Owner to Contractor, Owner shall remain responsible for all payments of the Contract Price (and only such payments) not yet paid arising after such assignment through and including the Final Payment. Owner shall have the right to assign this Agreement to any other financially qualified party without Contractor's prior written consent. Except as otherwise provided in this Section 26.4 or in Section 26.5, this Agreement may be otherwise assigned by the Parties only upon the prior written consent of the other Party. When duly assigned in accordance with the foregoing, this Agreement shall be binding upon and shall inure to the benefit of the permitted assignee; any other assignment shall be void and without force or effect.

**26.5 Assignment to Financing Parties.** Notwithstanding Section 26.4, Contractor agrees to (i) the assignment by Owner, without the consent of Contractor, of its rights and obligations under this Agreement to the Financing Parties in connection with the financing of the Project or to any designee of the Financing Parties, and (ii) the Financing Parties' performance of Owner's obligations under this Agreement after such assignment.

## ARTICLE 27

### NOTICES

**27.1 Notices.** Any notice, request, demand or other communication required or permitted under this Agreement shall be deemed to be properly given by the sender and received by the addressee if made in writing and sent: (a) by personal delivery; (b) in portable document format (PDF) attached to an email transmission, but only to the extent such transmission is promptly followed by overnight or certified mail, postage prepaid, return receipt requested; (c) by overnight or certified mail, postage prepaid, return receipt requested; or (d) by next day air courier service. Notices given pursuant to this Section 27.1 shall be addressed as follows to:

Owner: PacifiCorp d/b/a Rocky Mountain Power  
1407 West N Temple, Suite 310

Salt Lake City, UT 84116

Attention: [ ]

Email: [ ]

Contractor: [ ]

[ ]

[ ]

[ ]

Attention: [ ]

Email: [ ]

A Party, the Financing Parties or the Independent Engineer, by giving notice as provided in this Section 27.1, may, as to itself, change any of the details for the service of notice hereunder or designate a reasonable number of additional “with a copy to” recipients.

**27.2 Effective Time.** Any notice or notification given personally, through overnight mail or through certified letter shall be deemed to have been received on delivery, any notice given by express courier service shall be deemed to have been received the next Business Day after the same shall have been delivered to the relevant courier, and any notice given by PDF transmission shall be deemed to have been received on the date of delivery (but only to the extent such transmission was promptly followed by mail as provided in Section 27.1) if delivered prior to 5:00 pm Mountain Time; provided, that if such date of delivery is not a Business Day or is delivered after 5:00 pm Pacific Time, then the date of delivery shall be the immediately following Business Day.

## ARTICLE 28

### DISPUTE RESOLUTION; GOVERNING LAW

**28.1 Good faith negotiations.** In the event that any question, dispute, difference or claim arises out of or is in connection with this Agreement, including any question regarding its existence, validity, performance or termination (a “Dispute”), which either Party has notified to the other Party in a written notice stating that it is a “Notice of Dispute”, senior management personnel from both Contractor and Owner shall attempt to resolve the Dispute for a minimum period of thirty (30) Days following issuance of the Notice of Dispute, and such attempt shall include at least one in-person meeting between senior management personnel from both Contractor and Owner, each of whom has the authority to finally settle the Dispute on behalf of that Party. If the Dispute is not resolved by negotiation, the provisions of Section 28.2 and Section 28.3 below shall apply.

#### 28.2 Technical Disputes; Optional Arbitration.

(a) Technical Disputes. If a Notice of Dispute relates to a Dispute that is technical in nature (a "Technical Dispute"), such Dispute shall be submitted to an Independent Expert for expedited dispute resolution pursuant to the following provisions of this Section 28.2(a). The Parties shall negotiate in good faith to select an Independent Expert. If the Parties cannot agree within five (5) Business Days then the Party initiating the dispute (the "Dispute Initiator") shall send notice to the other Party proposing two potential independent engineers set forth in the definition of "Independent Expert". The other Party shall then have two (2) Business Days after receipt of such notice to select an Independent Expert from such two (2) potential independent engineers identified in such notice. If the other Party does not make a selection within such two (2)-Business Day period, the Dispute Initiator shall select an Independent Expert from such two (2) potential independent engineers identified in such notice. The Parties shall formalize their positions regarding the dispute in writing within four (4) Days of the submission of the Technical Dispute and submit such positions to the Independent Expert. The Parties and the Independent Expert shall meet at the Site within five (5) Business Days of the Independent Expert's receipt of the materials referenced in the immediately preceding sentence and the Independent Expert shall issue a binding ruling that both Parties will obey within five (5) Business Days thereof. The Party that will pay for the Independent Expert and all costs related thereto shall be the losing Party, as determined by the Independent Expert.

(b) Any Dispute other than a Technical Dispute that is not settled to the mutual satisfaction of the Parties within the applicable notice or cure periods provided in this Agreement or pursuant to Section 28.1, may proceed to court pursuant to Section 28.3 unless the Parties mutually agree in writing to resolve such Dispute by arbitration as provided herein.

(c) If the Parties elect to pursue arbitration, upon the expiration of the thirty (30) Day negotiation period set forth in Section 28.1, either Party may submit such Dispute to arbitration by providing a written demand for arbitration to the other Party, and such arbitration shall be conducted in accordance with the Rules of the AAA for the Resolution of Construction Industry Disputes (the "Arbitration Rules") in effect on the date that the submitting Party gives notice of its demand for arbitration under this Section 28.2. The arbitration shall be conducted at a location as agreed by the Parties, or if the Parties cannot so agree, the arbitration shall be conducted in Salt Lake County, Utah. Unless otherwise agreed by the Parties, discovery shall be conducted in accordance with the Federal Rules of Civil Procedure and the Parties shall be entitled to submit expert testimony or written documentation in the arbitration proceeding. The decision of the arbitrator(s) shall be final and binding upon Owner and Contractor and shall be set forth in a reasoned opinion, and any award may be enforced by Owner or Contractor, as applicable, in any court of competent jurisdiction. Any award of the arbitrator(s) shall include interest from the date of any damages incurred for breach of this Agreement, and from the date of the award until paid in full, at a rate equal to the lesser of (i) the rate published by the *Wall Street Journal* as the "prime rate" on the Business Day preceding the date on which such interest begins to accrue plus two percent (2%) and (ii) the maximum rate allowed under Applicable Law. Each of Owner and Contractor shall bear its own cost of preparing and presenting its case; however, the prevailing party in such arbitration shall be awarded its reasonable attorney's fees, expert fees, expenses and costs incurred in connection with the Dispute. The fees and expenses of the arbitrator(s), and other similar expenses, shall initially be shared equally by Owner and

Contractor, subject to reimbursement of such arbitration costs and attorney's fees and costs to the prevailing party. The arbitrator(s) shall be instructed to establish procedures such that a decision can be rendered within ninety (90) Days after the appointment of the arbitrator(s). The arbitration may include, by consolidation or joinder or in any other manner, any additional persons or entities if (1) such persons or entities are materially involved in a common issue of law or fact in dispute and (2) such persons or entities are either contractually bound to arbitrate or otherwise consent to arbitration.

(d) Appointment of Arbitrator(s). All arbitrators appointed to hear a Dispute pursuant to paragraph (i) or paragraph (ii) below shall have significant construction contract resolution experience and experience and understanding of the contemporary solar photovoltaic power industry and photovoltaic systems.

(i) Where the amount in dispute is less than One Million Dollars (\$1,000,000) the Dispute shall be heard by a single neutral arbitrator agreed by the Parties. If the Parties cannot agree on a single neutral arbitrator within fifteen (15) Business Days after the written demand for arbitration is provided, then the arbitrator shall be selected pursuant to the Arbitration Rules.

(ii) Where the amount in dispute is for One Million Dollars (\$1,000,000) or more, the Dispute shall be heard by a panel of three (3) arbitrators. Each Party shall select one neutral arbitrator to sit on the panel. The arbitrators selected by the Parties shall in turn nominate a third neutral arbitrator from a list of arbitrators mutually satisfactory to the Parties.

(e) Arbitrator Confidentiality Obligation. The Parties shall ensure that any arbitrator appointed to act under this Article 28 will agree to be bound to comply with the provisions of Article 25 with respect to the terms of this Agreement and any information obtained during the course of the arbitration proceedings.

**28.3 Governing Law/Litigation/Choice of Forum/Waiver of Jury Trial.** THIS AGREEMENT SHALL BE GOVERNED BY THE INTERNAL LAWS OF THE STATE OF UTAH, EXCLUDING ANY OF ITS CONFLICT OF LAW PROVISIONS THAT WOULD REQUIRE THE APPLICATION OF THE LAWS OF ANOTHER JURISDICTION. SUBJECT TO THE OTHER PROVISIONS OF THIS ARTICLE 28 AND THE ARBITRATION OPTION DESCRIBED IN SECTION 28.2, FOR PURPOSES OF RESOLVING ANY DISPUTE ARISING UNDER THIS AGREEMENT, THE PARTIES HEREBY SUBMIT TO THE EXCLUSIVE JURISDICTION OF THE FEDERAL COURTS (AND IN THE ABSENCE OF JURISDICTION THEREIN THE UTAH STATE COURTS IN SALT LAKE COUNTY) LOCATED IN THE STATE OF UTAH. THIS CONSENT TO JURISDICTION IS BEING GIVEN SOLELY FOR PURPOSES OF THIS AGREEMENT, AND IT IS NOT INTENDED TO, AND SHALL NOT, CONFER CONSENT TO JURISDICTION WITH RESPECT TO ANY OTHER DISPUTE IN WHICH A PARTY TO THIS AGREEMENT MAY BECOME INVOLVED. THE PARTIES ACKNOWLEDGE AND AGREE THAT TERMS AND CONDITIONS OF THIS AGREEMENT HAVE BEEN FREELY, FAIRLY AND



THOROUGHLY NEGOTIATED. EACH PARTY HEREBY WAIVES ANY OBJECTION THAT IT MAY HAVE TO THE VENUE OF SUCH ACTION, SUIT OR PROCEEDING IN SUCH COURT OR THAT SUCH SUIT, ACTION OR PROCEEDING IN SUCH COURT WAS BROUGHT IN AN INCONVENIENT COURT AND AGREES NOT TO PLEAD OR CLAIM THE SAME. EACH PARTY FURTHER AGREES THAT SUCH COURT SHALL HAVE *IN PERSONAM* JURISDICTION OVER EACH OF THEM WITH RESPECT TO ANY SUCH DISPUTE, CONTROVERSY, OR PROCEEDING. THE PARTIES SUBMIT TO THE JURISDICTION OF SAID COURT AND WAIVE ANY DEFENSE OF *FORUM NON CONVENIENS*. EACH PARTY, TO THE FULL EXTENT PERMITTED BY LAW, HEREBY KNOWINGLY, INTENTIONALLY AND VOLUNTARILY, WITH AND UPON THE ADVICE OF COMPETENT COUNSEL, WAIVES, RELINQUISHES AND FOREVER FORGOES THE RIGHT TO A TRIAL BY JURY IN ANY ACTION OR PROCEEDING BASED UPON, ARISING OUT OF, OR IN ANY WAY RELATING TO THE RIGHTS OR OBLIGATIONS SET FORTH IN THIS AGREEMENT OR ANY CONDUCT, ACT OR OMISSION OF CONTRACTOR OR OWNER OR ANY OF THEIR RESPECTIVE DIRECTORS, OFFICERS, AFFILIATES, EMPLOYEES, AGENTS, ATTORNEYS, OR OTHER REPRESENTATIVES, OR ANY OTHER PERSONS AFFILIATED WITH OWNER OR CONTRACTOR, IN EACH OF THE FOREGOING CASES, WHETHER SOUNDING IN CONTRACT, TORT OR OTHERWISE. EACH PARTY (I) CERTIFIES THAT NO REPRESENTATIVE OF THE OTHER PARTY HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT SUCH OTHER PARTY WOULD NOT, IN THE EVENT OF LITIGATION, SEEK TO ENFORCE THE FOREGOING WAIVER AND (II) ACKNOWLEDGES THAT IT AND THE OTHER PARTY HAS BEEN INDUCED TO ENTER INTO THIS AGREEMENT BY, AMONG OTHER THINGS, THE MUTUAL WAIVERS AND CERTIFICATIONS IN THIS SECTION 28.3. EACH PARTY FURTHER WAIVES ANY RIGHT TO CONSOLIDATE ANY ACTION IN WHICH A JURY TRIAL HAS BEEN WAIVED WITH ANY OTHER ACTION IN WHICH A JURY TRIAL CANNOT BE OR HAS NOT BEEN WAIVED.

**28.4 Work to Continue.** During the pendency of any dispute proceedings, as required under the terms of this Agreement, Owner shall continue to make undisputed payments and each Party shall continue to perform its obligations under this Agreement.

## ARTICLE 29

### LIMITATION OF LIABILITY

**29.1 Consequential Damages.** Neither Contractor nor Owner shall be liable to the other for, nor shall a court or arbitrator assess, any consequential losses or damages, whether arising in contract, warranty, tort (including negligence), strict liability or otherwise, including losses of use, profits, business opportunity, reputation or financing, subject to the following exclusions which constitute amounts which shall not be deemed to be limited or waived by the foregoing restriction: (a) the Liquidated Damages; (b) claims made by, damages incurred by, or amounts payable pursuant to an indemnity given hereunder; (c) damages arising out of a breach

of Article 25 by either Party; (d) claims arising out of fraud or willful misconduct; and (e) all Termination Payments.

**29.2 Overall Limitation of Liability.** Notwithstanding any other provision of this Agreement, the cumulative maximum liability of a Party to the other Party under this Agreement shall not exceed one hundred percent (100%) of the Contract Price, the maximum liability of Contractor for Facility Delay Liquidated Damages shall not exceed twenty percent (20%) of the Contract Price and the maximum liability of Contractor for Final Capacity Liquidated Damages shall not exceed twenty percent (20%). The foregoing limitation of liability shall not apply with respect to claims made by, damages incurred by, or amounts payable to third parties pursuant to an indemnity given hereunder or claims arising out of such Party's fraud or willful misconduct. To the extent any provision of this Agreement establishes a lower limit of liability of a Party with respect to a particular component or type of liability, such lower limit of liability shall control with respect to the relevant component or type of liability. Notwithstanding anything herein to the contrary, no liabilities of Contractor to Owner that are covered by insurance carried by Contractor pursuant to Article 23 (except deductibles paid by Contractor) shall count towards Contractor's cumulative maximum liability to Owner pursuant to this Agreement.

## **ARTICLE 30**

### **SURVIVAL**

**30.1 Survival.** The provisions within the Articles with the following titles shall survive termination of this Agreement: Contract Interpretation and Effectiveness, Taxes, Force Majeure Event; Owner-Caused Delay, Hazardous Materials, Intellectual Property, Suspension of the Work, Defaults and Remedies, Warranties, Publicity, Indemnity, Confidentiality, Assignment, Dispute Resolution; Governing Law, Limitation of Liability, Miscellaneous and any other provision which expressly or by implication survives termination.

## **ARTICLE 31**

### **MISCELLANEOUS**

**31.1 Terms in Subcontracts.** All Subcontracts shall conform to the requirements of this Agreement, insofar as applicable. All Work performed for the Contractor by a Subcontractor shall be pursuant to an appropriate written agreement between Contractor and the Subcontractor which shall contain provisions that:

(a) reasonably preserve and protect all the rights of Owner under this Agreement and to the Work to be performed under the Subcontract, so that the subcontracting thereof will not prejudice such rights;

(b) require that such Work be performed in accordance with the applicable requirements of this Agreement;

(c) require such Subcontractor to make available a representative with whom the Owner may discuss questions regarding the progress of the Work being performed by the Subcontractor;

(d) require such Subcontractor to provide and maintain adequate insurance consistent with the insurance required pursuant to this Agreement;

(e) require such Subcontractor to remove any employee or independent contractor of such Subcontractor used in the Work or in such Subcontractor's warranty obligations within two (2) Business Days after receiving notice from Owner to remove such employee or independent contractor if: (i) such employee or independent contractor, in Owner's reasonable judgment, creates a safety or security hazard or a material risk of either: (A) non-achievement of Substantial Completion or Final Completion; or (B) material non-performance by Contractor in accordance with this Agreement; and (ii) Contractor has not corrected such safety or security hazard or other non-performance identified in clause (i) to the reasonable satisfaction of Owner during such two (2) Business Day period;

(f) provide that, if following any termination of this Agreement, the Subcontract shall be assigned from the Contractor to the Owner, the Owner shall not be liable for obligations that accrue under the Subcontract before the date of such assignment; and

(g) such other provisions as required by other provisions of this Agreement (including the exhibits hereto).

**31.2 Third Party Beneficiaries.** The provisions of this Agreement are intended for the sole benefit of Owner and Contractor and there are no third-party beneficiaries hereof (except as expressly set forth herein).

**31.3 Further Assurances.** Owner and Contractor will each use its reasonable efforts to implement the provisions of this Agreement, and for such purpose each, at the reasonable request of the other, will, without further consideration, promptly execute and deliver or cause to be executed and delivered to the other such assistance (including in connection with any financing involving the Facility by either Party), or assignments, consents or other instruments in addition to those required by this Agreement, in form and substance satisfactory to the other, as the other may reasonably deem necessary or desirable to implement any provision of this Agreement.

**31.4 No Waiver.** A Party's waiver of any breach or failure to enforce any of the terms, covenants, conditions or other provisions of this Agreement at any time shall not in any way affect, limit, modify or waive that Party's right thereafter to enforce or compel strict compliance with every term, covenant, condition or other provision hereof, any course of dealing or custom of the trade notwithstanding. All waivers must be in writing and signed on behalf of Owner and Contractor in accordance with Section 31.5.

**31.5 Amendments in Writing.** Without limiting any provision of Article 10 with respect to mandatory Change Orders, no oral or written amendment or modification of this Agreement by any officer, agent, member, manager or employee of Contractor or Owner shall be of any force or effect unless such amendment or modification is in writing and is signed by a duly authorized representative of the Party to be bound thereby.

**31.6 Books and Record; Retention.** Contractor agrees to retain for ten (10) years (or any longer Warranty Period) all material records relating to its performance of the Work or Contractor's warranty obligations herein.

**31.7 Attorneys' Fees.** If any legal action or other proceeding is brought for the enforcement of this Agreement, the prevailing Party shall be entitled to be awarded its reasonable attorney's fees, expert fees, expenses and costs incurred in connection with such action or proceeding.

**31.8 Inspection, Review and Approval.** Notwithstanding Owner's inspection, review, monitoring, observation, acknowledgement, comment or Owner's approval of any items reviewed, inspected, monitored or observed in accordance with this Agreement, neither Owner nor any of its representatives or agents reviewing such items, including the Owner's Engineer, shall have any liability for, under or in connection with the items such Person reviews or approves, and Contractor shall remain responsible for the quality and performance of the Work in accordance with this Agreement. Owner's or its representative's inspection, review, monitoring, observation, acknowledgement, comment or approval of any items shall not constitute a waiver of any claim or right that Owner may then or thereafter have against Contractor. Unless otherwise expressly provided herein, Owner shall not unreasonably delay its review of any item submitted by Contractor for review or approval for review or approval; provided, however, the foregoing shall not be used to decrease any express time limitation for such review or approval set forth herein. Any review, inspection, monitoring or observation by Owner or its representatives in accordance with this Agreement shall not constitute any approval of the Work undertaken by such Person, cause Owner to have any responsibility for the actions, the Work or payment of such Person (other than in respect of Owner's obligations to pay Contractor in accordance with Article 8) or to be deemed to be in an employer-employee relationship with Contractor or any Subcontractor, or in any way relieve Contractor of its responsibilities and obligations under this Agreement or be deemed to be acceptance by Owner with respect to such Work.

**31.9 Independent Engineer.** Contractor acknowledges that an independent engineer or engineering firm (the "Independent Engineer") may be engaged by Owner for the purpose of providing to Owner or Financing Parties a neutral, third party overview of the Work. The Independent Engineer shall provide independent opinions and determinations, arrived at reasonably and in good faith, with respect to: (a) the status of the Work; (b) the performance of the Facility and equipment and the Facility Tests and the results and procedures related thereto; (c) invoices submitted by Contractor; (d) Contractor's quality control procedures for the Work and major components thereof; and (e) the approval of Change Orders. Owner undertakes that it will use reasonable efforts to ensure that the Independent Engineer gives its countersignature or

indicates that it is not willing to do so in relation to the relevant matter within the time specified in this Agreement for Owner to respond in relation to such matter; provided that any such unwillingness on the part of the Independent Engineer shall not affect or limit Owner's obligations hereunder. The Independent Engineer may, at its option, attend any meetings between Owner and Contractor related to the progress of the Facility and shall approve all Contractor's Applications for Payments prior to any payment being made by Owner thereunder; provided that any failure by the Independent Engineer to approve a Contractor's Application for Payment shall not affect or limit Owner's obligations hereunder. Notwithstanding anything else to the contrary contained herein, the Independent Engineer shall have no right to direct Contractor or any portion of the Work or to make any Change Order. Contractor shall maintain a complete, accurate and up-to-date log of all Change Orders and, upon request of the Independent Engineer, shall furnish copies of such log to the Independent Engineer. Contractor shall afford the Independent Engineer the same rights as Owner with respect to access to the Site.

**31.10 Financing Matters.** In connection with any collateral assignment by Owner of its rights, title and interest under this Agreement to any Financing Party in accordance with Section 26.2, Contractor shall execute and deliver any usual and customary consent in accordance with Section 26.2 and use commercially reasonable efforts to cause Major Subcontractors to execute subordination agreements. Contractor agrees to make available, or to use commercially reasonable efforts to cause its Subcontractors to make available, to the Financing Parties and the Independent Engineer, subject to an appropriate confidentiality agreement, independent reviewers, feasibility consultants, and other financial institutions or parties involved in the financing process, such information in the control of Contractor, its Affiliates and Subcontractors (including financial information concerning Contractor, its Affiliates and the Subcontractors) as may be reasonably requested by Owner. Contractor acknowledges that the Financing Parties and the Independent Engineer may monitor, inspect and review the Work as permitted by Article 6.

**31.11 Fees and Expenses.** Except as specifically set forth herein, each Party shall be responsible for any legal fees and expenses, financial advisory fees, accountant fees and any other fees and expenses incurred by such Party in connection with the negotiation, preparation and enforcement of this Agreement and the transactions contemplated hereby.

**31.12 Related Contracts.** Services and work performed at any time by Contractor or its Affiliates under any other Project Transaction Document shall not constitute Work hereunder. Owner shall use reasonable efforts to make claims against Contractor and its Affiliates under the appropriate Project Transaction Document. Notwithstanding the foregoing, Contractor shall not contend that it is not liable for any claim of Owner under or arising out of this Agreement on the grounds that the loss or damage suffered by Owner was caused by an act or omission, or the failure to comply with the terms of any other Project Transaction Document by, any Contractor Party or Subcontractor, and Contractor irrevocably waives any such defense in any Dispute. Contractor shall inform Owner if it believes that Owner made a claim under the wrong Project Transaction Document. If Contractor and Owner do not agree that such claim should have been made under a different Project Transaction Document, Contractor and Owner shall resolve any

such dispute regarding which Project Transaction Document a claim should have been made under by submitting such dispute to resolution in accordance with Article 28.

**31.13 Audit Rights.** With respect to any Change Order which adjusts the Contract Price by compensating Contractor on a reimbursable cost or time and materials basis, Contractor shall maintain, in accordance with Prudent Utility Practice and generally accepted accounting principles consistently applied, records and books of account as may be necessary for substantiation of all Contractor claims for additional compensation. Owner, Owner's Engineer, the Financing Parties, if any, and their authorized representatives shall be entitled to inspect and audit such records and books of account during normal business hours and upon reasonable advanced notice during the course of the Work and for a period of five (5) years after the Final Completion Date (or such longer period, where required by Applicable Law); provided, however, that the purpose of any such audit shall be only for verification of such costs, and Contractor shall not be required to keep records of or provide access to those of its costs covered by the fee, allowances, fixed rates, unit prices, lump sum amounts, or of costs which are expressed in terms of percentages of other costs. Contractor shall retain all such records and books of account for a period of at least five (5) years after the Final Completion Date (or such longer period, where required by Applicable Law). Contractor shall use commercially reasonable efforts to cause all Major Subcontractors engaged in connection with the Work or the performance by Contractor of its warranty obligations herein to retain for the same period all their records relating to the Work for the same purposes and subject to the same limitations set forth in this Section 31.13. Audit data shall not be released by the auditor to parties other than Contractor, Owner, Owner's Engineer, and their respective officers, directors, members, managers, employees and agents in connection with any such audit, subject to the provisions of Article 25. If, as a result of any audit conducted pursuant to this Section 31.13, the results of such audit indicate that Contractor received more or less than the amount to which it was entitled under this Agreement, either Owner shall pay the additional amount owed to Contractor or Contractor shall refund any overpayment to Owner, as applicable, in either case within ten (10) Days of a written request therefor. Owner shall be responsible for all costs and expenses of such audit unless an overpayment by Owner of more than three percent (3%) of the subject payment is discovered, in which case Contractor shall be responsible for such costs and expenses.

**[THE SIGNATURE PAGES IMMEDIATELY FOLLOW]**

IN WITNESS WHEREOF, the Parties hereto have duly executed and delivered this Agreement as of the Effective Date.

**PacifiCorp,  
an Oregon corporation**

By: \_\_\_\_\_  
Name:  
Title:

[\_\_\_\_\_]

By: \_\_\_\_\_  
Name:  
Title:

**2018 Rocky Mountain Power Renewable RFP  
Pro Forma**

**THIS DRAFT DOES NOT CONSTITUTE A BINDING OFFER AND SHALL NOT FORM THE BASIS FOR AN AGREEMENT BY ESTOPPEL OR OTHERWISE. ANY ACTIONS TAKEN BY A PARTY IN RELIANCE ON THE TERMS SET FORTH IN THIS DRAFT OR ON STATEMENTS MADE DURING NEGOTIATIONS PURSUANT TO THIS DRAFT SHALL BE AT THAT PARTY'S OWN RISK. UNTIL THE PARTIES HAVE COMPLETED THEIR DUE DILIGENCE AND THIS AGREEMENT IS NEGOTIATED, APPROVED, EXECUTED AND DELIVERED, NO PARTY SHALL HAVE ANY LEGAL OBLIGATIONS, EXPRESSED OR IMPLIED, OR ARISING IN ANY OTHER MANNER UNDER THIS DRAFT OR IN THE COURSE OF ANY NEGOTIATIONS.**

**BALANCE OF PLANT  
ENGINEERING, PROCUREMENT AND CONSTRUCTION AGREEMENT<sup>1</sup>  
([ ] Wind Project)**

**by and between**

[ ]

**Contractor's License No. [ ]<sup>2</sup>**

**and**

[ ]

Dated as of [ ]

---

<sup>1</sup> Further conforming changes will be required for a geothermal Project.

<sup>2</sup> Note to Bidders: A Utah contractor's license is required prior to execution of the BOP EPC agreement.



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## BALANCE OF PLANT

### ENGINEERING, PROCUREMENT AND CONSTRUCTION AGREEMENT

This BALANCE OF PLANT ENGINEERING, PROCUREMENT AND CONSTRUCTION AGREEMENT, dated as of [ ] (this “Agreement”), is entered into by and between [ ], a [ ] doing business as (“Owner”), and [ ], a [ ] formed under the laws of the State of [ ] (“Contractor”). Owner and Contractor are each hereinafter sometimes referred to as a “Party” and collectively as the “Parties.”

### RECITALS

**WHEREAS**, Owner intends to develop a wind power plant (the “Project”)<sup>3</sup> located in [ ], Utah, as more fully described in and including all of the components set forth in Exhibit 1 and Exhibit 3, Exhibit 3A, Exhibit 3B, Exhibit 14, Exhibit 15, Exhibit 24 (collectively, the “Technical Specifications”), on the real property more fully described in Exhibit 2 (the “Site”);

**WHEREAS**, Contractor has represented that it is experienced and qualified in providing technical assistance, licensing, engineering, procurement, supply, construction management, construction, unloading, erecting, installation, commissioning, start-up and testing services, and that it possesses the requisite expertise and resources to complete the Work;

**WHEREAS**, Owner desires to obtain, and Contractor desires to provide, through itself or through Subcontractors, the Work, including, among other things, engineering, procurement, construction and related services for the Contractor Facilities and engineering, construction, assembly, erection, and installation services for the WTGs, for the Contract Price;

**WHEREAS**, Contractor has agreed to guarantee the timely and proper completion of the Work in strict accordance with the terms and conditions hereinafter set forth; and

**WHEREAS**, after the Full Notice to Proceed, the Project Company as Owner may assign all of its rights, title and interest in, and obligations under, the Agreement to a prospective or actual purchaser of the Project assets and such prospective or actual purchaser will accept such assignment of all such rights, title, and interest and assumes all such obligations of Owner (except for payment obligations) under the Agreement in each case so that such prospective or actual purchaser of the Project assets, as of the effective date of such assignment, is the Owner under the Agreement.

**NOW, THEREFORE**, in consideration of the mutual covenants herein contained, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereto, intending to be legally bound, hereby agree as follows:

---

<sup>3</sup> Note to Bidders: If there are multiple facilities, it is contemplated that a separate BOP EPC Agreement will be entered into for each facility.

## ARTICLE 1

### DEFINITIONS

**1.1 Definitions.** As used in this Agreement, the following terms have the meanings indicated:

“AAA” means the American Arbitration Association.

“Abandons” means, other than in the event of a Force Majeure Event or an Owner-Caused Delay, that Contractor abandons, ceases to perform the Work or leaves the Site for a period longer than thirty (30) consecutive Days.

“Access Road Completion” has the meaning set forth in Section 7.1.

“Access Roads Completion Certificate” means a certificate in the form of Exhibit 17C.

“Actual Delay” has the meaning set forth in Section 9.3.

“Affiliate” means, when used with reference to a specified Person, any Person directly or indirectly Controlling, Controlled by, or under common Control with such specified Person. Notwithstanding the foregoing, for purposes of this Agreement (i) Transmission Provider shall not be deemed to be an Affiliate of Owner; and (ii) Affiliates of Owner shall extend only to Berkshire Hathaway Energy Company and such subsidiaries it directly or indirectly Controls.

“Agreement” has the meaning set forth in the preamble, including all Exhibits hereto, as the same may be modified, amended or supplemented from time to time in accordance with the terms hereof.

“Applicable Codes” means codes, standards or criteria, such as the National Electric Code and those codes, standards or criteria promulgated by the American Society of Mechanical Engineers, Underwriters Laboratories and Institute of Electrical and Electronics Engineers, and other standards institutions which are generally recognized as applicable to the Work or the Project.

“Applicable Laws” means any constitutional provision, law, statute, rule, regulation, ordinance, treaty, order, decree, judgment, decision, certificate, injunction, registration, license, permit, authorization, guideline, governmental approval, consent or requirement of any Governmental Authority, as construed from time to time by such Governmental Authority, including Environmental Laws.

“Applicable Permits” means each and every national, regional and local license, authorization, consent, ruling, exemption, variance, order, judgment, certification, filing, recording, permit or other approval with or of any Governmental Authority, including each and every environmental, construction or operating permit and any agreement, consent or approval from or with any other Person that is required by any Applicable Law or that is otherwise necessary for the performance of, in connection with, or related to, the Work or the design, construction or operation of the Project, including those set forth on Exhibit 6A and Exhibit 6B.

“Applicable Standards” means Prudent Industry Practices, Prudent Engineering Practices, the Interconnection Agreement and Applicable Codes, including those set forth in this Agreement; provided, however, that if any portion of such standards or codes conflicts with or is less stringent than any Applicable Law or Applicable Permit, such conflicting or less stringent portions of such standards shall not be deemed “applicable.”

“Application for Payment” means an application for payment in the form attached hereto as Exhibit 10.

“Arbitration Rules” has the meaning set forth in Section 23.2(c).

“As-Built Drawings” has the meaning set forth in Section 2.7.

“Availability Completion” means successful achievement of the pre functional test with respect to achievement of WTG Mechanical Completion for the first WTG to reach WTG Mechanical Completion at the Site.<sup>4</sup>

“BCP” has the meaning set forth in Section 20.1.

“Business Day” means a Day, other than a Saturday or Sunday or a public holiday, on which banks are generally open for business in the State of Utah.

“Cancellation Cost Cap” means the maximum applicable payment amount as set forth in the Cancellation Cost Cap column of the Schedule of Values that is due to Contractor in any given period should Owner terminate this Contract for convenience pursuant to Section 15.7 or should Contractor terminate this Contract pursuant to Section 15.4(b).

“Cash Flow Curve” means the periodic cash flow curve set forth in the Schedule of Values that constitutes the cumulative maximum payment obligation Owner will have to Contractor under this Agreement for any given period during the performance of the Work.

“Change Order” means a written document signed by Owner and Contractor in accordance with Article 9, authorizing an addition, deletion or revision to the Work, an adjustment of the Contract Price or Construction Schedule, and/or any other obligation of Owner or Contractor under this Agreement, which document is issued after execution of this Agreement.

“Claim Notice” has the meaning set forth in Section 19.5.

“Code” means the Internal Revenue Code of 1986, as amended.

“Commissioning” means the start-up commissioning and testing activities to be conducted in accordance with the Commissioning Procedures.

---

<sup>4</sup> Note to Bidders: The timing, conditions and requirements of Availability Completion remain subject to further review and change by Owner’s tax advisors.

“Commissioning Procedures” means the procedures set forth in Exhibit 14, the Wind Turbine Supply Contract.

“Confidential Information” has the meaning set forth in Section 20.1.

“Construction Schedule” means the critical path method construction schedule based on and consistent with the provisions set forth in Exhibit 4 for the progression of the Work by Contractor (including the achievement of the Guaranteed Mechanical Completion Date), created in accordance with Section 2.6 and as updated from time to time pursuant to the terms of this Agreement.

“Consumable Parts” has the meaning set forth in Section 2.8(g).

“Contract Documents” means this Agreement and any documents delivered hereunder, each of which is hereby incorporated by reference and made a part hereof for all purposes.

“Contract Price” means the sum of [\_\_\_\_\_] (\$\_\_\_\_\_), as the same may be modified from time to time in accordance with the terms of this Agreement.

“Contractor” has the meaning set forth in the preamble.

“Contractor Acquired Permits” means those Applicable Permits to be acquired by Contractor and designated on Exhibit 6A and any other Applicable Permits, other than Owner Acquired Permits.

“Contractor Critical Path Items” means those items that are designated as “Contractor Critical Path Items” in the Construction Schedule.

“Contractor Equipment” means all of the equipment, materials, apparatus, structures, tools, supplies and other goods provided and used by Contractor and its Subcontractors for performance of the Work but which is not intended to be incorporated into the Project.

“Contractor Event of Default” has the meaning set forth in Section 15.1.

“Contractor Facilities” means, collectively, the Infrastructure Facilities, and all other structures, equipment and components comprising the Project other than the Owner-Furnished Equipment.

“Contractor Lien” means any right of retention, mortgage, pledge, assessment, security interest, lease, advance claim, levy, claim, lien, charge or encumbrance on the Work, the Equipment, the Project, the Site or any part thereof directly or indirectly created, incurred, assumed or suffered to be created by any Contractor Party (other than in accordance with any other Project Transaction Document), any Subcontractor, or any of their respective employees, laborers or materialmen.

“Contractor Party” or “Contractor Parties” means each of Contractor, Contractor’s Guarantor and any of their respective present and future Affiliates and their respective directors, officers, employees, shareholders, agents, representatives, successors and permitted assigns.

“Contractor Performance Security” means a corporate guaranty from Contractor’s Guarantor in the form attached hereto as Exhibit 11.<sup>5</sup>

“Contractor Submittals” means the drawings, specifications, plans, calculations, model, designs and other deliverables described in Exhibit 7.

“Contractor’s Insurance” has the meaning set forth in Section 18.1, as further described in Part I of Exhibit 13.

“Contractor’s Representative” has the meaning set forth in Section 6.2.

“Credit Rating” of a Person means the credit rating then assigned by a Relevant Rating Agency to the long-term, senior, unsecured, non-credit-enhanced indebtedness of that Person.

“Day” means a calendar day unless it is specified that it means a Business Day.

“Defect” or “Defective” means, unless otherwise defined elsewhere in this Agreement as to a specific aspect of the Work, any designs, engineering, Equipment, installation or other Work which, in Owner’s reasonable judgment:

- (a) does not conform to Exhibit 1 or the Technical Specifications, or the Contractor Submittals that have been reviewed by Owner;
- (b) is of improper or inferior workmanship or quality;
- (c) includes a Serial Defect; or
- (d) is inconsistent with Prudent Utility Practice.

“Design Basis and Project Site Data” means the Design Basis and Project Site Data set forth in the Technical Specifications.

“Direct Costs” means the actual and substantiated costs (without mark-up) that are reasonably incurred by Contractor as a result of the event requiring the Change Order for the following items: (a) payroll wages paid for labor in the direct employ of Contractor at the Site; (b) cost of materials and permanent equipment; (c) payments made by Contractor to Subcontractors (such payments excluding any mark-ups by Contractor); (d) rental charges of machinery and equipment for the Work; (e) permit fees; (f) costs of mobilization and/or demobilization; and (g) associated engineering costs, if any, directly related to Work implemented under the Change Order. Direct Costs exclude any home-office, overhead or other indirect costs.

“Disclosing Party” has the meaning set forth in Section 20.1.

“Dispute” has the meaning set forth in Section 23.1.

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<sup>5</sup> Note to Bidders: Subject to Contractor credit review, a letter of credit or other security may be required during the Term and the Warranty Period.

“Dispute Initiator” has the meaning set forth in Section 23.2(a).

“Documentation” shall mean all Contractor Submittals, design documents, Monthly Progress Reports, Weekly Progress Reports engineering change notices (ECNs), requests for information (RFIs), as-built drawings, system turnover packages, isometrics, specifications (including the Technical Specifications), studies, system descriptions, lists, diagrams, procedures, instructions, reports, test results, calculations, manuals, and project schedules required by or referenced in the Technical Specifications or elsewhere in this Agreement, including all electronically originated and stored information and other data and information originated by Contractor or any Subcontractor in connection with Contractor’s obligations under this Agreement.

“Dollar” and “\$” means the lawful currency of the United States of America.

“Effective Date” has the meaning set forth in Section 27.19.

“Electrical Works” means the facilities and equipment, including the Interconnection Facilities (as defined in the Interconnection Agreement), as further described in Exhibit 1 and Exhibit 3B.

“Electrical Works Completion Certificate” means the certificate in the form of Exhibit 17E.

“Electrical Works Completion” has the meaning set forth in Section 7.3.

“Emergency” means an event occurring at the Site or any adjoining property that poses actual or imminent risk of serious personal injury to any Person or material physical damage to the Project requiring immediate preventative or remedial action, as reasonably determined by the Party assessing the subject event.

“Environmental Laws” means any federal, Indian tribe (including any agency, council or political subdivision thereof), state, or local law, regulation, ordinance, standard, guidance, or order pertaining to the protection of the environment and human health, including the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9601, et seq.; the Resource Conservation and Recovery Act, 42 U.S.C. 6901, et seq.; the Toxic Substances Control Act, 15 U.S.C. 2601, et seq.; the Clean Air Act, 42 U.S.C. 7401, et seq.; the Federal Water Pollution Control Act, 33 U.S.C. 1251 et seq.; the Occupational Safety and Health Act, 29 U.S.C. 651 et seq.; and any other law that governs: (a) the existence, removal, or remediation of Hazardous Materials on real property; (b) the emission, discharge, release, or control of Hazardous Materials into or in the environment; or (c) the use, generation, handling, transport, treatment, storage, disposal, or recovery of Hazardous Materials.

“Equipment” means all of the equipment, materials, apparatus, structures, tools, supplies, goods and other items provided by Contractor and its Subcontractors that are installed or incorporated into the Project or otherwise form or are intended to form part of the Work or the Project (other than Contractor Equipment).

“Event of Default” means either a Contractor Event of Default or an Owner Event of Default, as the context may require.

“FERC Electrical Plant Chart of Accounts” shall have the meaning set forth in Exhibit 28.

“FERC Unit of Plant Cost Allocation Book” shall have the meaning set forth in Exhibit 28.

“Final Completion” has the meaning set forth in Section 7.6.

“Final Completion Certificate” means the certificate in the form of Exhibit 19.

“Final Completion Date” means the date on which Final Completion occurs.

“Financing Parties” means any and all lenders, security holders, note or bond holders, lessors, lien holders, investors (including tax-equity investors), equity providers, holders of indentures, security agreements, mortgages, deeds of trust, pledge agreements and providers of swap agreements, interest rate hedging agreements, letters of credit and other documents evidencing, securing or otherwise relating to the construction, interim or long-term financing or refinancing of the Project or a portfolio of projects including the Project, and their successors and permitted assigns, and any trustees or agents acting on their behalf. The term “Financing Party” includes, for the avoidance of doubt, any Person or Persons that owns the Project and leases the Project to Owner or an Affiliate of Owner, as applicable, under a lease, sale-leaseback or synthetic lease structure.

“Force Majeure Event” means, when used in connection with the performance of a Party’s obligations under this Agreement, any act, condition or event occurring after the Effective Date which renders said Party unable to perform or comply with its obligations under this Agreement, but only if and to the extent (a) such event is not within the reasonable control, directly or indirectly, of the Party (or in the case of Contractor, any Affiliate thereof) seeking to have its performance obligation(s) excused thereby, (b) the Party seeking to have its performance obligation(s) excused thereby (or in the case of Contractor, any Affiliate thereof) has taken all reasonable precautions and measures in order to prevent or avoid such event or mitigate the effect thereof on its ability to perform its obligations under this Agreement and which by the exercise of due diligence such Party could not reasonably have been expected to avoid and which by the exercise of due diligence it has been unable to overcome, (c) such event is not the direct or indirect result of the negligence or the failure of, or caused by, the Party seeking to have its performance obligations excused thereby (or in the case of Contractor, any Affiliate thereof) and (d) the Party seeking to have its performance obligations excused thereby (or in the case of Contractor, any Affiliate thereof) had no actual or constructive prior knowledge of such event.

(i) Without limiting the meaning of but subject to the preceding sentence, the following events constitute Force Majeure Events to the extent that they render a Party unable to perform or comply with its obligations under this Agreement:

(A) war (whether or not war is declared), hostilities, revolution, rebellion, insurrection against any Governmental Authority, riot, terrorism, acts of a public enemy or other civil disturbance;

(B) acts of God, including storms, floods, lightning, earthquakes, hailstorms, ice storms, tornados, typhoons, hurricanes, landslides, volcanic eruptions, fires, objects striking the earth from space (such as meteorites), or any

other naturally occurring event for the location of the Site, or at such location in which Contractor performs the Work or Owner performs its obligations under this Agreement, that impacts the ability of the affected Party to perform its obligations under this Agreement;

(C) sabotage or destruction by a third party (other than any contractor retained by or on behalf of the invoking Party) of plants, facilities and equipment located in the continental United States of America necessary for the performance by the affected Party of its obligations under this Agreement; and

(D) except as set forth in subsections (ii)(C) and (ii)(D) below, industrial action, work stoppage, labor strike, boycott, or labor shortage in the continental United States of America.

(ii) Notwithstanding anything to the contrary in this definition, the term Force Majeure Event shall not be based on or include any of the following:

(A) economic hardship of either Party;

(B) Owner's inability to pay;

(C) a strike, work stoppage or labor dispute limited only to any one or more of Owner, Owner's Affiliates, Contractor or subcontractors thereof, or any other third party employed by a Party to work on the Project including strikes of Contractor or Subcontractor personnel at the Site or at Contractor's or Subcontractor's facilities;

(D) any labor shortages involving Contractor or a Subcontractor;

(E) Contractor's compliance or inability to comply with the Project Labor Agreement, except if Contractor's inability to comply is caused solely by a Force Majeure Event of the specific type described in subsection (i)(D) above;

(F) Site Conditions, except if Contractor's inability to comply is caused solely by a Force Majeure Event of the specific type described in subsection (i)(B) above;

(G) a Party's inability to obtain sufficient labor, materials, equipment or other resources to build the Project and perform the Work, except if such Party's inability to obtain sufficient labor, materials, equipment or other resources to build the Project and perform the Work is caused solely by a Force Majeure Event of the specific type described in any of subsections (i)(A) through (i)(D) above;

(H) the lack of wind or other fuel source of an inherently intermittent nature, except to the extent it is of the specific type described in subsection (i)(B) above;



(I) reductions in generation from the Project resulting from ordinary wear and tear, deferred maintenance or operator error;

(J) curtailment or reduction in deliveries at the direction of a Transmission Provider;

(K) a Party's inability to obtain permits or approvals of any type for the construction, operation or maintenance of the Project and necessary interconnection agreements or approvals, including, without limitation, approvals by any Governmental Authority that are subject to pre-decisional analysis under the federal National Environmental Policy Act, 42 U.S.C. §§ 4321-4370d;

(L) an Equipment failure, except if such Equipment failure is caused solely by a Force Majeure Event of the specific type described in any of subsections (i)(A) through (i)(D) above;

(M) utility interruptions;

(N) transportation or shipping accidents; or

(O) unavailability of preferred shipping methods.

"Foundation" means each Wind Turbine Generator foundation to be completed in accordance with this Agreement.

"Foundation Completion" has the meaning set forth in Section 7.2.

"Foundation Completion Certificate" means a certificate in the form of Exhibit 17D.

"Full Notice to Proceed" means a notice signed by a duly authorized representative of Owner to Contractor authorizing Contractor to commence and complete all Work under this Agreement.

"Governmental Authority" means any national, federal, Indian tribe (including any agency, council or political subdivision thereof), state, regional, province, town, city, county, local or municipal government, whether domestic or foreign or other administrative, regulatory or judicial body of any of the foregoing and all agencies, authorities, departments, instrumentalities, courts and other authorities lawfully exercising or entitled to exercise any administrative, executive, judicial, legislative, police, regulatory or taxing authority or power, or other subdivisions of any of the foregoing. For clarity, each of the Western Electricity Coordinating Council and the UPSC shall be a Governmental Authority.

"Guaranteed Access Road Completion Date" means [\_\_\_\_\_], for the [\_\_\_\_\_] Site, as may be extended only in accordance with the express terms of this Agreement.

"Guaranteed Date" means each of the Guaranteed Access Road Completion Date and the Guaranteed Mechanical Completion Date.

“Guaranteed Mechanical Completion Date” means [\_\_\_\_\_].<sup>6</sup>

“Hazardous Materials” means (a) any regulated substance, hazardous constituent, hazardous materials, hazardous wastes, hazardous substances, toxic wastes, radioactive substance, contaminant, pollutant, toxic pollutant, pesticide, solid wastes, and toxic substances as those or similar terms are defined under any Environmental Laws; (b) any friable asbestos or friable asbestos-containing material; (c) polychlorinated biphenyls (“PCBs”), or PCB-containing materials or fluids; (d) any petroleum, petroleum hydrocarbons, petroleum products, crude oil and any fractions or derivatives thereof; and (e) any other hazardous, radioactive, toxic or noxious substance, material, pollutant, or contaminant that, whether by its nature or its use, is subject to regulation or giving rise to liability under any Environmental Laws.

“Indemnifying Party” means, with respect to an indemnification obligation under this Agreement, the Party providing such indemnification.

“Indemnitee” means an Owner Party or a Contractor Party, as the context may require, being indemnified pursuant to Section 19.5.

“Independent Engineer” has the meaning set forth in Section 27.5.

“Independent Expert” means an independent third-party engineer mutually agreed upon by the Parties.

“Infrastructure Facilities” means all of the works, buildings, roads, pad mounted transformers, Electrical Works and other permanent fixtures as more fully described in Exhibit 1, Exhibit 3A and Exhibit 3B.

“Insolvency Event” means, with respect to a Person, such Person becomes insolvent, institutes or has instituted against it a case under Title 11 of the United States Code or is unable to pay its debts as they mature or makes a general assignment for the benefit of its creditors, or a receiver is appointed for the benefit of its creditors or on account of its insolvency.

“Intellectual Property Claim” means an allegation, claim or legal action asserted by a third party against an Owner Party alleging unauthorized use, disclosure, misappropriation, infringement, or other violation of such third party’s Intellectual Property Rights arising from (a) Owner Party’s use of the Licensed Technology to the extent used in accordance with the license granted pursuant to Section 14.1 or (b) Contractor’s performance (or that of its Affiliates or Subcontractors) under this Agreement asserted against Owner that (i) concerns any Equipment, Contractor Equipment or other goods, materials, supplies, items or services provided by Contractor (or its Affiliates or Subcontractors) under this Agreement, (ii) is based upon or arises out of the performance of the Work by Contractor (or its Affiliates or Subcontractors), including the use of any tools or other implements of construction by Contractor (or its Affiliates or Subcontractors) or (iii) is based upon or arises out of the design or construction of any item by Contractor (or its Affiliates or Subcontractors) under this Agreement or the use, or operation, of any item according

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<sup>6</sup>Note to Bidders: Please provide the proposed Guaranteed Mechanical Completion Date.

to directions embodied in Contractor's (or its Affiliates' or Subcontractors') Contractor Submittals, or any revision thereof, prepared or provided by Contractor.

"Intellectual Property Rights" means all intellectual property rights throughout the world, including all rights in patents and inventions (whether or not patentable); registered and unregistered copyrights, trademarks, database rights, semiconductor mask work rights; proprietary rights, trade secrets, know-how and confidential information.

"Interconnection Agreement" means [\_\_\_\_\_].

"Interconnection Facilities" means those facilities described in the Interconnection Agreement.

"Interim Punch List" has the meaning set forth in Section 7.4(b).

"Job Book" means all Contractor (and Subcontractor) engineering, design, purchasing and other information relating to the Work in the format and with the content as set forth in Exhibit 23.

"Job Site" means the Site and any other areas where Contractor may temporarily obtain care, custody and control, use, easement or license for purposes directly, indirectly or incidentally related to performance of, or as an accommodation to, the Work.

"Key Personnel" has the meaning set forth in Section 6.2.

"Licensed Technology" has the meaning set forth in Section 14.1.

"Losses" means any and all claims, actions, suits, proceedings, losses, liabilities, penalties, damages, costs or expenses (including attorneys' fees and disbursements) of any kind.

"Major Subcontract" means a Subcontract with a Major Subcontractor.

"Major Subcontractor" means (a) a Supplier of the distribution transformers or step-up transformers for the Project, (b) Contractor's electrical installation Subcontractors, Site preparation/grading Subcontractors and Project substation design and construction Subcontractors and (c) any other Subcontractor or Supplier for the Project with Subcontracts having an aggregate value in excess of Two Hundred Thousand Dollars (\$200,000) for performance of any part of the Work.

"Mechanical Completion Delay Liquidated Damages" has the meaning set forth in Section 7.8(c)(i).

"Milestone" means any milestone for the Work listed on Exhibit 4.

"Minimum Credit Rating" of a Person means that the Credit Rating of that Person is at least (a) BBB- (or its equivalent) as determined by Standard & Poor's and (b) Baa3 (or its equivalent) as determined by Moody's.

“Monthly Progress Report” means a progress report prepared by Contractor setting forth the detail required in Exhibit 8A.

“MW” means one million (1,000,000) watts of electric power.

“Notice of Dispute” has the meaning set forth in Section 23.1.

“Operating Manual” means the complete system instructions and procedures for the operation and maintenance of the Project, which shall comply with the requirements of the Work, including Contractor’s, manufactures’, suppliers’ and Subcontractors’ recommendations, lists of Spare Parts, all safety information and any precautionary measures therefor.

“Owner” has the meaning set forth in the preamble.

“Owner Acquired Permits” means those Applicable Permits to be acquired by Owner, as designated on Exhibit 6B.

“Owner-Caused Delay” means (a) any Owner suspension of the Work designated as an Owned-Caused Delay pursuant to Section 11.1 or (b) a failure by Owner (which failure is not otherwise excused by a Force Majeure Event or otherwise in accordance with this Agreement) to perform any of its material obligations under this Agreement including any failure by Owner to timely approve Contractor’s Submittals delivered in connection with this Agreement on or prior to the applicable date as provided in this Agreement (unless a deemed response to such notice is provided for hereunder); provided, however, that any actions by Transmission Provider shall in no event constitute an Owner-Caused Delay.

“Owner Event of Default” has the meaning set forth in Section 15.3.

“Owner-Furnished Equipment” means (i) WTGs and (ii) any other equipment or components of the Project to be furnished or procured by Owner as expressly set forth in Exhibit 1.

“Owner Inspection Parties” has the meaning set forth in Section 8.1.

“Owner Party” or “Owner Parties” means Owner and its present and future Affiliates and their respective directors, officers, employees, shareholders, agents, representatives, successors and permitted assigns. Notwithstanding the foregoing, for purposes of this Agreement, Transmission Provider shall not be deemed to be an Owner Party.

“Owner Subcontractor” means the Turbine Vendor and any other subcontractor (other than the Contractor) engaged by Owner to perform work in connection with the Project.

“Owner Taxes” means all Utah sales and use taxes with regard to any tangible personal property purchased or leased for, used in the permanent construction of, or incorporated into the Project.

“Owner’s Code of Business Conduct” means the Owner’s Code of Business Conduct set forth on Exhibit 29.

“Owner’s Engineer” means any engineering firm or firms or other engineer or engineers selected and designated by Owner, which may include an employee or employees of an Owner Party.

“Owner’s Insurance” has the meaning set forth in Section 18.2, as further described in Part II of Exhibit 13.

“Owner’s Representative” means the individual designated by Owner in accordance with Section 6.1.

“Party” and “Parties” have the meanings set forth in the preamble.

“Person” means any individual, corporation, partnership, company, joint venture, association, trust, unincorporated organization, limited liability company or any other entity or organization, including any Governmental Authority. A Person shall include any officer, director, member, manager, employee or agent of such Person.

“Placed in Service” means “placed in service” for purposes of Sections 45, 48 and 168 of the Code.

“Progress Payment” has the meaning set forth in Section 4.4.

“Project” means the complete, integrated, wind-powered, electric generating facility to be located on the Site, consisting of all foundations, structures, facilities, appliances, lines, transformers, WTGs, Towers, conductors, instruments, equipment, apparatus, components, roads and other property comprising and integrating the entire facility described generally in the Scope of Work and the Technical Specifications.

“Project Labor Agreement” means that certain Project Labor Agreement among Contractor and [\_\_\_\_].<sup>7</sup>

“Project Mechanical Completion” has the meaning set forth in Section 7.5.

“Project Mechanical Completion Certificate” means a certificate in the form of Exhibit 17B.

“Project Mechanical Completion Date” means the date on which Project Mechanical Completion occurs.

“Project Schedule” means the schedule attached hereto as Exhibit 4.

“Project Substation” means the substation at the Site.

“Project Transaction Documents” means this Agreement, the Contractor Performance Security, and any other agreements between Contractor or any Affiliate of Contractor and Owner

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<sup>7</sup> Note to Bidders: If the Site is on Tribal lands, any applicable Tribal labor requirements and related provisions will need to be addressed.

relating to the engineering, procurement, construction, development, acquisition, ownership, operation or maintenance of the Project.<sup>8</sup>

“Prudent Engineering Practices” means those practices, methods, equipment, specifications and standards of safety and performance, as the same may change from time to time, as are commonly used by professional construction and engineering firms performing engineering, procurement and construction services on wind energy facilities of the type, size and location similar to the project which, in the exercise of reasonable judgment and in the light of the facts known at the time the decision was made, are considered good, safe and prudent practice in connection with the construction and use of wind energy generating and operating equipment and other electrical equipment, facilities and improvements, with commensurate standards of safety, efficiency and economy, and as are in accordance with generally accepted national standards of professional care, skill, diligence and competence applicable to engineering, construction and project management practices. Prudent Engineering Practices are not necessarily defined as the optimal standard practice method or act to the exclusion of others, but rather refer to a range of action reasonable under the circumstances.

“Prudent Utility Practice” means those standards of design, engineering, construction, workmanship, care and diligence and those practices, methods and acts that would be implemented and normally practiced or followed by prudent wind engineering, construction, and installation firms in the design, engineering, procurement, installation, construction, testing and commissioning (and operation associated therewith) of rate-based, utility-scale wind facilities in the Western United States and otherwise performing services of a similar nature in the jurisdiction in which the Work will be performed and in accordance with which practices, methods and acts, in the exercise of prudent and responsible professional judgment by those experienced in the industry in light of the facts known (or that reasonably should have been known) at the time the decision was made, could reasonably have been expected to accomplish the desired result consistent with good business practices, good engineering design practices, safety, reliability, Applicable Codes, Applicable Laws, and Applicable Permits.

“Punch List” has the meaning set forth in Section 7.4(b)(i).

“Punch List Holdback” means an amount equal to one hundred fifty percent (150%) of the cost for each Punch List Item.

“Punch List Items” means each item of Work that:

(a) Owner and Contractor agree remain to be performed by Contractor as provided in Article 7;

(b) does not, in Owner’s reasonable judgment, affect the ability of Owner to safely operate the Project in accordance with Applicable Standards and in compliance with all Applicable Laws;

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<sup>8</sup> Note to Bidders: Project Transaction Documents should reference any O&M Agreement, Supply Agreement, Performance Guarantee or other agreements between Owner and Contractor or an Affiliate of Contractor, as applicable.

(c) does not, in Owner's reasonable judgment, affect the operability (including capacity, efficiency, reliability, or cost effectiveness), safety or mechanical or electrical integrity of the Project; and

(d) does not, in Owner's reasonable judgment, affect the ability to Commission and test the WTGs, Infrastructure Facilities and the other components of the Project.

"Quality Assurance Plan" means a plan substantially in the form of Exhibit 21.

"Real Property Rights" means all rights in or to real property necessary to perform the Work and to develop, construct, complete, operate, maintain and access the Project and the Site, including those rights set forth in deeds, leases, option agreements, co-tenancy and shared facility agreements, Applicable Permits, easements, licenses, private rights-of-way agreements and crossing agreements that exist as of the Effective Date, including as set forth on Exhibit 2.

"Receiving Party" has the meaning set forth in Section 20.1.

"Release" means the release, threatened release, discharge, deposit, injection, dumping, spilling, leaking or placing of any Hazardous Material into the environment so that such Hazardous Material or any constituent thereof may enter the environment, or be emitted into the air or discharged into any waters, including ground waters under Applicable Law and Applicable Permits.

"Relevant Rating Agency" means Moody's or S&P.

"Required Manuals" means the manuals (including any Spare Parts manuals), instructions and training aids, whether created by Contractor, Subcontractor or Supplier, reasonably necessary for the safe and efficient operation, maintenance, curtailment, start-up and shut down of the Project and Equipment as reasonably determined by Owner, including those identified in Exhibit 7.

"Retainage" means an amount equal to ten percent (10%) of the amount payable pursuant to each Progress Payment (other than the payment to be made in connection with Final Completion).

"SCADA System" means the supervisory control and data acquisition system installed by Contractor in the Project, as more specifically described in the Technical Specifications under "SCADA System" and in Exhibit 24.

"Schedule of Values" means the schedule of values attached hereto as Exhibit 9 which allocates the Contract Price to different separately identifiable portions of the Work and includes the Cancellation Cost Cap and Cash Flow Curve.

"Scheduled Final Completion Date" means the date described as such in the Project Schedule.

"Scope of Work" means the scope of the work to be performed by Contractor under this Agreement, as further described in the Exhibits.

“Serial Defect” means any failure or non-conformance has occurred with respect to five percent (5%) or more units of any particular item of Equipment, and such failure or non-conformance could reasonably be expected to result from the same cause.

“Site” has the meaning set forth in the Recitals.

“Site Condition” has the meaning set forth in Section 2.22.

“Site Safety Plan” means the site safety plan attached hereto as Exhibit 20.

“Spare Parts” means the spare parts provided by Contractor to Owner in accordance with Exhibit 27.

“Subcontract” means any purchase order, agreement or subcontract with a Subcontractor.

“Subcontractors” means any Person (including a Supplier) that, directly or indirectly, and of any tier (other than Contractor but including any Affiliate of Contractor) supplies any items or performs any portion of the Work in furtherance of Contractor’s obligations under this Agreement.

“Supplier” means any Equipment supplier with which Contractor or Subcontractor contracts in furtherance of Contractor’s obligations under this Agreement.

“Survival Period” has the meaning set forth in Section 19.7.

“Taxes” means any and all taxes, charges, duties, imposts, levies and withholdings imposed by any Governmental Authority, including sales tax, use tax, property tax, transfer tax, income tax, withholding taxes, corporation tax, franchise taxes, margin tax, capital gains tax, capital transfer tax, inheritance tax, value added tax, customs duties, capital duty, excise duties, betterment levy, stamp duty, stamp duty reserve tax, national insurance, social security or other similar contributions, and any interest, penalty, fine or other amount due in connection therewith.

“Technical Dispute” has the meaning set forth in Section 23.2(a).

“Technical Specifications” has the meaning set forth in the Recitals.

“Termination Payment” means (a) with respect to a termination by Contractor for an Owner Event of Default in accordance with Section 15.4(b) or a termination by Owner for convenience pursuant to Section 15.7, an amount equal to the Direct Costs incurred by Contractor (and not previously paid by Owner) through the effective date of the termination, which amount shall not in the aggregate exceed the Cancellation Cost Cap; and (b) with respect to a termination by Owner for a Contractor Event of Default, such amount determined in accordance with Section 15.5(b).

“Title Company” means [\_\_\_\_\_].

“Tower” means each steel tubular tower component of a Wind Turbine Generator (having a hub height of approximately [ ] meters) as further described in the Wind Turbine Supply Contract.



“Transmission Provider” means the transmission function of PacifiCorp d/b/a Rocky Mountain Power. Notwithstanding the foregoing, for purposes of this Agreement, Transmission Provider shall not be deemed to be Owner, an Owner Party or an Affiliate of Owner.

“Turbine Blade” means a [ ] meter rotor diameter turbine blade component of a Wind Turbine Generator as further described in the Wind Turbine Supply Contract.

“Turbine Nacelle” means the turbine nacelle component of a Wind Turbine Generator, including gearbox, generator, blade pitch controls, brakes, hydraulic systems, lightning protection system, and nacelle yaw controls, and associated control and ancillary equipment.

“Turbine Vendor” means [ ].

“UPSC” has the meaning set forth in Section 2.5(a).

“UTC” means the Utah Code.

“Warranty” has the meaning set forth in Section 16.1(a).

“Warranty Period” has the meaning set forth in Section 16.1(b).

“Warranty Service” has the meaning set forth in Section 16.1(c).

“Weekly Progress Report” means a weekly progress report prepared by Contractor setting forth the detail required in Exhibit 8B.

“Wind Day” means a day or portion thereof consisting of at least [5 hours] between the hours of 7 a.m. and 5 p.m. on which (i) the Contractor has scheduled construction activities at the Job Site involving erection of Towers and/or WTGs which cannot be performed due to sustained winds in excess of [30 mph] for erection of Towers and Turbine Nacelles and [25 mph] for the erection of the Turbine Blades or (ii) due to the necessary sequencing of Work or other scheduling considerations or contingencies, Contractor is unable to perform other Work at the Job Site that would not be affected by such sustained wind conditions; provided, however, in order to qualify as a Wind Day, such event and the scheduling and other impacts resulting therefrom must be beyond the reasonable control of the Contractor, be unavoidable or incapable of being prevented or overcome by the reasonable efforts and due diligence of the Contractor, and have an impact which will actually, demonstrably and adversely affect Contractor’s ability to complete a Milestone.<sup>9</sup>

“Wind Turbine Generator” or “WTG” means all or any portion of one (1) [ ] wind turbine generator, including the following components: a Tower, a Turbine Nacelle, three (3) Turbine Blades, hub, controller, control panels, wind vanes and anemometers, all as more particularly described in the Technical Specifications and to be delivered to the Site by the Turbine Vendor in accordance with the terms of the Wind Turbine Supply Contract.

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<sup>9</sup> Note to Bidders: Final details with respect to Wind Days will be typical and customary as related to the specific project site, tower height, and technology used.

“Wind Turbine Supply Contract” means that certain contract executed by and between Owner and Turbine Vendor and attached hereto as Exhibit 14.

“Work” means all obligations, duties, and responsibilities assigned to or undertaken by Contractor under this Agreement, as further described in Exhibit 1, with respect to the Project, including any of the foregoing obligations performed prior to the Effective Date, which shall be deemed to be Work performed by Contractor under this Agreement, notwithstanding the fact that it was performed in whole or in part prior to the Effective Date.

“WTG Construction Period” has the meaning set forth in Section 10.1.

“WTG Mechanical Completion” has the meaning set forth in Section 7.4.

“WTG Shipment” means the shipments of controllers, towers, nacelle/hubs and blades for a WTG, each such complete shipment constituting a WTG Shipment. Scheduled WTG Shipments are shown in Exhibit 14.

**1.2 Rules of Interpretation.** Unless otherwise required by the context in which any term appears:

(a) capitalized terms used in this Agreement have the meanings specified in this Article 1;

(b) the singular shall include the plural;

(c) references to “Articles,” “Sections,” “Schedules,” “Annexes,” “Appendices” or “Exhibits” (if any) shall be to articles, sections, schedules, annexes, appendices or exhibits (if any) of this Agreement, as the same may be amended, modified, supplemented or replaced pursuant to the terms hereof from time to time hereunder;

(d) all references to a particular entity shall include a reference to such entity’s successors and permitted assigns;

(e) the words “herein,” “hereof” and “hereunder” shall refer to this Agreement as a whole and not to any particular Section or subsection of this Agreement;

(f) all accounting terms not specifically defined herein shall be construed in accordance with generally accepted accounting principles in the United States of America, consistently applied;

(g) references to this Agreement shall include a reference to all appendices, annexes, schedules and Exhibits hereto, as the same may be amended, modified, supplemented or replaced pursuant to the terms hereof from time to time;

(h) references to any agreement, document or instrument shall mean a reference to such agreement, document or instrument as the same may be amended, modified, supplemented or replaced from time to time;

(i) the use of the word “including” in this Agreement to refer to specific examples shall be construed to mean “including, without limitation” or “including but not limited to” and shall not be construed to mean that the examples given are an exclusive list of the topics covered; and

(j) references to an Applicable Law or Applicable Permit shall mean a reference to such Applicable Law or Applicable Permit as the same may be amended, modified, supplemented or restated and be in effect from time to time.

The Parties collectively have prepared this Agreement, and none of the provisions hereof shall be construed against one Party on the ground that such Party is the author of this Agreement or any part hereof.

## ARTICLE 2

### RETENTION OF CONTRACTOR; CONTRACTOR RESPONSIBILITIES

**2.1 Work to be Performed.** Owner hereby retains Contractor, and Contractor hereby agrees to be retained by Owner, to perform or cause to be performed all Work in accordance with the terms and conditions of this Agreement. Contractor shall, at its own cost and expense, (i) design (or arrange for design pursuant to a Subcontract executed in accordance with this Agreement), engineer (or arrange for engineering pursuant to a Subcontract executed in accordance with this Agreement), procure, construct, start-up the Contractor Facilities, unload, assemble, erect, and install the WTG, conduct testing of the Contractor Facilities, and perform all of its other obligations hereunder, including without limitation completion of the Scope of Work in accordance with the Technical Specifications, (ii) manage, supervise, inspect and furnish or caused to be furnished all materials, equipment, machinery, tools, labor, transportation, temporary structures, temporary utilities, administration and other services and items required to complete and deliver to Owner the fully integrated and operational Project, all in accordance with this Agreement (including without limitation the Project Schedule and the Scope of Work, as each may be modified from time to time in accordance with the terms hereof by a Change Order or other amendment hereto), Applicable Laws and Applicable Standards.

### 2.2 General; Applicable Standards.

(a) Applicable Standards for the Work. Subject to the remedies provided for herein, Contractor shall perform the Work and turn the Project over to Owner in a manner that is: (i) sufficient, complete and adequate in all respects necessary for the Project to successfully achieve WTG Mechanical Completion for each WTG Shipment on or before the Guaranteed Mechanical Completion Date; (ii) in conformance with professional standards and skill, expertise and diligence of design and construction professionals regularly involved in wind power projects of similar size and nature to the Project; (iii) in compliance with the terms of this Agreement, all Applicable Laws and Applicable Permits and Applicable Standards; and (iv) approved as to form, use and content by public and private entities authorized to administer or enforce any building or construction code or standard whose approval of the final design of the Project, or any portion thereof, is necessary for the construction, operation of the Project, or interconnection of the Project in compliance with the Interconnection Agreement.

**2.3 Scope of Work; Exclusions Therefrom.** In light of the foregoing, Contractor has included within the Contract Price the cost to complete the Work. Items need not be specifically listed in this Agreement or in the Exhibits in order to be deemed to be items included in the Work. It is understood that Contractor is better qualified to list exclusions than Owner is to list inclusions. Therefore, any item indicated on this Agreement, reasonably inferable therefrom, incidental thereto or required in accordance with any Applicable Law or Applicable Permit, that is not specifically excluded from the Scope of Work in Contractor's exclusions set forth on Exhibit 1 of this Agreement, is to be considered part of the Work.

**2.4 Storage; Security of WTG.** Prior to the date of Project Mechanical Completion, and with respect to the WTGs upon delivery of the WTGs to the Site by the Turbine Vendor and with respect to the step-up transformers upon delivery of the step-up transformers to the Site by the step-up transformer supplier, Contractor shall provide appropriate storage and security for all Owner-Furnished Equipment, including the WTGs and step-up transformers, Consumable Parts, materials, supplies and other equipment required to unload, assemble, erect and install the WTGs and other property owned or leased by Contractor or any Subcontractor located at the Site at areas thereon provided by Owner, incorporated in the Owner-Furnished Equipment. Contractor shall use the same care to protect any of the Owner-Furnished Equipment at any time in its possession or under its control while performing the Work as it does with its own property, and shall be responsible for any damage to such property resulting from its failure to use such care and any damage or loss to such property until the date of Project Mechanical Completion. Contractor shall prepare and maintain accurate reports of incidents of loss, theft, or vandalism and shall furnish these reports to Owner in a timely manner.

**2.5 Compliance; Permits; Approvals.**

(a) Compliance and Cooperation with Applicable Laws, Applicable Permits, Applicable Codes and Prudent Utility Practices. Whether or not expressly set forth in any specific section or exhibit, Contractor shall comply with all Applicable Laws, Applicable Permits, Applicable Codes and Prudent Utility Practices in the course of performing the Work and cause the Project to comply with all Applicable Laws and Applicable Permits prior to the Project Mechanical Completion Date. Contractor shall provide to Owner such information, reports, and documents and take such other actions as may be reasonably requested by Owner to assist Owner in performing its notification and submittal responsibilities as set forth in any Applicable Permit, including as set forth in Section 2.21, and in connection with Owner's claiming of sales and property tax abatements with respect to the Project. The Project shall be designed and constructed in compliance with all of the requirements for a renewable energy system as may be provided under the Utah Code, including Chapter [*Utah Code Sections*], any regulations promulgated thereunder, and the associated implementing rules and regulations of the Utah Public Services Commission ("UPSC").

(b) Contractor Acquired Permits; Other Approvals. Contractor shall obtain and maintain in full force and effect the Contractor Acquired Permits and shall file on a timely basis any documents as are required to obtain and maintain the Contractor Acquired Permits in full force and effect. Contractor shall also be responsible for obtaining and maintaining in Contractor's or Owner's name in connection with the Work, as applicable, all construction permits, transportation permits, road use agreements, crossing rights with respect to electrical distribution lines, cable TV

lines, drain tiles, rural water lines, telecommunication lines, and other licenses and, with respect to rights-of-way, those necessary to build the Project, all of which, as necessary for operation of the Project, shall be included as Contractor Submittals as a condition of Final Completion. The Contract Price includes consideration for Contractor to obtain the Contractor Acquired Permits and such other approvals. Any Taxes, permit fees and other costs required for the procurement or maintenance of the Contractor Acquired Permits and such other approvals shall be at Contractor's sole expense. Additionally, Contractor shall provide reasonably requested assistance to Owner in obtaining any Owner Acquired Permit.

## **2.6 Commencement of Work; Scheduling and Milestones.**

(a) Notice to Proceed. The execution of this Agreement by the Parties shall be deemed to be Owner's notice to Contractor to proceed with the Work. On the Effective Date, Contractor shall commence and shall thereafter diligently pursue the Work assigning to it a priority that will permit the attainment of Access Road Completion on or before the Guaranteed Access Road Completion Date, and WTG Mechanical Completion for all WTGs on or before the Guaranteed Mechanical Completion Date. Contractor shall proceed with the performance of the Work in accordance with the Project Schedule.

(b) Project Schedule. Contractor shall perform the Work in accordance with the Project Schedule, including completing the Work required on or before the Guaranteed Access Road Completion Date and the Guaranteed Mechanical Completion Dates, as such Project Schedule may be adjusted pursuant to the terms hereof. Contractor hereby covenants and warrants to Owner that in undertaking to complete the Work in accordance with the terms hereof, Contractor has taken into consideration and made reasonable allowances for hindrances and delays (including without limitation delays due to weather and Wind Days as and to the extent provided in Article 10) incident to such Work. Contractor shall meet or achieve each Milestone noted as such on the Project Schedule no later than the date set forth opposite such Milestone on such Project Schedule. Contractor shall coordinate and incorporate the schedules of all Subcontractors and Owner Subcontractors into all applicable schedules, work plans and progress reports. Contractor shall provide the Project Schedule and any updates thereto that provide for the orderly, practicable and expeditious completion of the Work in accordance with the requirements of this Agreement on a weekly basis as the Work progresses, including the incorporation of delay and acceleration analyses where appropriate; provided, however, that Contractor shall not be relieved from the obligation to meet any Milestone set forth on the Project Schedule unless such date is extended pursuant to a Change Order, or otherwise pursuant to a written notice from Owner. The current portion of the Project Schedule and any update shall be presented electronically on a weekly basis and in such reasonable detail as Owner may require and shall address all material elements of the Work. Contractor shall submit to Owner not later than the fifth (5<sup>th</sup>) day of each month a Monthly Progress Report in the form of Exhibit 8A. Additionally, the updated and complete Project Schedule shall be made available to the Owner monthly, and as otherwise reasonably requested by Owner. Contractor shall attend and participate in daily planning meetings at the Job Site between representatives of Owner, Owner Subcontractors and Contractor to review the status of the Work. Contractor shall promptly notify Owner in writing at any time that Contractor has reason to believe that there shall be a material deviation in the Project Schedule and shall set forth in such notice the corrective action planned by Contractor. Delivery of such notice shall not relieve Contractor of its obligation to meet the Milestone specified hereunder.

(c) Acceleration of Work. If, at any time or from time to time, Owner determines, in its reasonable discretion, that:

(i) Contractor has failed to show adequate progress of the Work toward completion of a Milestone included in the Project Schedule, or

(ii) Contractor has failed to achieve a Milestone included in the Project Schedule, then, on each such date, after receiving a written request from Owner, Contractor shall promptly but in any event within five (5) Business Days, submit for approval by Owner a written recovery plan to complete all necessary Work to achieve completion of the remaining Milestones included in the Project Schedule by the date set forth for such Milestone in the Project Schedule. Owner shall promptly approve or submit reasonable revisions to such written recovery plan, and Contractor shall incorporate such revisions into such recovery plan and thereafter diligently prosecute the Work in accordance with such recovery plan. Approval by Owner of such recovery plan shall not (i) be deemed in any way to have relieved Contractor of its obligations under this Agreement relating to the failure to timely achieve either of the Guaranteed Access Roads Completion Date or the Guaranteed Mechanical Completion Dates, or (ii) be a basis for an increase in the Contract Price. If Contractor cannot cause prosecution of the Work to conform to the Project Schedule within ten (10) days, then Owner shall have the right to direct Contractor to accelerate the Work by means of overtime, additional crews, additional shifts, additional equipment and/or re-sequencing of the Work. In the event of any acceleration pursuant to this Section 2.6(c)(ii), Contractor shall cause prosecution of the Work to conform to the Project Schedule within ten (10) days. Contractor shall receive no reimbursement for costs arising out of, Contractor shall not be entitled to a Change Order with respect to, and Contractor shall be solely responsible for any costs or expenses incurred by Contractor as a result of, formulation and implementation of the recovery plan or the acceleration of the Work described in this Section 2.6(c)(ii). This Section 2.6(c)(ii) shall not be construed to limit any of the rights and remedies Owner may have under any provision of this Agreement. Nothing herein shall be construed to excuse, limit, alter or amend Contractor's obligations to cooperate with Owner and, where appropriate, to participate in any dispute resolution proceedings.

**2.7 As-Built Drawings.** Contractor shall prepare and submit to Owner a complete set of as-built drawings prepared by Contractor in accordance with the requirements of this Agreement, which accurately and completely represent in reasonable detail the physical placement of the Contractor Facilities and all Owner-Furnished Equipment as assembled, erected and installed (the "As-Built Drawings") no later than the Scheduled Final Completion Date. Such As-Built Drawings shall also be provided in [ ] editable electronic format.

## **2.8 Engineering and Design; and Other.**

(a) Engineering. Contractor shall perform (or arrange for performance pursuant to a Subcontract executed in accordance with this Agreement) all engineering and design services for completion of the Contractor Facilities in conformity with the requirements of this Agreement. All engineering work of or on behalf of Contractor requiring certification shall be certified, and all Contractor Submittals requiring sealing shall be sealed, in each case by professional engineers

licensed and properly qualified to perform such engineering services in all appropriate jurisdictions. Engineering and design specifications for Owner-Furnished Equipment are set forth in Wind Turbine Supply Contract, and Contractor shall design, prosecute and install the Work so as to effect complete integration of the Contractor Facilities with the Owner-Furnished Equipment according to Applicable Standards.

(b) Design. Contractor shall design (or arrange for design pursuant to a Subcontract executed in accordance with this Agreement) the Contractor Facilities such that they are capable of complying with the requirements of this Agreement, Applicable Laws, and Applicable Standards. No later than is reasonably necessary to achieve the Milestones, Contractor shall prepare (or arrange for preparation pursuant to a Subcontract executed in accordance with this Agreement) and submit all Contractor Submittals for the Work for Owner's review. Based on the Technical Specifications, Contractor shall prepare comprehensive Contractor Submittals setting forth in detail the requirements for the construction of the Work. As the drawings and specifications for the Work are issued, they shall be clearly identified as Contractor Submittals.

(c) Review of Contractor Submittals, Reports and Manuals.

(i) Plan for Review Schedule. Contractor shall provide to Owner within fifteen (15) days following the Effective Date a submittal schedule setting out the anticipated dates of issue of all other Contractor Submittals sufficient to enable Owner to plan its review of the documentation. The timing of Contractor Submittals in the schedule shall coordinate with the requirements of the Wind Turbine Supply Contract so as not to cause delay of any installations or other activities thereunder. Contractor shall transmit in a timely fashion one (1) set of reproducible Contractor Submittals as prepared by Contractor or any Subcontractor in conjunction with the performance of the Work (in addition to the final As-Built Drawings and documentation to be included in the Job Books) for each Job Book deliverable to Owner under Section 2.8(i)(iii), and, pursuant to Owner's reasonable request therefor, any additional Contractor Submittals and drawings not listed above.

(ii) Submission of Contractor Submittals. Contractor shall submit to Owner, periodically through the date of Project Mechanical Completion, current complete copies of the Contractor Submittals list, and shall submit to Owner, within a reasonable time after the request therefor, each other document and drawing that Owner requires for the construction, operation and maintenance of the Contractor Facilities. If this Agreement is terminated prior to the Project Mechanical Completion Date, Contractor shall furnish Owner with any and all final documents which have been prepared, and the most up-to-date versions of documents which are not yet final.

(iii) Owner Comment. Except as otherwise provided in this Agreement, within fifteen (15) days of receipt of any Contractor Submittal, Owner shall notify Contractor of any resulting comments or queries. If Owner fails to respond within such period, then such Design Document shall be deemed to have been reviewed by Owner. Contractor shall, within ten (10) days of Owner's notification of any comments or queries on any Design Document, amend such drawing or document or otherwise respond to Owner's comments or queries. Notwithstanding anything contained herein to the contrary,

Owner's review and/or acceptance of the Design Documents, or any portion thereof, shall not in any way relieve Contractor of any of its obligations or warranties set forth herein, including, but not limited to, its full responsibility for the accuracy of the dimensions, details, integrity and quality of the Design Documents. Owner shall notify Contractor as soon as practicable after it becomes aware of any errors in such designs; provided, however, that failure to so notify Contractor will not constitute a breach of this Agreement by Owner or otherwise affect Owner's rights under this Agreement.

(iv) Safety; Quality Assurance. Contractor shall take all precautions for the safety of all Persons present at the Site and to prevent accidents or injury to individuals or damage to property on, about, or adjacent to the Site. Contractor shall provide to all such Persons, at its own expense, safety equipment required to protect against injuries during the performance of the Work and shall provide (or cause to be provided) appropriate safety training to its employees, Subcontractors and Suppliers. Contractor and Owner hereby agree that the Site Safety Plan shall be implemented by Contractor to secure the Project and the Site during the execution of the Work, both before and after transfer of custody and control to Owner, including any remedial or warranty Work. Contractor shall notify all Persons accessing the Site of the Site Safety Plan, which shall apply to all such Persons. During the performance of the Work, Contractor shall be responsible for the oversight of all Persons at the Site and for the performance of the Work in accordance with the Site Safety Plan and with all Applicable Laws governing occupational health and safety, Applicable Permits and Prudent Utility Practices. Contractor shall require that any employee or personnel of Contractor or any Subcontractor or Supplier shall have passed a drug test within ten (10) Days prior to first coming on to the Site. Contractor and Owner further agree that the Quality Assurance Plan attached hereto as Exhibit 21 shall be implemented by Contractor.

(d) Preparatory Work. Contractor pursuant to this Agreement shall undertake all geotechnical work at and a topographical survey of, the Site, including any required utility locating notifications. Contractor shall undertake all necessary site preparation. All such preparatory work contained in this Section 2.8(d) shall be performed in accordance with the requirements of this Agreement.

(e) Materials, Equipment and Related Services. Contractor shall procure and supply, at its own expense, whether by producing itself or by procuring from others, all materials, equipment and services required for performance of its obligations under this Agreement (whether on or off the Site), including the furnishing of labor, equipment, materials and tools for performance of the Work. All equipment and materials purchased by Contractor shall be new (except as otherwise agreed to in writing by Owner and Contractor) and of suitable grade for their respective purpose, and plant identification shall be consistent throughout the Work. Contractor shall provide appropriate storage for materials, supplies and equipment for use in performance of the Work. Contractor shall have exclusive responsibility for construction methods, means, techniques and procedures and for the establishment of and compliance with safety procedures at the Site. All materials, supplies and equipment which may be used in performance of the Work and which are stored at a location other than on the Site shall be segregated from other materials, supplies and equipment.



(f) Utilities. As part of the Work, Contractor shall arrange and pay for construction power and water (including all water used for dust control) and the installation of construction telecommunication lines and utilities, but only to the extent necessary for Contractor to perform its Work hereunder, and pay when due all such utility usage charges. For all permanent utilities, such as backfeed power, permanent water and power (i.e., for operations and maintenance facilities), permanent telecommunication lines, grid telemetry, and infrastructure necessary (including internet access) to transmit data gathered by the SCADA System, Contractor shall arrange and pay for such permanent utilities prior to the Project Mechanical Completion Date and Owner shall pay for such permanent utilities after the Project Mechanical Completion Date.

(g) Consumable Parts. Contractor shall supply within the Contract Price all consumable parts required for assembling, erecting, installing, testing or otherwise performing the Work (the “Consumable Parts”) (excluding consumable parts comprising the Owner-Furnished Equipment). All Consumable Parts not used during Project start-up and testing shall become the property of Owner.

(h) List of Consumable Parts and Spare Parts. Sufficiently in advance of the first WTG Mechanical Completion Date to allow Owner to purchase timely and assemble and store same at the Site at or prior to commercial operation of the Project, Contractor shall provide a general list in Microsoft Excel format of recommended spare parts necessary to operate and maintain the Project (excluding spare parts comprising the Owner-Furnished Equipment) (the “Spare Parts”) and Consumable Parts necessary to operate and maintain the Project. For each Spare Part, the list shall indicate price, delivery lead time and maintenance cycle, if any, and shall be in Microsoft Excel format.

(i) Operating Manuals and Job Books.

(i) Record-Keeping. All Documentation relating to the Project shall be kept by Contractor in an organized fashion for reference by Owner during the performance by Contractor of the Work. Contractor shall also maintain at the Site at least one (1) copy of all Contractor Submittals, Change Orders and other modifications.

(ii) Operating Manuals and Procedures. Contractor shall submit for Owner’s written approval a draft of the Operating Manual and operating procedures which shall be part of the Job Books and submitted and revised as provided in this Section 2.8(i).

(iii) Job Books. Not later than the Project Mechanical Completion Date, Contractor shall deliver to Owner for Owner’s review and approval three (3) copies of the final Job Books, substantially in the format and having the contents set forth in Exhibit 23. The Job Books shall be prepared in English only. Where any of the information in the Job Books was produced by computer-aided design and is available to Contractor or any Subcontractor, Contractor shall provide or cause to be provided to Owner an editable electronic copy of such information; and Owner shall have a non-exclusive, irrevocable, royalty-free license to use such information for the purposes of construction, operation, maintenance, service, and/or repair of the Project.

## **2.9 Labor and Personnel.**

(a) Properly Licensed; Sufficient Qualified Personnel. Contractor shall use, and shall require each of its Subcontractors to use, only personnel who are qualified and properly trained and who possess every license, permit, registration, certificate or other approval required by Applicable Law or Applicable Permits to enable such persons to perform work forming part of the Work.

(b) Project Labor Agreement.

(i) Contractor shall comply in all material respects with the terms and conditions of the Project Labor Agreement; provided, however that Contractor is solely responsible for such compliance, and the Project Labor Agreement and compliance thereunder are not obligations of Owner and do not excuse Contractor from, or entitle Contractor to any schedule or cost relief with respect to, its performance of Work and other obligations under this Agreement.

(ii) Contractor shall remove from any performance of the Work, and cause any Subcontractor to remove from any performance of the Work, as soon as reasonably practicable, any Person performing the Work (including any Key Personnel) who is creating a risk of bodily harm or injury to themselves or others or whose actions create a risk of material property damage. Additionally, as soon as practicable after receiving a request by Owner, Contractor shall remove such Person (including any Key Personnel) from the Site, and cause any Subcontractor to remove such Person (including any Key Personnel) from the Site.

(iii) Contractor shall also remove, and cause its Subcontractors and agents to remove, any employee, agent or other Person engaged in the performance of the Work for Contractor (including any Key Personnel) or such Subcontractor, as the case may be, whose off-Site conduct violates any Applicable Laws or Applicable Permits. If a Person is harming or having a negative effect on the perception of the Project or Owner's relationship with the surrounding community based on two or more documented incidents, Owner may provide notice to Contractor and Contractor and Owner will meet to discuss an appropriate response. If the Parties cannot otherwise agree Contractor shall remove and cause its Subcontractors and agents to remove such Person.

(c) Training of Personnel.

(i) Design and Review of Training Program. Contractor shall design the training program (in accordance with the provisions of Exhibit 1) to be used for the training of Owner's designated operating personnel in the requirements for the start-up, shut-down, operation and maintenance of, and safety, general process understanding and emergency procedures for, the Project and all of its sub-systems and shall submit such training program to Owner by no later than the date that is six (6) months prior to the scheduled Project Mechanical Completion Date, which shall include the Operating Manual and focus on the use of the Operating Manual by operating personnel. Owner will review, comment on, and approve or disapprove such program in writing within twenty-five (25)

Days after such submission by Contractor. If Owner conditions its approval on reasonable changes in the program submitted by Contractor, Contractor will effect such changes at no additional cost to Owner and resubmit the program to Owner within ten (10) Days after Contractor receives Owner's conditional approval. Owner will then have ten (10) Days after such resubmission to review, comment on the original comments, and approve or disapprove the program as resubmitted by Contractor. Such procedure shall continue with the same ten (10) Day time periods until a program is approved by Owner.

(ii) **Commencement of Training.** Commencing on the date that is six (6) months prior to the scheduled Project Mechanical Completion Date, Contractor shall train Owner's designated operating personnel in the requirements for the start-up, shut-down, operation and maintenance of, and safety, general process understanding and emergency procedures for, the Project and all of its sub-systems pursuant to the training program approved by Owner.

**2.10 Security.** Contractor shall be responsible for the proper security and protection of the Site and all Equipment and materials furnished by Contractor and the Work performed until Project Mechanical Completion. Contractor shall prepare and maintain accurate reports of incidents of loss, theft, or vandalism and shall furnish these reports to Owner in a timely manner.

**2.11 Hazardous Materials.** Contractor shall comply with the provisions of Article 12 with respect to Hazardous Materials as part of and in connection with the Work.

**2.12 Start-Up and Testing.** Contractor shall perform the start-up and testing of the Contractor Facilities, including the calibration, pre functional testing and functional testing of all controls and equipment in accordance with Exhibit 1, Exhibit 3A, Exhibit 3B, and Exhibit 14. Contractor shall conduct all start-up, synchronization, operation and testing of the Contractor Facilities in accordance with this Agreement, applicable manufacturers' instructions and warranty requirements, Applicable Laws, Applicable Standards, Applicable Permits, and any and all applicable rules as agreed to by Owner and the Contractor. Owner and its respective authorized representatives shall have the right to inspect the Work and to be present during the start-up, synchronization, operation and testing of the Contractor Facilities.<sup>10</sup>

**2.13 Clean-up; Non-Interference.** Contractor shall at all times keep the Site reasonably free from waste materials and rubbish related to the Work. Contractor shall maintain the Job Site in a neat and orderly condition throughout the performance of the Work. During the period from WTG Mechanical Completion to Final Completion, Contractor's performance of the Work shall not unreasonably interfere with the Commissioning of the WTGs or the commercial operation of the Project. Prior to the Final Completion Date or as soon as practicable after the termination of this Agreement by Owner in accordance with the provisions of Article 15, Contractor shall: (i) remove all Contractor Equipment from the Job Site (other than Equipment, supplies and materials necessary or useful to the operation or maintenance of the Project and Equipment, supplies and materials directed by Owner to remain at the Job Site until completion of the Project); (ii) clean out all conduits; (iii) tear down and remove all temporary structures on the Job Site built by it or

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<sup>10</sup> Note to Bidders: See definition of Availability Completion. Protocol for the pre functional test of each WTG prior to energization and synchronization (prior to WTG Mechanical Completion) to be provided by bidders.

its Subcontractors and restore such areas to a condition consistent with that of a newly constructed power plant; (iv) remove all waste and rubbish from and around the Job Site; and (v) re-grade areas disturbed during the Work, as required by this Agreement and the conveyances and other documentation creating the Real Property Rights. During construction of the Project, Contractor shall use commercially reasonable efforts to minimize the disruption to public roads caused by the construction process and to repair any damages caused to a public road by Contractor during the construction process. After construction, Contractor shall leave such public roads in a state of equal condition as they were prior to construction, excepting normal wear and tear.

**2.14 Delivery and Unloading of Owner-Furnished Equipment.** Contractor shall unload the WTGs in compliance with the Wind Turbine Supply Contract, and Contractor shall be responsible for any reasonable costs and demurrage resulting from Contractor's failure to unload the WTGs in accordance with the terms and conditions of the Wind Turbine Supply Contract. Contractor shall unload the step-up transformers in compliance with Exhibit 15, and Contractor shall be responsible for any reasonable costs and demurrage resulting from Contractor's failure to unload the step-up transformers in accordance with Exhibit 15.

**2.15 Interconnection.** Contractor shall be responsible for performing all Work necessary to interconnect the WTGs, the Project Substation and other components of the Work, as set forth in the Scope of Work and Technical Specifications, and in compliance with the Interconnection Agreement.

#### **2.16 Defects.**

(a) Correction of Defects. Prior to Project Mechanical Completion, Contractor shall promptly correct or cause the correction of any part of the Work that is Defective, deficient or is otherwise not in accordance with this Agreement, regardless of the stage of its completion or the time or place of discovery of such errors and regardless of whether Owner has previously reviewed or inspected or otherwise accepted such part of the Work in any way. Contractor shall bear the cost of re-performing any Defective, deficient or non-conforming Work. All internal and third party costs reasonably incurred by Owner in attending or in consequence of any re-testing or inspection necessitated by any Work that is Defective, deficient or is otherwise not in accordance with this Agreement shall be deducted from the Contract Price. In the event that any part of the Work is discovered to be in a Defective, deficient or non-conforming condition after Project Mechanical Completion, correction of such Defective, deficient or non-conforming condition shall be governed by Article 16. Acceptance of any test, Equipment or Work by Owner shall not affect any rights Owner may have under a Warranty pursuant to Article 16.

(b) Serial Defects. If any Serial Defect arises at any time prior to Project Mechanical Completion, Owner shall provide notice to Contractor of such Serial Defect or, if Contractor becomes aware of any such Serial Defect, Contractor shall provide written notice of the same to Owner. Contractor shall determine what changes, repairs or replacements to any affected items of Equipment are necessary to correct such Serial Defect and to avoid further failures of the Equipment at the Project which may not have yet experienced such failures, and Contractor shall make such necessary changes, repairs or replacements to all the Equipment installed at the Project (whether or not such Equipment is installed, has been tested or has

experienced such failures) all at its own cost and expense. Contractor shall repeat such process on an iterative basis until such Serial Defect and the underlying cause thereof is corrected.

**2.17 Cooperation.** Contractor shall cooperate with Owner in connection with Owner's efforts to obtain the approvals, certificates, Applicable Permits and Owner's Commissioning of the WTGs. Contractor acknowledges that work may be performed by others (including without limitation the Turbine Vendor and other Owner Subcontractors) at the Job Site during the execution of Work under this Agreement. Contractor further acknowledges that Owner, through itself or through its employees, Subcontractors or agents, will continue to work and perform activities in connection therewith at the Job Site during the execution of the Work under this Agreement. Contractor shall cooperate and cause its Subcontractors to cooperate with Owner, Owner's Representatives and Owner Subcontractors (including Turbine Vendor), who may be working at or near the Job Site in order to assure that neither Contractor, nor any of its Subcontractors unreasonably hinders or increases the work being done by Owner and other unrelated contractors. Contractor agrees to perform the Work in full cooperation with such others and to permit, without charge, reasonable access to, and use of, the Job Site and the Work, by said others or by Owner, whether such Work is partially or entirely complete, when, in the reasonable judgment of Owner, such access or use is necessary for the performance and completion of the work of others. All material and labor shall be furnished, and the Work performed, at such time or times as shall be for the best interest of all contractors concerned, to the end that all Work, and the work of any separate contractor, will be properly coordinated and completed in accordance with the applicable schedules and the times of completion required by this Agreement. In addition, Contractor shall use reasonable efforts, and cause its Subcontractors to use their reasonable efforts, to assist Owner in creating, assessing and carrying out programs which shall, during all phases of the Work, minimize the impacts upon the host community caused by the construction of the Project. Such programs shall include: (i) sequencing of the Work so as to minimize the impacts of noise and dust at and around the Job Site and (ii) using local labor and other resources whenever reasonably possible and cost effective. Owner shall require Owner Subcontractors to similarly cooperate with Contractor and to comply with Contractor's safety plan and safety requirements.

**2.18 Contractor's Key Personnel.** Contractor shall appoint Contractor's Key Personnel in accordance with Section 6.2.

**2.19 FAA Lighting.** Upon Owner's request, Contractor shall supply and install the FAA lighting required for each WTG. Owner shall pay Contractor the per unit price set forth on Exhibit 25 for each WTG that Contractor installs the FAA required lighting.

**2.20 FERC Electrical Plant Chart of Accounts.** Within thirty (30) Days after the Final Completion Date, Contractor shall deliver to Owner a FERC Unit of Plant Cost Allocation Book, including a FERC Electrical Plant Chart of Accounts, containing the information described in Exhibit 28 and otherwise in form and substance acceptable to Owner. Owner shall have thirty (30) Days to review such FERC Unit of Plant Cost Allocation Book and provide comments to Contractor, and Contractor shall incorporate Owner's comments therein and provide the final FERC Unit of Plant Cost Allocation Book to Owner not later than seventy-five (75) Days after the Final Completion Date.

**2.21 Notification.** To the extent not prohibited by Applicable Law, with respect to the Project, Contractor shall provide Owner, promptly and in any event within five (5) Business Days (or such other time period set forth below) following (a) Contractor's actual knowledge of its occurrence or (b) Contractor's receipt of the relevant documentation, with written:

(a) Notification of all events requiring the submission by Contractor of a report to any Governmental Authority pursuant to the Occupational Safety and Health Act;

(b) Notifications and copies of all citations by Governmental Authorities concerning accidents or safety violations at the Site and, within five (5) Business Days of such written notice, a follow up report containing a description of any steps Contractor is taking and proposes to take, if any, with respect to such accident or safety violations;

(c) Notifications and copies of all written communication to or from any Governmental Authority, relating to any breach or violation or alleged breach or violation of any Applicable Law, any Applicable Permit, Applicable Codes or any provision of the Interconnection Agreement;

(d) Updates of status of communications with insurance companies related to claims with respect to an accident, incident or occurrence at the Site or in the performance of Work;

(e) Notifications and copies of any actions, suits, proceedings, patent or license infringements, or investigations pending or threatened against it at law or in equity before any court or before any Governmental Authority (whether or not covered by insurance) that (A) if determined adversely to Contractor would have a material adverse effect on Contractor's ability to perform its obligations under this Agreement or (B) relates to the Project; and

(f) Notifications within (A) (x) one (1) Business Day after Contractor has actual knowledge of any accident related to the Work that has a material and adverse impact on the environment or on human health (including any accident resulting in the loss of life) and (y) within three (3) Business Days after Contractor has actual knowledge of any recordable, lost-time injury related to the Work and (B) ten (10) Business Days thereafter, a report describing such accident or injury, the impact of such accident or injury and the remedial efforts required and (as and when taken) implemented with respect thereto.

**2.22 Site Conditions.** Contractor has inspected the Site, including both surface and subsurface conditions, and has satisfied itself as to all matters regarding the geotechnical and physical condition thereof, including those matters related to the environment, availability and quality of water, heat and other weather conditions at the Site, physical conditions at the Site, topography and ground surface conditions (including as such conditions may impact surface water runoff), any underground utilities, sound attenuation conditions, subsurface geology and conditions, nature and quality of surface and subsurface materials to be encountered (collectively, "Site Conditions"), and shall be responsible at its sole expense for all necessary works in relation to, or because of, such Site Conditions both below and above ground (including (subject to Article 12 and Article 19) the existence of Hazardous Materials, archeological or religious sites, and monuments) on the Site in connection with Contractor's performance of the Work. Contractor

shall be solely responsible for performing any preliminary Work on the Site necessary for the commencement of construction to occur, including removal of all physical impediments to performing Work on the Site, above and below ground, and preparing the Site for the Work. Contractor specifically acknowledges and accepts the Site Conditions and agrees that no claims by Contractor for additional payment or extensions of time shall be permitted with respect to the Site Conditions on the ground of any misunderstanding or misapprehension of the matters referred to in this Section 2.22 or on the ground of incorrect or insufficient information in respect of the Site or the Site Conditions, and Contractor specifically waives any right to seek a Change Order relating to any of the foregoing. Contractor acknowledges and agrees that none of Owner, any of its Affiliates or any of its agents or representatives have made, nor shall they make, any express or implied warranty to Contractor as to Site Conditions. Additionally, Contractor shall install the piles necessary for the Project as part of the Scope of Work. If additional soil samples, other geotechnical information or information about Site Conditions are needed before the piles can be installed, this additional sampling or gathering of additional information is the sole responsibility of Contractor.

**2.23 Other Reports and Quality Control Documents.** Contractor shall provide Owner with other reports and quality control documentation relating to the Work, the Equipment, the Project and the Subcontractors as Owner may reasonably request.

**2.24 Construction Methods.** Contractor shall make itself and its Subcontractors available to discuss and shall promptly respond to any reasonable questions from Owner, Owner's Engineer, any Financing Parties or the Independent Engineer regarding construction methods or procedures used during construction of the Project.

**2.25 Real Property Rights.**

(a) Compliance with Real Property Rights. Contractor shall comply with the terms of the Real Property Rights.

(b) Access to Site. If the Real Property Rights do not allow for the currently contemplated route of access to the Site, then obtaining any additional Real Property Rights needed for alternative routes of access and the construction and use of such alternative routes of access to the Site shall be at Contractor's sole cost and expense. Contractor shall be responsible to ensure that the access to the Site is sufficient to permit cranes and other operating and rigging equipment that will be used in the performance of the Work, if any, freedom to maneuver on or about the Site.

(c) Relocation of Facilities. If any lack of necessary Real Property Rights or exercise by a counterparty of its rights under any agreement relating to the Real Property Rights requires relocation of any utilities, transmission lines or other facilities from their existing or currently planned location, Contractor shall bear the sole construction cost associated with relocating any such utilities, transmission lines or other facilities.

(d) Construction Real Property Rights. To the extent not already obtained, Contractor shall obtain any additional Real Property Rights and easements necessary for Contractor to perform the Work. Contractor shall notify Owner upon the occurrence, or potential occurrence, of a dispute, conflict, confrontation, or other similar problem, or potential problem,

involving Real Property Rights or one or more owners or occupiers of land so situated as to potentially result in a situation that would reasonably be expected to have a material adverse effect upon the performance of the Work. Owner shall cooperate with Contractor in resolving all such problems.

(e) Damage from Construction. Contractor shall be required to reimburse Owner for any payment Owner is required to make to any other party to the agreements setting forth the Real Property Rights arising out of or in connection with Contractor's performance of the Work.

(f) Acknowledgment. Contractor acknowledges that it has reviewed the Real Property Rights, confirmed adequacy of the Real Property Rights, and is satisfied that such Real Property Rights are sufficient for Contractor to perform the Work hereunder.

**2.26 Tax Abatement Requirements.** Contractor acknowledges that Owner expects to obtain the sales and property tax abatements applicable to the Project under Utah law and recognizes that such abatements place specific requirements on Contractor and the construction of the Project. In connection therewith, Contractor agrees and warrants that all Work will be carried out in all respects necessary to fully comply with the requirements of [*Utah Code Provisions*], and any regulations promulgated thereunder, and Contractor agrees to cooperate with all requests by Owner in connection therewith.

**2.27 Taxes.** Contractor represents and warrants: (i) Contractor has not and will not claim production tax credits or investment tax credits under Code sections 45 or 48 with respect to any portion of the Project, Equipment, or Work; (ii) Contractor has not and will not claim depreciation deductions under Code sections 167 or 168 with respect to any portion of the Project, Equipment, or Work; (iii) No portion of the Project, Equipment, or Work as described in Code section 168(g)(1)(D); (iv) Contractor has acquired and held the Project, Equipment, and Work for sale in the normal course of its business of constructing and selling wind powered electrical generating facilities to third parties; (v) There has been no "original use" (within the meaning of Code section 48) of the Project, Equipment, or Work, other than original use by Owner; and (vi) No portion of the Project, Equipment, or Work has been or will be Placed in Service other than by Owner.

## ARTICLE 3

### SUBCONTRACTORS

#### 3.1 Suppliers and Subcontractors.

(a) Set forth in Exhibit 22 is a schedule of qualified Major Subcontractors who, notwithstanding anything to the contrary herein, Contractor shall be entitled to engage in furtherance of Contractor's obligations under this Agreement without the consent of Owner. Contractor shall notify Owner of any proposed additional Major Subcontractors or replacements thereof with whom Contractor anticipates engaging. Owner shall have the right to review and approve such engagement, such approval not to be unreasonably withheld or delayed. Contractor shall update and amend Exhibit 22 by notice to Owner from time to time as necessary to reflect



approved additions or changes thereto, provided Contractor may not change the supplier of WTGs without Owner's express written consent in its sole discretion.

(b) No Subcontract shall bind or purport to bind Owner, but each Major Subcontract shall (i) provide that the Subcontractor expressly agrees, upon Owner's request if this Agreement is terminated, to the assignment of such Major Subcontract to, at Owner's request, Owner, a Financing Party or any successor engineering, procurement and construction contractor to Contractor, (ii) incorporate by reference and flow down the provisions of this Agreement to the work or services performed by such Subcontractor, irrespective of whether such provisions are expressly made to so apply, including any provisions related to standards of performance, safety, insurance, indemnification, liability, choice of law and dispute resolution (iii) provide that Owner, any Financing Party or any successor engineering, procurement and construction contractor are a third-party beneficiary under such Major Subcontract.

(c) The use by Contractor of any Subcontractor shall not (i) constitute any approval of the Work undertaken by any such Subcontractor, (ii) relieve Contractor of its duties, responsibilities, obligations or liabilities hereunder, (iii) relieve Contractor of its responsibility for the performance of any work rendered by any such Subcontractor or (iv) create any relationship between Owner, on the one hand, and any such Subcontractor, on the other hand, or cause Owner to have any responsibility for the actions or payment of such Subcontractor. As between Owner and Contractor, Contractor shall be solely responsible for the acts, omissions or defaults of its Subcontractors and any other Persons for which Contractor or any such Subcontractor is responsible (with the acts, omissions and defaults of its Subcontractors and any such other Person being attributable to Contractor).

(d) In no event shall any act or omission by any Subcontractor constitute a Force Majeure Event except to the extent caused by an event or circumstance that itself constituted a Force Majeure Event.

(e) Until the Final Completion Date, Contractor shall furnish Owner with (i) claims, notices of claim, and other information relating to disputes with any Subcontractor and (ii) such information with respect to any Subcontractor as Owner may reasonably request; it being understood and agreed that information that Owner may reasonably request may include technical specifications, drawings, operating and maintenance manuals, Spare Parts lists, sourcing information for Spare Parts and consumables, inspection and test reports and training materials relative to the Work. Until the expiry of the Warranty Period, Contractor shall furnish Owner with reports received from the Subcontractors or other Persons relating to recall notices, defect notices or other similar product communications.

**3.2 Insurance.** Contractor and each Subcontractor shall obtain and maintain insurance required in accordance with Article 18 and Exhibit 13.

## ARTICLE 4

### CONTRACT PRICE

**4.1 Contract Price.** As full compensation for the Work and all of Contractor's obligations hereunder, Owner shall pay to Contractor, and Contractor agrees to accept as full compensation for the Work, the Contract Price. All payments due and payable to Contractor shall not exceed the applicable amount for such period in the Cash Flow Curve set forth in the Schedule of Values. The Contract Price shall be adjusted only as expressly provided under the terms of this Agreement and is otherwise firm and fixed and, except as otherwise indicated in this Article 4 below, shall be deemed to include all expenses to be incurred by Contractor related to Contractor's performance of its obligations under this Agreement. The Contract Price includes all Taxes except Owner Taxes as provided in this Article 4, as well as all permit fees related to all Contractor Acquired Permits and assistance provided by Contractor in acquiring all Owner Acquired Permits and any other obligation of Contractor hereunder. The Contract Price shall be paid by Owner to Contractor in accordance with the terms of this Article 4.

### **4.2 Payments.**

(a) Owner shall pay the Contract Price according to the Schedule of Values. Each Progress Payment shall be due and payable only to the extent it is supported by the completion of the corresponding Work set forth in the Schedule of Values for the payment of such Progress Payment. Subject to and in accordance with any mutually agreed upon Change Order, in no circumstance shall Owner have an obligation to pay any Application for Payment in amounts in excess of the Schedule of Values.

(b) Within thirty (30) Days after the acceptance of the Project Mechanical Completion Certificate, Owner shall release to Contractor the Retainage, less an amount equal to the Punch List Holdback for all Punch List Items that have not been completed at such time pursuant to the terms hereof. On the Final Completion Date, concurrent with the payment for the Final Completion, Owner shall release to Contractor any remaining Punch List Holdbacks then held by Owner. Any interest accruing on the Retainage shall accrue for the account of Owner and not Contractor.

(c) If Contractor fails to perform any Punch List Item on the Punch List within sixty (60) Days after the Project Mechanical Completion Date, Owner may elect by written notice to Contractor to retain the Punch List Holdback applicable to such Punch List Item and complete such Punch List Item itself. Upon Owner making such election, Contractor shall forfeit any return of such portion of the Punch List Holdback and Contractor's obligation to perform such Punch List Item shall be deemed satisfied.

**4.3 Milestone Assessment.** Contractor and Owner shall periodically, and in any event at least once each month, review the Work completed and assess the progress of on-Site Work completed and completion of the relevant Milestone. Owner's Engineer and any Independent Engineer may be present during such review and assessment of the Work.

**4.4 Application for Payment.** On or before the tenth (10<sup>th</sup>) Day of each month during the performance of the Work, Contractor shall submit to Owner an Application for Payment (in the form of Exhibit 10) with respect to that portion of the Work (including Punch List Items) which Contractor has satisfactorily completed during that month and for which Contractor has not been previously paid. Each Application for Payment shall set forth, as the amount of the Contract Price Contractor is entitled to be paid for such month, with respect to the items of Work set forth in the Schedule of Values, the aggregate of the amounts obtained by multiplying (x) the value of each item of Work set forth in the Schedule of Values and (y) that portion of such item of Work, expressed as a percentage, which has been satisfactorily completed during such month, as verified and approved by Owner, less (z) Retainage (for such month, the “Progress Payment”). Each Application for Payment shall be reasonably detailed and shall be accompanied by supporting Documentation evidencing the achievement of the Milestone pursuant to the Schedule of Values for which the Progress Payment is being requested, shall be accompanied by lien waivers required to be delivered pursuant to Section 4.5 and shall be sent by either (i) written notice, or (ii) electronic mail and confirmed by first class mail (with the date of receipt of the original by first class mail to be the date of receipt). In addition, as a condition precedent to Owner’s obligation to make payment, Contractor shall be current in its delivery of Monthly Progress Reports, Weekly Progress Reports and other Documentation required for all periods through the month for which payment is requested. In no event shall the aggregate amounts invoiced by Contractor or payable by Owner under each Application for Payment exceed the aggregate amount of the Contract Price payable cumulatively through such month according to the Cash Flow Curve. Owner shall make all payments of undisputed amounts when they become due, but in any event, no later than thirty (30) Days after receipt of the Application for Payment; provided that the payments in respect of any Application for Payment with respect to Project Mechanical Completion shall be due within thirty (30) Days after Owner’s acceptance of the Project Mechanical Completion Certificate. If Owner disputes a portion of an Application for Payment, Owner shall notify Contractor of such Dispute and shall pay to Contractor the undisputed portion in accordance with this Section 4.4. If such dispute is resolved within thirty (30) Days after receipt of the Application for Payment, Owner shall make payment of such resolved amounts within thirty (30) Days after resolution of the dispute. No partial payment made under this Agreement shall be construed to be an acceptance or approval by Owner of any part of the Work or to relieve Contractor of any of its obligations under this Agreement. Contractor shall be responsible for paying or ensuring the payment of all Subcontractors in connection with the Work completed by the Subcontractors in accordance with the terms of their Subcontracts.

**4.5 Lien Releases.** Contractor shall submit with each Application for Payment a conditional partial lien release in the form set forth in Exhibit 12A for the amount requested in the current Application for Payment in respect of work performed or materials delivered on the Site during the period covered by such Application for Payment. Both Contractor and its Major Subcontractors shall provide Owner a conditional final lien release in the form set forth in Exhibit 12B as a condition precedent to payment by Owner of the final Application for Payment. In addition to the lien releases described in this Section 4.5, Contractor shall deliver to the Title Company, as and when required by the Title Company in order to issue title insurance to any Financing Party and to provide an endorsement thereto with respect to mechanic’s liens pending disbursement coverage, (a) Contractor’s sworn statement and (b) a mechanic’s lien subordination agreement, each executed by Contractor and in form and substance acceptable to the Title Company.

**4.6 Release of Liability.** Contractor's acceptance of payment of the Application for Payment for Final Completion shall constitute a release by Contractor of Owner from all liens (whether statutory or otherwise and including mechanics' or suppliers' liens), claims and liability with respect to the payment of the Contract Price or any event or circumstance that would entitle Contractor to request a Change Order in respect of any event that occurs prior to Final Completion, except claims for which Contractor has delivered a dispute notice to Owner, claims that are based on facts or circumstances arising after Final Completion and claims arising under Article 19. No payment by Owner shall be deemed a waiver by Owner of any obligation of Contractor under this Agreement.

**4.7 Overdue Payments.** Overdue payment obligations of either Party hereunder shall bear interest from the date due until the date paid at a rate per annum equal to the lesser of (a) the rate published by the *Wall Street Journal* as the "prime rate" on the Business Day preceding the date on which such interest begins to accrue plus two percent (2%) and (b) the maximum rate allowed under Applicable Law.

**4.8 Disputed Payments.** Failure by Owner to pay any invoiced amount disputed in good faith until such dispute has been resolved in accordance with Article 23 shall not alleviate, diminish, modify or excuse the performance of Contractor or relieve Contractor's obligations to perform hereunder, subject to the provisions of such Article 23. Contractor's acceptance of any payment, and Owner's payment of any invoiced amount, shall not be deemed to constitute a waiver of amounts that are then in dispute. Contractor and Owner shall use reasonable efforts to resolve all disputed amounts expeditiously and in any case in accordance with the provisions of Article 23. No payment made hereunder shall be construed to be acceptance or approval of that part of the Work to which such payment relates or to relieve Contractor of any of its obligations hereunder. If an Application for Payment was properly submitted in accordance with all of the provisions of this Agreement and amounts disputed by Owner with respect to such Application for Payment are later resolved in favor of Contractor, Owner shall pay interest on such disputed amounts due to Contractor, at the interest rate set forth in Section 4.7, from the date on which such payment was originally due under Section 4.4 until the date such payment is actually received by Contractor. If amounts disputed in good faith that have been paid by Owner are later resolved in favor of Owner, Contractor shall refund any such payment and pay interest on such payment at the interest rate set forth in Section 4.7, from the date on which the payment was originally made by Owner until such refunded payment is received by Owner.

**4.9 Contractor Performance Security.** On the Effective Date, Contractor shall deliver to Owner and maintain in full force and effect the Contractor Performance Security in the form set forth in Exhibit 11. If Contractor fails to deliver the Contractor Performance Security or the issuer thereof repudiates or breaches its obligation to pay or perform thereunder, Owner shall be excused from paying any Progress Payments until such time as Contractor shall have delivered replacement contractor performance security in a form acceptable to Owner in its sole discretion.

**4.10 Holdback.**

(a) Any provision hereof to the contrary notwithstanding, upon the occurrence and continuance of any of the following events, Owner, upon notice to Contractor, may, but shall have no obligation to, withhold or retain such portion (including all) of any payment due to

Contractor under this Agreement as reasonably necessary to ensure the performance of the Work, to cover one hundred fifty percent (150%) of the Losses or reasonably anticipated Losses to Owner related to such event, or to otherwise protect fully Owner's rights hereunder:

- (i) A Contractor Event of Default shall have occurred;
- (ii) Contractor shall have failed to timely make undisputed payments to its Subcontractors for material or labor used in the Work and Owner is not in breach of its obligations to pay Contractor;
- (iii) Owner in good faith shall have determined based upon the Construction Schedule that Contractor cannot with prompt and reasonable acceleration of the Work achieve Scheduled Final Completion Date; provided, however, that amounts withheld or retained on account of this Section 4.10(a)(iii) shall not exceed the amount of any Mechanical Completion Delay Liquidated Damages which would be payable under Section 7.8(c); or
- (iv) Any part of such payment shall be attributable to Work that contains a defect or has not been performed in accordance with the terms of this Agreement.

(b) No payment made under this Section 4.10 shall be construed to be acceptance or approval of that part of the Work to which such payment relates or to relieve Contractor of any of its obligations hereunder. Should any dispute arise with respect to Owner's exercise of its rights under this Section 4.10, such dispute shall be subject to resolution in accordance with the expedited payment dispute procedures provided in Article 23. Contractor shall not have any rights of termination or suspension under Section 15.4 as a result of Owner's exercise or attempted exercise of its rights under this Section 4.10.

**4.11 Setoff.** Notwithstanding any other provision in this Agreement, Owner shall be entitled to set off against any amount it owes to Contractor under this Agreement, any undisputed amount(s) that either (a) Contractor owes to Owner under this Agreement or (b) Contractor or any Affiliate of Contractor owes to Owner under the Project Transaction Documents.

**4.12 Taxes.** The Contract Price includes any and all Taxes imposed under Applicable Law on Contractor, the Subcontractors, the Work, the construction or sale of Equipment to Owner or installation of the Project, except for Owner Taxes. In addition to the Contract Price, Owner assumes exclusive liability for and shall pay all Owner Taxes. Contractor and Owner agree to cooperate with each other to minimize the Tax liability of both Parties to the extent legally permissible and commercially reasonable for such Party. Contractor shall provide Owner with such assistance as may be reasonably requested by Owner in demonstrating eligibility for exemptions or exclusions from such Taxes (and any other Tax exemptions) to the relevant Governmental Authority, including as provided in Section 2.26. Contractor shall, in accordance with Applicable Law, timely administer and timely pay all Taxes that are included in the Contract Price and timely furnish to the appropriate taxing authorities all required information and reports in connection with such Taxes and furnish copies of such information and reports (other than information specifically pertaining to Contractor's income and profit) to Owner as reasonably requested by Owner and within thirty (30) Days after any request from Owner, Contractor shall

provide Owner with any other information regarding allocation of quantities, descriptions, and costs of property provided by Contractor and installed as part of the Project that is necessary in connection with the preparation of Owner's tax returns or as a result of an audit by a taxing authority. The Owner or its designee shall be entitled to all tax benefits associated with the Project, and Contractor will have no claim with respect to such benefits.

## **ARTICLE 5**

### **OWNER RESPONSIBILITIES**

**5.1 Access.** From the Effective Date until the Project Mechanical Completion Date, Owner shall provide Contractor with reasonable access to the Site as suitable and necessary for Contractor to complete the Work and perform its obligations in accordance with this Agreement. From the Project Mechanical Completion Date until the Final Completion Date, Owner shall provide Contractor with reasonable access to the Site as suitable and necessary for Contractor to complete the Punch List Items. Owner shall also provide Contractor with access to the SCADA System (consistent with Section 20.2). Owner shall provide reasonable access to the Site for Contractor to complete work in connection with the Warranties. Notwithstanding the foregoing, Contractor's access shall be subject to the terms of the Real Property Rights and any lack of access due to Contractor's failure to comply with the Real Property Rights or otherwise with the terms of this Agreement shall not be considered a breach by Owner.

**5.2 Compliance with Laws and Permits.** Owner shall at all times fully comply with Applicable Laws and Applicable Permits. Owner shall obtain and maintain in full force and effect all Owner Acquired Permits.

**5.3 Owner Scope.** Owner shall perform any obligations clearly identified as being Owner's responsibility pursuant to Exhibit 1. In connection with Owner's obligations under this Agreement, Owner shall be entitled to hire any third party quality consultants to advise Owner concerning the quality control and performance of the Project.

**5.4 Owner's Representative.** Owner shall appoint an Owner's Representative in accordance with Section 6.1.

**5.5 Insurance.** Owner shall obtain and maintain insurance required in accordance with Article 18.

**5.6 Cooperation.** Owner shall, and shall cause its contractors and their respective hired personnel (including Turbine Supplier) to, cooperate with Contractor and Subcontractors in coordinating the work of Owner's contractors and personnel who are working at or near the Site with the Work being performed by any Contractor Party or Subcontractor at or near the Site.

**5.7 Owner-Provided Information.** Owner, or its Affiliates, or their respective employees, representative and agents (or Owner's Engineer) may provide Contractor with opinions, recommendations and other statements or information and Contractor acknowledges that all such opinions, recommendations, statements and information have been or will be provided as background information and as an accommodation to Contractor. Contractor further acknowledges that neither Owner nor any of its Affiliates or their respective employees,

representative or agents (nor Owner's Engineer) makes any representations or warranties with respect to the accuracy of such information (including oral statements) or opinions expressed. Contractor further agrees, represents and warrants that it is not relying on Owner or Owner's Affiliates, or any of their respective employees, representatives or agents (or Owner's Engineer) for any information, data, inferences, conclusions, or other information with respect to Site Conditions, including the surface and sub-surface conditions of the Site and the surrounding areas, or the design of the Project, the Work, or otherwise.

**5.8 Conditions Precedent to Owner's Obligations.** Owner's obligations under this Agreement are subject to the fulfillment or waiver by Owner of each of the following conditions:

- (a) Owner has issued a Full Notice to Proceed to Contractor hereunder; and
- (b) Owner has received all required board and management approvals to authorize the issuance of such Full Notice to Proceed.

Contractor acknowledges that the decision whether or not to grant such approvals are in the sole, unreviewable discretion of Owner's board of directors and management; provided, however, that Contractor is entitled to assume that if Owner issues a Full Notice to Proceed, Owner has obtained all board and management approvals necessary to authorize such issuance.

## **ARTICLE 6**

### **REPRESENTATIVES; KEY PERSONNEL**

**6.1 Owner's Representative.** Owner designates, and Contractor agrees to accept, [ ] as "Owner's Representative" (the "Owner's Representative") for all matters relating to this Agreement and Contractor's performance of the Work (except as otherwise stated in this Agreement). The acts and omissions of Owner's Representative with respect to this Agreement are deemed to be the acts and omissions of Owner and shall be fully binding upon Owner. Owner may, upon written notice to Contractor pursuant to Article 22, change the designated Owner's Representative.

**6.2 Contractor's Key Personnel and Contractor's Representative.** Contractor designates, and Owner accepts, those individuals set forth on Exhibit 5 (the "Key Personnel") for all matters relating to Contractor's performance under this Agreement. The individual designated by Contractor on Exhibit 5 as "Contractor's Representative" (the "Contractor's Representative") shall have full responsibility for the prosecution and scheduling of the Work and any issues relating to this Agreement. If Contractor elects to replace Key Personnel, it shall promptly deliver a notice to Owner with the name and résumé of the proposed replacement individual. Owner shall have the right to approve any such replacement of Key Personnel, provided, however, that such approval shall not be unreasonably withheld or delayed. The actions taken by Contractor's Representative are deemed to be the acts of Contractor.

**6.3 Power to Bind.** The Parties shall vest, respectively, Owner's Representative and Contractor's Representative with sufficient powers to enable them to assume the obligations and exercise the rights of each Party, as applicable, under this Agreement.

**6.4 Notices.** Notwithstanding Section 6.1, Section 6.2, and Section 6.3, all amendments to this Agreement, Change Orders, notices and other communications between Contractor and Owner contemplated herein shall be delivered in writing and otherwise in accordance with Article 22.

## **ARTICLE 7**

### **COMPLETION OF WORK**

**7.1 Access Road Completion.** Contractor shall achieve Access Road Completion on or before the Guaranteed Access Road Completion Date and otherwise in accordance with the requirements of this Agreement. “Access Road Completion” shall mean that Contractor has achieved completion of the following:

- (a) the access roads to each applicable Foundation,
- (b) the turning radius (which such turning radii satisfy the requirements set forth in the Wind Turbine Supply Contract) that are necessary for the public roads in the State of [state project is located in] and from the public roads to the private access roads,
- (c) and other road improvements and work necessary to permit the delivery of the Wind Turbine Generator (including the Tower) to each Foundation, and otherwise in accordance with the requirements of this Agreement, and
- (d) Owner has accepted or is deemed to have accepted an Access Road Completion Certificate with respect to such Work pursuant to Section 7.7.

**7.2 Foundation Completion.** Contractor shall achieve Foundation Completion with respect to each individual Foundation on or before the Milestone Date therefor and otherwise in accordance with the requirements of this Agreement. “Foundation Completion” means with respect to a Foundation the achievement of the following with respect to each individual Foundation:

- (a) such Foundation is mechanically completed and installed in accordance with the Technical Specifications and the requirements of this Agreement;
- (b) such Foundation is structurally complete and contains all necessary embedded inserts;
- (c) the concrete portion of such Foundation has cured so as to have achieved the minimum strength necessary to allow assembly, erection and installation of the base Tower of the WTG thereon;
- (d) backfilling of the area surrounding such Foundation has been completed;
- (e) Contractor has documented any changes to each Foundation and the Infrastructure Facilities (both above-ground and below-ground in the immediate surrounding area of the such Foundation); and



(f) Owner has accepted or is deemed to have accepted a Foundation Completion Certificate with respect to such Work pursuant to Section 7.7.

**7.3 Electrical Works Completion.** Contractor shall achieve Electrical Works Completion on a per-circuit basis and otherwise in accordance with the requirements of this Agreement. “Electrical Works Completion” with respect to an individual circuit of Electrical Works and equipment associated therewith means the achievement of the following milestones:

- (a) The padmount foundations have been completed;
- (b) all of the Electrical Works including the installation of all grounding, necessary to energize the WTGs, are completed in accordance with the requirements of this Agreement;
- (c) subject to Punch List Items, all materials and equipment associated with such Electrical Works have been installed in accordance with the Technical Specifications, the Commissioning checklist set forth in Exhibit 1 and Exhibit 3B, and the other requirements of this Agreement and checked for adjustment;
- (d) such Electrical Works and all other Infrastructure Facilities necessary to achieve connection of such WTGs to the electricity transmission system interconnected at the Project Substation, are energized;
- (e) all of the Electrical Works necessary to achieve connection of such padmount transformers to the Project Substation in accordance with this Agreement have been installed, insulated, protected and tested, including synchronization with such system;
- (f) subject to Punch List Items, all of such Electrical Works have been properly constructed, installed, insulated and protected where required for such operation, correctly adjusted, tested and commissioned, are mechanically, electrically and structurally sound as set forth in the Technical Specifications, and can be used safely in accordance with the Contract Documents, Applicable Laws and Applicable Standards;
- (g) Contractor has prepared and submitted a list of Punch List Items with respect to such circuit of Electrical Works; and
- (h) Owner has accepted or is deemed to have accepted an Electrical Works Completion Certificate with respect to such Electrical Works pursuant to Section 7.7.

**7.4 Mechanical Completion of WTGs.** Contractor shall cause WTG Mechanical Completion with respect to each WTG to occur on or before the Guaranteed Mechanical Completion Date and otherwise in accordance with the requirements of this Agreement. “WTG Mechanical Completion” means, as to a WTG, the achievement of the following:

- (i) Foundation Completion and valid delivery and acceptance by Owner of a Foundation Completion Certificate with respect to such WTG;

(ii) subject to Punch List Items, such WTG is assembled, erected and installed so as to be demonstrably completed in accordance with the Technical Specifications, the WTG Mechanical Completion Certificate set forth in Exhibit 17A, the Wind Turbine Supply Contract and the other requirements of this Agreement;

(iii) subject to Punch List Items, all materials and equipment associated with such WTG have been installed in accordance with the Technical Specifications and verified in accordance with the installation checklists set forth in Exhibit 14;

(iv) Contractor has prepared and submitted a list of Punch List Items with respect to such WTG or other component;

(v) the WTG is ready to commence Commissioning;

(vi) Electrical Works Completion with respect to the Electric Works circuit line to which the WTG is connected and valid delivery and acceptance by Owner of an Electric Works Completion Certificate with respect to such circuit;

(vii) Turbine Vendor acknowledges that all Work necessary for Turbine Vendor to commence to Commission the WTG has been successfully completed by Contractor; and

(viii) Owner has accepted or is deemed to have accepted a WTG Mechanical Completion Certificate with respect to such WTG pursuant to Section 7.7.

(a) Commissioning of WTGs. Upon receipt by Owner of a WTG Mechanical Completion Certificate with respect to a WTG and promptly after Owner's countersignature thereof as provided in Section 7.7, Owner shall commence or shall cause to be commenced, with Contractor's cooperation and assistance, commissioning of such WTG; provided however, Contractor's obligation to provide assistance pursuant to this Section 7.4(a) shall be limited to providing information, access, lockout/tagout and assistance solely relating to the interface between Contractor's Work and the work of the Turbine Vendor.

(b) Punch List. In connection with and as a condition to the achievement of Electrical Works Completion for a particular circuit and the achievement of WTG Mechanical Completion as to each WTG, Contractor shall develop a list (each, an "Interim Punch List") setting forth parts of the Work which remain to be performed in order to confirm that the Work fully complies with the terms of this Agreement. Contractor agrees that installation of the fiber optic cable and connection to the Project's SCADA system is not an Interim Punch List Item. In addition to Contractor providing the Interim Punch List to Owner in accordance with this Article 7, Contractor shall also promptly provide a copy of such list to Owner upon Owner's request. Contractor shall make such revisions to such list as and when requested by Owner from time to time.

(i) As a condition to Project Mechanical Completion, Contractor shall prepare and submit to Owner a comprehensive list (the "Punch List") setting forth remaining Punch List Items, including any items from the Interim Punch Lists that have

not been completed and also including a listing of Contractor deliverables required to be provided to Owner hereunder as a prerequisite to the achievement of Final Completion, including without limitation, Lien releases, As-Built Drawings, and other required documentation, as well as performance of Job Site clean-up and other post-construction activities, and also including Contractor's reasonable estimate of the cost to complete each such Punch List Item. Contractor shall make such revisions to the Punch List as and when reasonably requested by Owner from time to time.

(ii) The Owner shall reasonably estimate the cost to complete all items on the Punch List that have not been completed. The Parties agree that with respect to Punch List Items that remain uncompleted and which are preventing Final Completion, it may be more expedient for Owner to complete such Punch List Items, at its sole election and option. If Owner so elects, at its sole discretion, Owner may, in lieu of requiring Contractor to complete the Punch List Items, require Contractor to pay to Owner an amount equal to one hundred percent (100%) of the commercial value of the remaining Punch List Items as established as provided above in this Section 7.4(b). Upon such election by Owner, such Punch List Items shall be deemed removed from the Punch List. Owner shall have the right to offset such amount owed by Contractor against any amounts owed by Owner to Contractor at Final Completion or otherwise under this Agreement.

**7.5 Project Mechanical Completion.** Contractor shall cause Project Mechanical Completion to occur timely following WTG Mechanical Completion of each of the WTGs and otherwise in accordance with the requirements of this Agreement. "Project Mechanical Completion" means the achievement of the following:

(i) WTG Mechanical Completion has occurred with respect to each WTG;

(ii) except for Punch List Items, all WTGs have been properly assembled, erected, installed, is mechanically, electrically and structurally sound as set forth in the Technical Specifications, so that it can be used safely in accordance with this Agreement, Applicable Laws and Applicable Standards;

(iii) Contractor has prepared and submitted to Owner the final and complete Punch List in accordance with Section 7.4(b);

(iv) Contractor has delivered three (3) draft copies of the Job Books (which include Operating Manuals) in accordance with Section 2.8(i);

(v) all quality assurance documentation has been provided to Owner in accordance with the Quality Assurance Plan and all non-conforming quality assurance issues have been resolved in accordance with the Quality Assurance Plan;

(vi) Contractor has provided appropriate and timely training as required hereunder; and

(vii) Owner has accepted or is deemed to have accepted a Project Mechanical Completion Certificate pursuant to Section 7.7.

(a) Punch List Work. Notwithstanding achievement of Project Mechanical Completion, Contractor shall remain obligated to complete the Punch List Items in accordance with this Agreement. Contractor shall give Owner written notice at least five (5) Business Days prior to declaring that Project Mechanical Completion has occurred and shall provide on such date a written Punch List. Owner shall be entitled to verify and, if necessary, correct or add to, the list of Punch List Items provided by Contractor. Contractor agrees to update such Punch List from time to time (but not less often than monthly) after Project Mechanical Completion and until Final Completion.

**7.6 Final Completion.** Contractor shall cause Final Completion to occur on or before the Scheduled Final Completion Date. “Final Completion” means the achievement of the following as to the Project:

(a) Project Mechanical Completion has been achieved in accordance with Section 7.5;

(b) Contractor has performed all of the Work such that the Project may be operated as a fully-integrated wind-powered electricity generating plant and all the tests, electrical continuity and ground fault tests have been successfully completed and any Defects found have been corrected;

(c) the Contractor Facilities are capable of being operated in a safe and proper manner in accordance with Applicable Laws and Applicable Permits (including for this purpose all variances or waivers of any Applicable Permits if such variances or waivers are final, irrevocable and permanent modifications to the requirements of Applicable Law or Applicable Permits);

(d) Owner has received a final list and summary of the work performed by all Subcontractors and verification of the payment thereof or bonds protecting Owner that are reasonably acceptable to Owner;

(e) any and all Liens in respect to the Project, this Agreement, the Equipment, the Job Site or any fixtures, personal property or Equipment included in the Work created by, through or under, or as a result of any act or omission of, Contractor or any Subcontractor or other Person providing labor or materials in connection with the Work shall have been released or bonded in form satisfactory to Owner (provided that Contractor’s final lien waiver, in substantially the form of Exhibit 12B attached hereto from Contractor and Subcontractor’s final lien waivers in the form of Exhibit 12B attached hereto from each Major Subcontractor or bonds protecting Owner that are reasonably acceptable to Owner, shall be given concurrently with Final Completion and payment of amounts due by Owner in connection therewith);

(f) all of Contractor’s supplies, personnel and waste have been removed from the Site and Contractor has satisfied all of its clean-up obligations hereunder;

(g) all Punch List Items have been corrected or performed and all other Work required to be completed by Contractor has been performed in each case to Owner’s reasonable satisfaction;

(h) the Contractor Facilities have been constructed in accordance with this Agreement and the Contractor Submittals and the final plans accurately reflect the Project as constructed;

(i) Contractor shall have paid all Mechanical Completion Delay Liquidated Damages due under this Agreement, if any;

(j) all As-Built Drawings and documentation shall have been delivered to, and accepted by, Owner; and

(k) Owner has accepted or is deemed to have accepted a Final Completion Certificate pursuant to Section 7.7.

**7.7 Achievement of Access Road Completion, Foundation Completion, Electrical Works Completion, WTG Mechanical Completion, Availability Completion, Project Mechanical Completion, and Final Completion.** When Contractor believes that it has achieved any of Access Road Completion, Foundation Completion, Electrical Works Completion, WTG Mechanical Completion, Availability Completion, Project Mechanical Completion or Final Completion, it shall deliver to Owner a completed Access Road Completion Certificate, Foundation Completion Certificate, Electrical Works Completion Certificate, WTG Mechanical Completion Certificate, Availability Completion Certificate, Project Mechanical Completion Certificate or Final Completion Certificate, as the case may be. Such certificate shall include the results of all testing relevant to achievement of such milestone and otherwise contain sufficient detail to enable Owner to determine that Contractor has achieved Access Road Completion, Foundation Completion, Electrical Works Completion, WTG Mechanical Completion, Availability Completion, Project Mechanical Completion or Final Completion, as the case may be.

(a) Owner shall, within five (5) Business Days, in the case of an Access Road Completion Certificate, Foundation Completion Certificate, Electrical Works Completion Certificate, or a WTG Mechanical Completion Certificate and ten (10) Business Days, in the case of an Availability Completion Certificate, Project Mechanical Completion Certificate or Final Completion Certificate, following receipt of such certificate, either (a) deliver to Contractor a countersigned Access Road Completion Certificate, Foundation Completion Certificate, Electrical Works Completion Certificate, WTG Mechanical Completion Certificate, Availability Completion Certificate, Project Mechanical Completion Certificate or Final Completion Certificate, as the case may be, indicating its acceptance of the achievement of such milestone, or (b) if reasonable cause exists for doing so, notify Contractor in writing that such milestone has not been achieved, stating in detail the reasons therefor. If Owner fails to notify Contractor of its acceptance or rejection of any of the foregoing certificates within the relevant time frame set forth in this paragraph, such certificate shall be deemed accepted by Owner.

(b) If Owner delivers the notice under the preceding clause (b), Contractor shall promptly either (i) notify Owner that Contractor disputes Owner's determination or (ii) take such action, including the performance of additional Work, to achieve such milestone, and upon completion of such actions shall issue to Owner another certificate with respect to such milestone pursuant to this Section 7.7. Such procedure shall be repeated as necessary until such milestone

has been achieved (whether by Owner's affirmative acceptance or deemed acceptance or by a determination made pursuant to the dispute resolution procedures of this Agreement). For the purposes of this Agreement, the date of achievement of Access Road Completion, Foundation Completion, Electrical Works Completion, WTG Mechanical Completion, Availability Completion, Project Mechanical Completion or Final Completion, as the case may be, shall be the date on which Contractor delivers to Owner, respectively, the Access Road Completion Certificate, Foundation Completion Certificate, Electrical Works Completion Certificate, WTG Mechanical Completion Certificate, Availability Certificate, Project Mechanical Completion Certificate or Final Completion Certificate that Owner ultimately accepts or is deemed to have accepted or, pursuant to a determination under the dispute resolution procedures, should have accepted. If Contractor disputes any rejection by Owner of a certificate submitted in accordance with this Section 7.7, Contractor shall proceed with further Work as directed by Owner under protest, reserving the right to submit a claim under Article 10 for the additional Work required by Owner.

## **7.8 Completion Guarantees.**

(a) Guaranteed Access Road Completion Date. Contractor guarantees that it shall achieve Access Road Completion on or before the Guaranteed Access Road Completion Date.

(b) Guaranteed Mechanical Completion Date. Contractor guarantees that it shall achieve Project Mechanical Completion on or before the Guaranteed Mechanical Completion Date.

(c) Mechanical Completion Delay Liquidated Damages.

(i) Obligation to Pay. Owner and Contractor acknowledge and agree that in the event of any failure to achieve, as required by Section 7.8(b), Project Mechanical Completion on or before the Guaranteed Mechanical Completion Date, such failure will directly cause substantial damage to Owner, which damage cannot be ascertained with reasonable certainty. Accordingly, if Contractor fails to achieve Project Mechanical Completion before the Guaranteed Mechanical Completion Date, it shall pay to Owner, as liquidated and agreed damages and not as a penalty, an amount equal to the following: \$[\_\_\_\_\_] /day (the "Mechanical Completion Delay Liquidated Damages").<sup>11</sup>

(ii) Reasonable Amount; Exclusive Remedy. It is understood and agreed between the Parties that the terms, conditions and amounts fixed pursuant to this Article 7 as Mechanical Completion Delay Liquidated Damages for failure to achieve the Guaranteed Mechanical Completion Date are reasonable, considering the damages that Owner would sustain in any of such events, and that these amounts are agreed upon and fixed as liquidated damages because of the difficulty of ascertaining the exact amount of damages that would be sustained as a result of delay in achieving Project Mechanical Completion. Subject to Owner's rights pursuant to Section 7.8 and Section 15.1, payment of Mechanical Completion Delay Liquidated Damages is the exclusive remedy for delays in achieving Project Mechanical Completion. Contractor hereby waives any rights or

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<sup>11</sup> Note to Bidders: Please provide liquidated damages to be included in definitive BOP EPC.

defenses that it may have under law that any liquidated damage payable hereunder is a penalty or otherwise void under law.

(iii) Accrual; Payment. Contractor's obligation to pay Mechanical Completion Delay Liquidated Damages when and as provided in this Section is an absolute and unconditional obligation, and shall not be released, discharged, diminished, or in any way affected by (i) any default by Owner in the performance or observance of any of its obligations hereunder, or any offset rights of Contractor pursuant to Section 7.8(e), provided in either case that Owner has paid all undisputed amounts due at such time to Contractor hereunder, (ii) the assignment by Owner of this Agreement to any Person, or (iii) any other circumstances, happening, condition or event. Contractor shall pay such liquidated damages without deduction, set-off, reduction or counterclaim. Contractor shall continue to make such payments of Mechanical Completion Delay Liquidated Damages until achievement of Project Mechanical Completion. In no event shall the payment of Mechanical Completion Delay Liquidated Damages excuse Contractor from performance of any of its other obligations hereunder, including the obligation to cause Project Mechanical Completion to occur.

(iv) Termination for Failure to Achieve Project Mechanical Completion within Sixty Days of Guaranteed Mechanical Completion Date. If and in the event Contractor fails to achieve Project Mechanical Completion within sixty (60) days of the Guaranteed Mechanical Completion Date, then (i) Contractor shall be considered in default, and may, at Owner's sole and exclusive discretion, be terminated in accordance with Section 15.1 of this Agreement, and (ii) Contractor shall continue to pay the Mechanical Completion Delay Liquidated Damages described in this Section 7.8 through any such termination of Contractor or until the exhaustion of the aggregate maximum amount of Mechanical Completion Delay Liquidated Damages payable by Contractor hereunder, whichever occurs first.

(d) Access Roads Delay. If Contractor fails to achieve Access Road Completion on or before the Guaranteed Access Road Completion Date, Contractor shall be required to pay Owner all amounts that Owner pays the Turbine Vendor under the terms of the Wind Turbine Supply Contract resulting from such delay, and Contractor shall also be responsible for all costs and expenses of Owner or Contractor as a result of the failure to achieve Access Roads Completion on or before the Guaranteed Access Road Completion Date.

(e) Offset Rights; Security for Obligations. Owner shall have the right to offset any amounts owing to Owner under this Article against Progress Payments or other amounts owing to Contractor and to exercise its rights against any security provided by or for the benefit of Contractor, in such order as Owner may elect in its sole discretion.

## ARTICLE 8

### INSPECTION

**8.1 Inspection.** Owner, its Affiliates, its representatives (including Owner's Engineer), any Financing Party, its representatives (including any Independent Engineer), and the

Transmission Provider (collectively, “Owner Inspection Parties”) shall have the right to observe and inspect any Equipment at the Site and the material, design, engineering, service, workmanship or any other portion of the Work at the Site; provided that (a) such observations and inspections shall be arranged at reasonable times and with reasonable advance notice to Contractor and (b) Owner has granted such Person access to the Site and Work for such purpose. Notwithstanding the foregoing, any personnel of such Owner Inspection Parties that have completed Contractor’s safety training and worker environmental training may observe and inspect the Work at the Site at any time subject to compliance with the Site Safety Plan. Prior to Project Mechanical Completion, Contractor shall promptly correct or cause the correction of any part of the Work that is defective, deficient or is otherwise not in accordance with this Agreement, regardless of the stage of its completion or the time or place of discovery of such errors and regardless of whether Owner has previously reviewed or inspected or otherwise accepted such part of the Work in any way. Contractor shall bear the cost of re-performing any defective, deficient or non-conforming Work and removing any deficient Work from the Site. In the event that any part of the Work is discovered to be in a defective, deficient or non-conforming condition after Project Mechanical Completion, correction of such defective, deficient or non-conforming condition shall be governed by Article 16.

**8.2 Off-Site Inspections.** If requested by Owner, Contractor shall obtain access and arrange for Owner Inspection Parties to inspect the off-Site facilities of Contractor and any Supplier under a Major Subcontract, including to witness tests of the Equipment being supplied by them and to partake in manufacturing facility tours, such inspections to be arranged at reasonable times and with reasonable advance notice. Contractor shall incorporate a forward-looking schedule into each Monthly Progress Report of the tests (if any) to be performed on such Equipment. If any Owner Inspection Party desires to be present at any such test listed on the Monthly Progress Report, Owner shall give Contractor five (5) Business Days’ notice prior to the date of such test. If the Contractor proposes to conduct any testing on Equipment that is not otherwise identified in a Monthly Progress Report, the Contractor must provide the Owner Inspection Parties no less than ten (10) Business Days’ notice of such proposed testing so that such Owner Inspection Parties may arrange to observe such testing.

## ARTICLE 9

### CHANGES AND EXTRA WORK

**9.1 Owner Requested Change Order.** Without invalidating this Agreement, Owner may request changes in the Work or the Project. Owner shall request such changes in the Work or the Project by delivering a written Change Order request to Contractor. As soon as practicable after receipt of a Change Order request, but in no event later than five (5) Days after receipt of a Change Order request, Contractor shall prepare and forward to Owner in writing: (i) a quotation for the price for the extra or changed Work and change to the Schedule of Values (if applicable); (ii) an estimate of any required adjustment to the Construction Schedule; (iii) any adjustment to Performance Criteria; and (iv) an estimate of any impact of the proposed change on any Applicable Permit, warranty and any other term or condition of this Agreement. The Parties shall negotiate in good faith to determine the adjustment to the Contract Price for Change Orders contemplated by this Section 9.1. If the Parties do not agree on the adjustment to the Contract Price in respect of this Section 9.1, then the adjustment to the Contract Price may be determined in accordance



with Exhibit 16 but only if the Parties so agree. If the Parties do not agree either (A) to a fixed price Change Order, or (B) that an adjustment to the Contract Price shall be determined in accordance with Exhibit 16, then Owner may nonetheless direct Contractor to proceed with the Work that is the subject of the Change Order, in which case (1) for a deductive Change Order, the Contract Price shall be reduced by the amount of any reduction in Contractor's Direct Costs and (2) in the case of an additive Change Order (or Change Order involving additive and deductive elements), Contractor shall be paid an amount equal to any net increase in its Direct Costs in performing the Change Order plus a markup of six percent (6%). Contractor shall submit Applications for Payment no more frequently than monthly with respect to Contractor's Direct Costs in accordance with the preceding sentence and Owner shall be obligated to pay such undisputed amounts within thirty (30) Days after Owner's receipt of Contractor's Application for Payment.

**9.2 Contractor Requested Change Order.** Contractor may propose a Change Order to Owner if the proposed changes improve the Project or are otherwise advisable for the Work. Any such proposed Change Order shall not affect the obligation of Contractor to perform the Work and to deliver the Project in accordance with this Agreement unless and until Owner executes a Change Order pursuant to Section 9.6. If the Parties do not agree on the adjustment to the Contract Price in respect of this Section 9.2, then the adjustment to the Contract Price may be determined in accordance with Exhibit 16 but only if the Parties so agree. If the Parties do not agree either (a) to a fixed price Change Order or (b) that an adjustment to the Contract Price shall be determined in accordance with Exhibit 16, then no Change Order shall be executed. If Contractor proceeds with a proposed change in the Work pursuant to this Section 9.2 without receiving the consent of Owner, Contractor shall be responsible for the removal of any such work if a Change Order request is not subsequently approved by Owner; provided, however, that in the event of any Emergency, Contractor shall act, in its good faith discretion, to prevent threatened damage, injury or loss to any Person or property.

**9.3 Mandatory Change Order.** Contractor shall be entitled to an adjustment in the Contract Price in the event of an Owner-Caused Delay and an adjustment in the Construction Schedule (including to any Guaranteed Dates) as set forth below upon the occurrence of any of the following events: (a) an Owner-Caused Delay or (b) a Force Majeure Event, in each case as and only to the extent permitted by Article 10. Contractor shall only be entitled to a Change Order if and to the extent it can demonstrate that the occurrence of a preceding event had an actual and demonstrable adverse impact (i) on Contractor's Direct Costs or (ii) when taken together with all other delays caused by the events described in (a) and (b) above of which Contractor has timely provided notice to Owner in accordance with this Agreement, on Contractor's ability to perform any Contractor Critical Path Item necessary for the achievement of any Guaranteed Date and, in such event, the Contractor Critical Path Items shall be correspondingly extended by the period of time (if any) that Contractor is actually and demonstrably delayed in the performance of such Contractor Critical Path Item as a result of the impact of such event (such period, the "Actual Delay").

**9.4 Limitation on Change Orders.** Change Orders shall be limited to (i) changes requested by Owner in accordance with Section 9.1, (ii) changes requested by Contractor and mutually agreed to by the Parties in accordance with Section 9.2 and (iii) changes in connection with mandatory Change Orders in accordance with Section 9.3. Notwithstanding anything to the

contrary, other than to the extent resulting from a Force Majeure Event occurring after the Effective Date, in no event shall any Site Condition give rise to a Change Order.

**9.5 Determining Change Order.** Any adjustment of the Construction Schedule pursuant to a Change Order shall be determined in accordance with Section 9.3 as well as Article 10. Any adjustment of the Contract Price shall include all costs to Contractor associated with the performance of the extra Work or changes or a reduction of the Contract Price based on savings to Contractor associated with the changes, as applicable. Adjustments in the Contract Price shall be determined in accordance with Section 9.1, Section 9.2 and Section 9.3, as applicable, as well as Article 10.

**9.6 Change Order Must Be in Writing.** No change in the Work or extra Work shall be valid and effective unless it is in writing in the form of a Change Order signed by the representatives of both Parties that includes a description of the amount of any adjustment of the Contract Price and any adjustment to the Construction Schedule, the Schedule of Values or the Performance Criteria due to the change.

## ARTICLE 10

### FORCE MAJEURE EVENT; OWNER-CAUSED DELAY; WIND DAYS

**10.1 Certain Events.** No failure or omission to carry out or observe any of the terms, provisions or conditions of this Agreement shall give rise to any claim against a Party, or be deemed to be a breach or an Event of Default under this Agreement, if such failure or omission shall be caused by or arise out of a Force Majeure Event or an Owner-Caused Delay; provided that the Party claiming relief strictly complies with the provisions of Article 10. Notwithstanding anything to the contrary in the foregoing, the obligation to pay money in a timely manner in accordance with the terms hereof shall not be subject to the Force Majeure Event or Owner-Caused Delay provisions hereof. Furthermore, the Parties acknowledge and agree that adherence to the Project Schedule may be impacted by Wind Days (and the delays resulting therefrom) during the period beginning on the commencement of the start of erection of Wind Turbine Generators and continuing through the Project Mechanical Completion Date (the “WTG Construction Period”). If the number of Wind Days occurring during the WTG Construction Period exceeds eight (8) days at the Site during the WTG Construction Period (counting for purposes of this paragraph only Wind Days which affect the progress of Contractor at the Job Site), and as a sole result of such Wind Day, Contractor is required to extend the period that Contractor is leasing a large crane, thereupon, such occurrence shall be treated as a Force Majeure Event and Contractor shall be entitled to a Change Order for the amount of delay to the Guaranteed Project Mechanical Completion Date, which is caused by the excess Wind Days in respect thereof in accordance with Section 10.4.

**10.2 Notice of Force Majeure Event and Owner-Caused Delay.** If a Party’s ability to perform its obligations under this Agreement is affected by a Force Majeure Event or an Owner-Caused Delay (in the case of Contractor), the Party claiming relief shall provide prompt notice, but in any event not later than twenty-four (24) hours of when the Force Majeure Event or Owner-Caused Delay first prevents or delays performance under this Agreement, to Contractor’s Representative or Owner’s Representative, as applicable, of any delay or anticipated delay in the

claiming Party's performance of this Agreement due to such Force Majeure Event or Owner-Caused Delay, including a description of the event including reasonable details (to the extent available and known to the claiming Party, at such time) regarding the underlying facts and conditions pursuant to which such Party is claiming a Force Majeure Event or Owner-Caused Delay and the anticipated length of the delay. After such notice, the claiming Party shall deliver written notice as soon as practicable, but in any event not later than five (5) Business Days after the claiming Party becomes aware of the delay or anticipated delay, describing in detail the particulars of the occurrence giving rise to the claim, including what date the claiming Party became aware of the occurrence of such event and an estimate of the event's anticipated duration and effect upon the performance of its obligations, any action being taken to avoid or minimize its effect, and a proposed recovery schedule (the "Delay Notice"). The Party claiming relief due to a Force Majeure Event or Owner-Caused Delay shall have a continuing obligation to deliver to the other Party regular updated reports and any additional documentation and analysis supporting its claim regarding a Force Majeure Event or an Owner-Caused Delay promptly after such information becomes available to such Party. IT IS A CONDITION TO CONTRACTOR'S RIGHT TO RECEIVE AN EXTENSION OF TIME, AN INCREASE TO THE CONTRACT PRICE AND OTHER ADJUSTMENTS TO THE CONSTRUCTION SCHEDULE THROUGH A CHANGE ORDER AS PROVIDED IN SECTION 10.3 THAT CONTRACTOR PROVIDE NOTICE TO OWNER WITHIN TWENTY-FOUR (24) HOURS OF THE TIME CONTRACTOR BECAME AWARE OR SHOULD HAVE BECOME AWARE OF THE FACTS OR CIRCUMSTANCES THAT PERMIT CONTRACTOR TO SEEK A CHANGE ORDER UNDER SECTION 10.3; IN THE EVENT CONTRACTOR DOES NOT PROVIDE NOTICE WITH SUFFICIENT DETAIL WITHIN TWENTY-FOUR (24) HOURS OF THE TIME CONTRACTOR BECAME AWARE OR SHOULD HAVE BECOME AWARE OF THE FACTS OR CIRCUMSTANCES THAT PERMIT CONTRACTOR TO SEEK A CHANGE ORDER UNDER SECTION 10.3, CONTRACTOR SHALL NOT BE ENTITLED TO A CHANGE ORDER UNDER ARTICLE 10 OR ANY OTHER RELIEF HEREUNDER.

**10.3 Force Majeure Event and Owner-Caused Delay Conditions.** Upon the occurrence of a Force Majeure Event or an Owner-Caused Delay, the suspension of, or impact on, performance due to such Force Majeure Event or Owner-Caused Delay shall be of no greater scope and no longer duration than is required by such event (taking into account the obligations affected thereby). In addition, the claiming Party shall exercise reasonable efforts to (a) minimize and mitigate the effects of any delay caused by, and costs arising from said Force Majeure Event or Owner-Caused Delay, (b) continue to perform its obligations hereunder not affected by such event and (c) correct or cure the effect of such event. When the Party claiming relief due to such Force Majeure Event or Owner-Caused Delay is able to resume performance of its affected obligations, such Party shall provide prompt notice to the other Party to that effect and promptly resume performance of all of its obligations under this Agreement.

#### **10.4 Contractor's Remedies.**

(a) Force Majeure Event. As Contractor's sole remedy for the occurrence of a Force Majeure Event, and provided that Contractor has otherwise materially complied with the applicable obligations it may have under Section 10.2 and Section 10.3, Contractor shall be entitled to an extension to the Construction Schedule (including to the Guaranteed Dates) to the extent of

the Actual Delay in accordance with Section 9.3. Force Majeure Events shall not entitle Contractor to an adjustment in the Contract Price or otherwise be compensable.

(b) Owner-Caused Delay. As Contractor's sole remedy for the occurrence of an Owner-Caused Delay, and provided that Contractor has otherwise materially complied with the applicable provisions of Section 10.2 and Section 10.3, Contractor shall be entitled to an extension to the Construction Schedule (including to the Guaranteed Dates) to the extent of the Actual Delay in accordance with Section 9.3. If Contractor's costs increase despite Contractor's reasonable efforts to mitigate any such increases pursuant to Section 10.3, the Contract Price shall be increased by the Direct Costs incurred by Contractor as a direct result of such Owner-Caused Delay.

(c) Changes Orders. Upon the occurrence of an event that entitles Contractor to relief under this Section 10.4, and subject to Contractor's compliance with the applicable provisions of this Article 10 and Article 9 in all material respects, Contractor and Owner shall prepare a Change Order in accordance with Article 9. The remedies set forth in this Section 10.4 shall be Contractor's sole remedies for any such event.

## ARTICLE 11

### SUSPENSION OF THE WORK

**11.1 Owner-Directed Suspension.** Owner may, upon five (5) Business Days' prior written notice to Contractor, direct Contractor to suspend its performance of all or any portion of the Work; provided that no prior written notice shall be required if such suspension is due to an Emergency or is otherwise required by Applicable Law. Upon the commencement of the suspension, Contractor shall stop the performance of the suspended Work except as may be necessary to carry out the suspension and protect and preserve the Work completed prior to the suspension. Contractor shall thereafter resume any suspended Work upon receipt of a written direction from Owner to resume the Work. Except as otherwise provided in Section 11.2, any period of Owner-directed suspension that extends beyond thirty (30) Days shall constitute an Owner-Caused Delay.

**11.2 Costs and Schedule Relief for Contractor-Caused Suspension.** Notwithstanding anything to the contrary, Contractor shall bear its own costs and delays incurred due to a suspension by Owner pursuant to Section 11.1 where such suspension is necessitated due to a breach of this Agreement by Contractor, any act or omission by any Contractor Party or Subcontractor, an Emergency or as otherwise required by Applicable Law, and Contractor shall not be entitled to a change to the Construction Schedule or an extension of time to the Guaranteed Dates in any of such cases.

## ARTICLE 12

### HAZARDOUS MATERIALS

**12.1 Use by Contractor.** Contractor shall minimize and manage the use of Hazardous Materials in the performance of its obligations under this Agreement and shall not permit any of the Subcontractors, directly or indirectly, to cause any Release in, on or under the Project, the Site

or the adjacent area except to the extent required for the performance of the Work, in such case, in accordance with Applicable Laws and Applicable Permits (including the performance of investigatory, monitoring, or other remedial work upon the Project, the Site or adjacent areas to the extent reasonably necessary to comply with Applicable Laws and Applicable Permits).

**12.2 Remediation by Contractor.** Contractor shall conduct and complete all investigations, studies, sampling, testing and remediation of the Site as required by Applicable Laws and Applicable Permits in connection with any Release, disposal or the presence of Hazardous Materials, where existing prior to the Effective Date or brought onto or generated at the Site by any Contractor Party or Subcontractor or to the extent any such Release is caused by the negligent acts or omissions of any Contractor Party or Subcontractor, except to the extent such Release is caused by any Owner Party after the Effective Date. Contractor shall promptly comply with all lawful orders and directives of all Governmental Authorities regarding Applicable Laws and Applicable Permits relating to the use, transportation, storage, handling or presence of Hazardous Materials, or any Release, by any Contractor Party, Subcontractor or any Person acting on its or their behalf or under its or their control of any such Hazardous Materials brought onto or generated at the Site by any Contractor Party or Subcontractor, except to the extent any such orders or directives are being contested in good faith by appropriate proceedings in connection with the Work.

**12.3 Hazardous Materials File.** During the performance of the Work, Contractor shall maintain and update a file of all safety data sheets for all Hazardous Materials used in connection with the Work hereunder, or used by or on behalf of any Contractor Party or Subcontractor at the Site and shall promptly deliver such file and any updates to Owner.

**12.4 Notice of Hazardous Materials.** If Contractor discovers, encounters or is notified of any Release or exposure to Hazardous Materials at the Site:

(a) Contractor shall promptly notify Owner thereof and take all reasonable efforts, consistent with Applicable Law or Applicable Permits, to mitigate the impacts associated with such Hazardous Materials including, as appropriate, containing any Release and stopping Work in and restricting access to areas affected by such Hazardous Materials;

(b) if any Contractor Party or Subcontractor has brought such Hazardous Materials onto the Site or generated such Hazardous Materials, Contractor shall, as promptly as reasonably practicable, remove such Hazardous Materials from the Site and remediate the Site to the extent required by all Applicable Laws and Applicable Permits in each case at Contractor's sole cost and expense, except where such materials were Released after the Effective Date by Owner, its Affiliates, or any third party other than any Contractor Party or Subcontractor; and

(c) if any Contractor Party or any Subcontractor has brought such Hazardous Materials onto the Site or generated such Hazardous Materials, Contractor shall not be entitled to any extension of time or additional compensation hereunder for any delay or costs incurred by Contractor as a result of the existence of such Hazardous Materials, except where such materials were Released after the Effective Date by Owner, its Affiliates, or any third party other than any Contractor Party or Subcontractor.

**12.5 Hazardous Materials Disposal System.** Contractor shall, in consultation with Owner, arrange and contract with contractors (who are appropriately licensed and insured) for the transportation from the Site and the management or disposal in accordance with Applicable Law and Applicable Permits of Hazardous Materials generated by or produced in connection with Contractor's performance of the Work. To the extent required by Applicable Law or Applicable Permits, Contractor shall (a) prepare and maintain accurate and complete documentation of all Hazardous Materials used by Contractor or Contractor Parties at the Site in connection with the Project, and of the disposal of any such materials, including transportation documentation and the identity of all Subcontractors providing Hazardous Materials disposal services to Contractor at the Site and (b) prepare and deliver all required notifications and reports to Governmental Authorities in connection with the presence of Hazardous Materials at the Site that were brought onto the Site or generated by any Contractor Party or Subcontractor. Contractor shall comply with Owner's reasonable requirements and procedures with respect to the disposal of such Hazardous Materials.

**12.6 Scope of Contractor Environmental Indemnification.** Contractor hereby specifically agrees to indemnify, defend and hold Owner and the Owner Parties harmless from and against any and all losses, liabilities, claims (including relating to personal injury or bodily injury or death), demands, damages, causes of action, fines, penalties, costs and expenses (including all reasonable consulting, engineering, attorneys' or other professional fees), whether or not involving damage to the Project or the Site, that they may incur or suffer by reason of:

(a) any use of or introduction of Hazardous Materials to the Site by any Contractor Party or Subcontractor in connection with the performance of the Work, which use includes the storage, transportation, processing or disposal of such Hazardous Materials by Contractor or any of its Subcontractors, whether lawful or unlawful;

(b) any Release or disturbance of Hazardous Materials in connection with the performance of the Work by Contractor or any of its Subcontractors (except as provided in Section 12.7);

(c) any administrative, enforcement or compliance proceeding commenced by or in the name of any Governmental Authority because of an alleged, threatened or actual violation of any Environmental Law by any Contractor Party or any Subcontractor;

(d) any action reasonably necessary to abate or remediate Hazardous Materials described in paragraphs (a) or (b) above, or prevent a violation or threatened violation of any Environmental Law by any Contractor Party or Subcontractor; and

(e) any action required by Contractor to mitigate a situation created by the violation of any Applicable Law or Applicable Permit by any Contractor Party or Subcontractor.

**12.7 Scope of Owner Environmental Indemnification.** Owner hereby specifically agrees to indemnify, defend and hold Contractor and Contractor Parties harmless from and against any and all losses, liabilities, claims (including relating to personal injury or bodily injury or death), demands, damages, causes of action, fines, penalties, costs and expenses (including, all reasonable consulting, engineering, attorneys' or other professional fees), whether or not involving damage to the Project or the Site, that they may incur or suffer by reason of:

(a) any Hazardous Materials present or used, brought upon, transported, stored, kept, discharged, or spilled by Owner or any Owner Party in, on, under or from the Site after the Effective Date including any Release by Owner or its Affiliates, in accordance with the terms of this Agreement and all Applicable Laws;

(b) any administrative, enforcement or compliance proceeding commenced by or in the name of any Governmental Authority because of an alleged, threatened or actual violation of any Environmental Law by Owner; and

(c) any action reasonably necessary to abate or remediate Hazardous Materials described in paragraphs (a) or (b) above, or to prevent a violation or threatened violation of any Environmental Law by Owner.

## **ARTICLE 13**

### **TITLE AND RISK OF LOSS**

**13.1 Equipment – Risk of Loss Before Project Mechanical Completion.** From the Effective Date and until the Project Mechanical Completion Date, subject to the provisions of this Article 13, Contractor has care, custody and control of all Equipment and other items that become part of the Project and shall exercise due care with respect thereto and assumes the risk of loss and full responsibility for the cost of replacing or repairing any damage to the Project and all materials, Equipment, supplies and maintenance equipment (including temporary materials, equipment and supplies) that are purchased for permanent installation in or for use during construction of the Project.

**13.2 Equipment – Risk of Loss After Project Mechanical Completion.** Owner shall take possession and control and shall assume and shall bear the risk of loss and responsibility in respect of the Project completed and transferred to Owner (excluding Contractor Equipment) upon the Project Mechanical Completion Date or the earlier termination of this Agreement, unless the loss or damage to the Project is (a) caused by any Contractor Party, Subcontractor or other Person over whom Contractor has control or (b) a defect covered by the Warranties provided by Contractor under this Agreement.

### **13.3 Title.**

(a) Contractor warrants good and marketable title, free and clear of all Contractor Liens (to the extent Owner's payments to Contractor are made in accordance with this Agreement), to all Work, Equipment and other items furnished by Contractor or any of the Subcontractors that become part of the Project.

(b) Title to the Project, and to any discrete and identifiable item or series of Equipment, shall pass to Owner upon the earliest to occur of (i) receipt by Contractor of payment (less any Retainage) in full therefor, (ii) delivery of such Equipment to the Site; (iii) Project Mechanical Completion and (iv) with respect to any applicable Equipment, incorporation of such Equipment into the Project.

## ARTICLE 14

### INTELLECTUAL PROPERTY

**14.1 Title to Plans and Specifications.** Upon Owner's payment of the Contract Price as provided in this Agreement, the documentation prepared by Contractor (including all Contractor Submittals) shall become the exclusive property of Owner; provided, however, that Contractor's intellectual property rights in any such documentation shall remain with Contractor and nothing in this Agreement shall be construed as limiting Contractor's rights to use its know-how, experience and skills of its employees (excluding Owner confidential information), whether or not acquired during performance of the Work, or to perform any construction or other services for any other person. Notwithstanding the foregoing, Contractor agrees to grant, and hereby does grant, to Owner an irrevocable, fully paid-up, royalty-free, perpetual, non-exclusive, world-wide, transferable license to use such intellectual property rights as needed for installing, owning, operating, repairing, maintaining, replacing, modifying and expanding the Project (the "Licensed Technology").

**14.2 Intellectual Property.** Contractor shall include, as a term or condition of each contract with a Major Subcontractor employed by it in the performance of the Work, an intellectual property indemnification provision (including patents, trademarks, copyrights and trade secrets) extending from the Major Subcontractor to Owner and Contractor, with similar obligations as those set forth in Section 14.4. Contractor shall enforce and render all assistance Owner may reasonably require on a reimbursable cost basis to enforce the terms of those indemnifications by such Major Subcontractors. This obligation shall not reduce or otherwise affect Contractor's obligation to provide all Work to Owner free and clear of all intellectual property infringement or other violation claims.

#### **14.3 Procurement of Proprietary Rights.**

(a) Contractor warrants that no infringement of any patents, trademark, registered design, copyright, design right or other registerable or proprietary intellectual property right of any kind will be caused by the performance of the Work, the ownership of confidential information or the Project and the Project's operation in accordance with the Required Manuals.

(b) Contractor shall procure, as required, the appropriate proprietary rights, licenses, agreements and permissions for materials, methods, processes and systems incorporated into the Project. In performing the Work, Contractor shall not incorporate into the Project any materials, methods, processes or systems which involve the use of any confidential information or intellectual property rights that Owner or Contractor do not have the right to use in connection with the performance of the Work or the construction, ownership or operation of the Project or which may cause any Losses to Owner or Contractor arising out of claims of infringement of any domestic intellectual proprietary rights, or applications for such rights, or use of confidential information.



#### **14.4 Intellectual Property Infringement.**

(a) Contractor shall pay all royalties, license and other fees payable under or in respect of, and shall defend, indemnify and hold harmless the Owner Parties from and against any claim arising out of, resulting from, or reasonably incurred in contesting, (i) any unauthorized disclosure by Contractor or any Subcontractor or use of any trade secrets, (ii) any other intellectual property infringement (including patent, copyright or trademark infringement) caused by Contractor's performance, or that of its Subcontractors, under this Agreement, or (iii) any claim asserted against such Owner Party that (A) concerns any equipment or other items provided by Contractor or any Subcontractor under this Agreement, (B) is based upon the performance of the Work by Contractor or any Subcontractor, including the use of any tools or implements for construction by Contractor or any Subcontractor, or (C) is based upon the design or construction of any item or unit specified by Contractor under this Agreement or upon the operation of any item or unit according to directions embodied in Contractor's final process design, or any revision thereof, prepared or approved by Contractor unless to the extent that such claims relate, in whole or in part, to (a) Owner's modification of such equipment or other items made without Contractor's approval, (b) the combination of such item with other products, materials, equipment, parts or apparatus not approved by Contractor, unless such combination was done in accordance with this Agreement, any change order, the Technical Specifications, or otherwise agreed to by the Contractor, and provided that such claim could not be brought but for such combination and such claim is based on infringement by the other products, materials, equipment, parts or apparatus or (c) a failure to promptly install an update required by Contractor, provided such update does not reduce or potentially reduce the performance of the Project as of such date or otherwise adversely affect the Project in any way with respect to the Project Transaction Documents or otherwise.

(b) If such claim for infringement or other violation results in a suit against an Owner Party, Contractor shall, at its election and in the absence of a waiver of this indemnity by such Owner Party, have sole charge and direction of said suit on such Owner Party's behalf so long as Contractor diligently prosecutes the same. If Contractor has charge of a suit brought against an Owner Party by a third party, such Owner Party shall render such assistance at Contractor's expense as Contractor may reasonably require in the defense of such suit except that such Owner Party shall have the right to be represented therein by counsel of its own choice and at its own expense. If such Owner Party is enjoined from completion of the Project or any part thereof, or from the use, operation or enjoyment of the Project or any part thereof as a result of such claim or any litigation based thereon, Contractor shall promptly seek to have such injunction removed at no cost to any Owner Party. If in such claim any device is held to constitute an infringement or other violation and its use is enjoined, Contractor shall either secure for each of the Owner Parties the right to continue using such device by suspension of the injunction or by procuring for such Owner Party a license, or otherwise at Owner's option and at Contractor's expense, replace such device with a non-infringing or violating device of equivalent utility, performance and expected life, or modify it so that it becomes non-infringing or violating without impairing its utility, performance and expected life.

## ARTICLE 15

### DEFAULTS AND REMEDIES

**15.1 Contractor Events of Default.** Contractor shall be in default of its obligations pursuant to this Agreement upon the occurrence of any one or more events of default set forth below (each, a “Contractor Event of Default”):

(a) Contractor fails to pay any amount due and owing to Owner under this Agreement that is not disputed in good faith, and such failure remains outstanding for a period of twenty (20) Business Days or more after receipt of notice from Owner stating that if Contractor does not pay such amount Owner may terminate in accordance with Section 15.2;

(b) an Insolvency Event occurs with respect to Contractor or, while the Contractor Performance Security is required to be in place, Contractor’s Guarantor;

(c) Contractor fails to maintain any insurance coverages required of it in accordance with Article 18 and Contractor fails to remedy such breach within thirty (30) Days after the date on which Contractor first receives a notice from Owner with respect thereto;

(d) Contractor assigns or transfers this Agreement or any right or interest herein except in accordance with Article 21;

(e) prior to the Final Completion Date, Contractor or any Affiliate of Contractor defaults under any other Project Transaction Document, or any such document is invalid, no longer in effect or unenforceable for any reason;

(f) except as a result of an Owner Event of Default, a Force Majeure Event, an Owner-Caused Delay or such other event for which Contractor is entitled to schedule relief under Section 9.3, Contractor fails to achieve Project Mechanical Completion within sixty (60) Days of the final Guaranteed Mechanical Completion Date;

(g) except as a result of an Owner Event of Default, a Force Majeure Event, an Owner-Caused Delay or such other event for which Contractor is entitled to schedule relief under Section 9.3, Contractor fails to achieve Final Completion within sixty (60) Days of the Guaranteed Final Completion Date;

(h) the total amount of Liquidated Damages or other damages owed by Contractor to Owner under this Agreement (including damages for any Losses incurred by Owner or Owner Parties pursuant to Article 17) exceed the applicable maximum liability thresholds set forth in Section 24.2;

(i) except as a result of an Owner Event of Default, a Force Majeure Event, an Owner-Caused Delay or such other event for which Contractor is entitled to schedule relief under Section 9.3, Contractor Abandons the Work and Contractor fails to remedy such breach within ten (10) Business Days after receipt of notice from Owner;

(j) Contractor violates in any material respect any of the provisions of this Agreement not otherwise addressed in this Section 15.1, which violation remains uncured for thirty (30) Days following Contractor's receipt of written notice thereof from Owner; provided, that if such violation is capable of cure but cannot reasonably be cured within such thirty (30) Day period, then Contractor's right to cure shall extend beyond for an additional period (not to exceed thirty (30) Days) so long as Contractor is diligently attempting to cure such violation;

(k) a representation or warranty made by Contractor in or pursuant to this Agreement was false or misleading in any material respect as of the date on which it was made and has not been cured within ten (10) Days after Contractor receives a notice from Owner with respect thereto; provided that such ten (10) Day limit shall be extended if: (i) such failure is reasonably capable of cure and curing such failure reasonably requires more than ten (10) Days; and (ii) Contractor commences such cure within such ten (10) Day period and diligently prosecutes and completes such cure within sixty (60) Days thereafter, in each case, after the date on which Contractor receives a notice from Owner with respect thereto;

(l) Contractor's Guarantor defaults in the performance of its obligations under the Contractor Performance Security or the Contractor Performance Security ceases to be in full force and effect as required by Section 4.9 and, in either case, Contractor has failed to deliver a comparable replacement therefor within five (5) Business Days after such failure;

(m) the Transmission Provider terminates the Interconnection Agreement due to an event of default or termination right thereunder resulting from (i) the negligence or willful misconduct of any Contractor Party or any Subcontractor in connection with this Agreement or (ii) the failure of any Contractor Party or any Subcontractor to comply with any of its obligations or a breach under this Agreement; or

(n) Contractor fails to comply with the requirements of Section 27.22.

**15.2 Owner Rights and Remedies.** If a Contractor Event of Default occurs, subject to Article 24 and without permitting double recovery, Owner shall have the following rights and remedies and may elect to pursue any or all of them, in addition to any other rights and remedies that may be available to Owner hereunder, and Contractor shall have the following obligations:

(a) Owner may terminate this Agreement by giving notice of such termination to Contractor and, upon such termination:

(i) Contractor shall withdraw from the Site, shall assign (to the extent such subcontract may be assigned) to Owner such of Contractor's subcontracts or purchase orders as Owner may request (in which case Contractor shall execute all assignments or other reasonable documents and take all other reasonable steps requested by Owner which may be required to vest in Owner all rights, set-offs, benefits and titles necessary to effect such assumption by Owner), and shall license, in the manner provided herein, to Owner all Intellectual Property Rights (to the extent not previously licensed in accordance with the terms hereof) of Contractor related to the Work reasonably necessary to permit Owner to complete or cause the completion of the Work, and in connection therewith Contractor authorizes Owner and its respective agents to use such information in

completing the Work, shall remove such materials, equipment, tools, and instruments used by and any debris or waste materials generated by Contractor in the performance of the Work as Owner may reasonably direct, and Owner may take possession of any or all Contract Documents necessary for completion of the Work (whether or not such Contract Documents are complete); and

(ii) Contractor shall be liable to Owner for damages as provided in Section 15.5 or as otherwise provided herein;

(b) Owner may direct Contractor to turn over to Owner all Equipment and other materials paid for by Owner;

(c) Owner may proceed against the Contractor Performance Security in accordance with its terms;

(d) Subject to the dispute resolution procedures set forth in Article 23, Owner may seek equitable relief solely to cause Contractor to take action, or to refrain from taking action, pursuant to this Agreement;

(e) Owner may pursue the dispute resolution procedures set forth in Article 28 to enforce the provisions of this Agreement;

(f) Subject to the dispute resolution procedures set forth in Article 23 and without permitting double recovery, Owner may seek actual damages subject to the limitations of liability set out in this Agreement;

(g) Owner may pursue remedies under Section 4.10;

(h) Owner may pursue remedies in accordance with Section 15.6; and

(i) Without limiting Contractor's right to assert any defenses with respect to such payment, Owner may make such payments, acting reasonably, that Contractor is failing to pay in connection with the relevant Contractor Event of Default and either offset the cost of such payment against payments otherwise due to Contractor under this Agreement or Contractor shall be otherwise liable to pay and reimburse such amounts to Owner.

**15.3 Owner Events of Default.** Owner shall be in default of its obligations pursuant to this Agreement upon the occurrence of any one or more events of default set forth below (each, an "Owner Event of Default");

(a) Owner fails to pay any amount of the Contract Price owing under this Agreement that is not disputed in good faith, and such failure remains outstanding for a period of twenty (20) Business Days after Owner has received a notice of such payment default from Contractor stating that if Owner does not pay such amount Contractor may terminate this Agreement in accordance with Section 15.4; or

(b) An Insolvency Event occurs with respect to Owner.

**15.4 Contractor Rights and Remedies.** If an Owner Event of Default occurs, subject to Article 24 and Section 15.5 and without permitting double recovery, Contractor shall have the following rights and remedies and may elect to pursue any or all of them, in addition to any other rights and remedies that may be available to Contractor hereunder:

(a) Contractor may suspend the Work by giving notice of such suspension to Owner concurrently with or at any time after Contractor gives Owner notice described in Section 15.3(a);

(b) Contractor may terminate this Agreement upon providing notice of such termination to Owner and shall be entitled to the remedy set forth in Section 15.5(a);

### **15.5 Termination Payment.**

(a) Upon any termination of this Agreement by Contractor for an Owner Event of Default, Owner shall pay the applicable Termination Payment due to Contractor on the date that is thirty (30) Days after Owner's receipt from Contractor of an Application for Payment for such Termination Payment. Such Termination Payment shall be Contractor's sole and exclusive remedy with respect to an Owner Event of Default that results in termination of this Agreement.

(b) In addition to the remedies provided in Section 15.2, upon termination of this Agreement for a Contractor Event of Default, subject to Article 24, Owner shall be entitled to recover from Contractor promptly upon notice to Contractor, as damages for loss of bargain and not as a penalty, (and in addition to all other amounts Owner is entitled to recover under this Agreement, including any liquidated damages or indemnification obligations owing from Contractor) an amount equal to the reasonable and direct costs of completing the Work (taking into account the requirements of the Construction Schedule and including compensation for obtaining a replacement contractor required as a consequence of such Contractor Event of Default) minus those costs that would have been payable to Contractor but for such Contractor Event of Default (and after considering all other amounts Owner is entitled to recover under this Agreement, including any liquidated damages or indemnification obligations owing from Contractor). Upon determination of the total cost of such remaining Work, Owner shall notify Contractor in writing of the amount, if any, of the resulting Termination Payment that Contractor shall pay Owner.

**15.6 Termination Right Not Exclusive.** Except as otherwise set forth in Section 15.5(a), a Party's right to terminate this Agreement pursuant to this Article 15 is in addition to, and without derogation from, any other rights and remedies such Party may have against the other Party under this Agreement or any Applicable Law, and each Party expressly reserves all such rights and remedies it may have against the other Party, whether in contract, tort or otherwise.

**15.7 Owner Termination for Convenience.** Owner may in its sole discretion terminate the Work and this Agreement for convenience and without cause at any time by giving notice of termination to Contractor to be effective upon the receipt of such notice by Contractor. In the event of such termination, as Contractor's sole and exclusive remedy, Owner shall, on the date that is thirty (30) Days after Owner's receipt of an Application for Payment therefor, pay the applicable Termination Payment due to Contractor.

**15.8 Contractor Conduct.** Upon issuance of a notice of termination pursuant to this Article 15, Contractor shall: (a) cease operations as directed by Owner in the notice; (b) take action necessary, or that Owner may reasonably direct, for the protection and preservation of the Work; and (c) except for Work directed to be performed prior to the effective date of termination stated in such notice, or except as expressly requested by Owner or under Section 15.2(a)(i), terminate all existing subcontracts and purchase orders that are terminable without premium, penalty or termination charges and enter into no further subcontracts and purchase orders with respect to the Work or the Project.

## **ARTICLE 16**

### **WARRANTIES**

#### **16.1 Warranty Provisions.**

(a) Warranty. Contractor warrants and guarantees to Owner during the Warranty Period that: (i) the Contractor Facilities and the Work shall be free from improper workmanship and Defects, new, unused and undamaged when installed, in compliance with Applicable Law, the Applicable Permits, the Applicable Standards, and the requirements of this Agreement, suitable for Owner's use as a wind-powered electrical generation facility (subject to normal wear and tear and maintenance and operation requirements and obsolescence that may result from advance in technology or other changes in needs or uses) under the climatic and normal operating conditions described in the Technical Specifications; (ii) the design, engineering, construction and procurement services related to the Contractor Facilities and the assembly, installation and erection of the WTGs and all aspects of the Work shall be performed with Contractor's best skill and judgment, in a good and workmanlike manner, conform to and be designed, engineered and constructed in accordance with the Contractor Submittals, Scope of Work, Technical Specifications, all Applicable Laws, Applicable Standards and Applicable Permits and other terms of this Agreement, conform with, and be designed and engineered according to professional standards and skill, expertise and diligence of design professionals regularly involved in wind power projects similar to the Project, and contain the Equipment, supplies and materials described in the Scope of Work; (iii) the completed Work shall perform as explicitly described or implied in this Agreement, except that the Contractor shall not be responsible for any failure of the completed Work to perform its intended functions as a complete, integrated wind-powered electric generating facility which is caused by the failure of the Owner-Furnished Equipment; and (iv) none of the Work, the Contractor Facilities, the Equipment, the Contractor Submittals, Technical Specifications, final plans and the design, engineering and other services rendered by Contractor hereunder, nor the use or ownership thereof by Owner in accordance with the licenses granted hereunder, infringes, violates or constitutes a misappropriation of any trade secrets, proprietary rights, intellectual property rights, patents, copyrights or trademarks ((i), (ii), (iii) and (iv), collectively, the "Warranty").

(b) Warranty Period; Extensions Thereof. The Warranty shall commence on the Project Mechanical Completion Date and shall continue until and expire on the second (2nd) anniversary of the Project Mechanical Completion Date (such applicable period, the "Warranty Period"); provided, however, if: (a) Owner fails to observe any Defect during the Warranty Period; and (b) such Defect would not have been revealed during the Warranty Period, despite Owner's

operation of the Project in accordance with commercially reasonable practices, then the Warranty Period (and the corresponding rights and obligations identified in this Article 16) shall be extended to effect repair of such Defect, provided Owner delivers Contractor written notice of such Defect within twelve (12) months from the end of the Warranty Period. Provided further that if ten percent (10%) or more of any type of component of the Project requires repair or replacement within the Warranty Period, then the warranty for that type of component shall be automatically extended for all such components of that type for an additional two (2) years from the date of the failure that caused the percentage of failures to reach ten percent (10%).

(c) Correction of Deficiencies. If during the Warranty Period the Work is found to contain Defects, or Contractor is otherwise in breach of any of the warranties set forth in this Section 16.1 and Contractor receives written notice thereof during the Warranty Period or promptly after the end of the Warranty Period (or the later period as provided in Section 16.1(b)), Contractor shall at its sole cost and expense (including the cost of labor and equipment), promptly correct, repair, replace such Defect or otherwise cure such breach as promptly as practicable upon being given written notice directing Contractor to correct such Work or remedy such breaches of Warranties with materials of new and good quality, or re-perform all such defective components of the Infrastructure Facilities or the Work (“Warranty Service”). Owner shall provide Contractor with reasonable access (with an object of minimizing revenue and operational disruption) to the Project in order to perform its obligation under this Article and the Parties shall schedule such corrections or replacements as necessary so as to minimize disruptions to the operation of the Project. Contractor shall bear all costs and expenses associated with correcting any Defect or breach of warranty, including, without limitation, necessary disassembly, transportation, reassembly and retesting, as well as reworking, repair or replacement of such Work, disassembly and reassembly of piping, ducts, machinery, Equipment or other Work as necessary to give access to improper, defective or non-conforming Work and correction, removal or repair of any damage to other work or property that arises from the Defect. If Contractor is obligated to repair, replace or renew any Equipment, item or portion of the Work hereunder, Contractor will undertake a technical analysis of the problem and correct the “root cause” unless Contractor can demonstrate to Owner’s reasonable satisfaction that there is not a risk of the reoccurrence of such problem. Contractor’s obligations under this Section shall not be impaired or otherwise adversely affected by any actual or possible legal obligation or duty of any Subcontractor to Contractor or Owner concerning any Defect or breach of warranty.

(d) Conformance of Warranty Service to Specifications. Contractor warrants in favor of Owner that all materials incorporated into the Work as part of repairs to and replacements of Work by Contractor or any Subcontractor, and repairs to and replacements of Work pursuant to the warranties set forth in this Section 16.1 shall conform to the requirements of this Agreement and all applicable warranties for the foregoing and shall be free from Defects. Contractor shall perform, at its cost and expense, such tests as Owner may reasonably request to verify that any correction, repair, replacement or re-performance of the Work pursuant to the Warranty complies with the requirements of the warranties set forth in this Section 16.1. The warranty period for the Warranty Services shall continue until and expire on the later of (i) the end of the Warranty Period or (ii) one year from the completion of such Warranty Service.

(e) Warranty Service at Contractor’s Cost; Survival. Contractor shall perform all Warranty Service at its own cost and expense. The provisions of this Section apply to Work

performed by Subcontractors as well as Work performed directly by Contractor. Contractor's obligation to correct, repair, replace or re-perform defective Work pursuant to this Article 16 shall survive the termination of this Agreement to the extent of Work performed by Contractor or any of its Subcontractors or paid for by Owner. Contractor shall not be excused from performing such Warranty Service after the end of the Warranty Period, if it receives notice of the Defect during the Warranty Period or as otherwise provided in this Article 16.

(f) Risk of Loss or Damage. Whenever Warranty Service is required pursuant to this Article 16, Contractor shall bear the risk of physical loss or damage to the Project as a result of Contractor's activities performing Warranty Service, to the extent not covered by Owner's builder's risk insurance as required to be provided by Owner pursuant to Section 18.2, and in the event of any reimbursement by Owner's builder's risk insurance for such damage, Contractor shall be responsible for associated deductibles or retention. If any Work must be removed from the Site, transportation charges associated with any repair shall be borne by Contractor.

(g) "Immediate Need" Corrective Actions. Where Owner determines that an "immediate need" exists, Owner may undertake corrective action, but Contractor reserves its right to investigate and determine the eligibility of such warranty claims. For the purposes of this Section 16.1(g), "immediate need" shall mean a situation where Owner reasonably believes that an imminent threat of harm to persons or property or a situation exists that could materially adversely impact the operation of the Project or the transmission system of the Utility. If the Owner has independently taken corrective action in the case of an "immediate need" pursuant to this Section 16.1(g), then Owner shall issue to Contractor: (i) a failure report, which shall contain technical and logistical information in sufficient detail to enable Contractor to evaluate (a) the Owner's representation of an "immediate need" and (b) the appropriateness of the Owner's corrective action, which shall be provided by Owner to Contractor within a reasonable period of time after the occurrence of such immediate need event; and (ii) copies of invoices received or prepared for costs and expenses claimed by Owner for reimbursement by Contractor (but only if such Owner work is due to a Defect in the Work or breach of the Warranty and not in relation to any defect or fault in the Utility's transmission system). Work performed by Owner in relation to a warranty claim under this Section 16.1(g) shall be billed on a "time and materials" basis (as further defined below) and such invoices shall be paid by Contractor within thirty (30) days (subject to review and approval by Contractor). For the purposes of this Section 16.1(g), "time and materials" shall mean: (a) with respect to "time," the product of one hundred ten percent (110%) of the normal hourly wage (including fringe benefits, insurance and taxes) Owner pays with respect to its particular employee (not including overhead) multiplied times the number of hours each employee performed the particular work; and (b) with respect to "materials," one hundred ten percent (110%) of the actual purchase price paid by Owner or an Affiliate to a third party for the materials incorporated or consumed in connection with the work; and (c) with respect to work performed by a subcontractor (other than an entity which is an Affiliate of Owner, work done by any such entity being deemed work done by Owner through its own employees for purposes of this Section 16.1(g)), one hundred ten percent (110%) of the actual amount paid by Owner to the subcontractor for such work.

**16.2 Delay.** Contractor shall perform the Warranty Service as promptly as reasonably possible after being notified in writing of such noncompliance by Owner, and in any event shall commence performance of the Warranty Service no later than the date made available by Owner



in such notice for performing the Warranty Service, which date shall be at least ten (10) Business Days after such notice. If, after notification of a Defect, Contractor shall delay past such date in commencing or continuing, or shall delay unnecessarily in completing, Warranty Service with respect to such Defect, then Owner may correct such Defect so that the defective component complies with the requirements of this Agreement, and Contractor shall be liable for all Direct Costs, charges and expenses reasonably incurred by Owner in connection with such repair or replacement and shall forthwith pay to Owner an amount equal to such costs, charges and expenses upon receipt of invoices with supporting documentation certified by Owner. Nothing in this Section 16.2 shall in any way limit or relieve Contractor of its obligations under this Agreement.

### **16.3 Subcontractor Warranties.**

(a) Contractor shall, for the protection of Contractor and Owner, obtain from the Subcontractors such guarantees and warranties with respect to Work performed as are reasonably obtainable, which guarantees and warranties shall equal or exceed those set forth in Section 16.1 and shall be made available and assignable to Owner to the full extent of the terms thereof upon the expiration of the Warranty Period. Owner shall be an express third-party beneficiary of all such guarantees and warranties. To the extent available, Owner shall have the right to require Contractor to secure additional warranty or extended guarantee protection pursuant to a Change Order issued in accordance with the provisions of Article 9. Upon the earlier of the expiration of the Warranty Period or termination of this Agreement, Contractor shall deliver to Owner copies of all relevant contracts providing for such guarantees and warranties.

(b) Contractor shall be responsible for enforcing the warranties of all Subcontractors through the Warranty Period unless Owner requests that any such warranties be assigned to it at an earlier date. Upon the earlier of the expiration of the Warranty Period or termination of this Agreement, Contractor shall assign to Owner all warranties received by it from Subcontractors or otherwise obtained under Section 16.3(a). Such assignment of warranties to Owner must also allow Owner to further assign such warranties. However, in the event that Owner makes any warranty claim against Contractor with respect to services supplied in whole or in part by any Subcontractor, and Contractor fulfills its obligations with respect to such claim by Owner, Contractor shall be entitled to enforce for its own benefit any warranty given by such Subcontractor with respect to such services.

**16.4 NO IMPLIED WARRANTIES.** THE WARRANTIES SET FORTH IN THIS AGREEMENT ARE EXCLUSIVE AND IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, FOR PERFORMANCE, MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE OR OTHERWISE. THERE ARE NO OTHER WARRANTIES, AGREEMENTS, ORAL OR WRITTEN, OR UNDERSTANDINGS WHICH EXTEND BEYOND THOSE SET FORTH IN THIS AGREEMENT WITH RESPECT TO THE WARRANTED WORK, MATERIALS AND EQUIPMENT. The foregoing sentence is not intended to disclaim any other obligations of Contractor set forth in this Agreement.

**16.5 End of Warranty Period.** During the thirty-day period prior to the scheduled end of the Warranty Period, Contractor and Owner shall jointly conduct an inspection and test of the Work to determine if any additional warranty items are required to be repaired or replaced pursuant to the Warranty in order to develop a list of such items; provided, however, that such actions by

Owner shall not constitute a waiver of Owner's rights with respect to latent Defects not discovered at such time.

**16.6 Limitations.** The provisions of this Article 16 shall survive expiration or termination of this Agreement.

**16.7 Proprietary Rights.** Without limiting any of the provisions of this Agreement, if Owner or Contractor is prevented from completing the Work or any part thereof, or from the use, operation or enjoyment of the Work or any part thereof as a result of a claim, action or proceeding by any Person for unauthorized disclosure, infringement or use of any trade secrets, proprietary rights, intellectual property rights, patents, copyrights or trademarks arising from Contractor's performance (or that of its Subcontractors) under this Agreement, including, without limitation, the Work, the Contractor Submittals, the Technical Specifications or other items and services provided by Contractor or any Subcontractor hereunder, Contractor shall promptly, but in no event later than thirty (30) days from the date of any action or proceeding, take all actions necessary to remove such impediment, including (a) secure termination of the injunction and procure for Owner or its Affiliates or assigns, as applicable, the right to use such materials, Contractor Submittals or Technical Specifications in connection with the operation and maintenance of the Project, without obligation or liability; or (b) replace such materials, Contractor Submittals or Technical Specifications, with a non-infringing equivalent, or modify same to become non-infringing, all at Contractor's sole expense, but subject to all the requirements of the Contract Documents.

## ARTICLE 17

### PUBLICITY

**17.1 Press Releases.** Subject to Section 20.1, as applicable, the Parties shall jointly agree upon the necessity and content of any press release in connection with the matters contemplated by this Agreement. Contractor shall coordinate with Owner with respect to, and provide Owner advance copies of the text of, any proposed announcement or publication that may include any non-public information concerning the Work prior to the dissemination thereof to the public or to any Person other than Subcontractors or advisors of Contractor, in each case, who agree to keep such information confidential. Contractor shall not disseminate any such announcement or publication without Owner's consent, which may be withheld in Owner's sole and absolute discretion.

## ARTICLE 18

### INSURANCE

**18.1 Contractor's Insurance.** Contractor shall, at its expense, procure or cause to be procured, and maintain or cause to be maintained, the policies of insurance and corresponding coverages specified in Part I of Exhibit 13 ("Contractor's Insurance"). Unless otherwise specified in Exhibit 13, Contractor's Insurance shall commence no later than the Effective Date and shall remain in full force and effect at all times from commencement of the Work until Project Mechanical Completion, unless required for a longer or shorter period in accordance with Exhibit 13.

**18.2 Owner's Insurance.** Owner shall, at its expense, procure or cause to be procured, and maintain or cause to be maintained, the policies of insurance and corresponding coverages specified in Part II of Exhibit 13 ("Owner's Insurance"). Owner's Insurance shall commence on the Effective Date and shall remain in full force and effect at all times until Project Mechanical Completion, unless required for a longer or shorter period in accordance with Exhibit 13. Subject to the prior agreement of the Parties and the affected insurers, Owner's Insurance may be included, at Owner's cost and responsibility, under one or more policies of Contractor's Insurance.

**18.3 Ratings.** All policies of insurances required or otherwise contemplated under this Agreement shall be provided by insurance companies having an A.M. Best Insurance Reports rating of A- X or better, and shall otherwise be in accordance with the requirements of this Article 18 and Exhibit 13.

**18.4 Policy Requirements.** Contractor's Commercial General Liability and Worker's Compensation insurance policies shall: (a) provide for a waiver of subrogation rights against Owner and all Owner Parties and any Financing Parties, and of any right of the insurers to any set-off or counterclaim or any other deduction, whether by attachment or otherwise, in respect of that policy; and (b) list Owner and the Owner Parties as "additional named insureds" with respect to liability arising out of or in connection with the Work by or on behalf of Contractor, excluding any contributory liability of Owner or any Owner Parties.

**18.5 No Limitation and Release.** Unless otherwise expressly provided in this Agreement, the insurance policy limits set forth in Exhibit 13 shall not be construed to limit the liability of the insured Party under this Agreement. Notwithstanding the foregoing sentence, each Party releases and waives any and all rights of recovery against the other Party and all of its Affiliates, subsidiaries, employees, successors, permitted assigns, insurers and underwriters that the other Party may otherwise have or acquire in, or from, or in any way connected with, any loss covered by policies of insurance maintained or required to be maintained by that Party pursuant to this Agreement or because of deductible clauses in or inadequacy of limits of any such policies of insurance.

**18.6 Reduction or Ceasing to be Maintained.** If at any time the insurance to be provided by Owner or Contractor hereunder shall be reduced or cease to be maintained, then (without limiting any other rights of the other Party set forth in this Agreement that arises as a result of such failure) the other Party may at its option take out and maintain the insurance required hereby and, in such event, (a) Owner may withhold the cost of insurance premiums expended for such replacement insurance from any payments to Contractor, or (b) Owner shall promptly reimburse Contractor for the premium of any such replacement insurance, as applicable.

**18.7 Expiration.** With respect to any insurance carried by Contractor which may expire before the date specified in Section 18.1, Contractor shall, at least one (1) month prior to the relevant policy renewal date, submit to Owner certificates of insurance, insurer binders or other satisfactory evidence that coverage required by this Article 18 has been renewed.

## ARTICLE 19

### INDEMNITY

**19.1 Contractor Indemnity.** Contractor shall indemnify, hold harmless and defend Owner and all Owner Parties from and against the following:

(a) all Losses arising from third-party claims for property damage, personal injury or bodily injury or death to the extent caused by any negligent, willful, reckless or otherwise tortious act or omission (including strict liability) of Contractor, any Subcontractor, or anyone directly or indirectly employed by any of them, or anyone for whose acts such Person may be liable during the performance of the Work or from performing or from a failure to perform any of its obligations under this Agreement, or any curative action under any Warranty following performance of the Work;

(b) all Losses associated with a take of a protected species if any are found on the Site during the performance of the Work;

(c) Losses sustained by Owner as a result of Contractor's breach of Section 3.29;

(d) all Losses incurred by Owner as a result of a claim under the Project Labor Agreement against Owner arising from the construction of the Project and performance of the Work;

(e) all Losses that directly arise out of or result from all claims for payment of compensation for Work performed hereunder, whether or not reduced to a lien or mechanic's lien, filed by Contractor or any Subcontractors, or other persons performing any portion of the Work, including reasonable attorneys' fees and expenses incurred by any Owner Party in discharging any Contractor Lien, except to the extent of a breach by Owner in relation to any obligation it has to make a payment under this Agreement;

(f) all Losses that directly arise out of or result from employers' liability or workers' compensation claims filed by any employees or agents of Contractor or any of the Subcontractors, regardless of negligence of Owner or any Owner Party contributing to such Losses;

(g) all Losses arising from third-party claims, including by Subcontractors, for property damage, personal injury or bodily injury or death that directly or indirectly arise out of or result from the failure of Contractor or any of the Subcontractors to comply with the terms and conditions of Applicable Laws during their performance of the Work;

(h) all fines or penalties issued by any Governmental Authority that directly arise out of or result from the failure of the Project (or any portion thereof), as designed, constructed and completed by Contractor or any Subcontractor, to be capable of operating in compliance with all Applicable Laws or the conditions or provisions of all Applicable Permits;

(i) any and all fines, penalties or assessments issued by any Governmental Authority that Owner may incur as a result of executing any applications to any such Governmental Authority at Contractor's request;

(j) all Losses arising from claims by any Governmental Authority that directly or indirectly arise out of or result from the failure of Contractor to pay, as and when due, all Taxes (other than Owner Taxes), fees or charges of any kind imposed by any Governmental Authority for which Contractor is obligated to pay pursuant to the terms of this Agreement;

(k) all Losses arising from claims by any Governmental Authority claiming Taxes (other than Owner Taxes) based on gross receipts or on income of Contractor, any of the Subcontractors, or any of their respective agents or employees with respect to any payment for the Work made to or earned by Contractor, any of the Subcontractors, or any of their respective agents or employees under this Agreement;

(l) all fines or penalties issued by, and other similar amounts payable to, any Governmental Authority that arise out of or result from the failure of Contractor, a Subcontractor or any of their respective agents or employees to comply with any Applicable Permit;

(m) all Losses arising from claims by any counterparties to the agreements setting forth the Real Property Rights arising out of or in connection with Contractor's performance of the Work;

(n) all Losses, including claims for property damage, personal injury or bodily injury or death, whether or not involving damage to the Project or the Site, that arise out of or result from:

(i) the use of Hazardous Materials by Contractor or any of its Subcontractors in connection with the performance of the Work, which use includes the storage, transportation, processing or disposal of such Hazardous Materials by Contractor or any of its Subcontractors, whether lawful or unlawful;

(ii) any Release in connection with the performance of the Work by Contractor or any of its Subcontractors; or

(iii) any enforcement or compliance proceeding commenced by or in the name of any Governmental Authority because of an alleged, threatened or actual violation of any Applicable Law by Contractor or any of its Subcontractors with respect to Hazardous Materials in connection with the performance of the Work.

**19.2 Owner Indemnity.** Owner shall indemnify, hold harmless and defend Contractor and all Contractor Parties from and against the following:

(a) all Losses arising from third-party claims for property damage, personal injury or bodily injury or death to the extent caused by any grossly negligent or willful act or omission during the performance by Owner or any Affiliate, or anyone directly or indirectly employed by any of them, or anyone for whose acts such Person may be liable, of their obligations or from a failure to perform any of their obligations under this Agreement;

(b) all Losses arising from claims by any Governmental Authority that directly or indirectly arise out of or result from the failure of Owner to pay, as and when due, all Owner Taxes for which Owner is obligated to pay pursuant to the terms of this Agreement;

(c) all Losses that directly arise out of or result from employers' liability or workers' compensation claims filed by any employees or agents of Owner, regardless of negligence of any Contractor Party or Subcontractor contributing to such Losses; and

(d) all fines or penalties issued by, and other similar amounts payable to, any Governmental Authority that arise out of or result from the failure of Owner, or any of its contractors, agents or employees, to comply with any Owner Acquired Permit.

### **19.3 Patent Infringement and Other Indemnification Rights.**

(a) Contractor shall defend, indemnify, and hold harmless the Owner Parties against all Losses arising from any Intellectual Property Claim. If Owner provides notice to Contractor of the receipt of any such claim, Contractor shall, at its own expense, settle or defend any such Intellectual Property Claim and pay all damages and costs, including reasonable attorneys' fees, awarded against Owner. In addition to the indemnity set forth above, if Owner is enjoined from completing the Project or any part thereof, or from the use, operation, or enjoyment of the Project or any part thereof, as a result of a final, non-appealable judgment of a court of competent jurisdiction or as a result of injunctive relief provided by a court of competent jurisdiction, Contractor shall use its best efforts to have such injunction removed at no cost to Owner; and Contractor shall, at its own expense and without impairing the performance requirements set forth in this Agreement: (i) procure for Owner, or reimburse Owner for procuring, the right to continue using the infringing service, Equipment or other Work; (ii) if the obligation set forth in subclause (i) is not commercially feasible, modify the infringing service, Equipment or other Work with service, Equipment or other Work, as applicable, with substantially the same performance, quality and expected life, so that the same becomes non-infringing; or (iii) if the obligations set forth in subclauses (i) and (ii) are not commercially feasible, replace the infringing service, Equipment or other Work with non-infringing service, Project or other Work, as applicable, of comparable functionality and quality; provided that in no case shall Contractor take any action which adversely affects Owner's continued use and enjoyment of the applicable service, Equipment, or other Work without the prior written consent of Owner.

(b) Notwithstanding anything set forth in Section 24.3(a) to the contrary, Contractor shall have no indemnity obligations under Section 24.3(a) for any Intellectual Property Claim to the extent arising from or in connection with (i) any modification of the Work by Owner or any third party (other than any Contractor Party or Subcontractor) of the Work, the Project, the Equipment or other goods, materials, supplies, items or services provided by Contractor (or any of its Affiliates or Subcontractors) that was not, in either case, authorized by any Contractor Party or Subcontractor or (ii) Owner's material variation from Contractor's recommended written procedures for using the Work (unless otherwise authorized by any Contracting Party or Subcontractor).

(c) Owner's acceptance of the supplied materials and equipment or other component of the Work shall not be construed to relieve Contractor of any obligation hereunder.

**19.4 Environmental Indemnification.** The scope of Contractor's and Owner's indemnification obligations with respect to environmental matters are addressed in Section 19.1(n), Section 12.6 and Section 12.7.

**19.5 Right to Defend.** An Indemnatee shall provide notice to the Indemnifying Party within thirty (30) Days after receiving notice of the commencement of any legal action or of any claims or threatened claims against such Indemnatee in respect of which indemnification may be sought pursuant to the foregoing provisions of this Article 19 or any other provision of this Agreement providing for an indemnity (such notice, a "Claim Notice"), and the Indemnifying Party shall thereafter promptly elect whether to assume such defense. The Indemnatee's failure to give, or tardiness in giving, such Claim Notice will reduce the liability of the Indemnifying Party only by the amount of damages attributable and prejudicial to such failure or tardiness, but shall not otherwise relieve the Indemnifying Party from any liability that it may have under this Agreement. If the Indemnifying Party assumes the defense, (i) it shall retain counsel reasonably acceptable to the Indemnatee and (ii) the Indemnatee shall have the right to employ separate counsel in any such proceeding and to participate in (but not control) the defense of such claim, and the fees and expenses of such special counsel shall be borne by the Indemnatee unless the Indemnifying Party agrees otherwise or except as set forth in the following sentence. If the Indemnifying Party does not assume the defense of the Indemnatee, does not diligently prosecute such defense, or if a conflict (including any actual or potential differing of interest between the Parties) precludes counsel for Indemnifying Party from providing the defense, then the Indemnatee shall have the absolute right to control the defense of such claim and the fees and expenses of such defense, including reasonable attorneys' fees of the Indemnatee's counsel, reasonable costs of investigation, court costs and other costs of suit, arbitration, dispute resolution or other proceeding, and any reasonable amount determined to be owed by Indemnatee pursuant to such claim, shall be borne by the Indemnifying Party, provided that the Indemnifying Party shall be entitled, at its expense, to participate in (but not control) such defense, and provided further that the Indemnifying Party shall reimburse the Indemnatee on a monthly basis for such costs and expenses. Subject to all of the foregoing provisions of this Section 19.5 as between the Parties, the Indemnifying Party shall control the settlement of all claims, in coordination with any insurer as required under the applicable insurance policies in Article 18 as to which it has assumed the defense; provided that to the extent the Indemnifying Party, in relation to such insurer, controls settlement: (a) such settlement shall include a dismissal of the claim and an explicit release from the party bringing such claim or other proceedings of all Indemnitees; and (b) the Indemnifying Party shall not conclude any settlement without the prior approval of the Indemnatee, which approval shall not be unreasonably withheld or delayed; provided further that, except as provided in the preceding sentence concerning the Indemnifying Party's failure to assume or to diligently prosecute the defense of any claim, no Indemnatee seeking reimbursement pursuant to the foregoing indemnity shall, without the prior written consent of the Indemnifying Party, settle, compromise, consent to the entry of any judgment in or otherwise seek to terminate any action, claim, suit, investigation or proceeding for which indemnity is afforded hereunder unless such Indemnatee reasonably believes that the matter in question involves potential criminal liability against such Indemnatee. Other than as provided in this Section 19.5, the Indemnifying Party shall not settle any claim without the prior written approval of the Indemnatee, which approval shall not be unreasonably withheld, delayed or conditioned. The Indemnatee shall provide reasonable assistance to the Indemnifying Party when the Indemnifying Party so requests, at the Indemnifying Party's expense,

in connection with such legal action or claim, including executing any powers-of-attorney or other documents required by the Indemnifying Party with regard to the defense or indemnity obligations.

**19.6 Comparative Fault.** Except as expressly provided to the contrary herein, it is the intent of the Parties that where fault is determined to have been joint or contributory, principles of comparative fault will be followed and each Party shall bear the proportionate cost of any Losses attributable to such Party's fault.

**19.7 Survival of Indemnity Obligations.** The indemnities set forth in this Article 19 shall survive the Final Completion Date or the earlier termination of this Agreement for a period expiring five (5) years following the Final Completion Date or said termination, whichever first occurs; provided that (i) with respect to indemnities arising out of or related to the Warranties, the indemnities shall survive for a period of five (5) years after the last Day of the applicable Warranty Period; (ii) indemnities arising out of or related to environmental matters (including as set forth in Article 12) shall survive for a period equal to the applicable statute of limitations; (iii) the indemnities arising out of Section 19.3 shall survive for a period expiring ten (10) year following the Final Completion Date or the earlier termination of this Agreement; and (iv) indemnities arising out of or related to Tax shall survive for a period equal to the later of (A) five (5) years following the Final Completion Date and (B) the applicable statute of limitations plus one hundred twenty (120) Days (such period, as applicable, the "Survival Period"). All Claim Notices must be delivered, if at all, to the applicable Party prior to the expiration of such applicable Survival Period. If any Claim Notice is made within such Survival Period, then the indemnifying period with respect to all claims identified in such Claim Notice (and the indemnity obligation of the Parties hereunder with respect to such claim) shall extend through the final, non-appealable resolution of such claims. For purposes of clarification hereunder, without limiting the other rights granted hereunder to either Party, a Party may enforce the indemnity provisions hereunder pursuant to the provisions of this Article 19 without having to declare an Owner Event of Default or a Contractor Event of Default, as applicable.

## ARTICLE 20

### CONFIDENTIALITY

**20.1 Dissemination of Confidential Information.** Neither Party (the "Receiving Party") shall (1) use for any purpose other than (i) performing its obligations under this Agreement or (ii) within the scope of the license and rights granted pursuant to Section 14.1 or (2) divulge, disclose, produce, publish, or permit access to, without the prior written consent of the other Party (the "Disclosing Party"), any Confidential Information of the Disclosing Party. "Confidential Information" means proprietary information concerning the business operations or assets of Owner or Contractor (as the case may be), and may include this Agreement and exhibits hereto, all information or materials prepared in connection with the Work performed under this Agreement, designs, drawings, specifications, techniques, models, data, documentation, source code, object code, diagrams, flow charts, research, development, processes, procedures, know-how, manufacturing, development or marketing techniques and materials, development or marketing timetables, strategies and development plans, customer, supplier or personnel names and other information related to customers, suppliers or personnel, pricing policies and financial information, and other information of a similar nature, whether or not reduced to writing or other



tangible form, and any other trade secrets. Confidential Information does not include (a) information known to the Receiving Party prior to obtaining the same from the Disclosing Party; (b) information in the public domain at the time of disclosure by the Receiving Party; (c) information obtained by the Receiving Party from a third party; (d) information approved for public release by express prior written consent of an authorized officer of the Disclosing Party or (e) information independently developed by the Receiving Party without use of the information provided by the Disclosing Party or in breach of this Article 20. Notwithstanding anything herein to the contrary, the Receiving Party has the right to disclose Confidential Information without the prior written consent of the Disclosing Party: (i) as required by any court or other Governmental Authority, or by any stock exchange on which the shares of any Party are listed, but only to the extent, that, based upon reasonable advice of counsel, Receiving Party is required to do so by the disclosure requirements of any Applicable Laws and prior to making or permitting any such disclosure, Receiving Party shall, to the extent legally permitted, provide Disclosing Party with prompt notice of any such requirement so that Disclosing Party (with Receiving Party's assistance if requested) may seek a protective order or other appropriate remedy, (ii) as otherwise required by Applicable Law, (iii) in connection with any government or regulatory filings, including without limitation, filings with any state energy regulatory commission, (iv) to any power purchaser, transmission provider, or an Owner contractor or prospective contractor (or advisors retained on their behalf) or their successors and permitted assigns, any Financing Parties, Independent Engineer, Owner's Engineer and its attorneys, accountants, financial advisors or other agents, in each case bound by confidentiality obligations, (v) to banks, investors and other financing sources and their advisors, in each case bound by confidentiality obligations or (vi) in connection with an actual or prospective merger or acquisition or similar transaction where the party receiving the Confidential Information is bound by the same or similar confidentiality obligations. The Parties acknowledge that the UPSC and the Utah [ ] have the power to examine Owner's books, records, minutes, papers and property and may, from time to time, request or require Owner to disclose or report to the UPSC and/or BCP (or any representatives thereof), as the case may be, any Confidential Information so requested or required without any requirement of notice to or consultation with Contractor.

**20.2 SCADA System Information.** Notwithstanding any other provision of this Article 20, Contractor shall have the right to remotely access the SCADA System installed by Contractor in the Project in order to collect all plant data for its own uses to the end of the Warranty Period; provided, however, that such access by Contractor shall be subject to any limitations Owner may impose that pertain to ensuring electric system reliability or infrastructure security. For the avoidance of doubt, this Agreement does not give Contractor any right to have operational control of the Project. Information shall not be distributed outside Contractor's organization without the express written consent of Owner.

### **20.3 Return of Confidential Information.**

(a) Except for Confidential Information necessary for Contractor to perform the Work and its obligations under this Agreement or as necessary for Owner in connection with the construction, operation or maintenance, use, modification, repair, disposal, removal or alteration of the Project, and subject to and in accordance with Section 14.1, at any time upon the request of Disclosing Party, Receiving Party shall promptly deliver to Disclosing Party or destroy (as determined by Receiving Party) all documents (and all copies thereof, however stored) furnished

to or prepared by Receiving Party that contain Confidential Information and all other documents in Receiving Party's possession that contain any such Confidential Information; provided that the Receiving Party may retain one copy of such Confidential Information solely for the purpose of complying with its audit and document retention policies and may retain such Confidential Information if required by Applicable Law; and provided, further, that all such retained Confidential Information shall be held subject to the terms and conditions of this Agreement.

(b) Notwithstanding the return or destruction of all or any part of the Confidential Information, the confidentiality provisions set forth in this Agreement shall nevertheless remain in full force and effect with respect to Confidential Information until the date that is two (2) years after the earlier of (i) the Final Completion Date or (ii) the termination of this Agreement.

## ARTICLE 21

### ASSIGNMENT

**21.1 Prohibition on Assignment.** Except as set forth in Section 21.2, no Party shall be entitled to assign this Agreement or any of its rights or obligations under this Agreement without the prior written consent of the other Party, which consent shall not be unreasonably withheld.

**21.2 Exceptions.** Notwithstanding the foregoing, (a) Owner, without the consent of the Contractor, shall be entitled to assign its right, title and interest in and to this Agreement to: (i) PacifiCorp d/b/a Rocky Mountain Power, (ii) any successor to Owner provided such successor is a public utility holding a certificate of public convenience and necessity granted by the UPSC pursuant to [*Utah Code Section*], where such assignment does not occur by operation of Law, (iii) a Person (other than a natural person) providing retail electric service in Utah, (iv) a Person (other than a natural person) whose Credit Rating, as published by either Relevant Rating Agency, is equal or superior to the Minimum Credit Rating as of the time of assignment or (v) a Person (other than a natural person) as otherwise required by Law, (b) Owner shall be entitled to assign its right, title and interest in and to this Agreement to any Financing Parties by way of security for the performance of obligations to such Financing Parties without the consent of Contractor who, subject to any consent entered into by Contractor with the Financing Parties, may further assign such rights, title and interest under this Agreement upon exercise of remedies by a Financing Party following a default by Owner under the financing agreements entered into between Owner and the Financing Parties and (c) each Party shall be entitled to assign its right, obligation, title and interest in and to this Agreement to any of its Affiliates or in connection with a merger or acquisition of substantially all of the assets of such Party, subject, with respect to any such assignment by Contractor, to the Contractor Performance Security and the continued validity thereof. Contractor shall execute any consent and agreement or similar documents with respect to such an assignment described in subclause (b) as the Financing Parties may reasonably request and acknowledges that such consent and agreement or similar document may, among other things, require Contractor to give the Financing Parties notice of, and an opportunity to cure, any breach of this Agreement by Owner. Contractor shall reasonably cooperate with Owner in the negotiation and execution of any reasonable amendment or addition to this Agreement required by the Financing Parties. Contractor shall, at Owner's cost and subject to the confidentiality provisions set forth in Article 20, make available to any Financing Parties and other Persons involved in the financing or refinancing of

the Project who have a need-to-know (e.g., counsel to a lender or any such other Person, Governmental Authority, underwriters, rating agencies, independent reviewers and feasibility consultants) such information in the control of Contractor (including financial information concerning Contractor) as may reasonably be requested by Owner on behalf of the Financing Parties or the Financing Parties' engineer with respect to financing of the Project. Contractor further agrees that, in connection with the financing or refinancing of the Project, Contractor shall, at the request of Owner, provide an opinion of counsel as to the enforceability against Contractor of this Agreement until expiration of the last Warranty Period. Any authorized assignment of this Agreement by either Party shall relieve such Party of its obligations hereunder at such time as the authorized successor agrees in writing to be bound by such assigning Party's obligations hereunder.

**21.3 Indemnitees; Successors and Assigns.** Upon any assignment by either Party hereunder, with respect to indemnification obligations, the definition of "Owner Party" or "Contractor Party", as applicable, shall be deemed modified to include the assignor and permitted assignee under such assignment and each of their respective employees, agents, partners, Affiliates, shareholders, officers, directors, members, managers, successors and permitted assigns.

**21.4 Assignment to Owner Affiliate; Assignment With Consent.** This Agreement or any right or obligation contained herein may be assigned by Owner, without the prior consent of Contractor, to (i) PacifiCorp d/b/a Rocky Mountain Power, its Affiliates, or their Financing Parties as a collateral assignment, on the understanding that, on enforcement of such collateral assignment by PacifiCorp d/b/a Rocky Mountain Power, its Affiliates or such Financing Parties, PacifiCorp d/b/a Rocky Mountain Power, its Affiliates or such Financing Parties (or their respective designee) may assume, or cause any purchaser at any foreclosure sale or any assignee or transferee under any instrument of assignment or transfer in lieu of foreclosure to assume, all of the interests, rights and obligations of Owner hereunder, (ii) any of its Affiliates, including the Project Company, or (iii) to PacifiCorp d/b/a Rocky Mountain Power, its Affiliates or to any other actual or prospective purchaser or owner of the Project assets (and such purchaser or owner may assign its rights in this Agreement back to Owner or any of its Affiliates without the consent of Contractor); provided that such Affiliate, purchaser or owner of the Project assets assumes all of Owner's obligations hereunder in such assignment (except for payment obligations that remain with the assigning Owner); and provided, further, that, in the case of an assignment of this Agreement by Owner to PacifiCorp d/b/a Rocky Mountain Power or its Affiliates, unless otherwise Notified by Owner to Contractor, Owner shall remain responsible for all payments of the Contract Price (and only such payments) not yet paid arising after such assignment through and including the Final Payment. Owner shall have the right to assign this Agreement to any other financially qualified party without Contractor's prior written consent. Except as otherwise provided in this Section 21.4 or in Section 21.5, this Agreement may be otherwise assigned by the Parties only upon the prior written consent of the other Party. When duly assigned in accordance with the foregoing, this Agreement shall be binding upon and shall inure to the benefit of the permitted assignee; any other assignment shall be void and without force or effect.

**21.5 Assignment to Financing Parties.** Notwithstanding Section 21.4, Contractor agrees to (i) the assignment by Owner, without the consent of Contractor, of its rights and obligations under this Agreement to the Financing Parties in connection with the financing of the

Project or to any designee of the Financing Parties, and (ii) the Financing Parties' performance of Owner's obligations under this Agreement after such assignment.

## ARTICLE 22

### NOTICES

**22.1 Notices.** Any notice, request, demand or other communication required or permitted under this Agreement shall be deemed to be properly given by the sender and received by the addressee if made in writing and sent: (a) by personal delivery; (b) in portable document format (PDF) attached to an email transmission, but only to the extent such transmission is promptly followed by overnight or certified mail, postage prepaid, return receipt requested; (c) by overnight or certified mail, postage prepaid, return receipt requested; or (d) by next day air courier service. Notices given pursuant to this Section 22.1 shall be addressed as follows to:

Owner: PacifiCorp d/b/a/ Rocky Mountain Power  
1407 W Temple, Suite 310  
Salt Lake City, Utah 84116  
Attention: [ ]  
Email: [ ]

Contractor: [ ]  
[ ]  
[ ]  
[ ]  
Attention: [ ]  
Email: [ ]

A Party, the Financing Parties or the Independent Engineer, by giving notice as provided in this Section 22.1, may, as to itself, change any of the details for the service of notice hereunder or designate a reasonable number of additional "with a copy to" recipients.

**22.2 Effective Time.** Any notice or notification given personally, through overnight mail or through certified letter shall be deemed to have been received on delivery, any notice given by express courier service shall be deemed to have been received the next Business Day after the same shall have been delivered to the relevant courier, and any notice given by PDF transmission shall be deemed to have been received on the date of delivery (but only to the extent such transmission was promptly followed by mail as provided in Section 22.1) if delivered prior to 5:00 pm Mountain Time; provided, that if such date of delivery is not a Business Day or is delivered after 5:00 pm Mountain Time, then the date of delivery shall be the immediately following Business Day.

## ARTICLE 23

### DISPUTE RESOLUTION; GOVERNING LAW

**23.1 Good Faith Negotiations.** In the event that any question, dispute, difference or claim arises out of or is in connection with this Agreement, including any question regarding its existence, validity, performance or termination (a “Dispute”), which either Party has notified to the other Party in a written notice stating that it is a “Notice of Dispute”, senior management personnel from both Contractor and Owner shall attempt to resolve the Dispute for a minimum period of thirty (30) Days following issuance of the Notice of Dispute, and such attempt shall include at least one in-person meeting between senior management personnel from both Contractor and Owner, each of whom has the authority to finally settle the Dispute on behalf of that Party. If the Dispute is not resolved by negotiation, the provisions of Section 23.2 and Section 23.3 below shall apply.

#### **23.2 Technical Disputes; Optional Arbitration.**

(a) Technical Disputes. If a Notice of Dispute relates to a Dispute that is technical in nature (a “Technical Dispute”), such Dispute shall be submitted to an Independent Expert for expedited dispute resolution pursuant to the following provisions of this Section 23.2(a). The Parties shall negotiate in good faith to select an Independent Expert. If the Parties cannot agree within five (5) Business Days then the Party initiating the dispute (the “Dispute Initiator”) shall send notice to the other Party proposing two potential independent engineers set forth in the definition of “Independent Expert”. The other Party shall then have two (2) Business Days after receipt of such notice to select an Independent Expert from such two (2) potential independent engineers identified in such notice. If the other Party does not make a selection within such two (2)-Business Day period, the Dispute Initiator shall select an Independent Expert from such two (2) potential independent engineers identified in such notice. The Parties shall formalize their positions regarding the dispute in writing within four (4) Days of the submission of the Technical Dispute and submit such positions to the Independent Expert. The Parties and the Independent Expert shall meet at the Site within five (5) Business Days of the Independent Expert’s receipt of the materials referenced in the immediately preceding sentence and the Independent Expert shall issue a binding ruling that both Parties will obey within five (5) Business Days thereof. The Party that will pay for the Independent Expert and all costs related thereto shall be the losing Party, as determined by the Independent Expert.

(b) Any Dispute other than a Technical Dispute that is not settled to the mutual satisfaction of the Parties within the applicable notice or cure periods provided in this Agreement or pursuant to Section 23.1, may proceed to court pursuant to Section 23.3 unless the Parties mutually agree in writing to resolve such Dispute by arbitration as provided herein.

(c) If the Parties elect to pursue arbitration, upon the expiration of the thirty (30) Day negotiation period set forth in Section 23.1, either Party may submit such Dispute to arbitration by providing a written demand for arbitration to the other Party, and such arbitration shall be conducted in accordance with the Rules of the AAA for the Resolution of Construction Industry Disputes (the “Arbitration Rules”) in effect on the date that the submitting Party gives notice of its demand for arbitration under this Section 23.2. The arbitration shall be conducted at

a location as agreed by the Parties, or if the Parties cannot so agree, the arbitration shall be conducted in Salt Lake County, Utah. Unless otherwise agreed by the Parties, discovery shall be conducted in accordance with the Federal Rules of Civil Procedure and the Parties shall be entitled to submit expert testimony or written documentation in the arbitration proceeding. The decision of the arbitrator(s) shall be final and binding upon Owner and Contractor and shall be set forth in a reasoned opinion, and any award may be enforced by Owner or Contractor, as applicable, in any court of competent jurisdiction. Any award of the arbitrator(s) shall include interest from the date of any damages incurred for breach of this Agreement, and from the date of the award until paid in full, at a rate equal to the lesser of (i) the rate published by the *Wall Street Journal* as the “prime rate” on the Business Day preceding the date on which such interest begins to accrue plus two percent (2%) and (ii) the maximum rate allowed under Applicable Law. Each of Owner and Contractor shall bear its own cost of preparing and presenting its case; however, the prevailing party in such arbitration shall be awarded its reasonable attorney’s fees, expert fees, expenses and costs incurred in connection with the Dispute. The fees and expenses of the arbitrator(s), and other similar expenses, shall initially be shared equally by Owner and Contractor, subject to reimbursement of such arbitration costs and attorney’s fees and costs to the prevailing party. The arbitrator(s) shall be instructed to establish procedures such that a decision can be rendered within ninety (90) Days after the appointment of the arbitrator(s). The arbitration may include, by consolidation or joinder or in any other manner, any additional persons or entities if (1) such persons or entities are materially involved in a common issue of law or fact in dispute and (2) such persons or entities are either contractually bound to arbitrate or otherwise consent to arbitration.

(d) Appointment of Arbitrator(s). All arbitrators appointed to hear a Dispute pursuant to paragraph (i) or paragraph (ii) below shall have significant construction contract resolution experience and experience and understanding of the contemporary wind power industry and WTG systems.

(i) Where the amount in dispute is less than One Million Dollars (\$1,000,000) the Dispute shall be heard by a single neutral arbitrator agreed by the Parties. If the Parties cannot agree on a single neutral arbitrator within fifteen (15) Business Days after the written demand for arbitration is provided, then the arbitrator shall be selected pursuant to the Arbitration Rules.

(ii) Where the amount in dispute is for One Million Dollars (\$1,000,000) or more, the Dispute shall be heard by a panel of three (3) arbitrators. Each Party shall select one neutral arbitrator to sit on the panel. The arbitrators selected by the Parties shall in turn nominate a third neutral arbitrator from a list of arbitrators mutually satisfactory to the Parties.

(e) Arbitrator Confidentiality Obligation. The Parties shall ensure that any arbitrator appointed to act under this Article 23 will agree to be bound to comply with the provisions of Article 20 with respect to the terms of this Agreement and any information obtained during the course of the arbitration proceedings.

**23.3 Governing Law/Litigation/Choice of Forum/Waiver of Jury Trial.** THIS AGREEMENT SHALL BE GOVERNED BY THE INTERNAL LAWS OF THE STATE OF UTAH, EXCLUDING ANY OF ITS CONFLICT OF LAW PROVISIONS THAT WOULD

REQUIRE THE APPLICATION OF THE LAWS OF ANOTHER JURISDICTION. SUBJECT TO THE OTHER PROVISIONS OF THIS ARTICLE 23 AND THE ARBITRATION OPTION DESCRIBED IN SECTION 23.2, FOR PURPOSES OF RESOLVING ANY DISPUTE ARISING UNDER THIS AGREEMENT, THE PARTIES HEREBY SUBMIT TO THE EXCLUSIVE JURISDICTION OF THE FEDERAL COURTS (AND IN THE ABSENCE OF JURISDICTION THEREIN THE UTAH STATE COURTS IN SALT LAKE COUNTY) LOCATED IN THE STATE OF UTAH. THIS CONSENT TO JURISDICTION IS BEING GIVEN SOLELY FOR PURPOSES OF THIS AGREEMENT, AND IT IS NOT INTENDED TO, AND SHALL NOT, CONFER CONSENT TO JURISDICTION WITH RESPECT TO ANY OTHER DISPUTE IN WHICH A PARTY TO THIS AGREEMENT MAY BECOME INVOLVED. THE PARTIES ACKNOWLEDGE AND AGREE THAT TERMS AND CONDITIONS OF THIS AGREEMENT HAVE BEEN FREELY, FAIRLY AND THOROUGHLY NEGOTIATED. EACH PARTY HEREBY WAIVES ANY OBJECTION THAT IT MAY HAVE TO THE VENUE OF SUCH ACTION, SUIT OR PROCEEDING IN SUCH COURT OR THAT SUCH SUIT, ACTION OR PROCEEDING IN SUCH COURT WAS BROUGHT IN AN INCONVENIENT COURT AND AGREES NOT TO PLEAD OR CLAIM THE SAME. EACH PARTY FURTHER AGREES THAT SUCH COURT SHALL HAVE *IN PERSONAM* JURISDICTION OVER EACH OF THEM WITH RESPECT TO ANY SUCH DISPUTE, CONTROVERSY, OR PROCEEDING. THE PARTIES SUBMIT TO THE JURISDICTION OF SAID COURT AND WAIVE ANY DEFENSE OF *FORUM NON CONVENIENS*. EACH PARTY, TO THE FULL EXTENT PERMITTED BY LAW, HEREBY KNOWINGLY, INTENTIONALLY AND VOLUNTARILY, WITH AND UPON THE ADVICE OF COMPETENT COUNSEL, WAIVES, RELINQUISHES AND FOREVER FORGOES THE RIGHT TO A TRIAL BY JURY IN ANY ACTION OR PROCEEDING BASED UPON, ARISING OUT OF, OR IN ANY WAY RELATING TO THE RIGHTS OR OBLIGATIONS SET FORTH IN THIS AGREEMENT OR ANY CONDUCT, ACT OR OMISSION OF CONTRACTOR OR OWNER OR ANY OF THEIR RESPECTIVE DIRECTORS, OFFICERS, AFFILIATES, EMPLOYEES, AGENTS, ATTORNEYS, OR OTHER REPRESENTATIVES, OR ANY OTHER PERSONS AFFILIATED WITH OWNER OR CONTRACTOR, IN EACH OF THE FOREGOING CASES, WHETHER SOUNDING IN CONTRACT, TORT OR OTHERWISE. EACH PARTY (I) CERTIFIES THAT NO REPRESENTATIVE OF THE OTHER PARTY HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT SUCH OTHER PARTY WOULD NOT, IN THE EVENT OF LITIGATION, SEEK TO ENFORCE THE FOREGOING WAIVER AND (II) ACKNOWLEDGES THAT IT AND THE OTHER PARTY HAS BEEN INDUCED TO ENTER INTO THIS AGREEMENT BY, AMONG OTHER THINGS, THE MUTUAL WAIVERS AND CERTIFICATIONS IN THIS SECTION 23.3. EACH PARTY FURTHER WAIVES ANY RIGHT TO CONSOLIDATE ANY ACTION IN WHICH A JURY TRIAL HAS BEEN WAIVED WITH ANY OTHER ACTION IN WHICH A JURY TRIAL CANNOT BE OR HAS NOT BEEN WAIVED.

**23.4 Work to Continue.** During the pendency of any dispute proceedings, as required under the terms of this Agreement, Owner shall continue to make undisputed payments and each Party shall continue to perform its obligations under this Agreement.

## ARTICLE 24

### LIMITATION OF LIABILITY

**24.1 Consequential Damages.** Neither Contractor nor Owner shall be liable to the other for, nor shall a court or arbitrator assess, any consequential losses or damages, whether arising in contract, warranty, tort (including negligence), strict liability or otherwise, including losses of use, profits, business opportunity, reputation or financing, subject to the following exclusions which constitute amounts which shall not be deemed to be limited or waived by the foregoing restriction: (a) the Liquidated Damages; (b) claims made by, damages incurred by, or amounts payable pursuant to an indemnity given hereunder; (c) damages arising out of a breach of Article 20 by either Party; (d) claims arising out of fraud or willful misconduct; and (e) all Termination Payments.

**24.2 Overall Limitation of Liability.** Notwithstanding any other provision of this Agreement, the cumulative maximum liability of a Party to the other Party under this Agreement shall not exceed one hundred percent (100%) of the Contract Price, the maximum liability of Contractor for Mechanical Completion Delay Liquidated Damages shall not exceed twenty percent (20%) of the Contract Price. The foregoing limitation of liability shall not apply with respect to claims made by, damages incurred by, or amounts payable to third parties pursuant to an indemnity given hereunder or claims arising out of such Party's fraud or willful misconduct. To the extent any provision of this Agreement establishes a lower limit of liability of a Party with respect to a particular component or type of liability, such lower limit of liability shall control with respect to the relevant component or type of liability. Notwithstanding anything herein to the contrary, no liabilities of Contractor to Owner that are covered by insurance carried by Contractor pursuant to Article 18 (except deductibles paid by Contractor) shall count towards Contractor's cumulative maximum liability to Owner pursuant to this Agreement.

## ARTICLE 25

### SURVIVAL

**25.1 Survival.** The provisions within the Articles with the following titles shall survive termination of this Agreement: Contract Interpretation and Effectiveness, Taxes, Force Majeure Event; Owner-Caused Delay, Hazardous Materials, Intellectual Property, Suspension of the Work, Defaults and Remedies, Warranties, Publicity, Indemnity, Confidentiality, Assignment, Dispute Resolution; Governing Law, Limitation of Liability, Miscellaneous and any other provision which expressly or by implication survives termination.

## ARTICLE 26

### REPRESENTATIONS AND WARRANTIES

**26.1 Representations and Warranties of Contractor.** Contractor represents and warrants to Owner that as of the Effective Date:



(a) Organization, Standing and Qualification. Contractor is a [\_\_\_\_], duly organized, validly existing, and in good standing under the laws of the State of [\_\_\_\_], and has full power to execute, deliver and perform its obligations hereunder to own, lease and operate its properties and to engage in the business it presently conducts and contemplates conducting under this Agreement, and is and will be duly licensed or qualified and in good standing under the laws of the State of Utah and in each other jurisdiction in which the nature of the business transacted by it makes such licensing or qualification necessary and where the failure to be licensed or qualified would have a material adverse effect on its ability to execute and deliver this Agreement or perform its obligations hereunder.

(b) Due Authorization; Enforceability. This Agreement has been duly authorized, executed and delivered by or on behalf of Contractor and is, upon execution and delivery by each of the Parties hereto, the legal, valid and binding obligation of Contractor, enforceable against Contractor in accordance with its terms, except as such enforceability may be limited by applicable bankruptcy, insolvency or similar laws affecting creditors' rights generally and by general equitable principles.

(c) No Conflict. The execution, delivery and performance by Contractor of this Agreement will not (i) violate or conflict with or cause a default under any covenant, agreement or understanding to which it is a party or by which it or any of its properties or assets is bound or affected, or its organizational documents, (ii) violate or conflict with any Applicable Law or (iii) subject the Project or any component part thereof to any lien other than as contemplated or permitted by this Agreement.

(d) Government Approvals. Other than with respect to the Applicable Permits, neither the execution nor the delivery by Contractor of this Agreement requires the consent or approval of, or the giving of notice to or registration with, or the taking of any other action in respect of, any Governmental Authority. Contractor represents and warrants that all Contractor Acquired Permits either have been obtained by Contractor and are in full force and effect or Contractor has no knowledge of any reason that any Contractor Acquired Permit cannot be obtained in the ordinary course of business and within the timeframe necessary so as to permit Contractor to timely commence and perform the Work to completion in accordance with the terms and conditions of this Agreement.

(e) Violation of Laws; No Suits; Proceedings. Contractor is not in violation of any Applicable Laws or judgment entered by any Governmental Authority, which violations, individually or in the aggregate, would materially and adversely affect its performance of any obligations under this Agreement. There are no actions, suits, proceedings, patent or license infringements or investigations pending or, to Contractor's knowledge after due inquiry, threatened against it before any court, arbitrator or Governmental Authority that individually or in the aggregate could result in any materially adverse effect on the business, properties or assets or the condition, financial or otherwise, of Contractor or in any impairment of its ability to perform its obligations under this Agreement. Contractor has no knowledge of any violation or default with respect to any order, writ, injunction or decree of any court or any Governmental Authority that may result in any such materially adverse effect or such impairment.

(f) Business Practices. Neither Contractor nor any Subcontractor, or their respective employees, officers, representatives, or other agents of Contractor have made or will make any payment or have given or will give anything of value, in either case to any government official (including any officer or employee of any Governmental Authority) to influence his, her or its decision or to gain any other advantage for Owner or Contractor in connection with the Work to be performed hereunder. Contractor is in compliance with the requirements set forth in Section 3.29.

(g) Licenses. All Persons who will perform any portion of the Work have or will have all business and professional certifications and licenses if and as required by the terms and conditions of this Agreement, Applicable Codes, Applicable Law and Applicable Permits to perform such portion of the Work under this Agreement and Contractor has no knowledge of any reason that any such certifications and licenses cannot be obtained in the ordinary course of business and within the timeframe necessary so as to permit such Persons to timely commence and perform any portion of the Work to completion in accordance with the terms and conditions of this Agreement.

(h) Financial Condition and Adequate Resources. Contractor is financially solvent, able to pay its debts as they mature, and possessed of sufficient working capital to complete its obligations under this Agreement. Contractor has or will procure adequate resources and is qualified, in each case directly or through its Subcontractors, to perform the Work in accordance with the terms and conditions of this Agreement.

(i) Intellectual Property. Contractor owns or has the right to use, or will be able to secure from its Affiliates or Subcontractors the right to use, all Intellectual Property Rights necessary to perform the Work without infringing on the rights of others and to enable Owner to use the Intellectual Property Rights in connection with the ownership, operation, use, maintenance, modification, altering, commissioning, de-commissioning, disposal of or removal of the Project without infringement on the rights of others. The Licensed Technology (and the use thereof to the extent used in accordance with the license granted under Section 14.1) do not and shall not infringe, or cause the infringement of, the Intellectual Property Rights of a third party.

**26.2 Representations and Warranties of Owner.** Owner represents and warrants to Contractor that as of the Effective Date:

(a) Organization, Standing and Qualification. Owner is a corporation, duly organized, validly existing, and in good standing under the laws of the State of Oregon, and has the full power to execute, deliver and perform its obligations hereunder and engage in the business it presently conducts and contemplates conducting under this Agreement, and Owner is and will be duly licensed or qualified and in good standing under the laws of the State of Utah and in each other jurisdiction in which the nature of the business transacted by it makes such licensing or qualification necessary and where the failure to be licensed or qualified would have a material adverse effect on its ability to perform its obligations hereunder.

(b) Due Authorization; Enforceability. This Agreement has been duly authorized, executed and delivered by or on behalf of Owner and is, upon execution and delivery by each of the Parties hereto, the legal, valid and binding obligation of Owner, enforceable against

Owner in accordance with its terms, except as such enforceability may be limited by applicable bankruptcy, insolvency or similar laws affecting creditors' rights generally and by general equitable principles.

(c) No Conflict. The execution, delivery and performance by Owner of this Agreement will not violate or conflict with or cause a default under any Applicable Law or any covenant, agreement or understanding to which it is a party or by which it or any of its properties or assets is bound or affected, or its organizational documents.

## ARTICLE 27

### MISCELLANEOUS PROVISIONS

**27.1 Terms in Subcontracts.** All Subcontracts shall conform to the requirements of this Agreement, insofar as applicable. All Work performed for the Contractor by a Subcontractor shall be pursuant to an appropriate written agreement between Contractor and the Subcontractor which shall contain provisions that:

(a) reasonably preserve and protect all the rights of Owner under this Agreement and to the Work to be performed under the Subcontract, so that the subcontracting thereof will not prejudice such rights;

(b) require that such Work be performed in accordance with the applicable requirements of this Agreement;

(c) require such Subcontractor to make available a representative with whom the Owner may discuss questions regarding the progress of the Work being performed by the Subcontractor;

(d) require such Subcontractor to provide and maintain adequate insurance consistent with the insurance required pursuant to this Agreement;

(e) require such Subcontractor to remove any employee or independent contractor of such Subcontractor used in the Work or in such Subcontractor's warranty obligations within two (2) Business Days after receiving notice from Owner to remove such employee or independent contractor if: (i) such employee or independent contractor, in Owner's reasonable judgment, creates a safety or security hazard or a material risk of either: (A) non-achievement of Project Mechanical Completion or Final Completion; or (B) material non-performance by Contractor in accordance with this Agreement; and (ii) Contractor has not corrected such safety or security hazard or other non-performance identified in clause (i) to the reasonable satisfaction of Owner during such two (2) Business Day period;

(f) provide that, if following any termination of this Agreement, the Subcontract shall be assigned from the Contractor to the Owner, the Owner shall not be liable for obligations that accrue under the Subcontract before the date of such assignment; and

(g) such other provisions as required by other provisions of this Agreement (including the exhibits hereto).

**27.2 Books and Record; Retention.** Contractor agrees to retain for ten (10) years (or any longer Warranty Period) all material records relating to its performance of the Work or Contractor's warranty obligations herein.

**27.3 Attorneys' Fees.** If any legal action or other proceeding is brought for the enforcement of this Agreement, the prevailing Party shall be entitled to be awarded its reasonable attorney's fees, expert fees, expenses and costs incurred in connection with such action or proceeding.

**27.4 Inspection, Review and Approval.** Notwithstanding Owner's inspection, review, monitoring, observation, acknowledgement, comment or Owner's approval of any items reviewed, inspected, monitored or observed in accordance with this Agreement, neither Owner nor any of its representatives or agents reviewing such items, including the Owner's Engineer, shall have any liability for, under or in connection with the items such Person reviews or approves, and Contractor shall remain responsible for the quality and performance of the Work in accordance with this Agreement. Owner's or its representative's inspection, review, monitoring, observation, acknowledgement, comment or approval of any items shall not constitute a waiver of any claim or right that Owner may then or thereafter have against Contractor. Unless otherwise expressly provided herein, Owner shall not unreasonably delay its review of any item submitted by Contractor for review or approval for review or approval; provided, however, the foregoing shall not be used to decrease any express time limitation for such review or approval set forth herein. Any review, inspection, monitoring or observation by Owner or its representatives in accordance with this Agreement shall not constitute any approval of the Work undertaken by such Person, cause Owner to have any responsibility for the actions, the Work or payment of such Person (other than in respect of Owner's obligations to pay Contractor in accordance with Article 4) or to be deemed to be in an employer-employee relationship with Contractor or any Subcontractor, or in any way relieve Contractor of its responsibilities and obligations under this Agreement or be deemed to be acceptance by Owner with respect to such Work.

**27.5 Independent Engineer.** Contractor acknowledges that an independent engineer or engineering firm (the "Independent Engineer") may be engaged by Owner for the purpose of providing to Owner or Financing Parties a neutral, third party overview of the Work. The Independent Engineer shall provide independent opinions and determinations, arrived at reasonably and in good faith, with respect to: (a) the status of the Work; (b) the performance of the Project and equipment; (c) invoices submitted by Contractor; (d) Contractor's quality control procedures for the Work and major components thereof; and (e) the approval of Change Orders. Owner undertakes that it will use reasonable efforts to ensure that the Independent Engineer gives its countersignature or indicates that it is not willing to do so in relation to the relevant matter within the time specified in this Agreement for Owner to respond in relation to such matter; provided that any such unwillingness on the part of the Independent Engineer shall not affect or limit Owner's obligations hereunder. The Independent Engineer may, at its option, attend any meetings between Owner and Contractor related to the progress of the Project and shall approve all Contractor's Applications for Payments prior to any payment being made by Owner thereunder; provided that any failure by the Independent Engineer to approve a Contractor's Application for Payment shall not affect or limit Owner's obligations hereunder. Notwithstanding anything else to the contrary contained herein, the Independent Engineer shall have no right to direct Contractor or any portion of the Work or to make any Change Order. Contractor shall maintain a complete,

accurate and up-to-date log of all Change Orders and, upon request of the Independent Engineer, shall furnish copies of such log to the Independent Engineer. Contractor shall afford the Independent Engineer the same rights as Owner with respect to access to the Site.

**27.6 Financing Matters.** In connection with any collateral assignment by Owner of its rights, title and interest under this Agreement to any Financing Party in accordance with Section 21.2, Contractor shall execute and deliver any usual and customary consent in accordance with Section 21.2 and use commercially reasonable efforts to cause Major Subcontractors to execute subordination agreements. Contractor agrees to make available, or to use commercially reasonable efforts to cause its Subcontractors to make available, to the Financing Parties and the Independent Engineer, subject to an appropriate confidentiality agreement, independent reviewers, feasibility consultants, and other financial institutions or parties involved in the financing process, such information in the control of Contractor, its Affiliates and Subcontractors (including financial information concerning Contractor, its Affiliates and the Subcontractors) as may be reasonably requested by Owner. Contractor acknowledges that the Financing Parties and the Independent Engineer may monitor, inspect and review the Work as permitted by Article 8.

**27.7 Fees and Expenses.** Except as specifically set forth herein, each Party shall be responsible for any legal fees and expenses, financial advisory fees, accountant fees and any other fees and expenses incurred by such Party in connection with the negotiation, preparation and enforcement of this Agreement and the transactions contemplated hereby.

**27.8 Related Contracts.** Services and work performed at any time by Contractor or its Affiliates under any other Project Transaction Document shall not constitute Work hereunder. Owner shall use reasonable efforts to make claims against Contractor and its Affiliates under the appropriate Project Transaction Document. Notwithstanding the foregoing, Contractor shall not contend that it is not liable for any claim of Owner under or arising out of this Agreement on the grounds that the loss or damage suffered by Owner was caused by an act or omission, or the failure to comply with the terms of any other Project Transaction Document by, any Contractor Party or Subcontractor, and Contractor irrevocably waives any such defense in any Dispute. Contractor shall inform Owner if it believes that Owner made a claim under the wrong Project Transaction Document. If Contractor and Owner do not agree that such claim should have been made under a different Project Transaction Document, Contractor and Owner shall resolve any such dispute regarding which Project Transaction Document a claim should have been made under by submitting such dispute to resolution in accordance with Article 23.

**27.9 Audit Rights.** With respect to any Change Order which adjusts the Contract Price by compensating Contractor on a reimbursable cost or time and materials basis, Contractor shall maintain, in accordance with Prudent Utility Practice and generally accepted accounting principles consistently applied, records and books of account as may be necessary for substantiation of all Contractor claims for additional compensation. Owner, Owner's Engineer, the Financing Parties, if any, and their authorized representatives shall be entitled to inspect and audit such records and books of account during normal business hours and upon reasonable advanced notice during the course of the Work and for a period of five (5) years after the Final Completion Date (or such longer period, where required by Applicable Law); provided, however, that the purpose of any such audit shall be only for verification of such costs, and Contractor shall not be required to keep records of or provide access to those of its costs covered by the fee, allowances, fixed rates, unit

prices, lump sum amounts, or of costs which are expressed in terms of percentages of other costs. Contractor shall retain all such records and books of account for a period of at least five (5) years after the Final Completion Date (or such longer period, where required by Applicable Law). Contractor shall use commercially reasonable efforts to cause all Major Subcontractors engaged in connection with the Work or the performance by Contractor of its warranty obligations herein to retain for the same period all their records relating to the Work for the same purposes and subject to the same limitations set forth in this Section 27.9. Audit data shall not be released by the auditor to parties other than Contractor, Owner, Owner's Engineer, and their respective officers, directors, members, managers, employees and agents in connection with any such audit, subject to the provisions of Article 20. If, as a result of any audit conducted pursuant to this Section 27.9, the results of such audit indicate that Contractor received more or less than the amount to which it was entitled under this Agreement, either Owner shall pay the additional amount owed to Contractor or Contractor shall refund any overpayment to Owner, as applicable, in either case within ten (10) Days of a written request therefor. Owner shall be responsible for all costs and expenses of such audit unless an overpayment by Owner of more than three percent (3%) of the subject payment is discovered, in which case Contractor shall be responsible for such costs and expenses.

**27.10 Third Party Beneficiaries.** The provisions of this Agreement are intended for the sole benefit of Owner and Contractor and there are no third-party beneficiaries hereof (except as expressly set forth herein).

**27.11 Further Assurances.** Owner and Contractor will each use its reasonable efforts to implement the provisions of this Agreement, and for such purpose each, at the reasonable request of the other, will, without further consideration, promptly execute and deliver or cause to be executed and delivered to the other such assistance (including in connection with any financing involving the Project by either Party), or assignments, consents or other instruments in addition to those required by this Agreement, in form and substance satisfactory to the other, as the other may reasonably deem necessary or desirable to implement any provision of this Agreement.

**27.12 No Waiver.** A Party's waiver of any breach or failure to enforce any of the terms, covenants, conditions or other provisions of this Agreement at any time shall not in any way affect, limit, modify or waive that Party's right thereafter to enforce or compel strict compliance with every term, covenant, condition or other provision hereof, any course of dealing or custom of the trade notwithstanding. All waivers must be in writing and signed on behalf of Owner and Contractor in accordance with Section 27.13.

**27.13 Amendments in Writing.** Without limiting any provision of Article 9 with respect to mandatory Change Orders, no oral or written amendment or modification of this Agreement by any officer, agent, member, manager or employee of Contractor or Owner shall be of any force or effect unless such amendment or modification is in writing and is signed by a duly authorized representative of the Party to be bound thereby.

**27.14 Order of Precedence.** In the event of a conflict or inconsistency between any of the Contract Documents forming part of this Agreement, the following order of precedence shall apply: (a) any duly executed amendment or Change Order to this Agreement (and between them, the most recently executed amendment or Change Order shall take precedence); (b) this Agreement (to the extent not superseded by a subsequent amendment); (c) Exhibit 1, Exhibit 16, the Technical

Specifications, Exhibit 7, Exhibit 20 and Exhibit 21 to this Agreement in the order indicated; (d) the Exhibits to this Agreement not otherwise specified in subclause (c) above; (e) the Contractor Submittals; and (f) any other Contract Documents not previously noted.

**27.15 Entire Agreement.** This Agreement and the exhibits attached hereto constitute the complete and entire agreement between the Parties with respect to the engineering, procurement, construction, testing and commissioning of the Project and supersedes any previous communications, negotiations, representations or agreements, whether oral or in writing, with respect to the subject matter addressed herein. NO PRIOR COURSE OF DEALING BETWEEN THE PARTIES SHALL FORM PART OF, OR SHALL BE USED IN THE INTERPRETATION OR CONSTRUCTION OF, THIS AGREEMENT. For the avoidance of doubt, this Agreement shall not supersede the other Project Transaction Documents, which shall remain in full force and effect.

**27.16 Invalidity.** Whenever possible, each provision or portion of any provision of this Agreement shall be interpreted in such manner as to be effective and valid under Applicable Law, but, to the extent permitted by law, if for any reason any provision which is not essential to the effectuation of the basic purpose of this Agreement is determined to be invalid, illegal or unenforceable, in whole or in part, such invalidity, illegality or unenforceability shall not affect the validity or enforceability of any other provision of this Agreement or this Agreement as a whole. Any such invalid, illegal or unenforceable portion or provision shall be deemed severed from this Agreement and the balance of this Agreement shall be construed and enforced as if this Agreement did not contain such invalid, illegal or unenforceable portion or provision. If any such provision of this Agreement is so declared invalid, illegal or unenforceable, the Parties shall promptly negotiate in good faith new provisions to eliminate such invalidity, illegality or unenforceability and to restore this Agreement as near as possible to its original intent and effect (including economic effect).

**27.17 Binding Effect.** This Agreement shall be binding upon the Parties hereto and their respective successors, heirs and assigns and shall inure to the benefit of the Parties hereto and their respective permitted successors, heirs and assigns.

**27.18 No Agency.** The Parties are independent contractors. Nothing in this Agreement is intended, or shall be construed, to create any association, joint venture, agency relationship or partnership between the Parties or to impose any such obligation or liability upon either Party (except and solely to the extent expressly provided in this Agreement pursuant to which Owner appoints Contractor as Owner's agent). Nothing in this Agreement shall be construed to give either Party any right, power or authority to enter into any agreement or undertaking for, or act as an agent or representative of, or otherwise bind, the other Party. Neither Contractor nor any of its employees is or shall be deemed to be an employee of Owner.

**27.19 Effective Date.** The effective date of this Agreement is the date when this Agreement has been signed by both Parties (the "Effective Date"), and Owner shall be deemed to have issued a full notice to proceed as of the Effective Date.

**27.20 Counterparts.** This Agreement may be signed in counterparts, each of which when executed and delivered shall constitute one and the same instrument. The Parties agree that

the delivery of this Agreement may be effected by means of an exchange of facsimile, .pdf or emailed signatures, which shall be deemed to be an original and shall be as effective for all purposes as delivery of a manually executed counterpart.

**27.21 Time is of the Essence.** To the extent that there is not a specific time period specified in this Agreement, time is of the essence with respect to a Party's performance of its obligations under this Agreement.

**27.22 Business Ethics.** Contractor, its employees, officers, agents, representatives and Subcontractors shall at all times maintain the highest ethical standards and avoid conflicts of interest in the performance of Contractor's obligations under this Agreement and shall comply with the Owner's Code of Business Conduct as it may be revised, updated or amended from time to time. In conjunction with its performance of the Work, Contractor and its employees, officers, agents and representatives shall comply with, and cause its subcontractor and its employees, officers, agents and representatives to comply with, all Applicable Laws, statutes, regulations and codes prohibiting bribery, corruption, kick-backs or similar unethical practices including, without limitation, the United States Foreign Corrupt Practices Act and the United Kingdom Bribery Act 2010. Without limiting the generality of the foregoing, Contractor specifically represents and warrants that neither Contractor nor any Subcontractor, employees, officers, representatives or other agents of Contractor have made or will make any payment, or have given or will give anything of value, in either case to any government official (including any officer or employee of any governmental authority) to influence his, her, or its decision or to gain any other advantage for Owner or Contractor in connection with the Work to be performed hereunder. Contractor shall maintain and cause to be maintained effective accounting procedures and internal controls necessary to record all expenditures in connection with this Agreement and to verify Contractor's compliance with this Section 27.22. Owner shall be permitted to audit such records as reasonably necessary to confirm Contractor's compliance with this Section 27.22. Contractor shall immediately provide notice to Owner of any facts, circumstances or allegations that constitute or might constitute a breach of this Section 27.22 and shall cooperate with Owner's subsequent investigation of such matters. Contractor shall indemnify and hold Owner harmless for all fines, penalties, expenses or other losses sustained by Owner as a result of Contractor's breach of this provision. The Parties specifically acknowledge that Contractor's failure to comply with the requirements of this Section 27.22 shall constitute a condition of default under this Agreement.

**[Signature Page Follows.]**



IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed by their duly authorized representatives as of the date and year first above written.

Owner:

[\_\_\_\_\_]

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

Its:\_\_\_\_\_

Contractor:

\_\_\_\_\_  
a \_\_\_\_\_ corporation

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

Its:\_\_\_\_\_

## **Appendices to Build Transfer Agreement**

### **List:**

Appendix A:	Technical Specification
Appendix B:	Project Schedule
Appendix C:	Approved Subcontractors
Appendix D:	Forms of Certificate of Substantial Completion and Certificate of Final Acceptance
Appendix E:	Wind Asset Equipment Warranties
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Appendix G:	Engineering Documents, Drawings and Other Deliverables
Appendix H:	Key Personnel
Appendix I:	Legal Description of Site
Appendix J:	Release and Waiver of Liens and Claims
Appendix K:	[Reserved]
Appendix L:	Form of Safety Assurance Plan
Appendix M:	Critical Milestones
Appendix N:	Form of Progress Report
Appendix O:	Spare Parts and Special Tools
Appendix P:	Wind Final Cost Report Requirements
Appendix Q-1:	Contractor Acquired Insurance
Appendix Q-2:	Owner Acquired Insurance
Appendix Q-3:	General Insurance Provisions
Appendix R:	Progress Payments
Appendix S:	Form of Parent Guaranty
Appendix T:	Developer Safety Assurance Program
Appendix U:	[Reserved]
Appendix V:	[Reserved]
Appendix W:	Change Order Work Rates
Appendix X:	Form of Acceptable Letter of Credit
Appendix Y:	Form of Developer's Invoice
Appendix Z:	Glossary of Defined Terms
Appendix AA:	Mechanical Completion, Substantial Completion, Final Acceptance, Performance Guarantees and Performance Tests
Appendix BB:	Change Order Costing
Appendix CC:	Change in Tax Law Losses Methodology

**APPENDIX A**  
**Technical Specifications**

The following documents are hereby incorporated into the Agreement as part of Appendix A:

**RFP Appendix A.1 (Wind) Scope of Work**  
**RFP Appendix A.2 (Wind) Definitions**  
**RFP Appendix A.3 (Wind) Work Specifications -**

**APPENDIX B**  
**Project Schedule**

1. The Project Schedule shall meet the following requirements:
  - a) The Project Schedule shall be a time-scaled, critical path method, logic diagram schedule of all engineering/design and equipment procurement for the Project and all material Work activities.
  - b) The Project Schedule shall include allowance for normal delays and difficulties that may be encountered in work of this nature including weather and holidays, etc.
  - c) The Project Schedule shall include all Critical Milestones identified in Appendix M.
  - d) The Project Schedule shall identify Developer's plan of execution for the design, engineering, procurement, equipment and material shipments and deliveries, erection, training, start-up and testing, and acceptance phases of the Work as well as key Permits and Contractor/Subcontractor and PacifiCorp interfaces and requirements necessary for the Work. The Project Schedule must be coded in such a way as to provide individual progress and schedules in accordance with an agreed upon sequence.
  - e) A complete and fully functional electronic version including all functional levels on Microsoft Project or Primavera of the Project Schedule (and any updates thereto) shall be provided to PacifiCorp with the printed copy.
  - f) The Project Schedule shall be updated monthly at a minimum. Contractor shall make the current Project Schedule available to PacifiCorp upon request.

2. Preliminary Project Schedule

The preliminary Project Schedule is attached hereto.

3. Final Project Schedule

Upon approval of the final Project Schedule in accordance with Section 10.1 of the Agreement, the final Project Schedule shall be attached hereto and supersede the preliminary Project Schedule.

## APPENDIX C

### Approved Subcontractors

The following is a list of Approved Subcontractors:

Vendors:

Equipment	Vendor
Wind Turbines:	
Wind Turbine Medium Voltage Transformers:	
Power Collection Construction:	
Main Step Up Transformer:	
Collector Substation Design:	
Collector Substation Construction:	
Transmission Line Design:	
Transmission Line Construction:	

*[See Section 2.4 of the RFP Appendix A.3 for a list of approved equipment suppliers, substation design engineers, construction contractors, interconnection line engineers and construction contractors.]*

Subcontractors:

Foundations
Collection System
Turbine Erection

Substation and transmission line consultants:

Dashiell

Contact: Rob Martin  
12301 Kurland Drive, Suite 400  
Houston, Texas 77034  
713-578-6084  
[mrob.martin@dashiell.com](mailto:mrob.martin@dashiell.com)

Electrical Consultants, Inc.  
Contact: Bruce LaMeres  
660 West 700 South  
Wood Cross, Utah 84087  
801-292-9954  
[bruce.lameres@ecisl.com](mailto:bruce.lameres@ecisl.com)

Power Engineers  
Contact: Don Evans  
9320 SW Barbur Blvd., Suite 200  
Portland, Oregon 97219  
503-244-9321  
[mdevans@powereng.com](mailto:mdevans@powereng.com)

Stanley Consultants, Inc.  
Contact: Ken Moriarty  
8000 S. Chester Street, Suite 500  
Centennial, Colorado 80112  
303-925-8248  
[jmoriartyken@stanleygroup.com](mailto:jmoriartyken@stanleygroup.com)

Substation and transmission line contractors:

Atkinson Power LLC  
Kelley Lange  
(202) 207-4349

Barnard Construction  
Derek C. Tisdell  
(406) 586-1995  
(Utah, Idaho and Wyoming)

Black & McDonald  
Chad Walters  
(801) 569-9219

Brink Constructors Inc  
Zane Brink  
602-342-6966  
(Utah, Idaho and Wyoming)

Cache Valley Electric  
Don Peterson  
(801) 978-1988

Christenson Electric  
Jim Hardison  
(503) 419-3350

Edison Power Constructors  
Toby Milkanson  
(602) 910-6990

International Line Builders  
Marla Jordan  
503-692-0193  
(Oregon, Washington)

Michels Power  
Landon Kluck  
(360) 236-0472

Newman Construction  
Mark Newman  
(801) 254-3524

PAR Electric Contractors  
(303) 366-0127

Potelco Inc  
Ryan Doud  
253-405-3832

Power Technology Inc  
Matt Crum  
(360) 828-5073

Probst Electric  
Redgie Probst  
435-657-1955  
(Utah, Idaho and Wyoming)

Sturgeon Electric Co.  
(303) 826-8000

Summit Line Construction LLC  
Loren Chandler  
(435)657-0721

Tice Electric Company  
Mike Podkranic  
(503) 872-8248

Wasatch Electric Company  
D. Kent Maughan  
(801) 487-4511

Wilson Construction  
Carmen Reed  
(503) 263-6882

## APPENDIX D

### **Form of Certificate of Mechanical Completion**

This Certificate of Mechanical Completion is provided in accordance with the Build Transfer Agreement by and between PacifiCorp and \_\_\_\_\_ (“Developer”) dated \_\_\_\_\_, 2017 (the “Agreement”).

Capitalized terms used and not otherwise defined herein, shall have the meanings specified in the Agreement.

In accordance with Section 20.1 of the Agreement, Developer hereby certifies that all Mechanical Completion Criteria and all other requirements to achieve Mechanical Completion in the Agreement have been satisfied with respect to [*identify turbine*].

Attached hereto is the required documentation provided in accordance with Section 20.1 and Appendix AA of the Agreement.

Executed this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

#### Acceptance

In accordance with Section 20.1 of the Agreement, PacifiCorp on this \_\_\_\_ day of \_\_\_\_\_, 20\_\_, hereby indicates its acceptance of the achievement of Mechanical Completion with respect to [*identify turbine*].

PacifiCorp

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_



## APPENDIX D

### **Form of Certificate of Substantial Completion**

This Certificate of Substantial Completion is provided in accordance with the Build Transfer Agreement by and between PacifiCorp and \_\_\_\_\_ (“Developer”) dated \_\_\_\_\_, 2017 (the “Agreement”).

Capitalized terms used and not otherwise defined herein, shall have the meanings specified in the Agreement.

In accordance with Section 20.2 of the Agreement, Developer hereby certifies that all Substantial Completion Criteria and all other requirements to achieve Substantial Completion in the Agreement have been satisfied.

Attached hereto is the required documentation provided in accordance with Section 20.2 and Appendix AA of the Agreement.

Executed this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

### Acceptance

In accordance with Section 20.2 of the Agreement, PacifiCorp on this \_\_\_\_ day of \_\_\_\_\_, 20\_\_, hereby indicates its acceptance of the achievement of Substantial Completion.

PacifiCorp

\_\_\_\_\_  
By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

## FORM OF CERTIFICATE OF FINAL ACCEPTANCE

This Certificate of Final Acceptance is provided in accordance with the Build Transfer Agreement by and between PacifiCorp and \_\_\_\_\_ (“Developer”) dated \_\_\_\_\_, 2017 (the “Agreement”).

Capitalized terms used and not otherwise defined herein shall have the meanings specified in the Agreement.

In accordance with Section 20.9 of the Agreement, Developer hereby certifies that all Final Acceptance Criteria and all other requirements to achieve Final Acceptance in the Agreement have been satisfied.

Attached hereto is the required documentation provided in accordance with Section 20.9 and Appendix AA of the Agreement.

Executed this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

### Acceptance

In accordance with Section 20.9 of the Agreement, PacifiCorp on this \_\_\_\_ day of \_\_\_\_\_, 20\_\_, hereby indicates its acceptance of the achievement of Final Acceptance.

PacifiCorp

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

## **APPENDIX E**

### **Wind Asset Equipment Warranties**

#### **Wind Turbine Warranty**

[Developer to provide the proposed wind turbine warranty duration, terms and conditions.]<sup>1</sup>

#### **Wind Turbine Pad Mounted Transformer (if applicable)**

[Developer to provide the proposed wind turbine pad mounted transformer warranty duration, terms and conditions.]

#### **Step-up Transformer Warranty**

[Developer to provide once the step-up transformer is selected, which shall be from the list of Approved Subcontractors.]

#### **SCADA Monitoring System Warranty**

[Developer to provide the proposed SCADA Monitoring System warranty duration, terms and conditions.]

#### **High Voltage Switch Gear**

[Seller to provide the proposed high voltage switch gear warranty duration, terms and conditions.]

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<sup>1</sup> NTD: If any turbine warranty provided in this Appendix E requires the turbines be maintained by the turbine manufacturer as a condition of such warranty, then Developer will be required to enter into and assign to PacifiCorp at Substantial Completion any such turbine maintenance agreement and the Contract Price and warranties reflected in this Appendix E should reflect the same.

## **APPENDIX F**

### **Manuals**

This Appendix F contains the specifications related to the manuals required to be delivered to PacifiCorp under the Agreement. As soon as reasonably practicable, this Appendix shall be updated to attach copies of each manual delivered to PacifiCorp in accordance with the requirements of the Agreement. Hard copy manuals shall be on standard 8-1/2" x 11" paper. Drawings and schedules which are to be bound into the manual shall also be 8-1/2" x 11" or 11" x 17" folded. Each manual shall be assembled and bound in heavy-duty post binders designed for rough usage. Light duty and ring binders are not acceptable. Binder capacity shall not exceed four inches, nor shall material included exceed the designed binder capacity. If the material to be furnished exceeds this capacity rating, multiple volumes shall be furnished. Binders shall be sized to the material to be contained, and capacity should not be more than approximately one-half inch greater than the thickness of material within the binder. All documents, illustrations, specifications, equipment data sheets, drawings, operating and maintenance instructions shall be in the English language. Use of the English system of units on documents is preferred; if the metric system of units is used, the drawing, data sheet, specification or illustration shall clearly indicate that the metric system of units is used. Each manual shall include a Table of Contents, front cover, side label and laminated index tabs and shall be of a consistent format.

The electronic copy of the manuals shall be organized in folders consistent with tabs in the paper manuals. Electronic copies of installation, operation and maintenance manuals shall be organized from the most general information in the top directory to the most specific information in the lowest level folder. The top level folders shall include a document containing a directory of the subfolders describing the contents of each and every subfolder. Electronic copies of installation, operation and maintenance manuals shall be organized by project, system, subsystem, equipment and components. Manufacturers' or vendors' electronic manuals shall be delivered as individual files. Contractor shall not merge or combine manufacturer and vendor provided files containing manuals.

The manuals to be provided shall include:

1. **Design Manuals**

Design manuals shall contain the following items:

- Drawing List, Drawing and Specification Identification System, Units of Measurement and Formats
- System List and Equipment Numbering System
- List of applicable drawings

- System design requirements
  - System and equipment descriptions
  - Equipment lists itemizing type, performance and technical requirements.
  - Overall performance data
2. Start Up, Operation and Shutdown Manual for the Project, including comprehensive and complete procedures for checkout, startup and testing of the Project and will include as a minimum the following items:
- Facility start-up and shutdown procedures
  - Startup schedule
  - Startup organization chart
  - Administrative procedures
  - Data sheets
  - Test procedures for all tests required for the Facility pursuant to the Primary Construction Contracts, including Substantial Completion and Final Acceptance.
  - Turnover sequences and procedures
  - Safety clearance procedure
  - Work responsibility matrix
3. Installation, Operation, and Maintenance Manuals for the Equipment, including information typically supplied for equipment and/or systems such as the following items:
- System or equipment startup and shutdown procedures
  - Description / design criteria of each item of equipment
  - Nameplate information and shop order numbers for each item of equipment and components thereof
  - Operating procedures and instructions for commissioning, startup, normal operation, shut down, standby and emergency conditions and special safety precautions for individual items of equipment or systems
  - List of any start-up prerequisites

- Normal range of system variables
- Operating limits and hazards for all equipment and systems including alarm and trip set points for all devices
- Testing and checking requirements
- Effect of loss of normal power
- Tolerance of electrical supply frequency variation
- Final performance and design data sheets, specifications and performance curves for all equipment including test data and test curves
- Preventive maintenance schedule and maintenance instructions for equipment including standard and special safety precautions
- Lubrication schedule showing requirements and specifications for lubricants for equipment
- Dismantling and assembly procedures for equipment with associated tests and checks prior to returning equipment to service.
- Detailed assembly drawings to complement assembly procedures mentioned above including parts lists and numbers for replacement ordering.
- Setting and running clearances and tolerances
- Cleaning procedures
- Specifications for any gases, chemicals, solvents or lubricants
- Drawing showing space provided for equipment maintenance for equipment and any fixed facilities for maintenance such as trolley beams, etc.
- Methods for trouble-shooting
- List of maintenance tools furnished with equipment
- Installation instructions, drawings and details
- Vendor drawings as appropriate
- Installation, storage and handling requirements.

The above requirements are a minimum; however, requirements which are clearly not applicable to specific items or components may be deleted, however, any additional information which is necessary for proper operation and care of the equipment shall be included.

## **APPENDIX G**

### **Engineering Documents, Drawings and Other Deliverables**

#### **1.0 General**

To facilitate PacifiCorp's review in accordance with the terms of this Agreement, the following submission requirements shall be met by Developer.

All transmittals are to clearly indicate PacifiCorp's name, Developer's project number, PacifiCorp's project number and name, how they are being sent, and the reason for the submittal. The transmittal should include a clear, concise description of all documents enclosed. Documentation by drawing number, revision number, and date should be indicated, if applicable. Distributions to other parties are to be shown on the face of the transmittal.

All documents prepared by Developer, Contractor or any of its Subcontractors shall be in English and shall bear the project number and name. Each document shall clearly indicate the applicable status, e.g. Preliminary, for Information, for Review, for Bid, for Construction, For Record Purpose.

Note: The following statuses are given to drawings and are shown on the drawing:

Manufacturer drawings:

- A – Authorized
- E – Exceptions Noted
- R – Returned to manufacturer for correction
- I – Information Only

Engineered drawings:

- T – Transmitted for approval
- C – Issued for construction
- F – For record purpose

All drawings, documents and manufacturer information shall indicate PacifiCorp's name. Developer shall ensure that PacifiCorp is listed as buyer of record with all Subcontractors providing any and all Material or Equipment for the Project.

The measurement system shall be U.S. Customary System, and all drawings and dimensions shall be to scale. Non-scale dimensions (NTS) on drawings will not be permitted on scalable drawings. A scale bar shall be included to permit use following photo-reduction.

All drawings shall be prepared per PacifiCorp's General AutoCAD/Drafting Standards hereafter referenced as (Specification DCAP876). Drawings shall be prepared on PacifiCorp borders. If Developer is unable to provide drawings on said borders, a written itemized request for exemptions must be submitted for review and acceptance by PacifiCorp. If exceptions are agreed to a complete drawing index must be provided using the drawing index template provided with Specification DCAP876 and associated documents.

Developer shall utilize Microstation for drawing development. Upon completion of the Project, all deliverable dgn files will be converted to deliverable AutoCad dwg format. Developer shall provide all drawings and information using PacifiCorp specified attributes. Developer's Subcontractor supplied drawings will be submitted in the same format (pdf) as submitted to Developer.

Acceptable drawing sizes are indicated in Specification DCAP876. Drawings shall be prepared in such a way that photo-reduction to B size shall result in a legible and useable drawing. When drawings larger than B size are submitted, a B size print shall also be submitted.

## **2.0 Design Review By PacifiCorp**

Developer shall provide to PacifiCorp any and all information upon which the design of the Facility is based, including the results of survey, geotechnical and materials investigations, shop drawings, design drawings and manufacturers' data. Engineering calculations shall be available for review by PacifiCorp in Developer's engineering design office.

Developer, Contractor and Subcontractor generated drawings and documents shall be issued to PacifiCorp for review. The final level of drawing and document review, including quantity required, shall be determined at the Project's kickoff meeting. Electronic AutoCAD files of drawings and other documents shall be submitted in addition to the hard copies as a part of the same transmittal and provided on Compact Disc (CD) or other electronic device as may be directed by PacifiCorp. These electronic drawings will be checked by PacifiCorp for compliance to documentation standards.

Except where expressly agreed otherwise by PacifiCorp, the following will apply to document submittals by Developer, Contractor or Subcontractors:

- a. Drawings: At least one copy in "B" size (11" x 17" format) shall be submitted in electronic form ("PDF" or comparable for design and construction drawings only). Final drawings shall be AutoCAD and must not be a newer version than that which is currently being used by PacifiCorp.



- b. Documents: Letter size hardcopies and one electronic copy shall be provided for written text such as letters, specifications, procedures design criteria, manuals, lists, etc. in Microsoft Word and / or Excel format.
- c. Drawings and Documents: Developer shall make reasonable efforts to secure electronically formatted drawings and documents from Contractor and all Subcontractors. When electronic formatting as noted in paragraph (a) and (b) above is not obtainable due to Contractor or Subcontractor policies or procedures then Developer shall have such materials converted and submitted in “tif“ or “pdf” format.
- d. Instruction, Operation, Equipment and all other Manuals: PDF manuals and other multi-page documents shall not exceed 100 MB and shall include a table of contents or index. Any PDF or multi-page document that is larger than 100 MB must be reduced or separated by chapter or tab. Bookmarking all chapters or tabs is preferred. Once the files or documents are placed on a Compact Disc (CD) they should be organized in the order of the hard copy binder or as one PDF (if less than 100 MB).

Contractor and Subcontractor drawings and documentation shall also be submitted in hardcopy and electronic format to PacifiCorp as described above. PacifiCorp may make comments directed to Developer on Contractor and Subcontractor drawings and documents if items are found not to be in compliance with the requirements of this Agreement. Developer shall be obligated to resolve any such compliance issues with Contractor or any Subcontractor in a timely manner and resubmit Contractor and Subcontractor drawings and documents.

### **3.0 Deliverables**

Developer shall submit general specifications covering the type and design of all principal components of the Equipment when specifications have not been provided in the Agreement.

All Materials shall be fully identified by Developer.

Developer shall submit a complete bill of materials and list of all instruments and accessories supplied for each equipment category or specification. Developer shall submit all bills of materials and equipment identification information electronically to PacifiCorp.

Developer shall be responsible for coordination with PacifiCorp for necessary interfaces. At the same time a copy of the interface information shall be submitted to PacifiCorp for review. Developer shall plan for the exchange of information in order to ensure the completion of the whole project meets the schedule requirement of the Agreement.

Developer shall submit detailed procedures for testing, commissioning and putting into operation all equipment and / or systems as required.

PacifiCorp will not necessarily examine all details submitted by Developer and may, at PacifiCorp's option, require submittal to be subject to review or regard them as for information and record purposes.

Developer shall be responsible for any discrepancies, errors, or omissions on the drawings, or other documents, supplied by Developer, Contractor or Subcontractors.

Developer shall complete any and all noted changes to the drawings and data which may be necessary to complete the Agreement requirements.

Any Work commenced prior to PacifiCorp's review of the drawings and /or data shall be at Developer's risk and any necessary design changes to comply with the requirements and objectives of the Agreement shall be made at no additional cost to PacifiCorp or cause delay to the Project Schedule.

Developer deliverables supplied to PacifiCorp shall include the following:

- A complete drawing index, in an Excel compatible file format per Specification DCAP876. Index shall include all Developer, Contractor and Subcontractor drawings.
- Diagrams - electrical one-line, electrical three-line, schematic, wiring including relay/control schematics, logic, SCADA and communication block diagrams.
- Physical arrangement and equipment drawings including site grading, equipment arrangement, building arrangement, civil, raceway and power, structure drawings, and underground utilities. The final list of drawings to be provided shall be determined by PacifiCorp after consultation with Developer.
- Drawings of all equipment foundations showing all structure and equipment outline requirements including anchor bolts and foundation loads that are to be used in the design of the foundations.
- Internal panel component arrangement drawings including terminal block size, location, spacing and types.
- Equipment, instrument, device, cable/conduit/raceway, and electrical load lists and schedules.
- Instrument manuals and data sheets (including protective and auxiliary relays, etc).

- Equipment manuals and data sheets.
- Complete system operating manuals.
- All drawings used for construction.
- Design Statements - Overall design concept and detailed design criteria.
- All Subcontractor's drawings, documentation, and manuals including outline drawings.
- All vendor drawings, documentation, and manuals including outline drawings.
- All other consultant drawings, documentation, and manuals including outline drawings.
- Schedules, including the Project Schedule.
- Project procedures manual - procedures for design, review and comment or approvals, procurement, construction, scheduling, progress reports, etc.
- Quality assurance and quality control program manuals.
- Environmental protection manual.
- Construction safety assurance plan.
- Procurement specifications.
- Erection specifications and procedures.
- Material instruction bulletins and cut sheets.
- Developer Permits.
- Progress Reports.
- Meeting minutes and reports.
- Instructions for handling, storage, and pre-operational and operational maintenance of equipment.
- Testing and commissioning plans and reports.
- Site and shop inspection and testing plans and requirements.

- Material safety data sheets for all hazardous materials and equipment.
- Test procedures including site and shop testing plans and requirements.
- Test reports or other required reports.
- Final commissioning and acceptance reports / documents.

#### 4.0 Final Drawings

Developer shall provide detailed “as built” drawings for the entire Project consisting of, but not limited to, plan and profile sheets, foundation detail drawings, mechanical, electrical, civil, one-line, three-line, schematics, control logic, wiring, raceways, conduits and duct banks. Documents shall be re-drafted as necessary to incorporate final information. Mark-up sketch, referencing, and other field marking techniques are not acceptable as final conformed drawings. Developer shall prepare “For Record Purposes” of the original drawings or data sheets.

During construction, Developer shall update and maintain on file in the field current mark-ups of all drawings and data sheets to represent actual work completed.

Conformed drawings developed by Developer shall be issued as the next sequential revision from previous releases. The revision block shall state “For Record Purposes”. All clouds, revision diamonds, and other interim control markings shall be removed. All information listed as “later” or “hold” shall be completed. The conformed drawings shall be clear and readable in both full size and B size reduction. Developer shall provide new versions of Contractor and Subcontractor drawings if PacifiCorp judges originals to be too damaged, deteriorated, or illegible.

All Contractor’s and Subcontractors’ drawings shall be conformed to reflect actual installed configuration. These Contractor and Subcontractor drawings shall be in sufficient detail to indicate the kind, size, arrangement, weight of each component, and operation of component materials and devices, the external connections, anchorages, and supports required; the dimensions needed for installation, and correlation with other materials and equipment. Final Contractor and Subcontractor drawings shall be bound in the equipment operation and maintenance manuals. One electronic copy for each drawing shall be supplied in AutoCAD format in a version acceptable to PacifiCorp.

#### Drawing Information:

All AutoCAD and drawing requirements are per Specification DCAP876. This specification includes, but is not limited to, information on the following:

- PacifiCorp Title Block Information. Borders are provided and required.

- Drawing numbers shall conform to the existing specific plant numbering guidelines. If there are no existing guidelines that apply, PacifiCorp will supply new numbers that can be used.
- Indexes, lists, data sheets, and schedules per Specification DCAP876, or other if approved.
- Drawing revisions.

## **5.0 Lists**

All lists, including drawing lists, instrument lists, equipment lists, circuit lists, raceway lists, conduit lists, piping and accessories lists, bills of materials, etc. shall be furnished in an Excel compatible file format per Specification DCAP876, or other as may be approved by PacifiCorp.

### **Instrumentation Lists and Data Sheets:**

- All instruments shall be given a “Tag Number” composed of two to four alpha characters and a three digit numeric reference per the Instrumentation Society of American standards and existing specific plant procedures.
- The “Tag Number” will be used to reference all instruments on drawings, instrument indexes and data sheets.
- Data sheets for each instrument shall reference vendor, model numbers, conditions of service, construction material, specifications, etc.

### **Equipment Lists:**

- All equipment shall be given a “Tag Number” identifying the type of equipment, the media that it services and a numeric reference per existing specific plant procedures.
- The “Tag Number” will be used to reference all equipment on drawings, instrument indexes and data sheets.
- Equipment indexes shall reference service location, drawing references, rating, manufactures, data sheet locations, etc.

### **Electrical Circuit Schedule:**

- All electrical cables shall be given a “Circuit Number” that meets specific plant requirements. Information on the existing system will be provided upon Developer selection.

- Cable Numbering

Cable numbering shall sequentially follow the existing specific plant numbering system. Multi-Conductor Signal Wire:

- Multi-Conductor Signal Wire:

Multi-conductor signal wire color scheme shall match the existing specific plant system.

- The “Circuit Numbers” will be used to reference all equipment on drawings, instrument indexes and data sheets.
- Circuit indexes shall reference service location, drawing references, rating, manufactures, data sheet locations, etc.

Piping Line List:

- All piping shall be given a “Line Number” that shall match the existing specific plant system.
- The “Line Number” will be used to reference all pipes on area/routing drawings, indexes and line lists.
- The line list shall contain line sizes, description of starting and ending location, operating and design location, insulation, drawing references, etc.

## **6.0 Software Requirements**

All Developer deliverables including final drawings, lists, and manuals shall be provided to PacifiCorp in the appropriate file format listed below. This requirement pertains to both Developer and/or original equipment manufacturer (OEM) developed deliverables.

All Developer deliverable lists, provided in database format, shall be designed to be integrated into PacifiCorp’s existing applications. PacifiCorp will provide Developer with formatting information as required.

Developer shall provide electronic submittals in the following software formats:

<b>Software Function</b>	<b>Software Name</b>
Word processing	Microsoft Word
Spreadsheets	Microsoft Excel
Database	Microsoft Access
Design/Construction & Original OEM Drawings	AutoCAD version no newer than that currently being used by PacifiCorp. Drawings in PDF format are only acceptable for design and construction phases of the project. (See specification DCAP876.)
Project Schedules	Microsoft Project 2010 or 2013 or Primavera.
Scannable Material	Adobe Acrobat ".pdf" or ".tif"

#### **7.0 Submission of Drawings and Data**

The documents and drawings for review and comment shall be submitted to PacifiCorp at the address specified in ARTICLE 35 of the Agreement.

Additional copy (or copies) may be directed for submittal to other PacifiCorp Representative(s) as requested.

Drawings / documents shall be updated as the engineering and design progresses to reflect current design(s). Revisions shall be identified per specification DCAP876.

PacifiCorp shall review all documents for conformance with the Agreement and mark or stamp said documents to indicate whether changes or corrections are required. Any and all necessary changes or corrections will be noted on the documents and returned to Developer. Developer shall resubmit the corrected or changed documents, with changes and corrections clearly indicated.

When no further corrections or changes to the drawings submitted by the Developer are required, they shall be marked "Issued for Construction." Developer shall supply one (1) reproducible and one (1) electronic copy for each of the "Issued for Construction" drawings to PacifiCorp for record. PacifiCorp will inform Developer when the final drawings have been received.

Design information may later be included on the certified drawings. The fact that such design information may later be included in the instruction and/or operating manuals does not relieve Developer from compliance with this requirement.

## **APPENDIX H**

### **Key Personnel**

In accordance with Section 7.13(b) of the Agreement, Developer shall provide the following Key Personnel list for Developer, Contractor and for all Subcontractors performing material portions of the Work.

<b>Individual</b>	<b>Title</b>	<b>Contact Information (Phone and Email)</b>
	Project Executive	
	Project Manager	
	Project Senior Superintendent	
	Project Superintendent	



**APPENDIX I**  
**Legal Description of Site**

**[Legal description of the Site to be provided by Developer.]**

## **APPENDIX J**

### **Release and Waiver of Liens and Claims**

[See attached]

## FORM OF PARTIAL RELEASE AND CERTIFICATE OF PROGRESS PAYMENT

With reference to that certain Build Transfer Agreement, dated [ ] (as amended through the date hereof, the “Agreement”), between PacifiCorp (“Company”) and [ ] (“Primary Contractor”).

Primary Contractor hereby certifies, represents and warrants that each of its subcontractors and materialmen has made full payment of all costs, charges and expenses incurred by them or on their behalf for work, labor, services, materials and equipment supplied to the foregoing premises and/or used by them in connection with the Primary Contractor’s work related to the Agreement as of the date hereof.

Primary Contractor further certifies, represents and warrants that it has made full payment of all costs, charges and expenses incurred by it or on its behalf for work, labor, services, materials and equipment supplied to the foregoing premises and/or used by it in connection with the Primary Contractor’s work related to the Agreement up to the date hereof.

In consideration of \$[ ] as payment for all work related to the Agreement up to the date hereof, Primary Contractor hereby unconditionally remises, releases and forever discharges Company’s premises and property from all claims, liens and obligations of every nature arising out of or in connection with the performance of Primary Contractor’s work relating to the Agreement as of the date hereof.

The foregoing shall not relieve Primary Contractor of its other obligations arising from its work performed relating to the Agreement, which by their nature survive completion of this portion of the work, including, without limitation, warranties, guarantees and indemnities.

Executed this [ ] day of [insert month], [insert year].

[insert Primary Contractor name]

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

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

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

## FORM OF PARTIAL RELEASE AND CERTIFICATE OF PROGRESS PAYMENT

With reference to that certain Build Transfer Agreement, dated [ ] (as amended through the date hereof, the "Agreement"), between PacifiCorp ("Company") and [ ] ("Primary Contractor") and related to which the undersigned party, [ ] ("Contractor"), has performed certain work for Primary Contractor.

Contractor hereby certifies, represents, and warrants that it has received full payment of all costs, charges and expenses incurred by it or on its behalf for work, labor, services, materials and equipment supplied to the foregoing premises and/or used in connection with its work related to the Agreement up to the date hereof.

Contractor further certifies, represents and warrants that each of its subcontractors and materialmen has made full payment of all costs, charges and expenses incurred by them or on their behalf for work, labor, services, materials and equipment supplied to the foregoing premises and/or used by them in connection with Contractor's work related to the Agreement up to the date hereof.

Contractor further certifies, represents and warrants that it has made full payment of all costs, charges and expenses incurred by it or on its behalf for work, labor, services, materials and equipment supplied to the foregoing premises and/or used by it in connection with Contractor's work related to the Agreement up to the date hereof.

In consideration of \$[ ] as payment for all work related to this Agreement up to the date hereof, Contractor hereby unconditionally remises, releases and forever discharges Company's premises and property from all claims, liens and obligations of every nature arising out of or in connection with the performance of Contractor's work relating to the Agreement up to the date hereof.

The foregoing shall not relieve Contractor of its other obligations arising from its work performed relating to the Agreement, which by their nature survive completion of this portion of the work, including, without limitation, warranties, guarantees and indemnities.

Executed this [ ] day of [insert month], [insert year].

[insert Contractor name]

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

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

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

## FORM OF RELEASE AND CERTIFICATE OF FINAL PAYMENT

With reference to that certain Build Transfer Agreement, dated [ ] (as amended through the date hereof, the “Agreement”), between PacifiCorp (“Company”) and [ ] (“Primary Contractor”).

Primary Contractor hereby certifies, represents and warrants that each of its subcontractors and materialmen has made full payment of all costs, charges and expenses incurred by them or on their behalf for work, labor, services, materials and equipment supplied to the foregoing premises and/or used by them in connection with Primary Contractor’s work related to the Agreement.

Primary Contractor further certifies, represents and warrants that it has made full payment of all costs, charges and expenses incurred by it or on its behalf for work, labor, services, materials and equipment supplied to the foregoing premises and/or used by it in connection with Primary Contractor’s work related to the Agreement.

In consideration of \$[ ] as final payment for all work relating to the Agreement, Primary Contractor hereby unconditionally remises, releases and forever discharges Company’s premises and property from all claims, liens and obligations of every nature arising out of or in connection with the performance of Primary Contractor’s work relating to the Agreement.

The foregoing shall not relieve Primary Contractor of its other obligations arising from its work performed relating to the Agreement, which by their nature survive completion of the work, including, without limitation, warranties, guarantees and indemnities.

Executed this [ ] day of [insert month], [insert year].

[insert Primary Contractor name]

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

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

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

Upon execution, return this certificate to PacifiCorp’s Representative as noted in the Agreement.

## FORM OF RELEASE AND CERTIFICATE OF FINAL PAYMENT

With reference to that certain Build Transfer Agreement, dated [ ] (as amended through the date hereof, the “Agreement”), between PacifiCorp (“Company”) and [ ] (“Primary Contractor”) and related to which the undersigned party, [ ] (“Contractor”), has performed certain work for Primary Contractor.

Contractor hereby certifies, represents, and warrants that it has received full payment of all costs, charges and expenses incurred by it or on its behalf for work, labor, services, materials and equipment supplied to the foregoing project and/or used in connection with its work related to the Agreement.

Contractor further certifies, represents and warrants that each of its subcontractors and materialmen has made full payment of all costs, charges and expenses incurred by them or on their behalf for work, labor, services, materials and equipment supplied to the foregoing premises and/or used by them in connection with Contractor’s work related to the Agreement.

Contractor further certifies, represents and warrants that it has made full payment of all costs, charges and expenses incurred by it or on its behalf for work, labor, services, materials and equipment supplied to the foregoing premises and/or used by it in connection with Contractor’s work related to the Agreement.

In consideration of \$[ ] as final payment for all work relating to the Agreement, Contractor hereby unconditionally remises, releases and forever discharges Company’s premises and property from all claims, liens and obligations of every nature arising out of or in connection with the performance of Contractor’s work relating to the Agreement.

The foregoing shall not relieve Contractor of its other obligations arising from its work performed relating to the Agreement, which by their nature survive completion of the work, including, without limitation, warranties, guarantees and indemnities.

Executed this [ ] day of [insert month], [insert year].

[insert Contractor name]

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

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

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

## **APPENDIX L**

### **Form of Safety Assurance Plan**

#### **PacifiCorp's Safety Program and Special Conditions**

The following is an amended version of PacifiCorp's Safety Assurance Program as applicable to a new "green-field" generating facility.

#### **APPLICABILITY**

The health, safety and environmental requirements below apply to Developer and all similarly situated parties performing Work at the Site, including Contractor and any Subcontractors. Developer shall ensure compliance with these requirements by Contractor and all of its Subcontractors. Any, and all training required in order for Developer's, Contractor's and its Subcontractor's personnel to comply with these requirements shall be received by those personnel prior to their performance of any Work. All such training shall be at Developer's expense.

#### **SECURITY**

Developer shall be responsible for the security of all Developer-furnished material and equipment, as well as any PacifiCorp-furnished material and equipment received by Developer.

The PacifiCorp project manager or other on-site PacifiCorp project supervisory personnel ("PacifiCorp Supervisor") may require identification of persons entering or leaving PacifiCorp sites or project sites. PacifiCorp may also require searches of vehicles entering or leaving its sites or project sites. PacifiCorp-owned project materials may only be removed from project sites with prior express written approval from the PacifiCorp Supervisor.

Developer shall each day provide the PacifiCorp Supervisor the number of Developer, Contractor and Subcontractor personnel working on the Project and when, where, and what work will occur.

#### **SITE CONTROL**

Developer shall furnish and utilize safety devices and equipment as appropriate to secure the Site and safeguard personnel of Developer, Contractor, Subcontractors, PacifiCorp and members of the public.

Developer shall at all times maintain the Site in the safest condition reasonably possible. At all times, it shall be Developer's duty to correct or arrange to give warning of any hazardous condition. Appropriate precautions and security shall be established by Developer to protect the public from Site hazards and to reduce the Site's potential as an attractive nuisance.

Barriers, barricade tapes and signs shall identify unsafe conditions. Danger area signs and barricades shall be designated by a predominantly red color. Danger area barricade tape shall be red and shall be lettered with either "DANGER" or "DANGER - DO NOT ENTER."

Caution area signs, barricades, and barricade tape shall be designated by a predominantly yellow color. Caution area barricade tape shall be yellow and shall be lettered with "CAUTION."

Barricades and barricade tape and/or flagging shall have properly completed information signs attached in a conspicuous location at each entry point stating the date, reason for the barricade and the person to contact for additional information. Signs, barricades, or other precautionary material shall be removed immediately upon termination of the hazard.

PacifiCorp uses a protective switching and tagging procedure to ensure systems are safe prior to work being performed on them. Developer shall familiarize its personnel and the personnel of Contractor and its Subcontractors with the switching terminology and the switching order processing policy documents, and shall follow all dispatch and grid dispatch procedures appropriate for the work.

In the event of an incident requiring outside assistance, Developer's personnel and any other persons working on the Site shall call 911 (local county dispatch emergency number) in order to receive the appropriate emergency assistance.

All accidents and fires are to be reported to the Dispatcher and to the PacifiCorp Supervisor. The person that reports the emergency must give his name, state the nature of the emergency and the location of the emergency. The Dispatcher and the PacifiCorp Supervisor will log the event and notify PacifiCorp Risk Management.

In the event of a fire, accident, or evacuation emergency, Developer must assemble and account for personnel at the Site. Upon completion of an accurate personnel count, Developer is to report the status of all personnel to the PacifiCorp Supervisor.

### **WEEKLY REPORTING**

Additionally every Wednesday before 1PM Developer shall provide either electronically or via fax a copy of the Developer Safety Report (attached herein below) of any incidents that have occurred since the previous report. If no incidents have occurred a copy of the Developer Safety Report shall be submitted denoting no incidents. This is required whenever Developer has any personnel working on any PacifiCorp property.

In the event of an environmental release, Developer's personnel shall immediately contact the Spill Hotline answering service at (800) 947-7455, which will take the name and phone number of the caller. A Power Delivery Health, Safety and Environment Department employee will return the call. In addition, all environmental incidents shall be reported to the PacifiCorp Supervisor.

### **PERSONAL PROTECTIVE EQUIPMENT REQUIREMENTS**

On all PacifiCorp work sites including pre-bid meetings and job walks. Developer shall ensure that their employees are provided with and wear;

- a. Non-Metallic Hard Hat satisfying ANSI Z89.1-2003 Class E



- b. Safety Glasses with Side Shields, satisfying ANSI Z87.1 -2003
- c. Safety Footwear, satisfying ANSI Z-41/ASTM F2413 with a class 75 rating
- d. Synthetic clothing should not be worn on any PacifiCorp worksite where energized work may be performed

When work is to be performed by Developer on a wind turbine generator, Developer's employees shall wear, at a minimum:

- a. Wind Energy positioning/climbing harness with a back, front and side D rings.
- b. Ladder Safe for appropriate cable or rail system.
- c. Lanyard with a force two fall rating capacity.
- d. Personal Rescue kit or a Multiple Rescue kit readily available in area of worker.

When work is to be performed by Developer on electrical equipment that is or may become energized, at 50 volts or greater, or within the area of a sub-station, Developer's employees shall wear, at a minimum;

- Long sleeve FR Shirts with an ATPV of 8.0 cal/cm<sup>2</sup> for shirt fabrics), with sleeves rolled down and buttoned. Note: Shirts or clothing with a higher ATPV may be required for work on some equipment at those sites where indicated by signage. Consult with PacifiCorp Supervisor to determine applicability of higher levels of protection.

When setting or removing meters from energized meter bases Developer's employees shall utilize Face Shields that satisfy ANSI Z87.1 -2003

## **TOOLS, EQUIPMENT AND SAFETY SUPPLIES**

Except as specifically noted elsewhere in the contract, Developer shall provide all tools, equipment and supplies, including safety supplies, to perform the work in a safe and appropriate manner.

## **SAFETY, HEALTH, ACCIDENT AND DAMAGE PREVENTION**

Prior to start of any work required by this Agreement, Developer shall be responsible for assuring that each of its own employees, together with all employees of Contractor and its Subcontractors, have received proper training and are fully aware of all safety, health, and security regulations pertaining to their work, including but not limited to, employee exposures, confined space hazards, fall protection, tag out/lockout procedures, and hearing conservation regulations.

Developer shall comply with all safety standards and accident prevention regulations promulgated by federal, state or local authorities having jurisdiction and will take or cause to be taken such additional measures as reasonably necessary to protect the life and health of all employees engaged in the performance of this Agreement and the Work required hereunder. Developer shall be responsible for the manner in which tools and equipment are used including the proper use of safety devices and equipment necessary to safeguard other workmen.

Developer's non-English speaking employees shall receive safety information in their native tongue. Developer shall provide PacifiCorp with the names, job title, work schedule, and language of non-

English speaking employees that will be working at the Facility. Developer shall provide a translator during the plant safety orientation so that each non-English speaking employee shall be able to comprehend the information being presented. Developer shall provide a bilingual employee who shall be responsible for communicating safety information from English to the non-English speaking employees. Developer shall provide a bilingual employee who shall be on plant site in the immediate vicinity of non-English speaking employees at all times to communicate emergency information and instructions. Should the nature of the work require Developer to divide into smaller work groups separating non-English speaking employees from the bilingual employee by more than 1000 ft. distance, additional bilingual employees shall be utilized at a ratio of one per work group. Developer's bilingual employee shall conduct a walk down of the work area with all non-English speaking employees, translating signs explaining hazards and warnings prior to commencing work.

Developer shall at all times conduct all operations under this Agreement in such a manner and with appropriate supervision as to avoid the risk of bodily harm to persons or risk of damage to any property. Developer shall promptly take all precautions which are necessary and adequate against any conditions which involve a risk of bodily harm to persons or a risk of damage to any property. Developer shall continuously inspect all work, materials, and equipment to discover and determine any such conditions and shall be responsible for discovery, determination, and correction of any such conditions.

For work performed in a confined space, as defined by federal and state Law, Developer shall: 1) comply with all OSHA and other permit space requirements; 2) have a formal written program defining in detail Developer's procedures for such compliance; and 3) provide a copy to PacifiCorp of such program prior to performing any such work. Developer shall promptly advise PacifiCorp of any hazards confronted or created in permit or non-permit spaces and shall provide PacifiCorp copies of all tests, permits, and other required documentation resulting from such work.

No scaffold shall be erected, moved, dismantled, or altered except under the supervision of competent persons.

Developer is responsible for ensuring compliance with the requirements set forth in the regulations governing the work. Such responsibility shall apply to both its operations and those of Contractor and Subcontractors. When violations of the safety and health regulations are called to its attention by PacifiCorp, Developer shall immediately correct the condition to which attention has been directed. Such notice, either oral or written, when served on Developer or its representative(s) shall be deemed sufficient.

In the event Developer fails or refuses to promptly comply with the directive issued by PacifiCorp, PacifiCorp may issue an order to suspend all or any part of the work. When satisfactory corrective action is taken, an order to resume work will be issued by PacifiCorp. Developer shall not be entitled to any extension of time, nor to any claim for damage, nor to excess costs by reason of either the directive or the suspension order. Failure of PacifiCorp to order discontinuance of any or all of Developer's operations shall not relieve Developer of its responsibility for the safety of personnel and property.

Developer shall:

- a. Submit a written safety program to PacifiCorp for review prior to start of work under this Agreement.
- b. Provide for weekly five (5) minute “tool box” safety meetings, conducted by its supervisor/foreman and attended by all craft employees on the job site with a copy of the meeting minutes provided to PacifiCorp within three (3) days after the meeting.
- c. Provide a daily job brief covering at a minimum the following:
  - Hazards associated with the job
  - Work procedures involved
  - Special precautions
  - Energy source controls
  - Personal protective equipment requirements
- d. Conduct regularly-scheduled safety meetings for all levels of supervision and workers.
- e. Provide trained personnel as part of site safety team to insure prompt and efficient first aid and medical care for injured employees. Developer shall be responsible for transporting any injured personnel. If ambulance service is required, Developer shall notify the plant control room operator who will make the necessary call.
- f. Developers must have a safety supervisor present on-site at all times work is being performed with authority to prevent or correct unsafe acts and conditions.
  1. Developers with less than 100 employees on-site may use an individual who has job duties in addition to safety if such other job duties do not interfere with the performance of the safety supervision.
  2. Developers with more than 100 employees on-site are required to have a full-time on-site safety supervisor.
- g. Reimburse PacifiCorp for any costs incurred by PacifiCorp resulting from citations for failure of Developer to comply with governing regulatory agencies.
- h. Have the sole responsibility for providing fire protection in its work area and following the PacifiCorp’s Burn Authorization Policy.

Serious accidents and/or fires shall be immediately reported as explained in the orientation. The person that reports the emergency will give their name, state what the emergency is and the location of the emergency. The plant will communicate the emergency to employees and Developer as explained in the orientation. Developer shall notify PacifiCorp’s designated representative of any reported injury or potential illness or fire as soon as practical.

In the event of a fire, accident, or evacuation emergency, Developer is to assemble and account for its personnel as directed by the plant alarm system. Upon completion of the accurate accounting, Developer is to report the status of its personnel to PacifiCorp.

Developer shall maintain an accurate record and shall provide a written report to plant Safety Administrator of all cases of death, fire, occupational diseases, or any injury to employees or the public involved, and property damage by accident, to performance of work under this Agreement within forty-eight (48) hours of such incident.

Developer shall be aware that PacifiCorp has adopted a smoke-free policy. All facilities which include all buildings, trailers (including Developer trailers), enclosed garages, plants, vaults, vehicles and enclosed equipment have been designated as “Non-Smoking” areas. Developer or its employees shall not be allowed to smoke in these designated areas.

All Developers’ employees working at the Site shall wear protective equipment appropriate to the specific work activity and in accordance with plant safety rules. All such equipment shall be furnished by Developer. Protective equipment includes, but is not limited to, hard hats, safety glasses, hearing protection, protective clothing, and safety toe footwear (must be appropriate for the work being performed and must meet ANSI Z41.1, 1967 or the new ASTM F2412 – 05 and F2413 – 05 standard and be non-fabric/non-perforated uppers, oils and acid resistant soles, and be a minimum of Class I/75 and C/75, effective September 1, 1991). Hard hats, safety glasses and safety toe footwear will be worn at all times while on the plant site, except in locker rooms, lunch rooms, and office rooms. Hearing protection will be worn in all posted areas or when otherwise directed by PacifiCorp. Protective clothing, gloves, and respirators will be used as work conditions dictate to assure the safety and health of all personnel.

When work is to be performed by Developer on a wind turbine generator, Developer’s employees shall wear, at a minimum:

- a. Wind Energy positioning/climbing harness with a back, front and side D rings.
- b. Ladder Safe for appropriate cable or rail system.
- c. Lanyard with a force two fall rating capacity.
- d. Personal Rescue kit or a Multiple Rescue kit readily available in area of worker.

Vehicles used to transport employees shall have seats firmly secured and adequate for the number of employees to be carried. Seat belts and anchorages meeting the requirements of 49 CFR Part 571 (Department of Transportation, Federal Motor Safety Standards) shall be installed and used in all motor vehicles. Developer employees will not be allowed to ride in a vehicle without the use of a seat belt.

All vehicles on site will observe the plant speed limit as posted.

All Developer provided equipment and vehicles will be operated with the headlights on. This will increase visibility, thereby enhancing the safety of all employees of PacifiCorp and Developer.

Anytime a vehicle is going to be moved from a parked position, a walk-around inspection is required. As an aid to help Developer employees remember the requirement of a walk-around inspection before moving a parked vehicle, Developer employees will be required to carry in all vehicles a traffic cone. When a vehicle is parked, the driver shall place the cone by the vehicle immediately upon exiting the car. Just prior to leaving the parking spot, the driver will perform a walk-around inspection, and will then retrieve the cone and secure it properly on/in the vehicle.

Metal ladders are prohibited on the Site.

Developer shall leave a job site in as safe a condition as possible. Before leaving a job, it shall be Developer's duty to correct or arrange to give a warning on any condition which is hazardous.

Unsafe conditions shall be identified by barriers, signs or some other suitable method. Danger area signs and barricades shall be designated by predominant red color. Caution area signs and barricades shall be designated by predominant yellow color. Barricades, barricade tape and/or flagging shall have properly completed yellow information tag (supplied by PacifiCorp) attached in a conspicuous location stating date, reason for barrier and person to contact. Signs and barricades shall be removed immediately upon completion of the job requirement.

Developer's work practices shall minimize interference and disruption to Facility maintenance and operation. Developer shall not remove or alter any part of the existing structures, equipment or system without prior knowledge or consent of PacifiCorp. Developer shall, at all times during the performance of the work, be in strict compliance with the Facility's hazardous energy control procedures.

### **SAFETY DATA SHEETS**

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

- a. Requirement that suppliers furnish appropriate Safety Data Sheets ("SDS") and appropriate labels of all purchased chemicals.
- b. For materials Developer brings to the jobsite, SDS for those materials must be presented to PacifiCorp for review by PacifiCorp's Facility Safety Administrator and Environmental Engineer prior to commencement of work. All materials must meet all state and federal regulations for containment.
- c. Requirement that Developer and all employees to review the SDS of the appropriate hazardous chemicals, and follow the requirements of the OSHA Hazard Communication Standard.

## **INDUSTRIAL HYGIENE – Personal Air Monitoring for air particulate exposure**

PacifiCorp's Generation Seller Safety Procedure outlines; "The Seller will conduct appropriate on-site safety and health inspections and industrial hygiene monitoring throughout the duration of the job." As such Developer is responsible to assure its workers in all work areas per OSHA requirements are provided with safe air to breathe. In work where dust, fumes, gases, etc. are contacted with workers, Developer must do personal air monitoring to determine the condition of air quality in worker's work area. This air monitoring will assist in determining the proper personal protection equipment and engineering controls to remove or lower air borne contaminants to a safe levels of fly ash-silica, coal-silica, heavy metals, hexavalent chromium, and other known air contaminant as identified in OSHA 1910.1000 subpart Z, Toxic and Hazardous Substances, and Table Z1-Z3.

## **HAZARDOUS MATERIALS AND HAZARDOUS WASTE**

To comply with federal and state regulations concerning hazardous materials and hazardous wastes, Developer using any regulated substances, including but not limited to chemicals, paints, thinners, and solvents, on the Site is responsible for the proper storage, usage, and disposal of the material or waste. Developer shall be responsible to inform PacifiCorp's Representative of the quality and type of hazardous materials brought on site in writing. This information is to be copied to the plant Environmental Engineer. Developer shall also be responsible for the removal of all wastes and unused materials, whether hazardous or nonhazardous, at the job completion. PacifiCorp shall approve the transportation and disposal of all wastes disposed of by Developer. PacifiCorp's Representative shall sign and retain all shipping papers for hazardous and toxic substance control act wastes including but not limited to hazardous waste manifests, land disposal restrictions, certificates of disposal. This information will be given to the plant Environmental Engineer. Wastes may not be disposed of at plant landfill unless specifically approved by the PacifiCorp's Representative and shall be recorded on the plant Daily Landfill Placement Log(s). The logs are to be given to the plant Environmental Engineer.

Developer's personnel and those of its Subcontractors are required at all times to be familiar with and abide by all provisions of the OSHA Hazard Communication Standard and SARA Title III, Emergency Planning and Community Right-to-know Act (EPCRA) rules.

The application, disposal, utilization or other handling of any lead or lead based material or product ("Lead Work") shall be performed in strict compliance with all applicable Federal, State and local laws and regulations, including without limitation Federal OSHA Construction Standard For Lead (29 CFR 1926.62). Prior to performing any Lead Work, Developer shall prepare and have in effect a written work plan specifically for such work. Developer shall provide a copy of that work plan to PacifiCorp for review upon request by PacifiCorp, which request may be made at any time or times. Developer shall provide documentation evidencing proof of competency of individuals under Developer's supervision executing the work plan.

The removal or handling of any devices known or suspected to contain mercury shall be coordinated with PacifiCorp and performed in accordance with PacifiCorp procedures and federal and state regulations. Any devices which Developer removes during the course of work which contain mercury shall be given to PacifiCorp for proper disposal.

Computer wastes (cathode ray tubes, central processing units) or electronic components that contain “mother-board” like components may contain high levels of Resource Conservation and Recovery Act (“RCRA”) regulated wastes. These materials may not be discarded into plant landfills. If these types of waste are generated by Developer, Developer shall ensure that the wastes are properly recycled and/or removed from PacifiCorp property.

Developer shall notify PacifiCorp if suspected asbestos containing material is encountered. Developer shall not disturb in any way the encountered material. If at any time while performing any maintenance or repairs, Developer encounters insulation or gasket material and cannot identify it as non-asbestos, Developer shall have the responsibility of notifying PacifiCorp of a potential asbestos hazard. PacifiCorp will test samples of suspect material. PacifiCorp’s insulating Developer shall contain or remove all asbestos containing material.

## **ENVIRONMENTAL COMPLIANCE**

A PacifiCorp representative shall provide the Developer with a copy of the Environmental RESPECT Policy. Prior to starting any work, Developer shall be responsible for assuring that all of its employees are fully aware of the Environmental RESPECT policy. Developer shall conduct its work in such a manner as to minimize all harmful impacts to the environment, and take all necessary precautions to protect the environment. Developer will be responsible to continuously inspect and monitor the performance of its employees as it relates to environmental stewardship. Environmental issues created by Developer’s operations and/or activities shall be promptly addressed by Developer and reported to the plant Environmental Department, as appropriate.

Developer is responsible for maintaining strict compliance with all federal and state environmental regulations. Many of these regulations have important requirements associated with employee training. Developer has sole responsibility for any employee training required by federal and state regulations. Proof of successful training completion and periodic testing or recertification must be provided upon request by PacifiCorp.

In addition to the applicable federal, state and local requirements, Developer must comply with the following:

- a. Developer shall abide by the plant’s fugitive dust control plan, including but not limited to speed limits, minimizing soil disturbance, application of water to control dust during work activity and proper operation and maintenance of equipment.
- b. Developer shall obtain applicable construction or operating permits prior to constructing activities or operating stationary equipment which:

- 1) Emits greater than five tons per year of any of the following pollutants: particulate matter (PM10), sulfur dioxide (SO2), carbon monoxide (CO), nitrogen oxides (NOx), and volatile organic compounds (VOC);
  - 2) Emits greater than 500 pounds per year of any hazardous air pollutant (HAP), and greater than 2,000 pounds per year for any combination of HAPs;
  - 3) Regulated by any standard or requirement of Section 111 or 112 of the Clean Air Act; and
  - 4) Has the potential to be a major source, as defined in R307-101-2, Utah Annotated Code (UAC) or Wyoming Air Quality Standards and Regulations, Chapter 6, Section 3.
- c. Developer shall notify the PacifiCorp Safety Administrator or plant Environmental Engineer prior to performing any sandblasting activity and abide by the plant's Title V Operating Permit conditions related to sandblasting activities. In the event that Developer performs sandblasting activities, the Developer shall have a certified Method 9 Visible Emission Observer on site and provide Method 9 observations as required by the plant's Title V Operating Permit.
- d. Developer shall obtain a Storm Water Construction Permit for construction activities disturbing greater than one acre. Developer has sole responsibility to perform inspections every fourteen (14) days of the runoff control devices, transfer the Storm Water Permit and the inspection sheets to the PacifiCorp Environmental Engineer within ten (10) days of construction completion. Developer shall seed disturbed ground as required by the Storm Water Construction Permit.
- e. Developer shall secure required permits and request approval by PacifiCorp Environmental Engineer prior to the discharge of any water into the water of the state. Developer shall secure required permits and request approval by PacifiCorp Environmental Engineer prior to dredging or disturbing any waterways on PacifiCorp property.
- f. Developer shall abide by the plant's Spill Prevention Control and Countermeasures requirements and shall:
- 1) Notify the PacifiCorp Environmental Engineer in writing of any equipment or containers that contain 55 gallons or more of petroleum products;
  - 2) Store all containers of petroleum products that are equal to or greater than 55 gallons in PacifiCorp approved secondary containment;
  - 3) Inspect for leaks on any and all Developer provided tanks and drums while on site;
  - 4) Report and clean up all spills in a timely manner in accordance with the plant's Spill Prevention Control and Countermeasures Plan;
  - 5) Immediately report to the plant Environmental Department any spill or leak which enters, or threats to enter, any Water of the State, including ground water; and
  - 6) Ensure all spills and leaks are cleaned in a prompt and timely manner.

## **HEALTH, SAFETY AND ENVIRONMENTAL VIOLATIONS**



All health, safety and environmental violations with respect to work performed by Developer, Contractor and its Subcontractors, must be corrected by Developer. Developer shall be solely liable for all costs, including government-imposed penalties, associated with health, safety, and/or environmental violations attributable to Developer, Contractor or its Subcontractors.

### **SUBCONTRACTORS**

These requirements apply to Contractor and all Subcontractors. It is the responsibility of Developer to inform all such parties regarding the applicable work rules and security, environmental, health, and safety requirements prior to the start of any subcontracted work, and to train such parties if necessary. PacifiCorp will provide copies of these requirements upon request.

### **WORK RULES**

Developer shall at all times maintain strict discipline among its employees, including the employees of Contractor and its Subcontractors. Developer shall comply with Site conditions and work rules established by PacifiCorp and shall cooperate with PacifiCorp in enforcing such rules.

Any employee of Developer or of Contractor or its Subcontractors, who is deemed by PacifiCorp to be incompetent or disorderly or who poses a danger to the safety of the work, shall be immediately removed from Project work upon the request of PacifiCorp and shall not again be employed in the Project work without the written consent of PacifiCorp.

### **CLEANUP**

Developer shall keep the work area, including storage areas used by it, free from accumulation of waste and trash.

Developer is solely responsible for the transport, storage, security, handling, use, removal, disposal, and all other aspects of materials it brings to, causes to have brought to, or receives at the jobsite. Developer shall promptly remove all of its unused material (unless desired by PacifiCorp to be left on site) and all of its generated waste and shall leave none behind at completion of the project. Upon completion of the work, Developer shall leave the work area in a condition satisfactory to PacifiCorp.

In the event of Developer's failure, within a reasonable time, to satisfactorily clean the area, PacifiCorp may, after written notice to Developer, perform the clean-up and removal at Developer's expense.

### **DEVELOPER DRUG AND ALCOHOL POLICY**

Developer shall establish, maintain, and provide proof of a confidential drug and alcohol testing program for all of Developer's employees and Subcontractors assigned to work for any PacifiCorp facility (collectively, the "Developer's Representatives"). This information should be provided to the plant safety administrator.

Developer's Representatives are prohibited from possessing, using, distributing, dispensing, manufacturing, selling or having in their possession or control any drug/banned substance while on any PacifiCorp property.

Developer shall provide for random drug testing that shall include all of Developer's Representatives. Developer may be asked, at any time, to provide documentation that such testing has taken place. Developer will cooperate when asked to drug test for safety violations, suspicious or inappropriate behavior, reports of drug use, or physical signs of drug use. Developer's Representatives selected for random testing shall be accompanied to the testing site by Developer's supervisory personnel as soon as practical on the same day they are selected. The plant Safety Administrator should be notified when a non-negative test has occurred and what actions the Developer supervisor has taken to ensure continued safety on the site.

The tests required pursuant to this program must be conducted by a laboratory certified by the National Institute on Drug Abuse (NIDA). Specimens will be collected and tested for:

- Cannabinoids (marijuana)
- Cocaine
- Opiates (codeine, morphine, heroin, synthetic opiates (i.e., hydrocodone, oxycodone, etc.)
- Amphetamines-methamphetamines
- Phencyclidine (PCP)
- Benzodiazepines (i.e., tranquilizers, Valium, Xanax)
- Barbiturates
- MDMA (Ecstasy)
- Heroin
- Metabolites of all substances listed above

Compound	Screen	Confirming
Ethanol (alcohol)	0.02% percent blood alcohol or equivalent, as indicated by blood, saliva, breathalyzer or similar test.	0.02% percent blood alcohol or equivalent, as indicated by blood, saliva, breathalyzer or similar test.

Drugs may be added or deleted and PacifiCorp reserves the right to test for other controlled substances as necessary. Test results that exceed non-negative levels will constitute immediate removal of the individual from any PacifiCorp plant property for no less than one year and responsibility for a tracking mechanism to confirm that the individual has not returned to any PacifiCorp plant property during that one year period is the obligation of Developer.

Failure of Developer or any of Developer's Representatives to comply with this policy shall be grounds for immediate removal from any PacifiCorp plant property.

In maintaining a drug free workplace, all PacifiCorp plants expect the full cooperation of Developer and any of Developer's Representatives.



## *Contractor Safety Report*

Report is due by **1:00 p.m. each Wednesday**. Please complete form and fax to 503-813-7190 or email to [ContractorSafetyInfo@pacificorp.com](mailto:ContractorSafetyInfo@pacificorp.com). Any questions, contact Aeranee Bennett at 503-813-5517.

**Contractor Name:**

**Report Date:**

**Company Contact Name and Number:**

**There are no new incidents to report.**

### **Incident 1**

☐ Vehicle Incident – Preventable    ☐ OSHA Recordable Incident    ☐ Near Miss  
☐ Vehicle Incident – Non-Preventable    ☐ Lost Time Incident    ☐ Circuit Interruption

**Employee name:**

**Date of incident:**

**Location of incident:**

**Name, title, phone number of person submitting information:**

**Description:**

**Actions taken to ensure incident does not reoccur:**

### **Incident 2**

☐ Vehicle Incident – Preventable    ☐ OSHA Recordable Incident    ☐ Near Miss  
☐ Vehicle Incident – Non-Preventable    ☐ Lost Time Incident    ☐ Circuit Interruption

**Employee name:**

**Date of incident:**

**Location of incident:**

**Name, title, phone number of person submitting information:**

**Description:**

**Actions taken to ensure incident does not reoccur:**

*Use additional sheets for more incidents.*

## APPENDIX M

### Critical Milestones

The Critical Milestones identified below are required to ensure the Project achieves Substantial Completion by Guaranteed Substantial Completion Date. This Appendix M identifies the methodology for interpreting the Critical Milestones table below.

The Critical Milestone table contains four (4) columns:

**COLUMN 1: Milestone “Number”**

A reference number for scheduling and logistics plan tracking. This number does not represent priority or sequence.

**COLUMN 2: Milestone “Title”**

This is a brief description of the Milestone requirement.

**COLUMN 3: Expected Completion Day or Date**

This will either be a specific date or a number of days following the Effective Date, as they were defined in the negotiation process prior to signing.

**COLUMN 4: Required in Logistics Plan**

This column is a quick reference for Critical Milestones to be included in a logistics plan or any updates thereto. A “Yes” indicates that it is to be included in a logistics plan and a “No” implies that the Critical Milestone should not be seen on a logistics plan.

CRITICAL MILESTONES CHART Appendix M			
Milestone Number	Milestone Title (Description)	Expected Completion Date	Required in Logistics Plan

## **APPENDIX N**

### **Form of Progress Report**

#### **1.0 Progress Report Requirements**

Electronic copies of each complete and final Progress Report in accordance with the below requirements and the requirements of Section 10.8 of the Agreement shall be provided in Microsoft Word, Microsoft Excel, Microsoft Project and Adobe Acrobat.

Each Progress Report shall satisfy the following minimum requirements:

- a) Table of Contents – Progress Report
- b) Executive Summary – Current Month  
A synopsis of Project status addressing specific aspects of the Project shall be included in the Progress Report, including a description of construction, engineering (by discipline), procurement (issuance of major purchase orders and subcontracts), shipment/delivery of major items, and expected Mechanical Completion Dates, the Substantial Completion Date and the Final Acceptance Date.
- c) Personnel Safety  
A synopsis of Developer's safety performance for the preceding month shall be included in the Progress Report, including numbers and types of injuries and lost time accidents.
- d) Environmental Report  
A synopsis of Developer's environmental compliance for the preceding month shall be included in the Progress Report, including a description of any deviations and reporting from applicable regulations, codes and standards.
- e) Summary of Progress and Status of Project.

Preceding Month -- A synopsis of the Project progress completed as of the preceding month shall be included in the Progress Report. The reporting format shall be based on completion of Critical Milestones and other critical path activities, and construction, engineering (organized by discipline), procurement (issuance of purchase orders), shipment of materials and equipment to the Site, status of material and equipment in storage, training and start-up.

Next Month -- The expected progress for the Project in the next month shall be included in the Progress Report in outline form based on engineering, procurement, shipment, construction and equipment installation and commissioning.

- f) Meeting Status  
A summary with minutes of major meetings for the preceding month shall be included as well as an agenda for next month's meeting identifying the date,

location, expected attendees and a one or two-sentence summary of anticipated topics of discussion for the next month and schedule for the next month meeting date.

- g) **Priorities/Issues/Concerns**  
Identification and evaluation of Project Problems that are anticipated to require a modification to the Agreement shall be included in the Progress Report.
- h) **Schedule Update**  
Reporting on important items and events, such as purchases and dates of arrival of major Equipment components and the completion of Critical Milestones shall be included in the Progress Report.

The reporting format (hard and electronic copy) shall use Microsoft Project. An updated copy of the Project Schedule shall be attached to the Progress Report with a written analysis of schedule status, including actual versus planned progress as indicated by the initial base line Project Schedule (and any updates thereof), with reference to the Critical Milestones and Project Schedule.

Progress curves measuring actual progress versus planned progress for the total progress as well as for individual bulk quantities such as cable pulled, terminations, duct bank, concrete poured, steel erected, structures erected, conductor installed, etc., shall be included in the Progress Report

- i) **Permit Status**  
Providing a list of Permits shall be included in the Progress Report, including current status and the date each Permit is to be obtained.
- j) **Drawings and Procurement Status**  
The updated engineering drawing list, engineering and procurement schedule, and current status as compared to overall Project Schedule shall be included in the Progress Report. Depending upon volume, this may be submitted on a monthly basis as a separate document.
- k) **Project Financial Status**  
The section shall include the billing, forecast, and accrual breakdowns, for the preceding month, a comparison of the Progress Payment schedule with the actual Progress Payments to date, and financial review of the Project to date for each line segment and the substations.

## **APPENDIX O**

### **Spare Parts and Special Tools**

#### **1.0 INTRODUCTION**

Developer shall obtain from each supplier a priced listing of recommended spare parts needed for the first five (5) years of operation of the Project. Pricing shall be valid for as long a period (e.g. two to five years) as reasonably available from suppliers. Each listing shall include the manufacturer of each part, a description of each part (including industry standard part number if available), the assembly or Equipment in which each part will be used, and recommended quantities to be stocked. Each listing should also classify the relative criticality of parts based on the manufacturer's experience; and shall list the lead-time required for manufacture and delivery of each part. In each case Developer shall make recommendations to PacifiCorp on specific items and quantities for purchasing spare parts.

All spare parts lists and equipment identification information shall be submitted electronically in Excel format. The spare parts lists shall be submitted no less than one hundred thirty (135) days prior to Substantial Completion.

#### **2.0 SPARE PARTS AND SPECIAL TOOLS**

Developer shall supply, at Developer's expense, all spare parts and operating consumables Developer deems necessary for the installation, startup and commissioning of the Facility prior to Final Acceptance. PacifiCorp shall not be liable in any way for Developer's inability to achieve Substantial Completion or Final Acceptance due to lack of any parts or special tools.

##### **2.1. Spare Parts**

The list of spare parts submitted shall be completed by Developer and be accompanied by detailed descriptions to identify the spare parts (including the supplier and the address of the supplier) and the specific item or items to which it applies. Developer shall indicate the minimum recommended inventory for routine maintenance at installation, startup, and continuous operation based on manufacturer's recommendations. Developer shall also indicate whether the recommended spare is a stock item or special-order item, the location of the nearest supply point, and approximate lead-time required for shipment.

Any spares supplied by Developer shall be strictly interchangeable with the parts which they are intended to replace and shall be of the same or better quality as the original parts. Each spare shall be clearly marked with the description, purpose, supplier's name, and supplier's part number.

##### **2.1.1. Recommended Spare Parts**



The recommended spare parts shall be listed and shall be those considered desirable by Developer.

The recommended spare parts shall include a quotation of the unit price, quantity, description, catalog number, part number, drawing reference(s) etc., for each recommended spare part to completely identify the item and the equipment component for which it is recommended.

PacifiCorp may order all or any of the spare parts at its own discretion. PacifiCorp shall reimburse Developer for any spare parts purchased by Developer.

2.1.2. Spare Parts Purchased at PacifiCorp's Discretion

In the event PacifiCorp directs Developer to purchase any spare parts, such spare parts shall be handled as follows:

- Spare parts shall be clearly identified and marked with the part number.
- Spare parts shall be packaged and shipped in containers appropriate for the parts. Separate containers shall be used for the spare parts for each major piece of Equipment. Where applicable, containers shall be designed and constructed for return shipment of damaged or worn components for repair.
- Spare parts shall be protected from damage due to moisture and dirt accumulation during an extended storage period by use of special coatings, airtight membranes, bags of desiccant, or other means acceptable to PacifiCorp.
- A weatherproofed itemized list of the contents shall be attached to the outside of each container. A similar weatherproof list shall be inside each container.

2.2. Consumable Parts and Materials

Prior to Substantial Completion, Developer shall supply a sufficient quantity of consumable parts and materials as may be required prior to Final Acceptance.

2.3. Tools and Equipment

Any special, non-standard tools and test equipment required to adjust, dismantle, re-assemble, or maintain any Equipment shall be provided by Developer.

Tools and test equipment shall be of suitable quality. All special tools for normal maintenance will be turned over to PacifiCorp no later than Substantial Completion.

Developer shall provide a list and supply to PacifiCorp all special tools. The list shall be detailed to identify the function of the tools and the specific item or items for which it applies.

Tools and test equipment shall be neatly arranged in a box and shall be shipped to the site in a suitable separate container clearly marked with the name of the Equipment for which the tools and test equipment are intended. The separate container shall be shipped along with the Equipment that they will be used on.

Maintenance tools for each piece of Equipment shall be boxed separately and the boxes shall be marked.

## APPENDIX P

### **Wind Final Cost Report Requirements**

Before Final Acceptance, Developer shall prepare and deliver to PacifiCorp a Final Cost Report. Delivery of a Final Cost Report to PacifiCorp, consistent with the requirements of this Appendix and otherwise in form and substance reasonably satisfactory to PacifiCorp, will be a condition of Final Acceptance.

The Final Cost Report will consist of the total Contract Price and any other costs associated with the Agreement or other Project Documents and incurred by PacifiCorp pursuant hereto or thereto broken down into individual retirement units and allocated on a percentage and total Dollar basis. Individual retirement units include all material, installation labor, engineering, and overheads associated with each major component of the Project.

Set forth below is a preliminary list of typical individual retirement units proposed for the Project, which is included for informational purposes only. No later than three (3) months before Final Acceptance, Developer will submit to PacifiCorp for its review a proposed breakdown of individual retirement units for the Project based on the final design of the Project. No later than one (1) month before Final Acceptance, Developer and PacifiCorp shall mutually agree on a final list of retirement units.

<b>Location Description</b>	<b>SYSTEM</b>	<b>SUBSYSTEM</b>
Common	Buildings	<b>Buildings, O&amp;M Building</b>
Common	Buildings	<b>Buildings</b> , storage sheds, miscellaneous structures
Common	Grounds	<b>Roads</b> , landscaping, paving, fencing, site civil improvements (drainage controls)
Common	Wells	<b>Water Well and pump</b>
Common	Electrical System	<b>Meteorological Tower (each)</b>
Common	Electrical System	<b>Outdoor Lighting and Security System</b>
Turbine	AC Electrical System	<b>Medium-Voltage Transformers (Each)</b> , 690V/34.5kV

Turbine	Structures	<b>Complete tower foundations and substructure (Each)</b> including excavation, concrete base, backfill, floor, pilings, drains, etc.
Turbine	AC Electrical System	<b>Wind Turbine Generator (Each)</b> including nacelle, structural towers (all sections), FAA lighting, blades, gearbox assembly, generator, hydraulic pumps and tower controller
Collection Feeder String 1, 2, 3...	AC Electrical System	<b>Medium-Voltage Collection System (For each collection feeder)</b> , from MV Transformers to Collection substation including individual 34.5kV breaker and relays
Common	Controls	<b>Controls</b> , wind turbine controls, SCADA, monitoring system, fiber communications
Common	AC Electrical System	<b>Step-Up Transformer</b> , collection system substation
Common	AC Electrical System	<b>High Side Breaker</b> , collection system substation
Common	AC Electrical System	<b>Capacitory Banks</b>
Common	AC Electrical System	<b>Overhead AC line</b> from high side of step-up transformer to point of interconnection substation, including towers, conductor, OPGW and avian protection devices

## **APPENDIX Q-1**

### **Developer Insurance**

Developer shall maintain or cause to be maintained the following types of insurance subject to the general provisions included in Appendix Q-3.

#### **1) Workers' Compensation/Employers' Liability**

- a) Developer shall maintain statutory limits for workers' compensation, to the extent required by applicable Laws, during the entire time that any persons are employed by Seller on the Site in connection with the Project.
- b) Developer shall maintain employers' liability insurance in the amount of \$1,000,000 each accident, \$1,000,000 disease policy limit and \$1,000,000 disease each employee.

#### **2) Automobile and Aviation Liability insurance**

Developer shall maintain or cause to be maintained the following additional insurance in as far as it may be applicable:

- a) Automobile liability insurance with respect to all mechanically propelled vehicles used on public highways or in any circumstances such as to be liable for compulsory motor insurance in accordance with applicable Laws of the state in which such vehicles will operate. The limit of liability shall not be less than \$1,000,000 combined single limit each accident for all owned, non-owned and hired vehicles.
  - b) Aircraft liability insurance, if applicable, with respect to all aircraft owned, non-owned, hired or chartered for use, if any, and hull and aviation liability shall be arranged. The limit of liability shall not be less than \$25,000,000 per occurrence. This requirement can be satisfied by a combination of primary and excess liability policies. Alternatively, Developer shall require that Contractor and any Subcontractors providing such Work to carry and maintain insurance during the course of the Project. Developer may satisfy the aircraft liability insurance requirement through its Contractor or Subcontractor if such Contractor or Subcontractor names PacifiCorp as additional insured.
- 3) Commercial general liability insurance for Developer's legal liability arising out of all the engineering, procurement and construction activities of Developer, Contractor and all Subcontractors with bodily injury (including death) and property damage limits of \$1,000,000 per occurrence and \$2,000,000 annual aggregate, provided the annual aggregate will apply separately to claims occurring with respect to the Project. Such insurance shall include, but not be limited to, contractual liability encompassing the indemnity provisions of this Agreement, personal injury, independent sellers, explosion, collapse and underground property damage and sudden accidental pollution liability. Coverage is required to be written on an occurrence form.

- 4) Professional liability insurance covering damages arising out of negligent acts, errors, or omissions committed by Developer in the performance of this Agreement, with a liability limit of not less than \$1,000,000 each claim and annual aggregate. Developer shall maintain this policy for a minimum of two (2) years after completion of the Work or shall arrange for a two (2) year extended discovery (tail) provision if the policy is not renewed. The intent of this policy is to provide coverage for claims arising out of the performance of Work under this Agreement and caused by any error, omission, breach or negligent act for which Developer is held liable. Alternatively, Developer shall require that Contractor, any Subcontractors or licensed design professionals providing such design Work to carry and maintain insurance during the course of the Project. Developer may satisfy the professional liability insurance requirement through its Contractor or licensed design professional Subcontractor, as applicable. Evidence of insurance from Contractor or licensed design professional Subcontractor, as applicable, to PacifiCorp is required prior to acceptance of this requirement.
- 5) Developer's pollution liability arising out of all operations of Developer, Contractor and any Subcontractors due to discharge, dispersal, release, or escape of contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water with bodily injury and property damage limits of not less than \$5,000,000 per occurrence annual aggregate for:
  - (a) bodily injury, sickness, disease, mental anguish or shock sustained by any person, including death;
  - (b) property damage including physical injury to or destruction of tangible property including the resulting loss of use thereof, clean up costs, and the loss of use of tangible property that has not been physically injured or destroyed;
  - (c) defense including loss adjustment costs, charges and expenses incurred in the investigation, adjustment or defense of claims for such compensatory damages;
  - (d) definition of pollution conditions shall include asbestos, lead, and mold so that these risks are covered if caused by the work or operations of Developer, Contractor and any Subcontractor, and the definition of property damage shall include natural resources damage; and
  - (e) coverage is required on an occurrence form.
- 6) Umbrella or excess liability insurance with a limit of \$25,000,000 per occurrence and in the annual aggregate in excess of the limits of insurance provided in paragraphs 1(b), 2(a), and 3 above on a follow form basis. Coverage is required to be written on an occurrence form.
- 7) Insurance providing coverage for Developer's, Contractor's and Subcontractor's owned or leased equipment and tools being used at the Site and not becoming permanent works of the Project.
- 8) All other insurance required by applicable Laws, including domestic and international.

- 9) Transit insurance covering worldwide (all domestic and international air, land, and water) shipments of Project Equipment, including machinery and materials. Developer may satisfy the transit insurance requirement through its equipment and material Subcontractors. Coverage is to be on a broad form basis, including ocean marine cargo plus war, strike, terrorism, riot and civil strife perils and should include warehouse to warehouse coverage including while such property is in temporary storage awaiting transit. Developer's builder's risk other property insurance will provide additional temporary storage if coverage terminates under the transit policy. Coverage shall include loading/unloading, debris removal, and expediting expense. The sum insured with respect to each shipment or temporary storage shall be equal to the replacement value of the largest single shipment or storage location. Transit coverage to attach from the time of leaving the manufacturers'/suppliers' warehouses and run continuously until reaching the final Project Site, including unloading, unless provided by builder's risk coverage.
- (a) The policy shall carry a 50/50 hidden or concealed damage provision, which provision shall also be retained if there is also transit coverage provided under Developer's builder's risk policy.
  - (b) Deductibles shall not be greater than \$50,000 for any one shipment.
  - (c) Developer shall have obtained such transit coverage on or prior to the date on which the exposure to the risk covered by the transit coverage arises. The only permissible cancellation is as follows: (i) cancellation on seven (7) days' notice for war, strikes, civil commotion; (ii) cancellation on forty-eight (48) hours' notice for strikes, riots, and civil commotion preventing passage to or from the United States; and (iii) cancellation on ten (10) days' notice for non-payment of premium.
  - (d) Coverage to continue during storage until builder's risk policy is in force.

Compliance with the transit insurance requirement shown herein, in total or in part, including the requirement for ocean marine cargo coverage applicable to shipments transported by ocean-going vessel, shall be met by Developer, Contractor, its Subcontractors, , or any combination of these parties without duplication of such insurance by Developer. All parties having a financial interest in this property shall be named loss payee or additional insured as their interest may appear.

- 10) Builder's risk insurance including inland marine transit (if not provided by the transit policy), and covering loss or damage to the Project during the construction, testing and commissioning periods and until the Substantial Completion Date covering all property used in the fabrication, assembly, installation, erection or alteration of the Work.

The policy will include the interest of all parties concerned and is to be on an "all risk" basis, or broad form basis, subject to normal and customary policy exclusions, terms and conditions and subject to adequate sub-limits for the following coverages; earthquake, flood, debris removal, demolition and expediting expenses. Coverage shall also provide inland transit and on and off site storage (to the extent storage coverage is not provided under the transit policy)

including fabrication/repairs.

- (a) Deductibles shall not be greater than \$250,000 per occurrence.
- (b) Developer shall have obtained such builder's risk coverage on or prior to the date on which the exposure to the risk covered by the builder's risk coverage arises.
- (c) The only permissible cancellation is for non-payment of premium and material change in the risk profile of the Project after coverage commences, upon at least ten (10) days notice.
- (d) Coverage to include 50/50 hidden or concealed damage provision.
- (e) Coverage to include testing coverage and resultant damage from faulty design, materials and workmanship and will include coverage after the transmission line is energized if Substantial Completion has not been achieved.
- (f) Coverage to include damage to existing property of PacifiCorp with a limit of \$20,000,000 each occurrence.
- (g) Coverage to include damage to property after being taken into use, including damage resulting from energizing lines, for that portion of the Work performed by one of the insured parties until the Project reaches Substantial Completion.

PacifiCorp reserves the right to provide the builder's risk insurance.



## **APPENDIX Q-2**

### **PacifiCorp Insurance**

PacifiCorp shall maintain or cause to be maintained the following types of insurance, subject to the general provisions included in Appendix Q-3.

- (1) PacifiCorp shall maintain statutory limits for worker's compensation to the extent required by applicable Laws, during the entire time that any persons are employed by PacifiCorp on the Site in connection with the Project and PacifiCorp shall maintain employer's liability insurance in the amount of \$1,000,000 each accident, \$1,000,000 disease policy limit and \$1,000,000 disease each employee. PacifiCorp may self insure where permitted by applicable Laws.
- (2) Commercial General Liability insurance for PacifiCorp's legal liability arising out of Project activities, and automobile liability insuring owned, non-owned or hired vehicles of PacifiCorp with a limit of not less than \$25,000,000 per occurrence and in the annual aggregate. PacifiCorp may self-insure where permitted by applicable Laws.
- (3) All other insurance required by applicable Laws.
- (4) PacifiCorp reserves the right to provide the builders risk insurance.

## APPENDIX Q-3

### General Insurance Provisions

- (1) All insurance may be carried through the worldwide insurance programs of PacifiCorp or Developer or their respective Affiliates. Compliance with the transit insurance requirement shown in Appendix Q-1, in total or in part, including the requirement for ocean marine cargo coverage applicable to shipments transported by ocean-going vessel, shall be met by Developer, Contractor, its Subcontractors, or any combination of these parties without duplication of such insurance by Developer. All parties having a financial interest in this property shall be named loss payee or additional insured as their interest may appear.
- (2) All insurance required to be maintained in Appendix Q-1 shall be endorsed to the effect that PacifiCorp, the financing entities (if applicable), Developer, Contractor, any Subcontractors and such other persons as PacifiCorp may specify in writing shall be included as additional insured's thereon except for workers' compensation and professional liability coverage. Third party liability policies shall provide for a cross liability and severability of interest clause. Vendors and others who merely transport, pick up, deliver or carry materials, personnel, parts or equipment, or any other items or persons to or from the Site shall not be considered "Subcontractors" for purposes of insurance coverage. Developer's insurance is primary insurance with respect to the interests of PacifiCorp and that any other insurance maintained by PacifiCorp is excess and not contributory insurance with the insurance required hereunder. Except for Professional liability, waivers of subrogation rights will be provided on all policies listed in Appendices Q-1 and Q-2.
- (3) In the event any insurance described herein (including the limits or deductibles thereof), other than insurance required by applicable Laws, shall not be available on commercially reasonable terms in the commercial insurance market for facilities having a similar risk profile, the Parties shall consent to waive the requirement to maintain such insurance to the extent the maintenance thereof is not so available on such terms, but the Parties shall continue to remain obligated to maintain any such insurance up to the level, if any, at which such insurance can be maintained on commercially reasonable terms in the commercial insurance market for facilities with a similar risk profile.
- (4) Loss payable wording shall be reasonably acceptable to the financing entities, if any.
- (5) Unless specified in Appendix Q, no insurance shall be canceled or reduced with respect to the interest of PacifiCorp, Developer, and financing entities, if any, without thirty (30) days (ten (10) days nonpayment of premium) prior written notice. In the event of cancellation due to nonpayment of premium, the financing entities, if any, shall have the right to make payments in order to keep insurance in force.

- (6) All insurance required to be maintained in accordance with Appendices Q-1 and Q-2 shall be placed with financially sound and reputable insurers having an A.M. Best rating of A-VII or better and with coverage forms acceptable to the Parties.
- (7) Developer, Contractor and its Subcontractor will be responsible to schedule and pay for marine cargo surveys required by the transit insurers for Equipment, machinery and supplies specified under the insurance. If Developer fails to schedule the required survey, Developer will be responsible for any reduction in, or loss of, coverage that results from such failure.
- (8) Developer shall require Contractor and its Subcontractors who perform Work at the Site to carry liability insurance (auto, commercial general liability, excess, aviation, professional and Developer's pollution when applicable) and workers' compensation, employers' liability insurance with limits that are appropriate given the scope of Contractor's and each Subcontractor's portion of the Work. However in the event that Contractor or Subcontractors do not provide the limits of liability shown in Appendix Q-1, Developer shall remain responsible and indemnify PacifiCorp for any claims, lawsuits, losses and expenses, including defense costs that exceed any of its Contractor's or Subcontractor's insurance limits or for uninsured claims or losses.
- (9) All amounts of insurance coverage under this Agreement are required minimums. PacifiCorp and Developer shall each be solely responsible for determining the appropriate amount of insurance, if any, in excess thereof. The required minimum amounts of insurance shall not operate as limits on recoveries available under this Agreement. PacifiCorp and Developer will be responsible for any deductibles and uninsured losses that apply to their insurance requirements as shown in Appendices Q-1 and Q-2.
- (10) Evidence of insurance required hereunder in the form of certificates of insurance shall be furnished by each Party when required to be delivered no later than the date on which coverage is required to be in effect pursuant to this Appendix and the Agreement, as applicable; provided, however, a copy of the transit and builder's risk insurance policies shall be provided by Developer to PacifiCorp not less than thirty (30) days prior to the date on which coverage is required to be in effect. It is hereby understood and agreed that the policy wording to be provided by Developer is confidential and privileged information, and is intended for the use of PacifiCorp in order to satisfy and validate the terms and conditions of this Agreement. Not later than the one-year anniversary of the date of delivery of the certificates of insurance hereunder or the expiration date of the policy if for a term of more than one year, and not later than each one-year anniversary or policy renewal date thereafter, each Party shall deliver copies of the certificate of insurance of the renewal insurance policies.
- (11) The transit and builder's risk insurance carried by Developer shall be primary and not excess to or contributing with any property insurance or self-insurance maintained by PacifiCorp with regard to the Project or PacifiCorp's other property.
- (12) Capitalized terms used in this Appendix Q-3 have the meaning given thereto in the Build Transfer Agreement – Appendix Q

Contract to which this Appendix Q-3 is attached.

**APPENDIX R**  
**Progress Payments**

**1.0 Progress Payments**

Developer shall submit to PacifiCorp for approval, such approval to be in the sole discretion of PacifiCorp, a completed Schedule of Values in accordance with the requirements of Section 2 of this Appendix. The Schedule of Values approved by PacifiCorp (“SOV”) shall be consistent with the expenditure schedule below and will include those SOV Items as determined in accordance with this Appendix R.

Progress Payment Number	Invoice Date	Incremental Progress Payment Amount	Maximum Cumulative Progress Payment Amount
		\$	\$

Notes:

Progress Payments for any particular month will be the dollar value of percent completed Schedule of Values (SOV) item during such month but shall in no event exceed the maximum cumulative Progress Payment amount.

Schedule of Values


## 2.0 Schedule of Values

### General

- (a) Each Progress Payment shall consist of the sum of Dollar amounts associated with completion of a SOV Item prior to submittal of Developer's Invoice.
- (b) The Progress Payments to Developer shall be based on actual completion of SOV items shown in Developer's approved SOV.
- (c) All SOV items included in a Progress Payment shall be supported with suitable documentation so that PacifiCorp can evaluate progress and completion of the SOV item.
- (d) All SOV items included in a Progress Payment shall be consistent with the SOV items identified in the attached SOV table which includes activities for engineering, procurement and construction.

### Schedule of Values

- (a) The Progress Payment Schedule shall be based on the SOVs attached herein and include a detailed list of SOV items and associated Dollar values completed by Developer with respect to each SOV.
- (b) The sum of the Dollar amounts for SOV items shall equal the Contract Price.

### SOV Items

- (a) SOV items consist of measurable and verifiable events or portions of the Work as further described in this subsection.
- (b) Each SOV item shall have a corresponding Dollar value. Completion of the SOV item shall entitle Development to payment for that portion of the Work, subject to the other conditions of the Agreement.
- (c) Dollar amounts associated with a SOV item shall be representative of the cost or value of the Work completed for that SOV item.
- (d) Work performed pursuant to a Change in Work shall be separately stated as SOV items with associated Dollar amounts. Such Change in Work SOV items shall follow the same requirements for SOV items as stated in the Agreement and this Appendix.
- (e) Guidelines for SOV items include the following:

- (A) SOV items shall normally not include costs or value of both (i)
- Build Transfer Agreement – Appendix R

material and equipment, and (ii) installation cost of such material and equipment, in the same SOV item.

- (B) SOV items may include commodities (e.g., feet of piping, cubic yards of concrete, tons of building steel erected, feet of cable pulled, feet of duct bank installed, completed foundations, structures erected, etc.) when such items (i) have been reasonably estimated for both cost and quantity as part of the development of the SOV, (ii) can be reasonably measured by PacifiCorp to determine degree of completion, and (iii) are regularly and fully reported in the Progress Report. Dollar values for SOV items involving commodities may include material and installation costs.
- (C) Overheads, margins, and other indirect costs should be included on a pro rata basis as part of the Dollar amount for an SOV item.
- (D) During the early months, SOV items should consist of activities or events associated with engineering tasks, procurement of equipment and commodities including initial payments, and initial construction activities typical of EPC projects. Examples include: completion of drawings or specifications by discipline or type, placement of key purchase commitments with Subcontractors, mobilization of the construction team to complete value engineering and planning, etc.
- (E) SOV items should be broken out by purchase commitments, functional areas, or other rational basis.

**APPENDIX S**  
**Form of Parent Guaranty**

This GUARANTY ("Guaranty") is made as of the \_\_\_ day of \_\_\_\_\_, 20, by \_\_\_\_\_ ("Guarantor"), to and for the benefit of **PACIFICORP**, an Oregon corporation having a principal office at 825 N.E. Multnomah, Suite 2000, Portland, OR 97232 ("Beneficiary"), with reference to the following.

WHEREAS, \_\_\_\_\_ ("Obligor"), is wholly owned, directly or indirectly, by Guarantor; and

WHEREAS, Obligor and Beneficiary have entered into that certain Build Transfer Agreement, dated as of [MONTH], [DATE], [YEAR] (hereinafter the "Agreement"); and

WHEREAS, to induce Beneficiary to enter into the Agreement, Guarantor executes and delivers to Beneficiary this Guaranty.

NOW, THEREFORE, for and in consideration of the foregoing premises, and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, Guarantor covenants and agrees as follows:

1. Definitions. Unless otherwise defined herein, all capitalized terms used herein which are defined in the Agreement shall have their respective meanings as therein defined. All references to the Agreement contained herein shall be construed to mean the Agreement as amended from time to time. Unless otherwise required by the context in which any term appears in this Guaranty: (a) the singular shall include the plural and vice versa; (b) the words "herein," "hereof" and "hereunder" shall refer to this Guaranty as a whole and not to any particular sections or subsections hereof; (c) the words "including" or "includes" shall be construed to mean without limitation" or "but not limited to" and (d) the word "or" is not necessarily exclusive.

2. Guaranty. Guarantor hereby absolutely, irrevocably and unconditionally guarantees to Beneficiary, its successors and permitted assigns the full and prompt payment and performance when due of all of Obligor's warranties, covenants, indebtedness, duties and agreements contained in the Agreement including, but not limited to, payment obligations under the Agreement. All obligations, representations, warranties, covenants, indebtedness, duties and agreements described above are collectively referred to herein as the "Obligations." If at any time Obligor fails, neglects or refuses to timely or fully perform any of the Obligations as expressly provided in the terms and conditions of the Agreement and Obligor has not (after receipt or written notice and within the applicable cure period): (a) in the case of the failure to perform a payment obligation under the Agreement, made such payment in full; or (b) in the case of a failure to perform any other of the Obligations, commenced and diligently pursued corrective action to the extent required by the Agreement, then upon receipt of written notice from Beneficiary specifying the failure, Guarantor shall promptly pay or perform, or cause to be paid or performed, any such Obligation as required pursuant to the terms and conditions of the Agreement. Notwithstanding anything set forth to the



contrary herein, with respect to any claim, action or proceeding against Guarantor in connection with this Guaranty, Guarantor shall be entitled to assert those rights, remedies and defenses which Obligor would be able to assert if such claim, action or proceeding were to be asserted or instituted against Obligor based upon the Agreement including, but not limited to, any limitations of liability set forth in the Agreement, but provided that in no event shall Guarantor be entitled to assert any defenses that arise by operation of law on account of an Event of Bankruptcy (as defined below) or the bankruptcy or insolvency of the Obligor. Guarantor agrees that this Guaranty is a guaranty of performance including, but not limited to, payment, and not merely a guaranty of collection and shall apply regardless of whether recovery of any or all of the Obligations may be or become discharged or uncollectible in Event of Bankruptcy in which Obligor is the debtor. All payments hereunder shall be made without reduction, whether by set-off or otherwise.

3. Unconditional Guaranty. The obligations of Guarantor hereunder are independent, absolute and unconditional, irrespective of any genuineness, validity, regularity or enforceability of the Obligations and irrespective of any genuineness, validity, regularity or enforceability of the Agreement, or any substitution, release or exchange of any other guarantee of or security for any of the Obligations, and, to the fullest extent permitted by applicable Law, irrespective of any other circumstance whatsoever which might otherwise constitute a legal or equitable discharge or defense of a surety or guarantor. Without limiting the generality of the foregoing, the occurrence of any one or more of the following shall not affect the liability of Guarantor hereunder:

- (a) at any time or from time to time, without notice to Guarantor, the time for any performance of or compliance with any of the Obligations shall be extended, or such performance or compliance shall be waived;
- (b) any acts or omissions by Obligor with respect to the Obligations;
- (c) any of the Obligations shall be modified, supplemented or amended in any respect, or any right with respect to the Obligations shall be waived or any other guaranty of any of the Obligations or any security therefore shall be released or exchanged in whole or in part or otherwise dealt with;
- (d) any lien or security interest granted to, or in favor of, Beneficiary as security for any of the Obligations shall fail to be valid or perfected;
- (e) the voluntary or involuntary liquidation, dissolution, sale or other disposition of the assets and liabilities, or the voluntary or involuntary receivership, insolvency, bankruptcy, assignment for the benefit of creditors, reorganization or other similar proceeding affecting Obligor, or rejection of the Agreement in any such proceeding, or any action taken by any trustee or receiver in connection therewith (an "Event of Bankruptcy");
- (f) any lack of authorization, in whole or in part, of the Obligations or any term or provision hereof or of the Agreement for any reason, or the rejection or purported rejection thereof in any Event of Bankruptcy;

- (g) whether Beneficiary shall have taken or failed to have taken any steps to collect or enforce any obligation or liability from Obligor or shall have taken any actions to mitigate its damages;
- (h) whether Beneficiary shall have taken or failed to have taken any steps to collect or enforce any guaranty of or to proceed against any security for any Obligation;
- (i) any applicable Law which might in any manner cause or permit to be invoked any alteration in the time, amount or manner of payment or performance of any of the Obligations or the obligations of Guarantor hereunder;
- (j) any merger or consolidation of Obligor or Guarantor into or with any other person or any sale, lease or transfer of all or any of the assets of Obligor or Guarantor to any other person;
- (k) any change in the ownership of any of the voting securities of Obligor or Guarantor;
- (l) to the extent as may be waived by applicable Law, the benefit of all principles or provisions of laws, rules and regulations which may be in conflict with the terms hereof;  
or
- (m) any failure on the part of Guarantor to comply with any applicable Law.

4. Subordination of Subrogation Rights. Guarantor hereby subordinates to all claims, rights and remedies that Beneficiary or any of Beneficiary's permitted assigns may have against Obligor any claim, right or remedy that Guarantor may now have or hereafter acquire against Obligor that arises hereunder or in connection herewith, including any claim, remedy or right of subrogation, reimbursement, indemnity, exoneration, contribution or participation in any claim, remedy or right against Obligor that arises in connection herewith, whether or not such claim, right or remedy arises in equity, under contract, by statute, under common law or otherwise until the Obligations have been paid and performed in full. If any amount shall erroneously be paid to Guarantor on account of such subrogation, reimbursement, indemnity, exoneration, contribution, and similar rights, such amount shall be held in trust for the benefit of Beneficiary and shall forthwith be paid to Beneficiary to be credited against the payment of the Obligations, whether matured or unmatured.

5. Remedies. Guarantor agrees that the Obligations shall be due and payable for purposes of this Guaranty notwithstanding any stay, injunction or other prohibition preventing a declaration of payment as against Obligor.

6. Certain Waivers. Guarantor hereby unconditionally and irrevocably waives, to the extent permitted by applicable law, (i) notice of any of the matters referred to in Section 3 hereof; (ii) all notices which may be required by applicable Law or otherwise, now or hereafter in effect, to preserve any rights against Guarantor hereunder, including, any demand, proof or notice of non-payment of the Obligations except as otherwise required by Section 2 hereof; and (iii) acceptance of this Guaranty, demand, protest, promptness, diligence, presentment, notice of default or

dishonor and any requirement of diligence, notice of intent to accelerate, notice of acceleration and notice of the incurring of the Obligations. Guarantor hereby waives: (a) any right to assert against Beneficiary any defense (legal or equitable), counterclaim, set-off, crossclaim or other claim that Guarantor may now or at any time hereafter have (x) against Obligor or (y) acquired from any other party to which Beneficiary may be liable; (b) any defense arising by reason of any claim or defense based upon an election of remedies by Beneficiary which in any manner impairs, affects, reduces, releases, destroys or extinguishes Guarantor's subrogation rights, rights to proceed against Obligor for reimbursement, or any other rights of the Guarantor to proceed against Obligor or against any other person, property or security and (c) any right to require Beneficiary to marshal, or have recourse to other collateral or surety, before exercising its rights hereunder.

7. Separate Enforcement. The obligations of Guarantor under this Guaranty are independent of and may be enforced separately from the Obligations, in a separate action or actions that may be brought and prosecuted against Guarantor whether or not action is brought against Obligor. Guarantor agrees that payment or performance of any of the Obligations or other acts which toll any statute of limitations applicable to the Obligations or the Agreement shall also toll the statute of limitations applicable to Guarantor's liability under this Guaranty.

8. Representations and Warranties. Guarantor additionally represents and warrants to Beneficiary as follows:

(a) Guarantor is a corporation duly organized, validly existing, authorized to do business and in good standing under the laws of the State of its formation.

(b) Guarantor has the requisite corporate power and authority to own its property and assets, transact the business in which it is engaged and to enter into this Guaranty and carry out its obligations hereunder. The execution, delivery, and performance of this Guaranty have been duly and validly authorized and no other corporate proceedings on the part of Guarantor or its affiliates are necessary to authorize this Guaranty or the transactions contemplated hereby.

(c) No authorization or approval or other action by, and no notice to or filing with, any governmental authority or other regulatory body or third party is required for the due execution, delivery and performance by Guarantor of this Guaranty.

(d) This Guaranty, when executed, shall constitute a valid and binding agreement of Guarantor and is enforceable against Guarantor in accordance with the terms of this Guaranty, except as may be limited by bankruptcy or insolvency or by other Laws affecting the rights of creditors generally and except as may be limited by the availability of equitable remedies, and except to the extent that the execution of this Guaranty was induced by fraud, misrepresentation, or fraudulent concealment by or on behalf of the Beneficiary.

(e) As of the date hereof, the execution, delivery, and performance of this Guaranty does not and will not (i) result in a default, breach or violation of the certificate or articles of incorporation or bylaws of Guarantor, or (ii) constitute an event which would permit any person or entity to terminate rights or accelerate the performance or maturity of any

indebtedness or obligation of Guarantor, the effect of which would materially affect Guarantor's ability to meet its obligations under this Guaranty, (iii) constitute an event which would require any consent of a third party or under any agreement to which Guarantor is bound, the absence of which consent would materially and adversely affect Guarantor's ability to meet its obligations under this Guaranty, or (iv) result in any default, breach or violation of any license, permit, franchise, judgment, writ, injunction, decree, order, charter, law, ordinance, rule or regulation applicable to Guarantor and which default, breach or violation would materially and adversely affect Guarantor's ability to meet its obligations under this Guaranty.

9. Amendments. No amendment of any provision of this Guaranty shall be effective unless it is in writing and signed by Guarantor, Beneficiary and any permitted assignee of Beneficiary's rights hereunder, and no waiver of any provision of this Guaranty, and no consent to any departure by Guarantor therefrom, shall be effective unless it is in writing and signed by Beneficiary or any permitted assignee of Beneficiary's rights hereunder. No delay on the part of Beneficiary 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 Guaranty by Beneficiary shall constitute a subsequent waiver of the same or any other breach, term or condition. No notice to or demand on Guarantor shall entitle Guarantor to any other or further notice or demand in similar or other circumstances or constitute a waiver of the rights of Beneficiary to any other or further action in any circumstances without notice or demand. The rights and remedies herein expressly provided are cumulative and not exclusive of any rights or remedies which Beneficiary would otherwise have.

10. Continuing Guaranty; Successor and Assigns. This Guaranty is a continuing guaranty and (i) shall apply to all Obligations whenever arising, (ii) shall remain in full force and effect until satisfaction in full of all of the Obligations, (iii) shall be binding upon Guarantor and its successors and permitted assigns and (iii) shall inure to the benefit of and be enforceable by Beneficiary and its successors, and assigns permitted under the Agreement. Notwithstanding the foregoing, however, Guarantor may not assign all or any portion of its rights or delegate all or any portion of its duties under this Guaranty without the prior written consent of Beneficiary. Any assignment by Guarantor without the foregoing consent shall be void.

11. Reinstatement. In the event that Beneficiary for any reason (including but not limited to bankruptcy preferences or alleged fraudulent transfers), is required to repay or disgorge any amounts received by it in respect of the Obligations, then the liability of Guarantor under this Guaranty, with respect to such amounts, shall be reinstated.

12. Governing Law. This Guaranty shall be governed by and construed in accordance with the laws of the state of New York, excluding rules governing conflicts of laws. Guarantor hereby submits, and by its acceptance hereof Beneficiary hereby submits, to the jurisdiction of the courts of the state of New York and to federal courts located within the city of New York

13. WAIVER OF JURY TRIAL. GUARANTOR AND BENEFICIARY HEREBY IRREVOCABLY WAIVE, TO THE FULLEST EXTENT PERMITTED BY LAW, ALL RIGHT

OF TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM ARISING OUT OF OR IN CONNECTION WITH THIS GUARANTY OR THE AGREEMENT TO WHICH THEY ARE A PARTY OR ANY MATTER ARISING HEREUNDER OR THEREUNDER.

14. Notices. Any notices or other communication to be given hereunder shall be given in writing, sent by (a) personal delivery, (b) internationally recognized expedited delivery service, (c) registered or certified United States mail, postage prepaid, or (d) facsimile (followed by registered or certified United States mail, postage prepaid) as follows:

To Guarantor:

To Beneficiary: PacifiCorp  
825 NE Multnomah, Suite 600  
Portland, OR 97232  
Attention: Credit Manager  
Phone No.: (503) 813-7230

With a copy to: PacifiCorp General Counsel  
825 NE Multnomah, Suite 1800  
Portland, OR 97232  
Phone No.: (503) 813-5029  
Attention: Jeff Erb

or to such other address or to the attention of such other individual as hereafter shall be designated in writing by the applicable party sent in accordance herewith. Any such notice or communication shall be deemed to have been given either at the time of personal delivery or, in the case of delivery service or mail, as of the date of receipt at the address and in the manner provided herein, or in the case of facsimile, upon receipt.

15. Severability. In the event that any of the provisions, or portions or applications thereof, of this Guaranty are held to be unenforceable or invalid by any court of competent jurisdiction, Beneficiary and Guarantor shall negotiate an equitable adjustment in such provisions of this Guaranty with a view toward effecting the purpose of this Guaranty, and the validity and enforceability of the remaining provisions, or portions or applications thereof, shall not be affected thereby.

16. Duty to Keep Informed. Guarantor assumes the responsibility for being and keeping itself informed of the financial condition of Obligor until the termination of all of the Obligations, and of all other circumstances bearing upon the risk of nonpayment or default under the Obligations which diligent inquiry would reveal, and agrees that Beneficiary shall have not duty to advise Guarantor of information known to it regarding such condition or any such circumstances.

17. Entire Agreement. This Guaranty contains the entire agreement and understanding of Guarantor and Beneficiary with respect to the subject matter hereof and supersedes all prior agreements and understandings, whether written or oral, of Guarantor and Beneficiary 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 Guarantor or Beneficiary.

18. No Third Party Beneficiaries. The provisions of this Guaranty shall only be for the benefit of, and enforceable by, Beneficiary and its permitted assigns and shall not inure to the benefit of or be enforceable by any other person or entity.

19. Further Assurances. Guarantor and Beneficiary shall each, 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 Guaranty.

20. Counterparts. This Guaranty may be executed 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.

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

IN WITNESS WHEREOF, the undersigned, intending to be legally bound hereby, has executed this Guaranty as of the date first written above.

Accepted:  
PACIFICORP

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

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

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

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

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

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

## **APPENDIX T**

### **Developer Safety Assurance Program**

[Developer to provide a copy of its Safety Assurance Program in accordance with Section 7.11(a) of the Agreement.]

**APPENDIX W**  
**Time and Materials Rates**

1.0 Standard Work Rates.

[Developer's standard work rates to be incorporated herein.]

2.0 Changes to Standard Work Rates.

Developer shall provide PacifiCorp written notice of any changes in the standard work rates described in Section 1.0 above. Effective upon receipt by PacifiCorp of such written notice, Section 1.0 above shall automatically be amended to reflect the changed standard work rates set forth in such written notice. Unless and until Section 1.0 above is amended as provided above, the standard work rates then in effect in Section 1.0 above shall be applicable with respect to any Change Order for which time and materials rates are applicable in accordance with ARTICLE 13 and Appendix BB.



**APPENDIX X**  
**FORM OF ACCEPTABLE LETTER OF CREDIT**

[insert bank name]  
-[insert bank address]

IRREVOCABLE STANDBY LETTER OF CREDIT  
DATE OF ISSUANCE: [\_\_\_\_\_]

BENEFICIARY:  
PacifiCorp, an Oregon corporation  
825 NE Multnomah  
Portland, OR 97232

Re: Letter of Credit No. [\_\_\_\_\_]

At the request of [insert Developer's legal name] ("Account Party"), [insert bank name] ("Issuing Bank") hereby establishes our irrevocable standby letter of credit ("Letter of Credit") in your favor for the aggregate amount of [\_\_\_\_\_] United States Dollars (\$[\_\_\_\_\_]), available to you at sight upon demand at our counters at [insert bank location] on or before the expiration hereof. Any request by you to draw on this Letter of Credit must be accompanied by this original or a certified copy of the original Letter of Credit, together with a completed certificate in the form attached as Exhibit A to this Letter of Credit, signed by a person purporting to be your officer or authorized agent, having complied with the instructions in brackets therein.

We hereby agree that documents drawn under and in compliance with the terms of this Letter of Credit shall be duly honored upon presentation as specified.

Partial drawings and multiple drawings are permitted hereunder.

The amount available to be drawn by you under this Letter of Credit shall be automatically reduced by the amount of any drawings previously paid through the Issuing Bank under this Letter of Credit.

This Letter of Credit shall be governed by the Uniform Customs and Practice for Documentary Credits, 2007 Revision, International Chamber of Commerce Publication No. 600 (the "UCP"), except to the extent that the terms hereof are inconsistent with the provisions of the UCP, including but not limited to Articles 14(b) and 36 of the UCP, in which case the terms of this Letter of Credit shall govern.

With respect to Article 14(b) of the UCP, the Issuing Bank shall have a reasonable amount of time, not to exceed one (1) banking day following the date of its receipt of documents from the Beneficiary, to examine the documents and determine whether to take up or refuse the documents and to inform the Beneficiary accordingly.

This Letter of Credit shall expire at our above office with the close of business on [insert date that is beyond the statutory period for filing a lien after the contract end date].

In the event of an Act of God, act of terrorism, riot, civil commotion, insurrection, war or any other cause beyond our control that interrupts our business and causes the place for presentation of this Letter of Credit to be closed for business on the last day for presentation, the expiration date of this Letter of Credit will be automatically extended without amendment to a date thirty (30) calendar days after the place for presentation reopens for business.

This Letter of Credit is transferable one or more times, but in each instance only in the full amount available to be drawn under the Letter of Credit at the time of such transfer. Any such transfer may be affected only through ourselves and only upon presentation to us at our above-specified office of a duly executed instrument of transfer in the format attached as Exhibit B to this Letter of Credit, together with the original of this Letter of Credit. Any transferee shall succeed to all of the rights of the transferor hereunder. We shall effect the transfer and advise the parties accordingly. All charges in connection with any transfer of this Letter of Credit are for the Account Party's account.

**[insert bank name]**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

The original of this document contains the seal  
of **[insert bank name]**

**EXHIBIT A TO IRREVOCABLE STANDBY LETTER OF CREDIT  
FORM OF LETTER OF CREDIT DRAWING CERTIFICATE**

The undersigned, an authorized officer or agent of PacifiCorp, an Organ corporation (“Beneficiary”), hereby certifies to **[insert bank name]** (“Issuing Bank”), with reference to the Irrevocable Standby Letter of Credit No. [\_\_\_\_\_] (“Letter of Credit”) by the Issuing Bank, that because **[check all that apply]**:

☐ (1) a Developer Default has occurred and is continuing under and as defined in that certain Build Transfer Agreement, dated as of [\_\_\_\_], 2017 (as such contract may be amended, restated or replaced from time to time) (the “Agreement”), between Account Party and Beneficiary, including its successors and assigns, or Developer has failed to pay Beneficiary any amounts due and payable under the Agreement, including, without limitation, amounts respecting liquidated damages;

☐ (2) the Letter of Credit is due to expire within thirty (30) days and Account Party has not delivered a replacement Letter of Credit or other Credit Support (as defined in the Agreement) to Beneficiary in accordance with the requirements of the Agreement; or

☐ (3) the Letter of Credit has ceased to satisfy the requirements for a Letter of Credit under the terms of the Agreement.

Beneficiary is drawing upon the Letter of Credit in an amount equal to \$[\_\_\_\_\_], which amount is not in excess of the remaining undrawn portion of the Letter of Credit as of the date of this certificate.

Capitalized terms not defined herein shall have the meanings given to them in the Letter of Credit.

Name of Beneficiary: PacifiCorp

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

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

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

Date: \_\_\_\_\_

**EXHIBIT B TO IRREVOCABLE STANDBY LETTER OF CREDIT  
FORM OF CERTIFICATE OF TRANSFER OF LETTER OF CREDIT IN ITS ENTIRETY**

Date: \_\_\_\_\_

**[insert Bank name]**  
**[insert Bank address]**

Subject: Your Letter of Credit No. \_\_\_\_\_ (“Letter of Credit”)

Ladies and Gentlemen:

For value received, we hereby irrevocably assign and transfer all our rights under the above-captioned Letter of Credit, as heretofore and hereafter amended, extended or increased, to:

\_\_\_\_\_  
**[insert name of transferee]**

\_\_\_\_\_  
**[insert address]**

By this transfer, all of our rights in the Letter of Credit are transferred to the transferee, and the transferee shall have sole rights as “Beneficiary” under the Letter of Credit, including sole rights relating to any amendments, whether increases or extensions or other amendments, and whether now existing or hereafter made. You are hereby irrevocably instructed to advise future amendment(s) of the Letter of Credit to the transferee without our consent or notice to us.

Enclosed is the original Letter of Credit and all the original amendments to the Letter of Credit prior to the date hereof. Please notify the transferee of this transfer and of the terms and conditions of the Letter of Credit as transferred. This transfer will not become effective until the transferee is so notified.

Very truly yours,

**[insert name of transferor]**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**[insert name of Bank]**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

[a corporate notary acknowledgement or a  
certificate of authority with corporate seal is  
acceptable in lieu of bank guarantee above]

**APPENDIX Y**  
**Form of Developer's Invoice**

Date: [\_\_\_\_\_]

Invoice number: [\_\_\_\_\_]

PacifiCorp  
Attention: Project Manager

Gentlemen:

[\_\_\_\_], a [\_\_\_\_\_] ("Developer"), submits this invoice for payment ("Developer's Invoice") pursuant to Section 3.4(b)(i) of the Build Transfer Agreement between Developer and PacifiCorp dated as of [\_\_\_\_], 2017 (the "Agreement"). Unless otherwise defined herein, all capitalized terms used in this Developer's Invoice shall have the meanings specified for such terms in the Agreement.

1. The undersigned is a duly authorized representative of Developer, authorized to execute and deliver this Developer's Invoice on behalf of Developer.

2. The documents and information contained herein, including all documents and information attached hereto, taken as a whole, is true, correct and complete in all material respects.

3. The Work has been performed in accordance with the requirements of the Agreement and the other Project Documents to which Developer is a party, including the Project Schedule.

4. Each of the Critical Milestones will be achieved by its respective Critical Milestone Completion Date.

Developer is entitled under the terms of the Agreement, including Section 3.3 and Appendix R of the Agreement, to a payment of \$\_\_\_\_\_ for the period ending [\_\_\_\_], 20[\_\_\_], which amount shall be paid as reflected in the table below:

EXAMPLE

	As of Previous Month	For This Month (This Invoice)	Total After this Invoice
Original Contract Price			
Contract Price Paid to Date			
Cumulative Progress Payments to Date			
Total Amount of Retainage withheld by PacifiCorp in the form of Letter of Credit; or Cash Total Retainage			
Actual Amount Paid or to be Paid to Developer			

5. Attached hereto as Attachment 1 are the Partial Release and Waiver of Liens and Claims and the Final Release and Waiver of Liens and Claims (as applicable) prepared by Developer, Contractor and each Subcontractor, as applicable, in accordance with Section 7.23(b) of the Agreement.

6. Except as set forth in Attachment 2 attached hereto and any Change Order Request delivered by Developer to PacifiCorp prior to the date hereof in accordance with this Agreement, Developer is aware of no facts or circumstances that would constitute the basis for a Change, including a change in the Scope of Work, Project Schedule, Progress Payments or Contract Price. Attachment 3 describes in reasonable detail each fact or circumstance that would constitute the basis for a Change, including to the extent reasonably determinable by Developer, the scope of any change in the Scope of Work, Project Schedule, Progress Payments or Contract Price.

IN WITNESS WHEREOF, the undersigned has executed this Developer's Invoice on the date first above written.

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

Project Manager

## Attachment 1

### Release and Waiver of Liens and Claims



## Attachment 2

### Facts and Circumstances Giving Rise to a Change

## APPENDIX Z

### Glossary of Defined Terms

“Additional Project Documents” means any Contract related to the design, engineering, development, construction, startup, testing, commissioning, completion, ownership and operation of the Project entered into by Developer or PacifiCorp and any other Person during the Time of Completion, including any documents contemplated by this Agreement entered into by Developer or PacifiCorp and any other Person; provided, however, that such Contract shall not constitute an Additional Project Document if: (a) it is entered into by Developer in the ordinary course of business in connection with the procurement of goods or the performance of services related to the Work; (b) can be readily replaced by other Contracts having substantially similar terms and conditions; and (c) has a value of Fifty Thousand Dollars (\$50,000) or less.

“Affiliate” means with respect to any Person, any other Person who, directly or indirectly, Controls such first Person or is Controlled by such first Person or is under common Control with such first Person; provided, however, that with respect to PacifiCorp, the term “Affiliate” does not include Berkshire Hathaway Inc. or any of its affiliates (other than PacifiCorp and any direct or indirect subsidiaries of PacifiCorp), and no provision of this Agreement shall apply to, be binding on, create any liability of or otherwise restrict the activities of Berkshire Hathaway Inc. or any of its affiliates (other than PacifiCorp and any direct or indirect subsidiaries of PacifiCorp).

“Agreement” shall have the meaning set forth in the preamble of this Agreement.

“Approved Subcontractors” means the vendors, suppliers, consultants and contractors identified in Appendix C.

“ASME” means American Society of Mechanical Engineers.

“Assignment and Assumption Agreement” shall have the meaning set forth in Section 2.2(a)(viii).

“Assignment of Easements” shall have the meaning set forth in Section 2.2(a)(ii).

“Assignment of Leases” shall have the meaning set forth in Section 2.2(a)(i).

“Assumed Liabilities” shall have the meaning set forth in Section 2.5(b).

“Authorized Officer” means (a) for Developer, any of [SPECIFY PERSONS/TITLES], and (b) for PacifiCorp, any of [SPECIFY PERSONS/TITLES].

“Bankruptcy Code” means the United States Bankruptcy Code, as in effect from time to time.

“Bankruptcy Laws” shall have the meaning set forth in Section 29.2(c).

“Begin Construction Guidance” means Section 48 of the Code (including Section 48(a)(5), and (6)), Section 45 of the Code (including Section 45(b)(5) and (d)), and Internal Revenue Service Notices 2013-29, 2013-60, 2014-46, 2015-25, 2016-31, and 2017-4), and any amendment, clarification, addition or supplement thereto, or replacement thereof.

“Bill of Sale” shall have the meaning set forth in Section 2.2(a)(vii).

“Business Day” means any day other than a Saturday, Sunday or other day on which banks are authorized or required to be closed in Cheyenne, Wyoming.

“Cash Escrow” means an escrow account established by Developer in a commercial bank or trust company organized under the laws of the United States of America or a political subdivision thereof, whose long-term senior unsecured debt is rated at least “A” by S&P and “A2” by Moody’s, and with assets (net of reserves) of at least \$10,000,000,000. Cash deposited to the escrow account shall earn interest at the rate applicable to money market deposits at the banking institution from time to time, and the interest shall be retained in the escrow account as additional security for Developer’s performance under this Agreement.

“Certificate of Final Acceptance” shall have the meaning set forth in Section 20.9(a).

“Certificate of Substantial Completion” shall have the meaning set forth in Section 20.1(a).

“Change” means any alteration of the Work whether by way of addition, deletion, modification, substitution or omission as instructed by PacifiCorp but shall not include any instruction to the extent that such instruction is issued as a result of any breach by Developer of this Agreement or otherwise to require Developer to fulfill its obligations under this Agreement. Changes shall include changes to Scope of Work, Project Schedule, Progress Payments, and Contract Price. Re-performance of any Work required to rectify or recover Work that is necessary due to Developer’s (or its Contractor’s or any Subcontractor’s) negligence or breach of this Agreement shall not constitute a Change.

“Change in Tax Law” means (a) any change in or amendment to the Code or another federal income tax statute, (b) any change in, or issuance of or promulgation of any proposed, temporary or final Treasury Regulations, (c) any IRS or Treasury Department guidance published or to be published in the Internal Revenue Bulletin and/or Cumulative Bulletin, and any other notice, announcement, revenue ruling, private letter ruling, technical advice memorandum, chief counsel advisory opinion, revenue procedure, or other guidance published by the IRS or the Treasury Department, (d) any decision of the U.S. Tax Court, the U.S. Court of Federal Claims, a U.S. District Court, a U.S. Court of Appeals or the U.S. Supreme Court, in each case, which occurs after the Closing Date.

“Change in Tax Law Losses” means losses incurred by any PacifiCorp Indemnified Party as a result of a Change in Tax Law that relates to: (a) the highest federal income tax rate applicable to corporations or to a corporation’s allocable share of income from a pass-through entity; (b) the amount or timing of depreciation deductions with respect to the Project (or any PTC Facility or

other property in the Project), or the ability of a PacifiCorp Indemnified Party to claim depreciation deductions with respect to the Project (or any PTC Facility or other property in the Project); (c) the amount or timing of the ITC or PTC with respect to the Project (or any PTC Facility or other property in the Project), or the ability of a PacifiCorp Indemnified Party to claim the ITC with respect to the Project (or any PTC Facility or other property in the Project); or (d) [\_\_\_\_\_]. The amount of any Change in Tax Law Losses shall be determined in good faith by PacifiCorp in accordance with the methodology set forth in Appendix V.

“Change Order” means any order identified as a “Change Order” and issued to Developer by PacifiCorp pursuant to Article 13 and Appendix BB, substantially in the form set forth in Exhibit D-1.

“Change Order Notice” means the notice of Change Order issued to Developer by PacifiCorp pursuant to Article 13 and Appendix BB, substantially in the form set forth in Exhibit D-3.

“Change Order Request” means the request of Change Order issued to PacifiCorp by Developer pursuant to Article 13 and Appendix BB, substantially in the form set forth in Exhibit D-2.

“Claim” means any indemnity, demand, demand letter, claim, litigation, cause of action, notice of noncompliance or violation, or other proceeding relating to the Project.

“Closing” shall have the meaning set forth in Section 2.4(a).

“Closing Date” shall have the meaning set forth in Section 2.3(a).

“Code” means the Internal Revenue Code of 1986, as the same may be amended from time to time, including any amendments or any substitute or successor provisions thereto.

“Condemnation Proceeding” shall have the meaning set forth in Section 7.26(a).

“Confidential Information” shall have the meaning set forth in Section 34.1(a).

“Confidentiality Affiliates” shall have the meaning set forth in Section 34.1(a).

“Consents” means all authorizations and approvals required to be obtained by Developer or PacifiCorp, as the case may be, under the Project Documents, including the PacifiCorp Consents and Developer Consents.

“Contract” means any agreement, lease, license (other than a Permit), note, bond, evidence of Indebtedness, mortgage, indenture, security agreement, purchase order, binding bid or other instrument or contract, whether written or oral.

“Contract Price” shall have the meaning set forth in Section 3.1(a).

“Contractor” shall mean the primary contractor engaged by Developer pursuant to the EPC Contract.

“Contractor Drawings and Manuals” means all drawings and information developed by Contractor and Subcontractors and provided to Developer in connection with Contractor’s and any Subcontractor’s obligations under the Primary Construction Contracts, all in accordance with the requirements of the Agreement.

“Contractor Guaranties” means the guarantees provided by or on behalf of Contractor or any Subcontractor pursuant to the Primary Construction Contracts.

“Control” of any Person means the possession, directly or indirectly, of the power either to (a) vote fifty percent (50%) or more of the securities or interests having ordinary voting power for the election of directors (or other comparable controlling body) of such Person or (b) direct or cause the direction of management or policies of such Person, whether through the ownership of voting securities or interests, by contract or otherwise, excluding in each case, any secured lender of such Person.

“Credit Matrix” means the credit matrix attached as Exhibit C.

“Credit Rating” means, as of any date, the lower of: (a) the most recently published senior, unsecured long-term debt rating (or corporate rating if a debt rating is not available) from S&P or (b) the most recently published senior, unsecured debt rating (or corporate rating if a debt rating is not available) from Moody’s. If option (a) and (b) are not available, the Credit Rating will be determined by PacifiCorp through an internal review process utilizing a proprietary credit scoring model developed in conjunction with a third party.

“Credit Support” means the amounts, if any, and subject to Article 6, shown on the Credit Matrix.

“Credit Support Security” means a Guaranty, Letter of Credit or Cash Escrow provided pursuant to Article 6.

“Critical Milestones” means certain Milestones designated in the Project Schedule as milestones that are critical to the ability of the Facility to achieve the Substantial Completion Date by the Guaranteed Substantial Completion Date. The Critical Milestones are set forth in Appendix M.

“Critical Milestone Completion Date” means the completion date by which Developer will achieve the corresponding Critical Milestone. The Critical Milestone Completion Dates are set forth in Appendix M.

“Defect” shall have the meaning set forth in Section 19.1(a).

“Deferred Permits” means, as of any date, all Developer Permits that have not yet been obtained, (a) the procurement of which is not required to have occurred on or before such date by applicable Law or the requirements of any Project Document and (b) as to which Developer has a reasonable expectation that such Developer Permits will be obtained in the ordinary course of business.

“Delay Liquidated Damages” shall have the meaning set forth in Section 24.2.

“Developer” shall have the meaning set forth in the preamble of this Agreement.

“Development Assets” shall mean the Leases, the Easements, the Transferred Permits, any Contracts to be transferred as part of the Development Assets on Closing, and any Improvements, including the Equipment, Materials or any other component of the Facility, at the Site as of the Closing Date.

“Developer Claim” shall have the meaning set forth in Section 32.1(a)(i).

“Developer Consents” shall have the meaning set forth in Section 4.4(b).

“Developer Default” shall have the meaning set forth in Section 29.1.

“Developer’s Equipment” means any of the events specified in Section 12.1.

“Developer-Initiated Change” shall have the meaning set forth in Section 13.2(a).

“Developer’s Knowledge” means the actual knowledge, after due inquiry, of [\_\_\_\_\_].

“Developer Parties” means Developer, Contractor and any Subcontractor and their respective employees and agents.

“Developer Permits” shall have the meaning set forth in Section 4.5(a).

“Developer Regulatory Approval” shall have the meaning set forth in Section 5.4(d).

“Developer’s Representative” shall have the meaning set forth in Section 7.13(a).

“Developer Safety Assurance Program” shall have the meaning set forth in Section 7.11(a).

“Dollars” and the “\$” symbol means the lawful currency of the United States of America.

“Draft Manuals” shall have the meaning set forth in Section 7.9(d).

“Easements” means easements, rights-of-way, licenses, occupancy or encroachment

permits, or similar entitlements which are used, or to be used, for or in the ownership, construction, operation or maintenance of the Facility, interests in which are to be conveyed by Developer to PacifiCorp at the Closing.

“Effective Date” shall have the meaning set forth in the preamble to this Agreement.

“Environmental Attributes” means any and all attributes of the Project (including all Renewable Energy Credits associated with such attributes) that are created or otherwise arise (whether before, on or after the Closing) from the Project’s generation of electricity using solar generation technologies, including any avoided, reduced, displaced or off set emissions of pollutants to the air, soil or water such as sulfur dioxides (SO<sub>2</sub>), nitrogen oxides (NO<sub>x</sub>), carbon monoxide (CO), mercury (Hg), carbon dioxide (CO<sub>2</sub>), any other greenhouse gas (GHG) that contributes to the actual or potential threat of altering the Earth’s climate, and any other pollutant that is now or may in the future be regulated under federal, state or local pollution control laws, regulations or ordinances, including those implemented under the federal Clean Air Act, 42 U.S.C. § 7401 et seq. and any equivalent state laws, or any voluntary rules, guidelines or programs. Forms of Environmental Attributes include any and all environmental air quality credits, green credits, carbon credits, emissions reduction credits, certificates, tags, offsets, allowances, or similar products or rights, howsoever entitled, (a) resulting from the avoidance of the emission of any gas, chemical, or other substance, including mercury, nitrogen oxide, sulfur dioxide, carbon dioxide, carbon monoxide, particulate matter or similar pollutants or contaminants of air, water, or soil gas, chemical, or other substance, and (b) attributable to the generation, purchase, sale or use of renewable energy generated by use of renewable generation technologies by the Project, or otherwise attributable to the Project. Environmental Attributes include those currently existing or after-arising under local, state, regional, federal, or international legislation or regulation or voluntary program, including any such legislation, regulation or program administered by the United Nations Framework Convention on Climate Change, the United States Environmental Protection Agency, the State of Oregon or any other Governmental Authority.

“Environmental Law” means any applicable Law that is in effect as of the Effective Date and relates to Regulated Materials, pollution, occupational safety (to the extent such relates to exposure to Regulated Materials), protection of occupational health (to the extent such relates to exposure to Regulated Materials) or the protection of the environment, natural resources, or wildlife, including, without limitation, (a) the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 et seq. (“CERCLA”), (b) the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 et seq., (c) the Federal Water Pollution Control Act, 33 U.S.C. § 1251 et seq. (the “Clean Water Act”), (d) the Clean Air Act, 42 U.S.C. § 7401 et seq. (“CAA”), (e) the Hazardous Materials Transportation Authorization Act of 1994, 49 U.S.C. § 5101 et seq., (f) the Occupational Safety and Health Act, 29 U.S.C. § 651 et seq., (g) the Toxic Substances Control Act, 15 U.S.C. §§ 2601 through 2629, (h) the Oil Pollution Act, 33 U.S.C. § 2701 et seq., (i) the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11001 et seq., (j) the Safe Drinking Water Act, 42 U.S.C. §§ 300f through 300j, (k) the Federal Insecticide, Fungicide, & Rodenticide Act, 7 U.S.C. § 136 et seq., (l) the Endangered Species Act, 16 U.S.C. § 1531 et seq., (m) the Migratory Bird Treaty Act, 16 U.S.C. § 703 et seq., (n) the Bald and Golden Eagle Protection Act, 16 U.S.C. § 668 et seq., (o) the National Historic

Preservation Act, 16 U.S.C. §§ 470a et seq., (p) the National Environmental Policy Act, [42 U.S.C. § 4321](#) et seq., (q) state equivalents to items (a) through (p), and (r) applicable guidance issued by implementing agencies, including the Land-Based Wind Energy Guidelines.

“EPC Contract” means the Engineering, Procurement and Construction Contract, to be entered into between Developer and Contractor, in form and substance acceptable to PacifiCorp, in its discretion.

“Equipment” means: (a) the equipment relating to the Project as described in [Appendix A](#), and, where indicated in [Appendix A](#), manufactured or provided by Approved Subcontractors; and (b) the equipment identified in Developer’s RFP Bid Summary Appendix C-2.xlsx, which is incorporated herein by reference.

“Estoppels” shall have the meaning set forth in [Section 2.2\(a\)\(v\)](#).

“Facility” means the renewable energy electric generating facility, to be located on the Site and to be constructed in accordance with this Agreement, as described more fully in [Appendix A](#), including the Equipment and Materials.

“Final Acceptance” means the Facility demonstrates that all of the Final Acceptance Criteria have been satisfied in accordance with the requirements of this Agreement.

“Final Acceptance Criteria” shall have the meaning set forth in [Appendix AA](#).

“Final Acceptance Date” means the date on which Final Acceptance is demonstrated in accordance with the requirements of [Section 20.9](#).

“Final Performance Test Report” shall have the meaning set forth in [Section 18.6\(b\)](#).

“Final Punch List” shall have the meaning set forth in [Section 20.3\(b\)](#).

“Force Majeure” means an event or cause not reasonably anticipated as of Effective Date, which is not within the reasonable control of or caused by the fault or negligence of the party affected thereby, and which the affected party has been unable to remedy, prevent or overcome, despite the use of reasonable care or exercise of diligence consistent with Prudent Industry Practices. To the extent that such event satisfies the requirements set forth in the preceding sentence, Force Majeure includes: acts of God, fire, flood, explosion, civil disturbance, sabotage, terrorism, hurricanes, tornadoes, lightning, earthquakes, war, action or restraint by court order or public or Governmental Authority; provided that none of the following shall constitute Force Majeure: (a) strikes or labor disturbances occurring at the Site or Contractor’s or Subcontractor’s facilities, except to the extent such strikes or labor disturbances at the Site or Contractor’s or Subcontractor’s facilities are directly related to strikes or labor disturbances that are simultaneously disrupting other business operations in the geographic region covered by the WECC; (b) shortages (real or perceived) of labor available for on-site Work; (c) delay or failure by Developer to obtain any Developer Permit, PacifiCorp Regulatory Approval or Developer



Regulatory Approval, other than the delay or failure to obtain Developer Permits, PacifiCorp Regulatory Approvals or Developer Regulatory Approvals occasioned by: (i) revocation, stay, or similar action by a Governmental Authority of a Permit, PacifiCorp Regulatory Approval or Developer Regulatory Approval after issuance thereof by a Governmental Authority; (ii) the failure of a Governmental Authority to comply with rules, procedures or other applicable Law applicable to such Governmental Authority; or (iii) another Force Majeure; (d) economic hardship including lack of money or credit and changes in exchanges rates; (e) utility interruptions; and (f) shipping accidents or unavailability of preferred shipping methods.

“GAAP” means United States generally accepted accounting principles.

“Governmental Authority” means any supranational, federal, state or other political subdivision thereof, including any municipality, township and county, and any entity exercising executive, legislative, judicial, regulatory or administrative functions of or pertaining to government, including any corporation or other entity owned or controlled by any of the foregoing, in each case, having jurisdiction over Developer, Contractor, any Subcontractor, PacifiCorp, the Project or this Agreement or any other Project Document.

“Guaranteed Substantial Completion Date” means [DATE].

“Guaranty” means that certain Guaranty by and between PacifiCorp and Guarantor, required by PacifiCorp pursuant to Section 6.1, in the form of Appendix S and otherwise in form and substance satisfactory to PacifiCorp, in its discretion.

“Guarantor” means a Person meeting the credit criteria set forth in Section 6.1 that provides a Guaranty to PacifiCorp in form and substance satisfactory to PacifiCorp in its discretion.

“Improvements” means all buildings, structures, fixtures and improvements located on the Site, including the Facility.

“Indemnified Party” shall have the meaning set forth in Section 26.1(c).

“Indemnifying Party” shall have the meaning set forth in Section 26.1(c).

“Indemnity Period” shall have the meaning set forth in Section 26.3.

“Intellectual Property” means all patents, trademarks, copyrights, drawings and all computer software whether or not subject to statutory registration or protection, that are owned, used, filed by or licensed to Developer, Contractor or any Subcontractor in connection with the Work or the Project.

“ITC” means the energy credit pursuant to Section 48 of the Code.

“Judgment” means any judgment, order, award, injunction, writ or decree of any Governmental Authority.

“Key Personnel” means, with respect to Developer, Contractor and any Subcontractor performing a material portion of the Work, a Project Executive, a Project Manager, a Project Senior Superintendent and a Project Superintendent for the Project.

“Late Payment Rate” means an amount equal to the Prime Rate plus 500 basis points, provided that in no event shall the Late Payment Rate exceed the maximum allowable usurious rate permitted by Applicable Law.

“Latent Defect” shall have the meaning set forth in Section 23.10(d).

“Latent Defects Liability Period” shall have the meaning set forth in Section 23.10(a).

“Law” means all laws (including each Environmental Law), statutes, codes, acts, ordinances, orders, judgments, decrees, injunctions, rules, regulations, permits, licenses, authorizations, directions and requirements of any Governmental Authority having the force and effect of law, and as to any Person, the organizational or governing documents of such Person.

“Leases” means all leases for the Real Property.

“Letter of Credit” means an irrevocable standby letter of credit in the form of Appendix X or otherwise in form and substance reasonably acceptable to PacifiCorp, which (a) is issued by a U.S. commercial bank, with such bank having assets (net of reserves) of at least \$10,000,000,000 and a credit rating on its senior unsecured debt of (a) “A2” or higher from Moody’s and (b) “A” or higher from S&P; (b) is transferable by PacifiCorp to any party to which PacifiCorp may assign this Agreement; and (c) shall remain in effect for at least ninety (90) days after the end of the Term.

“Liabilities” means all Claims including those relating to Environmental Laws, demands, damages, losses, liabilities or judgments, including all interest, penalties, fines and other sanctions, and any reasonable costs or expenses in connection therewith, including attorneys’ and consultants’ fees and expenses.

“Lien” means any mortgage, pledge, security interest, encumbrance, option, defect, lien, charge or other similar right of any Person of any kind, including any lien or charge arising by statute or other law.

“Material Adverse Change” means any change in condition after the Closing Date that actually has, or is reasonably likely to have, a significant adverse effect on: (a) the validity or enforceability of this Agreement or any of the other Project Documents; (b) the business, assets, prospects, operations, property or condition (financial or otherwise) of the Project, Developer, Contractor, any Subcontractor or any Guarantor; (c) PacifiCorp’s ability to own, control, or operate the Project (financial or otherwise); (d) the Project’s ability to operate and deliver energy to the System; (e) the performance of or the ability of Developer, Contractor, any Subcontractor or any Guarantor, to perform its respective obligations under the Project Documents to which it is a party; (f) the ability of PacifiCorp to enforce any of its material rights and remedies under the Project

Documents; or (g) Developer fails to meet the requirements of Section 6.1.

“Materials” means the Intellectual Property, equipment, machinery, apparatus, materials, articles and things of all kinds to be provided and incorporated into the Project by Developer, Contractor and the Subcontractors pursuant to this Agreement (including spare parts and tools to be supplied hereunder), other than the Equipment and the Non-PacifiCorp Materials.

“Mechanical Completion” means that a turbine within the Facility demonstrates that all of the Mechanical Completion Criteria for such turbine have been satisfied in accordance with the requirements of this Agreement.

“Mechanical Completion Criteria” shall have the meaning set forth in Appendix AA.

“Mechanical Completion Date” means the date on which Mechanical Completion for each turbine is demonstrated in accordance with the requirements of Section 20.1.

“Merit Shop” shall mean the construction philosophy which encourages open competition and a free-market approach that awards contracts to the lowest cost responsible bidder based solely on merit as determined by Contractor, regardless of labor affiliation.

“Milestone” shall have the meaning set forth in Section 10.1.

“Milestone Completion Dates” shall have the meaning set forth in Section 10.1.

“MW” means megawatt (alternating current basis).

“Non-PacifiCorp Materials” means any equipment, machinery, apparatus, materials, articles and things of all kinds that are not permanently incorporated into the Project.

“Notice of Final Acceptance” shall have the meaning set forth in Section 20.9(b).

“Notice of Request for Progress Payment” shall mean a Notice of Request for Progress Payment in the form set forth in Exhibit A.

“Notice to Proceed” means the Notice to Proceed to be issued in accordance with Section 17.1(a) in the form set forth in Exhibit B.

“Notice of Rejection of Substantial Completion” shall have the meaning set forth in Section 20.1(b).

“Notice of Substantial Completion” shall have the meaning set forth in Section 20.1(b).

“OEM” means the original manufacturer of any Equipment comprising a portion of the Project.

“OEM Certified” means that the Equipment in question is certified by the manufacturer thereof as new and clean, not in need of repair, carrying full manufacturer’s warranties and guarantees applicable to newly-manufactured equipment of that type, and all reliability and design technical notices have been implemented.

“Other Warranty Assignment” shall have the meaning set forth in Section 23.12.

“PacifiCorp” shall have the meaning set forth in the preamble of this Agreement.

“PacifiCorp’s Consents” shall have the meaning set forth in Section 5.4(b).

“PacifiCorp Default” shall have the meaning set forth in Section 29.2.

“PacifiCorp’s Drawings” means all the drawings and information provided by PacifiCorp to Developer under this Agreement or in connection with the RFP issued by PacifiCorp in anticipation of this Agreement, other than any drawings and information provided by or through PacifiCorp Transmission.

“PacifiCorp Indemnified Parties” means PacifiCorp and its Affiliates and their respective directors, officers, employees and agents.

“PacifiCorp-Initiated Change” shall have the meaning set forth in Section 13.2(b).

“PacifiCorp’s Knowledge” means the actual knowledge, after due inquiry, of [\_\_\_\_\_].

“PacifiCorp Obligation” shall have the meaning set forth in Section 10.2.

“PacifiCorp Permits” shall have the meaning set forth in Section 5.5(a).

“PacifiCorp Regulatory Approval” shall have the meaning set forth in Section 5.5(b).

“PacifiCorp Regulatory Approval” shall have the meaning set forth in Section 5.5(b).

“PacifiCorp’s Representative” means the natural Person designated as such by PacifiCorp pursuant to Section 8.3(a).

“PacifiCorp Transmission” means PacifiCorp, an Oregon corporation, acting in its transmission function capacity, and any successor thereto.

“PacifiCorp Transmission Interconnection Agreement” means the interconnection agreement between Developer and PacifiCorp Transmission that is in conformance with the requirements of PacifiCorp’s Open Access Transmission Tariff filed with the Federal Energy Regulatory Commission (or any successor thereto), as the same may be amended.

“Party” and “Parties” shall have the meanings set forth in the preamble of this Agreement.

“Performance Guarantees” means the performance guarantees that are required to be demonstrated during the Performance Tests as a condition to Substantial Completion or otherwise, all as set forth in Appendix AA.

“Performance Liquidated Damages” shall have the meaning set forth in Section 24.4.

“Performance Test” or “Performance Tests” means the performance tests specified in Appendix AA.

“Permitted Liens” means [\_\_\_\_\_].

“Permit” means any authorization, approval, consent, waiver, exception, variance, order, publication, license, filing, registration, ruling, permit, tariff, certification, exemption and other action, requirement by or with, and notice to and declarations of or with, any Governmental Authority.

“Person” means any natural person, corporation, general or limited partnership, limited liability company, firm, joint venture, estate, association, trust, government, governmental agency or any other entity, whether acting in an individual, fiduciary or other capacity.

“Pre-Closing Taxes” means Taxes of Developer, or with respect to the Project, for any Pre-Closing Tax Period. Taxes for a Straddle Period shall be allocated to the Pre-Closing Tax Period (a) ratably based on the number of days in the Straddle Period that are in the Pre-Closing Tax Period if they are imposed on a periodic basis and (b) based on an interim closing of the books if they are based upon or related to income or receipts.

“Pre-Closing Tax Period” means a taxable period or a portion thereof that ends on or before the Closing Date.

“Preliminary Performance Test Report” shall have the meaning set forth in Section 18.6(a).

“Primary Construction Contracts” means the EPC Contract, any contract or agreement between Contractor and any Subcontractor, and all agreements and documents referenced therein.

“Prime Rate” means the rate per annum (rounded upwards to the nearest 1/100th of 1% per annum) equal to the rate of interest which JP Morgan Chase in New York, New York or its successor announces from time to time as its “prime lending rate” or equivalent rate or if such rate is not available, another rate published as the “prime rate” as agreed by PacifiCorp and Developer, with each change in such rate to be effective on the day on which such change is effective.

“Progress Payment Date” means the date on which a Progress Payment becomes due as set forth in Section 3.1(a).

“Progress Payments” means the applicable amounts set forth in Appendix R.

“Progress Report” shall have the meaning set forth in Section 10.8(a).

“Project” means (i) the Facility, (ii) the Site, and (iii) those certain tangible and intangible rights and assets required to own and operate the Facility that are acquired by PacifiCorp pursuant to the Project Documents, all in accordance with the Project Documents, the Developer Permits, the PacifiCorp Permits applicable Law and Prudent Industry Practices.

“Project Documents” means once executed and in full force and effect, this Agreement, the Primary Construction Contracts, [the Turbine Maintenance Agreement]<sup>2</sup>, [the O&M Agreement]<sup>3</sup>, the PacifiCorp Interconnection Agreement, the Consents, the Bill of Sale, the Assignment of Lease, the Assignment of Easements, the Assignment and Assumption Agreement, the Estoppels, the Other Warranty Assignment, the Turbine Warranty Assignment, and any Additional Project Document.

“Project Party” means each of Developer, Contractor, any Subcontractor, and the Guarantor.

“Project Problem” shall have the meaning set forth in Section 10.8(b)(i).

“Project Schedule” shall have the meaning set forth in Section 10.1.

“Prudent Industry Practice” means any of the practices, methods and acts engaged in or approved by a significant portion of the electrical utility industry in the geographic region covered by the WECC, or its successor for wind powered electric generation facilities which, in the exercise of reasonable judgment in light of the facts known at the time the decision was made, would have been expected to accomplish the desired result in a cost-efficient manner consistent with good business practices and reliability criteria, safety considerations and expediency. Prudent Industry Practice is not intended to be limited to the optimum practice, method or act to the exclusion of all others but, rather, to be acceptable industry practices, methods or acts for gas-fired combined cycle electric generating facilities in the geographic region covered by the WECC.

“PTC” means the renewable energy production tax credit pursuant to Section 45 of the Code.

“PTC Facility” means “facility” within the meaning of Code Section 45(d)(1) and Internal Revenue Service Revenue Ruling 94-31.

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<sup>2</sup> NTD: If any turbine warranty provided in Appendix E will require that the turbines be maintained by the turbine manufacturer as a condition of such warranty, then Developer will be required to enter into and assign to PacifiCorp at Substantial Completion any such turbine maintenance agreement.

<sup>3</sup> NTD: To be included if Developer is offering an O&M Agreement as part of the Project.

“Punchlist Holdback Amount” shall have the meaning set forth in Section 20.3(b).

“Purchase Price” shall have the meaning set forth in Section 2.3(a).

“Purchase Price Allocation” shall have the meaning set forth in Section 21.3.

“Real Property” means all real property and interests in real property required in connection with the Project.

“Regulated Materials” means any substance, material, or waste which is now or hereafter becomes listed, defined, or regulated in any manner by any United States federal, state or local law and includes any oil, petroleum, petroleum products and polychlorinated biphenyls.

“Release” means, with respect to any Regulated Materials, any release, deposit, discharge, emission, leaking, spilling, seeping, migrating, injecting, pumping, pouring, emptying, escaping, dumping, disposing or other movement of any such Regulated Materials.

“Remediation” includes any response, remedial, removal, or corrective action, any activity to cleanup, detoxify, decontaminate, contain or otherwise remediate any Regulated Material, any actions to prevent, cure or mitigate any Release of any Regulated Material, any action to comply with any Environmental Laws or with any permits issued pursuant thereto, any inspection, investigation, study, monitoring, assessment, audit, sampling and testing, laboratory or other analysis, or evaluation relating to any Regulated Material.

“Renewable Energy Credits” means any credit, certificate, renewable energy certificate, allowance or similar right that is related to the Environmental Attributes of the Project, whether arising pursuant to applicable Law, certification, markets, trading, offset, private transaction, renewable portfolio standards, voluntary programs or otherwise.

“Renewable Energy Incentives” means the ITC, the PTC, accelerated depreciation (including bonus depreciation), and [list all current state-level abatements, credits, certificates, etc.].

“Reports” means one or more Phase I environmental assessment reports, environmental impact studies, geotechnical reports, interconnection system impact studies, and [\_\_\_\_\_], in each case, with respect to the Project and the Site.

“Requested Progress Payment” shall have the meaning set forth in Exhibit A.

“Required Change” shall have the meaning set forth in Section 13.2(c).

“RFP” shall have the meaning set forth in the recitals of this Agreement.

“Scope of Work” shall have meaning set forth in Appendix A.

“Significant Defect” means a single or recurring Defect which occurs at any time within two (2) years of the Substantial Completion Date which results in the cessation of operation of the Facility or will not, unless corrected, allow PacifiCorp to operate the Facility within parameters required to comply with applicable Law for a period of either three (3) consecutive days or an aggregate of five (5) days in the case of a recurring Defect.

“Site” means the premises on which the Project is to be located, together with the Easements, the legal description of all of which is set forth on Appendix I.

“Straddle Period” means a taxable period that includes but does not end on the Closing Date.

“Subcontractor” means any Person (including vendors, suppliers, contractors and consultants), other than Contractor, retained by Developer to perform a part of Developer’s obligations under any Project Document.

“Substantial Completion” means the Facility demonstrates that all of the Substantial Completion Criteria has been satisfied in accordance with the requirements of this Agreement.

“Substantial Completion Criteria” shall have the meaning set forth in Appendix AA.

“Substantial Completion Date” means the date on which Substantial Completion is demonstrated in accordance with the requirements of Section 20.2.

“Supplier” means any supplier of Equipment or Materials to the Project which has a right to place a Lien on the Project.

“Surplus Items” shall have the meaning set forth in Section 20.8.

“System” means the electric transmission sub-station and distribution facilities owned, operated or maintained by PacifiCorp Transmission, which shall include, after construction and installation of the Project, the circuit reinforcements, extensions, and associated terminal facility reinforcements or additions required to complete the Project, all as set forth in the PacifiCorp Transmission Interconnection Agreement.

“Tax” or “Taxes” means any and all taxes, charges, fees, levies, tariffs, duties, liabilities, impositions or other assessments in the nature of a tax (together with any and all interest, penalties, additions to tax and additional amounts imposed with respect thereto) imposed by any tax authority or other Governmental Authority, including income, gross receipts, profits, excise, real or personal property, environmental, sales, use, value-added, ad valorem, withholding, social security, retirement, employment, unemployment, customs duties, worker’s compensation, occupation, service, license, net worth, capital stock, payroll, franchise, gains, stamp, transfer and recording taxes, and shall include any liability for the Taxes of any other person or entity under Treasury Regulations Section 1.1502-6 (or similar provisions of state or local law), or as a transferee or successor, by contract or otherwise.



“Target Closing Date” shall have the meaning set forth in Section 2.9.

“Tax Returns” means any return, declaration, report, claim for refund, or information return or statement relating to Taxes, including any such document prepared on a consolidated, combined or unitary basis and also including any schedule or attachment thereto, and including any amendment thereof.

“Technical Specification” means the specification for the Work set forth in Appendix A and Appendix AA, and any modifications thereof made pursuant to the terms of this Agreement.

“Transfer Tax” shall have the meaning set forth in Section 21.2.

“Time for Completion” means the period between the Effective Date and the Substantial Completion Date.

“Title Company” means [NAME OF TITLE COMPANY], or such other title insurance company acceptable to PacifiCorp, in its discretion.

“Title Policy” means a title insurance policy issued by Title Company at Developer’s expense (except as set forth herein) insuring PacifiCorp’s leasehold rights in the Real Property, including the Easements as appurtenant easements, and the Improvements, that (a) is in form and substance and contains such requirements, modifications and endorsements as PacifiCorp may reasonably approve, (b) contains such additional affirmative coverage and endorsements (at PacifiCorp’s cost and expense) as PacifiCorp may reasonably request, (c) is in such amount as PacifiCorp may negotiate with the Title Company, (d) insures that PacifiCorp is the sole holder of all leasehold rights, title and interests with respect to the Real Property, subject to Permitted Liens, (e) names PacifiCorp as the insured, (f) is issued as of the Closing Date by the Title Company, (g) shows as exceptions only the Permitted Liens, and (h) does not contain the standard pre-printed exceptions that appear in the related title insurance commitment, which shall be deleted based on such affidavits and certifications signed or obtained by Developer and acceptable to the Title Company.

“Transferred Permits” means Developer Permits with respect to the Project (other than the Deferred Permits) which are to be assigned by Developer to PacifiCorp at the Closing.

“Treasury Regulations” means the final and temporary regulations promulgated under the Code, as amended.

“Turbine Warranty Assignment” shall have the meaning set forth in Section 23.12.

“Unidentified Project Problem” shall have the meaning set forth in Section 10.8(c).

“USTs” shall have the meaning set forth in Section 4.9(b).

“Warranty” shall have the meaning set forth in Section 23.1.

“Warranty Period” shall have the meaning set forth in Section 23.2.

“WECC” means the Western Electricity Coordinating Council.

“Witness Point Events” shall have the meaning set forth in Section 14.3(a).

“Witness Point Schedule” shall have the meaning set forth in Section 14.3(a).

“Work” means the Equipment and Materials to be supplied and the entire works and services to be performed, or caused to be performed, by Developer under this Agreement, together with any modifications thereto in accordance with the terms hereof.

“Year” means a calendar year.

## APPENDIX AA

### **Mechanical Completion, Substantial Completion, Final Acceptance, Performance Guarantees and Performance Tests**

#### **A. Mechanical Completion Criteria**

The following enumerated requirements are the conditions precedent to the achievement of Mechanical Completion for each turbine (the “**Mechanical Completion Criteria**”):

1. The foundation of the turbine is complete in accordance with the Technical Specification and requirements of the applicable Project Documents.
2. The turbine is assembled, erected and installed so as to be demonstrably completed in accordance with the Technical Specification and the requirements of the applicable Project Documents.
3. All materials and equipment that are part of the Work and associated with such turbine have been installed in accordance with the Technical Specifications and verified in accordance with the applicable installation checklists and assembly manuals.
4. Developer has prepared and submitted a list of punch list items with respect to such turbine or other component.
5. The turbine has been energized and is ready to commence commissioning.
6. The electric works circuit line to which the turbine is connected is completed in accordance with the Technical Specification and the requirements of the applicable Project Documents.
7. The turbine vendor acknowledges that all Work necessary to achieve Mechanical Completion of the turbine and for the turbine Vendor to commence commissioning of the turbine has been successfully completed.

#### **B. Substantial Completion Criteria**

The following enumerated requirements are the conditions precedent to the achievement of Substantial Completion (the “**Substantial Completion Criteria**”):

1. All turbines that are a part of the Project have achieved Mechanical Completion.
2. At least five (5) Business Days prior to the Substantial Completion Date, Developer and PacifiCorp shall have agreed to the Final Punch List.
3. Subject to any items on the Final Punch List, all Work, including all activities described in the Scope of Work, has been properly constructed, installed, tested, and is mechanically, electrically and structurally sound and free from defects, each in complete conformance with the Technical Specifications and other requirements of the Agreement.

4. Subject to any items on the Final Punch List, all turbines and their associated equipment and materials can be used safely (without hazard or damage to themselves, the Project or any other property and without injury to any person) and are capable of being operated in a reliable manner as a single Project to their full performance capabilities set forth in the specifications and in accordance with the Technical Specifications and other requirements of the Agreement.
5. The Reliability Test described in RFP Appendix A.3, Section 14.32.3 (6) has been successfully completed.
6. The Performance Tests, if so directed by the PacifiCorp, described herein have been successfully completed.
7. Spare Parts have been procured, as directed by PacifiCorp, and delivered to the Site in accordance with Section 7.19 of the Agreement.
8. Subject to any items on the Final Punch List, all construction debris, rubbish, foreign material and equipment have been removed from the Site and all roads, temporary construction pads and laydown areas have been repaired and restored in accordance with the Technical Specifications and other applicable requirements of the Agreement and Developer shall have removed from the Site all Surplus Items in accordance with Section 20.7 of the Agreement.
9. Subject to any items on the Final Punch List, all Spare Parts lists, Special Tools and documents that are to be delivered to PacifiCorp by Developer on or before the Substantial Completion Date pursuant to the Agreement have, in fact, been delivered to PacifiCorp.
10. PacifiCorp has received the Draft Manuals from Developer at least sixty (60) days prior to the Substantial Completion Date.
11. PacifiCorp shall have received the operation and maintenance and other manuals in accordance with the requirements of the Agreement.
12. Developer has provided all applicable and required training in accordance with Section 7.10 of the Agreement, Appendix A and the Technical Specifications.
13. Developer has fulfilled all of the requirements of Appendix O.
14. All Milestones that are to be completed on or before the Substantial Completion Date pursuant to the Project Schedule have, in fact, been completed.
15. Developer has paid all liquidated damages invoiced through the date of delivery to PacifiCorp of the Notice of Substantial Completion.
16. Developer has assigned to PacifiCorp all Equipment and other warranties in accordance with the Agreement.
17. Developer has delivered all lien waivers required pursuant to the Agreement.

### C. Final Acceptance Criteria

The following enumerated requirements are the conditions precedent to the achievement of Final Acceptance (the “**Final Acceptance Criteria**”):

1. Substantial Completion has been achieved.
2. Developer has performed all Work such that the Project may be operated as a fully-integrated wind-powered electricity generating facility, all required tests have been successfully completed and any defects have been corrected, and all equipment is capable of being operated in a safe and proper manner in accordance with the Technical Specifications and other requirements of the Agreement.
3. The Contractor Drawings and Manuals accurately reflect the Facility as constructed and at least five (5) final hard copies and one (1) digital copy of such final Contractor Drawings and Manuals were delivered to PacifiCorp within sixty (60) days after the Substantial Completion Date, including any addenda thereto required pursuant to Section 7.9(f) of the Agreement.
4. The Facility is capable of being operated in a safe, normal, reliable and continuous manner in accordance with applicable Laws and Permits (excluding for this purpose all variances or waivers of any Permits) and the Project Documents at all operating conditions and modes specified in the Scope of Work.
5. All items on the Final Punch List have been completed to PacifiCorp’s reasonable satisfaction, or PacifiCorp, in its sole discretion, has withheld any remaining amounts of the Contract Price to complete any items on the Final Punch List not completed by Developer in accordance with the terms hereof.
6. Developer has provided PacifiCorp with all Permits or, where applicable, copies of Permits.
7. Any and all Liens in respect to the Facility, the Project Documents, the Equipment, the Materials, the Site or any fixtures, personal property or other equipment or materials included in the Work created by, through or under, or as a result of any act or omission of, Developer, Contractor or any Subcontractor or any other Persons providing labor or materials in connection with the Work shall have been released or bonded in form reasonably satisfactory to PacifiCorp.
8. Developer shall have paid all liquidated damages and any other amounts due under the Agreement and other Project Documents, if any.
9. All of Developer’s supplies, construction trailers and equipment, personnel (including Contractor and Subcontractors), and rubbish have been removed from the Site.
10. All of Developer’s cleanup, restoration and related obligations have been completed.
11. A Final Cost Report has been delivered to PacifiCorp in accordance with Appendix P and in a form and substance satisfactory to PacifiCorp.

12. PacifiCorp shall have received the operation and maintenance and other manuals in accordance with the requirements of the Agreement.
13. All Developer documents that are to be delivered to PacifiCorp by Developer pursuant to the Agreement have, in fact, been delivered to PacifiCorp, including, but not limited to, as-built drawings, final Contractor Drawings and Manuals, and lien waivers and final release and waiver of claims.
14. Developer has fully performed all of its duties and obligations under the Agreement required to be performed as of the date of Final Acceptance.

#### **D. Performance Guarantee and Testing**

Developer guarantees that when first tested in accordance with the Performance Tests below that the project will achieve ninety-eight percent (98%) of the nominal calculated Project annual energy yield computed on the basis of the calculated power curve from the Power Curve Test, the Power Curve Guarantee provided by the wind turbine supplier and the project site representative wind speed distribution. Performance Liquidated Damages will be determined to be equal to the net present value assessed over the 10-year PTC period of the grossed-up pre-tax value of the PTC (on a dollars per megawatt-hour basis) times the amount of expected annual energy losses due to the Project not meeting the Power Curve guarantee after adjusting for the two percent (2%) nominal calculated project annual energy yield margin.

#### **E. Power Curve Tests**

To demonstrate that the Performance Guarantee has been satisfied, PacifiCorp may elect at its own expense to cause the nominated units to be tested in accordance with IEC 614 00-12-1 by a qualified testing authority acceptable to Developer (such acceptance not to be unreasonably withheld or delayed) and a wind turbine testing protocol agreed to by PacifiCorp and Developer. The initial Performance Test must commence within one hundred and twenty (120) days after completion of the last turbine and PacifiCorp shall give Developer at least thirty (30) days' notice prior to commencing any such Performance Test. If the Performance Test has not commenced within this time for reasons not attributable to Developer, then the Performance Test shall be waived and the Site shall be deemed to have achieved the Performance Guarantee. Developer shall be afforded an opportunity to perform inspections and maintenance prior to the Performance Test, at Developer's sole expense and that PacifiCorp can observe; provided that such inspections and maintenance shall not delay the scheduled Performance Tests. The Performance Guarantee shall be met when the Performance Test result meets the Performance Guarantee. In no event will Developer be responsible for the cost of the Site operation or operating personnel required to conduct any Performance Test or re-test. The data collection for each nominated unit shall continue until the conditions set forth in the test procedure have been met. The test result shall be reported to Developer within ten (10) Business Days from the completion of the Performance test for Developer's review.

If a terrain assessment carried out by a qualified testing authority indicates that the Site meets IEC criteria such that no Site calibration is required, then requirements for Site calibration may be waived by mutual agreement of the Parties.

## **APPENDIX BB**

### **Change Order Costing**<sup>4</sup>

#### **1.0 General**

If there is a Change Order, as contemplated in ARTICLE 13 of the Agreement and Developer and PacifiCorp mutually agree that it is impractical to adjust the Contract Price on a lump sum basis or fail to agree upon such a lump sum adjustment, then the Parties shall agree to a cost adjustment for the change on a time and materials basis pursuant to Section 2.0 below.

#### **2.0 Time and Materials Adjustment**

The time and material rates set forth in Appendix W shall be used for Change Orders for which a lump sum adjustment has not been agreed to by PacifiCorp and Developer. In addition to the rates set forth in Appendix W, all other direct costs resulting from such Change Order less any savings or cost not incurred plus/minus as required, will be provided at cost.

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<sup>4</sup> NTD: This Agreement is included in the Table of Contents but is not included in the main body of the Agreement – discuss. Is there any reason that any essential information cannot be included in Article 13 where the provisions on Charge Order are contained?